

NORTH CAROLINA REGISTER

VOLUME 30 • ISSUE 03 • Pages 262 - 431

August 3, 2015

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Contact List for Rulemaking Questions or Concerns

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

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

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NORTH CAROLINA REGISTER
 Publication Schedule for January 2015 – December 2015

| FILING DEADLINES | | | NOTICE OF TEXT | | PERMANENT RULE | | | TEMPORARY RULES |
|-----------------------|------------|---------------------|----------------------------------|--------------------------------|--|--------------------------------------|---|--|
| Volume & issue number | Issue date | Last day for filing | Earliest date for public hearing | End of required comment Period | Deadline to submit to RRC for review at next meeting | Earliest Eff. Date of Permanent Rule | Delayed Eff. Date of Permanent Rule 31st legislative day of the session beginning: | 270 th day from publication in the Register |
| 29:13 | 01/02/15 | 12/08/14 | 01/17/15 | 03/03/15 | 03/20/15 | 05/01/15 | 05/2016 | 09/29/15 |
| 29:14 | 01/15/15 | 12/19/14 | 01/30/15 | 03/16/15 | 03/20/15 | 05/01/15 | 05/2016 | 10/12/15 |
| 29:15 | 02/02/15 | 01/09/15 | 02/17/15 | 04/06/15 | 04/20/15 | 06/01/15 | 05/2016 | 10/30/15 |
| 29:16 | 02/16/15 | 01/26/15 | 03/03/15 | 04/17/15 | 04/20/15 | 06/01/15 | 05/2016 | 11/13/15 |
| 29:17 | 03/02/15 | 02/09/15 | 03/17/15 | 05/01/15 | 05/20/15 | 07/01/15 | 05/2016 | 11/27/15 |
| 29:18 | 03/16/15 | 02/23/15 | 03/31/15 | 05/15/15 | 05/20/15 | 07/01/15 | 05/2016 | 12/11/15 |
| 29:19 | 04/01/15 | 03/11/15 | 04/16/15 | 06/01/15 | 06/22/15 | 08/01/15 | 05/2016 | 12/27/15 |
| 29:20 | 04/15/15 | 03/24/15 | 04/30/15 | 06/15/15 | 06/22/15 | 08/01/15 | 05/2016 | 01/10/16 |
| 29:21 | 05/01/15 | 04/10/15 | 05/16/15 | 06/30/15 | 07/20/15 | 09/01/15 | 05/2016 | 01/26/16 |
| 29:22 | 05/15/15 | 04/24/15 | 05/30/15 | 07/14/15 | 07/20/15 | 09/01/15 | 05/2016 | 02/09/16 |
| 29:23 | 06/01/15 | 05/08/15 | 06/16/15 | 07/31/15 | 08/20/15 | 10/01/15 | 05/2016 | 02/26/16 |
| 29:24 | 06/15/15 | 05/22/15 | 06/30/15 | 08/14/15 | 08/20/15 | 10/01/15 | 05/2016 | 03/11/16 |
| 30:01 | 07/01/15 | 06/10/15 | 07/16/15 | 08/31/15 | 09/21/15 | 11/01/15 | 05/2016 | 03/27/16 |
| 30:02 | 07/15/15 | 06/23/15 | 07/30/15 | 09/14/15 | 09/21/15 | 11/01/15 | 05/2016 | 04/10/16 |
| 30:03 | 08/03/15 | 07/13/15 | 08/18/15 | 10/02/15 | 10/20/15 | 12/01/15 | 05/2016 | 04/29/16 |
| 30:04 | 08/17/15 | 07/27/15 | 09/01/15 | 10/16/15 | 10/20/15 | 12/01/15 | 05/2016 | 05/13/16 |
| 30:05 | 09/01/15 | 08/11/15 | 09/16/15 | 11/02/15 | 11/20/15 | 01/01/16 | 05/2016 | 05/28/16 |
| 30:06 | 09/15/15 | 08/24/15 | 09/30/15 | 11/16/15 | 11/20/15 | 01/01/16 | 05/2016 | 06/11/16 |
| 30:07 | 10/01/15 | 09/10/15 | 10/16/15 | 11/30/15 | 12/21/15 | 02/01/16 | 05/2016 | 06/27/16 |
| 30:08 | 10/15/15 | 09/24/15 | 10/30/15 | 12/14/15 | 12/21/15 | 02/01/16 | 05/2016 | 07/11/16 |
| 30:09 | 11/02/15 | 10/12/15 | 11/17/15 | 01/02/16 | 01/20/16 | 03/01/16 | 05/2016 | 07/29/16 |
| 30:10 | 11/16/15 | 10/23/15 | 12/01/15 | 01/15/16 | 01/20/16 | 03/01/16 | 05/2016 | 08/12/16 |
| 30:11 | 12/01/15 | 11/05/15 | 12/16/15 | 02/01/16 | 02/22/16 | 04/01/16 | 05/2016 | 08/27/16 |
| 30:12 | 12/15/15 | 11/20/15 | 12/30/15 | 02/15/16 | 02/22/16 | 04/01/16 | 05/2016 | 09/10/16 |

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) text of proposed rules;
- (3) text of permanent rules approved by the Rules Review Commission;
- (4) emergency rules
- (5) Executive Orders of the Governor;
- (6) 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; and
- (7) 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.

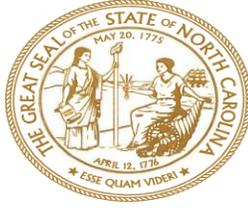
NOTICE OF TEXT

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.



State of North Carolina

PAT McCRORY

GOVERNOR

JUNE 24, 2015

EXECUTIVE ORDER NO. 75

NORTH CAROLINA EMERGENCY RESPONSE COMMISSION

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

Section 1. Establishment

There is hereby established the North Carolina Emergency Response Commission, hereinafter referred to as the "Commission." The Commission shall consist of not less than 14 members and shall be composed of at least the following persons, or their designee as approved by the Commission Chairperson:

- a. Secretary of the North Carolina Department of Public Safety, who shall serve as the Chairperson;
- b. Director of Emergency Management, North Carolina Department of Public Safety, who shall serve as the Vice-Chairperson;
- c. Commissioner of the Division of Law Enforcement, North Carolina Department of Public Safety;
- d. The Adjutant General, North Carolina National Guard;
- e. Commander of the State Highway Patrol, North Carolina Department of Public Safety;
- f. Deputy Secretary of the North Carolina Department of Environment and Natural Resources;
- g. Chief Deputy Secretary of the North Carolina Department of Transportation;
- h. Chief of the Office of Emergency Medical Services, Division of Health Service Regulation, North Carolina Department of Health and Human Services;
- i. Assistant State Fire Marshall, Office of the State Fire Marshall, North Carolina Department of Insurance;
- j. Director of the State Bureau of Investigation, North Carolina Department of Public Safety;
- k. Director, Division of Public Health, North Carolina Department of Health and Human Services;

- l. Assistant Deputy Commissioner of Labor for Occupational Safety and Health, North Carolina Department of Labor;
- m. President of the North Carolina Community College System; and
- n. Director of the Emergency Programs Division, North Carolina Department of Agriculture and Consumer Services.

In addition to the foregoing, up to eight (8) at-large members from local government, private industry and the public may be appointed by the Governor and serve terms of two (2) years at the pleasure of the Governor. These members may consist of the following persons:

- a. A Chief of Police;
- b. A Sheriff;
- c. A Fire Chief;
- d. A representative of emergency medical services in North Carolina;
- e. A representative of emergency managers in North Carolina;
- f. A representative of medium or large sized public assembly venues in North Carolina;
- g. A representative affiliated with the production, storage or transportation of hazardous materials;
- h. A private citizen of the state of North Carolina.

Section 2. Duties

The Commission is designated as the State Emergency Response Commission as defined in the Emergency Planning and Community Right-to-Know Act of 1986 enacted by the United States Congress and hereinafter referred to as the "Act." The Commission serves in three roles:

- a. The Commission will perform all of the duties required under the Act and other advisory, administrative, regulatory, or legislative actions.
 1. Designate emergency planning districts to facilitate preparation and implementation of emergency plans as required under Section 301(b) of the Act.
 2. Appoint local emergency planning committees described under Section 301(c) of the Act and supervise and coordinate the activities of such committees for each planning district.
 3. Establish procedures for reviewing and processing requests from the public for information under Section 324 of the Act.
 4. Designate additional facilities that may be subject to the Act under Section 302 of the Act and notify the Administrator of the Environmental Protection Agency of any such additional facilities.
 5. Review the emergency plans submitted by the local emergency planning committees and recommend revisions of the plans that may be necessary to ensure their coordination with emergency response plans of adjacent districts and state plans.
- b. The Commission will act in an advisory capacity to the Homeland Security Advisor, as designated by the Governor, to provide input regarding the activities of the North

Carolina State Homeland Security Program and the Domestic Preparedness Regions. Specifically, the Commission will:

1. Review the State Homeland Security Strategy to ensure it is aligned with local, state, and federal priorities as required by the United States Department of Homeland Security (DHS), and that its goals and objectives are being met in accordance with program intent.
 2. Review applications and subsequent allocations for state and regional homeland security projects funded by DHS grant programs.
 3. Review plans for preventing, preparing for, responding to, and recovering from acts of terrorism and all hazards – man-made or natural.
- c. The Commission will act in an advisory capacity to provide coordinated stakeholder input to the Secretary of the Department of Public Safety/Emergency Management in the preparation, implementation, evaluation, and revision of the North Carolina emergency management program. To this purpose, the Commission will work to:
1. Increase state and local disaster/emergency response capabilities; and
 2. Coordinate training, education, technical assistance, and outreach activities.

Section 3. Administration

- a. The Department of Public Safety shall provide administrative support and staff to the Commission as may be required.
- b. Members of the Commission shall serve without compensation but may receive reimbursement for travel and subsistence expenses in accordance with state guidelines and procedures and contingent on the availability of funds.

Section 4. Effect and Duration

This Executive Order is effective immediately. It supersedes and replaces all other executive orders on this subject. It shall remain in effect until December 31, 2016, pursuant to N.C. Gen. Stat. § 147-16.2 or until rescinded.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this 24th day of June in the year of our Lord two thousand and fifteen, and of the Independence of the United States of America the two hundred and thirty-eight.


Pat McCrory
Governor

ATTEST:


Elaine F. Marshall
Secretary of State



BOARD OF PHARMACY**Extension of Comment Period**

On July 15, 2015, the North Carolina Board of Pharmacy published proposed amendments to 21 NCAC 46 .1417 – REMOTE MEDICATION ORDER PROCESSING SERVICES for public comment. The comment period was initially scheduled to close on September 15, 2015, at 9:00 a.m. In order to provide additional time for written comments, the comment period has been extended to October 19, 2015, at 9:00 a.m. The public hearing remains scheduled for September 15, 2015, at 9:00 a.m. Details about the proposed amendment can be found in the North Carolina Register at 30:2 NCR 179, as well as on the Board of Pharmacy website's tab for Rulemakings in Progress (<http://www.ncbop.org/rulemakings.htm>).

ENVIRONMENTAL MANAGEMENT COMMISSION

Extension of Comment Period

Notice of Text for 15A NCAC 02L .0106 proposed by the Environmental Management Commission was published in the NC Register June 15, 2015 issue. The comment period has been extended to September 12, 2015. An additional public hearing is scheduled for September 10, 2015 at 6:30 pm, located in the Ground Floor Hearing Room of the Archdale Building, 512 N. Salisbury St., Raleigh NC 27604. Public comments may be submitted on the proposed rule through September 12, 2015 to:

Evan Kane, Groundwater Planning & Environmental Review Branch Chief, NC Division of Water Resources, 1611 Mail Service Center, Raleigh, NC 27699-1611 or CorrectiveActionRule@lists.ncmail.net.

Note from the Codifier: The notices published in this Section of the NC Register include the text of proposed rules. The agency must accept comments on the proposed rule(s) for at least 60 days from the publication date, or until the public hearing, or a later date if specified in the notice by the agency. If the agency adopts a rule that differs substantially from a prior published notice, the agency must publish the text of the proposed different rule and accept comment on the proposed different rule for 60 days. Statutory reference: G.S. 150B-21.2.

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Medical Care Commission intends to adopt the rule cited as 10A NCAC 130 .0301.

Link to agency website pursuant to G.S. 150B-19.1(c):
<http://www2.ncdhhs.gov/dhsr/ruleactions.html>

Proposed Effective Date: January 1, 2016

Public Hearing:

Date: September 1, 2015

Time: 10:00 a.m.

Location: Dorothea Dix Campus, Brown Building, Room 104, 801 Biggs Drive, Raleigh, NC 27603

Reason for Proposed Action: *The Health Care Personnel Education and Credentialing Section is responsible for approving all Nurse Aide I training programs in the state as well as maintain the NC Nurse Aide I Registry, which is a listing of all individuals successfully completing the Nurse Aide I competency exam. Federal regulations require a person to successfully complete a training program and a competency exam or successfully complete a competency exam to be listed on the NC Nurse Aide I Registry. This rule adoption is being proposed in accordance with federal regulation because currently, there is no requirements for people listed on the NC Nurse Aide I Registry to have completed a NC DHHS approved training program prior to have successfully completing a competency exam. The option to successfully complete only a competency exam is listed in the rule, if the equivalency criteria is met. The expectation from the public is that all people listed on the Nurse Aide I Registry have met the minimal training requirements by attending DHHS approved training programs and the goal is the provision of safe care to NC citizens.*

Comments may be submitted to: Nadine Pfeiffer, 2701 Mail Service Center, Raleigh, NC 27699-2701, email DHSR.RulesCoordinator@dhhs.nc.gov

Comment period ends: October 2, 2015

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)
- Approved by OSBM
- No fiscal note required by G.S. 150B-21.4

CHAPTER 13 – NC MEDICAL CARE COMMISSION

SUBCHAPTER 130 – HEALTHCARE PERSONNEL REGISTRY

SECTION .0300 - NURSE AIDE I REGISTRY

10A NCAC 130 .0301 NURSE AIDE I TRAINING AND COMPETENCY EVALUATION

(a) To be eligible to be listed on the NC Nurse Aide I Registry a person shall pass a Nurse Aide I training program approved by the Department and the State of North Carolina's Nurse Aide I competency exam.

(b) This Rule incorporates 42 CFR Part 483 by reference, including all subsequent amendments and editions. Copies of the Code of Federal Regulations may be accessed electronically free of charge from www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR.

(c) The State of North Carolina's Nurse Aide I competency exam shall include each course requirement specified in the Department-approved training program as provided for in 42 CFR Part 483.152.

(d) The State of North Carolina's Nurse Aide I competency examination shall be administered and evaluated only by the Department or its agent as provided for in 42 CFR Part 483.154.

(e) A record of completion of the State of North Carolina's Nurse Aide I competency exam shall be included in the NC Nurse Aide I Registry within 30 business days of passing both the written or

oral examination and the skills demonstration as provided for in 42 CFR Part 483.154.

(f) If the State of North Carolina's Nurse Aide I competency exam candidate does not pass both the written or oral examination and the skills demonstration as provided for in 42 CFR Part 483.154, the candidate shall be advised by the Department of the areas which the individual did not pass.

(g) Every competency exam candidate shall have, as provided for in 42 CFR Part 483.154, the opportunity to take the exam three times before being required to retake and pass a Nurse Aide I training program which is approved by the Department according to 42 CFR Part 483.151 through Part 483.152.

(h) A person who is currently listed on any state's Nurse Aide I Registry shall not be required to take the Department approved Nurse Aide I training program to be listed or relisted on the NC Nurse Aide I Registry unless the person fails to pass the State of North Carolina's Nurse Aide I competency exam after three attempts.

(i) U.S. military personnel who have completed medical corpsman training and retired or non-practicing nurses shall not be required to take the Department-approved Nurse Aide I training program to be listed or relisted on the Nurse Aide I Registry unless the person fails to pass the State of North Carolina's Nurse Aide I competency exam after three attempts.

Authority G.S. 131E-255; 42 CFR Part 483.

TITLE 12 – DEPARTMENT OF JUSTICE

Notice is hereby given in accordance with G.S. 150B-21.2 that the Criminal Justice Education and Training Standards Commission intends to amend the rules cited as 12 NCAC 09A .0103, .0206; 09B .0106, .0203, .0232, .0233, .0302, .0401, .0403, .0501, .0502; 09C .0401; 093E .0109; 09G .0204, .0308, and .0405.

Link to agency website pursuant to G.S. 150B-19.1(c):
http://www.ncdoj.gov/getdoc/a73bb246-9b8f-4959-9388-18b24bfd986a/Proposed-Rule-Revisions_11-20-15.aspx

Proposed Effective Date: February 1, 2016

Public Hearing:

Date: November 20, 2015

Time: 10:30 a.m.

Location: Wake Technical Community College-Public Safety Training Center, 321 Chapanoke Road, Raleigh, NC 27603, phone

Reason for Proposed Action:

12 NCAC 09A .0103 – The Commission has defined the term "Active Duty Military" as reference for the revisions proposed for 09B .0401, .0403 and for the proposed temporary rule (09B .0701 – submitted on July 9, 2015).

12 NCAC 09A .0206 – The Commission proposes that the Director of the Standards Division be authorized to summarily suspend Concealed Carry Handgun Instructors who fail to adhere to existing rules when instructing courses.

12 NCAC 09B .0106, .0203, .0302, .0501; 09G .0204, .0308, and .0405 – The Commission has clarified the language regarding high school equivalency testing.

12 NCAC 09B .0232 and .0233 – The Commission has revised the training topic areas and associated hours for two training courses.

12 NCAC 09B .0401 and .0403 – The Commission voted to create an avenue for (non-military police) military members currently serving in an active duty status to obtain certification as law enforcement officers, to include deadlines and restrictions.

12 NCAC 09B .0502 – The Commission proposes clarification language for the responsibilities of School Directors delivering specific types of training.

12 NCAC 09C .0401 – The Commission has revised the name of the committee reviewing criminal justice schools, and the responsibilities of the Division in that regard.

12 NCAC 09E .0109 – The Commission has provided for the certification of multiple In-Service Training Coordinators for a single agency.

Comments may be submitted to: Trevor Allen, P.O. Drawer 149, Raleigh, NC 27602, phone (919) 779-8205, fax (919) 779-8210, email tjallen@ncdoj.gov

Comment period ends: November 20, 2015

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)
- Approved by OSBM
- No fiscal note required by G.S. 150B-21.4

CHAPTER 09 - CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS

SUBCHAPTER 09A - CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION

SECTION .0100 - COMMISSION ORGANIZATION AND PROCEDURES

12 NCAC 09A .0103 DEFINITIONS

The following definitions apply throughout Subchapters 12 NCAC 09A through 12 NCAC 09F, except as modified in 12 NCAC 09A .0107 for the purpose of the Commission's rule-making and administrative hearing procedures:

- (1) "Active Duty Military" means, for the purpose of determining certification eligibility for certification pursuant to Rules 12 NCAC 09B .0401 and 12 NCAC 09B .0403, full-time duty in the active military service of the United States. Such term includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. Such term does not include full-time National Guard duty. For the purpose of determining eligibility for certification pursuant to Rule 12 NCAC 09B .0701, "Active Duty Military" means a member of any branch of military service who have performed as a military police officer for not less than 1,040 hours during the five years preceding the date of application.
- ~~(1)~~(2) "Agency" or "Criminal Justice Agency" means those state and local agencies identified in G.S. 17C-2(2).
- ~~(2)~~(3) "Alcohol Law Enforcement Agent" means a law enforcement officer appointed by the Secretary of the Department of Public Safety as authorized by G.S. 18B-500.
- ~~(3)~~(4) "Chief Court Counselor" means the person responsible for administration and supervision of juvenile intake, probation, and post-release supervision in each judicial district, operating under the supervision of the Department of Public Safety, Division of Adult Correction and Juvenile Justice.
- ~~(4)~~(5) "Commission of an offense" means a finding by the North Carolina Criminal Justice Education and Training Standards Commission or an administrative body that a person performed the acts necessary to satisfy the elements of a specified criminal offense.
- ~~(5)~~(6) "Convicted" or "Conviction" means, for purposes of this Chapter, the entry of:
 - (a) a plea of guilty;
 - (b) a verdict or finding of guilt by a jury, judge, magistrate, or other adjudicating body, tribunal, or official, either civilian or military; or
 - (c) a plea of no contest, nolo contendere, or the equivalent.
- ~~(6)~~(7) "Criminal Justice Officer(s)" means those officers identified in G.S. 17C-2(3), and

excluding Correctional officers and probation/parole officers.

- ~~(7)~~(8) "Criminal Justice System" means the whole of the State and local criminal justice agencies described in Item (1) of this Rule.
- ~~(8)~~(9) "Department head" means the chief administrator of any criminal justice agency, and specifically includes any chief of police or agency director. "Department Head" also includes a designee appointed in writing by the Department head.
- ~~(9)~~(10) "Director" means the Director of the Criminal Justice Standards Division of the North Carolina Department of Justice.
- ~~(10)~~(11) "Educational Points" means points earned toward the Professional Certificate Programs for studies completed, with passing scores achieved, for semester hour or quarter hour credit at a regionally accredited institution of higher learning. Each semester hour of college credit equals one educational point and each quarter hour of college credit equals two-thirds of an educational point.
- ~~(11)~~(12) "Enrolled" means that an individual is currently actively participating in an on-going presentation of a Commission-certified basic training course that has not concluded on the day probationary certification expires. The term "currently actively participating" as used in this definition means:
 - (a) for law enforcement officers, that the officer is attending an approved course presentation averaging a minimum of 12 hours of instruction each week; and
 - (b) for Department of Public Safety, Division of Adult Correction and Juvenile Justice personnel, that the officer is attending the last or final phase of the approved training course necessary for satisfying the total course completion requirements.
- ~~(12)~~(13) "High School" means graduation from a high school that meets the compulsory attendance requirements in the jurisdiction in which the school is located.
- ~~(13)~~(14) "In-Service Training" means all training prescribed in 12 NCAC ~~09B~~09E .0105 that must be completed, with passing scores achieved, by all certified law enforcement officers during each full calendar year of certification.
- ~~(14)~~(15) "In-Service Training Coordinator" means the person designated by a law enforcement agency head to administer the agency's in-service training program.
- ~~(15)~~(16) "Lateral Transfer" means the employment of a criminal justice officer, at any rank, by a criminal justice agency, based upon the officer's

special qualifications or experience, without following the usual selection process established by the agency for basic officer positions.

~~(16)~~(17) "Law Enforcement Code of Ethics" means the code adopted by the Commission on September 19, 1973, that reads as follows:

As a law enforcement officer, my fundamental duty is to serve the community; to safeguard lives and property; to protect the innocent against deception, the weak against oppression or intimidation, and the peaceful against violence or disorder; and to respect the constitutional rights of all to liberty, equality, and justice.

I will keep my private life unsullied as an example to all, and will behave in a manner that does not bring discredit to me or to my agency.

I will maintain courageous calm in the face of danger, scorn, or ridicule; develop self-restraint; and be constantly mindful of the welfare of others. Honest in thought and deed both in my personal and official life, I will be exemplary in obeying the law and the regulations of my department. Whatever I see or hear of a confidential nature or that is confided to me in my official capacity will be kept ever secret unless revelation is necessary in the performance of my duty.

I will never act officiously or permit personal feelings, prejudices, political beliefs, aspirations, animosities or friendships to influence my decisions. With no compromise for crime and with relentless prosecution of criminals, I will enforce the law courteously and appropriately without fear or favor, malice or ill will, never employing unnecessary force or violence and never accepting gratuities.

I recognize the badge of my office as a symbol of public faith, and I accept it as a public trust to be held so long as I am true to the ethics of the police service. I will never engage in acts or corruption or bribery, nor will I condone such acts by other police officers. I will cooperate with all legally authorized agencies and their representatives in the pursuit of justice.

I know that I alone am responsible for my own standard of professional performance and will take every reasonable opportunity to enhance and improve my level of knowledge and competence.

I will constantly strive to achieve these objectives and ideals, dedicating myself before God to my chosen profession...law enforcement.

~~(17)~~(18) "Juvenile Court Counselor" means a person responsible for intake services and court

supervision services to juveniles under the supervision of the chief court counselor.

~~(18)~~(19) "Juvenile Justice Officer" means persons designated by the Secretary of the Department of Public Safety, Division of Adult Correction and Juvenile Justice to provide for the care and supervision of juveniles placed in the physical custody of the Department.

~~(19)~~(20) "Law Enforcement Officer" means an appointee of a criminal justice agency or of the State or of any political subdivision of the State who, by virtue of his or her office, is empowered to make arrests for violations of the laws of this State. Specifically excluded from the title of "Law Enforcement Officer" are sheriffs and their sworn appointees with arrest authority who are governed by the provisions of G.S. 17E.

~~(20)~~(21) "Law Enforcement Training Points" means points earned toward the Law Enforcement Officers' Professional Certificate Program by successful completion of Commission-approved law enforcement training courses. Twenty classroom hours of Commission-approved law enforcement training equals one law enforcement training point.

~~(21)~~(22) "LIDAR" is an acronym for "Light Detection and Ranging," and means a speed-measuring instrument that electronically computes, from transmitted infrared light pulses, the speed of a vehicle under observation.

~~(22)~~(23) "Local Confinement Personnel" means any officer, supervisor, or administrator of a local confinement facility in North Carolina as defined in G.S. 153A-217; any officer, supervisor, or administrator of a county confinement facility in North Carolina as defined in G.S. 153A-218; or, any officer, supervisor, or administrator of a district confinement facility in North Carolina as defined in G.S. 153A-219.

~~(23)~~(24) "Misdemeanor" means those criminal offenses not classified under the laws, statutes, or ordinances as felonies. Misdemeanor offenses are classified by the Commission as follows:

(a) "Class A Misdemeanor" means a misdemeanor committed or omitted in violation of any common law, duly-enacted ordinance, or criminal statute of this State that is not classified as a Class B Misdemeanor pursuant to Sub-item (23)(b) of this Rule. Class A Misdemeanor also includes any act committed or omitted in violation of any common law, duly enacted ordinance, criminal statute, or criminal traffic code of any jurisdiction other

than North Carolina, either civil or military, for which the maximum punishment allowable for the designated offense under the laws, statutes, or ordinances of the jurisdiction in which the offense occurred includes imprisonment for a term of not more than six months. Excluded from this grouping of "Class A Misdemeanor" criminal offenses for jurisdictions other than North Carolina, are motor vehicle or traffic offenses designated as misdemeanors under the laws of other jurisdictions, or duly enacted ordinances of an authorized governmental entity with the exception of the offense of impaired driving that is included herein as a Class A Misdemeanor if the offender could have been sentenced for a term of not more than six months. Also included herein as a Class A Misdemeanor is the offense of impaired driving, if the offender was sentenced under punishment level three G.S. 20-179(i), level four G.S. 20-179(j), or level five G.S. 20-179(k). Class A Misdemeanor shall also include acts committed or omitted in North Carolina prior to October 1, 1994 in violation of any common law, duly enacted ordinance, or criminal statute, of this State for which the maximum punishment allowable for the designated offense included imprisonment for a term of not more than six months.

- (b) "Class B Misdemeanor" means an act committed or omitted in violation of any common law, criminal statute, or criminal traffic code of this State that is classified as a Class B Misdemeanor as set forth in the Class B Misdemeanor Manual as published by the North Carolina Department of Justice that is hereby incorporated by reference and shall include any later amendments and editions of the incorporated material as provided by G.S. 150B-21.6. The publication is available from the Commission's website:
<http://www.ncdoj.gov/getdoc/60bb12ca-47c0-48cb-a0e3-6095183c4c2a/Class-B-Misdemeanor-Manual-2005.aspx>.
Class B Misdemeanor also includes any act committed or omitted in

violation of any common law, duly enacted ordinance, criminal statute, or criminal traffic code of any jurisdiction other than North Carolina, either civil or military, for which the maximum punishment allowable for the designated offense under the laws, statutes, or ordinances of the jurisdiction in which the offense occurred includes imprisonment for a term of more than six months but not more than two years. Excluded from this grouping of "Class B Misdemeanor" criminal offenses for jurisdictions other than North Carolina, are motor vehicle or traffic offenses designated as being misdemeanors under the laws of other jurisdictions with the following exceptions: Class B Misdemeanor includes the following:

- (i) either first or subsequent offenses of driving while impaired if the maximum allowable punishment is for a term of more than six months but not more than two years;
- (ii) driving while license permanently revoked or permanently suspended; and
- (iii) those traffic offenses occurring in other jurisdictions which are comparable to the traffic offenses specifically listed in the Class B Misdemeanor Manual. "Class B Misdemeanor" shall also include acts committed or omitted in North Carolina prior to October 1, 1994 in violation of any common law, duly enacted ordinance, criminal statute, or criminal traffic code of this State for which the maximum punishment allowable for the designated offense included imprisonment for a term of more than six months but not more than two years.

~~(24)~~(25) "Qualified Assistant" means an additional staff person designated as such by the School Director to assist in the administration of a course when a certified institution or agency assigns additional responsibilities to the certified School Director during the planning,

development, and implementation of a certified course.

- ~~(25)~~(26) "Radar" means a speed-measuring instrument that transmits microwave energy in the 10,500 to 10,550 MHZ frequency (X) band, or transmits microwave energy in the 24,050 to 24,250 MHZ frequency (K) band, and either of which operates in the stationary or moving mode. "Radar" further means a speed-measuring instrument that transmits microwave energy in the 33,400 to 36,000 MHZ (Ka) band and operates in either the stationary or moving mode.
- ~~(26)~~(27) "Resident" means any youth committed to a facility operated by the Department of Public Safety, Division of Adult Correction and Juvenile Justice.
- ~~(27)~~(28) "School" or "criminal justice school" means an institution, college, university, academy, or agency that offers criminal justice, law enforcement, or traffic control and enforcement training for criminal justice officers or law enforcement officers. "School" includes the criminal justice training course curriculum, instructors, and facilities.
- ~~(28)~~(29) "School Director" means the person designated by the sponsoring institution or agency to administer the criminal justice school.
- ~~(29)~~(30) "Speed-Measuring Instruments" (SMI) means those devices or systems, including radar time-distance, and LIDAR, approved under authority of G.S. 17C-6(a)(13) for use in North Carolina in determining the speed of a vehicle under observation and particularly includes all named devices or systems as referenced in the approved list of 12 NCAC 09C .0601.
- ~~(30)~~(31) "Standards Division" means the Criminal Justice Standards Division of the North Carolina Department of Justice.
- ~~(31)~~(32) "Time-Distance" means a speed-measuring instrument that electronically computes, from measurements of time and distance, the average speed of a vehicle under observation.

Authority G.S. 17C-2; 17C-6; 17C-10; 153A-217.

SECTION .0200 - ENFORCEMENT OF RULES

12 NCAC 09A .0206 SUMMARY SUSPENSIONS

(a) The Commission, by and through the Probable Cause Committee, may summarily suspend the certification of a criminal justice officer or instructor before the commencement of proceedings for suspension or revocation of the certification when, in the opinion of the Probable Cause Committee, the public health, safety, or welfare requires this emergency action of summary suspension. The Commission has determined that the following conditions specifically affect the public health, safety,

or welfare and therefore it, by and through the Probable Cause Committee, may utilize summary suspension when:

- (1) the person has committed or been convicted of a violation of the criminal code that would require a permanent revocation or denial of certification; or
- (2) the certified officer fails to satisfactorily complete the in-service training requirements as prescribed in 12 NCAC 09E.
- (3) ~~The~~the certified officer has produced a positive result on a urinalysis test, conducted in accordance with 09B .0101(5).

(b) For the purpose of considering a summary suspension of certification, the Probable Cause Committee may meet upon notice given by mail, telephone, or other means not less than 48 hours in advance of the meeting.

(c) A summary suspension is effective on the date specified in the order of summary suspension or on service of the certified copy of the order at the last known address of the person, whichever is later. The summary suspension remains effective during the proceedings.

(d) ~~The director~~Director, upon receipt of information showing the existence of a basis provided for in Subparagraph (a)(1), (2), or (3) of this Rule, shall coordinate the meeting described in Paragraph (b) of this Rule. Any affected person shall be notified, if feasible, that the person may submit any matters to the Probable Cause Committee for its consideration before the Committee acts on the summary suspension issue. Under no circumstance shall the person be allowed more than 48 hours to submit information to the Probable Cause Committee.

(e) Upon verbal notification by the Director that the certification of an officer or instructor is being summarily suspended by written order, the Department head of the criminal justice agency or the executive officer of the institution shall take such steps as are necessary to ensure that the officer or instructor does not perform duties requiring certification by the Commission.

(f) The Commission, by and through the Director, upon determining that a Commission-certified Concealed Carry Handgun Instructor has conducted a concealed carry handgun training course as mandated by G.S. 14-415(a)(4) that is not in compliance with Rule 12 NCAC 09F .0102, and negatively affects the public safety and welfare, may summarily suspend the instructor's Concealed Carry Handgun Instructor certification until such time the training course has been brought into compliance, or reported to the Probable Cause Committee for action.

- (1) for each instance the Director shall:
 - (A) Summarily suspend the Concealed Carry Handgun Instructor certification, prohibiting him or her from delivering concealed carry handgun training until the Director determines the training program is brought into compliance with Rules 12 NCAC 09F .0102 and .0105; and
 - (B) Inform the instructor that he or she may appeal the Director's suspension by requesting, in writing, a formal

hearing before the Probable Cause Committee at the next scheduled Commission meeting.

Authority G.S. 17C-6; 17C-10; 150B-3.

SUBCHAPTER 09B - STANDARDS FOR CRIMINAL JUSTICE EMPLOYMENT: EDUCATION: AND TRAINING

SECTION .0100 - MINIMUM STANDARDS FOR CRIMINAL JUSTICE EMPLOYMENT

12 NCAC 09B .0106 DOCUMENTATION OF EDUCATIONAL REQUIREMENTS

(a) Each applicant for employment as a criminal justice officer shall furnish to the employing agency documentary evidence that the applicant has met the educational requirements for the criminal justice field of expected employment.

(b) Documentary evidence of educational requirements shall consist of official transcripts of courses completed or diplomas received from a school which meets the approval guidelines of either the North Carolina Department of Public Instruction, the Division of Non-Public Instruction, or comparable out-of-state agency. Documentary evidence of college or university graduation, at an Associate's Degree or higher, consists of diplomas or transcripts from colleges or universities accredited as such by the Department of Education of the state in which the institution is located, an accredited body recognized by either the U.S. Department of Education or Council for Higher Education Accreditation, or the state university of the state in which the institution is located. The Director of the Standards Division shall determine whether other types of documentation will be permitted in specific cases. High school diplomas earned through correspondence enrollment are not recognized toward these minimum educational requirements.

(c) ~~Documentary evidence of having received a high school equivalency credential as recognized by the issuing state. passed the General Educational Development Test shall be satisfied by a certified copy of GED test results or GED certificate. A certified copy of a military GED diploma may be used as alternate evidence of GED completion.~~

Authority G.S. 17C-6; 17C-10.

12 NCAC 09B .0203 ADMISSION OF TRAINEES

(a) The school director shall not admit any individual as a trainee in a presentation of the Basic Law Enforcement Training Course who is not a citizen of the United States.

(b) The school shall not admit any individual younger than 20 years of age as a trainee in any non-academic basic criminal justice training course. Individuals under 20 years of age may be granted authorization for early enrollment as trainees in a presentation of the Basic Law Enforcement Training Course with prior written approval from the Director of the Standards Division. The Director shall approve early enrollment as long as the individual turns 20 years of age prior to the date of the State Comprehensive Examination for the course.

(c) The school shall give priority admission in certified criminal justice training courses to individuals holding full-time employment with criminal justice agencies.

(d) The school shall not admit any individual as a trainee in a presentation of the "Criminal Justice Instructor Training Course" who does not meet the education and experience requirements for instructor certification under Rule .0302 of this Subchapter within 60 days of successful completion of the Instructor Training State Comprehensive Examination.

(e) The school shall not admit an individual, including partial or limited enrollees, as a trainee in a presentation of the Basic Law Enforcement Training Course unless the individual, within one year prior to admission to Basic law Enforcement Training, places into course DRE 098 or above at a North Carolina Community College as a result of taking the Reading and English component of the North Carolina Diagnostic Assessment and Placement test as approved by the State Board of Community Colleges on October 17, 2014 (<http://www.nccommunitycolleges.edu/state-board-community-colleges/meetings/october-17-2014>), or has taken the reading component of a nationally standardized test within one year prior to admission to Basic Law Enforcement Training and has scored at or above the tenth grade level or the equivalent. For the purposes of this Rule:

- (1) Partial or limited enrollee does not include enrollees who hold general certification or who have held general certification within 12 months prior to the date of enrollment.
- (2) A "nationally standardized test" means a test that:
 - (A) reports scores as national percentiles, stanines, or grade equivalents; and
 - (B) compares student test results to a national norm.

(f) The school shall not admit any individual as a trainee in a presentation of the Basic Law Enforcement Training Course unless the individual has provided to the School Director a medical examination report, completed by a physician licensed to practice medicine in North Carolina, a physician's assistant, or a nurse practitioner, to determine the individual's fitness to perform the essential job functions of a criminal justice officer. The Director of the Standards Division shall grant an exception to this standard for a period of time not to exceed the commencement of the physical fitness topical area when failure to receive the medical examination report is not due to neglect on the part of the trainee.

(g) The school shall not admit any individual as a trainee in a presentation of the Basic Law Enforcement Training Course unless the individual is a ~~high school~~ school, college or university graduate or has ~~passed the General Educational Development Test indicating received a high school equivalency~~ equivalency credential recognized by the issuing state. High school diplomas earned through correspondence enrollment are not recognized toward the educational requirements.

(h) The school shall not admit any individual trainee in a presentation of the Basic Law Enforcement Training Course unless the individual has provided the School Director a certified criminal record check for local and state records for the time period since the trainee has become an adult and from all locations

where the trainee has resided since becoming an adult. An Administrative Office of the Courts criminal record check or a comparable out-of-state criminal record check shall satisfy this requirement.

(i) The school shall not admit any individual as a trainee in a presentation of the Basic Law Enforcement Training Course who has been convicted of the following:

- (1) a felony;
- (2) a crime for which the punishment could have been imprisonment for more than two years;
- (3) a crime or unlawful act defined as a "Class B Misdemeanor" within the five year period prior to the date of application for employment, unless the individual intends to seek certification through the North Carolina Sheriffs' Education and Training Standards Commission;
- (4) four or more crimes or unlawful acts defined as "Class B Misdemeanors," regardless of the date of conviction;
- (5) four or more crimes or unlawful acts defined as "Class A Misdemeanors," except the trainee may be enrolled if the last conviction date occurred more than two years prior to the date of enrollment;
- (6) a combination of four or more "Class A Misdemeanors" or "Class B Misdemeanors" regardless of the date of conviction, unless the individual intends to seek certification through the North Carolina Criminal Justice Education and Training Standards Commission.

(j) Individuals charged with crimes as specified in Paragraph (i) of this Rule, and such offenses were dismissed or the person was found not guilty, may be admitted into the Basic Law Enforcement Training Course but completion of the Basic Law Enforcement Training Course does not ensure that certification as a law enforcement officer or justice officer through the North Carolina Criminal Justice Education and Training Standards Commission will be issued. Every individual who is admitted as a trainee in a presentation of the Basic Law Enforcement Training Course shall notify the School Director of all criminal offenses the trainee is arrested for or charged with, pleads no contest to, pleads guilty to, or is found guilty of, and of all Domestic Violence Orders (G.S. 50B) that are issued by a judicial official after a hearing that provides an opportunity for both parties to be present. This includes all criminal offenses except minor traffic offenses and includes any offense of Driving Under the Influence (DUI) or Driving While Impaired (DWI). A "minor traffic offense" is defined, for the purposes of this Paragraph, as an offense where the maximum punishment allowable by law is 60 days or fewer. Other offenses under G.S. 20 (Motor Vehicles) or similar laws of other jurisdictions that shall be reported to the School Director are G.S. 20-138.1 (driving while under the influence), G.S. 20-28 (driving while license permanently revoked or permanently suspended), G.S. 20-30(5) (fictitious name or address in application for license or learner's permit), G.S. 20-37.8 (fraudulent use of a fictitious name for a special identification card), G.S. 20-102.1 (false report of theft or

conversion of a motor vehicle), G.S. 20-111(5) (fictitious name or address in application for registration), G.S. 20-130.1 (unlawful use of red or blue lights), G.S. 20-137.2 (operation of vehicles resembling law enforcement vehicles), G.S. 20-141.3 (unlawful racing on streets and highways), G.S. 20-141.5 (speeding to elude arrest), and G.S. 20-166 (duty to stop in event of accident). The notifications required under this Paragraph shall be in writing, specify the nature of the offense, the court in which the case was handled, the date of the arrest or criminal charge, the date of issuance of the Domestic Violence Order (G.S. 50B), the final disposition, and the date thereof. The notifications required under this Paragraph shall be received by the School Director within 30 days of the date the case was disposed of in court. The requirements of this Paragraph are applicable at all times during which the trainee is enrolled in a Basic Law Enforcement Training Course. The requirements of this Paragraph are in addition to the notifications required under 12 NCAC 10B .0301 and 12 NCAC 09B .0101(8).

Authority G.S. 17C-6; 17C-10.

12 NCAC 09B .0232 SPECIALIZED SUBJECT CONTROL ARREST TECHNIQUES INSTRUCTOR TRAINING

(a) The instructor training course required for specialized subject control arrest techniques instructor certification shall consist of a minimum of ~~78~~ 75 hours of instruction presented during a continuous period of not more than two weeks.

(b) Each specialized subject control arrest techniques instructor training course shall be designed to provide the trainee with the skills and knowledge to perform the function of a criminal justice subject control arrest techniques instructor in a Basic Law Enforcement Training Course or a "Law Enforcement Officers' Annual In-Service Training Program."

(c) Each applicant for specialized subject control arrest techniques instructor training shall:

- (1) have completed the criminal justice general instructor training course;
- (2) present a letter from a licensed physician stating the applicant's physical fitness to participate in the course; and
- (3) present a written endorsement by either
 - (A) a certified school director indicating the student may be utilized to instruct subject control arrest techniques in Basic Law Enforcement Training Courses; or
 - (B) a department head, certified school director, or in-service training coordinator indicating the student may be utilized to instruct Subject Control Arrest Techniques for the "Law Enforcement Officers' In-Service Training Program."

(d) Each specialized subject control arrest techniques instructor training course shall include the following identified topic areas and minimum instructional hours for each area:

PROPOSED RULES

| | | |
|------|--|-------------------------------------|
| (1) | Orientation <u>Pre-Qualification Testing</u> | 1 Hour <u>4 Hours</u> |
| (2) | Skills Pre-Test <u>Orientation</u> | 1 Hour <u>1 Hour</u> |
| (3) | Student Instructional Practicum <u>Response to Injury</u> | 34 Hours <u>34 Hours</u> |
| (4) | Practical Skills Evaluation <u>Combat Conditioning</u> | 34 Hours <u>34 Hours</u> |
| (5) | Response to Injury <u>Safety Guidelines/Rules</u> | 42 Hours <u>42 Hours</u> |
| (6) | Combat Conditioning <u>SC/AT Techniques and Instructional Methods</u> | 42 Hours <u>42 Hours</u> |
| (7) | Safety Guidelines/Rules <u>Fundamentals of Professional Liability</u> | 24 Hours <u>24 Hours</u> |
| (8) | Practical Skills Enhancement | 4 Hours |
| (9) | Subject Control/Arrest Techniques <u>Practical Skills and Instructional Methods</u> | 44 Hours <u>44 Hours</u> |
| (9) | Student Instructional Practicum | 6 Hours |
| (10) | Fundamentals of Professional Liability For Law Enforcement Trainers | 4 Hours <u>4 Hours</u> |
| (10) | BLET Lesson Plan Review | 4 Hours |
| | TOTAL | 7875 Hours |

(e) The "Specialized Subject Control Arrest Techniques Instructor Training Manual" as published by the North Carolina Justice Academy shall be the curriculum for specialized subject control arrest techniques instructor training courses. Copies of this publication may be inspected at the:

Criminal Justice Standards Division
North Carolina Department of Justice
1700 Tryon Park Drive
Post Office Drawer 149
Raleigh, North Carolina 27610

and may be obtained at the cost of printing and postage from the Academy at the following address:

North Carolina Justice Academy
Post Office Box 99
Salemberg, North Carolina 28385

(f) The Commission-certified school that is certified to offer the "Specialized Subject Control Arrest Techniques Instructor Training" course is the North Carolina Justice Academy.

Authority G.S. 17C-6.

12 NCAC 09B .0233 SPECIALIZED PHYSICAL FITNESS INSTRUCTOR TRAINING

(a) The instructor training course required for specialized physical fitness instructor certification shall consist of a minimum of 58 hours of instruction presented during a continuous period of not more than two weeks.

(b) Each specialized physical fitness instructor training course shall be designed to provide the trainee with the skills and knowledge to perform the function of a criminal justice physical fitness instructor in a Basic Law Enforcement Training Course or a "Law Enforcement Officers' Annual In-Service Training Program."

(c) Each applicant for specialized physical fitness training shall:

- (1) qualify through one of the following three options:

- (A) have completed the criminal justice general instructor training course;
 - (B) hold a current and valid North Carolina Teacher's Certificate, hold a baccalaureate degree in physical education, and be teaching in physical education topics; or
 - (C) be presently instructing physical education topics in a community college, college, or university and possess a baccalaureate degree in physical education; and
- (2) present a written endorsement by either:
 - (A) a school director indicating the student may be utilized to instruct physical fitness in Basic Law Enforcement Training Courses; or
 - (B) a certified school director, or in-service training coordinator indicating the student may be utilized to instruct physical fitness for the "Law Enforcement Officers' In-Service Training Program"; and
 - (3) present a letter from a physician stating fitness to participate in the course.

(d) Each specialized physical fitness instructor training course shall include the following identified topic areas and minimum instructional hours for each area:

| | | |
|--------|--|-------------------------------------|
| (1) | Orientation <u>Pre-Qualification Testing</u> | 5 Hours <u>5 Hours</u> |
| (2) | Lesson Plan Review <u>Orientation</u> | 4 Hours <u>1 Hour</u> |
| (3) | Physical Fitness Assessments, Exercise Programs and Instructional Methods | 31 Hours <u>31 Hours</u> |
| (3) | Physical Fitness Sessions | 6 Hours |
| (4) | Injury Care and Prevention | 4 Hours <u>4 Hours</u> |
| (4) | Physical Fitness Assessments, Exercise Programs, and Instructional Methods | 20 Hours |
| (5) | Nutrition <u>Injury Care and Prevention</u> | 64 Hours <u>64 Hours</u> |
| (6) | Civil Liabilities for Trainers <u>Nutrition</u> | 27 Hours <u>27 Hours</u> |
| (7) | CVD Risk Factors <u>Civil Liability</u> | 23 Hours <u>23 Hours</u> |
| (8) | CVD Risk Factors | 3 Hours |
| (8)(9) | Developing In-Service Wellness Programs and Validating Fitness Standards | 4 Hours <u>4 Hours</u> |
| (10) | Lesson Plan Review | 2 Hours |
| (11) | Exercise Leadership | 3 Hours |
| | TOTAL | 58 Hours |

(e) The "Physical Fitness Instructor Training Manual" as published by the North Carolina Justice Academy shall be the curriculum for specialized physical fitness instructor training courses. Copies of this publication may be inspected at the:

Criminal Justice Standards Division
North Carolina Department of Justice
1700 Tryon Park Drive
Post Office Drawer 149
Raleigh, North Carolina 27610

and may be obtained at the cost of printing and postage from the Academy at the following address:

North Carolina Justice Academy
Post Office Box 99

Salemburg, North Carolina 28385

(f) The Commission-certified school that is certified to offer the "Specialized Physical Fitness Instructor Training" course is the North Carolina Justice Academy.

Authority G.S. 17C-6.

SECTION .0300 - MINIMUM STANDARDS FOR CRIMINAL JUSTICE INSTRUCTORS

12 NCAC 09B .0302 GENERAL INSTRUCTOR CERTIFICATION

(a) General Instructor Certification issued after December 31, 1984 shall be limited to those topics that are not expressly incorporated under the Specific Instructor Certification category. Individuals certified under the general instructor category shall not teach any of the subjects specified in Rule .0304 of this Section, entitled "Specific Instructor Certification." To qualify for issuance of General Instructor Certification, an applicant shall demonstrate a combination of education and experience in criminal justice and proficiency in the instructional process to the satisfaction of the Commission. The applicant shall meet the following requirements for General Instructor Certification:

- (1) Present documentary evidence showing that the applicant:
 - (A) is a high school, college or university graduate, or has received ~~passed the General Education Development Test (GED) indicating a high school equivalency, equivalency credential as recognized by the issuing state;~~ and
 - (B) has acquired four years of practical experience as a criminal justice officer or as an administrator or specialist in a field directly related to the criminal justice system.
- (2) Present evidence showing completion of a Commission-certified instructor training program or an equivalent instructor training course utilizing the Instructional Systems Design model, an international model with applications in education, military training, and private enterprise.
- (3) Pass the comprehensive written examination administered by the Commission, as required in Rule .0413(d) of this Subchapter.

(b) Applications for General Instructor Certification shall be submitted to the Standards Division within 60 days of the date the applicant passed the state comprehensive examination administered at the conclusion of the Commission-certified instructor training program or an equivalent instructor training course utilizing the Instructional Systems Design model, an international model with applications in education, military training, and private enterprise.

(c) Persons having completed a Commission-certified instructor training course or an equivalent instructor training course utilizing the Instructional Systems Design model, an international model

with applications in education, military training, and private enterprise, and not having made application within 60 days of completion of the course shall complete a subsequent Commission-certified instructor training course in its entirety.

(d) Applicants for Speed Measuring Instrument Instructor courses shall possess general instructor certification.

Authority G.S. 17C-6.

SECTION .0400 - MINIMUM STANDARDS FOR COMPLETION OF TRAINING

12 NCAC 09B .0401 TIME REQUIREMENT FOR COMPLETION OF TRAINING

(a) Each criminal justice officer, with the exception of law enforcement officers, holding probationary certification shall complete, with passing scores, a Commission-accredited basic training course as prescribed in Rules .0235, .0236, and .0412 of this Subchapter that includes training in the skills and knowledge necessary to perform the duties of his or her office. The officer shall complete the course within one year from the date of his original appointment, as determined by the date of the probationary certification.

(b) Each law enforcement officer shall have completed with passing scores the accredited basic training course as prescribed in Rule .0205 of this Subchapter prior to obtaining probationary certification.

(c) If a trainee completes the basic training course as prescribed in Rule .0205 of this Subchapter prior to being employed as a law enforcement officer, the trainee shall be duly appointed and sworn as a law enforcement officer within one year of successfully passing the comprehensive written exam as specified in Rule .0406 of this Subchapter for that basic training course to be recognized under these Rules.

(d) If a trainee, while on active duty in the armed forces, completes the basic training course in its entirety as prescribed in Rule .0205 of this Subchapter, the trainee shall be eligible for probationary certification, as prescribed in 12 NCAC 09C .0303 within one year of separation from active duty status from the armed forces. The trainee's eligibility for certification shall expire five years from the date the trainee achieves a passing score on the BLET comprehensive written examination, unless otherwise provided by law.

~~(d)~~(e) If local confinement supervisory and administrative personnel complete basic training prior to being employed by a facility in a supervisory and administrative position that requires certification as prescribed in G.S. 153A-217 and G.S. 153A-218, the personnel shall be duly appointed to a local confinement facility supervisory and administrative position within one year of the completion of training for the basic training course specified in 12 NCAC 09B .0205. This one year period shall begin with the date the applicant achieves a passing score on the comprehensive written exam, as specified in Rule .0411 of this Section.

Authority G.S. 17C-2; 17C-6; 17C-10.

12 NCAC 09B .0403 EVALUATION FOR TRAINING WAIVER

(a) The Standards Division staff shall evaluate each law enforcement officer's training and experience to determine if equivalent training has been completed as specified in Rule .0402(a) of this Section. Applicants for certification with prior law enforcement experience shall have been employed in a full-time, sworn law enforcement position in order to be considered for training evaluation under this Rule. Applicants for certification with a combination of full-time and part-time experience shall be evaluated on the basis of the full-time experience only. The following criteria shall be used by Standards Division staff in evaluating a law enforcement officer's training and experience to determine eligibility for a waiver of training requirements:

- (1) Persons having completed a Commission-accredited basic training program and not having been duly appointed and sworn as a law enforcement officer within one year of completion of the program shall complete a subsequent Commission-accredited basic training program, as prescribed in Rule .0405(a) of this Section, and achieve a passing score on the State Comprehensive Examination prior to obtaining probationary law enforcement certification, unless the Director determines that a delay in applying for certification was not due to neglect on the part of the applicant, in which case the Director may accept a Commission-accredited basic training program that is over one year old. The extension of the one year period shall not exceed 30 days from the first year anniversary of the passing of the state comprehensive examination;
- (2) Out-of-state transferees shall be evaluated to determine the amount and quality of their training and experience. Out-of-state transferees shall not have a break in service exceeding one year. At a minimum, out-of-state transferees shall have two years' full-time, sworn law enforcement experience and have completed a basic law enforcement training course accredited by the transferring State. Prior to employment as a certified law enforcement officer, out-of-state transferees must complete with a passing score the employing agency's in-service firearms training and qualification program as prescribed in 12 NCAC 09E .0106. At a minimum, out-of-state transferees shall complete the Legal Unit in a Commission-accredited Basic Law Enforcement Training Course as prescribed in Rule .0205(b)(1) of this Subchapter and shall achieve a passing score on the State Comprehensive Examination within the 12 month probationary period;
- (3) Persons who have completed a minimum 369-hour basic law enforcement training

program accredited by the Commission under guidelines administered beginning October 1, 1984 and have been separated from a sworn position for over one year but less than three years who have had a minimum of two years' experience as a full-time, sworn law enforcement officer in North Carolina shall complete the Legal Unit in a Commission-accredited Basic Law Enforcement Training Course as prescribed in Rule .0205(b)(1) of this Subchapter, and shall achieve a passing score on the State Comprehensive Examination within the 12 month probationary period. Prior to employment as a certified law enforcement officer, these persons shall complete with a passing score the employing agency's in-service firearms training and qualification program as prescribed in 12 NCAC 09E;

- (4) Persons out of the law enforcement profession for over one year but less than three years who have had less than two years' experience as a full-time, sworn law enforcement officer in North Carolina shall complete a Commission-accredited basic training program, as prescribed in Rule .0405(a) of this Section, and achieve a passing score on the State Comprehensive Examination;
- (5) Persons out of the law enforcement profession for over three years regardless of prior training or experience shall complete a Commission-accredited basic training program, as prescribed in Rule .0405(a) of this Section, and shall achieve a passing score on the State Comprehensive Examination;
- (6) Persons who separated from law enforcement employment during their probationary period after having completed a Commission-accredited basic training program and who have separated from a sworn law enforcement position for more than one year shall complete a subsequent Commission-accredited basic training program and achieve a passing score on the State Comprehensive Examination;
- (7) Persons who separated from a sworn law enforcement position during their probationary period after having completed a Commission-accredited basic training program and who have separated from a sworn law enforcement position for less than one year shall serve a new 12 month probationary period as prescribed in Rule .0401(a) of this Section, but need not complete an additional training program;
- (8) Persons who have completed a minimum 160-hour basic law enforcement training program accredited by the North Carolina Criminal Justice Training and Standards Council under guidelines administered

- beginning on July 1, 1973 and continuing through September 30, 1978 and who have separated from a sworn law enforcement position for over one year but less than two years shall be required to complete the Legal Unit and the topical area entitled "Law Enforcement Driver Training" of a Commission-accredited Basic Law Enforcement Training Course as prescribed in Rule .0205(b)(1) and .0205(b)(5)(C) of this Subchapter and achieve a passing score on the State Comprehensive Examination within the 12 month probationary period;
- (9) Persons who have completed a minimum 160-hour basic law enforcement training program accredited by the North Carolina Criminal Justice Training and Standards Council under guidelines administered beginning on July 1, 1973 and continuing through September 30, 1978 and have been separated from a sworn law enforcement position for two or more years shall be required to complete a Commission-accredited basic training program, as prescribed in Rule .0405 of this Section regardless of training and experience and shall achieve a passing score on the State Comprehensive Examination;
 - (10) Persons who have completed a minimum 240-hour basic law enforcement training program accredited by the Commission under guidelines administered beginning October 1, 1978 and continuing through September 30, 1984 and have been separated from a sworn position over one year but less than three years shall be required to complete the Legal Unit in a Commission-accredited Basic Law Enforcement Training Course as prescribed in Rule .0205(b)(1) of this Subchapter and achieve a passing score on the State Comprehensive Examination within the 12 month probationary period;
 - (11) Persons previously holding law enforcement certification in accordance with G.S. 17C-10(a) who have been separated from a sworn law enforcement position for over one year and who have not previously completed a minimum basic training program accredited by either the North Carolina Criminal Justice Training and Standards Council or the Commission shall complete a Commission-accredited basic training program, as prescribed in Rule .0405 of this Section, and shall achieve a passing score on the State Comprehensive Examination prior to employment;
 - (12) Persons who have completed training as a federal law enforcement officer and are candidates for appointment as a sworn law enforcement officer in North Carolina shall be required to complete a Commission-accredited basic training program, as prescribed in Rule .0405 of this Section, and shall achieve a passing score on the State Comprehensive Examination;
 - (13) Applicants with part-time experience who have a break in service in excess of one year shall complete a Commission-accredited basic training program, as prescribed in Rule .0405 of this Section, and achieve a passing score on the State Comprehensive Examination prior to employment;
 - (14) Applicants who hold or previously held certification issued by the North Carolina Sheriffs' Education and Training Standards Commission (Sheriffs' Commission) shall be subject to evaluation of their prior training and experience on an individual basis. The Standards Division staff shall determine the amount of training required of these applicants, based upon:
 - (A) the active or inactive status held by the applicant;
 - (B) the amount of time served in an active status during the year immediately prior to application for certification by the Commission;
 - (C) the length of any break in the applicant's service; and
 - (D) whether the applicant has completed mandatory in-service training for each year his or her certification was held by the Sheriffs' Commission.
 - (15) Alcohol law enforcement agents who received basic alcohol law enforcement training prior to November 1, 1993 and transfer to another law enforcement agency in a sworn capacity shall be subject to evaluation of their prior training and experience on an individual basis. The Standards Division staff shall determine the amount of training required of these applicants, based upon the type of certification held by the applicant and the length of any break in the applicant's sworn, full-time service.
 - (16) Wildlife enforcement officers who separate from employment with the Wildlife Enforcement Division and transfer to another law enforcement agency in a sworn capacity shall be subject to evaluation of their prior training and experience on an individual basis. The Standards Division staff shall determine the amount of training required of these applicants, based upon the type of certification held by the applicant and the length of any break in the applicant's sworn, full-time service.
 - (17) Active duty, guard, or reserve military members failing to complete all of the required annual in-service training topics, as defined in 12 NCAC

09E .0105, of this Chapter, due to military obligations, are subject to the following training requirements as a condition for return to active criminal justice status. The agency head shall verify the person's completion of the appropriate training by submitting a statement, on Form F-9C, Return to Duty Request form. This form is located on the agency's website: <http://www.ncdoj.gov/getdoc/ac22954d-5e85-4a33-87af-308ba2248f54/F-9C-6-11.aspx>.

- (A) Active ~~duty~~, duty members of the armed forces eligible for probationary certification pursuant to Subparagraph (a)(18) of this Rule, and active duty, guard, or reserve military members holding probationary or general certification as a criminal justice officer who fail to complete all of the required annual in-service training topics due to military obligations for up to a period of three years, shall complete the previous year's required in-service training topics, the current year's required in-service training topics, and complete with a passing score the appointing agency's in-service firearms training and qualification program as prescribed in 12 NCAC 09E prior to their return to active criminal justice status;
- (B) Active, guard or reserve military members holding probationary or general certification as a criminal justice officer who fail to complete all of the required annual in-service training topics due to military obligations for a period greater than three years shall complete the following topic areas within the following time frames:
 - (i) The person shall complete the previous year's required in-service training topics, the current year's required in-service training topics, and complete the appointing agency's in-service firearms training and qualification program as prescribed in 12 NCAC 09E prior to their return to active criminal justice status;
 - (ii) The person shall achieve a passing score on the practical skills testing for the First Responder, Law Enforcement Driver Training, and Subject

Control Arrest Techniques topics enumerated in Rule .0205(b)(5) of this Subchapter prior to return to active criminal justice status. This practical skills testing may be completed either in a Commission-accredited Basic Law Enforcement Training course or under the instruction of a [Commission-certified] instructor for that particular skill. The person shall complete one physical fitness assessment in lieu of the Fitness Assessment and Testing topic. The person must also be examined by a physician per Rule .0104(b) of this Subchapter; and

- (iii) The person shall complete some of the topics in the legal unit of instruction in the Basic Law Enforcement Training course as set forth in Rule .0205(b)(1) of this Subchapter. The required topics include Motor Vehicle Law; Juvenile Laws and Procedures; Arrest, Search and Seizure/Constitutional Law; and ABC Laws and Procedures. The person shall achieve a passing score on the appropriate topic tests for each course delivery. The person may undertake each of these legal unit topics of instruction either in a Commission-accredited Basic Law Enforcement Training course or under the instruction of a Commission certified instructor for that particular topic of instruction. The person shall have 12 months from the beginning of his or her return to active criminal justice status to complete each of the enumerated topics of instruction.
- (18) An active duty member of the armed forces who completes the basic training course in its entirety as prescribed in Rule .0405 of this Section, and annually completes the mandatory in-service training topics as prescribed in Rule

12 NCAC 09E .0105, with the exception of the Firearms Qualification and Testing requirements contained in 12 NCAC 09E .0105(a)(1) for each year subsequent to the completion of the basic training course and achieves a passing score on the state comprehensive examination as prescribed in Rule .0406 of this Section within five years of separating from active duty status, shall be eligible for probationary certification as prescribed in Rule 12 NCAC 09C .0303 for a period of 12 months from the date he or she separates from active duty status in the armed forces. All mandatory in-service training topics as prescribed in 12 NCAC 09E .0105 of this Chapter must be completed by the individual prior to receiving probationary certification as prescribed in Rule 12 NCAC 09C .0303.

(b) In the event the applicant's prior training is not equivalent to the Commission's standards, the Commission shall prescribe as a condition of certification supplementary or remedial training to equate previous training with current standards.

(c) Where certifications issued by the Commission require satisfactory performance on a written examination as part of the training, the Commission shall require the examinations for the certification.

(d) In those instances not incorporated within this Rule or where an evaluation of the applicant's prior training and experience determines that required attendance in the entire Basic Law Enforcement Training Course would be impractical, the Director of the Standards Division is authorized to exercise his or her discretion in determining the amount of training those persons shall complete during their probationary period.

(e) The following criteria shall be used by Standards Division staff in evaluating prior training and experience of local confinement personnel to determine eligibility for a waiver of training requirements:

- (1) Persons who hold probationary, general, or grandfather certification as local confinement personnel and separate after having completed a Commission-accredited course as prescribed in Rule .0224 or .0225 of this Subchapter and have been separated for one year or more shall complete a subsequent Commission-accredited training course and achieve a passing score on the State Comprehensive Examination during the probationary period as prescribed in Rule .0401(a) of this Section;
- (2) Persons who separated from a local confinement personnel position after having completed a Commission-accredited course as prescribed in Rule .0224 or .0225 of this Subchapter and who have been separated for less than one year shall serve a new 12 month probationary period, but need not complete an additional training program;
- (3) Applicants who hold or previously held "Detention Officer Certification" issued by the

North Carolina Sheriffs' Education and Training Standards Commission shall be subject to evaluation of their prior training and experience on an individual basis. No additional training shall be required where the applicant obtained certification and successfully completed the required 120 hour training course, and has not had a break in service in excess of one year; and

- (4) Persons holding certification for local confinement facilities who transfer to a district or county confinement facility shall complete the course for district and county confinement facility personnel, as adopted by reference in Rule .0224 of this Subchapter, and achieve a passing score on the State Comprehensive Examination during the probationary period as prescribed in Rule .0401(a) of this Section.

Authority G.S. 17C-2; 17C-6; 17C-10; 93B-15.1.

SECTION .0500 - MINIMUM STANDARDS FOR CRIMINAL JUSTICE SCHOOL DIRECTORS

12 NCAC 09B .0501 CERTIFICATION OF SCHOOL DIRECTORS

(a) Any person designated to act as, or who performs the duties of, a school director in the delivery or presentation of a Commission-certified criminal justice training course shall be and continuously remain certified by the Commission as a school director.

(b) To qualify for initial certification as a criminal justice school director, an applicant shall:

- (1) Attend and successfully complete a Commission-certified instructor training course or an equivalent instructor training program as determined by the Commission (if certified after July 1, 2004); and
- (2) Present documentary evidence showing that the applicant:
 - (A) is a ~~high school~~ school, college or university graduate or has received a passed the General Education Development Test (GED) indicating high school equivalency credential as recognized by the issuing state and has acquired five years of practical experience as a criminal justice officer or as an administrator or specialist in a field directly related to the criminal justice system. At least one year of the required five years experience must have been while actively participating in criminal justice training as a Commission-certified instructor; or
 - (B) has been awarded an associate degree and has acquired four years of practical experience as a criminal

justice officer or as an administrator or specialist in a field directly related to the criminal justice system. At least one year of the required four years experience must have been while directly participating in criminal justice training as a Commission-certified instructor; or

(C) has been awarded a baccalaureate degree from a regionally accredited institution of higher learning;

- (3) Attend or must have attended the most current offering of the school director's orientation as developed and presented by the Commission staff, otherwise an individual orientation with a staff member shall be required.
- (4) Submit a written request for the issuance of such certification executed by the executive officer of the institution or agency currently certified, or which may be seeking certification, by the Commission to make presentation of certified training programs and for whom the applicant will be the designated school director.

(c) To qualify for certification as a school director in the presentation of the "Criminal Justice Instructor Training Course" an applicant shall:

- (1) Document that he/she has been awarded a baccalaureate degree from a regionally accredited institution of higher learning; and
- (2) Present evidence showing successful completion of a Commission-certified instructor training course or an equivalent instructor training program as determined by the Commission; and
- (3) Be currently certified as a criminal justice instructor by the Commission; and
- (4) Document successful participation in a special program presented by the Justice Academy for purposes of familiarization and supplementation relevant to delivery of the instructor training course and trainee evaluation.

Authority G.S. 17C-6.

12 NCAC 09B .0502 TERMS AND CONDITIONS OF SCHOOL DIRECTOR CERTIFICATION

(a) The term of certification as a school director is two years from the date the Commission issues the certification, unless earlier terminated by action of the Commission. Upon application, the certification may subsequently be renewed by the Commission for three-year periods. The application for renewal shall contain documentation meeting the requirements of Rule .0501(b)(2) and (3) of this Section.

(b) To retain certification as a Basic Law Enforcement Training school director, the school director shall:

- (1) Participate in annual training conducted by commission staff;

- (2) Maintain and comply with the current version of the "Basic Law Enforcement Training Course Management Guide";
- (3) Maintain and ensure compliance with the current version of the "Basic Law Enforcement Training Instructor Notebook" assigned to each certified school; and
- (4) Perform the duties and responsibilities of a school director as specifically required in Rule .0202 of this Subchapter.

(c) To retain certification as a Speed Measuring Instrument, Instructor Training, or Specialized Instructor Training school director, the school director shall:

- (1) Participate in annual training conducted by commission staff;
- (2) Maintain and ensure compliance with the current version of the specific speed measuring instrument or Instructor Training notebook assigned to each certified school; and
- (3) Perform the duties and responsibilities of a school director as specifically required in Rule .0202 of this Subchapter.

Authority G.S. 17C-6.

SUBCHAPTER 09C - ADMINISTRATION OF CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS

SECTION .0400 - ACCREDITATION OF CRIMINAL JUSTICE SCHOOLS AND TRAINING COURSES

12 NCAC 09C .0401 ACCREDITATION OF CRIMINAL JUSTICE SCHOOLS

~~(a) The Commission shall establish a standing subcommittee, called the Certification Committee, of the Education and Training Committee for the purposes of evaluating Request for School Certification applications and making recommendations to the Education and Training committee on the granting of certification to institutions and agencies. The Certification Committee shall be comprised of two members appointed by the School Directors' Advisory Committee and two members who shall be Commission members to include the North Carolina Department of Community Colleges' representative to the Commission. The Chairman of the Commission shall appoint the Chairman of the Certification Committee.~~

~~(b)(a) Any school requesting certification accreditation meeting the minimum requirements contained in 12 NCAC 09B .0200 must submit a completed Form F-10(SA) Request for School Certification Accreditation application. The Form F-10(SA) is available on the agency's website: [http://www.ncdoj.gov/getdoc/9134b822-24a7-4d70-8a3b-b2bd807100c4/F-10\(SA\)-6-11.aspx](http://www.ncdoj.gov/getdoc/9134b822-24a7-4d70-8a3b-b2bd807100c4/F-10(SA)-6-11.aspx). Upon receipt of a completed Request for School Certification Accreditation application:~~

- (1) The Standards Division staff shall review the application for any omissions and clarifications and conduct a site visit to tour facilities, confirm information on the application, and determine if and where deficiencies exist;

- (2) The Standards Division Staff shall contact the applying institution or agency concerning deficiencies and shall provide assistance on correcting problem areas;
- (3) The Standards Division staff shall make a recommendation to the Certification-Education and Training Committee when the accredited institution has satisfied the requirements outlined in 12 NCAC 09B .0200; and
- ~~(4) The Standards Division staff shall submit the application and staff reports to the Certification Committee for review;~~
- ~~(5) The Certification Committee shall then submit a recommendation to the Education and Training Committee on the approval or denial of the application; and~~
- ~~(6)~~(4) The Education and Training Committee shall recommend to the full Commission at its next regularly scheduled meeting the approval or denial of certification-accreditation for the applicant institution or agency.

(c) Certification-Accreditation of a school shall remain effective for five years from issuance unless earlier suspended or revoked for failure to maintain compliance with the requirements outlined in 12 NCAC 09B .0200, Minimum Standards for Criminal Justice Schools and Criminal Justice Training Programs or Courses of Instruction.

(d) The identity of those schools certified-accredited under this Rule shall be published and distributed annually by the Standards ~~Division~~ Division, via the agency's website: <http://www.ncdoj.gov/CMSPages/GetFile.aspx?nodeguid=6cb7e157-87f7-40a3-b281-d95a36807bb9> ~~together with the name and business address of the school director and the schedule of criminal justice training courses planned for delivery during the succeeding year.~~

(e) A school may apply for recertification-reaccreditation to the Commission by submitting a completed Request for School Certification-Accreditation application. The application for recertification-reaccreditation shall contain information on changes in facilities, equipment, and staffing. Upon receipt of a completed application:

- (1) The Standards Division staff shall review the application for any omissions and clarification;
- (2) The Standards Division staff shall attach copies of the reports of site visits conducted during the last period of certification-accreditation to the application;
- (3) The Standards Division staff shall submit the application and staff reports to the Certification Education and Training Committee for Review; review; and
- ~~(4) The Certification Committee shall submit a recommendation to the Education and Training Committee on the approval or denial of the application; and~~
- ~~(5)~~(4) The Education and Training Committee shall recommend to the full Commission at its next regularly scheduled meeting the approval or

denial of certification-accreditation of the applicant institution or agency.

(f) In instances where certified schools have been found to be in compliance with 12 NCAC 09B .0200 through favorable site visit reports, Standards Division staff shall ~~recertify-reaccredit~~ on behalf of the Commission. Such action shall be reported to the ~~Commission through the Certification Committee and the Education and Training Committee~~ at its next scheduled meeting.

~~(g)~~ In instances where the Education and Training Committee determines the school seeking accreditation or reaccreditation is not in compliance with 12 NCAC 09B .0200, the school application and staff reports shall be reviewed by the Probable Cause Committee, as specified in 12 NCAC 09A .0201.

~~(g)~~(h) The Commission may suspend or revoke a school's certification-accreditation when it finds that the school has failed to meet or continuously maintain any requirement, standard, or procedure for school or course certification-accreditation.

~~(h)~~(i) The certification-Accreditation of a school whose certification-accreditation is scheduled to expire in calendar year ~~2006~~ 2015 and who has submitted a request for recertification is extended for a maximum of two years under the following conditions:

- (1) certification-accreditation has not expired;
- (2) the school has submitted a request for recertification-reaccreditation along with the required documentation by December 31, ~~2006~~; 2015.
- (3) the Standards Division staff is unable to complete the recertification process by December 31, ~~2006~~; 2014; and
- (4) the school is not denied recertification-reaccreditation prior to the expiration of the current ~~certification-accreditation~~. Certification-Accreditation or certification accreditation extension according to this Paragraph expires when recertification-reaccreditation is denied or revoked or the Standards Division staff is able to complete the recertification-reaccreditation process and it is determined that the school is in compliance with the Rules for recertification-Reaccreditation. If the school recertification-reaccreditation is denied or revoked, the school must shall not deliver Commission certified accredited criminal justice courses until such recertification-reaccreditation has been granted or reinstated by the Commission.

Authority G.S. 17C-6.

SUBCHAPTER 09E - IN-SERVICE TRAINING PROGRAMS

SECTION .0100 - LAW ENFORCEMENT OFFICER'S IN-SERVICE TRAINING PROGRAM

12 NCAC 09E .0109 IN-SERVICE TRAINING COORDINATOR REQUIREMENTS

(a) Any ~~person~~persons designated by ~~his or her~~an agency head to act as, or who ~~performs~~perform the duties of, an In-Service Training Coordinator in the delivery or presentation of a Commission-mandated or Commission-recognized in-service training course shall have on file confirmation from the Commission acknowledging designation as In-Service Training Coordinator prior to acting in an official capacity as an In-Service Training Coordinator.

(b) To be eligible to serve as an In-Service Training Coordinator, an applicant shall:

- (1) have four years of practical experience as a criminal justice officer or as an administrator or specialist in a field directly related to the criminal justice system;
- (2) ~~hold~~be certified by the Commission as a General Instructor certification; Instructor;
- (3) have ~~successfully participated in~~completed the "Coordinating In-Service Training" course presented by the North Carolina Justice Academy for the purpose of familiarization with trainee and instructor evaluation.

(c) The agency head shall submit to the Criminal Justice Standards Division a Commission ~~In-Service~~In-Service Training Coordinator Request form containing the ~~name~~names and other requested information for the ~~person~~persons selected to act as In-Service Training ~~Coordinator~~Coordinators for the agency. The agency head shall ensure that the ~~person~~persons selected ~~meets~~meet the requirements set forth in Paragraphs (a) and (b) of this Rule.

Authority G.S. 17C-6.

SUBCHAPTER 09G - STANDARDS FOR CORRECTIONS EMPLOYMENT, TRAINING, AND CERTIFICATION

SECTION .0200 - MINIMUM STANDARDS FOR CERTIFICATION OF CORRECTIONAL OFFICERS, PROBATION/PAROLE OFFICERS, AND PROBATION/PAROLE OFFICERS-SURVEILLANCE

12 NCAC 09G .0204 EDUCATION

(a) Every person employed as a correctional officer by the North Carolina Department of Public Safety, Division of Adult Correction and Juvenile Justice shall be a ~~high school~~school, college, or university graduate or have ~~passed~~received at the ~~General Educational Development "GED" Test~~indicating high school equivalency ~~credential as recognized by the issuing state.~~

(b) Every person employed as a probation/parole officer by the North Carolina Department of Public Safety, Division of Adult Correction and Juvenile Justice shall be a graduate of a regionally accredited college or university and have attained at least the baccalaureate degree.

(c) Each applicant for employment as a corrections officer shall furnish to the North Carolina Department of Public Safety, Division of Adult Correction and Juvenile Justice documentary

evidence that the applicant has met the educational requirements for the corrections field of expected employment.

- (1) Documentary evidence of educational requirements shall consist of official transcripts of courses completed or diplomas received from a school that meets the requirements of the North Carolina Department of Public Instruction, the Division of Non-Public Instruction, a comparable out-of-state agency, or is a regionally accredited college or university. High school diplomas earned through correspondence enrollment are not recognized toward these minimum educational requirements.
- (2) Documentary evidence of ~~completion of the General Educational Development "GED" Test~~high school equivalency shall be satisfied by a certified copy of a high school equivalency credential as recognized by the issuing state.~~GED test results showing successful completion. A certified copy of a military GED diploma may be used as alternate evidence of GED completion.~~

Authority G.S. 17C-6; 17C-10.

SECTION .0300 - CERTIFICATION OF CORRECTIONAL OFFICERS, PROBATION/PAROLE OFFICERS, AND INSTRUCTORS

12 NCAC 09G .0308 GENERAL INSTRUCTOR CERTIFICATION

(a) General Instructor Certification after December 31, 1984 shall be limited to those topics that are not expressly incorporated under the Specialized Instructor Certification category. Individuals certified under the general instructor category are not authorized to teach any of the subjects specified in 12 NCAC 09G .0310, entitled "Specialized Instructor Certification." To qualify for issuance of General Instructor Certification, an applicant shall demonstrate a combination of education and experience in corrections and proficiency in the instructional process to the satisfaction of the Commission by meeting the following requirements:

- (1) Present documentary evidence showing that the applicant:
 - (A) is a ~~high school~~school, college or university graduate or has ~~received~~passed the General Education Development Test (GED) indicating a high school equivalency; equivalency credential as recognized by the issuing state; and
 - (B) has acquired four years of practical experience as a criminal justice officer or as an administrator or specialist in a field related to the criminal justice system.

- (2) Present evidence showing successful completion of a Commission-certified instructor training program or an equivalent instructor training course utilizing the Instructional Systems Design model, an international model with applications in education, military training, and private enterprise; and
- (3) Achieve a passing score on the comprehensive written examination administered by the Commission, as specified in 12 NCAC 09B .0413(d), of this Chapter, within 60 days of completion of the Commission-certified instructor training program.

(b) Applications for General Instructor Certification shall be submitted to the Standards Division within 60 days of the date the applicant achieved a passing score on the comprehensive written examination administered by the Commission for the Commission-certified instructor training program or an equivalent instructor training course utilizing the Instructional Systems Design model, an international model with applications in education, military training, and private enterprise.

(c) Persons having completed a Commission-certified instructor training course or an equivalent instructor training course utilizing the Instructional Systems Design model, an international model with applications in education, military training, and private enterprise, and not having made application within 60 days of completion of the course shall complete a subsequent Commission-certified instructor training course.

Authority G.S. 17C-6.

12 NCAC 09G .0405 CERTIFICATION OF SCHOOL DIRECTORS

(a) Any person designated to act as, or who performs the duties of, a School Director in the delivery or presentation of a Commission-certified corrections training course shall be and continuously remain certified by the Commission as a School Director.

(b) To qualify for initial certification as a corrections School Director, an applicant shall:

- (1) Attend and successfully complete a Commission-certified instructor training course or an equivalent instructor training program as determined by the Commission (if certified after January 1, 2006); and
- (2) present documentary evidence showing that the applicant:
 - (A) is a high school graduate or has ~~received~~ ~~passed the General Education Development Test (GED) indicating a~~ high school equivalency credential as recognized by the issuing state and has acquired five years of practical experience as a criminal justice officer, corrections officer, or as an administrator or specialist in a field directly related to the corrections

system. At least one year of the required five years experience must have been while actively participating in corrections training as a Commission-certified instructor; or

- (B) has been awarded an associate degree and has acquired four years of practical experience as a criminal justice officer, corrections officer, or as an administrator or specialist in a field directly related to the corrections system. At least one year of the required four years experience must have been while directly participating in corrections training as a Commission-certified instructor; or
- (C) has been awarded a baccalaureate degree from a regionally accredited institution of higher learning;

(3) attend or have attended the most current offering of the School Director's orientation as developed and presented by the Commission staff, otherwise an individual orientation with a staff member shall be required; and

(4) submit a written request to the Commission for the issuance of such certification. This request shall be executed by the executive officer of the North Carolina Department of Correction.

(c) To qualify for certification as a School Director in the presentation of the "Criminal Justice Instructor Training Course" an applicant shall:

- (1) document that he/she has been awarded a baccalaureate degree from a regionally accredited institution of higher learning;
- (2) present evidence showing successful completion of a Commission-certified instructor training course or an equivalent instructor training program as determined by the Commission;
- (3) be currently certified as a criminal justice instructor by the Commission; and
- (4) document successful participation in a special program presented by the Justice Academy for purposes of familiarization and supplementation relevant to delivery of the instructor training course and trainee evaluation.

Authority G.S. 17C-6.

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Environmental Management Commission intends to adopt the rules cited as 15A NCAC 02L .0501 - .0515.

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

Proposed Effective Date: January 2, 2016

Public Hearing:

Date: August 26, 2015

Time: 2:00 p.m.

Location: Green Square Building, Room 1210, 217 West Jones Street, Raleigh, NC 27603

Reason for Proposed Action: The Environmental Management Commission has received a petition for rulemaking and the Division of Waste Management has taken comments from stakeholders who maintain it is inconsistent to require risk-based remediation for only petroleum contamination from petroleum USTs. This change can be protective of human health and the environment and will reduce costs to some stakeholders.

Comments may be submitted to: Linda L. Smith, NCDENR/DWM/UST Section, 1637 Mail Service Center, Raleigh, NC 27699-1637, phone (919) 707-8150, fax (919) 715-1117, email Linda.L.Smith@ncdenr.gov

Comment period ends: October 2, 2015

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)
Approved by OSBM
No fiscal note required by G.S. 150B-21.4

CHAPTER 02 - ENVIRONMENTAL MANAGEMENT

SUBCHAPTER 02L - GROUNDWATER CLASSIFICATION AND STANDARDS

SECTION .0500 - RISK-BASED ASSESSMENT AND CORRECTIVE ACTION FOR NON-UST PETROLEUM RELEASES

15A NCAC 02L .0501 PURPOSE AND SCOPE

(a) The purpose of this Section is to establish procedures for risk-based assessment and corrective action sufficient to:

- (1) protect human health and the environment;
(2) abate and control contamination of the waters of the State as deemed necessary to protect human health and the environment;
(3) permit management of the State's groundwaters to protect their designated current usage and potential future uses;
(4) provide for anticipated future uses of the State's groundwater;
(5) recognize the diversity of contaminants, the State's geology and the characteristics of each individual site; and
(6) accomplish these goals in a cost-efficient manner to assure the best use of the limited resources available to address groundwater pollution within the State.

(b) The applicable portions of Section .0100 not specifically excluded apply to this Section.

Authority G.S. 143-215.2; 143-215.3(a)(1); 143B-282.

15A NCAC 02L .0502 DEFINITIONS

The definitions as set out in Rule .0102 of this Subchapter apply to this Section, except that the following definitions apply throughout this Section:

- (1) "Aboveground storage tank" or "AST" means any one or a combination of tanks (including underground pipes connected thereto) that is used to contain an accumulation of petroleum.
(2) "AST system" means an aboveground storage tank, connected underground piping, underground ancillary equipment, and containment system, if any".
(3) "Discharge" means, but is not limited to, any emission, spillage, leakage, pumping, pouring, emptying, or dumping of oil into groundwater or surface water or upon land in such proximity to such water that it is likely to reach the water and any discharge upon land which is intentional, knowing or willful.
(4) "Operator" means any person in control of, or having responsibility for the daily operation of the AST system.
(5) "Owner" means any person who owns a petroleum aboveground storage tank or other non-UST petroleum tank, stationary or mobile, used for storage, use, dispensing, or transport.
(6) "Person" means an individual, trust, firm, joint stock company, Federal agency, corporation, state, municipality, commission, political subdivision of a state, or any interstate body.

"Person" also includes a consortium, a joint venture, a commercial entity, and the United States Government.

- (7) "Petroleum" is defined in G.S. 143-215.94A(10).
- (8) "Release" means any spilling, leaking, emitting, discharging, escaping, or leaching or disposing into groundwater, surface water, or surface or subsurface soils.
- (9) "Tank" is a device used to contain an accumulation of petroleum and constructed of non-earthen materials (e.g., concrete, steel, plastic) that provides structural support.

Authority G.S. 143-212(4); 143-215.2; 143-215.3(a)(1); 143-215.77; 143B-282.

15A NCAC 02L .0503 RULE APPLICATION

This Section applies to any non-UST petroleum discharge. The requirements of this Section shall apply to the owner and operator of a petroleum aboveground storage tank or other non-UST petroleum tank, stationary or mobile, from which a discharge or release occurred and any person determined to be responsible for assessment and cleanup of a discharge or release from a non-UST petroleum source, including any person who has conducted or controlled an activity which results in the discharge or release of petroleum or petroleum products (as defined in G.S. 143-215.94A(10)) to the groundwaters of the State, or in proximity thereto; these persons shall be collectively referred to for purposes of this Section as the "responsible party".

Authority G.S. 143-215.2; 143-215.3(a)(1); 143B-282.

15A NCAC 02L .0504 REQUIRED INITIAL RESPONSE AND ABATEMENT ACTIONS BY RESPONSIBLE PARTY

A responsible party shall:

- (1) take actions to prevent any further discharge or release of petroleum from the non-UST petroleum source; identify and mitigate any fire, explosion or vapor hazard; and report the release within 24 hours, in compliance with G.S. 143-215.83(a), 84(a), and 85(b);
- (2) perform initial abatement actions to measure for the presence of a release where contamination is most likely to be present and to confirm the precise source of the release; to investigate to determine the possible presence of free product and to begin free product removal; and to continue to monitor and mitigate any additional fire, vapor, or explosion hazards posed by vapors or by free product; and submit a report within 20 days after release confirmation summarizing these initial abatement actions;
- (3) remove contaminated soil which would act as continuing source of contamination to groundwater. For a new release, if initial

abatement actions involving control and removal of contaminated materials can be initiated within 48 hours from discovery; before contaminated materials have the opportunity to impact groundwater; and if remaining soils contain contaminants with levels less than the TPH action level or less than either the soil-to-groundwater or residential MSCCS (whichever is lowest); no further action is necessary. If the abatement actions cannot be initiated within 48 hours of discovery and petroleum contaminated soil concentrations less than TPH action level cannot be achieved, conduct activities in the subsequent items of this Rule.

- (4) conduct initial site assessment, assembling information about the site and the nature of the release, including but not necessarily limited to the following:
 - (a) Site history and site characterization, including but not limited to, data on nature and estimated quantity of release and data from available sources and site investigations concerning surrounding populations, water quality, use, and approximate locations of wells, surface water bodies, and subsurface structures potentially effected by the release, subsurface soil conditions, locations of subsurface utilities, climatological conditions, and landuse;
 - (b) Results of free product investigations and free product removal, if applicable;
 - (c) Results of groundwater and surface water investigations, if applicable;
 - (d) Summary of initial response and abatement actions; and submit this information in the report required under Item (5) of this Rule.
- (5) submit within 90 days of the discovery of the discharge or release an initial assessment and abatement report containing the site characterization information required in Item (4) of this Rule; soil assessment information sufficient to show that remaining unsaturated soil in the side walls and at the base of the excavation does not contain contaminant levels which exceed either the "soil-to-groundwater" or the residential maximum soil contaminant concentrations established by the Department pursuant to Rule .0511 of this Section, whichever is lower; and documentation to show that neither bedrock nor groundwater was encountered in the excavation (or if groundwater was encountered, that contaminant concentrations in groundwater were equal to or less than the groundwater

quality standards established in Rule .0202 of this Subchapter). If such showing is made, the discharge or release shall be classified as low risk by the Department.

Authority G.S. 143-215.2; 143-215.3(a)(1); 143B-282.

15A NCAC 02L .0505 REQUIREMENTS FOR LIMITED SITE ASSESSMENT

If the required showing cannot be made under Rule .0504 of this Section, submit within 120 days of the discovery of the discharge or release, or within such other greater time limit approved by the Department, a report containing information needed by the Department to classify the level of risk to human health and the environment posed by a discharge or release under Rule .0506 of this Section. Such report shall include, at a minimum:

- (1) a location map, based on a USGS topographic map, showing the radius of 1500 feet from the source area of a confirmed release or discharge and depicting all water supply wells, surface waters and designated wellhead protection areas as defined in 42 U.S.C. 300h-7(e) within the 1500-foot radius. For purposes of this Section, source area means point of release or discharge from the non-UST petroleum source or, if the point of release cannot be determined precisely, source area is defined as the area of highest contaminant concentrations;
- (2) a determination of whether the source area of the discharge or release is within a designated wellhead protection area as defined in 42 U.S.C. 300h-7(e);
- (3) if the discharge or release is in the Coastal Plain physiographic region as designated on a map entitled "Geology of North Carolina" published by the Department in 1985, a determination of whether the source area of the discharge or release is located in an area in which there is recharge to an unconfined or semi-confined deeper aquifer which is being used or may be used as a source of drinking water;
- (4) a determination of whether vapors from the discharge or release pose a threat of explosion due to the accumulation of vapors in a confined space, pose a risk to public health from exposure, or pose any other serious threat to public health, public safety or the environment;
- (5) scaled site map(s) showing the location of the following which are on or adjacent to the property where the source is located: site boundaries, roads, buildings, basements, floor and storm drains, subsurface utilities, septic tanks and leach fields, underground and aboveground storage tank systems, monitoring wells, water supply wells, surface water bodies and other drainage features, borings and the sampling points;

- (6) the results from a limited site assessment which shall include the following actions:
 - (a) Determine the presence, the lateral and vertical extent, and the maximum concentration levels of soil and, if possible, groundwater contamination and free product accumulations.
 - (b) Install as many monitoring wells constructed in accordance with 15A NCAC 02C, within the area of maximum soil or groundwater contamination as needed to determine the groundwater flow direction and maximum concentrations of dissolved groundwater contaminants or accumulations of free product, to include at a minimum three monitoring wells, unless a greater or lesser number are specified for a particular site by the Department ; during well construction, collect and analyze soil samples, which should represent the suspected highest contaminant-level locations by exhibiting visible contamination or elevated levels of volatile organic compounds, from successive locations at five-foot depth intervals in the boreholes of each monitoring well within the unsaturated zone; collect potentiometric data from each monitoring well; and collect and analyze groundwater or measure the amount of free product, if present, in each monitoring well;
- (7) the availability of public water supplies and the identification of properties served by the public water supplies within 1500 feet of the source area of a confirmed discharge or release;
- (8) the land use, including zoning if applicable, within 1500 feet of the source area of a confirmed discharge or release;
- (9) a discussion of site specific conditions or possible actions which could result in lowering the risk classification assigned to the release. Such discussion shall be based on information known or required to be obtained under this Paragraph; and
- (10) names and current addresses of all responsible parties for all petroleum sources for which a discharge or release is confirmed, the owner(s) of the land upon which such petroleum sources are located, and all potentially affected real property owners. Documentation of ownership of ASTs or other sources and of the property upon which a source is located shall be provided. When considering a request from a responsible party for additional time to submit

the report, the Division shall consider the extent to which the request for additional time is due to factors outside of the control of the responsible party, the previous history of the person submitting the report in complying with deadlines established under the Commission's rules, the technical complications associated with assessing the extent of contamination at the site or identifying potential receptors, and the necessity for action to eliminate an imminent threat to public health or the environment.

Authority G.S. 143-215.2; 143-215.3(a)(1); 143B-282.

15A NCAC 02L .0506 DISCHARGE OR RELEASE CLASSIFICATIONS

The Department shall classify the risk of each known discharge or release as high, intermediate or low risk unless the discharge or release has been classified under Rule .0504(3) of this Section. For purposes of this Section:

- (1) "High risk" means that:
 - (a) a water supply well, including one used for non-drinking purposes, has been contaminated by the release or discharge;
 - (b) a water supply well used for drinking water is located within 1000 feet of the source area of a confirmed discharge or release;
 - (c) a water supply well not used for drinking water is located within 250 feet of the source area of a confirmed discharge or release;
 - (d) the groundwater within 500 feet of the source area of a confirmed discharge or release has the potential for future use in that there is no source of water supply other than the groundwater;
 - (e) the vapors from the discharge or release pose a serious threat of explosion due to accumulation of the vapors in a confined space or pose a risk to public health from exposure; or
 - (f) the discharge or release poses an imminent danger to public health, public safety, or the environment.
- (2) "Intermediate risk" means that:
 - (a) surface water is located within 500 feet of the source area of a confirmed discharge or release and the maximum groundwater contaminant concentration exceeds the applicable surface water quality standards and criteria found in 15A NCAC 02B .0200 by a factor of 10;
 - (b) in the Coastal Plain physiographic region as designated on a map entitled

"Geology of North Carolina" published by the Department in 1985, the source area of a confirmed discharge or release is located in an area in which there is recharge to an unconfined or semi-confined deeper aquifer which the Department determines is being used or may be used as a source of drinking water;

- (c) the source area of a confirmed discharge or release is within a designated wellhead protection area, as defined in 42 U.S.C. 300h-7(e);
- (d) the levels of groundwater contamination for any contaminant except ethylene dibromide, benzene and alkane and aromatic carbon fraction classes exceed 50 percent of the solubility of the contaminant at 25 degrees Celsius or 1,000 times the groundwater standard or interim standard established in Rule .0202 of this Subchapter, whichever is lower;
or
- (e) the levels of groundwater contamination for ethylene dibromide and benzene exceed 1,000 times the federal drinking water standard set out in 40 CFR 141.

- (3) "Low risk" means that:
 - (a) the risk posed does not fall within the high or intermediate risk categories; or
 - (b) based on review of site-specific information, limited assessment or interim corrective actions, the Department determines that the discharge or release poses no significant risk to human health or the environment.

If the criteria for more than one risk category applies, the discharge or release shall be classified at the highest risk level identified in Rule .0507 of this Section.

Authority G.S. 143-215.2; 143-215.3(a)(1); 143B-282.

15A NCAC 02L .0507 RECLASSIFICATION OF RISK LEVELS

(a) The Department may reclassify the risk posed by a release if warranted by further information concerning the potential exposure of receptors to the discharge or release or upon receipt of new information concerning changed conditions at the site. After initial classification of the discharge or release, the Department may require limited assessment, interim corrective action, or other actions which the Department believes will result in a lower risk classification. It shall be a continuing obligation of each responsible party to notify the Department of any changes that might affect the level of risk assigned to a discharge or release by the Department if the change is known or should be known by

the responsible party. Such changes shall include, but shall not be limited to, changes in zoning of real property, use of real property or the use of groundwater that has been contaminated or is expected to be contaminated by the discharge or release, if such change could cause the Department to reclassify the risk.

(b) If the risk posed by a discharge or release is determined by the Department to be high risk, the responsible party shall comply with the assessment and cleanup requirements of Rule .0106(c), (g) and (h) of this Subchapter. The goal of any required corrective action for groundwater contamination shall be restoration to the level of the groundwater standards set forth in Rule .0202 of this Subchapter, or as closely thereto as is economically and technologically feasible. In any corrective action plan submitted pursuant to this Paragraph, natural attenuation shall be used to the maximum extent possible. If the responsible party demonstrates that natural attenuation prevents the further migration of the plume, the Department may approve a groundwater monitoring plan.

(c) If the risk posed by a discharge or release is determined by the Department to be an intermediate risk, the responsible party shall comply with the assessment requirements of Rule .0106(c) and (g) of this Subchapter. As part of the comprehensive site assessment, the responsible party shall evaluate, based on site specific conditions, whether the release poses a significant risk to human health or the environment. If the Department determines, based on the site-specific conditions, that the discharge or release does not pose a significant threat to human health or the environment, the site shall be reclassified as a low risk site. If the site is not reclassified, the responsible party shall, at the direction of the Department, submit a groundwater monitoring plan or a corrective action plan, or a combination thereof, meeting the cleanup standards of this Paragraph and containing the information required in Rule .0106(h) of this Subchapter. Discharges or releases which are classified as intermediate risk shall be remediated, at a minimum, to a cleanup level of 50 percent of the solubility of the contaminant at 25 degrees Celsius or 1,000 times the groundwater standard or interim standard established in Rule .0202 of this Subchapter, whichever is lower for any groundwater contaminant except ethylene dibromide, benzene and alkane and aromatic carbon fraction classes. Ethylene dibromide and benzene shall be remediated to a cleanup level of 1,000 times the federal drinking water standard set out in 40 CFR 141. Additionally, if a corrective action plan or groundwater monitoring plan is required under this Paragraph, the responsible party shall demonstrate that the groundwater cleanup levels are sufficient to prevent a violation of:

- (1) the rules contained in 15A NCAC 02B;
- (2) the standards contained in Rule .0202 of this Subchapter in a deep aquifer as described in Rule .0506(2)(b) of this Section; and
- (3) the standards contained in Rule .0202 of this Subchapter at a location no closer than one year time of travel upgradient of a well within a designated wellhead protection area, based on travel time and the natural attenuation capacity of the subsurface materials or on a physical barrier to groundwater migration that exists or

will be installed by the person making the request.

In any corrective action plan submitted pursuant to this Paragraph, natural attenuation shall be used to the maximum extent possible.
(d) If the risk posed by a discharge or release is determined by the Department to be a low risk, the Department shall notify the responsible party that no cleanup, no further cleanup or no further action will be required by the Department, unless the Department later determines that the discharge or release poses an unacceptable risk or a potentially unacceptable risk to human health or the environment. No notification will be issued pursuant to this Paragraph, however, until the responsible party has completed soil remediation pursuant to Rule .0508 of this Section or as closely thereto as economically or technologically feasible; has submitted proof of public notification and has recorded any land-use restriction(s), if required; and paid any applicable statutorily authorized fees. The issuance by the Department of a notification under this Paragraph shall not affect any private right of action by any party which may be affected by the contamination.

Authority G.S. 143-215.2; 143-215.3(a)(1); 143B-282.

15A NCAC 02L .0508 ASSESSMENT AND REMEDIATION PROCEDURES

Assessment and remediation of soil contamination shall be addressed as follows:

- (1) At the time that the Department determines the risk posed by the discharge or release, the Department shall also determine, based on site-specific information, whether the site is "residential" or "industrial/commercial." For purposes of this Section, a site is presumed residential, but may be classified as industrial/commercial if the Department determines based on site-specific information that exposure to the soil contamination is limited in time due to the use of the site and does not involve exposure to children. For purposes of this Item, "site" means both the property upon which the discharge or release has occurred and any property upon which soil has been affected by the discharge or release.
- (2) The responsible party shall submit a report to the Department assessing the vertical and horizontal extent of soil contamination.
- (3) For a discharge or release classified by the Department as low risk, the responsible party shall submit a report demonstrating that soil contamination has been remediated to either the residential or industrial/commercial maximum soil contaminant concentration established by the Department pursuant to Rule .0511 of this Section, whichever is applicable.
- (4) For a discharge or release classified by the Department as high or intermediate risk, the responsible party shall submit a report

demonstrating that soil contamination has been remediated to the lower of:

- (a) the residential or industrial/commercial maximum soil contaminant concentration, whichever is applicable, that has been established by the Department pursuant to Rule .0511 of this Section; or
- (b) the "soil-to-groundwater" maximum soil contaminant concentration that has been established by the Department pursuant to Rule .0511 of this Section.

Authority G.S. 143-215.2; 143-215.3(a)(1); 143B-282.

15A NCAC 02L .0509 NOTIFICATION REQUIREMENTS

(a) A responsible party who submits a corrective action plan which proposes natural attenuation or to cleanup groundwater contamination to a standard other than a standard or interim standard established in Rule .0202 of this Subchapter, or to cleanup soil other than to the standard for residential use or soil-to-groundwater contaminant concentration established pursuant to this Section, whichever is lowest, shall give notice to: the local Health Director and the chief administrative officer of each political jurisdiction in which the contamination occurs; all property owners and occupants within or contiguous to the area containing the contamination; and all property owners and occupants within or contiguous to the area where the contamination is expected to migrate. Such notice shall describe the nature of the plan and the reasons supporting it. Notification shall be made by certified mail concurrent with the submittal of the corrective action plan. Approval of the corrective action plan by the Department shall be postponed for a period of 30 days following receipt of the request so that the Department may consider comments submitted. The responsible party shall, within a time frame determined by the Department to be sufficient, provide the Department with a copy of the notice and proof of receipt of each required notice, or of refusal by the addressee to accept delivery of a required notice. If notice by certified mail to occupants under this Paragraph is impractical, the responsible party may give notice by posting such notice prominently in a manner designed to give actual notice to the occupants. If notice is made to occupants by posting, the responsible party shall provide the Department with a copy of the posted notice and a description of the manner in which such posted notice was given.

(b) A responsible party who receives a notice pursuant to Rule .0507(d) of this Section for a discharge or release which has not been remediated to the groundwater standards or interim standards established in Rule .0202 of this Subchapter or to the lower of the residential or soil-to-groundwater contaminant concentrations established under Rule .0511 of this Section, shall, within 30 days of the receipt of such notice, provide a copy of the notice to: the local Health Director and the chief administrative officer of each political jurisdiction in which the contamination occurs; all property owners and occupants within or contiguous to the area containing contamination; and all property owners and

occupants within or contiguous to the area where the contamination is expected to migrate. Notification shall be made by certified mail. The responsible party shall, within a time frame determined by the Department, provide the Department with proof of receipt of the copy of the notice, or of refusal by the addressee to accept delivery of the copy of the notice. If notice by certified mail to occupants under this Paragraph is impractical, the responsible party may give notice by posting a copy of the notice prominently in a manner designed to give actual notice to the occupants. If notice is made to occupants by posting, the responsible party shall provide the Department with a description of the manner in which such posted notice was given.

Authority G.S. 143-215.2; 143-215.3(a)(1); 143B-282.

15A NCAC 02L .0510 DEPARTMENTAL LISTING OF DISCHARGES OR RELEASES

To the extent feasible, the Department shall maintain in each of the Department's regional offices a list of all non-UST petroleum discharges or releases discovered and reported to the Department within the region.

Authority G.S. 143-215.2; 143-215.3(a)(1); 143B-282.

15A NCAC 02L .0511 ESTABLISHING MAXIMUM SOIL CONTAMINATION CONCENTRATIONS

For purposes of risk-based assessment and remediation for non-UST petroleum releases, refer to Rule .0411 of this Subchapter for establishment of maximum soil contamination concentrations.

Authority G.S. 143-215.2; 143-215.3(a)(1); 143B-282;

15A NCAC 02L .0512 ANALYTICAL PROCEDURES FOR SOIL SAMPLES

For purposes of risk-based assessment and remediation for non-UST petroleum releases, refer to Rule .0412 of this Subchapter for analytical procedures for soil samples.

Authority G.S. 143-215.2; 143-215.3(a)(1); 143B-282.

15A NCAC 02L .0513 ANALYTICAL PROCEDURES FOR GROUNDWATER SAMPLES

For purposes of risk-based assessment and remediation for non-UST petroleum releases, refer to Rule .0413 of this Subchapter for analytical procedures for groundwater samples.

Authority G.S. 143-215.2; 143-215.3(a)(1); 143B-282.

15A NCAC 02L .0514 REQUIRED LABORATORY CERTIFICATION

In accordance with 15A NCAC 02H .0804, laboratories are required to obtain North Carolina Division of Water Resources laboratory certification for parameters that are required to be reported to the State in compliance with the State's surface water, groundwater and pretreatment rules.

Authority G.S. 143-215.2; 143-215.3(a)(1); 143B-282.

15A NCAC 02L .0515 DISCHARGES OR RELEASES FROM OTHER SOURCES

This Section shall not relieve any person responsible for assessment or cleanup of contamination from a source other than a non-UST petroleum release from its obligation to assess and clean up contamination resulting from such discharge or releases.

Authority G.S. 143-215.2; 143-215.3(a)(1); 143B-282.

Notice is hereby given in accordance with G.S. 150B-21.2 that the Marine Fisheries Commission intends to amend the rules cited as 15A NCAC 03J .0103; 03R .0108, .0112.

Link to agency website pursuant to G.S. 150B-19.1(c): http://portal.ncdenr.org/web/mf/mfc-proposed-rules-links

Proposed Effective Date: April 1, 2016

Public Hearing:

Date: September 9, 2015

Time: 6:00 p.m.

Location: NC Division of Marine Fisheries, 5285 Highway 70 West, Morehead City, NC 28557

Reason for Proposed Action:

15A NCAC 03J .0103 GILL NETS, SEINES, IDENTIFICATION, RESTRICTIONS

In accordance with the NC Striped Mullet Fishery Management Plan Amendment 1, proposed amendments established restrictions for using runaround or non-stationary gill nets to address user conflicts.

15A NCAC 03R .0108 MECHANICAL METHODS PROHIBITED

Proposed amendments clarify that the rule for mechanical methods for oystering only applies to internal coastal waters, not the Atlantic Ocean.

15A NCAC 03R .0112 ATTENDED GILL NET AREAS

In accordance with the NC Striped Mullet Fishery Management Plan Amendment 1, proposed amendments remove the Newport River Trawl Net Prohibited Area as a small mesh gill net attendance area, making attendance requirements consistent with other similar areas of the state.

Comments may be submitted to: Catherine Blum, P.O. Box 769, Morehead City, NC 28557, phone 252-808-8014, fax 252-726-0254, email Catherine.Blum@ncdenr.gov

Comment period ends: October 2, 2015

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)
Approved by OSBM
No fiscal note required by G.S. 150B-21.4

CHAPTER 03 - MARINE FISHERIES

SUBCHAPTER 03J - NETS, POTS, DREDGES, AND OTHER FISHING DEVICES

SECTION .0100 - NET RULES, GENERAL

15A NCAC 03J .0103 GILL NETS, SEINES, IDENTIFICATION, RESTRICTIONS

(a) It is unlawful to use gill nets:

- (1) With a mesh length less than two and one-half inches.
(2) In internal waters in Internal Coastal Waters from April 15 through December 15, with a mesh length five inches or greater and less than five and one-half inches.

(b) The Fisheries Director may, by proclamation, limit or prohibit the use of gill nets or seines in coastal waters, Coastal Fishing Waters, or any portion thereof, or impose any or all of the following restrictions on gill net or seine fishing operations:

- (1) Specify area.
(2) Specify season.
(3) Specify gill net mesh length.
(4) Specify means/methods.
(5) Specify net number and length.
(1) specify time;
(2) specify area;
(3) specify means and methods, including:
(A) gill net mesh length, but the maximum length specified shall not exceed six and one-half inches in Internal Coastal Waters; and
(B) net number and length, but for gill nets with a mesh length four inches or greater, the maximum length specified shall not exceed 2,000 yards per vessel in Internal Coastal Waters regardless of the number of individuals involved; and

(4) specify season.

(c) It is unlawful to use fixed or stationary gill nets in the Atlantic Ocean, drift gill nets in the Atlantic Ocean for recreational purposes, or any gill nets in ~~internal waters~~ Internal Coastal Waters unless nets are marked by attaching to them at each end two separate yellow buoys which shall be of solid foam or other solid buoyant material no less than five inches in diameter and no less than five inches in length. Gill ~~nets, which nets that~~ are not connected together at the top ~~line, line~~ are considered as individual nets, requiring two buoys at each end of each individual net. Gill nets connected together at the top line are considered as a continuous net requiring two buoys at each end of the continuous net. Any other marking buoys on gill nets used for recreational purposes shall be yellow except one additional buoy, any shade of hot pink in color, constructed as specified in this Paragraph, shall be added at each end of each individual net. Any other marking buoys on gill nets used in commercial fishing operations shall be yellow except that one additional identification buoy of any color or any combination of colors, except any shade of hot pink, may be used at either or both ends. The owner shall be identified on a buoy on each end either by using engraved buoys or by attaching engraved metal or plastic tags to the buoys. Such identification shall include owner's last name and initials and if a vessel is used, one of the following:

- (1) ~~Owner's~~ owner's N.C. motor boat registration ~~number, number;~~ or
- (2) ~~Owner's~~ owner's U.S. vessel documentation name.

(d) It is unlawful to use gill nets:

- (1) ~~Within~~ within 200 yards of any flounder or other finfish pound net set with lead and either pound or heart in use, except from August 15 through December 31 in all ~~coastal fishing waters~~ Coastal Fishing Waters of the Albemarle Sound, including its tributaries to the boundaries between ~~coastal and joint fishing waters, Coastal and Joint Fishing Waters,~~ west of a line beginning at a point 36° 04.5184' N - 75° 47.9095' W on Powell Point; running southerly to a point 35° 57.2681' N - 75° 48.3999' W on Caroon Point, it is unlawful to use gill nets within 500 yards of any pound net set with lead and either pound or heart in use; and
- (2) ~~From~~ from March 1 through October 31 in the Intracoastal Waterway within 150 yards of any railroad or highway bridge.

(e) It is unlawful to use gill nets within 100 feet either side of the center line of the Intracoastal Waterway Channel south of the entrance to the Alligator-Pungo River Canal near Beacon "54" in Alligator River to the South Carolina line, unless such net is used in accordance with the following conditions:

- (1) ~~No~~ no more than two gill nets per vessel may be used at any one time;
- (2) ~~Any~~ any net used must be attended by the fisherman from a vessel who shall at no time be more than 100 yards from either net; and

(3) ~~Any~~ any individual setting such nets shall remove them, when necessary, in sufficient time to permit unrestricted ~~boat~~ vessel navigation.

(f) It is unlawful to use ~~drift gill nets in violation of 15A NCAC 03J .0101(2) and Paragraph (e) of this Rule.~~ runaround, drift, or other non-stationary gill nets, except as provided in Paragraph (e) of this Rule:

- (1) to block more than two-thirds of any natural or manmade waterway, sound, bay, creek, inlet, or any other body of water; or
- (2) in a location where it will interfere with navigation or with existing, traditional uses of the area other than navigation.

(g) It is unlawful to use unattended gill nets with a mesh length less than five inches in a commercial fishing operation in the gill net attended areas designated in 15A NCAC 03R .0112(a).

(h) It is unlawful to use unattended gill nets with a mesh length less than five inches in a commercial fishing operation from May 1 through November 30 in the ~~internal coastal and joint waters~~ Internal Coastal Waters and Joint Fishing Waters of the state designated in 15A NCAC 03R .0112(b).

~~(i) For gill nets with a mesh length five inches or greater, it is unlawful:~~

- (1) ~~To use more than 3,000 yards of gill net per vessel in internal waters regardless of the number of individuals involved.~~
- (2) ~~From June through October, for any portion of the net to be within 10 feet of any point on the shoreline while set or deployed, unless the net is attended.~~

(i) It is unlawful for any portion of a gill net with a mesh length five inches or greater to be within 10 feet of any point on the shoreline while set or deployed, unless the net is attended from June through October in Internal Coastal Waters.

(j) For the purpose of this Rule and 15A NCAC 03R .0112, ~~shoreline~~ "shoreline" is defined as the mean high water line or marsh line, whichever is more seaward.

Authority G.S. 113-134; 113-173; 113-182; 113-221.1; 143B-289.52.

SUBCHAPTER 03R - DESCRIPTIVE BOUNDARIES

SECTION .0100 - DESCRIPTIVE BOUNDARIES

15A NCAC 03R .0108 MECHANICAL METHODS PROHIBITED TO TAKE OYSTERS

The dredges and mechanical methods prohibited areas referenced in 15A NCAC 03K .0204 are delineated in the following ~~coastal water areas:~~ Internal Coastal Waters:

- (1) In Roanoke Sound and tributaries, south of a line beginning at a point 35° 55.1461' N - 75° 39.5618' W on Baum Point, running easterly to a point 35° 55.9795' N - 75° 37.2072' W and north and east of a line beginning at a point 35° 50.8315' N - ~~75° N~~ 75° N - 75° 37.1909' W on the west side of the mouth of Broad Creek,

running easterly to a point 35° 51.0097' N - 75° 36.6910' W near Beacon "17", running southerly to a point 35° ~~48.6145'~~ 48.6145' N - 75° 35.3760' W near Beacon "7", running easterly to a point 35° 49.0348' N - 75° 34.3161' W on Cedar Point.

(2) In Pamlico Sound and tributaries:

- (a) Outer Banks ~~area, within area, within~~ the area described by a line beginning at a point 35° 46.0638' N - 75° 31.4385' W on the shore of Pea Island; running southwestly to a point 35° 42.9500' N - 75° 34.1500' W; running southerly to a point 35° 39.3500' N - 75° 34.4000' W; running southeasterly to a point 35° 35.8931' N - 75° 31.1514' W in Chicamacomico Channel near Beacon "ICC"; running southerly to a point 35° 28.5610' N - 75° 31.5825' W on Gull Island; running southerly to a point 35° 22.8671' N - 75° 33.5851' W in Avon Channel near Beacon "1"; running southwestly to a point 35° 18.9603' N - 75° 36.0817' W in Cape Channel near Beacon "2"; running westerly to a point 35° 16.7588' N - 75° 44.2554' W in Rollinson Channel near Beacon "42RC"; running southwestly to a point 35° 14.0337' N - 75° 45.9643' W southwest of Oliver Reef near the quick-flashing beacon; running westerly to a point 35° 09.3650' N - 76° 00.6377' W in Big Foot Slough Channel near Beacon "14BF"; running southwestly to a point 35° 08.4523' N - 76° 02.6651' W in Nine Foot Shoal Channel near Beacon "9"; running westerly to a point 35° 07.1000' N - 76° 06.9000; running southwestly to a point 35° 01.4985' N - 76° 11.4353' W near Beacon "HL"; running southwestly to a point 35° 00.2728' N - 76° 12.1903' W near Beacon "2CS"; running southerly to a point 34° 59.4383' N - 76° 12.3541' W in Wainwright Channel immediately east of the northern tip of Wainwright Island; running easterly to a point 34° 58.7853' N - 76° 09.8922' W on Core Banks; running northerly along the shoreline and across the inlets following the COLREGS Demarcation lines to the point of beginning;
- (b) Stumpy Point Bay, north of a line beginning at a point 35° 40.9719' N - 75° 44.4213' W on Drain Point;

- running westerly to a point 35° 40.6550' N - 75° 45.6869' W on Kazer Point;
- (c) Pains Bay, east of a line beginning at a point 35° 35.0666' N - 75° 51.2000' W on Pains Point, running southerly to a point 35° 34.4666' N - 75° 50.9666' W on Rawls Island; running easterly to a point 35° 34.2309' N - 75° 50.2695' W on the east shore;
- (d) Long Shoal River, north of a line beginning at a point 35° 35.2120' N - 75° 53.2232' W at the 5th Avenue Canal, running easterly to a point 35° 35.0666' N - 75° 51.2000' W on the east shore on Pains Point;
- (e) Wysocking Bay:
 - (i) Wysocking Bay, north of a line beginning at a point 35° 25.2741' N - 76° 03.1169' W on Mackey Point, running easterly to a point 35° 25.1189' N - 76° 02.0499' W at the mouth of Lone Tree Creek;
 - (ii) Mount Pleasant Bay, west of a line beginning at a point 35° 23.8652' N - 76° 04.1270' W on Browns Island, running southerly to a point 35° 22.9684' N - 76° 03.7129' W on Bensons Point;
- (f) Juniper Bay, north of a line beginning at a point 35° 22.1384' N - 76° 15.5991' W near the Caffee Bay ditch, running easterly to a point 35° 22.0598' N - 76° 15.0095' W on the east shore;
- (g) Swan Quarter Bay:
 - (i) ~~Caffee~~ Caffee Bay, east of a line beginning at a point 35° 22.1944' N - 76° 19.1722' W on the north shore, running southerly to a point 35° 21.5959' N - 76° 18.3580' W on Drum Point;
 - (ii) Oyster Creek, east of a line beginning at a point 35° 23.3278' N - 76° 19.9476' W on the north shore, running southerly to a point 35° 22.7018' N - 76° 19.3773' W on the south shore;
- (h) Rose Bay:
 - (i) Rose Bay, north of a line beginning at a point 35° 25.7729' N - 76° 24.5336' W

- on Island Point, running southeasterly and passing near Beacon "5" to a point 35° 25.1854' N - 76° 23.2333' W on the east shore;
- (ii) Tooleys Creek, west of a line beginning at a point 35° 25.7729' N - 76° 24.5336' W on Island Point, running southwesterly to a point 35° 25.1435' N - 76° 25.1646' W on Ranger Point;
- (i) Spencer Bay:
 - (i) Striking Bay, north of a line beginning at a point 35° 23.4106' N - 76° 26.9629' W on Short Point, running easterly to a point 35° 23.3404' N - 76° 26.2491' W on Long Point;
 - (ii) Germantown Bay, north of a line beginning at a point 35° 24.0937' N - 76° 27.9348' W; on the west shore, running easterly to a point 35° 23.8598' N - 76° 27.4037' W on the east shore;
- (j) Abel Bay, northeast of a line beginning at a point 35° 23.6463' N - 76° 31.0003' W on the west shore, running southeasterly to a point 35° 22.9353' N - 76° 29.7215' W on the east shore;
- (k) Pungo River, Fortescue Creek, east of a line beginning at a point 35° 25.9213' N - 76° 31.9135' W on Pasture Point; running southerly to a point 35° 25.6012' N - 76° 31.9641' W on Lupton Point;
- (l) Pamlico River:
 - (i) North Creek, north of a line beginning at a point 35° 25.3988' N - 76° 40.0455' W on the west shore, running southeasterly to a point 35° 25.1384' N - 76° 39.6712' W on the east shore;
 - (ii) Campbell Creek (off of Goose Creek), west of a line beginning at a point 35° 17.3600' N - 76° 37.1096' W on the north shore; running southerly to a point 35° 16.9876' N - 76° 37.0965' W on the south shore;
 - (iii) Eastham Creek (off of Goose Creek), east of a line beginning at a point 35° 17.7423' N - 76° 36.5164' W on the north shore; running southeasterly to a point 35° 17.5444' N - 76° 36.3963' W on the south shore;
- (iv) Oyster Creek-Middle Prong, southwest of a line beginning at a point 35° 19.4921' N - 76° 32.2590' W on Cedar Island; running southeasterly to a point 35° 19.1265' N - 76° 31.7226' W on Beard Island Point; and southwest of a line beginning at a point 35° 19.5586' N - 76° 32.8830' W on the west shore, running easterly to a point 35° 19.5490' N - 76° 32.7365' W on the east shore;
- (m) Mouse Harbor, west of a line beginning at a point 35° 18.3915' N - 76° 29.0454' W on Persimmon Tree Point, running southerly to a point ~~35° 17.1825' N~~ 35° 17.1825' N - 76° 28.8713' W on Yaupon Hammock Point;
- (n) Big Porpoise Bay, northwest of a line beginning at a point 35° 15.6993' N - 76° 28.2041' W on Big Porpoise Point, running southwesterly to a point 35° 14.9276' N - 76° 28.8658' W on Middle Bay Point;
- (o) Middle Bay, west of a line beginning at a point 35° 14.8003' N - 76° 29.1923' W on Deep Point, running southerly to a point 35° 13.5419' N - 76° 29.6123' W on Little Fishing Point;
- (p) Jones Bay, west of a line beginning at a point 35° 14.0406' N - 76° 33.3312' W on Drum Creek Point, running southerly to a point 35° 13.3609' N - 76° 33.6539' W on Ditch Creek Point;
- (q) Bay River:
 - (i) Gales Creek-Bear Creek, north and west of a line beginning at a point 35° 11.2833' N - 76° 35.9000' W on Sanders Point, running northeasterly to a point 35° 11.9000' N - 76° 34.2833' W on the east shore;
 - (ii) Bonner Bay, southeast of a line beginning at a point 35° 09.6281' N - 76° 36.2185' W on the west shore; running northeasterly to a point 35°

- 10.0888' N - 76° 35.2587' W
on Davis Island Point;
- (r) Neuse River:
- (i) Lower Broad Creek, west of a line beginning at a point 35° 05.8314' N - 76° 35.3845' W on the north shore; running southwesterly to a point 35° 05.5505' N - 76° 35.7249' W on the south shore;
- (ii) Greens Creek - north of a line beginning at a point 35° 01.3476' N - 76° 42.1740' W on the west shore of Greens Creek; running northeasterly to a point 35° 01.4899' N - 76° 41.9961' W on the east shore;
- (iii) Dawson Creek, north of a line beginning at a point 34° 59.5920' N - 76° 45.4620' W on the west shore; running southeasterly to a point 34° 59.5800' N - 76° 45.4140' W on the east shore;
- (iv) Clubfoot Creek, south of a line beginning at a point 34° 54.5424' N - 76° 45.7252' W on the west shore, running easterly to a point 34° 54.4853' N - 76° 45.4022' W on the east shore;
- (v) Turnagain Bay, south of a line beginning at a point 34° 59.4065' N - 76° 30.1906' W on the west shore; running easterly to a point 34° 59.5668' N - 76° 29.3557' W on the east shore;
- (s) West Bay:
- (i) Long Bay-Ditch Bay, west of a line beginning at a point 34° 57.9388' N - 76° 27.0781' W on the north shore of Ditch Bay; running southwesterly to a point 34° 57.2120' N - 76° 27.2185' W on the south shore of Ditch Bay; then south of a line running southeasterly to a point 34° 56.7633' N - 76° 26.3927' W on the east shore of Long Bay;
- (ii) West Thorofare Bay, south of a line beginning at a point 34° 57.2199' N - 76° 24.0947' W on the west shore; running easterly to a point 34° 57.4871' N - 76° 23.0737' W on the east shore;
- (iii) Merkle Bay, east of a line beginning at a point 34° 58.2286' N - 76° 22.8374' W on the north shore, running southerly to a point 34° 57.5920' N - 76° 23.0704' W on Merkle Bay Point;
- (iv) North Bay, east of a line beginning at a point 35° 01.8982' N - 76° 21.7135' W on Point of Grass, running southeasterly to a point 35° 01.3320' N - 76° 21.3353' W on Western Point.
- (3) In Core Sound and its tributaries, southwest of a line beginning at a point 35° 00.1000' N - 76° 14.8667' W near Hog Island Reef; running easterly to a point 34° 58.7853' N - 76° 09.8922' W on Core Banks; and in the following waterbodies and their ~~tributaries~~ tributaries: Back Bay, the Straits, Back Sound, North River, Newport River, Bogue ~~Sound~~ Sound, and White Oak River.
- (4) In ~~any of the coastal waters of~~ Onslow, Pender, New Hanover, and Brunswick counties.

Authority G.S. 113-134; 113-182; 143B-289.52.

15A NCAC 03R .0112 ATTENDED GILL NET AREAS

(a) The attended gill net areas referenced in 15A NCAC 03J .0103(g) are delineated in the following areas:

- (1) Pamlico River, west of a line beginning at a point 35° 27.5768' N - 76° 54.3612' W on Ragged Point; running southwesterly to a point 35° 26.9176' N - 76° 55.5253' W on Mauls Point;
- (2) Within 200 yards of any shoreline in Pamlico River and its tributaries east of a line beginning at a point 35° 27.5768' N - 76° 54.3612' W on Ragged Point; running southwesterly to a point 35° 26.9176' N - 76° 55.5253' W on Mauls Point; and west of a line beginning at a point 35° 22.3622' N - 76° 28.2032' W on Roos Point; running southerly to a point at 35° 18.5906' N - 76° 28.9530' W on Pamlico Point;
- (3) Pungo River, east of the northern portion of the Pantego Creek breakwater and a line beginning at a point 35° 31.7198' N - 76° 36.9195' W on the northern side of the breakwater near Tooleys Point; running southeasterly to a point 35° 30.5312' N - 76° 35.1594' W on Durants Point;
- (4) Within 200 yards of any shoreline in Pungo River and its tributaries west of the northern portion of the Pantego Creek breakwater and a line beginning at a point 35° 31.7198' N - 76°

36.9195' W on the northern side of the breakwater near Tooleys Point; running southeasterly to a point 35° 30.5312' N - 76° 35.1594' W on Durants Point; and west of a line beginning at a point 35° 22.3622' N - 76° 28.2032' W on Roos Point; running southerly to a point at 35° 18.5906' N - 76° 28.9530' W on Pamlico Point;

- (5) Neuse River and its tributaries northwest of the Highway 17 highrise bridge;
- (6) Trent River and its tributaries; and
- (7) Within 200 yards of any shoreline in Neuse River and its tributaries east of the Highway 17 highrise bridge and south and west of a line beginning on Maw Point at a point 35° 09.0407' N - 76° 32.2348' W; running southeasterly near the Maw Point Shoal Marker "2" to a point 35° 08.1250' N - 76° 30.8532' W; running southeasterly near the Neuse River Entrance Marker "NR" to a point 35° 06.6212' N - 76° 28.5383' W; running southerly to a point 35° 04.4833' N - 76° 28.0000' W near Point of Marsh in Neuse River. In Core and Clubfoot creeks, the Highway 101 Bridge constitutes the attendance boundary.

(b) The attended gill net areas referenced in 15A NCAC 03J .0103(h) are delineated in the following ~~coastal and joint waters~~ Internal Coastal Waters and Joint Fishing Waters of the state south of a line beginning on Roanoke Marshes Point at a point 35° 48.3693' N - 75° 43.7232' W; running southeasterly to a point 35° 44.1710' N - 75° 31.0520' W on Eagles Nest Bay to the South Carolina State line:

- (1) All primary nursery areas described in 15A NCAC 03R .0103, all permanent secondary nursery areas described in 15A NCAC 03R .0104, and no-trawl areas described in 15A NCAC 03R .0106(2), (4), (5), ~~(7)~~, (8), (10), (11), and (12);
- (2) In the area along the Outer Banks, beginning at a point 35° 44.1710' N - 75° 31.0520' W on Eagles Nest Bay; running northwesterly to a point 35° 45.1833' N - 75° 34.1000' W west of Pea Island; running southerly to a point 35° 40.0000' N - 75° 32.8666' W west of Beach Slough; running southeasterly and passing near Beacon "2" in Chicamicomico Channel to a point 35° 35.0000' N - 75° 29.8833' W west of the Rodanthe Pier; running southwestly to a point 35° 28.4500' N - 75° 31.3500' W on Gull Island; running southerly to a point 35° 22.3000' N - 75° 33.2000' W near Beacon "2" in Avon Channel ; running southwestly to a point 35° 19.0333' N - 75° 36.3166' W near Beacon "2" in Cape Channel; running southwestly to a point 35° 15.5000' N - 75° 43.4000' W near Beacon "36" in Rollinson Channel; running southeasterly to a point 35°

14.9386' N - 75° 42.9968' W near Beacon "35" in Rollinson Channel; running southwestly to a point 35° 14.0377' N - 75° 45.9644' W near a "Danger" Beacon northwest of Austin Reef; running southwestly to a point 35° 11.4833' N - 75° 51.0833' W on Legged Lump; running southeasterly to a point 35° 10.9666' N - 75° 49.7166' W south of Legged Lump; running southwestly to a point 35° 09.3000' N - 75° 54.8166' W near the west end of Clarks Reef; running westerly to a point 35° 08.4333' N - 76° 02.5000' W near Nine Foot Shoal Channel; running southerly to a point 35° 06.4000' N - 76° 04.3333' W near North Rock; running southwestly to a point 35° 01.5833' N - 76° 11.4500' W near Beacon "HL"; running southerly to a point 35° 00.2666' N - 76° 12.2000' W; running southerly to a point 34° 59.4664' N - 76° 12.4859' W on Wainwright Island; running easterly to a point 34° 58.7853' N - 76° 09.8922' W on Core Banks; running northerly along the shoreline and across the inlets following the ~~Colregs~~ COLREGS Demarcation Line to the point of beginning;

- (3) In Core and Back sounds, beginning at a point 34° 58.7853' N - 76° 09.8922' W on Core Banks; running northwesterly to a point 34° 59.4664' N - 76° 12.4859' W on Wainwright Island; running southerly to a point 34° 58.8000' N - 76° 12.5166' W; running southeasterly to a point 34° 58.1833' N - 76° 12.3000' W; running southwestly to a point 34° 56.4833' N - 76° 13.2833' W; running westerly to a point 34° 56.5500' N - 76° 13.6166' W; running southwestly to a point 34° 53.5500' N - 76° 16.4166' W; running northwesterly to a point 34° 53.9166' N - 76° 17.1166' W; running southerly to a point 34° 53.4166' N - 76° 17.3500' W; running southwestly to a point 34° 51.0617' N - 76° 21.0449' W; running southwestly to a point 34° 48.3137' N - 76° 24.3717' W; running southwestly to a point 34° 46.3739' N - 76° 26.1526' W; running southwestly to a point 34° 44.5795' N - 76° 27.5136' W; running southwestly to a point 34° 43.4895' N - 76° 28.9411' W near Beacon "37A"; running southwestly to a point 34° 40.4500' N - 76° 30.6833' W; running westerly to a point 34° 40.7061' N - 76° 31.5893' W near Beacon "35" in Back Sound; running westerly to a point 34° 41.3178' N - 76° 33.8092' W near Buoy "3"; running southwestly to a point 34° 39.6601' N - 76° 34.4078' W on Shackelford Banks; running easterly and northeasterly along the

shoreline and across the inlets following the COLREGS Demarcation lines to the point of beginning;

- (4) Within 200 yards of any shoreline in the area upstream of the 76° 28.0000' W longitude line beginning at a point 35° 22.3752' N - 76° 28.0000' W near Roos Point in Pamlico River; running southeasterly to a point 35° 04.4833' N - 76° 28.0000' W near Point of Marsh in Neuse River; and
(5) Within 50 yards of any shoreline east of the 76° 28.0000' W longitude line beginning at a point 35° 22.3752' N - 76° 28.0000' W near Roos Point in Pamlico River; running southeasterly to a point 35° 04.4833' N - 76° 28.0000' W near Point of Marsh in Neuse River, except from October 1 through November 30, south and east of Highway 12 in Carteret County and south of a line from a point 34° 59.7942' N - 76° 14.6514' W on Camp Point; running easterly to a point at 34° 58.7853' N - 76° 09.8922' W on Core Banks; to the South Carolina State Line.

Authority G.S. 113-134; 113-173; 113-182; 113-221; 143B-289.52.

substantive public interest" as a part of its periodic review process because these rules would be of substantive interest to its regulated public and subject to comment. Since no comments were received previously, the Board, having identified these rules as necessary to the enforcement of the governing statute, now seeks to readopt these rules and prevent them from expiring.

21 NCAC 23 .0104 – The Board would like to readopt with changes, this rule to do away with the carryover of continuing education hours as it is cumbersome and administratively difficult to track.

Comments may be submitted to: Barbara Geiger, P.O. Box 41421, Raleigh, NC 27629, phone (919) 872-2229, fax (919) 872-1598, email info@nciclb.org

Comment period ends: October 2, 2015

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.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 23 – IRRIGATION CONTRACTORS' LICENSING BOARD

Notice is hereby given in accordance with G.S. 150B-21.3A(c)(2)g. that the North Carolina Irrigation Contractors' Licensing Board intends to readopt with substantive changes the rule cited as 21 NCAC 23 .0104 and readopt without substantive changes the rules cited as 21 NCAC 23 .0206, .0207, .0406, and .0505.

Pursuant to G.S. 150B-21.2(c)(1), the text of rules to be readopted without substantive changes are not required to be published. The text of the rules are available on the OAH website: http://reports.oah.nc.us/ncac.asp.

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

Proposed Effective Date: December 1, 2015

Public Hearing:

Date: August 19, 2015

Time: 10:00 a.m.

Location: State Board of Examiners, 1109 Dresser Court, Raleigh, NC 27609

Reason for Proposed Action: The Board identified 21 NCAC 23 .0206, .0207, .0406, and .0505 as being "Necessary with

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)
Approved by OSBM
No fiscal note required by G.S. 150B-21.4
No fiscal note required by G.S. 150B-21.3A(d)(2)

SECTION .0100 - LICENSING

21 NCAC 23 .0104 CONTINUING EDUCATION

(a) Continuing Education (CEU) credit shall not be obtained for the same course more frequently than every three years.

(b) Each individual licensee must earn ten hours of approved continuing education each calendar year. The 10 hours shall include at least two but not more than four hours of business education. The remaining hours of continuing education shall consist of training in landscape and turf irrigation technology.

(e) A licensed contractor may carry forward from the year earned to the following year up to 10 hours of continuing education.

(c) A licensed contractor shall provide proof of attendance for all continuing education upon request by the Board.

(e)(d) Only continuing education classes or activities that have been approved by the Board as meeting the requirements of this Rule satisfy the licensee's continuing education requirement.

Authority G.S. 89G-5; 89G-9.

21 NCAC 23 .0206 – READOPTION WITHOUT SUBSTANTIVE CHANGES

21 NCAC 23 .0207 – READOPTION WITHOUT SUBSTANTIVE CHANGES

21 NCAC 23 .0406 – READOPTION WITHOUT SUBSTANTIVE CHANGES

21 NCAC 23 .0505 – READOPTION WITHOUT SUBSTANTIVE CHANGES

CHAPTER 42 – BOARD OF EXAMINERS IN OPTOMETRY

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina State Board of Examiners in Optometry intends to amend the rule cited as 21 NCAC 42J .0101.

Link to agency website pursuant to G.S. 150B-19.1(c): http://web1.ncoptometry.org/notices.aspx

Proposed Effective Date: December 1, 2015

Instructions on How to Demand a Public Hearing: (must be requested in writing within 15 days of notice): A public hearing may be requested by contacting John D. Robinson, O.D., Executive Director, North Carolina State Board of Examiners in Optometry, 109 North Graham Street, Wallace, NC 28466, (910) 285-3160, (800) 426-4457, exdir@ncoptometry.org

Reason for Proposed Action: This rule is amended to conform with the fee schedule set out in N.C. Gen. Stat. 90-123.

Comments may be submitted to: John D. Robinson, O.D., 109 North Graham Street, Wallace, NC 28466, phone (910) 285-3160, fax (910) 285-4546, email exdir@ncoptometry.org

Comment period ends: October 2, 2015

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)
Approved by OSBM
No fiscal note required by G.S. 150B-21.4

SUBCHAPTER 42J - FEE SCHEDULE

21 NCAC 42J .0101 FEES

The Board hereby establishes the following fees:

- (1) Each application for general optometry examinations \$400.00\$800.00
(2) Each general optometry license renewal \$245.00\$300.00
(3) Each certificate of license to a resident optometrist desiring to change to another state or territory \$200.00\$300.00
(4) Each license issued to a practitioner of another state or territory to practice in this state \$250.00\$350.00
(5) Each license to resume practice issued to an optometrist who has retired from the practice of optometry or who has moved from and returned to this state \$250.00\$350.00
(6) Each application for registration as an optometric assistant or renewal thereof \$50.00\$100.00
(7) Each application for registration as an optometric technician or renewal thereof \$50.00\$100.00
(8) Each duplicate license \$50.00\$100.00
(9) Each renewal license for each branch office \$45.00\$100.00
(10) Each certificate of registration for a professional corporation or limited liability company \$50.00
(11) Each renewal certificate of registration for a professional corporation or limited liability company \$25.00

Authority G.S. 55B-10; 55B-11; 57C-2-01; 90-117.5; 90-123.

CHAPTER 66 – VETERINARY MEDICAL BOARD

Notice is hereby given in accordance with G.S. 150B-21.2 that the Veterinary Medical Board intends to amend the rule cited as 21 NCAC 66 .0108.

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

Proposed Effective Date: December 1, 2015

Instructions on How to Demand a Public Hearing: (must be requested in writing within 15 days of notice): Write to the Board office: Thomas Mickey, NCVMB Executive Director, 1611 Jones Franklin Rd., Ste 106, Raleigh, NC 27606.

Reason for Proposed Action: Increase the issuance or renewal fee for professional corporations.

Comments may be submitted to: Thomas Mickey, 1611 Jones Franklin Rd, Ste 106, Raleigh, NC 27606

Comment period ends: October 2, 2015

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)
Approved by OSBM
No fiscal note required by G.S. 150B-21.4

SECTION .0100 - STATUTORY AND ADMINISTRATIVE PROVISIONS

21 NCAC 66 .0108 FEES

The following fees established by the Board shall be paid in advance to the Executive Director of the Board:

- (1) Veterinary License
(a) Issuance or Renewal \$150.00
(b) North Carolina License Examination \$250.00
(c) Late Renewal Fee \$50.00
(d) Reinstatement \$100.00
(2) Veterinary Technician Registration
(a) Issuance or Renewal \$50.00
(b) North Carolina Veterinary Technician Examination \$50.00
(c) Late Renewal Fee \$50.00
(d) Reinstatement \$100.00
(3) Professional Corporation Certificate of Registration
(a) Issuance or Renewal 150.00 \$160.00
(b) Late Renewal Fee \$50.00
(c) Reinstatement \$100.00
(4) Limited Veterinary License
(a) Issuance or Renewal \$150.00
(b) Late Renewal Fee \$50.00
(c) Reinstatement \$100.00
(5) Veterinary Faculty Certificate
(a) Issuance or Renewal \$150.00
(b) Late Renewal Fee \$50.00
(c) Reinstatement \$100.00
(6) Zoo Veterinary Certificate
(a) Issuance or Renewal \$150.00
(b) Late Renewal Fee \$50.00
(c) Reinstatement \$100.00
(7) Temporary Permit: Issuance \$150.00
(8) Veterinary Student Intern Registration: Issuance \$25.00
(9) Veterinary Student Preceptee Registration: Issuance \$25.00
(10) Veterinary Practice Facility Inspection \$125.00
(11) Copies of Board publications, rosters, or other materials available for distribution from the Board shall be free or at a minimal cost unless otherwise specifically provided by law. As used herein, "minimal cost" shall mean the actual cost of reproducing the public record or public information.

Authority G.S. 90-185(6); 90-186(3); 90-187(b); 90-187.5; 90-187.6; 132-6.2.

APPROVED RULES

*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 June 16, 2015.

**REGISTER CITATION TO THE
NOTICE OF TEXT**

COMMERCE - EMPLOYMENT SECURITY, DIVISION OF

| | | | |
|---|----|-----------------|-----------|
| <u>Office Location</u> | 04 | NCAC 24A .0101* | 29:17 NCR |
| <u>Address Changes</u> | 04 | NCAC 24A .0102* | 29:17 NCR |
| <u>Addresses for Notice</u> | 04 | NCAC 24A .0103* | 29:17 NCR |
| <u>Addresses for Filing Claims, Appeals, Exceptions, Request...</u> | 04 | NCAC 24A .0104* | 29:17 NCR |
| <u>Definitions</u> | 04 | NCAC 24A .0105* | 29:17 NCR |
| <u>Filing/Mailing Dates and Use of Forms</u> | 04 | NCAC 24A .0106* | 29:17 NCR |
| <u>Digital Signatures</u> | 04 | NCAC 24A .0107* | 29:17 NCR |
| <u>Signatures on Reports and Forms</u> | 04 | NCAC 24A .0108* | 29:17 NCR |
| <u>Power of Attorney</u> | 04 | NCAC 24A .0109* | 29:17 NCR |
| <u>Written Request Required</u> | 04 | NCAC 24A .0201* | 29:17 NCR |
| <u>Clear Description of Records Required</u> | 04 | NCAC 24A .0202* | 29:17 NCR |
| <u>Determination as to Disclosure</u> | 04 | NCAC 24A .0203* | 29:17 NCR |
| <u>Release of Information to Third Party</u> | 04 | NCAC 24A .0204* | 29:17 NCR |
| <u>Fees for Copies and Services</u> | 04 | NCAC 24A .0205* | 29:17 NCR |
| <u>Method of Payment</u> | 04 | NCAC 24A .0206 | 29:17 NCR |
| <u>Payment Required Before Information Release</u> | 04 | NCAC 24A .0207 | 29:17 NCR |
| <u>Right to Petition</u> | 04 | NCAC 24A .0301* | 29:17 NCR |
| <u>Disposition of Petition</u> | 04 | NCAC 24A .0302* | 29:17 NCR |
| <u>Filing a Claim</u> | 04 | NCAC 24B .0101* | 29:17 NCR |
| <u>Alternative Filing Methods</u> | 04 | NCAC 24B .0102* | 29:17 NCR |
| <u>Weekly Certifications</u> | 04 | NCAC 24B .0103* | 29:17 NCR |
| <u>Information to be Provided to New Claimants Filing a Claim</u> | 04 | NCAC 24B .0104* | 29:17 NCR |
| <u>Antedating</u> | 04 | NCAC 24B .0105* | 29:17 NCR |
| <u>Suspension of Benefits for Probation Violators Who Avoid</u> | 04 | NCAC 24B .0106* | 29:17 NCR |
| <u>Registration for Work</u> | 04 | NCAC 24B .0201 | 29:17 NCR |
| <u>Benefits Rights of Interstate Claimants</u> | 04 | NCAC 24B .0202* | 29:17 NCR |
| <u>Claims for Benefits</u> | 04 | NCAC 24B .0203* | 29:17 NCR |
| <u>Determination of Claims</u> | 04 | NCAC 24B .0204 | 29:17 NCR |
| <u>Appellate Procedure</u> | 04 | NCAC 24B .0205* | 29:17 NCR |
| <u>Canadian Claims</u> | 04 | NCAC 24B .0206 | 29:17 NCR |
| <u>Notification of Interstate Claim</u> | 04 | NCAC 24B .0207* | 29:17 NCR |
| <u>Requirements for Claimants</u> | 04 | NCAC 24B .0301* | 29:17 NCR |
| <u>Record of Work and Wages of Claimants</u> | 04 | NCAC 24B .0302* | 29:17 NCR |
| <u>Determinations</u> | 04 | NCAC 24B .0401 | 29:17 NCR |
| <u>Request for Separation Information from Employer</u> | 04 | NCAC 24B .0402* | 29:17 NCR |
| <u>Notice to Employer of Labor Dispute Claim</u> | 04 | NCAC 24B .0501* | 29:17 NCR |

APPROVED RULES

| | | | |
|---|----|-----------------|-----------|
| <u>Employer Response Requirement</u> | 04 | NCAC 24B .0502 | 29:17 NCR |
| <u>Determination of Labor Dispute and Referral for Hearing Issues</u> | 04 | NCAC 24B .0503* | 29:17 NCR |
| <u>Notice Requirement for Overpayment</u> | 04 | NCAC 24B .0504* | 29:17 NCR |
| <u>Bill for Repayment of Overpayment</u> | 04 | NCAC 24B .0601* | 29:17 NCR |
| <u>Wage Audit Notice for Employers</u> | 04 | NCAC 24B .0602* | 29:17 NCR |
| <u>Waiver of Repayments of Nonfraudulent Overpayment</u> | 04 | NCAC 24B .0603* | 29:17 NCR |
| <u>Waiver of Repayments of Fraudulent Overpayment</u> | 04 | NCAC 24B .0701* | 29:17 NCR |
| <u>Decision and Consideration of Waiver Petitions</u> | 04 | NCAC 24B .0702* | 29:17 NCR |
| <u>Factors in Determining Equity and Good Conscience</u> | 04 | NCAC 24B .0703 | 29:17 NCR |
| <u>Factors in Determining Fault</u> | 04 | NCAC 24B .0704* | 29:17 NCR |
| <u>Duties of the Requesting State</u> | 04 | NCAC 24B .0705* | 29:17 NCR |
| <u>Duties of Recovering State</u> | 04 | NCAC 24B .0801* | 29:17 NCR |
| <u>Duties of Paying State</u> | 04 | NCAC 24B .0802* | 29:17 NCR |
| <u>Withdrawals of Combined Wage Claims</u> | 04 | NCAC 24B .0803* | 29:17 NCR |
| <u>Setoff Debt Collection Act Hearings</u> | 04 | NCAC 24B .0804* | 29:17 NCR |
| <u>Notice of Referral</u> | 04 | NCAC 24B .0901* | 29:17 NCR |
| <u>Reevaluation of Debt</u> | 04 | NCAC 24B .1001 | 29:17 NCR |
| <u>Appeal Date Established by Testimony</u> | 04 | NCAC 24B .1002* | 29:17 NCR |
| <u>Exception to Timeliness Requirement</u> | 04 | NCAC 24C .0101* | 29:17 NCR |
| <u>Base Period Employer Denied Noncharging</u> | 04 | NCAC 24C .0102* | 29:17 NCR |
| <u>Employer Party to Determination</u> | 04 | NCAC 24C .0103 | 29:17 NCR |
| <u>Appearance by Party</u> | 04 | NCAC 24C .0104* | 29:17 NCR |
| <u>Presenting and Scheduling Appeals Claims</u> | 04 | NCAC 24C .0201* | 29:17 NCR |
| <u>Contents of Appeal to Appeals Section</u> | 04 | NCAC 24C .0202* | 29:17 NCR |
| <u>Appeals Hearing Notice</u> | 04 | NCAC 24C .0203 | 29:17 NCR |
| <u>Telephone Hearings</u> | 04 | NCAC 24C .0204* | 29:17 NCR |
| <u>In-person Hearings</u> | 04 | NCAC 24C .0205* | 29:17 NCR |
| <u>Rescheduling a Hearing</u> | 04 | NCAC 24C .0206 | 29:17 NCR |
| <u>Disqualification of Appeals Referee</u> | 04 | NCAC 24C .0207 | 29:17 NCR |
| <u>Conduct of Hearings</u> | 04 | NCAC 24C .0208 | 29:17 NCR |
| <u>Hearsay</u> | 04 | NCAC 24C .0209* | 29:17 NCR |
| <u>Controlled Substance Results</u> | 04 | NCAC 24C .0210 | 29:17 NCR |
| <u>Contents of Appeals Decision</u> | 04 | NCAC 24C .0211* | 29:17 NCR |
| <u>Administration Proceedings</u> | 04 | NCAC 24C .0212 | 29:17 NCR |
| <u>Notices of Service to Party</u> | 04 | NCAC 24C .0301 | 29:17 NCR |
| <u>Issuance of Subpoenas</u> | 04 | NCAC 24C .0302* | 29:17 NCR |
| <u>Objection to Subpoena</u> | 04 | NCAC 24C .0401 | 29:17 NCR |
| <u>Requirements for Appeal Statement to Board of Review</u> | 04 | NCAC 24C .0402* | 29:17 NCR |
| <u>Acknowledgement of Appeal</u> | 04 | NCAC 24C .0501 | 29:17 NCR |
| <u>Oral Arguments</u> | 04 | NCAC 24C .0502* | 29:17 NCR |
| <u>Legal Representation</u> | 04 | NCAC 24C .0503* | 29:17 NCR |
| <u>Introduction of Evidence in Higher Authority Hearings</u> | 04 | NCAC 24C .0504* | 29:17 NCR |
| <u>Content of Higher Authority Decision</u> | 04 | NCAC 24C .0505* | 29:17 NCR |
| <u>Post-Decision Relief</u> | 04 | NCAC 24C .0506 | 29:17 NCR |
| <u>Notice of Claim to Employer</u> | 04 | NCAC 24C .0601* | 29:17 NCR |
| | 04 | NCAC 24D .0101 | 29:17 NCR |

APPROVED RULES

| | | | | | |
|--|----|----------|--------|-------|-----|
| <u>Notice to Employer of Potential Charges</u> | 04 | NCAC 24D | .0102* | 29:17 | NCR |
| <u>Requirements for Filing Protests</u> | 04 | NCAC 24D | .0103* | 29:17 | NCR |
| <u>Time for Filing Protests</u> | 04 | NCAC 24D | .0104* | 29:17 | NCR |
| <u>Grounds for Protest</u> | 04 | NCAC 24D | .0105* | 29:17 | NCR |
| <u>DES's Responsibilities Upon Receipt of Protest</u> | 04 | NCAC 24D | .0106 | 29:17 | NCR |
| <u>Determination on Grounds Contained in Protest</u> | 04 | NCAC 24D | .0107* | 29:17 | NCR |
| <u>Making the Request for Noncharging</u> | 04 | NCAC 24D | .0201* | 29:17 | NCR |
| <u>Determination on Requests for Noncharging</u> | 04 | NCAC 24D | .0202* | 29:17 | NCR |
| <u>Appealing Denial of Request for Noncharging</u> | 04 | NCAC 24D | .0203* | 29:17 | NCR |
| <u>Adequacy Threshold</u> | 04 | NCAC 24D | .0301* | 29:17 | NCR |
| <u>Adequacy Threshold Determination</u> | 04 | NCAC 24D | .0302* | 29:17 | NCR |
| <u>Adequacy Penalty Determination</u> | 04 | NCAC 24D | .0303* | 29:17 | NCR |
| <u>Appealing Adequacy Penalty</u> | 04 | NCAC 24D | .0304* | 29:17 | NCR |
| <u>Voluntary Election by Employer</u> | 04 | NCAC 24D | .0401 | 29:17 | NCR |
| <u>Election to Reimburse in Lieu of Contributions</u> | 04 | NCAC 24D | .0402* | 29:17 | NCR |
| <u>Payment of Employer Taxes</u> | 04 | NCAC 24D | .0403* | 29:17 | NCR |
| <u>Records of Employers</u> | 04 | NCAC 24D | .0501 | 29:17 | NCR |
| <u>Wage Records</u> | 04 | NCAC 24D | .0502* | 29:17 | NCR |
| <u>Allowances and Reimbursement Advances</u> | 04 | NCAC 24D | .0503* | 29:17 | NCR |
| <u>Manner of Recordkeeping</u> | 04 | NCAC 24D | .0504 | 29:17 | NCR |
| <u>General Format of Reports and Forms and Methods of</u> | 04 | NCAC 24D | .0601 | 29:17 | NCR |
| <u>Status Reports</u> | 04 | NCAC 24D | .0602* | 29:17 | NCR |
| <u>Quarterly Reports from Taxed Employers</u> | 04 | NCAC 24D | .0603* | 29:17 | NCR |
| <u>Annual Reports from Domestic Employers</u> | 04 | NCAC 24D | .0604* | 29:17 | NCR |
| <u>Transfer of Experience</u> | 04 | NCAC 24D | .0701* | 29:17 | NCR |
| <u>Requirements for Transfer of Experience</u> | 04 | NCAC 24D | .0702* | 29:17 | NCR |
| <u>Application</u> | 04 | NCAC 24D | .0801* | 29:17 | NCR |
| <u>Special Tax Investigations</u> | 04 | NCAC 24D | .0901* | 29:17 | NCR |
| <u>Request for Redetermination of Tax Rate</u> | 04 | NCAC 24D | .1001* | 29:17 | NCR |
| <u>Division's Obligations</u> | 04 | NCAC 24D | .1002* | 29:17 | NCR |
| <u>Continued Payments Required</u> | 04 | NCAC 24D | .1003 | 29:17 | NCR |
| <u>Appealing a Tax Matter</u> | 04 | NCAC 24D | .1101* | 29:17 | NCR |
| <u>Scheduling Tax Hearings</u> | 04 | NCAC 24D | .1102* | 29:17 | NCR |
| <u>Telephone Hearings</u> | 04 | NCAC 24D | .1103 | 29:17 | NCR |
| <u>In-person Hearings</u> | 04 | NCAC 24D | .1104 | 29:17 | NCR |
| <u>Rescheduling a Tax Hearing</u> | 04 | NCAC 24D | .1105 | 29:17 | NCR |
| <u>Subpoenas</u> | 04 | NCAC 24D | .1106 | 29:17 | NCR |
| <u>The Tax Opinion</u> | 04 | NCAC 24D | .1107 | 29:17 | NCR |
| <u>Request for Seasonal Determination</u> | 04 | NCAC 24D | .1201 | 29:17 | NCR |
| <u>Written Determination</u> | 04 | NCAC 24D | .1202* | 29:17 | NCR |
| <u>Display Required</u> | 04 | NCAC 24D | .1203* | 29:17 | NCR |
| <u>Wage Records and Reports Requirements</u> | 04 | NCAC 24D | .1204* | 29:17 | NCR |
| <u>Notice to Employer</u> | 04 | NCAC 24D | .1301* | 29:17 | NCR |
| <u>Notice to Garnishee</u> | 04 | NCAC 24D | .1302 | 29:17 | NCR |
| <u>Official Forms</u> | 04 | NCAC 24D | .1401* | 29:17 | NCR |
| <u>Confidentiality of Unemployment Insurance Information</u> | 04 | NCAC 24E | .0101 | 29:17 | NCR |

APPROVED RULES

| | | | | | |
|--|----|----------|-------|-------|-----|
| <u>Request for Documents and Records</u> | 04 | NCAC 24E | .0102 | 29:17 | NCR |
| <u>Fees for Copies and Services</u> | 04 | NCAC 24E | .0103 | 29:17 | NCR |
| <u>Payment of Fees</u> | 04 | NCAC 24E | .0104 | 29:17 | NCR |

PUBLIC HEALTH, COMMISSION FOR

| | | | | | |
|--------------------------------|-----|---------|--------|-------|-----|
| <u>Mandated Services</u> | 10A | NCAC 46 | .0201* | 29:16 | NCR |
| <u>Grade A Milk Sanitation</u> | 10A | NCAC 46 | .0212 | 29:16 | NCR |

SOCIAL SERVICES COMMISSION

| | | | | | |
|---------------------------------|-----|----------|--------|-------|-----|
| <u>Reasonable Accommodation</u> | 10A | NCAC 73A | .0107* | 29:16 | NCR |
| <u>Notices</u> | 10A | NCAC 73A | .0108* | 29:16 | NCR |

COASTAL RESOURCES COMMISSION

| | | | | | |
|---|-----|----------|--------|-------|-----|
| <u>General Permit for Excavation Within or Connecting to Exi...</u> | 15A | NCAC 07H | .1501* | 29:15 | NCR |
| <u>Approval Procedures</u> | 15A | NCAC 07H | .1502* | 29:15 | NCR |
| <u>General Conditions</u> | 15A | NCAC 07H | .1504* | 29:15 | NCR |
| <u>Specific Conditions</u> | 15A | NCAC 07H | .1505* | 29:15 | NCR |

PUBLIC HEALTH, COMMISSION FOR

| | | | | | |
|------------------------------------|-----|----------|--------|-------|-----|
| <u>Revised Total Coliform Rule</u> | 15A | NCAC 18C | .1539* | 29:16 | NCR |
|------------------------------------|-----|----------|--------|-------|-----|

CERTIFIED PUBLIC ACCOUNTANT EXAMINERS, BOARD OF

| | | | | | |
|-----------------------------------|----|----------|--------|-------|-----|
| <u>Computation of CPE Credits</u> | 21 | NCAC 08G | .0409* | 29:16 | NCR |
|-----------------------------------|----|----------|--------|-------|-----|

DENTAL EXAMINERS, BOARD OF

| | | | | | |
|---|----|----------|--------|-------|-----|
| <u>Applications</u> | 21 | NCAC 16R | .0101* | 29:04 | NCR |
| <u>Fee for Late Filing and Duplicate License</u> | 21 | NCAC 16R | .0102* | 29:04 | NCR |
| <u>Continuing Education Required</u> | 21 | NCAC 16R | .0103 | 29:04 | NCR |
| <u>Approved Courses and Sponsors</u> | 21 | NCAC 16R | .0104 | 29:04 | NCR |
| <u>Reporting of Continuing Education</u> | 21 | NCAC 16R | .0105 | 29:04 | NCR |
| <u>Variances and Exemptions from and Credit for Continuing E...</u> | 21 | NCAC 16R | .0106 | 29:04 | NCR |
| <u>Penalty/Non-Compliance/Continuing Education</u> | 21 | NCAC 16R | .0107 | 29:04 | NCR |
| <u>License Void Upon Failure to Timely Renew</u> | 21 | NCAC 16R | .0108* | 29:04 | NCR |
| <u>Renewal Certificate Must Be Displayed</u> | 21 | NCAC 16R | .0110* | 29:04 | NCR |
| <u>Continuing Education Required</u> | 21 | NCAC 16R | .0201* | 29:04 | NCR |
| <u>Approved Courses and Sponsors</u> | 21 | NCAC 16R | .0202* | 29:04 | NCR |
| <u>Reporting Continuing Education</u> | 21 | NCAC 16R | .0203* | 29:04 | NCR |
| <u>Variances and Exemption from and Credit for Continuing E...</u> | 21 | NCAC 16R | .0204* | 29:04 | NCR |
| <u>Penalty/Non-Compliance/Continuing</u> | 21 | NCAC 16R | .0205* | 29:04 | NCR |
| <u>Definitions</u> | 21 | NCAC 16S | .0101* | 29:04 | NCR |
| <u>Board Agreements with Peer Review Organizations</u> | 21 | NCAC 16S | .0102* | 29:04 | NCR |
| <u>Confidentiality</u> | 21 | NCAC 16S | .0202* | 29:04 | NCR |
| <u>Record Content</u> | 21 | NCAC 16T | .0101* | 29:04 | NCR |
| <u>Transfer of Records Upon Request</u> | 21 | NCAC 16T | .0102* | 29:04 | NCR |

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|---|----|-----------------|-----------|
| <u>Secretary-Treasurer</u> | 21 | NCAC 16U .0101* | 29:04 NCR |
| <u>Investigative Panel</u> | 21 | NCAC 16U .0102* | 29:04 NCR |
| <u>Reports from the Controlled Substance Reporting System</u> | 21 | NCAC 16U .0103* | 29:04 NCR |
| <u>Definition: Unprofessional Conduct by a Dentist</u> | 21 | NCAC 16V .0101* | 29:04 NCR |
| <u>Definition: Unprofessional Conduct by a Dental Hygienist</u> | 21 | NCAC 16V .0102* | 29:04 NCR |
| <u>Direction Defined</u> | 21 | NCAC 16W .0101 | 29:04 NCR |
| <u>Training for Public Health Hygienists</u> | 21 | NCAC 16W .0102 | 29:04 NCR |
| <u>Eligibility Requirements</u> | 21 | NCAC 16Y .0101* | 29:04 NCR |
| <u>Application</u> | 21 | NCAC 16Y .0102* | 29:04 NCR |
| <u>Employment</u> | 21 | NCAC 16Y .0103* | 29:04 NCR |
| <u>Direction and Supervision</u> | 21 | NCAC 16Y .0104 | 29:04 NCR |
| <u>Eligibility to Practice Hygiene Outside Direct Supervision</u> | 21 | NCAC 16Z .0101* | 29:04 NCR |
| | | | |
| PHARMACY, BOARD OF | | | |
| <u>Registration</u> | 21 | NCAC 46 .3301* | 29:04 NCR |

TITLE 04 – DEPARTMENT OF COMMERCE

History Note: Authority G.S. 96-4; 20 C.F.R. 640; Eff. July 1, 2015.

04 NCAC 24A .0101 OFFICE LOCATION

The administrative offices of the North Carolina Department of Commerce, Division of Employment Security (hereinafter "DES," or "The Division") are located at 700 Wade Avenue, in Raleigh, North Carolina. The General Mailing Address is P.O. Box 25903, Raleigh, NC 27611-5903. The same work hours shall be observed by the Division as observed by the Office of State Human Resources (OSHR). This office is open to the public during regular business hours, from 8:00 a.m. to 5:00 p.m., Monday through Friday, except for approved state holidays as set forth in 25 NCAC 01E .0901.

History Note: Authority G.S. 96-4; Eff. July 1, 2015.

04 NCAC 24A .0102 ADDRESS CHANGES

(a) Each employing unit that has or had individuals in employment as defined in G.S. 96-1 shall notify DES in writing of any change to its mailing address. This notice shall be transmitted by facsimile, via the internet, or by postal mail within seven days after the effective date of the change. All notices shall be submitted to the Tax Administration Section, ATTN: Address Change by mail to Post Office Box 26504, Raleigh, North Carolina, 27611, facsimile to (919) 715-7194, or email to des.tax.customerservice@nccommerce.com.

(b) Each claimant who is liable to DES for an overpayment of benefits, or is registered for work at a public employment office, shall notify DES by facsimile, via the internet, or by postal mail of any change of address within seven days after the effective date of the change. All notices shall be submitted to the Benefits Integrity Unit, ATTN: Overpayment Address Change by mail to Post Office Box 25903, Raleigh, NC 27611, facsimile to (919) 733-1369, or email to des.ui.bpc@nccommerce.com.

04 NCAC 24A .0103 ADDRESSES FOR NOTICE

(a) In all transactions requiring notice by G.S. 96 or these Rules, DES shall provide notice to the party's last known address as reflected in its official records.

(b) Except as provided in Paragraph (a) of this Rule, when DES mails a notice of an initial claim to the employer at one of the following addresses:

- (1) the address of the employer for which the claimant last worked;
- (2) if the employer has more than one branch or division at different locations, the address of the branch or division for which the claimant last worked; or
- (3) an address designated by the employer as reflected in DES's official records.

History Note: Authority G.S. 96-4; 96-14.1; Eff. July 1, 2015.

04 NCAC 24A .0104 ADDRESSES FOR FILING CLAIMS, APPEALS, EXCEPTIONS, REQUESTS OR PROTESTS

(a) Claimants shall file a claim for unemployment insurance benefits by internet on DES's website, or by telephone.

- (1) The telephone number for filing a new initial claim is (877) 841-9617.
- (2) Claimants with a social security number ending in an odd number shall file weekly certifications on Monday and Wednesday through Saturday by dialing (888) 372-3453.
- (3) Claimants with a social security number ending in an even number shall file weekly

certifications on Tuesday through Saturday by dialing (888) 372-3453.

(b) Appeals from a Determination by Adjudicator shall be filed with the Appeals Section by mail, facsimile, or email.

- (1) The mailing address is Post Office Box 25903, Raleigh, North Carolina 27611.
- (2) The facsimile number is (919) 733-1228.
- (3) The email address is des.public.appeals@nccommerce.com.
- (4) Any questions regarding the contents of a Determination by Adjudicator shall be directed to the Adjudication Unit by telephone to (919) 707-1410, facsimile at (919) 733-1127, or email at des.ui.customerservice@nccommerce.com.

(c) Appeals of a Non-Fraud Overpayment Determination shall be filed with the Benefits Integrity Unit by mail or facsimile.

- (1) The mailing address is Post Office Box 25903, Raleigh, North Carolina 27611.
- (2) The facsimile number is (919) 733-1369.
- (3) Any questions regarding the contents of a Non-Fraud Overpayment Determination shall be directed to the Benefits Integrity Unit by telephone to (919) 707-1338, facsimile at (919) 733-1369, or email at des.ui.bpc@nccommerce.com.

(d) Appeals of a Fraud Overpayment Determination shall be filed with the Benefits Integrity Unit by mail, or facsimile.

- (1) The mailing address is Post Office Box 25903, Raleigh, North Carolina 27611.
- (2) The facsimile number is (919) 733-1369.
- (3) Any questions regarding the contents of a Fraud Overpayment Determination shall be directed to the Benefits Integrity Unit by telephone to (919) 707-1338, facsimile at (919) 733-1369, or email at des.ui.bpc@nccommerce.com.

(e) Appeals of a Monetary Determination shall be filed with the Monetary Revision Unit by mail, facsimile, or email.

- (1) The mailing address is Post Office Box 25903, Raleigh, North Carolina 27611.
- (2) The facsimile number is (919) 715-3983.
- (3) The email address is des.ui.customerservice@nccommerce.com.
- (4) Any questions regarding the contents of a Monetary Determination shall be directed to the Monetary Revision Unit by telephone to (919) 707-1257, facsimile at (919) 715-3983, or email at des.ui.customerservice@nccommerce.com.

(f) Appeals of a Wage Transcript and Monetary Determination shall be filed with the Monetary Revision Unit by mail or facsimile.

- (1) The mailing address is Post Office Box 25903, Raleigh, North Carolina 27611.
- (2) The facsimile number is (919) 715-3983.
- (3) Any questions regarding the contents of a Wage Transcript and Monetary Determination shall be directed to the Monetary Revision Unit by telephone to (919) 707-1257, facsimile at (919)

715-3983, or email at des.ui.customerservice@nccommerce.com.

(g) Petitions for Waiver of Overpayment shall be filed with the Benefits Integrity Unit by mail, or facsimile.

- (1) The mailing address is Post Office Box 25903, Raleigh, North Carolina 27611.
- (2) The facsimile number is (919) 733-1369.
- (3) Any questions regarding the contents of an overpayment determination shall be directed to the Benefit Payment Control Unit by telephone to (919) 707-1338, facsimile at (919) 733-1369 or email at des.ui.bpc@nccommerce.com.

(h) Claimant appeals of a North Carolina Department of Revenue (NCDOR) Offset Letter shall be filed with the Benefits Integrity Unit by mail, or facsimile.

- (1) The mailing address is Post Office Box 25903, Raleigh, North Carolina 27611.
- (2) The facsimile number is (919) 733-1369.
- (3) Any questions regarding the contents of a North Carolina Department of Revenue Offset Letter shall be directed to the Benefits Integrity Unit by telephone to (919) 707-1338, facsimile at (919) 733-1369, or email at des.ui.bpc@nccommerce.com.

(i) Employer appeals of a North Carolina Department of Revenue Offset Letter for outstanding tax debts shall be filed with and Tax Administration Section by mail, facsimile, or email.

- (1) The mailing address is Post Office Box 26504, Raleigh, NC 27611.
- (2) The facsimile number is (919) 733-1255.
- (3) The email address is des.tax.customerservice@nccommerce.com.
- (4) Any questions regarding the contents of a NCDOR Offset letter for outstanding tax debts shall be directed to the Tax Administration Section by telephone to (919) 707-1150, facsimile at (919) 733-1255, or email at des.tax.customerservice@nccommerce.com.

(j) Claimant Requests for Reevaluation under the Treasury Offset Program (TOP) shall be filed with the Benefit Integrity Unit of mail or facsimile.

- (1) The mailing address is Post Office Box 25903, Raleigh, North Carolina 27611.
- (2) The facsimile number is (919) 715-3983.
- (3) Any questions regarding TOP shall be directed to a Recovery Specialist by telephone to (919) 707-1338, or email at des.ui.bpc@nccommerce.com.

(k) Employer requests shall be filed with Employer Call Center (ECC) by mail, telephone, facsimile or email.

- (1) The mailing address is Post Office Box 25903, Raleigh, North Carolina 27611.
- (2) The phone number is (919) 707-1150.
- (3) The facsimile number is (919) 715-0780.
- (4) The email address is des.tax.customerservice@nccommerce.com.

(l) Appeals from an Appeals Decision shall be filed with the Board of Review by mail, facsimile, or email.

- (1) The mailing address is Post Office Box 28263, Raleigh, North Carolina 27611.
 - (2) The facsimile number is (919) 733-0690.
 - (3) The email address is des.ha.appeals@nccommerce.com.
- (m) Requests for Post-Decision Relief or Reconsideration shall be filed with the Board of Review by mail, facsimile, or email.
- (1) The mailing address is Post Office Box 28263, Raleigh, North Carolina 27611.
 - (2) The facsimile number is (919) 715-7193.
 - (3) The email address is BOR@nccommerce.com.
- (n) Protests or appeals of a Tax Liability Determination shall be filed with the Tax Administration Section by mail, facsimile, or email.
- (1) The mailing address is Post Office Box 26504, Raleigh, NC 27611.
 - (2) The facsimile number is (919) 733-1255.
 - (3) The email address is des.tax.customerservice@nccommerce.com.
- (o) Protests or appeals of a Tax Rate Assignment shall be filed with the Tax Administration Section by mail, facsimile, or email.
- (1) The mailing address is Post Office Box 26504, Raleigh, NC 27611.
 - (2) The facsimile number is (919) 733-1255.
 - (3) The email address is des.tax.customerservice@nccommerce.com.
- (p) Protests or appeals of Audit Results shall be filed with the Tax Administration Section by mail, facsimile, or email.
- (1) The mailing address is Post Office Box 26504, Raleigh, NC 27611.
 - (2) The facsimile number is (919) 733-1255.
 - (3) The email address is des.tax.customerservice@nccommerce.com.
- (q) Protests or appeals of Tax Assessments shall be filed with the Tax Administration Section by mail, facsimile, or email.
- (1) The mailing address is Post Office Box 26504, Raleigh, NC 27611.
 - (2) The facsimile number is (919) 733-1255.
 - (3) The email address is des.tax.customerservice@nccommerce.com.
- (r) Exceptions to a Tax Opinion shall be filed with the Board of Review by mail, facsimile or email.
- (1) The mailing address is Post Office Box 28263, Raleigh, North Carolina 27611.
 - (2) The facsimile number is (919) 715-7193.
 - (3) The email address is BOR@nccommerce.com.
- (s) Protests or appeals of benefit charges to an employer's account, or requests for non-charging shall be filed with the Employer Benefit Charges/Benefit Charges Unit by mail or facsimile.
- (1) The mailing address is Post Office Box 25903, Raleigh, North Carolina 27611-5903.
 - (2) The facsimile number is (919) 733-1126.
 - (3) All questions regarding non-charging shall be directed to the Employer Benefit Charges/Benefit Charges Unit at (919) 707-1279.

(t) Protests or appeals of a Denial of Seasonal Assignment shall be filed with the Tax Administration Section by mail, facsimile, or email.

- (1) The mailing address is Post Office Box 26504, Raleigh, NC 27611.
- (2) The facsimile number is (919) 733-1255.
- (3) The email address is des.tax.customerservice@nccommerce.com.

(u) Transmittal of interstate work search records and photo identification shall be filed with the Interstate Unit by mail, or facsimile.

- (1) The Mailing Address is Post Office Box 27967, Raleigh, North Carolina 27611.
- (2) The facsimile number is (919) 733-1370.
- (3) All questions regarding interstate work search requirements shall be directed to the Interstate Unit at (919) 707-1237.

History Note: Authority G.S. 96-4; 96-14.1; Eff. July 1, 2015.

04 NCAC 24A .0105 DEFINITIONS

In addition to the terms defined in G.S. 96, the following definitions apply whenever these terms are used in this Chapter:

- (1) "Additional claim" means the reopening of a valid initial claim for unemployment insurance benefits after a claimant, as defined in Item (15) of this Rule, ceased filing a weekly certification as defined in G.S. 96-14.9, for one or more weeks due to intervening employment. The first week of eligibility filed after a claim has been reopened shall constitute a waiting period week if all eligibility requirements set forth in G.S. 96-14.9 are met.
- (2) "Agent state" means any state from which, or through which a claimant files a claim for benefits from another state.
- (3) "Adjudicator" means an employee of DES appointed to conduct an informal investigation and render a determination as required by G.S. 96-15(b).
- (4) "Appeal" means a submission by a party with statutory appeal rights requesting the Appeals Section of DES or the Board of Review to review a determination or decision that is adverse to that party.
- (5) "Appeals Referee" or "Hearing Officer" means an attorney appointed to hear or decide an appeal from a determination by an adjudicator and issues involving the rights, status, and liabilities of an employer pursuant to the provisions of G.S. 96-4(q) or 96-15(c).
- (6) "Appeals Section" means the section within DES where Appeals Referees conduct quasi-judicial administrative evidentiary hearings and make decisions in contested cases for unemployment insurance benefits. The

- Appeals Section also consists of support staff that assists Appeals Referees.
- (7) "Authorized Representative" means an individual authorized by an employer or employing unit to act on the employer or employing unit's behalf before DES.
- (8) "Base period" means as defined in G.S. 96-1(b)(3). Calendar quarters are January through March, April through June, July through September, and October through December.
- (9) "Benefit week" means a period of seven consecutive calendar days, ending at 11:59 pm on Saturday.
- (10) "Benefit wage credits" means wages used to determine a claimant's monetary eligibility for benefits. Benefit wage credits consist of the wages a claimant received or should have received during the claimant's base period of employment and to include those wages that were awarded and paid to the claimant after the base period pursuant to a court order; a National Labor Relations Board determination; another adjudicative agency; or by private agreement, consent, or arbitration for loss of pay because of discharge. DES shall credit the awarded wages to the quarter in which the wages should have been paid.
- (11) "Board of Review" means as defined in G.S. 96-4(b) and is the body that conducts "higher authority review" of appeals arising from the decisions of the Division, tax liability hearings, and labor disputes. The Board of Review is also referred to as the "Board" or "BOR."
- (12) "Calendar Period" means the 52 week period beginning with the first day of a week in which an individual first files a valid claim for benefits and registers for work. The week begins on the first Sunday preceding the initial claim filed and ends the following year at 11:59 p.m. on Saturday.
- (13) "Charging cycle" means the 52 week period beginning August 1st and ending July 31st the year following the year in which the employer's account is assessed and charged for erroneous payments against its account, due to establishing a pattern of untimely and inadequate responses to Requests for Separation Information (NCUI 500AB) during the preceding reporting cycle.
- (14) "Chief Appeals Referee" includes the Chief Appeals Referee's designee, unless otherwise stated.
- (15) "Claimant" means an individual who files an unemployment insurance benefits claim for payments as provided in G.S. 96-14.1.
- (16) "Clear and convincing evidence" is evidence indicating that the thing to be proved is highly probable or reasonably certain.
- (17) "Customarily," as the term is used in G.S. 96-16, means during at least 75 percent of the calendar years of an observation interval.
- (18) "Day" means a calendar day.
- (19) "Delivery service" means an authorized designated carrier pursuant to Rule 4(j) of the North Carolina Rules of Civil Procedure and 26 U.S.C. 7502(f)(2).
- (20) "DES website" means the internet address found at www.ncesc.com.
- (21) "Due diligence" means the measure of carefulness, precaution, attentiveness, and good judgment as to be expected from, and exercised by a reasonable and prudent person under the particular circumstances.
- (22) "Effective date of a claim" means either the benefit year beginning on the Sunday preceding the payroll week ending date if the claimant is payroll attached, or the benefit year beginning on the Sunday of the calendar week within which a claimant filed a valid claim for benefits and registered for work if the claimant is not payroll attached.
- (23) "Electronic transmission" means transmission by facsimile or internet.
- (24) "Equity and good conscience" means fairness as applied to a given set of circumstances.
- (25) "Fault" means an error or defect of judgment or of conduct; any deviation from prudence or duty resulting from inattention, incapacity, perversity, bad faith, or mismanagement.
- (26) "Good cause" means a legally sufficient reason.
- (27) "In-person/telephone hearing" means an administrative hearing before the Appeals Section, Board of Review, or other designated Hearing Officer where at least one party or witness appears in-person, and another party or witness appears by telephone.
- (28) "Interstate benefit payment plan" means the plan approved by the Interstate Conference of Employment Security Agencies under which benefits may be paid to unemployed claimants absent from the state (or states) where benefit wage credits accumulated. This Rule incorporates the United States Department of Labor's Interstate Benefit Payment Plan, Interstate Agreements, ET Handbook No. 392 app. B (2d ed. 1997) by reference and includes subsequent amendments and editions of the referenced material in accordance with G.S. 150B-21.6. Copies of the incorporated material are located at 700 Wade Avenue, in Raleigh, North Carolina, and can be obtained by request at no cost to the public by contacting DES as specified under 04 NCAC 24A .0201.
- (29) "Interstate claimant" means a claimant who claims benefits under the unemployment insurance law of one or more liable states

- through the facilities of an agent state, or directly with the liable state. The term "interstate claimant" shall not include any claimant who customarily commutes from a residence in an agent state to work in a liable state unless the Division finds that this exclusion would create an undue hardship.
- (30) "Labor dispute" means a dispute between an employer and its employees about wages, hours, working conditions, or issues concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or condition of employment, between those who could be concerned in the controversy.
- (31) "Last known address" means the most recent address provided to DES by the claimant or taxpayer located in its official record, except that DES shall update addresses maintained in its official records by referring to data accumulated and maintained in the United States Postal Service (USPS) National Change of Address database that retains change of address information (NCOA Database). If the claimant or taxpayer's name and last known address in DES's official records match the claimant or taxpayer's name and previous mailing address contained in the NCOA database, the new address in the NCOA database is the taxpayer's last known address. This Rule incorporates the United States Postal Service's National Change of Address Database by reference and includes subsequent amendments and editions of the referenced material in accordance with G.S. 150B-21.6. Copies of the incorporated material are located at 700 Wade Avenue, in Raleigh, North Carolina, and can be obtained by request at no cost to the public by contacting DES as specified under 04 NCAC 24A .0201.
- (32) "Legal representative" means a licensed attorney or a person supervised by a licensed attorney.
- (33) "Liable state" means any state against which a claimant files a claim for benefits through another state.
- (34) "Observation interval" means an interval of time including the four consecutive calendar years preceding the calendar year in which an application for a seasonal determination is made pursuant to G.S. 96-16. In the case of a newly liable employer or an employer whose operational activities have changed, the observation interval may be less than four calendar years.
- (35) "Party with appeal rights" means a party who has the right to appeal an unfavorable determination or decision pursuant to G.S. 96-4(q) and G.S. 96-15.
- (36) "Public employment office" means a local office managed and operated by the Division of Workforce Solutions (DWS) of the North Carolina Department of Commerce.
- (37) "Regularly recurring" means a period or periods of operational activity and shall be deemed regularly recurring if, during at least 75 percent of the calendar years in the observation interval, the beginning and ending dates of the period or periods do not vary more than four weeks.
- (38) "Reopened claim" means the resumption of a valid initial claim following a break in filing weekly certifications during a benefit year and the break was caused by reasons other than intervening employment. The first week of eligibility following the effective date of the reopened claim shall constitute a waiting period week if all eligibility requirements set forth in G.S. 96-14.9 are met.
- (39) "Reporting cycle" means the 52 week period beginning August 1st and ending July 31st the following year in which the employer's account is examined and recorded for any inadequate responses to Requests for Separation Information (NCUI 500AB).
- (40) "State" means any of the 50 states in the United States and includes the District of Columbia, Puerto Rico and the U.S. Virgin Islands.
- (41) "Wages paid" means both wages actually received by a worker, and wages "constructively paid." Wages are constructively paid when they are credited to the account of, or set apart for a worker without any substantial restriction as to the time or manner of payment or condition upon which payment is to be made, and shall be made available so that the worker may draw upon them at any time, and payment brought within the worker's control and disposition, although not then actually reduced to possession.
- (42) "Wages payable" means wages earned but not paid.
- (43) "Weekly period" means a seven day period beginning at 12:00 a.m. Sunday and ending on the following Saturday at 11:59 p.m.
- (44) "Week of unemployment" includes any week of unemployment as defined in the law of the liable state from which benefits for the week are claimed.

History Note: Authority G.S. 84; 96-1; 96-4; 96-9.2; 96-9.6; 96-14.1; 96-14.9; 96-15; 96-17; 96-20; Eff. July 1, 2015.

04 NCAC 24A .0106 FILING/MAILING DATES AND USE OF FORMS

(a) Except as otherwise provided in this Chapter, a document or form shall be filed with DES on the date the document or form is received by DES.

(b) When determining whether a party had good cause for filing a late appeal or protest, DES shall consider the date mailed in the order listed:

- (1) the postmark date or the postal meter date, where there is only one;
- (2) the postmark date if there is both a postmark date and a postal meter date, if they conflict; or
- (3) the date the document was delivered to a delivery service, which is equivalent to a postmark date of the United States Postal Service.

(c) A document received in an envelope bearing no legible postmark, postal meter date, or date of delivery to the delivery service shall be considered to have been sent three business days before receipt by DES, or on the date of the document, if the document date is less than three days earlier than date of receipt.

(d) If the envelope is lost after delivery to DES, the date on the document shall control. If the document is undated, DES shall deem the date the writing was sent to be three business days prior to receipt by DES, subject to sworn testimony establishing an earlier date from the sender of the writing.

(e) Except as otherwise provided in this Chapter, the date and time that DES receives a document shall be used when the document is sent by facsimile transmission or via the internet.

(f) Except as otherwise provided in this Chapter, when a document furnishes information that is sufficient to indicate the purpose or intent of the document, but is not on a form prescribed by DES, the controlling date shall be determined as described in this Section.

History Note: Authority G.S. 96-4; Eff. July 1, 2015.

04 NCAC 24A .0107 DIGITAL SIGNATURES

A digital signature provided by an employing unit or claimant shall authenticate a written electronic communication sent to DES with the same force and effect as that of a manual signature by the person or individual using it. The digital signature shall have the following characteristics:

- (1) unique to the person or individual using it;
- (2) ability to be independently verified;
- (3) under the sole control of the person or individual using it; and
- (4) infeasible to change the data in the communication without invalidating the digital signature.

History Note: Authority G.S. 96-4; 96-9.15; Eff. July 1, 2015.

04 NCAC 24A .0108 SIGNATURES ON REPORTS AND FORMS

Where DES requires a signature on a report or form, the writing shall be signed by:

- (1) the individual, if the person required to submit the report or form is an individual;
- (2) an officer or authorized representative, if the employing unit required to submit the report or form is a corporation;
- (3) a partner or other authorized representative, if the employing unit required to submit the report or form is a partnership;
- (4) a member or other authorized representative, if the employing unit required to submit the form is an association;
- (5) an authorized member or officer having knowledge of its affairs, if the employing unit required to submit the report or form is an unincorporated organization;
- (6) the fiduciary, if the employing unit required to submit the report or form is a trust or estate; or
- (7) the head of the department, or designee having control of the services to which contributions, reimbursements, or other payments are attributable, if the employing unit required to submit the report or form is the State of North Carolina.

History Note: Authority G.S. 96-4; 96-9.15; Eff. July 1, 2015.

04 NCAC 24A .0109 POWER OF ATTORNEY

An employer may appoint an agent with full or limited power and authority to act on its behalf with DES. An employer's appointment of an agent shall be made in writing in the manner prescribed by G.S. 32A-1.

History Note: Authority G.S. 96-4; 96-9.15; 32A-1; 32A-2; Eff. July 1, 2015.

04 NCAC 24A .0201 WRITTEN REQUEST REQUIRED

Any individual or employing unit requesting to inspect or copy any record containing confidential unemployment insurance information shall make the request in writing. All requests shall be submitted to the Legal Services Section, ATTN: Legal Release by mail to Post Office Box 25903, Raleigh, North Carolina, 27611, facsimile to (919) 715-7194, or email to legal.release@nccommerce.com.

History Note: Authority G.S. 96-4; 20 CFR 603; Eff. July 1, 2015.

04 NCAC 24A .0202 CLEAR DESCRIPTION OF RECORDS REQUIRED

(a) Each written request for unemployment insurance information shall describe the record or records sought and provide sufficient details to permit identification and location of the records.

(b) The request may specify:

- (1) the subject matter of the record;
- (2) the date or approximate date that the record was made;

- (3) the place where the record was made;
- (4) the person or office that made the record; and
- (5) any other necessary identifying details about the record, such as an account or form number.

(c) If the description is insufficient for an employee familiar with the subject area of the request to locate the record, the General Counsel or designee shall notify the person making the request and indicate the additional information required to locate the record.

History Note Authority G.S. 96-4; 20 CFR 603; Eff. July 1, 2015.

04 NCAC 24A .0203 DETERMINATION AS TO DISCLOSURE

(a) If the General Counsel or designee determines that the applicable law does not permit disclosure of the requested information, the General Counsel or designee shall provide written notification to the person making the request. The notice shall state reasons for the denial, including the applicable law prohibiting disclosure.

(b) Where there is specific information in a record that is prohibited from disclosure, the specific information shall be deleted or redacted before providing the requested record.

History Note: Authority G.S. 96-4; 20 CFR 603; Eff. July 1, 2015.

04 NCAC 24A .0204 RELEASE OF INFORMATION TO THIRD PARTY

(a) Upon written request, a claimant, employer, applicant, or other person who authorizes information or records to be released to a third party or person shall provide:

- (1) the name of the third party or person;
- (2) the address of the third party or person;
- (3) a statement that the claimant, employer, applicant or other person authorizing the disclosure of information waives confidentiality as to the information directed to be released.

(b) An individual requesting that DES release or disclose to a third party or person the individual's quarterly wage records, including the amount of wages, names, and addresses of each employer reporting wages for the individual shall:

- (1) clearly identify the third party or person by name;
- (2) provide the address of the third party or person;
- (3) contain a statement that the individual waives confidentiality as to the information authorized to be disclosed to the identified third party;
- (4) state that the authorization and waiver is given on the basis of informed consent as mandated by 20 CFR Part 603.5 and any other applicable federal regulation that may be promulgated by the U.S. Department of Labor; and
- (5) contain a clear statement that the employing unit that provided the information to DES has

been provided proper advance notice of the request for disclosure.

History Note: Authority G.S. 96-4; 20 CFR 603.5; Eff. July 1, 2015.

04 NCAC 24A .0205 FEES FOR COPIES AND SERVICES

(a) Search Fees:

- (1) The fee for searching DES records by authorized staff shall be four dollars and forty cents (\$4.40) for each one-quarter hour or fraction thereof required to obtain the records to be searched or to search the records.
- (2) If the search for requested records requires transportation of DES staff to the location of the records, or transportation of the records to DES staff at a cost of more than five dollars (\$5.00), the actual transportation costs shall be added to the search time cost.
- (3) If the search for requested records requires batch processing by computer, the General Counsel or designee shall provide an estimate of DES's cost to produce the information to individual making the request. The amount of the estimate provided shall be based on the computer programming and other actions necessary for the batch processing. Upon consenting to the estimate provided by the General Counsel or designee, DES shall send an invoice for the actual cost of producing the requested information to the individual making the request.

(b) Reproduction Fees: The fees for obtaining copies of records shall be computed as follows:

- (1) copying: one cent (\$0.01) per page;
- (2) transcription of hearing: three dollars and seventy-five cents (\$3.75) per quarter hour or fraction thereof;
- (3) recording of hearing: three dollars and seventy-five cents (\$3.75) per compact disk or recording.

(c) No more than 10 copies of any document shall be furnished in response to any request.

(d) Administrative and Overhead Fees: The fee required for the time required for the General Counsel or designee to review a request and determine whether the request is authorized by G.S. 96-4 shall be five dollars and eighty-four cents (\$5.84) for each one-quarter hour or fraction thereof. The overhead cost for processing and invoicing shall be four dollars and fifty cents (\$4.50) per invoice.

History Note: Authority G.S. 96-4(x); 20 CFR 603; Eff. July 1, 2015.

04 NCAC 24A .0206 METHOD OF PAYMENT

(a) Fees shall be paid by cash, money order, or certified check.

(b) An agency of state or federal government, a county, or a municipality may pay fees by draft.

(c) Payments shall be mailed to the North Carolina Department of Commerce, Division of Employment Security, ATTN: Finance and Budget, Post Office Box 25903, Raleigh, North Carolina 27611.

History Note: Authority G.S. 96-4(x); 20 CFR 603; Eff. July 1, 2015.

04 NCAC 24A .0207 PAYMENT REQUIRED BEFORE INFORMATION RELEASE

(a) Payment shall accompany all requests for release of information. If payment does not accompany a request, DES shall send an invoice for all fees due to the individual making the request, due immediately upon receipt.

(b) When exigent circumstances requires the immediate release of information to local, state, or federal law enforcement officials, DES shall release the information upon receipt of a written assurance demonstrating a guaranty of future payment from the law enforcement official making the request.

History Note: Authority G.S. 96-4; 20 CFR 603; Eff. July 1, 2015.

04 NCAC 24A .0301 RIGHT TO PETITION

(a) The petition shall be in writing and contain the following information:

- (1) the subject area to which the petition is directed;
- (2) a draft of the proposed or amended rule;
- (3) the reason for the proposal;
- (4) the effect of the requested rule change;
- (5) any data supporting the proposal;
- (6) the name and address of each petitioner; and
- (7) the date.

(b) Any person submitting a petition requesting the adoption, amendment, or repeal of a rule under this Chapter shall address the petition to the Rules Coordinator, Attn: DES Legal Services Section, Post Office Box 25903, Raleigh, North Carolina 27611-5903.

History Note: Authority G.S. 96-4; 150B-20; Eff. July 1, 2015.

04 NCAC 24A .0302 DISPOSITION OF PETITION

(a) Upon receipt of a petition, the Secretary of Commerce, or designee shall review the petition to determine whether the public interest would be served by granting the request.

(b) Within 30 days of receiving the petition, the Secretary or designee shall make a decision on the petition and inform the petitioner by mailing:

- (1) a written denial of the petition and the reason for the denial; or
- (2) written notice to the petitioner that the Secretary or designee will initiate a rule-making proceeding as required by G.S. 150B-20(c).

(c) Each determination granting or denying a petition shall include a statement that the Secretary or designee's decision is a final agency decision subject to judicial review.

(d) Each determination shall include instructions for filing a request for judicial review in the superior court pursuant to G.S. 150B-45 within 30 days after receiving the determination.

History Note: Authority G.S. 96-4; 150B-20; 150B-45; Eff. July 1, 2015.

04 NCAC 24B .0101 FILING A CLAIM

(a) An individual shall contact DES by internet or telephone to file a valid initial claim for benefits pursuant to 04 NCAC 24A .0104.

(b) Prior to receiving any benefits, the claimant shall register for work with a public employment office, unless exempt from this requirement under G.S. 96-14.9 or federal law.

(c) In the event of a mass layoff by an employer, the employer may request to electronically file an initial claim for benefits for the individuals to be laid off. The request shall be made to DES through its website at www.ncesc.com. The employer shall provide DES with a list of the individuals who wish to file an initial claim for benefits. For each individual, the list shall include all information required in Paragraph (d) of this Rule for an initial claim. The list shall be used by DES as an initial claim for each individual on the list. Each individual shall subsequently file his or her weekly certification.

(d) Information for an initial claim shall include:

- (1) the claimant's name, social security number, address, telephone number, email address, and date of birth, and gender;
- (2) immigration status;
- (3) whether the claimant worked for the federal government or in another state during the previous two years;
- (4) whether the claimant applied for or is receiving disability payments;
- (5) whether the claimant was or will be paid vacation or severance and the time frame that the payment covers;
- (6) whether the claimant refused work since becoming unemployed;
- (7) whether the claimant filed for or is receiving benefits under any other unemployment insurance law;
- (8) whether the claimant applied for or is receiving any type of retirement pension;
- (9) the name and complete address of the claimant's last employer;
- (10) the reason for the claimant's separation from work; and
- (11) the claimant's beginning and ending dates of employment.

History Note: Authority G.S. 96-4; 96-14.1; 96-14.9; 96-15; 20 CFR 602; Eff. July 1, 2015.

04 NCAC 24B .0102 ALTERNATIVE FILING METHODS

A claimant shall file an initial claim, or a weekly certification for payment of benefits by mail, delivery service, or facsimile to DES's Central Office in Raleigh, North Carolina. A claimant shall file an initial claim, or a weekly certification for payment of benefits at a Division of Workforce Solutions public employment office throughout the State when hazardous or emergency conditions exist that prevent a DES representative from accepting the claim or weekly certification by telephone or internet due to inclement weather or declared natural disaster.

History Note: Authority G.S. 96-4; 96-14.1; 96-14.9; 96-15; 20 CFR 602; Eff. July 1, 2015.

04 NCAC 24B .0103 WEEKLY CERTIFICATIONS

(a) After a claimant files an initial claim and establishes a benefit year, the claimant shall file subsequent weekly certification for payment of benefits by telephone, or internet on DES's website at intervals of no less than 7 and no more than 14 consecutive days for each week claimed.

- (1) Each claimant shall file weekly certifications as prescribed under 04 NCAC 24A .0104(a).
- (2) If at any time during the benefit year, more than 14 calendar days elapse since the claimant last filed a weekly certification, the claimant shall file an additional or reopened claim for benefits as defined in 04 NCAC 24A .0105, and shall comply with all eligibility requirements.

(b) Each claimant shall:

- (1) file claims and weekly certifications in accordance with the rules of this Chapter that includes the following:
 - (A) information required for claims filing outlined in Rule .0101 of this Section.
 - (B) information required for filing weekly certification, including each claimant's full name and social security number;
- (2) inform DES of whether he or she worked during the previous calendar week;
- (3) provide information regarding all earnings before deductions (gross) for work performed during the previous calendar week;
- (4) provide information as to whether he or she received holiday, vacation, bonus, or separation pay, and the gross amount during the previous calendar week;
- (5) inform DES of whether he or she began receiving or whether there was a change in any type of retirement pension during the previous calendar week;
- (6) provide information regarding whether he or she applied for or received any disability payments during the previous calendar week;
- (7) inform DES of whether he or she was physically able and available for work, during the previous calendar week;

- (8) provide information as to whether he or she looked for work, refused work or kept a record of work search during the previous calendar week as required by G.S. 96-14.9(e)(4);
- (9) provide information as to whether he or she has quit a job or been discharged from a job since filing a claim for unemployment benefits;
- (10) sign all forms for the valid initial claim or weekly certification that are filed in person, by mail or delivery service; and
- (11) submit all claims and weekly certifications as required by the Employment Security Law and this Section.

History Note: Authority G.S. 96-4; 96-14.1; 96-14.9; 96-15; 96-15.01; Eff. July 1, 2015.

04 NCAC 24B .0104 INFORMATION TO BE PROVIDED TO CLAIMANTS FILING A NEW CLAIM

A claimant filing a new claim for benefits shall be informed that:

- (1) unemployment benefits are subject to federal and state income tax;
- (2) he or she may elect to have federal and state income tax deducted and withheld from the payment of unemployment benefits;
- (3) he or she may change a previous withholding status; and
- (4) any amounts deducted and withheld for taxes shall be only after amounts are deducted and withheld under any other provisions of the Employment Security Law.

History Note: Authority G.S. 96-4; 96-14.2; Eff. July 1, 2015.

04 NCAC 24B .0105 ANTEDATING

A valid initial claim shall be retroactively effective to the Sunday of the calendar week during which a claimant would have filed a claim if the failure to file the claim at that time includes the following:

- (1) a notice of the time and place for filing a claim for benefits that should have been posted was not posted in the claimant's employment establishment;
- (2) the claimant's employer coerced the claimant not to file a claim for benefits and the claimant contacted an authorized representative of DES no later than 14 days following his or her last day of work;
- (3) natural disaster where the claimant works or resides; or
- (4) an invalid claim was filed in good faith in another state.

History Note: Authority G.S. 96-4; 96-14.1; 96-15; Eff. July 1, 2015.

04 NCAC 24B .0106 SUSPENSION OF BENEFITS FOR PROBATION VIOLATORS WHO AVOID ARREST

(a) Upon receipt of a valid court order resulting from a probation violation for absconson or willful avoidance of arrest, DES shall suspend benefits pursuant to the terms outlined by the issuing judge in the order, effective beginning on the Sunday following the effective date of the order.

(b) Within seven days of receiving the order, DES shall provide written notice and reasons for the ineligibility for benefits to the claimant, the issuing court, and the North Carolina Department of Public Safety.

(c) The notice shall state:

- (1) the claimant's name;
- (2) the claimant's address as contained in DES's official records and provided with the court order;
- (3) the date the order was entered; and
- (4) the effective date of the claimant's ineligibility for benefits.

History Note: Authority G.S. 15A-1345; 96-4; 96-14.1; Eff. July 1, 2015.

04 NCAC 24B .0201 REGISTRATION FOR WORK

(a) The agent state shall register each claimant for work:

- (1) who files through the agent state for work; or
- (2) upon notification of a claim filed directly with the liable state, as required by the law, regulations, and procedures of the agent state.

(b) The registration shall be accepted as meeting the registration requirements of the liable state.

(c) Each agent state shall report each interstate claimant who fails to meet the registration or re-employment assistance reporting requirements of the agent state to the liable state.

History Note: Authority G.S. 96-4; 96-24; Eff. July 1, 2015.

04 NCAC 24B .0202 BENEFIT RIGHTS OF INTERSTATE CLAIMANTS

(a) If a claimant files a claim against any state, and it is determined by the state that the claimant has benefit wage credits available in the state, then claims shall be filed only against the state as long as benefit wage credits are available in that state. Once benefit wage credits become unavailable in that state, the claimant shall file claims against any other state where benefit wage credits are available.

(b) For the purposes of this Section, benefit wage credits shall be deemed to be unavailable from another state:

- (1) whenever benefits have been exhausted, terminated, or postponed for an indefinite period, or the entire period in which benefits would otherwise be payable; or
- (2) whenever benefits are affected by the applications of a seasonal restriction.

History Note: Authority G.S. 96-4; 96-15; 96-16; 96-21; 96-24; 20 CFR 616;

Eff. July 1, 2015.

04 NCAC 24B .0203 CLAIMS FOR BENEFITS

(a) Claims for benefits or waiting-period credit filed by an interstate claimant directly with the liable state shall be filed according to the liable state's procedures. Any adjustments required to fit the type of week used by the liable state shall be made by the liable state based on consecutive claims filed.

(b) Claims shall be filed according to the agent state's regulations for intrastate claims in the same manner as provided in Rule .0101 of this Subchapter.

- (1) With respect to claims for weeks of unemployment during which a claimant was not working for his regular employer, the liable state shall accept a continued claim that is filed up to one week or one reporting period late under circumstances that it considers good cause. If a claimant files more than one reporting period late, the filing shall open an additional claim, and no continued claim for a past period shall be accepted.

- (2) With respect to weeks of unemployment during which a claimant is attached to his regular employer, the liable state shall accept any claim filed within the time applicable to claims under the law of the agent state.

History Note: Authority G.S. 96-4; 20 CFR 616; Eff. July 1, 2015.

04 NCAC 24B .0204 DETERMINATION OF CLAIMS

(a) In connection with each claim filed by an interstate claimant, the agent state shall compile and report the facts relating to the claimant's availability for work and eligibility for benefits to the liable state.

(b) The agent state's responsibility and authority in determination of interstate claims shall be limited to investigation and reporting of relevant facts, including facts pertaining to each claimant's registration for work or reporting for re-employment assistance as required by the agent state.

History Note: Authority G.S. 96-4; 96-15; 20 CFR 616; Eff. July 1, 2015.

04 NCAC 24B .0205 APPELLATE PROCEDURE.

(a) The agent state shall cooperate in taking evidence and holding hearings in interstate benefit claims appeals.

(b) The agent state shall conduct appeal hearings in disputed cases and determine timeliness using the liable state's laws, regulations, or policies and practices. In interstate appeals where North Carolina is the liable state, timeliness of the appeal shall be determined by provisions of the Employment Security Law, 04 NCAC 24A .0106, and any DES decisions applicable to intrastate appeals.

(c) The agent state shall conduct the hearings on appealed interstate benefit claims.

History Note: Authority G.S. 96-4; 20 CFR 616;

Eff. July 1, 2015.

04 NCAC 24B .0206 CANADIAN CLAIMS

The provisions of this Section apply to all Canadian claims.

*History Note: Authority G.S. 96-4;
Eff. July 1, 2015.*

04 NCAC 24B .0207 NOTIFICATION OF INTERSTATE CLAIM

- (a) The liable state shall notify the agent state of each initial claim, reopened claim file, claim transferred to interstate status, and each weekly claim filed from the agent state.
- (b) Notice shall be provided using the Interstate Benefit Payment Plan uniform procedures and record format promulgated as written guidance by the USDOL.
- (c) This Rule incorporates the United States Department of Labor's Interstate Benefit Payment Plan, Interstate Agreements, ET Handbook No. 392 app. B (2d ed. 1997) by reference and includes subsequent amendments and editions of the referenced material in accordance with G.S. 150B-21.6. Copies of the incorporated material found in the Interstate Benefit Payment Plan are located at 700 Wade Avenue, in Raleigh, North Carolina 27605, and may be obtained by request at no cost to the public by contacting DES as specified under 04 NCAC 24A .0201.

*History Note: Authority G.S. 96-4; 20 CFR 616;
Eff. July 1, 2015.*

04 NCAC 24B .0301 REQUIREMENTS FOR CLAIMANTS

- (a) Every claimant shall register for work at www.NCWorks.gov or a public employment office in the state in which you reside, actively seek work, are available for work, and will accept suitable work unless specifically exempted by G.S. 96-14.9 or federal law.
- (b) Each claimant shall make the minimum number of weekly work search contacts required by G.S. 96-14.9(e)(3).
 - (1) Each claimant shall maintain weekly work search contact records as required by G.S. 96-14.9(e)(4).
 - (2) Each claimant who receives his or her first unemployment benefit payment on or after March 1, 2014 shall have a mandatory in-person Employability Assessment Interview (EAI) with a workforce specialist at a local DWS office as a condition of continued eligibility for receipt of unemployment insurance benefits. Claimants excepted from this requirement are: Reemployment Eligibility Assessment (REA); those enrolled in and attending a Workforce Investment Act (WIA) program; attached claims; and longshoremens.
 - (A) The EAI shall be scheduled within four weeks of the first benefit payment to a claimant.
 - (B) Each claimant reporting for EAI shall be required to present a valid form of identification to DWS or their

designee to establish their availability for work as required under G.S. 96-14.9. Valid identification shall be identification issued at the state or federal level and acceptable for Employment Verification (I-9) purposes, and includes the following:

- (i) driver's license;
- (ii) military identification;
- (iii) United States Passport;
- (iv) passport card;
- (v) trusted traveler cards such as the NEXUS SENTRI and FAST CARDS issued by the U.S. Department of Homeland Security;
- (vi) Permanent Resident Card (green card); and
- (vii) Native American tribal identification card.

(C) DWS shall notify each claimant receiving an initial EAI of the date, time, and location by mail, at least 14 days in advance of the EAI.

(c) Each claimant attending an EAI shall present his or her record of work in order to receive unemployment insurance services at a DWS office.

(d) Each claimant shall actively seek suitable work as required under G.S. 96-14.9 and 20 C.F.R. 604.5 to receive unemployment benefits.

- (1) Work registration at www.NCWORKS.gov alone shall be insufficient to establish that a claimant is actively seeking work.
- (2) Each claimant shall seek work on their own behalf.
- (3) Restrictions as to salary, hours, or working conditions that are inconsistent with the labor market pursuant to the factors outlined in G.S. 96-14.9(f) shall indicate that a claimant is not making a reasonable search for suitable work.

*History Note: Authority G.S. 96-4; 96-14.9; 96-14.14; 96-15;
20 CFR 604;
Eff. July 1, 2015.*

04 NCAC 24B .0302 RECORD OF WORK AND WAGES OF CLAIMANTS

(a) Each claimant who has registered for work and filed a claim for unemployment insurance benefits shall keep a record of any work performed during any day within a benefit period. Each claimant shall record all work performed, regardless of whether the work constitutes employment as defined in G.S. 96-1(12).

- (b) The record of work shall include the:
- (1) name and address of each individual or entity for whom the claimant worked;
 - (2) total remuneration earned; and
 - (3) the number of hours worked during the benefit period.

(c) Each claimant shall submit the record of work to DES when requested. DES shall request the record of work under the following conditions:

- (1) when a claimant's availability for work is questioned by failing to meet any of the requirements under G.S. 96-14.9(d);
- (2) whenever an inconsistency arises between what a claimant asserts in a work search report and what an employer reports to DES;
- (3) during a claimant's eligibility for benefits review;
- (4) during an audit; or
- (5) when a claimant reports to a DWS office for an Employability Assessment Interview.

(d) Each interstate claimant shall transmit a copy of their record of work, including photo identification to DES via facsimile or mail as provided in 04 NCAC 24A .0104(u).

History Note: Authority G.S. 96-4; 96-15; 20 CFR 604; Eff. July 1, 2015.

04 NCAC 24B .0401 DETERMINATIONS

Each adjudicator shall render a written determination resolving any issues related to the claim or protest under G.S. 96-15, which shall include:

- (1) each issue or question involved;
- (2) the docket number of the case;
- (3) the resolution of each issue;
- (4) the citation of the provision of law applied to reach the resolution of each issue or question;
- (5) the parties' rights to file an appeal of the determination;
- (6) the statutory time period under G.S. 96-15(b)(1) within which an appeal shall be filed;
- (7) instructions for requesting an in-person hearing;
- (8) information on filing an appeal of the determination by mail, facsimile, or email, as set forth in 04 NCAC 24A .0104; and
- (9) notice that claims filed on or after June 30, 2013 are subject to repayment of overpayments, including those resulting from any decision that is later reversed on appeal.

History Note: Authority G.S. 96-4; 96-15; 20 CFR 602; Eff. July 1, 2015.

04 NCAC 24B .0402 REQUEST FOR SEPERATION INFORMATION FROM EMPLOYER

(a) In connection with a claim filed by a claimant, DES shall require the claimant's last employer to provide complete information (sufficient facts) to make a correct initial determination of the claimant's eligibility for unemployment insurance benefits without having to contact the employer to obtain additional information.

(b) Employers shall submit a Form NCUI 500AB consistent with G.S. 96-15(b)(2) that shall be provided to the employer's last

known address as reflected in its official records and include the following information:

- (1) last and first dates of employment;
- (2) the claimant's pay rate;
- (3) the gross amount of the vacation, severance, and any sick pay;
- (4) the beginning and ending dates covered by the separation payments;
- (5) if the claimant quit their job:
 - (A) a copy of the employee's resignation letter if one exists.
 - (B) the reason(s) for the resignation; or
- (6) if the claimant was discharged:
 - (A) the reason(s) for the separation and supporting documentation and evidence;
 - (B) copies of any employee policies, warnings, handbooks, documents, or contracts signed by the employee that pertain to the employee's discharge; or
- (7) if the claimant is still employed:
 - (A) conditions under which the employee was hired;
 - (B) the number of hours per week that the employee is currently working;
 - (C) any reduction of the employee's work hours, the date the reduction took place, reasons for the reduction, and if temporary, any date when the employee may be allowed to return to work; or
- (8) if the employee was separated due to an inability to perform job duties and was employed less than 100 days, an explanation describing the inability to perform the job duties; and
- (9) any separation information requested by DES, or which the employer should expect is necessary for DES to make a correct initial determination of the claimant's eligibility for unemployment benefits.

(c) Employers may respond to requests for separation information by mail or fax as provided under 04 NCAC 24A .0104, or by submitting their responses at www.ncesc.com through the employer portal.

History Note: Authority G.S. 96-4; 96-11.3; 96-11.4; 96-15; 20 U.S.C. 3303; Eff. July 1, 2015.

04 NCAC 24B .0501 NOTICE TO EMPLOYER OF LABOR DISPUTE CLAIM

When a claimant files a claim for benefits that allegedly involves unemployment due to a labor dispute, DES shall notify the employer of the claim filed within 30 days of receipt.

History Note: Authority G.S. 96-4; 96-15; Eff. July 1, 2015.

04 NCAC 24B .0502 EMPLOYER RESPONSE REQUIREMENT

(a) Within five days of receiving notice that a claim was filed involving unemployment due to a labor dispute, the employer shall provide the UI Director or designee, with a list containing:

- (1) the names of all affected employees;
- (2) the complete mailing addresses, including zip codes of all affected employees; and
- (3) the social security numbers of all affected employees.

(b) The employer shall also provide the UI Director or designee, with:

- (1) notice of the first day of unemployment;
- (2) the reason for the labor dispute; and
- (3) the place where the labor dispute is or was in progress.

History Note: Authority G.S. 96-4; 96-14.7; 96-15; Eff. July 1, 2015.

04 NCAC 24B .0503 DETERMINATION OF LABOR DISPUTE AND REFERRAL FOR HEARING

(a) If an issue of unemployment due to a labor dispute exists, the General Counsel shall refer the matter in writing to DES's Board of Review or designee for hearing.

(b) Hearings involving the issue of unemployment due to a labor dispute shall be heard upon order of the Board of Review or designee and conducted pursuant to 04 NCAC 24D .1103.

History Note: Authority G.S. 96-4; 96-14.7; 96-15; Eff. July 1, 2015.

04 NCAC 24B .0504 ISSUES

The issues to be decided in labor dispute hearings may include the following:

- (1) whether a labor dispute existed, and if so, identification of the beginning and ending dates of the labor dispute, or whether the dispute is ongoing;
- (2) the reasons for the labor dispute;
- (3) whether any individual is disqualified to receive benefits as provided in G.S. 96-14.7(b); and
- (4) any other issue ordered by DES's Board of Review or designee, which shall be provided to each party in writing.

History Note: Authority G.S. 96-4; 96-14.7; 96-15; Eff. July 1, 2015.

04 NCAC 24B .0601 NOTICE REQUIREMENT FOR OVERPAYMENT

A determination finding an overpayment of benefits to a claimant shall contain:

- (1) the date the determination was mailed to the claimant;
- (2) reasons for the overpayment;

- (3) the statutory authority under G.S. 96-18(g)(3) for seeking repayment of the overpayment;
- (4) notice that the claimant may protest the overpayment determination and instructions on how to protest the overpayment determination as provided in 04 NCAC 24A .0104(c); and
- (5) notice that the claimant may file a request for waiver of the overpayment in the same manner as prescribed under Item (4) of this Rule.

History Note: Authority G.S. 96-4; 96-18; Eff. July 1, 2015.

04 NCAC 24B .0602 BILL FOR REPAYMENT OF OVERPAYMENT

(a) If a claimant does not protest an overpayment determination within 30 days, the determination of overpayment shall become final. DES shall mail a bill to the claimant for the amount of the overpayment owed after a final determination or decision.

(b) The first bill shall contain:

- (1) the total amount of the overpayment; and
- (2) notice that repayment of an overpayment determined to be fraudulent shall not be waived.

History Note: Authority G.S. 96-4; 96-18; Eff. July 1, 2015.

04 NCAC 24B .0603 WAGE AUDIT NOTICE FOR EMPLOYERS

(a) DES shall mail a Wage Audit Notice to an employer requesting information for investigating a potential claimant overpayment whenever a discrepancy or question to that claimant's eligibility for unemployment benefits exists. The Wage Audit Notice shall:

- (1) identify the claimant whose weekly earnings information is sought;
- (2) request the employer provide weekly earnings information during the specified time period; and
- (3) any other information necessary to investigate the claimant's overpayment status.

(b) The employer shall respond to the Wage Audit Notice request within 15 days by mail at NC Division of Employment Security, Benefits Integrity Unit, Post Office Box 25903 Raleigh, NC 27611 or internet at www.ncesc.com.

History Note: Authority G.S. 96-4; 96-18; Eff. July 1, 2015.

04 NCAC 24B .0701 WAIVER OF REPAYMENT OF NONFRAUDULENT OVERPAYMENT

(a) Claimants may petition DES for a waiver of non-fraud unemployment insurance overpayments as provided in Rule .0601 of this Subchapter.

(b) A request for waiver of overpayment shall be accompanied by all evidence or documents that the claimant wishes DES to consider in deciding whether to grant the waiver and a written explanation of the basis of the waiver request.

(c) DES shall not consider any petition for waiver of overpayment while an appeal of the overpayment is pending.

History Note: Authority G.S. 96-4; 96-15; 96-18;
Eff. July 1, 2015.

04 NCAC 24B .0702 WAIVER OF REPAYMENT OF FRAUDULENT OVERPAYMENT

DES shall not waive repayment of overpayment of any State or federal unemployment insurance benefits caused by a claimant's fraud as defined under G.S. 96-18.

History Note: Authority G.S. 96-4; 96-18;
Eff. July 1, 2015.

04 NCAC 24B .0703 DECISION AND CONSIDERATION OF WAIVER PETITIONS

(a) The Assistant Secretary or designee shall consider the degree of the claimant's fault in creating the overpayment and any other matters tending to show that collection of the overpayment would be against equity and good conscience. Except as provided in Rule .0704 of this Section, a claimant's present economic circumstances or present ability to repay is not relevant to whether a waiver request should be granted.

(b) The Assistant Secretary or designee shall render a written decision on the waiver request.

History Note: Authority G.S. 96-4; 96-18;
Eff. July 1, 2015.

04 NCAC 24B .0704 FACTORS IN DETERMINING EQUITY AND GOOD CONSCIENCE

(a) DES shall consider the following factors:

- (1) whether the overpayment resulted from a decision on appeal and whether there was notice to the claimant that the case had been appealed;
- (2) whether there has been an affirmative finding under Subparagraph (a)(1) of this Rule regarding the claimant and the overpayment; and
- (3) whether recovery of the overpayment would cause extraordinary and lasting financial hardship to the claimant resulting in the claimant's loss of or inability to obtain minimal necessities of food, medicine, and shelter; and whether the financial hardship as described may be expected to last for the foreseeable future.

(b) In applying this hardship test in the case of attempted recovery by repayment, a substantial period of time shall be 180 days, and the foreseeable future shall be no less than 360 days.

(c) In applying this hardship test in the case of proposed recoupment from other benefits, a substantial period of time and the foreseeable future is the longest potential period of benefit entitlement at the time of the request for a waiver of repayment.

(d) In making financial hardship determinations, DES shall consider all potential income sources of the claimant, the

claimant's family, and all cash resources available to the claimant and the claimant's family in the time period being considered.

History Note: Authority G.S. 96-4; 96-18;
Eff. July 1, 2015.

04 NCAC 24B .0705 FACTORS IN DETERMINING FAULT

(a) In determining whether fault exists in any overpayment of state or federal compensation, the following factors shall be considered:

- (1) whether the claimant made or caused another to make a material statement or representation in connection with the application for federal compensation that resulted in the overpayment, and whether the claimant knew or should have known that the statement or representation was inaccurate;
- (2) whether the claimant failed or caused another to fail to disclose or omit a material fact in connection with an application for the compensation that resulted in the overpayment, and whether the claimant knew or should have known that the fact was material;
- (3) whether the claimant knew or could have been expected to know that he or she was not entitled to the compensation payment; and
- (4) whether there was a determination that the overpayment was the result of fraud as defined under G.S. 96-18.

(b) If any factor in Paragraph (a) of this Rule is confirmed, recovery of the overpayment shall not be waived.

History Note: Authority G.S. 96-4; 96-18;
Eff. July 1, 2015.

04 NCAC 24B .0801 DUTIES OF THE REQUESTING STATE

The requesting state shall:

- (1) send the recovering state a request for overpayment recovery assistance that shall include:
 - (a) certification that the overpayment is collectible under the requesting state's law;
 - (b) certification that the determination is final and that any rights to postpone recoupment of the benefits are exhausted or have expired;
 - (c) a statement of whether the state is participating in a cross-program offset by agreement with the U.S. Secretary of Labor; and
 - (d) a copy of the initial overpayment determination and a statement of the outstanding balance;
- (2) send notice of the request to the claimant pursuant to Rule .0802 of this Section;

- (3) send the recovering state a new outstanding overpayment balance whenever the requesting state receives any amount of repayment from a source other than the recovering state (e.g., interception of tax refund); and
- (4) send notice of the request by a method approved by the United States Department of Labor (USDOL).

History Note: Authority G.S. 96-4; 96-18; Eff. July 1, 2015.

04 NCAC 24B .0802 DUTIES OF RECOVERING STATE

In recovering state or federal benefit overpayments, the recovering state shall:

- (1) issue an overpayment recovery determination to the claimant that shall include the following:
 - (a) statutory authority for the offset;
 - (b) identity of the state requesting recoupment;
 - (c) date of the original overpayment determination;
 - (d) type of overpayment, such as fraud or non-fraud;
 - (e) program type;
 - (f) total amount of offset; and
 - (g) amount to be offset weekly;
- (2) offset any benefits to be paid for each week claimed, in the amount permitted by that state's law;
- (3) prepare and forward a check payable to the requesting state, showing the amount recovered, except as provided in Rule .0803 of this Section;
- (4) retain a record of the overpayment balance in its files no later than the exhaustion of benefits, end of the benefit year, exhaustion or end of an additional or extended benefit period, or other extension of benefits, whichever is later; and
- (5) not redetermine the original overpayment determination.

History Note: Authority G.S. 96-4; 96-18; Eff. July 1, 2015.

04 NCAC 24B .0803 DUTIES OF PAYING STATE

(a) In recovering outstanding overpayments in the transferring state, the paying state shall:

- (1) offset any outstanding overpayment it receives from a transferring state prior to honoring any request from any other Interstate Reciprocal Overpayment Recovery Arrangement (IRORA) participating state; and
- (2) credit deductions against the benefits paid statement, or forward a check to the transferring state as described Rule .0802 of this Section.

(b) This Rule incorporates the National Association of State Workforce Agencies' Interstate Reciprocal Overpayment Recovery Arrangement (2013) by reference and includes subsequent amendments and editions of the referenced material in accordance with G.S. 150B-21.6. Copies of the incorporated material are located at 700 Wade Avenue, in Raleigh, North Carolina, and may be obtained by request at no cost to the public by contacting DES as specified under 04 NCAC 24A .0201.

History Note: Authority G.S. 96-4; 96-18; Eff. July 1, 2015.

04 NCAC 24B .0804 WITHDRAWALS OF COMBINED WAGE CLAIMS

(a) Withdrawal of a combined wage claim after benefits have been paid shall only be permitted where the combined wage claimant has repaid benefits overpaid, or authorizes the new liable state to offset the overpayment.

- (1) The paying state shall issue an overpayment determination and forward a copy, together with an overpayment recovery request and an authorization to offset, with the initial claim to the new liable state.
- (2) The recovering state, which is the new liable state, shall:
 - (A) offset the total amount of any overpayment resulting from withdrawal of a combined wage claim before releasing any payments to the claimant;
 - (B) offset the total amount of any overpayment resulting from withdrawal of a combined wage claim before honoring a request from any other participating state under IRORA;
 - (C) provide the claimant with written notice for the amount offset; and
 - (D) prepare and forward a check representing the amount recovered to the requesting state as described Rule .0802(a) of this Section.

(b) This Rule incorporates the National Association of State Workforce Agencies' Interstate Reciprocal Overpayment Recovery Arrangement (2013) by reference and includes subsequent amendments and editions of the referenced material in accordance with G.S. 150B-21.6. Copies of the incorporated material are located at 700 Wade Avenue, in Raleigh, North Carolina, and may be obtained by request at no cost to the public by contacting DES as specified under 04 NCAC 24A .0201.

History Note: Authority G.S. 96-4; 96-18; Eff. July 1, 2015.

04 NCAC 24B .0901 SETOFF DEBT COLLECTION ACT HEARINGS

Hearings pursuant to G.S. 105A-8(B) shall be conducted consistent with the procedures prescribed in 04 NCAC 24C .0209.

History Note: Authority G.S. 96-4; 105A-8(b); Eff. July 1, 2015.

04 NCAC 24B .1001 NOTICE OF REFERRAL

(a) Consistent with 31 U.S.C. 3716, DES shall notify each claimant by mail of its intent to refer the debt to the Treasury Offset Program (TOP) at least 60 days before submitting the debt to TOP.

(b) Each notice shall include:

- (1) the claimant's name;
- (2) the type of debt;
- (3) the total amount of the referred debt;
- (4) the total amount of fees, as applicable;
- (5) the amount of assessed penalties, as applicable;
- (6) a citation to the legal authority that permits collection of the debt through TOP;
- (7) a clear statement of DES's intention to collect the debt through administrative offset;
- (8) a statement that the claimant may request a copy of DES's records that support the debt pursuant to Subchapter 04 NCAC 24A;
- (9) a statement of the claimant's right to request that DES reevaluate the debt;
- (10) the time period in which request for reevaluation shall be made;
- (11) a statement of the claimant's right to request to enter into a written repayment agreement with DES;
- (12) a mailing address to which payments shall be sent;
- (13) a mailing address and facsimile number to request a reevaluation of the debt;
- (14) a telephone number to seek information regarding the notice;
- (15) the date that the notice was mailed to the claimant; and
- (16) instructions for paying the debt.

(c) Claimants choosing to repay the debt after receiving notice shall make payment payable to Division of Employment Security and mail to Benefit Payment Control (BPC) Unit, Post Office Box 25903, Raleigh, NC 27611. or remit by credit card on DES's website at www.ncesc.com, or by calling BPC at (919) 707-1338

History Note: Authority G.S. 96-4; 96-18; 31 CFR 285; 26 U.S.C. 6402; 31 U.S.C. 3716; Eff. July 1, 2015.

04 NCAC 24B .1002 REEVALUATION OF DEBT

(a) A claimant requesting a reevaluation of their debt shall submit a written request to DES's Benefits Integrity Unit by mail to Post Office Box 25903, Raleigh, NC 27611-5903, or facsimile to (919) 733-1369.

- (1) The written request shall explain why the debt should not be referred to the Treasury Offset Program (TOP) for collection.

(2) The written request shall be accompanied by documents or other clear and convincing evidence that shows:

- (A) the identity of the individual to whom the debt is assigned is incorrect; and
- (B) the amount of the debt is inaccurate.

(b) The Assistant Secretary or designee shall consider the evidence submitted by the claimant.

(c) The Assistant Secretary or designee shall issue a written decision on the request for reevaluation. The written decision shall be mailed to the claimant and include the following:

- (1) whether the debt shall be referred to TOP; and
- (2) reasons for the decision.

History Note: Authority G.S. 96-4; 96-18; 31 CFR 285; 26 U.S.C. 6402; 31 U.S.C. 3716; Eff. July 1, 2015.

04 NCAC 24C .0101 APPEAL DATE ESTABLISHED BY TESTIMONY

(a) A party shall be allowed to establish an appeal date earlier than a postal meter date, or the date of a document only in the face of clear and convincing evidence.

(b) When a party alleges filing an appeal that DES never received, the party shall present clear and convincing evidence of a timely filing, which may be corroborated by testimony or physical evidence linked to the appeal in question.

(c) The Appeals Referee shall allow cross-examination to establish timeliness of an appeal consistent with 04 NCAC 24A .0106.

History Note: Authority G.S. 96-4; 96-15; Eff. July 1, 2015.

04 NCAC 24C .0102 EXCEPTION TO TIMELINESS REQUIREMENT

Timeliness sanctions shall be waived when DES or an agent state representative gives misleading information on appeal rights to a party, if the party:

- (1) establishes what he or she was told was misleading and how he or she was misled;
- (2) identifies, if possible, the individual who misled him or her; and
- (3) no written instructions contrary to the misleading information were provided by DES to the party with service of the order being appealed.

History Note: Authority G.S. 96-4; 96-15; Eff. July 1, 2015.

04 NCAC 24C .0103 BASE PERIOD EMPLOYER DENIED NONCHARGING

A base period employer who was not the claimant's last employer may file an appeal from a determination denying noncharging of benefits to its account as provided in 04 NCAC 24D .0200. The claimant is not a party with appeal rights in this appeal.

History Note: Authority G.S. 96-4; 96-11.3; 96-11.4; Eff. July 1, 2015.

04 NCAC 24C .0104 EMPLOYER PARTY TO DETERMINATION

An employer may file an appeal from a determination that affects a claimant's entitlement to benefits if the employer is a party to the determination. Only one employer shall be a party with appeal rights to a proceeding.

- (1) An employer named as the last employer on an initial claim shall be a party to a determination ruling on the merits of the claimant's separation from employment and other specific issues raised by the employer regarding the claimant's entitlement to benefits.
- (2) An employer named as the last employer on an additional or continued claim shall be a party to a determination ruling on the merits of that additional or continued claim regarding separation from employment or other specific issues raised by the employer if the employer:
 - (A) was the employer named as the last employer on the claimant's initial claim; or
 - (B) is a base period employer whose account has been ruled subject to charging of benefits.
- (3) A reimbursing employer named as the last employer on an additional or continued claim shall be a party to a determination ruling on the merits of that additional or continued claim regarding separation from employment or other specific issues raised by the employer if the employer:
 - (A) was the employer named as the last employer on the claimant's initial claim; or
 - (B) is a base period employer.
- (4) If an employer, during a claimant's benefits year, provides DES with information that raises specific issues, including a potential disqualification, ineligibility, allegations of fraud, or other issues that affect a claimant's entitlement to benefits, the employer shall be a party with appeal rights to a determination ruling on the merits of the specific issue raised by the employer if the employer is:
 - (A) named as the last employer on the claimant's initial claim;
 - (B) a base period taxed employer whose account has been ruled subject to charging of benefits, even if that employer was named as the last employer on the claimant's initial claim and did not timely respond to notice of the claimant's initial claim; or
 - (C) a base period reimbursing employer.

- (5) An employer against whom a claimant has alleged entitlement to additional base period wages shall be a party with appeal rights to that issue.

History Note: Authority G.S. 96-4; 96-11.3; 96-11.4; 96-15; Eff. July 1, 2015.

04 NCAC 24C .0201 APPEARANCE BY PARTY

An appearance by a party to an appeals hearing includes offering testimony, questioning witnesses, and presenting oral argument.

- (1) A party shall appear by telephone when the party participates in the telephone conference call with the Appeals Referee on the date and time of the hearing and participates in the proceedings.
- (2) A party shall appear in person at the location on the date and times scheduled for the in-person hearing, and participate in the proceedings.

Mere submission of written documents or observation of the proceedings does not constitute an appearance.

History Note: Authority G.S. 96-4; 96-15; Eff. July 1, 2015.

04 NCAC 24C .0202 PRESENTING AND SCHEDULING APPEALED CLAIMS

A party wishing to appeal from an adjudicator's determination shall file an appeal by mail, facsimile, or email pursuant to Rule 04 NCAC 24A .0104(b).

History Note: Authority G.S. 96-4; 96-15; Eff. July 1, 2015.

04 NCAC 24C .0203 CONTENTS OF APPEAL TO APPEALS SECTION

A party's written appeal shall contain the following:

- (1) the date of the appeal;
- (2) the identity of the determination being appealed;
- (3) a clear statement of the party's intent to appeal; and
- (4) the name of the party appealing.

History Note: Authority G.S. 96-4; 96-15; Eff. July 1, 2015.

04 NCAC 24C .0204 APPEALS HEARING NOTICE

(a) The Appeals Section shall mail notice of the hearing to each party at least 14 days before the hearing date.

(b) Notice of the hearing shall include:

- (1) the determination appealed;
- (2) the appealing party;
- (3) the time of the hearing;
- (4) the date of the hearing;
- (5) if requested at the time of filing the appeal, the physical location of an in-person hearing;

- (6) the telephone number of each party for telephone hearings;
- (7) each issue, with statutory reference, to be heard and decided;
- (8) the name and contact information of the designated Appeals Referee;
- (9) the manner by which witnesses may offer evidence and participate in the hearing;
- (10) each party's right to legal representation;
- (11) instructions for requesting a rescheduling of the hearing;
- (12) each party's right and instructions for requesting the issuance of a subpoena for the production of records or individuals to appear to testify;
- (13) instructions on how to request an in-person hearing; and
- (14) instructions on how to give evidence for a hearing.

(c) The determination, the written appeal, and any additional documents provided to the Appeals Section by either party, shall accompany the hearing notice.

History Note: Authority G.S. 96-4; 96-15; Eff. July 1, 2015.

04 NCAC 24C .0205 TELEPHONE HEARINGS

- (a) Hearings shall be conducted by telephone conference call, unless a request is made for an in-person hearing at the time the appeal is filed or an objection is made pursuant to Rule .0206 of this Section.
- (b) In cases of telephone hearings, the Appeals Section shall provide a Telephone Hearing Questionnaire for a party to use to submit each telephone number to be called by the Appeals Referee for the hearing. In the absence of the submission by a party of any telephone number to be called for the hearing, the Appeals Referee shall call a party at the telephone number listed on the hearing notice.

History Note: Authority G.S. 96-4; 96-15; Eff. July 1, 2015.

04 NCAC 24C .0206 IN-PERSON HEARINGS

- (a) A party may request an in-person hearing:
 - (1) at the time the appeal is filed; or
 - (2) by filing a written objection to the telephone conference call to:
 - (A) the Appeals Section as provided for in 04 NCAC 24A .0104; or
 - (B) the designated Appeals Referee using the contact information provided on the hearing notice.
- (b) If travel is required to conduct the in-person hearing, the objecting party shall be required to travel to a location convenient to the non-objecting party and where the Division regularly conducts in-person hearings as determined by the Appeals Referee based on each party's location.

History Note: Authority G.S. 96-4; 96-15; Eff. July 1, 2015.

04 NCAC 24C .0207 RESCHEDULING A HEARING

(a) Either before or during a hearing, an Appeals Referee, on his or her own motion, or on the motion of a party, may continue or adjourn a hearing for "good cause" in accordance with 04 NCAC 24A .0105. In addition to the reasons set forth in G.S. 96-15(d1), a continuance or an adjournment, may be granted at the request of a party due to:

- (1) illness of the party;
- (2) death in the immediate family of the requesting party;
- (3) a need to obtain an interpreter or translator;
- (4) a religious observance;
- (5) jury duty;
- (6) actively seeking legal representation;
- (7) court appearance unrelated to DES;
- (8) active military duty;
- (9) scheduling conflict created by new employment; or
- (10) to accommodate the business needs of the employer.

(b) Before a hearing, requests for a continuance of the hearing shall be made to the designated Appeals Referee orally or in writing. The request for a continuance of a hearing shall specifically state and explain the reasons for the request.

History Note: Authority G.S. 96-4; 96-15; Eff. July 1, 2015.

04 NCAC 24C .0208 DISQUALIFICATION OF APPEALS REFEREE

- (a) An Appeals Referee shall be free of any personal interest or bias in the appeal over which he or she is presiding.
- (b) An Appeals Referee shall not participate in hearing an appeal in which that Appeals Referee has a personal interest in the outcome of the appeals decision.
- (c) An Appeals Referee may recuse themselves from a hearing to avoid the appearance of impropriety or partiality.
- (d) A pre-hearing challenge to the impartiality of a designated Appeals Referee shall be in writing, addressed to the Chief Appeals Referee, and shall be heard and decided by the Chief Appeals Referee or designee.
- (e) The Chief Appeals Referee or designee's decision on any pre-hearing challenge to the impartiality of an assigned Appeals Referee shall be in writing and mailed to the parties.

History Note: Authority G.S. 96-4; 96-15; 20 CFR 650.2; Eff. July 1, 2015.

04 NCAC 24C .0209 CONDUCT OF HEARINGS

- (a) Consistent with G.S. 96-15(f), all hearings shall be conducted in a manner to preserve the substantial rights of the parties.
 - (1) The parties to an appeal before an Appeals Referee have the right to present relevant and material evidence as determined by the Appeals Referee.

- (2) The Appeals Referee may ask questions to develop the record as to the relevant facts, circumstances, and issues presented at the hearing.
- (3) The Appeals Referee may examine parties and witnesses, and shall allow cross-examination to the extent necessary to afford the parties due process.
- (4) All issues relevant to the appeal shall be considered and ruled upon.

(b) The Appeals Referee shall give each party 10 minutes from the time of the scheduled hearing to appear for the hearing. If the appealing party fails to appear at the hearing and a continuance had not been previously granted the Appeals Referee shall issue an Appeals Decision dismissing the appeal.

(c) A party desiring to introduce documents or other evidence at a hearing shall provide an authenticated copy plus one copy for the Appeals Referee to include in the official record, and a copy to each party to the proceeding. Documents or other evidence shall be provided to the opposing party prior to the hearing.

(d) A party offering numerous documents into evidence shall prepare a list of documents in the order of their presentation. The list shall be provided to the Appeals Referee and opposing party before the hearing, to become part of the official hearing record.

(e) Official notice may be taken of all facts for which judicial notice may be taken and of other facts within the specialized knowledge of the DES. The official notice and its source shall be stated on the record and made known to the parties at the earliest practicable time. A party shall be given an opportunity to dispute the noticed fact by argument and submission of evidence.

History Note: Authority G.S. 96-4; 96-15; 20 CFR 650.2; Eff. July 1, 2015.

04 NCAC 24C .0210 HEARSAY

(a) Hearsay evidence shall be accepted as credible evidence only when it:

- (1) falls within the statutory or common law exceptions to the hearsay rules; or
- (2) has an equivalent indicia of trustworthiness as competent evidence; and
- (3) is more probative on the point for which it is offered than any other evidence which the party offering the hearsay could reasonably be expected to procure.

(b) The Appeals Referee may permit the parties to file an affidavit at the time of the hearing in the same manner as applicable to other hearsay evidence.

History Note: Authority G.S. 8C, Art. 8; 96-4; 96-15; Eff. July 1, 2015.

04 NCAC 24C .0211 CONTROLLED SUBSTANCE RESULTS

In lieu of live testimony from a laboratory representative at a contested claims hearing, an affidavit from an authorized representative of the laboratory may be presented to prove controlled substance examination results, chain of custody, or

compliance with all testing or retesting required by federal or state law.

- (1) When a party desires to introduce the affidavit at the hearing, a copy of the affidavit shall be received by the party against whom the affidavit will be offered at least two days before the hearing.
- (2) If the party who desires to introduce the affidavit is unable, despite reasonable efforts, to accomplish the required service within the time specified, the Appeals Referee may adjourn or continue the hearing to allow such service to be accomplished. However, the Appeals Referee shall not continue the hearing if the party against whom the affidavit is offered has refused to accept service or has taken other steps to avoid or delay receipt of the affidavit.
- (3) At the hearing, the party shall offer an authenticated copy of the affidavit as an exhibit.
- (4) If the party against whom the affidavit is offered objects to the entry of the affidavit into the official record, the objecting party may request an adjournment or continuance of the hearing to subpoena the author of the affidavit. The affidavit's author shall be permitted to testify by telephone at the reconvened hearing.
- (5) Once the affidavit is made a part of the official record of evidence compiled by the Appeals Referee, the Appeals Referee may in their discretion, base findings of fact on the affidavit.
- (6) The results of the controlled substance examination and compliance with any applicable statutory or regulatory procedural requirements shall be deemed proven if the claimant admits or stipulates to them during the hearing or by affidavit.

History Note: Authority G.S. 95-230; 95-231; 95-232; 95-233; 95-234; 96-4; 96-15; 96-235; Eff. July 1, 2015.

04 NCAC 24C .0212 CONTENTS OF APPEALS DECISION

- (a) The Appeals Decision shall include:
- (1) the names of the individuals present for the hearing;
 - (2) findings of fact necessary for a resolution of the appeal;
 - (3) the applicable statutory provisions;
 - (4) conclusions of law;
 - (5) the name of the Appeals Referee who conducted the hearing and rendered the decision; and
 - (6) notice of each party's right to file an appeal of the Appeals Decision and the time period for filing an appeal.

History Note: Authority G.S. 96-4; 96-15;

Eff. July 1, 2015.

04 NCAC 24C .0301 ADMINISTRATIVE PROCEEDINGS

- (a) An individual who is a party to a proceeding may represent himself or herself before an Appeals Referee.
- (b) A partnership or association may be represented by any of its members.
- (c) A corporation may be represented by an officer.
- (d) Any party may be represented by a legal representative as defined in 04 NCAC 24A .0105.

History Note: Authority G.S. 84; 96-4; 96-15; 96-17; Eff. July 1, 2015.

04 NCAC 24C .0302 NOTICES AND SERVICE TO PARTY

- (a) Notices or certification of legal representation shall be in writing and presented to the Appeals Referee to become part of the official record, and shall contain:
 - (1) the name of the supervising attorney;
 - (2) the name of the person being supervised;
 - (3) the supervising attorney's active North Carolina State Bar number; and
 - (4) the phone and address information of the supervising attorney.
- (b) When a party has a legal representative, all documents or information required to be provided to the party shall only be provided to the legal representative, unless otherwise instructed on the record during the hearing. An address provided to an Appeals Referee for mailing of an Appeals Decision does not constitute a change of address with DES as set forth in 04 NCAC 24A .0102.

History Note: Authority G.S. 84; 96-4; 96-15; 96-17; Eff. July 1, 2015.

04 NCAC 24C .0401 ISSUANCE OF SUBPOENAS

- (a) Subpoenas to compel the attendance of witnesses and the production of records for any appeal hearing may be issued at the direction of the designated Appeals Referee.
 - (1) A subpoena may be issued at the request of a party or on motion of the Appeals Referee.
 - (2) Any documentation showing service of the subpoena shall become part of the official hearing record.
 - (3) Any request for a subpoena shall be in writing, sent to the Appeals Referee, and shall include:
 - (A) the name of the party requesting the subpoena;
 - (B) the claimant's name;
 - (C) the docket number of the case;
 - (D) the name, address, and telephone number of each person sought for appearance at the hearing;
 - (E) the specific identification of any document, recording, or item sought,

- (F) including a detailed description of where the item is located;
- (F) the name and address of the individual or party in possession of any item sought; and
- (G) a statement of why the testimony or evidence to be subpoenaed is necessary for a proper presentation of the case.
- (4) The request shall be granted only to the extent that the items or testimony sought appears relevant to the issues on appeal.

- (b) Legal representatives may issue subpoenas at their own expense only if prior consent is obtained by the designated Appeals Referee.
- (c) Subpoenas shall be issued at least five days before the date of the scheduled hearing.

History Note: Authority G.S. 96-4; 96-15; Eff. July 1, 2015.

04 NCAC 24C .0402 OBJECTION TO SUBPOENA

- (a) Any party or person receiving a subpoena may serve a written objection to the issuance of a subpoena. The objection shall be addressed to the designated Appeals Referee, sent prior to the hearing, and contain the following:
 - (1) the reasons for the objection; and
 - (2) the relief sought by the objecting party.
- (b) The Appeals Referee shall rule on the objection and notify the parties of the ruling before the hearing. The Appeals Referee's ruling shall be in writing or recorded as part of the official hearing record.

History Note: Authority G.S. 96-4; 96-15; Eff. July 1, 2015.

04 NCAC 24C .0501 REQUIREMENTS FOR APPEAL STATEMENT TO BOARD OF REVIEW

- A party shall file a written statement of appeal from an appeals decision to the Board of Review. A written statement of appeal from an Appeals Decision to the Board of Review shall include the following:
 - (1) identify the decision being appealed by the docket number;
 - (2) contain a clear statement of the reasons or grounds for the appeal; and
 - (3) state the name of the party appealing.

History Note: Authority G.S. 96-4; 96-15; Eff. July 1, 2015.

04 NCAC 24C .0502 ACKNOWLEDGMENT OF APPEAL

- (a) The receipt of a party's appeal from an Appeals Decision shall be acknowledged in writing by the Appeals Section and sent to all parties of record.
- (b) The notice acknowledging receipt of an appeal shall inform each party of the following:

- (1) the right to request oral arguments;
- (2) the deadline to request oral arguments;
- (3) the right to submit written arguments regarding the appeal;
- (4) the deadline for submitting written arguments; and
- (5) that the party may submit a written request for a record of the hearing proceeding pursuant to G.S. 96-15(f); and the procedures for obtaining a record of the hearing, including recordings or transcripts.

(c) Records shall be provided in accordance with G.S. 96-4(x) and Section .0200 of 04 NCAC 24A.

History Note: Authority G.S. 96-4; 96-15; 20 CFR 603; Eff. July 1, 2015.

04 NCAC 24C .0503 ORAL ARGUMENTS

(a) Oral arguments shall be granted at the discretion of the Board of Review.

(b) A written request for oral arguments shall include the following:

- (1) be directed to the Board of Review, North Carolina Department of Commerce by mail, facsimile, or email pursuant to 04 NCAC 24A .0104(1);
- (2) be received within 15 days of the date on the notice acknowledging receipt of an appeal from an Appeals Decision; and
- (3) contain a statement that a copy of the request was mailed or personally delivered to the opposing party, if one exists.

(c) If the request is granted, the Board of Review shall give written notice to each interested party to appear before the Board of Review.

(d) Notice to appear before the Board of Review to present oral arguments shall contain:

- (1) the Higher Authority Decision docket number;
- (2) the Lower Appeals Decision docket number;
- (3) the identity of the party requesting oral arguments;
- (4) the right of the non-requesting party to appear and present oral arguments;
- (5) the date and time for oral arguments;
- (6) the physical address where oral arguments are scheduled to be held; and
- (7) each party's right to legal representation.

(e) The notice to appear for oral arguments shall be mailed to each party at least 14 calendar days before the date scheduled for arguments.

(f) Any request to reschedule oral arguments shall be sent by mail, fax, or email to the Board of Review pursuant to 04 NCAC 24A .0104(1), and to each party to the proceeding by mail, fax, or delivery service as defined under 04 NCAC 24A .0105. A request to reschedule oral arguments shall state the reason(s) for the request.

History Note: Authority G.S. 96-4; 96-15;

Eff. July 1, 2015.

04 NCAC 24C .0504 LEGAL REPRESENTATION

(a) An individual who is a party to a proceeding may represent himself or herself before the Board of Review.

(b) A partnership or association may be represented by any of its members.

(c) A corporation may be represented by an officer.

(d) Any party may be represented by a legal representative as defined in 04 NCAC 24A .0105.

(e) Notices or certification of attorney supervision shall be in writing and presented to the Board of Review to become part of the official record and shall contain:

- (1) the name and business address of the supervising attorney; and
- (2) the supervising attorney's active North Carolina State Bar number.

(f) When a party has a legal representative, all documents or information required to be provided to the party shall be provided only to the legal representative, unless otherwise requested in writing to the Board of Review. An address provided to the Board of Review for mailing shall not constitute a change of address with DES for purposes of 04 NCAC 24A .0102.

(g) Any information provided to a party's legal representative shall have the same force and effect as if it had been sent to the party.

History Note: Authority G.S. 96-4; 96-15; 96-17; Eff. July 1, 2015.

04 NCAC 24C .0505 INTRODUCTION OF EVIDENCE IN HIGHER AUTHORITY HEARINGS

A party desiring to introduce documents or other non-testimonial evidence at a de novo hearing shall provide an authenticated copy plus one copy for the Board of Review, or a hearing officer appointed by the Board to include in the official record at the hearing. A copy shall be provided to each party prior to the hearing. Documents or other evidence shall be provided to the opposing party prior to the hearing.

History Note: Authority G.S. 96-4; 96-15; Eff. July 1, 2015.

04 NCAC 24C .0506 CONTENT OF HIGHER AUTHORITY DECISION

The Board of Review shall issue a written Higher Authority Decision that includes the following:

- (1) the names of the members of the Board of Review who participated in the review;
- (2) findings of fact, conclusions of law, and the decision of the Board of Review;
- (3) instructions for filing an appeal of the Higher Authority Decision to the superior court and the date the Higher Authority Decision was mailed;
- (4) instructions for requesting any post-decision relief or reconsideration if applicable under Rule .0601 of this Subchapter; and

- (5) notice that claims filed on or after June 30, 2013 shall be subject to repayment of overpayment of benefits resulting from any decision that is later reversed on appeal.

- (4) claimant's weekly benefit amount and weekly earnings allowance;
- (5) employer's reporting number used to report wages for the claimant;
- (6) base period wages reported by the employer by calendar quarter and dollar amount;
- (7) employer's percentage of total base period wages reported;
- (8) maximum potential charge amount that can be applied to the employer's experience rating account if the claimant exhausts his or her benefits;
- (9) a statement containing the employer's right to protest the notice; and
- (10) the time period within which a protest shall be filed pursuant to G.S. 96-15(b)(2).

History Note: Authority G.S. 96-4; 96-11.4; 96-15; Eff. July 1, 2015.

04 NCAC 24C .0601 POST-DECISION RELIEF

(a) A written request for reconsideration or post-decision relief shall:

- (1) be in the form of a motion or petition, and shall be clearly identified as a Request for Reconsideration or a Motion or Petition for Post-Decision Relief;
- (2) identify the party seeking post-decision relief;
- (3) contain the name of each party, and the docket number of the Higher Authority Decision;
- (4) contain a statement that a copy was mailed or personally delivered to each party to the proceedings; and
- (5) explain the reasons why post-decision relief should be granted.

(b) The written request shall be filed no later than 30 days after the Higher Authority Decision was mailed to each party, and the timeliness requirements of 04 NCAC 24A .0106 apply.

(c) The written request shall be filed with the Board of Review pursuant to 04 NCAC 24A .0104(m).

(d) Any order granting or denying a party's request for post-decision relief shall contain the following notices:

- (1) that a party has a right to petition for judicial review by appealing the original Higher Authority Decision to the superior court; and
- (2) that claims filed on or after June 30, 2013 shall be subject to repayment of overpayment of benefits resulting from any decision that is later reversed on appeal.

History Note: Authority G.S. 96-4; 96-11.4; 96-15; Eff. July 1, 2015.

04 NCAC 24D .0101 NOTICE OF CLAIM TO EMPLOYER

Upon receipt of a claim for benefits filed by a claimant, DES shall notify the claimant's last employer and all base period employers of the claim filed.

History Note: Authority G.S. 96-4; 96-11.4; 96-15; Eff. July 1, 2015.

04 NCAC 24D .0102 NOTICE TO EMPLOYER OF POTENTIAL CHARGES

(a) DES shall notify each employer in writing of potential charges to the employer's account. The notice shall contain the:

- (1) date of the notice;
- (2) claimant's name and social security number;
- (3) date the claimant's benefit year began;

(b) Notice of potential charges to the employer's account shall be provided using the following forms, as applicable:

- (1) Notice of Combined Wage Claim and Potential Charges to Your Account (Form NCUI 551C);
- (2) Notice of Unemployment Claim, Wages Reported and Potential Charges (Form NCUI 551L);
- (3) Notice of Initial Claim and Potential Charges to Reimbursable Employer (Form NCUI 551R);
- (4) Notice of Initial Claim and Potential Charges for Claimants on Temporary Layoff (Form NCUI 551T);
- (5) Reversal of Previously Allowed Noncharging (Form NCUI 553A);
- (6) Reversal of Previously Denied Noncharging (Form NCUI 554);
- (7) Administrative Determination Disallowing Noncharging (Form NCUI 570); or
- (8) List of Charges to Your Account (Form NCUI 626).

History Note: Authority G.S. 96-4; 96-11.1; 96-11.2; 96-11.3; 96-11.4; 96-15; Eff. July 1, 2015.

04 NCAC 24D .0103 REQUIREMENTS FOR FILING PROTESTS

(a) An employer who protests the benefit charges to its account shall make the protest as follows:

- (1) in writing within 14 days of the mailing date of the notice of potential charges;
- (2) by mail to: DES Employer Benefit Charges/Benefit Charges Unit, Post Office Box 25903, Raleigh, North Carolina 27611-5903; or facsimile to 919-733-1126; and
- (3) list all grounds for the protest as prescribed under Rule .0105 of this Section.

(b) Any of the following forms, when completed with the information indicated in Paragraph (a) of this Rule, shall constitute compliance with this Rule:

- (1) Notice of Combined Wage Claim and Potential Charges to Your Account (Form NCUI 551C);

- (2) Administrative Determination Disallowing Noncharging (Form NCUI 570);
- (3) List of Charges to Your Account (Form NCUI 626); or
- (4) Unemployment Tax Rate Assignment (Form NCUI 104).

History Note: Authority G.S. 96-4; 96-11.3; 96-11.4;
Eff. July 1, 2015.

04 NCAC 24D .0104 TIME FOR FILING PROTESTS
The provisions of 04 NCAC 24A .0106 shall apply in determining timeliness of a protest.

History Note: Authority G.S. 96-4; 96-11.3; 96-11.4;
Eff. July 1, 2015.

04 NCAC 24D .0105 GROUNDS FOR PROTEST
An employer shall only file protests for the following reasons:

- (1) clerical errors in the list of charges;
- (2) charges resulting from individuals who were never employed by the employer;
- (3) charges resulting from individuals who remain employed by the employer; or
- (4) errors in adding charges to an incorrect account.

History Note: Authority G.S. 96-4; 96-11.3; 96-11.4; 96-11.5;
Eff. July 1, 2015.

04 NCAC 24D .0106 DES'S RESPONSIBILITIES UPON RECEIPT OF PROTEST
(a) DES shall review the employer's account charges and investigate the accuracy of the charges based on the reasons provided by the employer in the protest.
(b) Upon completion of its review, DES shall issue a written determination of its findings based on the reasons provided by the employer in the protest.

History Note: Authority G.S. 96-4; 96-11.4;
Eff. July 1, 2015.

04 NCAC 24D .0107 DETERMINATION ON GROUNDS CONTAINED IN PROTEST
The determination by DES shall contain:

- (1) notice of whether the relief sought by the employer in the protest was granted or denied;
- (2) any adjustments that have been made to the list of charges if the relief sought in the protest was granted, or the reasons for denial if the relief sought in the protest was denied;
- (3) the date the determination was mailed to the employer;
- (4) the employer's right to appeal the determination consistent with 04 NCAC 24C .0203; and
- (5) the time period within which an appeal shall be filed.

History Note: Authority G.S. 96-4; 96-11.3; 96-11.4;

Eff. July 1, 2015.

04 NCAC 24D .0201 MAKING THE REQUEST FOR NONCHARGING
An employer who requests noncharging of benefit charges shall make the request as follows:

- (1) by stating the reason(s) for the request in writing;
- (2) within 15 days of the mailing date of the notice of potential charges; and
- (3) sent by mail to: DES Employer Benefit Charges/Benefit Charges Unit, Post Office Box 25903, Raleigh, North Carolina 27611-5903; or by facsimile to 919-733-1126.

History Note: Authority G.S. 96-4, 96-11.3, 96-11.4;
Eff. July 1, 2015.

04 NCAC 24D .0202 DETERMINATION ON REQUESTS FOR NONCHARGING
DES shall render a determination in writing as to each request for noncharging. The determination shall contain notice of whether the request for noncharging has been granted or denied.

- (1) Where a request for noncharging is granted, the employer's account shall be protected from benefit charges for benefit payments made after the last day that the claimant worked, based on wages reported by the employer before the claimant separated from the employer.
- (2) Where a request for noncharging is denied, the determination shall contain:
 - (a) the reason(s) for denying the request;
 - (b) the mailing date of the determination;
 - (c) the time period within which a protest of the denial must be filed; and
 - (d) instructions for protesting the denial to the Employer Benefit Charges/Benefit Charges Unit by mail to Post Office Box 25903, Raleigh, North Carolina 27611-5903, or facsimile to (919) 733-1126.

History Note: Authority G.S. 96-4; 96-11.1; 96-11.3; 96-11.4;
Eff. July 1, 2015.

04 NCAC 24D .0203 APPEALING DENIAL OF REQUEST FOR NONCHARGING
(a) The employing unit may file an appeal following an unsuccessful protest of a request for noncharging.
(b) Employers shall direct all appeals from denials of a request for noncharging to the Appeals Section.
The provisions of 04 NCAC 24A .0106 shall apply in determining timeliness of an appeal.
(c) Hearings on the denial of noncharging shall be conducted pursuant to the provisions of 04 NCAC 24C .0209.

History Note: Authority G.S. 96-4; 96-11.3; 96-11.4;
Eff. July 1, 2015.

04 NCAC 24D .0301 ADEQUACY THRESHOLD

(a) An employer who establishes a pattern of failing to provide a timely response or adequate response to the Request for Separation Information (Form NCUI 500AB) under 04 NCAC 24B .0107, shall not be relieved of charges for resulting erroneous unemployment insurance benefit payments.

(b) In determining the timeliness of an employer response, DES shall consider the following:

- (1) whether the response was received within 14 days pursuant to G.S. 96-15; and
- (2) whether the employer had good cause for failing to respond within the 14 day period.

(c) In determining the adequacy of an employer response, DES shall consider the following:

- (1) what information was requested;
- (2) whether the response to the request is sufficient to satisfy the request;
- (3) whether an employer should have provided DES with copies of relevant handbooks, policies, warnings, recordings, documents, or other information related to the claim; and
- (4) whether the employer's responses provide enough facts to enable an authorized DES representative to make a correct legal determination without having to contact the employer to obtain additional information.

(d) An employer who fails to submit timely or adequate responses to two or two-percent, whichever is greater, of the total requests for separation information (Form NCUI 500AB) under G.S. 96-11.4 during the reporting cycle, shall not be relieved of erroneous payments in the following charging cycle as defined under 04 NCAC 24A .0105.

(e) DES shall review each employer's account every reporting cycle to determine whether the employer has a pattern of failing to respond timely or adequately to requests for separation information under G.S. 96-11.4, and shall issue an Adequacy Threshold Determination at the conclusion of the reporting year cycle if the employer has met the criteria defined under Paragraph (d) of this Rule.

History Note: Authority G.S. 96-4; 96-11.3; 96-11.4; 96-15; 23 U.S.C. 3303; Eff. July 1, 2015.

04 NCAC 24D .0302 ADEQUACY THRESHOLD DETERMINATION

(a) The Adequacy Threshold Determination shall include:

- (1) the effect of the determination on the employer's account;
- (2) the reasons for the determination;
- (3) the date the determination was mailed to the employer;
- (4) instructions for protesting the determination; and
- (5) the time period within which a protest must be filed.

(b) An employer may protest its Adequacy Threshold Determination and shall file its written request with DES's Tax Administration Section by mail, facsimile, or email pursuant to 04 NCAC 24A .0104(n).

- (1) The request shall include the following:
 - (A) the name of the employing unit;
 - (B) the address of the employing unit;
 - (C) the account number of the employing unit;
 - (D) a brief statement of the question involved and reasons for the request; and
 - (E) the name, address, and official position of the individual making the request.

- (2) The written request shall be filed within 15 days after the date that the Adequacy Threshold Determination notice was mailed to the employer, and the timeliness requirements of 04 NCAC 24A .0106 shall apply.

(c) Following the written request, the Tax Administration Section shall review the employer's request for review and issue a written determination. The determination shall contain the following:

- (1) notify the employing unit of whether its application was granted or denied;
- (2) indicate whether additional information from the employing unit is required; and
- (3) explain the reasons for the ruling and what information was considered.

(d) No further right of appeal from an unfavorable written determination of a protest of an adequacy threshold determination shall exist unless and until an Adequacy Penalty Determination, as defined under Rule .0303 of this Section is subsequently issued at the conclusion of the employer's charging year.

History Note: Authority G.S. 96-4; 96-11.3; 96-11.4; 23 U.S.C. 3303; Eff. July 1, 2015.

04 NCAC 24D .0303 ADEQUACY PENALTY DETERMINATION

(a) DES shall issue an Adequacy Penalty Determination at the end of each charging year cycle if the employer's account is not relieved of charges for untimely or inadequate responses for particular claims during that charging year cycle, resulting from an adequacy threshold determination in the prior charging year cycle that the employer met or exceeded the adequacy threshold.

(b) The Adequacy Penalty Determination shall include the following:

- (1) a listing containing the specific claims that would have resulted in a relief from charges as a result of erroneous unemployment insurance payments that were later reversed on appeal; and
- (2) instructions for protesting the Adequacy Penalty Determination;

(c) An employer may protest its Adequacy Penalty Determination and shall file its written request with DES's Tax Administration

Section by mail, facsimile, or email pursuant to 04 NCAC 24A .0104(n).

- (1) The request shall include:
 - (A) the name of the employing unit;
 - (B) the address of the employing unit;
 - (C) the account number of the employing unit;
 - (D) a brief statement of the question involved and reasons for the request; and
 - (E) the name, address, and official position of the individual making the request.
- (2) The written request shall be filed within 15 days after the date that the Adequacy Penalty Determination was mailed to the employer, and the timeliness requirements of 04 NCAC 24A .0106 shall apply.
- (3) Following the written request, the Tax Administration Section shall review the employer's request and issue a written determination. The determination shall include the following:
 - (A) notify the employing unit of whether its application was granted or denied;
 - (B) indicate whether additional information from the employing unit is required;
 - (C) explain the reasons for the ruling and identify the information considered; and
 - (D) instructions for appealing the denial to the Board of Review.

History Note: Authority G.S. 96-4; 96-11.3; 96-11.4; 23 U.S.C. 3303; Eff. July 1, 2015.

04 NCAC 24D .0304 APPEALING ADEQUACY PENALTY DETERMINATIONS

- (a) An employer may file an appeal of its Adequacy Penalty Determination and request a hearing. The appeal shall be filed with DES's Tax Administration Section by mail, facsimile, or email pursuant to 04 NCAC 24A .0104(n).
- (b) The appeal shall contain the following:
 - (1) the date of the appeal;
 - (2) the identity of the determination, decision or result being appealed;
 - (3) a clear statement of the party's intent to appeal;
 - (4) reasons for the appeal; and
 - (5) the name of the party appealing the determination, decision, or result.
- (c) The provisions of 04 NCAC 24A .0106 apply in determining the timeliness of an appeal.
- (d) Appeal hearings from Adequacy Penalty Determinations shall be conducted as set forth in Section .1100 of this Subchapter.

History Note: Authority G.S. 96-4; 96-11.3; 96-11.4; 23 U.S.C. 3303; Eff. July 1, 2015.

04 NCAC 24D .0401 VOLUNTARY ELECTION BY EMPLOYERS

- (a) Any employer electing coverage under G.S. 96-9.8 of the Employment Security Law shall make the election by completing the Employer Status Report (Form NCUI 604), available on DES's website at www.ncesc.com.
- (b) The information provided in the Employer Status Report (Form NCUI 604) shall be provided in the same manner as required under Rule .0602 of this Subchapter.
- (c) Voluntary election shall not be granted if DES determines that potential benefit payments would exceed the taxes received from the employer.
- (d) The effective date of coverage is January 1, or the first day of employment in the year in which the voluntary election is made, whichever is later.
- (e) Employers who satisfy the criteria for voluntary election of coverage under this Rule, shall have a contributory unemployment tax account, and shall not have a reimbursable account.

History Note: Authority G.S. 96-4; 96-9.6; 96-9.8; 26 U.S.C. 3309; Eff. July 1, 2015.

04 NCAC 24D .0402 ELECTION TO REIMBURSE IN LIEU OF CONTRIBUTIONS

- (a) An employer electing to pay reimbursements for benefits, rather than contributions who meets the requirements of Rule .0401 of this Section, shall make the election by completing the Employer Status Report (Form NCUI 604) as set forth in Rule .0602 of this Subchapter, and mailing it to DES's Tax Administration at Post Office Box 26504, Raleigh, NC 27611.
- (c) A qualifying employer under G.S. 96-9.6 electing to pay reimbursements for benefits, rather than contributions, shall make the election by writing a letter stating their election to the Tax Administration Section of DES at Post Office Box 26504, Raleigh, NC 27611 within 30 days after the employer receives written notification from the Division that it is eligible to make an election as defined under G.S. 96-9.6.

History Note: Authority G.S. 96-4; 96-9.6; 96-9.8; 26 U.S.C. 3309; Eff. July 1, 2015.

04 NCAC 24D .0403 PAYMENT OF EMPLOYER TAXES

- (a) Taxes shall be due and payable to the DES's administrative office in Raleigh, North Carolina, or to an agent of DES designated to accept payments.
- (b) Tax payments shall be made as follows:
 - (1) electronic check;
 - (2) credit card;
 - (3) Automated Clearing House (ACH) credit;

- (4) business check with funds drawn from a U.S. financial institution;
- (5) cashier's check from a U.S. financial institution; or
- (6) cash.
- (c) Payments shall be made payable to the Division of Employment Security and sent by U.S. mail or delivery service to DES Tax Administration at Post Office Box 26504, Raleigh North Carolina 27611.
- (d) Timeliness of payments shall be determined pursuant to the 04 NCAC 24A .0106.

History Note: Authority G.S. 96-4; 96-9.15; Eff. July 1, 2015.

04 NCAC 24D .0501 RECORDS OF EMPLOYERS

(a) Each employer shall keep accurate employment and payroll records. These records shall be maintained for five years after the calendar year in which wages for services are paid and shall include the following:

- (1) the name and correct address of the employer;
- (2) the name and address of each division, branch, or establishment operated, owned, or maintained by the employer at different locations in North Carolina; and
- (3) the following information for each individual performing services for the employer:
 - (A) the individual's name;
 - (B) the individual's address;
 - (C) the individual's social security number;
 - (i) if an individual performing services for an employer does not have a social security number, the employer shall request that the individual produce a receipt issued by the Social Security Administration, showing that the individual has filed an application for a social security number;
 - (ii) the employer shall copy and retain a copy of the receipt, and the individual must retain the receipt;
- (D) the dates on which the individual performed services for the employer;
- (E) the actual number of hours worked each day and total number of hours worked each week;
- (F) daily attendance record, including times that the individual did not work for reasons other than lack of work;
- (G) the state or states in which the individual performed services;
 - (i) the base of operations if any of the services are performed

- outside North Carolina, and are not incidental to the services performed in North Carolina; or
- (ii) if there is no base of operations, then the place from which services are directed or controlled; and
- (iii) the individual's state of residence;

- (H) the amount of wages paid to the individual for each separate payroll period, if paid weekly, or if not paid weekly, by calendar weeks;
 - (i) date of payment of the wages; and
 - (ii) amounts or remuneration paid to each individual for each separate payroll period other than "wages," as defined in G.S. 96-1(b)(28);
- (I) amounts paid to individuals as allowances or reimbursements for travel or other business expenses, dates of payments, and the amounts of expenditures actually incurred and documented by the individual;
- (J) whether, during any payroll period the individual worked less than full time, and if so, the hours and dates worked;
- (K) reasons for an individual's separation from work;
- (L) any contract between the employer and the worker;
- (M) where the employer considers the worker to be an independent contractor or otherwise not an "employee" under the Employment Security Law, all records, documentation and evidence which supports that classification; and
- (N) federal and state tax returns for the periods when the worker was employed.

(b) In addition to the records required in Paragraph (a) of this Rule, each employer shall keep the following:

- (1) the records that establish and reflect ownership and any changes of ownership of the employer;
- (2) the address where the headquarters of the employer is located;
- (3) the mailing address of the employer; and
- (4) the address at which the records are available for inspection or audit by representatives of DES.

(c) Each employer's records shall reflect:

- (1) the addresses of owners; or
- (2) in the event the employer is a corporation or an unincorporated organization, the records shall

show the addresses of directors, officers, and any individuals on whom subpoenas, legal processes, or citations may be served in North Carolina.

History Note: Authority G.S. 96-4; 96-9.15; 96-10; 26 U.S.C. 3306; Eff. July 1, 2015.

04 NCAC 24D .0502 WAGE RECORDS

(a) Wages paid for services excluded from the definition of "employment" as defined in G.S. 96-1(b)(12) shall be separately reflected in the employer's records to indicate the following:

- (1) the time of service; and
- (2) remuneration for services that is separate from taxable wages.

(b) Where there are pay periods in which an individual performs services excluded from the term "employment," and any service which is "employment," the employer's record shall reflect the hours spent in the excluded service and the hours spent in "employment."

(c) If any remuneration other than monetary wages is paid to or is received by an individual related to services performed by the individual, the records shall show the total amount of cash wages and the cash value of any other remuneration paid by the employer.

(d) If any part of an individual's wages is not paid in cash, the reasonable cash value of the remuneration other than cash shall be deemed for all relevant purposes as follows:

- (1) the amount that is agreed upon between the employer and the individual if:
 - (A) the terms of the agreement are reported to DES; and
 - (B) DES determines that the agreed value or amount is reasonable pursuant to IRS Publication 15-B; or
- (2) the amount DES determines if:
 - (A) the amount agreed upon is unreasonable; or
 - (B) the employer and the individual fail to agree upon an amount; or
 - (C) the employer fails to report the terms of an agreement to DES; and
 - (D) the employer fails to show the cash value of the noncash remuneration prior to the due date of contributions with respect to the wages.
- (3) DES shall determine an amount by reviewing documents, tax values, internet sites and other available information that reflects the market value.

(e) This Rule incorporates material found in the IRS Publication 15-B by reference and includes subsequent amendments and editions of the referenced material in accordance with G.S. 150B-21.6. Copies of the incorporated material found in IRS Publication 15-B are located at 700 Wade Avenue, in Raleigh, North Carolina and may be obtained at no cost to the public by

request by contacting DES as specified under 04 NCAC 24A .0201.

History Note: Authority G.S. 96-1(b)(28); 96-4; 26 U.S.C. 3306; IRS Pub. 15-B; Eff. July 1, 2015.

04 NCAC 24D .0503 ALLOWANCES AND REIMBURSEMENT ADVANCES

(a) Allowances, advances of reimbursements paid to an individual in employment for traveling, and other bona fide expenses incurred or reasonably expected to be incurred in the business of the individual's employer shall not be treated as wages, provided:

- (1) a separate payment is made for the expenses; or
- (2) itemized accounting records are kept indicating the separate amounts where a single payment covers both wages and expenses combined; and the amount of payments for expenses excluded from wages shall not exceed the amounts allowable as deductible expenses by income tax regulations under the United States Internal Revenue Code, 26 U.S.C. 62(2) and 26 U.S.C. 162(a)(2). Where the United States Internal Revenue Service (IRS) has not made a determination, DES shall make an independent determination.

(b) Where an employee must pay traveling and other expenses out of commissions or salary and these amounts are not accounted for separately, the entire amount of commissions or salary shall be considered wages, unless the employer submits itemized records which show that a certain percentage of commissions or salary is expenses.

- (1) The money value for room and board shall not be included in wages if the room and board is provided to the employee for the convenience of the employer.
 - (A) If the room and board has been excluded from wages by the IRS for income tax withholdings, FICA and FUTA, it shall be considered to be for the convenience of the employer and excluded from wages.

(c) This rule incorporates 26 U.S.C. 62(2) "Adjusted Gross Income Defined" and 26 U.S.C. 162(a)(2) "Traveling Expenses" by reference and includes subsequent amendments and editions of the referenced material in accordance with G.S. 150B-21.6. Copies of the incorporated material found in 26 U.S.C. 62(2) and 26 U.S.C. 162(a)(2) are located at 700 Wade Avenue, in Raleigh, North Carolina, and may be obtained by request at no cost to the public by contacting DES as specified under 04 NCAC 24A .0201.

History Note: Authority G.S. 96-4; 150B-21.6; 26 U.S.C. 62(2); U.S.C. 162(a)(2). Eff. July 1, 2015.

04 NCAC 24D .0504 MANNER OF RECORDKEEPING

(a) Each employer shall maintain records as prescribed in this Section.

(b) All records shall be kept and maintained in a manner that preserves the integrity of all reports that the employing unit is required to file with DES.

- (1) Records shall be accessible to authorized representatives of DES within the geographical boundaries of the State of North Carolina.
- (2) When records are not maintained, or are not available within North Carolina, the employing unit shall pay to DES the expenses and costs incurred when a representative of DES is required to travel outside the State of North Carolina to inspect or audit the employing unit's records or provide for delivery of the required records for inspection or audit to DES via mail or electronic transmission.
- (3) Where records are delivered via electronic transmission, the employer shall provide DES with all necessary information to access the content of the electronic transmission.

(c) Where any part of an employing unit's accounting records are maintained by an automated data processing system, the employing unit shall provide the following:

- (1) audit trails with all supporting documentation;
- (2) general accounting books with any ledgers containing source references that coincide with financial reports for reporting periods; and
- (3) a description of the automatic data processing portion of the employing unit's accounting system.

(d) Each employing unit, when requested by DES, shall furnish a job description of duties performed by any individual or group of individuals who are performing or have performed services for the employing unit.

(e) Records prescribed by this Subchapter shall be preserved for five years after the calendar year in which wages for services are paid.

History Note: Authority G.S. 96-4; 96-10; 26 U.S.C. 3306; Eff. July 1, 2015.

04 NCAC 24D .0601 GENERAL FORMAT OF REPORTS AND FORMS AND METHODS OF SUBMISSION

(a) The following shall file the portion of the required Employer's Quarterly Tax and Wage Report (NCUI 101) that contains the name, social security number, and gross wages of each employee on magnetic or electronic media using a compact disk, online remote tax filing, or upload of data file via the internet format:

- (1) employers with 25 or more employees in any one calendar quarter; and
- (2) other entities, including agents reporting on behalf of employers, who file reports for a client employer with a total of 25 or more employees in any one calendar quarter.

(b) Quarterly Employer's Tax and Wage Reports (Form NCUI 101) shall contain the individual employees' wages section and wage summary section.

(c) Employers, including agents, who file an Employer's Quarterly Tax and Wage Report for a client employer with less than 25 total employees in any one calendar quarter may use magnetic or electronic media reporting. Employers with less than 25 employees may also file paper returns.

(d) A magnetic or electronic media wage report from agents reporting on behalf of employers may contain information from multiple employers.

History Note: Authority G.S. 96-4; 96-9.15; Eff. July 1, 2015.

04 NCAC 24D .0602 STATUS REPORTS

(a) Each employing unit shall file an Employer Status Report (Form NCUI 604) with DES within 10 days of becoming subject to the Employment Security Law. The Employer Status Report shall contain the following:

- (1) the name and address of the business;
- (2) names, social security numbers, and addresses of the owners and responsible officers of the business;
- (3) any records pertaining to contracts for business acquisitions that indicate successorship status; and
- (4) any information about company officers in continuity of control cases.

(b) An employing unit that ceases business, transfers, leases, or sells all or any part of the assets of its business, or changes the trade name or address of the business shall give notice to DES within 10 days by filing a status report. The status report shall contain, in addition to the requirements listed under Paragraph (a) of this Rule, the former name and address of the business.

History Note: Authority G.S. 96-4; 96-10; 96-11.7; Eff. July 1, 2015.

04 NCAC 24D .0603 QUARTERLY REPORTS FROM TAXED EMPLOYERS

(a) Each employer, other than a domestic employer who has elected to report and pay annually under G.S. 96-9.15(f), shall file with DES, within the month during which contributions for any period become due, an Employer's Quarterly Tax and Wage Report (Form NCUI 101) for the preceding calendar quarter that shall indicate the following:

- (1) the total amount of remuneration paid for employment, or proof that no remuneration was paid during the quarter;
- (2) the total amount of wages paid for employment;
- (3) the amount of wages paid to each individual employee; and
- (4) the name and social security number of each individual to whom the wages were paid and the federal identification number, if one exists.

History Note: Authority G.S. 96-4; 96-9.6; 96-9.15; 96-10;

Eff. July 1, 2015.

04 NCAC 24D .0604 ANNUAL REPORTS FROM DOMESTIC EMPLOYERS

- (a) A request by a domestic employer to report wages paid, and pay contributions on an annual basis shall be made in writing and delivered to DES pursuant to 04 NCAC 24A .0104. There is no special form or format required for the written request.
- (b) Each qualified domestic employer who has made an election as referenced in Paragraph (a) of this Rule shall file with DES, a domestic Employer's Annual Tax and Wage Report (Form NCUI 101-C), that shall include all information specified under Rule .0603 of this Section and subtotaled for each quarter during the calendar year in which wages were paid.

History Note: Authority G.S. 96-4; 96-9.15; 96-10; Eff. July 1, 2015.

04 NCAC 24D .0701 TRANSFER OF EXPERIENCE

- (a) A new successor employer that acquires a part of an entity related to the transferring employer shall request a percentage of the transferring employer's experience rating when:
 - (1) the successor employer is a distinct and severable portion of the transferring employer;
 - (2) it is severed from the control of the transferring employer;
 - (3) a severable and distinct portion of the successor employer would not be a disregarded entity or subsidiary of the transferring employer but an entity that is operational on its own with no support from the transferring employer;
 - (4) the successor employer is comprised of shareholders or owners, or employees from the transferring employer; and
 - (5) the successor employer's operations may remain similar to those of the transferring employer including proprietorships that split between family members as defined in G.S. 96-1(b)(18), spin-off corporations, partnerships that split operations between partners, or any other division in operations, that would not result in denial of a new discrete employer number to the successor employer pursuant to G.S. 96-11.7(c).
- (b) A transferring employer shall be left operational on its own with no support from the successor employer.
- (c) A successor employer shall request a transfer of experience under conditions described in Rule .0702 of this Section and a transferring employer shall request to retain the remaining experience pursuant to Rule .0702 of this Section.
- (d) The percentage of the experience that is transferred to the successor employer shall be transferred as of the date of acquisition for use in determining the successor's contribution rate.

History Note: Authority G.S. 96-4; 96-10; 96-11.7; Eff. July 1, 2015.

04 NCAC 24D .0702 REQUIREMENTS FOR TRANSFER OF EXPERIENCE

- (a) A successor employer shall submit the following information to DES when requesting a partial transfer of experience rating:
 - (1) the total three-year taxable payroll ending June 30th prior to the last computation date for the transferring employer; and
 - (2) the total three-year taxable payroll ending June 30th prior to the last computation date for the transferring employer, relating to the severable portion acquired.
- (b) Notwithstanding Paragraph (a) of this Rule, an alternate three-year payroll may be used when the severed or retained unit was not operated by the transferring employer during the three-year period ending June 30th prior to the last computation date.
- (c) A successor employer that acquires the experience rating account, either total or partial, shall be liable for accrued benefits and acquire related rights based on the transferring employer's employment prior to the acquisition. Benefit charges to the transferring or successor employer shall be made in accordance with the percentage used to transfer the experience rating account, based on wages paid prior to the transfer.
- (d) The requirements of this Section shall apply to transfers mandated by law, and those requiring DES's approval pursuant to G.S. 96-11.7.
- (e) The completion and submission of Form NCUI 603 with the information described in Paragraph (a) of this Rule, and in accordance with Rule 04 NCAC 24A .0104(o) shall satisfy the requirements of this Rule.

History Note: Authority G.S. 96-4; 96-10; 96-11.7; Eff. July 1, 2015.

04 NCAC 24D .0801 APPLICATION

- (a) An employing unit may file a request for compromise of its tax debt with DES.
- (b) A request for compromise shall include the following:
 - (1) the name and address of the employing unit;
 - (2) the date the request to compromise is made;
 - (3) the date the requested compromise is requested to be effective;
 - (4) stated reasons for the request to compromise;
 - (5) evidence to support the claim or reasons for the request;
 - (6) the amount and terms offered by the employer to settle the debt; and
 - (7) the signature of a duly authorized representative of the employer.
- (c) The employer shall provide all information requested by the Department pursuant to Section .0500 of this Section for the determination of the compromise.
- (d) The request for compromise shall be filed with DES's Tax Administration Section by mail, facsimile, or email, pursuant to 04 NCAC 24A .0104(n).

History Note: Authority G.S. 96-4; 96-10; 96-10.1; Eff. July 1, 2015.

04 NCAC 24D .0901 SPECIAL TAX INVESTIGATIONS

(a) When it is discovered by a representative of DES that a claimant is alleging that he or she was an employee and the employer is alleging that the claimant was not an employee, the matter shall be referred to DES's Assistant Secretary in writing.

(b) The Assistant Secretary, on behalf of DES, shall issue a Result of Investigation by the Tax Administration Section upon receipt of the findings of the investigation. The Result of Investigation shall be in writing and mailed to each party to the controversy pursuant to 04 NCAC 24A .0103.

(d) The Result of Investigation shall provide notice of each party's rights for filing an appeal to obtain a hearing before the Board of Review, and the time period within which an appeal shall be filed by mail to the Board of Review, ATTN: Legal Services Section, Post Office Box 25903, Raleigh, 27611-5903.

(e) Appeal hearings pursuant to this Section shall be upon order of the Board of Review and conducted pursuant to Rule .1103 of this Subchapter.

History Note: Authority G.S. 96-4; 96-9.2; Eff. July 1, 2015.

04 NCAC 24D .1001 REQUEST FOR REDETERMINATION OF TAX RATE

(a) An employer may request a review and redetermination of its tax rate after receiving notice of the tax rate.

(b) An employer requesting a review and redetermination of its tax rate shall file its written request with DES's Tax Administration Section by mail to Post Office Box 26504, Raleigh, NC 27611, facsimile to (919) 733-1255, or email to des.tax.customerservice@nccommerce.com.

- (1) The request shall include the following:
 - (A) the name of the employer;
 - (B) the address of the employer;
 - (C) the account number of the employer;
 - (D) a brief statement of the question involved and reasons for the request; and
 - (E) the name, address, and official position of the individual making the request.

(c) The request for a review and redetermination shall be filed on or before prior to May 1 following the effective date of the contribution rate pursuant to G.S. 96-9.2(d).

History Note: Authority G.S. 96-4; 96-9.2; Eff. July 1, 2015.

04 NCAC 24D .1002 DIVISION'S OBLIGATIONS

(a) The Division shall review the employing unit's request to review and redetermine its tax rate and all available facts, and shall issue a written ruling. The ruling shall be mailed to the employing unit's address as set forth in 04 NCAC 24A .0103 and include the following:

- (1) notify the employing unit of whether its application was granted or denied;

- (2) the applicable legal authority, with specific citations, for the ruling;
- (3) contain the mailing date of the notice;
- (4) a statement containing the employer's right to appeal the notice; and
- (5) the time period within which an appeal shall be filed.

(b) The employing unit may file an appeal of the ruling and request a hearing.

- (1) The appeal shall be filed with DES's Tax Administration Section by mail, facsimile, or email pursuant to Rule 04 NCAC 24A .0104(o).
- (2) Hearings requested pursuant to this Section shall be conducted as set forth in Rule .1103 of this Subchapter.

History Note: Authority G.S. 96-4; 96-9.2; Eff. July 1, 2015.

04 NCAC 24D .1003 CONTINUED PAYMENTS REQUIRED

The employer shall continue to pay contributions at the rate assigned pending any hearing on an application for review and redetermination of tax rate until finally adjudicated. If the rate assigned is subsequently changed by a ruling of the Board of Review or the courts, the employer shall be entitled to a refund, or be liable for additional contributions.

History Note: Authority G.S. 96-4; 96-9.2; 96-10; Eff. July 1, 2015.

04 NCAC 24D .1101 APPEALING A TAX MATTER

(a) All appeals regarding tax matters, or monetary eligibility shall be filed with the DES Tax Administration Section pursuant to 04 NCAC 24A .0104(n).

- (b) A written appeal under this rule shall contain the following:
- (1) the date of the appeal;
 - (2) the identity of the determination, decision, or result being appealed;
 - (3) a clear statement of the party's intent to appeal;
 - (4) reasons for the appeal; and
 - (5) the name of the party appealing the determination, decision, or result.

History Note: Authority G.S. 96-4; Eff. July 1, 2015.

04 NCAC 24D .1102 SCHEDULING TAX HEARINGS

(a) A notice of the hearing shall be mailed to each party at least fourteen days before the hearing date.

- (b) The hearing notice shall include the following:
- (1) identify the determination, decision, or result being appealed or protested;
 - (2) the name of the appealing or protesting party;
 - (3) the date and time of the hearing;
 - (4) if requested at the time of the filing of the appeal, the physical location of an in-person hearing;

- (5) the telephone number at which each party will be called for a telephone hearing;
- (6) each issue, with statutory reference, to be heard and decided;
- (7) the name and contact information for the Board of Review or designated Hearing Official;
- (8) the manner in which witnesses may offer evidence and participate in the hearing;
- (9) each party's right to obtain a legal representative as defined in 04 NCAC 24A .0105;
- (10) instructions for requesting a rescheduling of the hearing;
- (11) notice that a party may object to a telephone hearing and request an in-person hearing;
- (12) a statement of each party's right to request the issuance of a subpoena for the production of records or individuals to appear to testify, and instructions for how to do so.

History Note: Authority G.S. 96-4; Eff. July 1, 2015.

04 NCAC 24D .1103 TELEPHONE HEARINGS

- (a) Hearings shall be conducted by telephone conference call, unless a request is made for an in-person hearing at the time the appeal is filed, or an objection is made pursuant to Rule .1104 of this Section.
- (b) In cases of telephone hearings, the Board of Review shall provide a Telephone Hearing Questionnaire for each party to submit each telephone number to be called by the Board of Review or its designated Hearing Official for the hearing. If a party fails to submit a telephone number to be called for the hearing, the Board of Review shall call each party at the telephone number listed on the hearing notice.

History Note: Authority G.S. 96-4; Eff. July 1, 2015.

04 NCAC 24D .1104 IN-PERSON HEARINGS

- (a) A party shall only request an in-person hearing at the time the appeal is filed in writing, or by filing a written objection to the telephone conference call, received at least seven days before the scheduled hearing.
- (b) If travel is required to conduct the in-person hearing, the objecting party shall travel to a location convenient to the non-objecting party, as determined by the Board of Review.

History Note: Authority G.S. 96-4; Eff. July 1, 2015.

04 NCAC 24D .1105 RESCHEDULING A TAX HEARING

- (a) The Board of Review may continue or adjourn a hearing at any time.
- (b) A request for a continuance of a hearing made prior to the hearing date shall be in writing and shall specify the reasons for the request.

History Note: Authority G.S. 96-4; Eff. July 1, 2015.

04 NCAC 24D .1106 SUBPOENAS

(a) Any party's request for a subpoena to be issued by the Board of Review shall be in writing, sent to the Board of Review, and shall include:

- (1) the name of the party requesting the subpoena;
- (2) the claimant's name, if applicable;
- (3) the employer's name, if applicable;
- (4) the docket number of the case;
- (5) the name, address, and telephone number of each person sought for appearance at the hearing;
- (6) the specific identification of any document, recording, or item sought, including a detailed description of where the item is located;
- (7) the name and address of the individual or party in possession of any item sought; and
- (8) a statement of why the testimony or evidence to be subpoenaed is necessary for a proper presentation of the case.

(b) Legal representatives shall issue subpoenas at their own expense and discretion.

(c) Any party or person receiving a subpoena may serve a written objection to the issuance of the subpoena.

- (1) The objection shall be directed to the Board of Review prior to the commencement of the hearing and provide reasons for the objection and the relief sought by the objecting party.
- (2) The Board of Review shall rule on the objection and notify the parties before the hearing. The Board of Review's reasons for its ruling shall be in writing or stated on the record during the hearing.

History Note: Authority G.S. 96-4; Eff. July 1, 2015.

04 NCAC 24D .1107 THE TAX OPINION

(a) Following the conclusion of a tax hearing, the Board of Review shall issue a tax opinion with respect to the appeal filed.

(b) The tax opinion shall set forth:

- (1) a statement of the case;
- (2) any findings of fact;
- (3) conclusions of law;
- (4) the final order with regard to the opinion rendered;
- (5) the date the opinion was mailed;
- (6) instructions for filing an appeal; and
- (7) the time period within which an appeal shall be filed.

(c) The Board of Review shall mail a copy of the tax opinion to each party to the appeal.

History Note: Authority G.S. 96-4; Eff. July 1, 2015.

04 NCAC 24D .1201 REQUEST FOR SEASONAL DETERMINATION

- (a) Each employer desiring a seasonal determination shall request assignment of the seasonal period by DES.
- (b) The request shall be made in writing by completing the Application for Seasonal Determination (Form NCUI 611) that is available on DES's website at www.ncesc.com and addressed to the Tax Administration Section by mail, facsimile, or email as provided in 04 NCAC 24A .0104.
- (c) Requests for Seasonal Determination using (Form NCUI 611) shall contain the following:
- (1) the employing unit's name and physical address;
 - (2) years of operation in North Carolina;
 - (3) location of each seasonal pursuit;
 - (4) description of seasonal each pursuit; and
 - (5) beginning and ending dates of each seasonal pursuit for the last four years.
- (d) The request shall be filed at least 20 days before the beginning date of the period of production operations for which the designation is requested.
- (e) Completion and Submission of Form NCUI 611 shall satisfy the requirements of this Rule.

History Note: Authority G.S. 96-4; 96-16; Eff. July 1, 2015.

04 NCAC 24D .1202 WRITTEN DETERMINATION

- (a) DES shall issue a written determination granting or denying the request upon making its determination pursuant to G.S. 96-16(c). The determination shall notify the employer of the following:
- (1) the specific seasonal period assigned by DES;
 - (2) the effective date of the determination; and
 - (3) the specific filing requirements for seasonal employers.
- (b) Any determination that denies the request for a seasonal designation shall state the reasons for the denial.
- (c) Each determination shall contain notice of each party's right to appeal the determination and request a hearing, the date the determination was mailed, and the time period within which an appeal shall be filed.
- (d) The employer may file its appeal of a denial of a request for seasonal pursuit designation with DES's Tax Administration Section in the same manner as prescribed under Rule .1201 of this Section, by submitting a Form NCUI 611 by mail to Post Office Box 26504, Raleigh, NC 27611, facsimile to (919) 733-1255, or email to des.tax.customerservice@nccommerce.com
- (e) Hearings shall be conducted as set forth in Rule .1103 of this Subchapter.

History Note: Authority G.S. 96-4; 96-16; Eff. July 1, 2015.

04 NCAC 24D .1203 DISPLAY REQUIRED

- (a) Each employer shall display no less than two Notice to Workers of a Seasonal Determination forms in separate locations

(Form NCUI 543) on its premises. Form NCUI 543 shall be sent to employers when approved for Seasonal Pursuit status by mail and shall contain:

- (1) notice that a seasonal determination was requested by the employer and issued by DES; and
- (2) instructions for workers employed by the employer to protest the determination within 10 days.

(b) The Notice to Workers of a Seasonal Determination (Form NCUI 543) shall be provided by DES and shall be displayed on the employer's premises in such places as:

- (1) entry ways used by workers to enter and exit the employer's premises;
- (2) in or near an area where a record of time worked is required to be used or frequented by workers;
- (3) a bulletin board in places where workers gather; or
- (4) other locations within the place of employment visible to employees.

History Note: Authority G.S. 96-4; 96-16; Eff. July 1, 2015.

04 NCAC 24D .1204 WAGE RECORDS AND REPORTS REQUIREMENT

- (a) Any pursuit that DES determines to be seasonal shall maintain payroll records such that the seasonal wages paid to workers during the active periods of the seasonal pursuit may be distinguished from any non-seasonal wages that are paid to those workers.
- (b) Any employer engaged in a seasonal pursuit shall submit quarterly wage reports pursuant to Rule .0603 of this Subchapter, showing the seasonal wages paid to workers during the active periods assigned by DES.
- (c) Within 15 days of the date that DES mails notice of a seasonal period, the employer shall complete and submit to DES a Breakdown of Wages Previously Reported for Workers to Show Seasonal and Non-Seasonal Wages (Form NCUI 542) with seasonal wages in the current base period and in intervening quarters between the base period and completed calendar quarters preceding the first day of the active period, which shall include the following:
- (1) each worker's social security number, and name; and
 - (2) each worker's seasonal wages, non-seasonal wages and total wages for each calendar quarter.
- (d) Any wages earned by seasonal workers outside the seasonal period assigned by DES shall be reported as non-seasonal wages, even though they may have been earned for seasonal work.

History Note: Authority G.S. 96-4; 96-16; Eff. July 1, 2015.

04 NCAC 24D .1301 NOTICE TO EMPLOYER

(a) DES shall serve notice and execution of levy on employer to collect past due unemployment insurance taxes, penalties, interest, and costs.

(b) Notice shall be written and provided to the employer by U.S. mail.

(c) The notice shall state the following:

- (1) that DES is in possession of judgments and executions that were properly docketed and indexed by the clerks of the superior court;
- (2) the county of the superior court where the judgments and executions are docketed;
- (3) that DES mailed previous notice of the debt and the date DES mailed notice to the employer;
- (4) the amount owed by the employer;
- (5) the name of any other individual or entity that will receive notice of the debt;
- (6) the statutory authority for service of execution of levy by DES;
- (7) the relief sought by DES; and
- (8) the name, address and telephone number of an authorized representative of DES who may be contacted regarding the debt.

History Note: Authority G.S. 1-359; 96-4; 96-10; 96-18; Eff. July 1, 2015.

04 NCAC 24D .1302 NOTICE TO GARNISHEE

(a) DES shall serve notice and execution of levy on third parties in order to collect past due unemployment insurance taxes, penalties, interest, and costs.

(b) Notice shall be written and provided to the garnishee by U.S. mail.

(c) The notice shall state the following:

- (1) the name of the indebted employer;
- (2) that DES is in possession of judgments and executions that were properly docketed and indexed by the clerks of the superior court;
- (3) the county of the superior court where the judgments and executions are docketed;
- (4) that the employer has received previous notice of the debt;
- (5) the amount owed by the employer;
- (6) statutory authority for service of execution of levy;
- (7) relief sought and how to remit payment; and
- (8) the name, address and telephone number of an authorized representative of DES who may be contacted regarding the debt.

History Note: Authority G.S. 1-359; 96-4; 96-10; Eff. July 1, 2015.

04 NCAC 24D .1401 OFFICIAL FORMS

(a) Unless otherwise provided, all employer forms referenced under the rules of this Chapter are available by contacting the Employer Call Center (ECC) as follows:

- (1) mailing address is Post Office Box 26504, Raleigh, North Carolina 27611;
- (2) phone number is (919) 707-1150;
- (3) facsimile number is (919) 715-0780; or
- (4) email address is des.tax.customerservice@nccommerce.com.

(b) Unless otherwise provided, all claimant forms referenced under the rules of this Chapter are available by contacting the Customer Call Center (CCC) as follows:

- (1) mailing address is P.O. Box 25903, Raleigh, NC 27611-5903;
- (2) phone number is (888) 737-0259;
- (3) facsimile number is (919) 250-4315; or
- (4) email address is des.ui.customerservice@nccommerce.com.

History Note: Authority G.S. 96-4; 96-16; Eff. July 1, 2015.

- 04 NCAC 24E .0101 CONFIDENTIALITY OF UNEMPLOYMENT INSURANCE INFORMATION**
- 04 NCAC 24E .0102 REQUEST FOR DOCUMENTS AND RECORDS**
- 04 NCAC 24E .0103 FEES FOR COPIES AND SERVICES**
- 04 NCAC 24E .0104 PAYMENT OF FEES**

History Note: Authority G.S. 96-4(d); 96-4(x); 20 CFR 603; Eff. May 1, 2013; Repealed Eff. July 1, 2015.

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

10A NCAC 46 .0201 MANDATED SERVICES

The following is a list of mandated services required to be provided in every county of this state. The local health department shall provide or ensure the provision of these services in accordance with the rules in this Section:

- (1) Adult Health;
- (2) Home Health;
- (3) Dental Public Health;
- (4) Food, Lodging and Institutional Sanitation;
- (5) Individual On-Site Water Supply;
- (6) Sanitary Sewage Collection, Treatment and Disposal;
- (7) Communicable Disease Control;
- (8) Vital Records Registration;
- (9) Maternal Health;
- (10) Child Health;
- (11) Family Planning;
- (12) Public Health Laboratory Support.

History Note: Authority G.S. 130A-9; Eff. July 1, 1984; Transferred and Recodified from 10 NCAC 12 .0227 Eff. April 4, 1990;

Amended Eff. July 1, 2015.

10A NCAC 46 .0212 GRADE A MILK SANITATION

History Note: Authority G.S. 130A-9; Eff. October 1, 1984; Amended Eff. October 1, 1985; Transferred and Recodified from 10 NCAC 12 .0238 Eff. April 4, 1990; Repealed Eff. July 1, 2015.

10A NCAC 73A .0107 REASONABLE ACCOMODATION

Reasonable accommodations shall be provided to allow an applicant or recipient with disabilities to comply with the drug testing requirement in accordance with the Americans with Disabilities Act of 1990, as amended in 2008 (P.L. 110-325), which is incorporated by reference, including subsequent amendments and editions. A copy of the Act may be obtained on the United States Department of Justice, Civil Rights Division at <http://www.ada.gov/pubs/adastatute08.htm>.

History Note: Authority G.S. 108A-29.1; 143B-153; Eff. July 1, 2015.

10A NCAC 73A .0108 NOTICES

- (a) At application and at redetermination of eligibility for cash assistance, each applicant or recipient shall receive notice of rights and responsibilities, hearing and appeal rights, and conditions for a retest.
- (b) At the time of testing and upon receipt of a confirmed positive drug test result, the applicant or recipient shall receive notice of rights and responsibilities, hearing and appeal rights, and conditions for a retest.
- (c) Upon receipt of a confirmed positive test result, the county department of social services shall refer the applicant or recipient for substance abuse information to a "qualified professional in substance abuse" as defined in Rule 10A NCAC 27G .0104(19), which is incorporated by reference, including subsequent amendments and editions. A copy of the Rule may be obtained at <http://reports.oah.state.nc.us/ncac.asp>.

History Note: Authority G.S. 108A-29.1; 108A-79; 143B-153; Eff. July 1, 2015.

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

15A NCAC 07H .1501 PURPOSE

This permit for excavation within or connecting to existing canals, channels, basins, or ditches in estuarine waters, public trust waters and coastal shoreline AECs shall allow excavation within existing canals, channels, basins, and ditches in estuarine and public trust waters for the purpose of maintaining water depths and creating new boat basins from non-wetland areas that will be used for

private, non-commercial activities. This general permit is also subject to the procedures outlined in Subchapter 07J .1100.

History Note: Authority G.S. 113A-107(a),(b); 113A-113(b); 113A-118.1; 113-229(cl); Eff. July 1, 1984; Amended Eff. July 1, 2015; December 1, 1987.

15A NCAC 07H .1502 APPROVAL PROCEDURES

(a) The applicant for a general permit for excavation within or connecting to existing canals, channels, basins, or ditches in estuarine waters, public trust waters and coastal shoreline areas of environmental concern shall contact the Division of Coastal Management and request approval for development. Applicants shall provide their name and address, the site location, and the dimensions of the project area.

(b) The applicant must provide:

- (1) A written statement signed by the adjacent riparian property owners indicating that they have no objections to the proposed work; or
- (2) Certified mail return receipts (or copies thereof) indicating that the adjacent riparian property owners have been notified by certified mail of the proposed work. Such notice should instruct adjacent property owners to provide any comments on the proposed development in writing for consideration by permitting officials to the Division of Coastal Management within ten days of receipt of the notice, and indicate that no response will be interpreted as no objection.

(c) DCM staff will review the permit request and comments and determine, based on the potential impacts of the proposed project, whether the proposed project complies with the requirements of this Section and can be approved by a General Permit. If DCM staff finds that the proposed project does not comply with the requirements of this Section, the applicant will be notified that they must submit an application for a major development permit in accordance with 15A NCAC 07J .0200.

(d) No work shall begin until an onsite meeting is held with the applicant and a Division of Coastal Management representative to inspect and mark the proposed area of excavation and spoil disposal. Written authorization to proceed with the proposed development may be issued during this site visit. All excavation shall be completed within 120 days of the date of permit issuance.

History Note: Authority G.S. 113A-107(a),(b); 113A-113(b); 113A-118.1; 113-229(cl); Eff. July 1, 1984; Amended Eff. July 1, 2015; January 1, 1990; December 1, 1987.

15A NCAC 07H .1504 GENERAL CONDITIONS

(a) Individuals shall allow representatives of the Division of Coastal Management to make periodic inspections at any time necessary to ensure that the activity being performed under authority of this general permit for excavation within or connecting to existing canals, channels, basins, or ditches in estuarine waters, public trust waters and coastal shoreline areas of

environmental concern, is in accordance with the terms and conditions set forth in this Section.

(b) This general permit shall not be applicable to proposed maintenance excavation when the Division determines that the proposed activity will adversely affect adjacent property.

(c) This permit shall not be applicable to proposed construction where the Division has determined, based on an initial review of the application, that notice and review pursuant to G.S. 113A-119 is necessary because there are unresolved questions concerning the proposed activity's impact on adjoining properties or on water quality; air quality; coastal wetlands; cultural or historic sites; wildlife; fisheries resources; or public trust rights.

(d) No new basins shall be allowed that result in closure of shellfish waters according to the closure policy of the Division of Marine Fisheries, 15A NCAC 18A .0911.

(e) This permit shall not eliminate the need to obtain any other required state, local, or federal authorization, nor to abide by regulations adopted by any federal or other state agency.

(f) Development carried out under this permit shall be consistent with all local requirements, AEC rules, and local Land Use Plans current at the time of authorization.

History Note: Authority G.S. 113A-107(a),(b); 113A-113(b); 113A-118.1; 113-229(cl);

Eff. July 1, 1984;

Amended Eff. May 1, 1990; December 1, 1987;

RRC Objection due to ambiguity Eff. May 19, 1994;

Amended Eff. July 1, 2015; August 1, 1998; July 1, 1994.

15A NCAC 07H .1505 SPECIFIC CONDITIONS

Proposed maintenance excavation shall meet each of the following specific conditions to be eligible for authorization by this general permit.

- (1) New basins shall be allowed only when they are located entirely in highground and join existing man-made canals or basins.
- (2) New basins shall be no larger than 50' in either length or width and no deeper than the waters they join.
- (3) New basins shall be for the private non-commercial use of the land owner.
- (4) Maintenance excavation shall involve the removal of no more than 1,000 cubic yards of material as part of a single and complete project.
- (5) All excavated material shall be placed entirely on high ground above the mean high tide or ordinary high water line, and above any marsh or other wetland.
- (6) All spoil material shall be stabilized or retained so as to prevent any excavated material from re-entering the surrounding waters, marsh or other wetlands.
- (7) The proposed project shall not involve the excavation of any marsh, submerged aquatic vegetation (as defined at 15A NCAC 03I .0101 by the Marine Fisheries Commission), or other wetlands.

- (8) Maintenance excavation shall not exceed the original dimensions of the canal, channel, basin or ditch and in no case be deeper than 6 feet below mean low water or ordinary low water, nor deeper than connecting channels.
- (9) Proposed excavation shall not promote or provide the opportunity for a change to a public or commercial use at the time of project review.
- (10) Maintenance excavation as well as excavation of new basins shall not be allowed within or with connections to primary nursery areas without prior approval from the Division of Marine Fisheries or Wildlife Resources Commission (whichever is applicable).
- (11) Bulkheads shall be allowed as a structural component on one or more sides of the permitted basin to stabilize the shoreline from erosion.
- (12) The bulkhead shall not exceed a distance of two feet waterward of the normal high water or normal water level at any point along its alignment.
- (13) Bulkheads shall be constructed of vinyl or steel sheet pile, concrete, stone, timber, or other suitable materials approved by the Division of Coastal Management. Approval of other suitable materials shall be based upon the potential environmental impacts of the proposed material.
- (14) All backfill material shall be obtained from an upland source pursuant to 15A NCAC 07H .0208. The bulkhead shall be constructed prior to any backfilling activities and shall be structurally tight so as to prevent seepage of backfill materials through the structure.
- (15) Construction of bulkhead authorized by this general permit in conjunction with bulkhead authorized under 15A NCAC 07H .1100 shall be limited to a combined maximum shoreline length of 500 feet.

History Note: Authority G.S. 113A-107(a),(b); 113A-113(b); 113A-118.1; 113-229(cl);

Eff. July 1, 1984;

Amended Eff. July 1, 2015; September 1, 1988; December 1, 1987.

15A NCAC 18C .1539 REVISED TOTAL COLIFORM RULE

The provisions of 40 C.F.R. 141, Subpart Y - Revised Total Coliform Rule are hereby incorporated by reference including any subsequent amendments and editions. Copies are available for public inspection as set forth in Rule .0102(a) and (b) of this Subchapter.

History Note: Authority G.S. 130A-315;

Eff. July 1, 2015.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 08 – BOARD OF CERTIFIED PUBLIC ACCOUNTANT EXAMINERS

21 NCAC 08G .0409 COMPUTATION OF CPE CREDITS

(a) Group Courses: Non-College. CPE credit for a group course that is not part of a college curriculum shall be given based on contact hours. A contact hour shall be 50 minutes of instruction and one-half contact hour shall be equal to 25 minutes of instruction. For example, a group course lasting 100 minutes shall be two contact hours equaling two CPE credits. A group course lasting 75 minutes shall be one and one-half contact hours equaling one and one-half CPE credits. A group course lasting 25 minutes shall be one-half contact hour and equal to one-half CPE credit. When individual segments of a group course are less than 50 minutes, the sum of the individual segments shall be added to determine the number of contact hours. For example, five 30-minute presentations shall be 150 minutes, which shall be three contact hours and three CPE credits. No credit shall be allowed for a segment unless the participant completes the entire segment. Internet based programs shall employ a monitoring mechanism to verify that participants are participating during the duration of the course. No credit shall be allowed for a group course having fewer than 25 minutes of course instruction.

(b) Completing a College Course. CPE credit for completing a college course in the college curriculum shall be granted based on the number of credit hours the college gives the CPA for completing the course. One semester hour of college credit shall be 15 CPE credits; one quarter hour of college credit shall be 10 CPE credits; and one continuing education unit shall be 10 CPE credits. No CPE credit shall be given to a CPA who audits a college course.

(c) Self Study. CPE credit for a self-study course shall be given based on the average number of contact hours needed to complete the course. The average completion time shall be allowed for CPE credit. A sponsor shall determine on the basis of pre-tests or NASBA word count formula the average number of contact hours of course material it takes to complete a course. A contact hour shall be 50 minutes and one-half contact hour shall be 25 minutes of course material. No self-study course may contain less than 25 minutes of course material.

(d) Instructing a CPE Course. CPE credit for teaching or presenting a CPE course for CPAs shall be given based on the number of contact hours spent in preparing and presenting the course. No more than 50 percent of the CPE credits required for a year shall be credits for preparing for and presenting CPE courses. CPE credit for preparing or presenting a course shall be allowed only once a year for a course presented more than once in the same year by the same CPA.

(e) Authoring a Publication. CPE credit for published articles and books shall be given based on the number of contact hours the CPA spent writing the article or book. No more than 25 percent

of a CPA's required CPE credits for a year shall be credits for published articles or books. An article written for a CPA's client or business newsletter shall not receive CPE credit.

(f) Instructing a Graduate Level College Course. CPE credit for instructing a graduate level college course shall be given based on the number of credit hours the college gives a student for completing the course, using the calculation set forth in Paragraph (b) of this Rule. Credit shall not be given for instructing a course in which there is credit given towards an undergraduate degree.

(g) No more than 50 percent of the CPE credits required for a year shall be credits claimed under Paragraph (d) and (f) of this Rule.

History Note: Authority G.S. 93-12(8b); Eff. May 1, 1989; Amended Eff. July 1, 2015; January 1, 2014; February 1, 2012; January 1, 2007; January 1, 2004; February 1, 1996; April 1, 1994; March 1, 1990.

CHAPTER 16 – BOARD OF DENTAL EXAMINERS

21 NCAC 16R .0101 APPLICATIONS

(a) A renewal application shall be completed and received in the Board's office before midnight on January 31 of each year. The renewal form may be obtained on the board's website: www.ncdentalboard.org.

(b) Eligible licensees as defined by Rule .0206 of this Subchapter shall be granted an extension period in accordance with 26 U.S.C. 7508 in which to pay license, general anesthesia, and sedation permit renewal fees, obtain CPR certification, renew professional association and corporation registrations and comply with the Dental Board's continuing education rules.

History Note: Authority G.S. 90-28; 90-31; 90-39; 93B-15; Eff. April 1, 2003; Amended Eff. July 1, 2015; February 1, 2008.

21 NCAC 16R .0102 FEE FOR LATE FILING AND DUPLICATE LICENSE

(a) If the application for a renewal certificate, accompanied by the fee required by 21 NCAC 16M .0101, is not received in to the Board's office before midnight on January 31 of each year, an additional fee of fifty dollars (\$50.00) shall be charged for the renewal certificate.

(b) A fee of twenty-five dollars (\$25.00) shall be charged for each duplicate of any license or certificate issued by the Board.

History Note: Authority G.S. 90-31; 90-39; Eff. April 1, 2003; Amended Eff. July 1, 2015; February 1, 2008.

21 NCAC 16R .0103 CONTINUING EDUCATION REQUIRED

21 NCAC 16R .0104 APPROVED COURSES AND SPONSORS

21 NCAC 16R .0105 REPORTING OF CONTINUING

EDUCATION

21 NCAC 16R .0106 VARIANCES AND EXEMPTION FROM AND CREDIT FOR CONTINUING EDUCATION
21 NCAC 16R .0107 PENALTY/NON-COMPLIANCE/CONTINUING EDUCATION

History Note: Authority G.S. 90-31.1; 90-38; Eff. May 1, 1994; Amended Eff. November 1, 2008; September 1, 2008; February 1, 2008; April 1, 2003; August 1, 2002; April 1, 2001; August 1, 1998. Repealed Eff. July 1, 2015.

21 NCAC 16R .0108 LICENSE VOID UPON FAILURE TO TIMELY RENEW

If an application for a renewal certificate, accompanied by the renewal fee and any applicable late filing fees required by 21 NCAC 16M .0101 is not received in the Board's office before midnight on March 31 of each year, the license shall become void and the applicant must apply for reinstatement. A copy of the reinstatement application form and the location of the Board's office can be found at www.ncdentalboard.org.

History Note: Authority G.S. 90-31; 90-34; Eff. July 1, 2015.

21 NCAC 16R .0110 RENEWAL CERTIFICATE MUST BE DISPLAYED

The current certificate of renewal of license shall be posted where it is visible to patients receiving treatment in the office where the dentist is employed, and shall be exhibited or produced to the North Carolina State Board of Dental Examiners or its investigators during every visit to the office. Photocopies may not be substituted for the current certificate of renewal or duplicates issued by the Board.

History Note: Authority G.S. 90-33; Eff. July 1, 2015.

21 NCAC 16R .0201 CONTINUING EDUCATION REQUIRED

Except as permitted in Rule .0204 of this Section as a condition of license renewal, every dentist shall complete at least 15 clock hours of continuing education each calendar year. Any or all of the hours may be acquired through self-study courses, provided that the self-study courses shall be related to clinical patient care and offered by a Board approved sponsor listed in Rule .0202 of this Section. The dentist shall pass a test following every self-study course and obtain a certificate of completion. Courses taken to maintain current CPR certification shall not count toward the mandatory continuing education hours.

History Note: Authority G.S. 90-31.1; Eff. July 1, 2015.

21 NCAC 16R .0202 APPROVED COURSES AND SPONSORS

(a) Courses allowed to satisfy the continuing education requirement shall be related to clinical patient care. Hours devoted to financial issues or practice development topics shall not be counted toward the continuing education requirement. Hours spent reviewing dental journals, publications or videos shall not count toward fulfilling the continuing education requirement, with the exception of self-study courses as described in Rule .0201 of this Section offered by Board approved sponsors.

(b) Approved continuing education course sponsors include:

- (1) those recognized by the Continuing Education Recognition Program of the American Dental Association;
- (2) the Academy of General Dentistry;
- (3) North Carolina Area Health Education Centers;
- (4) educational institutions with dental, dental hygiene or dental assisting schools or departments;
- (5) national, state or local societies or associations; and
- (6) local, state or federal governmental entities.

History Note: Authority G.S. 90-31.1; Eff. July 1, 2015.

21 NCAC 16R .0203 REPORTING CONTINUING EDUCATION

(a) All licensed dentists shall report the number of continuing education hours completed annually on the license renewal application form submitted to the Board. The organization offering or sponsoring each course shall provide to each attendee a report containing the following information:

- (1) course title;
- (2) number of hours of instruction;
- (3) date of the course attended;
- (4) name(s) of the course instructor(s); and
- (5) name of the organization offering or sponsoring the course.

(b) Evidence of employment by or affiliation with an agency or institution as specified in Rule .0204(c) of this Section shall be verified by a director or official acting in a supervisory position.

(c) All licensed dentists shall maintain the report referred to in Paragraph (a) of this Rule for at least two years following completion of the course and shall produce a copy of the report to the Board or its investigator during every Board audit of the licensee's continuing education hours.

History Note: Authority G.S. 90-31.1; Eff. July 1, 2015.

21 NCAC 16R .0204 VARIANCES AND EXEMPTION FROM AND CREDIT FOR CONTINUING EDUCATION

(a) Upon receipt of written evidence, the Board may grant exemptions from the mandatory continuing education requirements set out in Rule .0201 of this Section as follows:

- (1) A dentist who practices not more than 250 clock hours in a calendar year shall be exempt from

all continuing education requirements. Such dentists, who shall be known as semi-retired Class I dentists, shall maintain current CPR certification.

- (2) A dentist who practices not more than 1,000 clock hours in a calendar year shall be exempt from one half of the continuing education courses required of dentists who practice full time. Such dentists, who shall be known as semi-retired Class II dentists, shall maintain current CPR certification.
- (3) A retired dentist who does not practice any dentistry shall be exempt from all continuing education and CPR certification requirements.
- (4) A dentist who is unable to practice dentistry because of a physical or mental illness may request a variance in continuing education hours during the period of the disability. The Board may grant or deny requests for variance in continuing education hours based on a disabling condition on a case by case basis, taking into consideration the particular disabling condition involved and its effect on the dentist's ability to complete the required hours. In considering the request, the Board may require additional documentation substantiating any specified disability.

(b) In those instances where continuing education is waived and the exempt individual wishes to resume practice, the Board shall require continuing education courses in accordance with Paragraph (a) of this Rule when reclassifying the licensee. The Board may require those licensees who have not practiced dentistry for a year or more to undergo a bench test before allowing the licensee to resume practice if there is evidence that the licensee is unable to practice dentistry competently, such as a failing score on a dental licensing examination, a written report of a licensed physician, evaluation conducted by a substance abuse treatment facility, appointment of a guardian for the dentist or adjudication of incompetence by a court.

(c) Dentists shall receive 10 hours credit per year for continuing education when engaged in any of the following:

- (1) service on a full-time basis on the faculty of an educational institution with involvement in education, training, or research in dental or dental auxiliary programs; or
- (2) service on a full time basis with a federal, state, or county government agency whose operation is related to dentistry or dental auxiliaries. Verification of credit hours shall be maintained in the manner specified in Rule .0203 of this Section.

(d) Dentists who work at least 20 hours per week in an institution or entity described in Subparagraph (c)(1) or (2) of this Rule shall receive five hours credit per year for continuing education.

(e) Dentists shall receive up to two hours of continuing education credits per year for providing dental services on a volunteer basis at any state, city, or county operated site. Credit will be given at

ratio of 1:5, with one hour credit given for every five hours of volunteer work.

(f) Eligible licensees as defined by Rule .0206 of this Section shall be granted a waiver of their mandatory continuing education requirements.

History Note: Authority G.S. 90-31.1; 90-38; Eff. July 1, 2015.

21 NCAC 16R .0205 PENALTY/NON-COMPLIANCE/CONTINUING EDUCATION

If an applicant for a renewal of license fails to provide proof of completion of reported continuing education hours for the current year as required by Rule .0203 of this Section, the Board shall refuse to issue a renewal certificate until the licensee completes the required hours of education for the current year and complies with the requirements of Rules 21 NCAC 16R .0101 and .0102. If an applicant applies for credit for or exemption from continuing education hours and fails to provide the required documentation upon request, the Board shall refuse to issue a certificate of renewal until the applicant meets the qualifications for exemption or credit. If an applicant fails to meet the qualifications for renewal, including completing the required hours of continuing education and delivering the required documentation to the Board's office before midnight on March 31 of each year, the license shall become void and the licensee must seek reinstatement.

History Note: Authority G.S. 90-31.1; Eff. July 1, 2015.

21 NCAC 16S .0101 DEFINITIONS

The following definitions are applicable to impaired dentist programs established in accordance with G.S. 90-48.2:

- (1) "Board" -- the North Carolina State Board of Dental Examiners;
- (2) "Impairment" -- chemical dependency or mental illness;
- (3) "Board of Directors" -- individuals comprising the oversight panel consisting of representatives from the North Carolina Dental Society, the Board, licensed dental hygienists, and the UNC School of Dentistry established to function as a supervisory body to the North Carolina Caring Dental Professionals;
- (4) "Director" -- the person designated by the Board of Directors to organize and coordinate the activities of the North Carolina Caring Dental Professionals;
- (5) "North Carolina Caring Dental Professionals" -
- the program established through agreements between the Board and special impaired dentist peer review organizations formed by the North Carolina Dental Society made up of Dental Society members designated by the Society, the Board, a licensed dental hygienist upon recommendation of the dental hygienist member of the Board, and the UNC School of

Dentistry to conduct peer review activities as provided in G.S. 90-48.2(a).

- (6) "North Carolina Caring Dental Professionals members" -- the two hygienists appointed by the Dental Board and volunteer Dental Society members selected by the Board of Directors from peer review organizations to serve as parties to interventions, to direct impaired dentists into treatment, and as monitors of those individuals receiving treatment. Peer liaisons and volunteers participating in programs for impaired dental hygienists shall be dental hygienists.

History Note: Authority G.S. 90-48; 90-48.2; 90-48.3; Eff. April 1, 1994; Temporary Amendment Eff. August 20, 1999; Amended Eff. July 1, 2015; April 1, 2001.

21 NCAC 16S .0102 BOARD AGREEMENTS WITH PEER REVIEW ORGANIZATIONS

The Board may enter into agreements with special impaired dentist peer review organizations, pursuant to G.S. 90-48.2, to establish the North Carolina Caring Dental Professionals to be supervised by the Board of Directors. Such agreements shall provide for:

- (1) investigation, review and evaluation of records, reports, complaints, litigation, and other information about the practice and practice patterns of licensed dentists and dental hygienists as may relate to impaired dentists and dental hygienists;
- (2) identification, intervention, treatment, referral, and follow up care of impaired dentists and dental hygienists; and
- (3) due process rights for any subject dentist or dental hygienist.

History Note: Authority G.S. 90-48; 90-48.2; 90-48.3; Eff. April 1, 1994; Temporary Amendment Eff. August 20, 1999; Amended Eff. July 1, 2015; April 1, 2001.

21 NCAC 16S .0202 CONFIDENTIALITY

Information received by the Program regarding voluntary participants shall remain confidential and shall not be released to the Dental Board or members of the public, except as set out in Rule .0203(b) of this Section. Voluntary participants who meet the requirements of Rule .0203(b) of this Section shall be reported to the Board along with evidence of the events leading to the report. Information received about participants referred to the Program by the Board shall be exchanged with the Board or its investigators.

History Note: Authority G.S. 90-48; 90-48.2; Eff. April 1, 1994. Amended Eff. July 1, 2015.

21 NCAC 16T .0101 RECORD CONTENT

A dentist shall maintain complete treatment records on all patients for a period of at least 10 years. Treatment records may include such information as the dentist deems appropriate but shall include:

- (a) Patient's full name, address and treatment dates;
- (b) Patient's nearest relative or responsible party;
- (c) Current health history;
- (d) Diagnosis of condition;
- (e) Specific treatment rendered and by whom;
- (f) Name and strength of any medications prescribed, dispensed or administered along with the quantity and date, provided;
- (g) Work orders issued during the past two years;
- (h) Treatment plans for patients of record, except that treatment plans are not required for patients seen only on an emergency basis;
- (i) Diagnostic radiographs, study models and other diagnostic aids, if taken; and
- (j) Patients' financial records and copies of all insurance claim forms.

History Note: Authority G.S. 90-28; 90-48; Eff. October 1, 1996; Amended Eff. July 1, 2015.

21 NCAC 16T .0102 TRANSFER OF RECORDS UPON REQUEST

A dentist shall, upon request by the patient of record, provide all information required by the Health Insurance Portability and Accountability Act (HIPAA) and this Rule, including original or diagnostic copies of radiographs and a legible copy of all treatment records to the patient or to a licensed dentist identified by the patient. The dentist may charge a fee not exceeding the actual cost of duplicating the records. The records shall be provided within 30 days of the request and production shall not be contingent upon current, past or future dental treatment or payment of services.

History Note: Authority G.S. 90-28; 90-48; Eff. October 1, 1996; Amended Eff. July 1, 2015; April 1, 2014; November 1, 2008.

21 NCAC 16U .0101 SECRETARY-TREASURER

The Board's Secretary-Treasurer or another Board member appointed by the Secretary-Treasurer shall supervise and direct investigations of acts or practices that might violate the provisions of the Dental Practice Act, the Dental Hygiene Act or the Board's Rules. The Secretary-Treasurer or other Board member appointed by the Secretary-Treasurer in consultation with the Investigative Panel, shall determine whether cases involving licensees, interns or applicants for licenses or permits shall be set for hearing or settlement conference and recommend to the Board dispositions of cases that are not set for hearing or settlement conference.

History Note: Authority G.S. 90-28; 90-41; 90-41.1; 90-48; 90-223; 90-231; Eff. October 1, 1996.

Amended Eff. July 1, 2015.

21 NCAC 16U .0102 INVESTIGATIVE PANEL

The Secretary-Treasurer or another Board member appointed by the Secretary-Treasurer shall chair the Investigative Panel. The Board's Counsel, Director of Investigations, Investigators and other staff members appointed by the Secretary-Treasurer shall serve on the Panel. The Investigative Panel shall conduct investigations and prepare and present the Board's case in all reinstatement cases, and disciplinary proceedings and in civil actions to enjoin the unlawful practice of dentistry.

History Note: Authority G.S. 90-28; 90-41; 90-41.1; 90-48; 90-223; 90-231; 150B-40; Eff. October 1, 1996. Amended Eff. July 1, 2015.

21 NCAC 16U .0103 REPORTS FROM THE CONTROLLED SUBSTANCES REPORTING SYSTEM

The Department of Health and Human Services (DHHS) may submit a report to the North Carolina State Board of Dental Examiners if it receives information that DHHS believes provides a basis to investigate whether a dentist has issued prescriptions for controlled substances in a manner that may violate laws governing the prescribing of controlled substances or the practice of dentistry.

History Note: Authority G.S. 90-41; 90-113.74; Eff. July 1, 2015.

21 NCAC 16V .0101 DEFINITION: UNPROFESSIONAL CONDUCT BY A DENTIST

Unprofessional conduct by a dentist shall include the following:

- (1) Having professional discipline imposed, including the denial of licensure, by the dental licensing authority of another state, territory, or country; (For purposes of this Section, the surrender of a license under threat of disciplinary action shall be considered the same as if the licensee had been disciplined.);
- (2) Intentionally presenting false or misleading testimony, statements, or records to the Board or the Board's investigator or employees during the scope of any investigation, or at any hearing of the Board;
- (3) Committing any act which would constitute sexual assault or battery as defined by Chapter 14 of the North Carolina General Statutes in connection with the provision of dental services;
- (4) Violating any order of the Board previously entered in a disciplinary hearing, or failing to comply with a subpoena of the Board;
- (5) Conspiring with any person to commit an act, or committing an act which would tend to coerce, intimidate, or preclude any patient or witness from testifying against a licensee in any disciplinary hearing, or retaliating in any

manner against any patient or other person who testifies or cooperates with the Board during any investigation under the Dental Practice or Dental Hygiene Acts;

- (6) Failing to identify to a patient, patient's guardian, or the Board the name of an employee, employer, contractor, or agent who renders dental treatment or services upon request;
- (7) Prescribing, procuring, dispensing, or administering any controlled substance for personal use except those prescribed, dispensed, or administered by a practitioner authorized to prescribe them;
- (8) Pre-signing blank prescription forms or using pre-printed or rubber stamped prescription forms containing the dentist's signature or the name of any controlled substance;
- (9) Forgiving the co-payment provisions of any insurance policy, insurance contract, health prepayment contract, health care plan, or nonprofit health service plan contract by accepting the payment received from a third party as full payment, unless the dentist discloses to the third party that the patient's payment portion will not be collected;
- (10) Failing to provide radiation safeguards required by; the State Department of Health and Human Services, the federal Occupational and Safety Health Administration, the Food and Drug Administration and the Environmental Protection Agency;
- (11) Having professional connection with or lending one's name to the unlawful practice of dentistry;
- (12) Using the name of any deceased or retired and licensed dentist on any office door, directory, stationery, bill heading, or any other means of communication any time after one year following the death or retirement from practice of said dentist;
- (13) Failing to comply with any provision of any contract or agreement with the Caring Dental Professionals Program;
- (14) Failing to file a truthful response to a notice of complaint within the time allowed in the notice.
- (15) Failing to notify the Board of a change in current physical address within 10 business days.
- (16) Permitting more than two dental hygienists for each licensed dentist in the office to perform clinical hygiene tasks;
- (17) Failing to produce diagnostic radiographs or other treatment records on request of the Board or its investigator;
- (18) Soliciting employment of potential patients by live telephone solicitation or permitting or directing another to do so;

- (19) Giving or paying anything of value in exchange for a promise to refer or referral of potential patients;
- (20) Failing to offer 30 days of emergency care upon dismissing a patient from a dental practice;
- (21) Withholding or refusing treatment to an existing patient conditioned upon payment of an outstanding balance;
- (22) Using protected patient health information, as defined by 45 CFR 160.103, to solicit potential patients;
- (23) Making misleading or untruthful statements for the purpose of procuring potential patients, or directing or allowing an employee or agent to do so;
- (24) Making material false statements or omissions in any communication with the Board or its agents regarding the subject of any disciplinary matter under investigations by the Board;
- (25) Refusing to permit a Board agent or employee to conduct a sterilization inspection;
- (26) Acquiring any controlled substance from any source by fraud, deceit or misrepresentation.

- (6) cooperates with the Board during any investigation of any licensee;
- (6) Failing to identify to a patient, patient's guardian, or the Board the name of any person or agent who renders dental treatment or services upon request;
- (7) Procuring, dispensing, or administering any controlled substance for personal use except those prescribed, dispensed, or administered by a practitioner authorized to prescribe them;
- (8) Acquiring any controlled substance from any pharmacy or other source by misrepresentation, fraud or deception;
- (9) Having professional connection with or lending one's name to the illegal practice of dental hygiene;
- (10) Failing to comply with any provision of any contract or agreement with the Caring Dental Professionals Program;
- (11) Failing to file a truthful response to a notice of complaint, within the time allowed in the notice;
- (12) Failing to notify the Board of a change in current physical address within 10 business days;
- (13) Working in a clinical hygiene position if the ratio of hygienists to licensed dentists present in the office is greater than 2:1;
- (14) Soliciting employment of potential patients in person or by telephone or assisting another person to do so;
- (15) Giving or paying anything of value in exchange for a promise to refer or referral of potential patients;
- (16) Using protected patient health information, as defined by 45 CFR 160.103, to solicit potential patients;
- (17) Making misleading or untruthful statements for the purpose of procuring potential patients or assisting another to do so;
- (18) Making material false statements or omissions in any communication with the Board or its agents regarding the subject of any disciplinary matter under investigation by the Board.

History Note: Authority G.S. 90-28; 90-41; 90-48; Eff. August 1, 1998; Amended Eff. July 1, 2015; October 1, 2001; August 1, 2000.

**21 NCAC 16V .0102 DEFINITION:
UNPROFESSIONAL CONDUCT BY A DENTAL
HYGIENIST**

Unprofessional conduct by a dental hygienist shall include the following:

- (1) Having professional discipline imposed, including the denial of licensure, by the dental hygiene licensing authority of another state, territory, or country; (For purposes of this Section, the surrender of a license under threat of disciplinary action shall be considered the same as if the licensee had been disciplined.);
- (2) Presenting false or misleading testimony, statements, or records to the Board or a Board employee during the scope of any investigation or at any hearing of the Board;
- (3) Committing any act which would constitute sexual assault or battery as defined by Chapter 14 of the North Carolina General Statutes in connection with the provision of dental hygiene services;
- (4) Violating an order of the Board previously entered in a disciplinary hearing or failing to comply with a subpoena of the Board;
- (5) Conspiring with any person to commit an act, or committing an act which would tend to coerce, intimidate, or preclude any patient or witness from testifying against a licensee in any disciplinary hearing, or retaliating in any manner against any person who testifies or

History Note: Authority G.S. 90-223; 90-229; Eff. August 1, 1998; Amended Eff. July 1, 2015; October 1, 2001; August 1, 2000; September 1, 1998.

21 NCAC 16W .0101 DIRECTION DEFINED

Pursuant to G.S. 90-233(a), a public health hygienist may perform clinical procedures under the direction of a licensed dentist, as defined by 21 NCAC 16Y .0104(c) of this Chapter, who is employed by a State government dental public health program or a local health department as a public health dentist. The specific clinical procedures delegated to the hygienist must be completed, in accordance with a written order from the dentist, within 60 days

of the dentist's in-person evaluation of the patient. The dentist's evaluation of the patient shall include a complete oral examination, thorough health history and diagnosis of the patient's condition. Direction of a licensed dentist is not required for public health hygienists who provide only educational information, such as instruction in brushing and flossing.

History Note: Authority G.S. 90-223; 90-233(a); Temporary Adoption Eff. October 1, 1999; Eff. April 1, 2001; Amended Eff. July 1, 2015.

21 NCAC 16W .0102 TRAINING FOR PUBLIC HEALTH HYGIENISTS

(a) Prior to performing clinical procedures pursuant to G.S. 90-233(a) under the direction of a duly licensed dentist, a public health hygienist must have:

- (1) five years of experience in clinical dental hygiene;
- (2) current CPR certification, taken in a live hands-on course;
- (3) six hours of continuing education in medical emergencies each year in addition to the minimum continuing education required for license renewal; and
- (4) such other training as may be required by the Dental Health Section of the Department of Health and Human Services.

(b) For purposes of this Rule, a minimum of 4,000 hours performing primarily prophylaxis or periodontal debridement under the supervision of a duly licensed dentist shall be equivalent to five years experience in clinical dental hygiene.

History Note: Authority G.S. 90-223; 90-233(a); Temporary Adoption Eff. October 1, 1999; Eff. April 1, 2001; Amended Eff. July 1, 2015.

21 NCAC 16Y .0101 ELIGIBILITY REQUIREMENTS

(a) Persons shall be eligible for an intern permit under the provisions of G.S. 90-29.4 if they are:

- (1) not licensed to practice dentistry in North Carolina, but are a graduate of and have a DMD or DDS degree from a dental school or program accredited by the Commission on Dental Accreditation of the American Dental Association; or
- (2) a graduate of a dental program other than a program accredited by the Commission on Dental Accreditation of the American Dental Association who has been accepted into a graduate, intern, fellowship, or residency program at a North Carolina Dental School or teaching hospital offering programs in dentistry.

(b) An intern permit shall not be granted to an individual who:

- (1) lacks good moral character;

- (2) has been disciplined by any dental board or other licensing body in another state or country.

History Note: Authority G.S. 90-28; 90-29.4; 90-30; Eff. August 1, 2002; Amended Eff. July 1, 2015; August 1, 2009.

21 NCAC 16Y .0102 APPLICATION

(a) Applicants for intern permit who are graduates of dental schools or programs as set out in Rule .0101(1) of this Subchapter shall:

- (1) complete the Application for Intern Permit available on the Board's website: www.ncdentalboard.org;
- (2) submit an official copy of dental school transcripts;
- (3) forward a letter from a prospective employer;
- (4) submit a signed release form, completed Fingerprint Record Card, and such other form(s) required to perform a criminal history check at the time of the application;
- (5) pass written examination(s) approved by the Board, as set out on its website: www.ncdentalboard.org, and
- (6) pay the nonrefundable intern permit fee referred to in 21 NCAC 16M .0101(a)(5).

(b) Applicants for intern permit who are graduates of a dental program as set out in Rule .0101(2) of this Subchapter shall:

- (1) submit written confirmation that the applicant has qualified for and is currently enrolled in a graduate, intern, fellowship, or residency program in the North Carolina Dental School or teaching hospital offering programs in dentistry;
- (2) submit written confirmation that an ad hoc committee (consisting of three associate or full professors, only one of whom represents the department in question) has evaluated the applicant's didactic and clinical performance with the point of observation being not less than three months from the applicant's start of the program, and has determined that the applicant is functioning at a professional standard consistent with a dental graduate from an ADA-accredited dental school;
- (3) complete a simulated clinical offered by a Board-approved provider set out on its website: www.ncdentalboard.org;
- (4) submit written confirmation that the applicant has completed a program of study at the training facility in:
 - (A) clinical pharmacology;
 - (B) prescription writing in compliance with Federal and State laws; and
 - (C) relevant laws and administrative procedures pertaining to the DEA;
- (5) submit a written statement of the total time required to complete the graduate, intern,

fellowship, or residency program, and the date that the applicant is scheduled to complete said program;

- (6) submit a signed release form, completed Fingerprint Record Card, and such other form(s) required to perform a criminal history check at the time of the application;
- (7) complete written examination(s) administered by the Board; and
- (8) pay the non-refundable intern permit fee referred to in 21 NCAC 16M .0101(a)(5).

(c) In making application, the applicant shall authorize the Board to verify the information contained in the application or documents submitted or to seek such further information pertinent to the applicant's qualifications or character as the Board may deem necessary pursuant to G.S. 90-41.

(d) Intern permits shall expire on an annual basis and are subject to renewal by the Board upon application and payment of the renewal fee.

History Note: Authority G.S. 90-28; 90-29.4; Eff. August 1, 2002; Temporary Amendment Eff. January 1, 2003; Amended Eff. July 1, 2015; January 1, 2004.

21 NCAC 16Y .0103 EMPLOYMENT

(a) The practice of dentistry under an intern permit is limited to the confines and registered patients of the following employment sites:

- (1) a nonprofit hospital, sanatorium, or a like institution;
- (2) a nonprofit health care facility serving low-income populations; or
- (3) a state or governmental facility or entity or any political subdivision of such.

Each facility or entity set out in Paragraph (a) of this Rule shall submit documentation to the Board evidencing that it meets the qualifications set out in G.S. 90-29.4(3) in order for the facility or site to be considered an approved employment site.

(b) A listing of approved sites is available on the Board's website: www.ncdentalboard.org.

(c) A request for change in practice location shall be submitted in writing to the Board and is subject to the new practice location meeting the requirements of Paragraph (a) of this Rule.

(d) The holder of an intern permit shall not receive any compensation in excess of an allowance for salaries or other compensation for personal services provided.

History Note: Authority G.S. 90-28; 90-29.4; Eff. August 1, 2002; Amended Eff. July 1, 2015.

21 NCAC 16Y .0104 DIRECTION AND SUPERVISION

(a) Holders of a valid intern permit who are currently licensed in Canada, a U.S. territory or state may practice under direction of one or more dentists with a current and valid North Carolina license. Such directing dentist shall be responsible for all

consequences or results arising from the permit holder's practice of dentistry.

(b) Holders of a valid intern permit who are not currently licensed in Canada, a U.S. territory or state may work only under supervision of one or more dentists with a current and valid North Carolina license. Such supervising dentist shall be responsible for all consequences or results arising from the permit holder's practice of dentistry.

(c) For purposes of this Section, the acts of a permit holder are deemed to be under the direction of a licensed dentist when performed in a locale where a licensed dentist is not always required to be physically present during the performance of such acts and such acts are being performed pursuant to the dentist's order, control, and approval.

(d) For purposes of this Section, the acts of a permit holder are deemed to be under the supervision of a licensed dentist when performed in a locale where a licensed dentist is physically present during the performance of such acts and such acts are being performed pursuant to the dentist's order, control, and approval.

History Note: Authority G.S. 90-28; 90-29.4; Eff. August 1, 2002; Amended Eff. July 1, 2015.

21 NCAC 16Z .0101 ELIGIBILITY TO PRACTICE HYGIENE OUTSIDE DIRECT SUPERVISION

(a) To be eligible to perform the clinical hygiene procedures set out in G.S. 90-221(a) without the direct supervision of a dentist, a dental hygienist shall:

- (1) maintain an active license to practice dental hygiene in this State;
- (2) have no prior disciplinary history in any State;
- (3) complete at least three years of experience in clinical dental hygiene or at least 2,000 hours of performing prophylaxis or periodontal debridement under the supervision of a dentist licensed in this State within the five calendar years immediately preceding initial approval to work without direct supervision;
- (4) maintain current CPR certification;
- (5) complete at least six hours of Board approved continuing education in dental office medical emergencies, in addition to the minimum hours of continuing education required for license renewal. A list of Board-approved sponsors appears in 21 NCAC 16I .0103.

(b) To retain eligibility to perform the clinical hygiene procedures set out in G.S. 90-221(a) without direct supervision of a dentist, a dental hygienist shall:

- (1) complete at least six hours of Board approved continuing education in dental office medical emergencies each year, in addition to the minimum hours of continuing education required for license renewal;
- (2) maintain current CPR certification;

- (3) comply with all provisions of the N.C. Dental Practice Act and all rules of the Dental Board applicable to dental hygienists; and
- (4) cooperate with all Board inspections of any facility at which the hygienist provides dental hygiene services without direct supervision of a dentist.

*History Note: Authority G.S. 90-221; 90-233;
 Eff. February 1, 2008;
 Amended Eff. July 1, 2015.*

CHAPTER 46 – BOARD OF PHARMACY

21 NCAC 46 .3301 REGISTRATION

(a) Following initial registration with the Board, registration of a pharmacy technician shall be renewed annually through the

Board's electronic renewal process and shall expire on December 31. It shall be unlawful to work as a pharmacy technician more than 60 days after expiration of the registration without renewing the registration. A registration expired for more than 60 days due to non-renewal shall be reinstated only if the applicant meets the requirements of 21 NCAC 46 .1612.

(b) The current registration of a pharmacy technician shall be available for inspection by agents of the Board.

(c) Pharmacy technicians who provide services solely at a free clinic as defined in G.S. 90-85.44 shall register with the Board and complete the training program described in G.S. 90-85.15A, but are exempt from the pharmacy technician registration fee.

*History Note: Authority G.S. 90-85.6; 90-85.15A;
 Eff. April 1, 2003;
 Amended Eff. February 1, 2006; February 1, 2005;
 Temporary Amendment Eff. March 28, 2006;
 Amended Eff. July 1, 2015; July 1, 2006.*

RULES REVIEW COMMISSION

This Section contains information for the meeting of the Rules Review Commission August 20, 2015 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
Jeff Hyde (1st Vice Chair)
Margaret Currin
Jay Hemphill
Faylene Whitaker

Appointed by House
Garth Dunklin (Chair)
Stephanie Simpson (2nd Vice Chair)
Anna Baird Choi
Jeanette Doran
Ralph A. Walker

COMMISSION COUNSEL

| | |
|-----------------|---------------|
| Abigail Hammond | (919)431-3076 |
| Amber Cronk May | (919)431-3074 |
| Amanda Reeder | (919)431-3079 |
| Jason Thomas | (919)431-3081 |

RULES REVIEW COMMISSION MEETING DATES

| | |
|------------------|--------------------|
| August 20, 2015 | September 17, 2015 |
| October 15, 2015 | November 19, 2015 |

AGENDA

**RULES REVIEW COMMISSION
THURSDAY, AUGUST 20, 2015 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 matters
 - A. Pesticide Board – 02 NCAC 09L .0504, .0505, .0507, .0522, .1102, .1104, .1108 (Reeder)
 - B. Board of Electrolysis Examiners – 21 NCAC 19 .0201, .0202, .0203, .0204, .0407, .0409, .0501, .0602, .0608, .0622, .0701, .0702 (Reeder)
 - C. Board of Massage and Bodywork Therapy – 21 NCAC 30 .0201, .0701, .0702, .1001, .1002, .1003, .1004, .1005, .1006, .1007, .1008, .1009, .1010, .1011, .1012, .1013, .1014, .1015 (May)
- IV. Review of Log of Filings (Permanent Rules) for rules filed between June 23, 2015 and July 20, 2015
 - Veterans Affairs Commission (Thomas)
 - State Board of Elections (May)
 - Medical Care Commission (Reeder)
 - Environmental Management Commission 02B (Reeder)
 - Environmental Management Commission 02D, 02Q (May)
 - Coastal Resources Commission (Reeder)
 - Veterinary Medical Board (Thomas)
 - Building Code Council (Hammond)
- V. Existing Rules Review
 - Review of Reports
 - 1. 02 NCAC 57 – Tobacco Trust Fund Commission (Thomas)
 - 2. 10A NCAC 13H – Medical Care Commission (Hammond)
 - 3. 10A NCAC 70I – Social Services Commission (Reeder)
 - 4. 10A NCAC 70K – Social Services Commission (Reeder)
 - 5. 19A NCAC 01 – Department of Transportation (Reeder)

6. 19A NCAC 04 – Department of Transportation (Reeder)
7. 19A NCAC 05 – Department of Transportation (Reeder)
8. 19A NCAC 06 – Department of Transportation (Reeder)

- VI. Commission Business
- Legislative Update
 - Next meeting: Thursday, September 17, 2015
-

**Commission Review
Log of Permanent Rule Filings
June 23, 2015 through July 20, 2015**

VETERANS AFFAIRS COMMISSION

The rules in Chapter 26 concern Veterans Affairs.

The rules in Subchapter 26B concern the Veterans Affairs Commission and include general provisions (.0100); and veterans' dependents scholarships (.0200).

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|--------------------------------|----|------|-----|-------|
| <u>Forms and Instructions</u> | 01 | NCAC | 26B | .0104 |
| Amend/* | | | | |
| <u>Where to Obtain Forms</u> | 01 | NCAC | 26B | .0105 |
| Amend/* | | | | |
| <u>Delegation of Authority</u> | 01 | NCAC | 26B | .0106 |
| Amend/* | | | | |

ELECTIONS, STATE BOARD OF

The rules in Chapter 17 concern photo identification.

| | | | | |
|---|----|------|----|-------|
| <u>Determination of Reasonable Resemblance at Check-In</u> | 08 | NCAC | 17 | .0101 |
| Adopt/* | | | | |
| <u>Determination of Reasonable Resemblance by Judges of</u> | 08 | NCAC | 17 | .0102 |
| Adopt/* | | | | |
| <u>Identification of Curbside Voters</u> | 08 | NCAC | 17 | .0103 |
| Adopt/* | | | | |
| <u>Opportunity to Update Name or Address After Reasonable Re...</u> | 08 | NCAC | 17 | .0104 |
| Adopt/* | | | | |
| <u>Declaration of Religious Objection to Photograph</u> | 08 | NCAC | 17 | .0105 |
| Adopt/* | | | | |

MEDICAL CARE COMMISSION

The rules in Chapter 13 are from the NC Medical Care Commission.

The rules in Subchapter 13B set standards for the licensing of hospitals including supplemental rules for the licensure of skilled intermediate, adult care home beds in a hospital (.1900); specialized rehabilitative and rehabilitative services (.2000); general information (.3000); procedure (.3100); general requirements (.3200); patients' bill of rights (.3300); supplemental rules for the licensure of critical care hospitals (.3400); grievance and management (.3500); management and administration of operations (.3600); medical staff (.3700); nursing services (.3800); medical record services (.3900); outpatient services (.4000); emergency services (.4100); special care units (.4200); maternal-neonatal services (.4300); respiratory care services (.4400); pharmacy services and medication administration (.4500); surgical and anesthesia services (.4600); nutrition and dietetic services (.4700); diagnostic imaging (.4800); laboratory services and pathology (.4900); physical rehabilitation services (.5000); infection control (.5100); psychiatric services

(.5200); nursing and adult care beds (.5300); comprehensive inpatient rehabilitation (.5400); supplemental rules for hospitals providing living organ donation transplant services (.5500); physical plant (.6000); general requirements (.6100); and construction requirements (.6200).

Definitions 10A NCAC 13B .2101
Adopt/*

Reporting Requirements 10A NCAC 13B .2102
Adopt/*

The rules in Subchapter 13C concern licensing of ambulatory surgical facilities including general provisions (.0100); licensing procedures (.0200); governing authority and management (.0300); medical and surgical services (.0400); anesthesia services (.0500); pathology services (.0600); radiology services (.0700); pharmaceutical services (.0800); nursing services (.0900); medical records services (.1000); surgical facilities and equipment (.1100); functional safety (.1200); control and sanitation (.1300); and physical plant construction (.1400).

Definitions 10A NCAC 13C .0103
Amend/*

Reporting Requirements 10A NCAC 13C .0206
Adopt/*

ENVIRONMENTAL MANAGEMENT COMMISSION

The rules in Subchapter 2B pertain to surface water standards and monitoring including procedures for assignment of water quality standards (.0100); the standards used to classify the waters of the state (.0200); stream classifications (.0300); effluent limitations (.0400); monitoring and reporting requirements (.0500); and water quality management plans (.0600).

Mitigation Program Requirements for Protection and Maintenance... 15A NCAC 02B .0295
Adopt/*

The rules in Subchapter 2D are air pollution control requirements including definitions and references (.0100); air pollution sources (.0200); air pollution emergencies (.0300); ambient air quality standards (.0400); emission control standards (.0500); air pollutants monitoring and reporting (.0600); complex sources (.0800); volatile organic compounds (.0900); motor vehicle emission control standards (.1000); control of toxic air pollutants (.1100); control of emissions from incinerators (.1200); oxygenated gasoline standard (.1300); nitrogen oxide standards (.1400); general conformity for federal actions (.1600); emissions at existing municipal solid waste landfills (.1700); control of odors (.1800); open burning (.1900); transportation conformity (.2000); risk management program (.2100); special orders (.2200); emission reduction credits (.2300); clean air interstate rules (.2400); mercury rules for electric generators (.2500); and source testing (.2600).

PM2.5 Particulate Matter 15A NCAC 02D .0410
Amend/*

Prevention of Significant Deterioration Requirements for ... 15A NCAC 02D .0544
Amend/*

The rules in Subchapter 2Q are from the EMC and relate to applying for and obtaining air quality permits and include general information (.0100); fees (.0200); application requirements (.0300); acid rain program requirements (.0400); establishment of an air quality permitting program (.0500); transportation facility requirements (.0600); toxic air pollutant procedures (.0700); exempt categories (.0800); and permit exemptions (.0900).

Payment of Fees 15A NCAC 02Q .0206
Amend/*

Applications 15A NCAC 02Q .0304
Amend/*

| | |
|---------------------------------|--------------------|
| <u>Applicability</u> Amend/* | 15A NCAC 02Q .0502 |
| <u>Application</u> Amend/* | 15A NCAC 02Q .0507 |

COASTAL RESOURCES COMMISSION

The rules in Subchapter 7H are the state guidelines for areas of environmental concern (AECs) including introduction and general comments (.0100); the estuarine system (.0200); ocean hazard areas (.0300); public water supplies (.0400); natural and cultural resource areas (.0500); development standards (.0600); general permits for construction or maintenance of bulkheads and the placement of riprap for shoreline protection in estuarine and public trust waters (.1100); piers, docks and boat houses in estuarine and public trust waters (.1200); general permit to construct boat ramps along estuarine and public trust shorelines and into estuarine and public trust waters (.1300); groins in estuarine and public trust waters (.1400); excavation within or connecting to existing canals, channels, basins, or ditches in estuarine waters, public trust waters, and estuarine shoreline AECs (.1500); aerial and subaqueous utility lines with attendant structures in coastal wetlands, estuarine waters, public trust waters and estuarine shorelines (.1600); emergency work requiring a CAMA or a dredge and fill permit (.1700); beach bulldozing landward of the mean high-water mark in the ocean hazard AEC (.1800); temporary structures within the estuarine and ocean hazard AECs (.1900); authorizing minor modifications and repair to existing pier/mooring facilities in estuarine and public trust waters and ocean hazard areas (.2000); construction of sheetpile sill for shoreline protection in estuarine and public trust waters (.2100); construction of freestanding moorings in established waters and public trust areas (.2200); replacement of existing bridges and culverts in estuarine waters, estuarine shorelines, public trust areas and coastal wetlands (.2300); placement of riprap for wetland protection in estuarine and public trust waters (.2400); replacement of structures; the reconstruction of primary or frontal dune systems; and the maintenance excavation of existing canals, basins, channels, or ditches, damaged, destroyed, or filled in by hurricanes or tropical storms (.2500); construction of wetland, stream and buffer mitigation sites by the North Carolina Ecosystem Enhancement Program or the North Carolina Wetlands Restoration Program (.2600); and the construction of riprap sills for wetland enhancement in estuarine and public trust waters (.2700).

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| <u>AECs Within Ocean Hazard Areas</u> Amend/* | 15A NCAC 07H .0304 |
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The rules in Subchapter 7K set out activities in areas of environmental concern (AECs) which do not require a Coastal Area Management Act (CAMA) permit. These include activities that are not considered development (.0100); exempt minor maintenance and improvement (.0200); and exempt federal agency activities (.0400).

| | |
|---|--------------------|
| <u>Single Family Residences Exempted from the CAMA Permit</u> Repeal/* | 15A NCAC 07K .0213 |
|---|--------------------|

VETERINARY MEDICAL BOARD

The rules in Chapter 66 are from the Veterinary Medical Board including statutory and administrative provisions (.0100); practice of veterinary medicine (.0200); examination and licensing procedures (.0300); rules petitions hearings (.0400); declaratory rulings (.0500); administrative hearings procedures (.0600); administrative hearings decisions related rights (.0700) and judicial review (.0800).

| | |
|---|------------------|
| <u>Practice of Veterinary Medicine</u> Amend/* | 21 NCAC 66 .0209 |
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BUILDING CODE COUNCIL

| | |
|--|---|
| <u>2012 NC Building Code/Cross-Laminated Timber</u> Amend/* | Chapter 2, 602.4, 2302.1, 2303.1.4, Chapter 35 |
|--|---|

RULES REVIEW COMMISSION

| | |
|---|--|
| <u>2011 NC Electrical Code/Raceways in Wet Locations Above Amend/*</u> | 300.8 |
| <u>2012 NC Energy Conservation Code/Fenestration Amend/*</u> | 402 |
| <u>2012 NC Energy Conservation Code/Building Envelope Amend/*</u> | Table 502.1.2 |
| <u>2012 NC Existing Building Code/Smoke Alarms Amend/*</u> | 403.6.1, 404.6, 603.2, 703.3, 1203.3 |
| <u>2012 NC Existing Building Code/Carbon Monoxide Detection Amend/*</u> | Ch. 2, Section 403.7, 703.2, 1203.13, 1401.2.6, Ch. 47 |
| <u>2012 NC Fire Code/Inspections Adopt/*</u> | 106 |
| <u>2012 NC Fire Code/Carbon Monoxide Detection Amend/*</u> | Chapter 2, Section 915, Chapter 47 |
| <u>2012 NC Fuel Gas Code/CSST Amend/*</u> | 310.1.1, Chapter 8 |
| <u>2012 NC Plumbing Code/Sewage Backflow Amend/*</u> | 715.1 |
| <u>2012 NC Residential Code/Cross-Laminated Timber Amend/*</u> | Ch. 2, R502.1.6, R502.8.2, R506.1.3, R802.1.5, Ch. 44 |
| <u>2012 NC Residential Code/Fenestration Amend/*</u> | N1102 |

CONTESTED CASE DECISIONS

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

| | |
|------------------------|------------------|
| Melissa Owens Lassiter | A. B. Elkins II |
| Don Overby | Selina Brooks |
| J. Randall May | Phil Berger, Jr. |
| J. Randolph Ward | |

| <u>AGENCY</u> | <u>CASE NUMBER</u> | <u>DATE</u> | <u>PUBLISHED DECISION REGISTER CITATION</u> |
|---|--------------------|-------------|---|
| <u>BOARD OF ARCHITECTURE</u> | | | |
| Board of Architecture v. Anthony Hunt | 14 BOA 04954 | 03/03/15 | 30:01 NCR 77 |
| <u>DEPARTMENT OF PUBLIC SAFETY</u> | | | |
| Kimberly H. Oliver v. Victims Compensation Commission | 13 CPS 14371 | 04/17/15 | 30:03 NCR 354 |
| Jack Norris v. Victims Compensation Commission | 14 CPS 06019 | 03/30/15 | 30:01 NCR 89 |
| <u>DEPARTMENT OF HEALTH AND HUMAN SERVICES</u> | | | |
| Kenneth Terrell Ford v. DHHS, Division of Facility Services | 13 DHR 10745 | 05/04/15 | 30:03 NCR 360 |
| Rex Hospital v. DHHS, Division of Medical Assistance | 13 DHR 18151 | 05/29/15 | 30:03 NCR 372 |
| UNC Hospitals at Chapel Hill v. DHHS, Division of Medical Assistance | 13 DHR 19653 | 05/29/15 | 30:03 NCR 387 |
| UNC Hospitals at Chapel Hill v. DHHS, Division of Medical Assistance | 13 DHR 19654 | 05/29/15 | 30:03 NCR 387 |
| Sunrise Clinical Associates PLLC. v. Alliance Behavioral Healthcare, NCDHHS | 14 DHR 01503 | 04/02/15 | 30:01 NCR 97 |
| Fidelity Community Support Group Inc. v. Alliance Behavioral Healthcare, NCDHHS | 14 DHR 01594 | 04/02/15 | 30:01 NCR 133 |
| Bio-Medical Applications of NC, Inc d/b/a BMA Rocky Mount v. NCDHHS, Division of Health Service Regulation, Certificate of Need Section and Total Renal Care Inc d/b/a Nash County Dialysis | 14 DHR 05495 | 03/26/15 | 30:02 NCR 196 |
| Bernita Webster v. NCDHHS, Division of Health Service Regulation, Healthcare Personnel Registry | 14 DHR 05566 | 03/10/15 | 30:02 NCR 229 |
| Erica Chante Johnson v. NCDHHS, Division of Health Service Regulation, Healthcare Personnel Registry | 14 DHR 06571 | 03/10/15 | 30:02 NCR 236 |
| <u>DEPARTMENT OF PUBLIC SAFETY</u> | | | |
| Ronnie Earl Smith Jr. v. NC Criminal Justice Education and Training Standards Commission | 14 DOJ 04114 | 04/09/15 | 30:02 NCR 243 |
| Susan Maney v. NC Criminal Justice Education and Training Standards Commission | 14 DOJ 05067 | 04/14/15 | 30:02 NCR 252 |
| <u>DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES</u> | | | |
| Alcoa Power Generating Inc. v. Division of Water Resources, DENR | 13 EHR 18085 | 05/29/15 | 30:03 NCR 402 |
| <u>OFFICE OF STATE HUMAN RESOURCES (formerly OFFICE OF STATE PERSONNEL)</u> | | | |
| Deni Crawley v. NCDPS Foothills Correctional Institution | 13 OSP 11438 | 04/28/15 | 30:01 NCR 62 |
| Deni Crawley v. NCDPS Foothills Correctional Institution | 13 OSP 19135 | 04/28/15 | 30:01 NCR 62 |

FILED

STATE OF NORTH CAROLINA
COUNTY OF DAVIDSON

IN THE OFFICE OF ADMINISTRATIVE
HEARINGS
2015 APR 17 PM 12:41

OFFICE OF ADMINISTRATIVE HEARINGS
FILE NO. 13 CPS 14371

KIMBERLY H. OLIVER,

Petitioner,

v.

NC CRIME VICTIMS COMPENSATION
COMMISSION,

Respondent.

FINAL DECISION –
ORDER OF DISMISSAL

THIS MATTER came on for hearing before the Honorable Selina M. Brooks Administrative Law Judge presiding, on January 28, 2015, in High Point, North Carolina.

APPEARANCES

For Petitioner: Charles R. Foster
205 E. Westwood Avenue
High Point, NC 27262

For Respondent: Yvonne B. Ricci
Assistant Attorney General
N.C. Department of Justice
Public Safety Section
9001 Mail Service Center
Raleigh, NC 27699-9001

PRE-TRIAL AGREEMENT

A Pre-Trial Agreement was entered on consent of counsel for the parties by the Honorable Selina M. Brooks on January 28, 2015.

WITNESSES

The following witnesses appeared and testified on behalf of Petitioner:

1. Kimberly H. Oliver, Petitioner
2. Dewey Shively
3. Samuel F. Parker (LCSW), the Director of the Employee Assistance Program at Family Service of the Piedmont, accepted as an expert in counseling services

The following witnesses appeared and testified on behalf of Respondent:

1. Officer Adam Thomas Kallfez, Thomasville Police Department
2. Antonette Douglas, Claims Investigator, N.C. Department of Crime Control and Public Safety, Division of Victim Compensation Services

EXHIBITS

Petitioner's exhibits 1-8 were admitted into evidence.

Respondent's exhibits 1-7 were admitted into evidence.

ISSUES

1. Whether the Petitioner has presented substantial evidence to establish that the requirements for an award have been met in accordance with N.C. Gen. Stat. §§ 15B-2(12a) and -4(a)?
2. Whether the Petitioner has presented substantial evidence to establish that she was a victim of criminally injurious conduct, within the meaning of N.C. Gen. Stat. §§ 15B-2(5) and -2(13)?

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following:

FINDINGS OF FACT

1. The Petitioner in this case is Kimberly Oliver, a resident of Davidson County, North Carolina.
2. Respondent is the Division of Victim Compensation Services within the North Carolina Department of Public Safety. Respondent is created under Chapter 15B of the North Carolina General Statutes and charged with administering the Crime Victims Compensation Fund in North Carolina.
3. The Petitioner was dating Norris Leon Thomas who was an engineer in the United States Army stationed at Fort Eustis in Newport News, Virginia. Mr. Thomas did not live with the Petitioner and her two daughters, ages eighteen (18) and nineteen (19), but would often come to the Petitioner's home in Thomasville and stay with her during the weekends. Mr. Thomas was visiting with the Petitioner on the weekend beginning September 14, 2012. (Resp. Exs. 1 and 7; Testimony of Petitioner).
4. Petitioner testified to the following facts: On September 15, 2012, Mr. Thomas went to the Petitioner's home after 6:00 p.m., intoxicated. Mr. Thomas wanted the Petitioner to go out with him to eat. Because Mr. Thomas was drunk, the Petitioner told him she did not want to go out with him and went upstairs to her bedroom,

followed by Mr. Thomas a short time later. The Petitioner and Mr. Thomas began to argue, and he grabbed her by the wrist and pushed her against the wall. Petitioner felt a “pop” in her right wrist. Mr. Thomas, who is over six feet tall and weighs more than two hundred pounds, threw her on the bed. Mr. Thomas held her in a “headlock” and tried to grope her inappropriately. The Petitioner was eventually able to get away from Mr. Thomas and he later left her home upon her request to do so. (Resp. Ex. 7; Testimony of Petitioner).

5. After Mr. Thomas left, the Petitioner did not immediately seek medical treatment for any alleged injuries at any local medical facility or pharmacy. (Testimony of Petitioner)
6. The Petitioner and her daughters stayed at the home of a friend Dewey Shively that evening. (Testimony of Petitioner) Mr. Shively gave Petitioner a towel with crushed ice in it to place on her right wrist and he also advised her to file a police report. (Testimony of Shively)
7. The Petitioner did not receive any medical attention until she was able to be examined by her primary care physician, Dr. Sara Furr, at Cornerstone Health Care on September 18, 2012. The medical note prepared by Dr. Furr states that “to my questioning, patient denies any history of trauma to wrist or hand. Does work at computer all day.” It does not include a specific report from the Petitioner that she was physically and sexually assaulted by Mr. Thomas during a domestic dispute on September 15, 2012. (Resp. Ex. 4; Testimony of Petitioner).
8. Petitioner is employed in the call center at Bank of America and spends “approximately four hours a day typing.” (Testimony of Petitioner)
9. On September 18, 2012, the Petitioner appeared before a magistrate in Davidson County resulting in warrants being issued to Mr. Thomas for misdemeanor sexual battery and assault on a female. (Resp. Ex. 2) Mr. Thomas turned himself in at the police department. (Testimony of Kallfez)
10. Thomasville Police Officer Adam T. Officer Kallfelz testified that he accompanied Mr. Thomas to the Petitioner’s residence on September 18, 2012, in order for Mr. Thomas to get his personal property. While the Petitioner denies that she was home during this time on September 18, 2012, Officer Kallfelz testified that he knocked on the Petitioner’s door and waited about fifteen to twenty minutes, but no one answered the door. Officer Kallfelz further testified that he could see through a window and saw a woman that looked like the Petitioner in the residence. (Resp. Ex. 2; Testimony of Officer Kallfelz).
11. Officer Kallfez advised Mr. Thomas that in order to retrieve his property from Petitioner that he would need to obtain a warrant from a magistrate. (Testimony of Kallfez)

12. On September 20, 2012, Petitioner was seen by Mark Warburton, MD, at High Point Orthopedic and Sports Medicine who, after examining Petitioner, gave an assessment of “sprained right wrist.” (Pet. Ex. 3)
13. Mr. Thomas went before a Magistrate and obtained a warrant against Petitioner on September 26, 2012. (Resp. Ex. 2)
14. The Petitioner obtained a 50B Domestic Violence Order of Protection against Mr. Thomas on October 8, 2012 (Guilford County, 12 CVD 1617), that was renewed for one more year on October 7, 2013. Mr. Thomas did not appear at either setting of the Petitioner’s Complaint and Motion for Domestic Violence Protective Order in Guilford County District Court. (Pet. Ex. 6)
15. Following a bench trial in Davidson County District Court on December 5, 2012, at which both the Petitioner and Mr. Thomas testified, Mr. Thomas was found not guilty. (Resp. Ex. 3; Testimony of Petitioner).
16. On March 21, 2013, Petitioner filed a Victim Compensation Application with Respondent, seeking compensation for expenses incurred as a result of the alleged September 15, 2012, incident. (Resp. Exs. 1 and 5).
17. Antonette Douglas (hereinafter “Investigator Douglas”), Respondent’s Claims Investigator with more than nine years experience investigating crime victims compensation claims, was assigned to Petitioner’s claim.
18. After reviewing the Thomasville Police Department Arrest Report, interviewing United States Army Agent Fennewell who indicated that there was no investigation warranted, reviewing the September 18, 2012 medical note from Cornerstone Administrative Services, and the fact that Mr. Thomas was found not guilty of misdemeanor sexual battery and assault on a female, Investigator Douglas recommended to Respondent that Petitioner’s claim be denied on the grounds that no incident could be substantiated so that the Petitioner was not a victim of criminally injurious conduct as defined in N.C. Gen. Stat. §§ 15B-2(5) and -2(13). (Resp. Exs. 2-6; Testimony of Douglas).
19. By a letter mailed to Petitioner on May 8, 2013, Respondent denied Petitioner’s claim for compensation on the ground that Petitioner “did not suffer personal injury or death directly and proximately resulting from criminally injurious conduct within the meaning of G.S. 15B.” (Resp. Ex. 6; Testimony of Douglas).

BASED UPON the foregoing Findings of Fact, the Undersigned hereby makes the following:

CONCLUSIONS OF LAW

1. Both parties were properly before the Administrative Law Judge in that jurisdiction and venue are proper and both parties received notice of the hearing.

2. Respondent has the authority and responsibility under Chapter 15B of the North Carolina General Statutes to investigate and award or deny claims for compensation under the Crime Victims Compensation Act.
3. Under North Carolina's Crime Victims Compensation Act, Respondent is permitted to compensate only victims or those who file claims on behalf of victims. "Victim," in turn, is defined as "[a] person who suffers personal injury or death proximately caused by criminally injurious conduct." N.C. Gen. Stat. § 15B-2(13).
4. Pursuant to N.C. Gen. Stat. § 15B-4(a), "compensation for criminally injurious conduct shall be awarded to a claimant if substantial evidence establishes that the requirements for an award have been met." Further, N.C. Gen. Stat. § 15B-4(a) provides, "[t]he Commission shall follow the rules of liability applicable to civil tort law in North Carolina."
5. The Petitioner bears the burden of showing that the victim's injury was based on criminally injurious conduct within the meaning of N.C. Gen. Stat. § 15B-2(5). *See Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res.*, 176 N.C. App. 594, 606-608, 627 S.E.2d 326, 336-337 (2006). (Unless a statute provides otherwise, the petitioner has the burden of proof in all contested cases.) *See also, Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 328, 507 S.E.2d 272, 281 (1998).
6. "Criminally injurious conduct," is defined as "[c]onduct that by its nature poses a substantial threat of personal injury or death, and is punishable by fine or imprisonment or death, or would be so punishable but for the fact that the person engaging in the conduct lacked the capacity to commit the crime under the laws of this State." N.C. Gen. Stat. § 15B-2(5).
7. "Substantial evidence," is defined as "[r]elevant evidence that a reasonable mind might accept as adequate to support a conclusion." N.C. Gen. Stat. § 15B-2(12a).
8. The uncontroverted evidence shows that on December 5, 2012, Norris Leon Thomas was found not guilty by a Davidson County District Court Judge of misdemeanor sexual battery and assault on a female.
9. The Petitioner has not met her burden of proving by a preponderance of the evidence that she is a victim of criminally injurious conduct as defined in Chapter 15B of the North Carolina General Statutes.
10. Petitioner has not carried her burden in demonstrating that Respondent acted outside its authority, acted arbitrarily and capriciously, used improper procedure, failed to act as required by law or rule, or acted erroneously when it denied her claim for crime victim's compensation in accordance with N.C. Gen. Stat. § 15B-2(5).

BASED UPON the foregoing Findings of Fact and Conclusions of Law, the Undersigned hereby makes the following:

DECISION

Respondent's decision to deny Petitioner's claim for Crime Victims Compensation is hereby **AFFIRMED**.

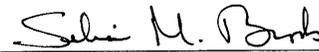
NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

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 the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, in the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within thirty (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, North Carolina 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.** 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 thirty (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.

IT IS SO ORDERED.

This the 17th day of April, 2015.



Selina M. Brooks
Administrative Law Judge

STATE OF NORTH CAROLINA

Filed

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13 DHR 10745

COUNTY OF WAYNE

2015 MAY -4 PM 2:04

KENNETH TERRELL FORD
PETITIONER

Office of
Administrative Hearings

VS.

N. C. DEPARTMENT OF HEALTH AND
HUMAN SERVICES, DIVISION OF
FACILITY SERVICES
RESPONDENT

AMENDED FINAL DECISION
PURSUANT TO ORDER OF REMAND
N.C. GEN. STAT. § 150B-51(d)

On March 24, 2015, Wayne County Superior Court Judge Arnold O. Jones remanded this contested case to the Office of Administrative Hearings, pursuant to N.C. Gen. Stat. § 150B-51(d), for the undersigned Administrative Law Judge to:

[C]orrect the error of law and make a determination whether Respondent otherwise substantially prejudiced Petitioner's rights and failed to use proper procedure, failed to act as required by law or rule, acted erroneously, or acted arbitrarily and capriciously with the burden of proof placed on the Petitioner.

(March 24, 2015 Order of Remand) Pursuant to the Order of Remand, Administrative Law Judge Melissa Owens Lassiter hereby makes the determination of the above-cited issue in this contested case, places the burden of proof on the Petitioner, and amends the February 12, 2014 Final Decision as follows:

On October 25, 2013, Administrative Law Judge Melissa Owens Lassiter heard this contested case in Goldsboro, North Carolina. On December 9, 2013, the undersigned ruled that Respondent failed to present sufficient evidence to substantiate the finding that Petitioner abused a resident of O'Berry Neuro-Medical Treatment Center on August 13, 2012. On January 17, 2014, pursuant to the undersigned's Order, Petitioner filed a proposed Final Decision with the Office of Administrative Hearings.

APPEARANCES

For Petitioner: Dustin B. Pittman, Strickland, Lapas, Agner & Associates,
112 North William Street, Goldsboro, North Carolina 27530

For Respondent: Josephine N. Tetteh, Assistant Attorney General, N.C.
Department of Justice, P.O. Box 629, Raleigh, North Carolina 27602-0629

ISSUES

1. Whether Petitioner proved by a preponderance of evidence that Respondent failed to use proper procedure, or failed to act as required by law or rule by failing to afford Petitioner the right to the hearing before substantiating and entering a finding of abuse against Petitioner's name on the Health Care Personnel Registry?

2. Whether Petitioner proved by a preponderance of evidence that Respondent otherwise substantially prejudiced Petitioner's rights, and acted erroneously, failed to use proper procedure, failed to act as required by law or rule, or acted arbitrarily and capriciously when it entered a substantiated finding of abuse against Petitioner's name on the Health Care Personnel Registry?

APPLICABLE LAW

N.C. Gen. Stat. § 131E-256, and rules promulgated thereunder
N.C. Gen. Stat. § 150B-22, et seq. and rules promulgated thereunder

PREHEARING MOTION

Before hearing, Petitioner made a Motion in Limine to exclude any reference to a photo array, and any and all photographic identification of Petitioner by the resident PH as such identifications were unreliable and likely to confuse the trier of fact pursuant to Rule 403 of the Rules of Evidence. The Court reserved ruling on the motion until testimony was heard. Based on the preponderance of evidence heard at trial, the undersigned denied Petitioner's Motion.

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: None

For Respondent: Exhibits 1 - 31

WITNESSES

For Petitioner: No witnesses

For Respondent: Petitioner, Kim Brantham, Trolinger, Dr. Donald Statuto, Donna Ramsey, Toney Walters, Gwendolyn Woods, Lynette Cox, Pamela Anderson

FINDINGS OF FACT

Procedural Background

1. On March 21, 2013, Respondent notified Petitioner that it was substantiating an allegation of abuse against Petitioner for abusing a resident of O'Berry Neuro-Medical Treatment Center, on August 13, 2012, in Goldsboro, North Carolina.

Respondent also advised Petitioner that it was listing the substantiated finding against Petitioner's name on the Health Care Personnel Registry as follows:

On or about August 13, 2012, Kenneth Terrell Ford, a Health Care Personnel, abused a resident (PH) by willfully kicking the resident in the groin and pushing the resident's head against a wall resulting in physical harm, pain, and mental anguish.

(Respondent's Exhibit 30)

Adjudicated Facts

2. Petitioner was employed at O'Berry Neuro-Medical Treatment Center ("O'Berry") as a Health Care Technician I from May 15, 1999 until October 10, 2012. At O'Berry, Petitioner was generally referred to as "Ken." (T. p. 157)

3. On August 13, 2012, PH was a 72 year old resident who was assigned to Petitioner's care on the "B" shift in Unit 6-3 at O'Berry. PH had been diagnosed with vascular dementia, moderate mental retardation, cardiovascular accident, contractures, hypertension, atherosclerosis, and had a long time history of seizures. (Resp Exh 27)

a. PH was ambulatory, and walked with an unsteady or staggered gait due to one leg being shorter than the other, and because he had a flat left foot. PH wore custom insoles in his shoes to help with walking. Because of his leg and foot issues, PH was considered a high risk for falls, and required assistance with mobility at times. PH's upper right arm was contracted. (Resp Exh 27, T. p.164)

b. PH functioned in the high or severe range of Mental Retardation cognitively, and in the moderate range adaptively. He was verbal and able to communicate, but also stuttered. According to PH's Person Center Plan and O'Berry staff, PH easily became confused and forgot things, would not recognize familiar faces or objects, and forgot people's names. "When he gets upset, he starts rambling and talks very fast, and puts all kinds of stuff together. He may put things that happened in the past with things now." (Resp Exh 24) "He may become irritable and curse or hit at staff." When asked to do something, he may have problems carrying out tasks. (Resp Exh 27) The unit staff provided supports to PH that PH needed to minimize agitation associated with his dementia. (Resp Exh 4)

c. The preponderance of the evidence established that resident PH would get the present and future mixed up, and sometimes exaggerated. "He adds the future with the present." (Resp Exh 17) "[S]ometimes, PH does exaggerate and sometimes his conversation might be totally off the wall." "Sometimes, he's talking about his school days and how many years he went to school; and he exaggerates about . . . like for ten years or sixteen years." (T. pp. 124-125) In addition, PH did not refer to individuals by name, but called them "boy" or "girl." (Resp Exh 17, T. p. 67)

4. In August of 2012, Petitioner was assigned to Unit or Group Home 6-3 at O'Berry where he generally worked the "B" Shift from 7:00 a.m. until 3:30 p.m.

5. On August 13, 2012, Petitioner arrived at work at approximately 7:00 a.m., and attended a morning briefing until approximately 7:10 a.m. Petitioner was assigned to care for resident PH that day. The employees on the "A" shift had already awakened, and dressed Petitioner's patients. Health care tech Jerry McClarin had gotten resident PH out of bed, and dressed. The "A" shift employees had completed the body check form indicating no injury was noted to PH after the "A" shift had performed its body check of PH.

6. At 7:00 a.m., resident PH asked health care tech Swindell Coley for his money. Coley advised PH to wait until they finished with morning briefing.

7. After the morning briefing, Petitioner began walking down the hall, and met resident PH. Petitioner and Jerry McClarin performed a superficial body check of PH's arms and legs since PH was already dressed, and wearing shorts. Petitioner did not see any injuries on PH.

8. At approximately 7:15 a.m., Petitioner began grooming his other patients.

9. About 7:15 a.m., Swindell Coley and Jerry McClarin gave PH \$2.00 in the canteen area. PH left the canteen room behind Coley and McClarin.

10. At approximately 7:30 a.m. on August 13, 2012, resident PH approached Donna Trolinger ("Trolinger"), a licensed practical nurse who was distributing medications, to obtain his medications. Trolinger thought PH appeared mad and upset. After Trolinger asked PH what was wrong, PH told Trolinger, "Kent kicked me." Trolinger gave PH his meds, and turned away from PH to sign the medication book. When Trolinger turned back around, she saw that PH had pulled his pants and underwear down, and was pointing to his pelvic or groin area, above and to the left of his penis. PH told Trolinger that "Kent kicked me." PH told Trolinger that Kent kicked him two or three times. (Resp Exhs 9, 10, 19, 21)

11. Ms. Trolinger asked Petitioner to wait a minute, and asked Swindell Coley for assistance. Trolinger explained to Coley what PH had told her. When Coley saw PH, PH pointed to his groin, and explained that "that boy" banged or pushed his head against the wall. PH stomped his foot, and hit himself in the stomach area. (Resp Exhs 9, 10, 19, 21)

12. Mr. Coley notified Toney Walters, the Group Home Manager, of PH's statements. Walters notified Wanda Medline, Administrator on Duty, who contacted Kim Brantham, Chief Advocate. PH told Walters that "a boy" or "that boy" pushed PH's head against the wall. (Resp Exh 17)

13. Around 7:40 a.m. or 7:50 a.m., Walters, Trolinger, Petitioner, and Jerry McClarin, took PH to a private bathroom to perform a body check. Petitioner stood at the door while Trolinger examined PH. Nurse Trolinger observed a quarter-size mark in

PH's pelvic area, above and to the left of his penis. That area was tender to the touch. It was difficult for Trolinger to see the bruise without the use of a flashlight. Trolinger found no injury to PH's head or shoulder. (Resp Exhs 10, 21)

14. Mr. Toney Walters had been on the unit hall that morning between 7:00 a.m. and 7:30 a.m. He did not recall any commotion, or noise which was out of the ordinary. He did not hear anything that would leave him to believe a patient had been kicked in the scrotum. Walters never heard PH say the name "Kent," or witnessed PH identify Petitioner in any way as the person who kicked or pushed him. Walters explained that resident PH "normally does not call names. I never heard him call a staff name." (T. 121) In addition, Walters noted that "Ken" was not the name used to refer to Petitioner. (T. p. 117) At hearing, Mr. Walters acknowledged that the only way an injury is reported on the body check form is if a staff member writes it on there. Walters also acknowledged that if he willfully injured a patient, he would not report an injury on his body check form.

15. That day, Petitioner asked resident PH why he said Petitioner's name as the "boy" who hit him. PH told Petitioner that, "It wasn't you. It was another guy in short pants, and he had something on his shoulder." (Resp Exh 7)

16. At approximately 11:30 a.m. on August 13, 2012, Dr. Donald Statuto examined PH, and observed a bruise in PH's pelvic area that was in the process of diffusing over the pubic area. Dr. Statuto was employed at O'Berry, and had been since 2006. His responsibilities included treating residents for injuries. Dr. Statuto's examination revealed that PH's skin over the bruise was intact. In Statuto's medical experience and opinion, the bruise appeared like a "blunt force trauma," and the injury occurred within the last twenty-four hours. (Resp Exh 18, T. pp. 93-94) Resident PH told Dr. Statuto that someone hit him, but PH never told Statuto that he was kicked. PH never mentioned any names to Statuto.

17. On August 13, 2012, Petitioner left work at 1:30 p.m., and was off work on August 14, 2012. On August 15, 2012, Petitioner returned to work. He was assigned to a different unit until August 17, 2012. (T. p. 164) Petitioner did not interact with resident PH after the kicking incident was reported on August 13, 2012.

18. Kim Brantham, O'Berry Chief Advocate, was responsible for the training of employees and the investigation of allegations of abuse or neglect of residents. At some time prior to 8:00 a.m. on August 13, 2012, Brantham received notice of the allegation of abuse regarding PH. Brantham was notified that PH was kicked by Kent in his bedroom.

19. At hearing, Brantham opined that the injury experienced by PH could have been caused by an accident, or means other than abuse, but that possibility was not examined during her investigation into the August 13, 2012 incident with PH.

20. Lynette Cox was a Unit Director at O'Berry, and was responsible for two clusters, which comprise eight homes. She never witnessed PH personally identify Petitioner as the individual who kicked him, but did indicate that PH identified Petitioner

from photographs. Petitioner consistently denied to her that he abused PH. Cox was aware that PH had fallen and been injured in the past.

21. On August 13, 2012, Nurse Donna Trolinger, Unit Director Lynette Cox, and Chief Advocate Kim Brantham interviewed PH. The staff asked PH if there was anything he wanted to share with them. PH "pointed to his groin area," and stated, "that man kicked him and pushed his head into wall." (Resp Exh 25) PH rambled from one topic to another. PH could not remember the name of the man who kicked him, but he told staff that the incident happened "last night in his bedroom." As PH was preparing to leave the office, Petitioner came to the door. PH said, "That's the boy." Staff asked PH if Petitioner was the man who kicked, and pushed his head against the wall. PH stated that Petitioner was the man that had kicked him, and pushed his head against the wall. However, PH also told staff that Petitioner was the man with the yellow pants and his friend. PH then said it was another man [who hit him]. (T. pp. 68-69) PH described the man who hit him as wearing shorts with a striped shirt "like his." PH was wearing a blue-striped polo shirt. O'Berry staff determined during its investigation that another staff member was also wearing a striped shirt like PH's and shorts on August 13, 2012. (Resp Exh 25, p. 7 of 21)

22. On August 17, 2012, O'Berry management placed Petitioner, and two other staff members on administrative leave or investigative status.

23. Gwendolyn Woods ("Woods") is the niece of PH. On August 13, 2012, O'Berry nurse April Sprague telephoned Ms. Woods, and advised her of the incident involving PH. The next day, August 14, 2012, Woods visited PH. PH told Woods that "Ken" kicked him in the private area.

24. On August 17, 2012, Woods visited PH again at O'Berry, and performed a body check on PH. Woods observed red and purple whelps on PH's side and buttocks. These whelps had not been previously reported to Woods. She showed the whelps to three nurses. The ones on PH's buttocks had not healed completely, and some were fresh. (T. pp. 140-141) Because PH told Woods he was still hurting, Ms. Woods took PH to Lenoir Memorial Hospital that day for an evaluation of his injuries. (Resp Exhs 11, 31)

25. On August 22, 2012, Cox and Brantham interviewed PH again with Ms. Woods present. Staff laid seven photographs of male staff members in front of PH. They asked PH if he saw the man who kicked him. PH looked through the photos one by one. Upon seeing Petitioner's photo, PH said, "That's the man." When staff asked PH if Petitioner was the man who kicked him, PH began talking about tapes, dogs, and various other unrelated topics. Staff sporadically placed the photos in front of PH again, and asked PH if he saw the person who kicked him. PH selected Petitioner's photo. PH also identified another male staff member as the person who gave him his bath. (T. p. 49) When PH looked again at the photos, he pointed to Petitioner's photo, and said, "That's the man. That's my friend." (T. p. 50) PH also identified Frankie Bellamy, another health care tech, and talked about hitting Mr. Bellamy "beside the head with his belt." PH stated that "a man had come in his room and got in his bed." (Resp Exh 25)

26. On August 29, 2012, Cox and Brantham interviewed PH with Woods present. PH claimed that a man who lived down the hall came to his room and got into the bed with PH. PH also identified Frank Bellamy, another O'Berry staff member, by photograph as the man who got into his bed, and hit him with a belt while he resided at O'Berry. PH described how his head was slammed "upside that bed, my foot up, my head down, my arm and my shoulders," by that man. PH noted that the man who hit him doesn't live with him, but comes in the back door [of O'Berry]. PH described how that man drives different cars, and works with PH at night. (Resp. Exh. 25)

a. During this interview, PH frequently became confused, and said he was confused. PH made various statements wherein he mixed together incidents from his past, including things that he experienced during his childhood, and things his dad did to him, with things that occurred in his room at O'Berry.

b. Throughout the interview, Ms. Woods told O'Berry staff what she thought PH was saying, or what he meant by his statements.

27. Subsequently, Woods removed PH from O'Berry, and brought him to live with her and her family. PH told Ms. Woods that "staff were hitting me, but he wouldn't call any names . . . he [PH] was telling me from 2012 that he didn't want to be there, and he said they were hitting him." (Resp Exh 22) While staying with Woods, PH cried a lot, had a lot of nightmares, and always talked about the incident over and over, saying that Kent kicked him. (T. pp. 139-141) At times, PH would holler at Woods' home, and she would tell him not to yell, hit, or cuss her. PH responded to Woods that, "they hit, they kick, they punch." (T. p. 140)

28. Pamela Anderson ("Anderson") is a nurse investigator employed by Respondent who investigates complaints of abuse and neglect at facilities regulated by Respondent. Ms. Anderson supervised investigator Ann Groves who primarily investigated the allegations of abuse against Petitioner. Respondent conducted its investigation from October 9, 2012 through March 18, 2013. (Resp. Exh. 30, p. 3)

29. On March 4, 2013, almost six months after the alleged incident occurred, Investigator Groves interviewed PH. PH remembered living at O'Berry, but did not recall how long he lived there. When Groves asked PH if he knew the staff members by name, PH said, "I can't call it right now." When Groves asked if PH remembered a staff member called Petitioner, PH responded, "yes." Groves asked PH, "Did you ever have an incident with Kenneth Ford?" PH's answer on the interview sheet was, "He put his hand over my eyes." Ms. Groves asked PH, "Where did the incident occur?" PH answered, "In the shower." Ms. Groves also asked PH if he was injured or harmed. PH told Ms. Groves that he was hit, and pointed to a bruise in his groin area.

a. Ms. Groves showed PH a photograph of Petitioner, and asked PH if he knew who that was. PH said, "That was the man that did it." PH called the man Kenneth, and said "he hit him with a belt, poured water on his head." When Groves asked who kicked him, PH took the picture of Petitioner and said, "He did." (Resp Exh 23)

b. At hearing, during cross-examination, Ms. Anderson acknowledged that PH did not know that the photograph they showed him was Petitioner. She also acknowledged that PH did not identify Petitioner as the man who kicked him until Ms. Groves showed Petitioner's photograph to PH. (T. pp. 206-207)

30. In her investigative report, Anderson noted that Toney Walters informed her that PH told Walters and Nurse Trolinger that the incident happened last night when in bed. (Resp. Exh. 25, p. 7) Walters also told her that staff member Jerry McClarin worked A-shift on August 13, 2012. Mr. Walters first told Anderson that McClarin was wearing shorts and a blue-striped shirt like PH on August 13, 2012. Later, Walters said McClarin might have been wearing long blue jeans on August 13, 2012. (Resp. Exh. 25, p. 7) At hearing, there was no evidence proving that Respondent further investigated whether Mr. McClarin or any other O'Berry staff could have kicked resident PH, and pushed his head against the wall.

31. Based on Respondent's investigation, Anderson opined that Petitioner kicked PH in the groin on the morning of August 13, 2012. Anderson believed that PH was standing behind Petitioner, and kicked PH "donkey style," which resulted in PH's injury. However, Anderson acknowledged that no person she interviewed in the course of the investigation heard any commotion in the unit which would suggest Petitioner kicked PH "donkey style" on August 13, 2012. (T. pp. 199-201)

32. Anderson based her finding, in part, on what she described as inconsistencies in the statements Petitioner gave to individuals during the O'Berry investigation and the DHHS investigation. However, upon closer examination, Anderson was unable to identify any inconsistent statements made by Petitioner.

33. Dr. Donna Ramsey ("Ramsey") is a psychologist who treated PH from January of 2013 until June of 2013. After conducting a clinical assessment of PH, Dr. Ramsey diagnosed PH with Post Traumatic Stress Disorder ("PTSD"). Ramsey indicated that PH seemed to relive a trauma from his past that affected his behavior and overall demeanor. Ramsey described PH's statements about this incident as the "same man, with the same belt, standing there at night." Ramsey indicated that PH never mentioned a kick, and it seemed to her like the event he was describing happened at night. Ramsey was also aware from Ms. Woods that PH had experienced some physical and sexual abuse. She "got many statements from him [PH] that there absolutely was a trauma," and that it impacted PH psychologically, physically, and emotionally. (T. p. 104)

34. Petitioner proved by a preponderance of evidence that he never worked the "A" or night shift while he was employed at O'Berry.

35. At hearing, Dr. Statuto opined that based on his "logical medical opinion," PH's injury was most likely caused by a fall into a curved object like the edge of a table. He explained that:

I envision a curved surface. The corner of a table would be a – a good way to explain how the blood vessel was probably broken. . . . He could have fallen. More likely than not, that's what it is.

(T. p. 95-97) In Statuto's medical opinion, resident PH's injury was not caused by a kick or a punch.

36. A preponderance of the evidence also established that PH suffered bruises on his right buttocks and side, but the origin or source of such injury was unknown, and not determined by Respondent.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to N.C. Gen. Stat. Chapters 131E and 150B. To the extent 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. All parties have been correctly designated, and there is no question of misjoinder or nonjoinder.

3. Pursuant to Superior Court Judge Jones' Order of Remand, Petitioner has the burden of proving by a preponderance of the evidence that Respondent otherwise substantially prejudiced Petitioner's rights, and acted erroneously, acted arbitrarily or capriciously, failed to use proper procedure, or failed to act as required by law or by rule when it substantiated and listed a finding of abuse against Petitioner's name on the Health Care Personnel Registry.

4. N.C. Gen. Stat. § 131E-256(a)(1)(a) requires Respondent maintain a registry containing the names of all health care personnel working in health care facilities in North Carolina who have been subject to findings of abuse of a resident. The Health Care Personnel Registry provides a process to protect residents from abuse by preventing the future employment of personnel in health care facilities who are known to be abusive.

5. As a health care personnel working in a health care facility, Petitioner is subject to the provisions of N.C. Gen. Stat. § 131E-256.

6. "Abuse" is defined by 42 CFR Part 488.301 as "the willful infliction of injury, unreasonable confinement, intimidation or punishment which results in physical harm, pain, or mental anguish."

7. A preponderance of the evidence showed that Respondent did not deny Petitioner any due process rights to a hearing before substantiating and entering a finding of abuse against Petitioner's name on the Health Care Personnel Registry. This contested case hearing afforded Petitioner the required due process rights to a hearing before Respondent could implement any agency action against Petitioner.

8. A preponderance of the evidence clearly established that resident PH suffered physical injury to his groin area on or about August 13, 2012.

9. Petitioner proved by a preponderance of the evidence that Respondent otherwise substantially prejudiced Petitioner's rights, and acted erroneously by finding that Petitioner was the person who abused resident PH on August 13, 2012, at O'Berry Center, by kicking PH in the groin and pushing PH's head against a wall.

a. First, Petitioner proved that resident PH was the only person who identified Petitioner as the man who kicked him in the groin on August 13, 2012, and there were no eyewitnesses to the incident.

b. Secondly, Petitioner established, by a preponderance of the evidence, that PH's identification of Petitioner as the perpetrator was not reliable. PH had dementia, and was known to "mix together" events from the past with events in the present. During the facility's three interviews of PH, PH's confusion of the past and present day events was apparent and frequent. PH rambled in his answers. At the same time that PH identified Petitioner, from a photograph, as the man who hit him, PH pointed to Petitioner's photo and called Petitioner his friend. PH described the man who kicked him as someone wearing shorts and a striped shirt like he was wearing on August 13, 2012. On August 13, 2012, PH similarly told Petitioner that Petitioner wasn't the man who kicked him, and "It was another guy in short pants, and he had something on his shoulder." (Resp Exh 7) During the O'Berry Center's investigation, PH indicated he was hit while in his bedroom, and Respondent determined that PH was kicked while in his bedroom. However, during Respondent's investigation of PH, PH also said the kicking incident occurred in the shower, and PH said the incident occurred last night [August 12, 2012].

c. There was no evidence that Petitioner was wearing shorts and a striped shirt at work on August 13, 2012. O'Berry management learned that another staff member was wearing shorts and striped shirt like PH on August 13, 2012. (Resp Exh 25) There was no evidence Respondent further investigated this factor.

d. During the O'Berry Center's interview of PH, PH not only accused another staff member of getting in the bed and sexually abusing him, but claimed that someone hit him with a belt.

e. Contrary to Respondent's determination that PH was kicked around 7:20 a.m. on August 13, 2012, Toney Walters told Respondent that PH told him and Nurse Trolinger that PH was kicked "last night when he was in bed." (Resp. Exh. 25, p. 7)

f. Dr. Statuto's logical medical opinion was that PH's injury was most likely caused by a fall into a curved object like the edge of a table. Dr. Statuto examined PH four hours after PH was injured. There was no evidence that Respondent physically examined PH. Respondent did not interview PH until

seven months after the injury occurred. Respondent presented insufficient medical evidence to rebut Dr. Statuto's medical opinion.

9. The photographic evidence of PH's bruised buttocks, combined with PH's statements, and Dr. Ramsey's statements undoubtedly proved that PH suffered physical harm from being hit by a belt during the subject time period. Nevertheless, since that issue was not part of the contested case before me, the undersigned will not make any determination regarding that issue.

10. In this case, Petitioner proved by a preponderance of the evidence that Resident PH's statements were contradictory and inconsistent. Petitioner proved by a preponderance of the evidence that Respondent substantially prejudiced Petitioner's rights and acted erroneously by substantiating by relying on Resident PH's inconsistent statements by making a finding of abuse against Petitioner's name, and listing such finding against Petitioner's name on the Health Care Personnel Registry.

FINAL DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby **REVERSES** Respondent's decision to place a finding of substantiated abuse against Petitioner's name on the Health Care Personnel Registry, and Orders such finding against Petitioner's name be removed from the Health Care Personnel Registry.

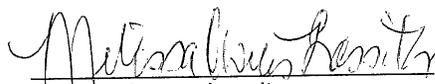
NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34. 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 the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed.

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 03.0102, 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 US mail as indicated by the date the Final Decision was postmarked.**

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 4th day of May, 2015.


Melissa Owens Lassiter
Administrative Law Judge

ISSUE

Whether the Department 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 as required by N.C. Gen. Stat. § 150B-23

Whether the Department was entitled to recoup \$2,635.30 in overpayments from Petitioner, which were identified in an audit with Program Integrity case number 513000050?

APPLICABLE STATUTES AND RULES

42 U.S.C. §§ 1396a - 1396v
42 C.F.R. Parts 455 and 456
N.C. Gen. Stat. § 150B-22 *et seq.*
10A N.C.A.C. 22F *et seq.*
21 N.C.A.C. 64 .0101 *et seq.*
N.C. State Plan for Medical Assistance

EXHIBITS

Petitioner's Exhibits 1-5 were admitted into evidence.

Respondent's Exhibits 1-13, 15-19 were admitted into evidence.

WITNESSES

For Petitioner: Joan B. Crowson, RN, MSN, CCM

For Respondent: Laurence H. Raney, M.D.
 Judy Diamond, RN

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, the undersigned makes the following:

FINDINGS OF FACT

1. At all times material to this matter, Petitioner, Rex Hospital, Inc. ("Petitioner"), was an enrolled provider of Acute Inpatient Hospital Services in the North Carolina Medicaid Program.
2. This matter involves an audit of Petitioner conducted by Health Management Systems ("HMS") on or about March, 2013 (Program Integrity Case No. 513000050). (Rsp. Ex. 3). HMS offices are located in Texas, but the reviewing contractors are from across the country.
3. Respondent contends that the admission to inpatient status in the case under review was not medically necessary and observation status would have been appropriate as determined by the reviewing physician (Rsp. Exs. 10 and 15, T pp. 111, 117). Respondent contends that the medical records did not justify admission to inpatient status. (Rsp. Ex. 5).
4. To initiate the audit, an initial record request letter was sent to the Petitioner. (Rsp.'s Ex. 3, T p. 41).
5. As a result of the audit, HMS identified an overpayment of \$2,635.30, which was identified as Program Integrity Case No. 513000050. (Rsp. Ex. 5).
6. On June 5, 2013 HMS notified Petitioner of the audit results for Program Integrity Case No. 513000050 via mail and requested that Petitioner send in a check for the overpayment within thirty (30) days or file a Request for Reconsideration within fifteen (15) days. (Rsp. Ex. 5).
7. There is no contention that Petitioner failed to adequately comply with internal grievance and review requirements.
8. Petitioner filed a timely appeal for the one (1) inpatient admission to this Court and the case was set for hearing on December 4-5, 2014, by Order dated October 22, 2014.
9. The audits were conducted by nurse reviewers employed by HMS entering data from each patient's chart into the Interqual admission criteria software. (Rsp. Exs. 8 and 13, T pp. 46-49).

10. There is little to no evidence about the company HMS. The inference is that its business—perhaps sole business—is to provide post-payment reviews such as those at issue herein across the entire country.

11. Interqual is a nationally accepted criteria screening tool used by hospitals to help initially determine if a patient meets in-patient criteria.

12. Judy Diamond is an Appeals Team Lead Coordinator for HMS. Ms. Diamond testified on behalf of Respondent. She has an Associate's Degree in Nursing; has been a nurse for 18 years; is licensed as a nurse in the State of California; and oversees HMS audits in numerous states. (Ex. 18, T p. 22) Ms. Diamond received minimal training in the use of Interqual from HMS but uses the program on a daily basis. (T pp. 24-25) She receives regular updates and the manual is updated annually but she does not receive particular on-going or yearly training on Interqual and is not and has not ever been tested on Interqual.

13. By her testimony, she has completed thousands of Interqual reviews determining whether a hospital stay met Interqual's criteria for an inpatient stay. (T pp. 25, 30) Ms. Diamond is familiar with and uses DMA's policies and manuals. (T p. 23).

14. Ms. Diamond was accepted as an expert in the administration of Interqual Level of Care Criteria and her testimony is to be given the weight the trier of fact deems appropriate. (T p. 34)

15. Upon receipt of the medical records from a hospital, the HMS nurse reviewer selects the version of Interqual to use based upon the date of admission and the category of treatment and then would check the appropriate boxes in the screening tool depending upon the nurse's review of the records. (T p. 30).

16. According to Ms. Diamond, the process that HMS uses is that the nurse reviewer reviews the records and completes the Interqual clinical assessment based upon the date of service. (T p. 42) If the Interqual criteria are met justifying in-patient treatment, then it is a non-finding and no recoupment is sought. (T p. 42) If the Interqual criteria are not met, then the file is sent back to a supervisor for assignment to a licensed physician to review. (T p. 42) If the physician finds that the admission to inpatient setting was medically necessary despite not meeting Interqual guidelines, the admission is entered as a non-finding and no recoupment is sought. (T pp. 42-43) If, on the other hand, the physician finds that admission to inpatient setting was not medically necessary, HMS seeks recoupment for the admission to a setting that is not medically necessary. (T p. 43).

17. Ms. Diamond did not identify the nurse reviewer in this case, and thus it is not known whether the nurse is licensed in North Carolina or anywhere else. She generally has no knowledge of the credentials or experience of the nurse reviewers nor how a particular nurse applies the Interqual assessment. In essence, she generally knows nothing about most nurses other than the name, an identifying number and which state the nurse is licensed in. (T pp. 55, 59)

18. Ms. Diamond acknowledges that each nurse reviewer also prepares a written summary. (T pp. 61-62) The summary is the reviewing nurse's assertion of what was important from the file, not part of the Interqual assessment. The summary is forwarded to the reviewing physician who may or may not use the summary. No reviewing nurse appeared and testified in this hearing.

19. Ms. Diamond was not aware if an “inter-rater” was used by reviewing nurses to assure accuracy and reliability between the different professionals using the Interqual. (T. p. 58)
20. Ms. Diamond had no role in reviewing this file except and until to provide testimony in this contested case. She was not the reviewing nurse and has no underlying knowledge of anything about the particular files but is offering her opinion on the application of Interqual.
21. Laurence H. Raney, M.D. was called to testify by the Respondent. Dr. Raney is Board Certified in Emergency Medicine. He received his MD from the University of Florida in 1983 and is a member of the American College of Emergency Physicians, the American Academy of Emergency Medicine and the Air Medical Physicians Association. (Rsp. Ex. 18, T. pp. 72-77).
22. Dr. Raney has never practiced medicine of any kind in North Carolina. Dr. Raney has never served on a hospital utilization management committee. Through researching UNC Hospital and the community in which it resides, Dr. Raney was able to familiarize himself with the community standard of care at UNC Hospital and determined that the standard of care was similar to a hospital at which he previously worked. (T pp. 76-77).
23. Dr. Raney was admitted by the Court to testify as an expert in emergency medicine and hospital admissions. His testimony is to be given the weight the trier of fact deems appropriate. (T p. 108).
24. Dr. Raney had no role in reviewing this file except and until to provide testimony in this contested case. He was not the reviewing physician and has no underlying knowledge of anything about the particular files but is offering his opinion on the admission review process and his review of the particular files in preparation for this hearing.
25. Any claims for patients which were found to not meet the Interqual admission criteria were subsequently reviewed by a licensed physician. (Rsp. Exs. 10 and 15, T pp. 38, 67, 79-80).
26. For the patient admission at issue from the audit, Respondent contends the inpatient admission did not meet the Interqual criteria for an inpatient admission and thus would appropriately be forwarded to a physician for review. (Rsp. Exs. 8 and 13, T pp. 47-49, 55-56)
27. According to Dr. Raney, once the case is before the physician for review, the doctor does not review the Interqual criteria, but does a whole new clinical review. The Interqual is in essence the first line tool which gets the particular case file to the doctor level for review. There is no prohibition to the doctor looking at the Interqual criteria.
28. According to Dr. Raney, the physician to whom this review was forwarded was a North Carolina licensed physician.
29. He has little to no knowledge of the credentials or experience of the physician reviewer nor how that particular doctor reviewed the file nor whether the doctor reviewed the Interqual assessment. In essence, he knows very little about that doctor or how he reviewed the files at issue. No North Carolina doctor was called to present evidence in this matter.
30. The Respondent contends that the audit found that Petitioner failed to comply with the DMA Hospital Provider Manual (last revised November 1999) which was in effect at the time that services examined by the audit were rendered for the patients involved. (Rsp. Ex. 2).

31. The Respondent's argument relies in large part on the Hospital Provider Manual. The Manual states that "[m]edically necessary and non-experimental inpatient hospital services are available to all eligible Medicaid recipients without limitation on length of stay." (Rsp. Ex. 2, p. 63).

32. The Hospital Provider Manual states that "[t]he Medicaid program will pay the cost of inpatient services that have been determined to be covered by the program and are medically necessary." (Rsp. Ex. 2, p. 64).

33. The Hospital Provider Manual also states that when "an entire hospital stay or any portion of an inpatient hospital stay is denied, the charges for that denied stay . . . will not be covered by Medicaid." (Rsp. Ex. p. 128).

34. Finally, the Hospital Provider Manual states that "[p]atients who are admitted to observation status do not qualify as inpatients, even when they stay past midnight." (Rsp. Ex. 2, p. 128).

35. Nothing has been presented to this Tribunal which elevates the Provider Manual to the status of rule. If such exists by way of exemption, or otherwise, it has not been produced. Absent such authority it would seem that the DMA Hospital Provider Manual would be relegated to the same status as the Adult Medicaid Manual which "merely explains the definitions that currently exist in federal and state statutes, rules and regulations" and that "[v]iolations of or failures to comply with the MAF [Medicaid] Manual [are] of no effect" unless the act or omission in question amounts to a "failure to meet the requirements set out in the federal and state statutes and regulations." *Joyner v. N. Carolina Dep't of Health & Human Servs.*, 214 N.C. App. 278, 288-89, 715 S.E.2d 498, 505-06 (2011)

36. The underlying question to be resolved is whether or not Petitioner used acceptable medical standards within the community it serves in making the determination on in-patient versus observation status. The paramount question is whether or not the services rendered were medically necessary.

37. After the reconsideration review, the alleged overpayments for the inpatient admission at Rex Hospital of one patient remained contested between the parties, with the one admission having a total value of \$2,635.30. The alleged overpayment is for patient D.D.

38. Petitioner did not challenge the accuracy of the \$2,635.30 total figure at the hearing of this case.

39. Joan B. Crowson, RN, MSN, CCM is currently employed as an assistant director of utilization management with the Petitioner UNC Hospital. Ms. Crowson testified for the Petitioner and was admitted as an expert in utilization management and the use of Interqual and hospital admissions. (Pt. Ex. 2; T p. 186). She offered testimony concerning Rex Hospital as well.

40. Part of Ms. Crowson's duties are to make sure that the nurses at the various locations for utilization management within the UNC Hospitals system are reviewing in accordance with the Code of Federal Regulations. Interqual is an integral part of utilization management. Ms. Crowson and the other UM nurses are trained every year and tested every year on Interqual. Ms. Crowson has personally been using Interqual since 1997, having reviewed possibly as many as hundreds of

thousands of cases. (T p. 176)

41. Ms. Crowson assisted Rex Hospital for a period of time while Rex was without a director. Further she has assisted as Rex and UNC Hospitals try to merge their electronic medical records. Thus Ms. Crowson has knowledge of Rex Hospital's utilization management program. She has worked closely with the UM managers at Rex. According to Ms. Crowson, the Rex UM program is very similar to that of UNC Hospitals. (T. p. 230)

42. According to Ms. Crowson, Rex does not have "resident" doctors rotating in and out of the hospital and it does not have psychiatry and therefore the UM system at UNC may be somewhat more involved. (T. p. 231)

43. While Ms. Crowson is more familiar with the UNC Hospital process than with that of Rex Hospital, she is aware that every hospital in the state of North Carolina is required to comply with the Code of Federal Regulations and the federal code requires a utilization plan. (T pp. 210, 223). Ms. Crowson even drafted the utilization management plan for UNC Hospitals. (T. p. 212)

44. Ms. Crowson is not a doctor to make the determination of admittance; however, as a member of the UM committee at UNC Hospital which reviews admissions, she has a function that is part of the decision as to the appropriateness of an admission.

45. While Ms. Crowson observed that the services which were planned for or provided to any patient admitted to an inpatient setting could have been done in an observation setting, she also stated that any service could be provided while in observation, including intensive care services. (T p. 247). Thus, in theory, every admission could be an "observation;" however, that would not be in keeping with the federal regulatory guidelines.

46. The fact that any service could be provided while in observation raises what is perhaps the underlying, but unspoken issue, which is whether or not this is a monetary and not a medical issue. Medicaid will pay the cost if the hospital stay is in-patient but the cost becomes the patient's responsibility if it is an observation setting. Rhetorically, if money is not at least partially driving the bus, then why does it matter so long as the patient is receiving proper care? Also, it is very important to note that the patient has zero input into the decision-making. The patient just knows that he or she spent a night in the hospital and does not know the wrangling of the decision-making until they get a bill. In other words, the decision does not necessarily affect the treatment received by the patient, but it does affect what happens in billing. (T. p. 218)

47. Ms. Crowson testified about the process used by the hospitals. The decision-making would not have reached the doctor level of review if the question about Interqual had not already been addressed. She testified that in each instance the process was followed correctly and thus the patient's records would have gone through the Interqual process. Respondent's witness Dr. Raney had stated that the doctors did not consult the Interqual reports anyway.

48. Ms. Crowson makes clear that any cases which did not meet criteria for admission at the nurse review/Interqual level are the ones that are reviewed by another doctor other than just the decision of the admitting physician. (T. p. 229)

49. If the reviewing physician and the admitting doctor are not in agreement after the initial physician review, then yet another independent physician is consulted for the review. In the

hospital scheme of review, it takes two doctors to override the admitting decision of the attending physician. (T. p. 246)

50. Petitioner has complied with the federal regulatory guidelines for hospital admissions.

Based upon the foregoing Findings of Fact, this Tribunal makes the following

CONCLUSIONS OF LAW

1. All parties are properly before the Office of Administrative Hearings, and this tribunal has jurisdiction of the parties and of the subject matter at issue.
2. Respondent bears the burden of proof in this matter pursuant to N.C. Gen. Stat. §108C-12.
3. The test established by N.C. Gen. Stat. § 150B-23 is whether or not the agency “(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.”
4. It is undisputed that Petitioner is a hospital providing Acute Inpatient Hospital Services to Medicaid recipients.
5. The federal enabling authority comes from 42 CFR 456 *et. seq.* and especially Subpart C, §§456.50 *et. seq.*, which specifically deals with utilization controls for hospitals.
6. 42 CFR 456.4 places the responsibility for monitoring the utilization control program with the state agency, the Respondent. Among other requirements, the state agency must “take all necessary corrective action to ensure the effectiveness of the program; [and] establish methods and procedures to implement this section.”
7. 42 CFR 456.5 requires the state agency to have written criteria for evaluation of the appropriateness and quality of the Medicaid services rendered. Such criteria has not been produced for this contested case hearing.
8. 42 CFR 456.6 requires the Respondent to have an agreement with another agency wherein that subordinate agency “is responsible for establishing a plan for the review by professional health personnel of the appropriateness and quality of Medicaid services.” An assumption may be that it is Health Management Systems, but there is scant evidence to that effect—only that HMS conducted the audit.
9. 42 CFR 431.107 requires the State Medicaid Plan to provide for an agreement between the State Medicaid agency and each provider. This requirement is echoed in 42 CFR 456.101 which further requires the hospital which provides inpatient care to have a utilization review plan “that provides for review of each beneficiary’s need for the services that the hospital furnishes him.”

10. 42 CFR 456.105 requires each hospital to establish a committee to perform the utilization review as required. 42 CFR 456.122 requires the committee to have written criteria to assess the needs for admission. Further it requires the committee to have “more extensive written criteria” for cases which have shown to be associated with high costs, or frequently are associated with the furnishing of excessive services, or are associated with attending physicians whose care is frequently found to be questionable.

11. There is no contention, and thus no evidence, that either the hospital or the individual doctors have been shown to have been associated with high costs, or that they are frequently associated with furnishing excessive services, or that the individual doctors care has frequently been found to be questionable.

12. 42 CFR 456.105 provides the hospital’s committee with more specific details of the review to be conducted. If the hospital committee agrees that admission is warranted, then a date for review of that decision is assigned. If the committee does not think the criteria has been met, then the committee or a subgroup of the committee which includes at least one physician reviews the case. If the decision of the committee continues to be that admission is not warranted, then the attending physician is given an opportunity to present his reasons justifying admission. If the attending does not present further information, then the committee’s decision stands. If, however, the attending physician does present further information, then at least two physicians are required to review and overturn the decision of the attending doctor.

13. The hospital fully complied with these federal requirements. (Pet. Ex. 3) While there is less direct evidence concerning Rex that UNC Hospital, because of the holding in this contested case, the dearth of evidence is of no consequence in that the Respondent has failed to carry its burden of proof.

14. N.C. Gen. Stat. 108A, Part 6, §§ 108A-54 *et. seq.* and entitled Medical Assistance Program, is the North Carolina enabling statutes for the Medicaid program. N.C. Gen. Stat. § 108A-54 authorizes the Respondent to adopt rules to implement the state Medicaid program. (Emphasis added)

15. N.C. Gen. Stat. § 108A-54.1B(a) more specifically authorizes the Respondent to adopt both temporary and permanent rules “to implement or define the federal laws and regulations, the North Carolina State Plan of Medical Assistance” and more particularly “the audits and program integrity.” (Emphasis added) N.C. Gen. Stat. § 108A-54.1B(d) acknowledges that some plans and waivers which have been approved by CMS for the North Carolina Medicaid program have the same force and effect as properly promulgated rules. There is no evidence or argument presented to this Tribunal which identifies the hospital recoupment cases as being within such plan or waivers.

16. Armed with the authority to enact rules, the Respondent should have clear and concise rules which apply to this action to recoup monies paid to participating hospitals and, if such exists, it has not been provided in the course of this contested case. N.C. Gen. Stat. § 108A-54.2 applies to “policy” and does not help Respondent’s position.

17. Respondent relies exclusively in its argument on rules found within 10A NCAC 22F. Subchapter 22F is entitled Program Integrity, and it is the subchapter dealing with program integrity for the entirety of Medicaid, not just the hospitals.

18. 10A NCAC 22F .0101, entitled Scope, specifically states that “[T]his Subchapter shall provide methods and procedures to ensure the integrity of the Medicaid program.” (Emphasis added). In other words, if methods and procedures exist, they should be found in this subchapter.

19. Interestingly 10A NCAC 22F .0101 cites three General Statutes and one federal regulation as the authority for this rule. The first statute cited is N.C. Gen. Stat. § 108A-25(b) which states that a program of medical assistance is to be established and shall be administered by the county departments of social services. There is no evidence that the counties have had any role at all in the process with which this contested case is concerned.

20. The remaining two references to general statutes are N.C. Gen. Stat. § 108A-63 and N.C. Gen. Stat. § 108A-64, both of which refer to provider fraud. There has not been even an inference that provider fraud is involved in this case.

21. 10A NCAC 22F .0103 also requires the Respondent to develop methods and procedures for broadly dealing in practically any manner with cases involving “fraud, abuse, error, overutilization or the use of medically unnecessary or medically inappropriate services.” The rule goes further and states that “the Division shall institute methods and procedures to recoup improperly paid claims.”

22. Also, interestingly, 10A NCAC 22F .0103 refers to the same three statutes and the same federal regulation as 10A NCAC 22F .0101, which do not apply to this contested case based on the evidence presented. There is no evidence county departments of social services have been involved in this contested case.

23. 10A NCAC 22F .0301 defines “provider abuse.” The assertion by Respondent, presumably, is that the hospital cases fit within this definition because the questioned charges were “not necessary” and that the hospital failed “to provide and maintain within accepted medical standards for the community . . . medically necessary care and services.” (Emphasis added) However, as before, the authority for 10A NCAC 22F .0301 does not apply to the evidence as presented in this contested case.

24. 10A NCAC 22F .0601(a) provides for restitution for improper payments, but also lacks authority from the North Carolina General Assembly that is applicable to this contested case.

25. 10A NCAC 22F .0403 explains the process after utilization review has determined a patient has had an excessive length of stay, but there is nothing about how the determination for excessive stay is made. This rule likewise refers to N.C. Gen. Stat. § 108A-25(b) which requires the county departments to be involved.

26. Since all references by Respondent to rules refer to Subchapter 22F, and that subchapter does not authorize action as sought in this contested case, the Respondent has failed to show that it has statutory or promulgated rule authority to do what it proposes to do in this contested case, i.e., recoup money paid to the hospital.

27. If there is any other statutory or rule authority, Respondent has failed to present such authority to this Tribunal.

28. Respondent relies in part on the DMA Hospital Provider Manual (revised November 1999). Nothing has been presented to this Tribunal which elevates the Provider Manual to the status of rule. If such exists by way of exemption, or otherwise, it has not been produced. Absent such authority it would seem that the DMA Hospital Provider Manual would be relegated to the same status as the Adult Medicaid Manual as addressed in Joyner v. N. Carolina Dep't of Health & Human Servs., which states

The principal authority upon which DHHS relied in . . . was the North Carolina Adult Medicaid Manual, which is an “internal instructional reference for DHHS employees in the application of DHHS policy and interpretation of the federal Medicaid requirements.” Although the provisions of the Medicaid Manual are clearly entitled to some consideration in attempts to understand the rules and regulations governing eligibility for Medicaid benefits, we have previously stated that the Medicaid Manual “merely explains the definitions that currently exist in federal and state statutes, rules and regulations” and that “[v]iolations of or failures to comply with the MAF [Medicaid] Manual [are] of no effect” unless the act or omission in question amounts to a “failure to meet the requirements set out in the federal and state statutes and regulations [.]” (*Internal cites omitted*)

Joyner v. N. Carolina Dep't of Health & Human Servs., 214 N.C. App. 278, 288-89, 715 S.E.2d 498, 505-06 (2011)

29. It is also noted that the DMA Hospital Provider Manual, page 43, refers to a provision in the Administrative Code that has long since been repealed.

30. It is not known if Respondent is attempting to bootstrap the contract between Petitioner and Respondent into this argument. It was introduced as an exhibit, but there is no argument or reference to the contract in this case. However, assuming *arguendo* that such were the case, it would be without merit. In the contract, paragraph 3(e) makes reference to practically anything that has been reduced to writing and might remotely have relevance, including the kitchen sink. Mere reference to a writing in a contract does not rise to the level of enforceability unless the receiving party has a semblance of real notice. Further the contract requires that the contract is governed by the litany so long as it is “consistent with and expressly or implicitly authorized” and there is zero evidence of any of the contractual terms. Therefore the contract has no control in this case.

31. *Even if* it is assumed that the proper authority exists for these reviews, nothing has been presented to this Tribunal which shows the process followed to get to OAH. There is no evidence of how it was determined that these particular cases were chosen, how many cases were reviewed in total, were these cases merely randomly selected or what prompted the audit. Many unanswered questions of the process exist. With no evidence, one cannot determine what is the proper procedure as required in N.C. Gen. Stat. § 150B-23, much less whether or not it was followed.

32. *Even if* it is assumed that the proper authority exists and that the proper procedure was followed, the Respondent does not prevail on the facts of this case.

33. This contested case is not just about a comparison of Dr. Raney's testimony and Ms. Crowson's testimony; however, assuming yet again that it was, neither of Respondent's witnesses participated in an active role in the initial reviews as compared to Ms. Crowson's very direct involvement of all of the hospitals process and reviews.

34. If there is a comparison to be made, then it would be Dr. Raney's much removed review of the patient's file as opposed to the admitting physician's opinion plus that of at least one reviewing doctor, possibly two.

35. The Eleventh Circuit Court of Appeals has discussed this to a degree, and while not controlling in this district it is certainly instructive. In Moore ex rel. Moore v. Reese, 637 F.3d 1220, 1223 (11th Cir. 2011), the Court of Appeals also dealt with the extent to which a state Medicaid agency may review the treating physician's determination of medical necessity.

36. The Court found in essence that neither the state agency nor the admitting physician necessarily prevails over the other:

In sum, the Medicaid Act does not give the treating physician unilateral discretion to define medical necessity so long as the physician does not violate the law or breach ethical duties any more than it gives such discretion to the state so long as the state does not refuse to provide a required service outright. It is a false dichotomy to say that one or the other, the state's medical expert or the treating physician, must have complete control, or must be deferred to, when assessing whether a service or treatment is medically necessary under the Medicaid Act.

Moore ex rel. Moore v. Reese, 637 F.3d 1220, 1259-60 (11th Cir. 2011)

37. *Even if* the comparison was or should be Dr. Raney's testimony versus the admitting doctor and/or the first line reviewing doctor, for the Respondent at best it would be substantially equal. In other words there has not been enough evidence to carry the burden of proof.

38. Respondent's evidence has shown at the very best that it did basically the exact same process the hospital did on the dates of admission except the State comes back with a different result. While the federal regulations require the individual states to have some form of quality and utilization management, this seems like Monday morning quarterbacking at its worse.

39. Based on the testimony and evidence presented in this contested case hearing, the hospital had a more extensive review at the time of the admissions than the Respondent has had after the fact. And in so doing, the hospital fully complied with the federal regulations and their own policy that was approved by the state.

40. Based on the testimony and qualifications of the parties' respective witnesses, the Court finds that the weight of the evidence supports Petitioner's contention that inpatient admission was medically necessary for this patient.

41. Ms. Crowson's testimony is given more credibility because she was actually more directly involved in the process under review even though she is employed with UNC Hospitals and not directly with Rex. Giving Dr. Raney and Ms. Diamond the weight deemed appropriate by the finder of fact, they are giving their opinions from afar and in hind-sight and are not given as much credibility as Ms. Crowson.

42. The underlying foundation for this entire process is the monetary considerations in order to protect and safeguard Medicaid monies so that the money is not wasted but rather spent on those in actual need. The very first section of 42 C.F.R. § 456 acknowledges such:

(1) Methods and procedures to safeguard against unnecessary utilization of care and services. Section 1902(a)(30) requires that the State plan provide methods and procedures to safeguard against unnecessary utilization of care and services.

(2) Penalty for failure to have an effective program to control utilization of institutional services. Section 1903(g)(1) provides for a reduction in the amount of Federal Medicaid funds paid to a State for long-stay inpatient services if the State does not make a showing satisfactory to the Secretary that it has an effective program of control over utilization of those services.

42 C.F.R. § 456.1

43. This and other parts of that section of the federal requirements show that the State can be penalized for not exercising proper control over the hospitalizations. The penalty is monetary. The references within the quote in paragraph 42 above are to requirements in sections of the Social Security Act.

44. This swirl of decision-making is made without any input from the patient. The patient has no idea of how these decisions may affect him or her. They are not asked if they would rather go home or if they want to be on "observation" and remain in the hospital even though it will cost them money if the in-patient is being denied.

45. Rhetorically, the question becomes is this a monetary decision or truly a medical decision. According to Ms. Diamond, HMS is the entity that seeks recoupment—not the Respondent DHHS, the single state agency responsible for Medicaid in the State of North Carolina. It could be an easy jump to make that HMS has monetary incentive and thus the close calls become monetary decisions from the Respondent's perspective; however, there is not sufficient evidence from which to conclude such is the case, and the issues in this case are framed solely about the medical decisions.

46. In this contested case, the Petitioner did what was required of them by the federal regulations.

47. With regard to the patient at issue in the case, the Respondent has failed to prove that it was not medically necessary to admit the patient to inpatient status. Stated in the positive, the patient was properly admitted into the hospital as an inpatient. The patient should not have instead been admitted to observation.

48. Respondent failed to meet its burden of showing by a preponderance of the evidence that DMA's identification of the payment as having been an improper overpayment and any subsequent action to recoup such payment was proper. Respondent failed to meet its burden of proof to show that the hospital failed to provide and maintain within accepted medical standards for the community medically necessary care and services.

49. As required in N.C. Gen. State §150B-23, Respondent exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; and failed to act as required by law or rule.

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned makes the following:

DECISION

The decision by Respondent DMA to recoup \$2,635.30 from Petitioner is not supported by the evidence and hereby is **REVERSED**.

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

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 03.0102, 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.

IT IS SO ORDERED.

This the 29th day of May, 2015.



DONALD W. OVERRY
Administrative Law Judge Presiding

Filed

STATE OF NORTH CAROLINA
COUNTY OF WAKE

2015 MAY 29 5:54 PM
IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13 DHR 19653, 13 DHR 19654

Office of
Administrative Hearings

UNIVERSITY OF NORTH CAROLINA)
HOSPITALS AT CHAPEL HILL)
(D.W. and G.B.))
Petitioner)

v.)

FINAL DECISION

N.C. DEPARTMENT OF HEALTH AND)
HUMAN SERVICES, DIVISION OF)
MEDICAL ASSISTANCE)
Respondent)

.....
THIS CAUSE came on for hearing before the undersigned Administrative Law Judge Donald W. Overby on December 4-5, 2014, in Raleigh, North Carolina.

APPEARANCES

For Petitioner: Tracy M. Field
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ISSUE

Whether the Department 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 as required by N.C. Gen. Stat. § 150B-23

Whether the Department was entitled to recoup a total of \$12,216.81 in overpayments from Petitioner, which were identified in an audit with Program Integrity case numbers 513000061?

APPLICABLE STATUTES AND RULES

- 42 U.S.C. §§ 1396a - 1396v
- 42 C.F.R. Parts 455 and 456
- N.C. Gen. Stat. § 150B-22 *et seq.*
- 10A N.C.A.C. 22F *et seq.*
- 21 N.C.A.C. 64 .0101 *et seq.*
- N.C. State Plan for Medical Assistance

EXHIBITS

Petitioner's Exhibits 1-5 were admitted into evidence.

Respondent's Exhibits 2, 3, 5-8, 10-13, and 15-19 were admitted into evidence.

WITNESSES

For Petitioner: Joan B. Crowson, RN, MSN, CCM

For Respondent: Laurence H. Raney, M.D.
 Judy Diamond, RN

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, the undersigned makes the following:

FINDINGS OF FACT

1. At all times material to this matter, Petitioner, University of North Carolina Hospitals at Chapel Hill ("Petitioner"), was an enrolled provider of Acute Inpatient Hospital Services in the North Carolina Medicaid Program.
2. This matter involves an audit of Petitioner conducted by Health Management Systems ("HMS") on or about March, 2013 (Program Integrity Case No. 513000061). (Rsp. Ex. 3). HMS offices are located in Texas, but the reviewing contractors are from across the country.
3. Respondent contends that neither of the admissions to inpatient status in the cases under review was medically necessary and observation status would have been appropriate as determined by the reviewing physician (Rsp. Exs. 10 and 15, T pp. 111, 117). Respondent contends that the medical records did not justify admission to inpatient status. (Rsp. Ex. 5).
4. To initiate the audit, an initial record request letter was sent to the Petitioner. (Rsp.'s Ex. 3, T p. 41).
5. As a result of the audit, HMS identified an overpayment of \$16,606.94, which was identified as Program Integrity Case No. 513000061. (Rsp. Ex. 5).
6. On May 31, 2013 HMS notified Petitioner of the audit results for Program Integrity Case No. 513000061 via mail and requested that Petitioner send in a check for the overpayment within thirty (30) days or file a Request for Reconsideration within fifteen (15) days. (Rsp. Ex. 5).
7. There is no contention that Petitioner failed to adequately comply with internal grievance and review requirements.
8. Petitioner filed timely appeals for two (2) of the admissions to this Court and the case was set for hearing on December 4-5, 2014, by Order dated October 22, 2014.
9. The audits were conducted by nurse reviewers employed by HMS entering data from each patient's chart into the Interqual admission criteria software. (Rsp. Exs. 8 and 13, T pp. 46-49).

10. There is little to no evidence about the company HMS. The inference is that its business—perhaps sole business—is to provide post-payment reviews such as those at issue herein across the entire country.

11. Interqual is a nationally accepted criteria screening tool used by hospitals to help initially determine if a patient meets in-patient criteria.

12. Judy Diamond is an Appeals Team Lead Coordinator for HMS. Ms. Diamond testified on behalf of Respondent. She has an Associate's Degree in Nursing; has been a nurse for 18 years; is licensed as a nurse in the State of California; and oversees HMS audits in numerous states. (Ex. 18, T p. 22) Ms. Diamond received minimal training in the use of Interqual from HMS but uses the program on a daily basis. (T pp. 24-25) She receives regular updates and the manual is updated annually but she does not receive particular on-going or yearly training on Interqual and is not and has not ever been tested on Interqual.

13. By her testimony, she has completed thousands of Interqual reviews determining whether a hospital stay met Interqual's criteria for an inpatient stay. (T pp. 25, 30) Ms. Diamond is familiar with and uses DMA's policies and manuals. (T p. 23).

14. Ms. Diamond was accepted as an expert in the administration of Interqual Level of Care Criteria and her testimony is to be given the weight the trier of fact deems appropriate. (T p. 34)

15. Upon receipt of the medical records from a hospital, the HMS nurse reviewer selects the version of Interqual to use based upon the date of admission and the category of treatment and then would check the appropriate boxes in the screening tool depending upon the nurse's review of the records. (T p. 30).

16. According to Ms. Diamond, the process that HMS uses is that the nurse reviewer reviews the records and completes the Interqual clinical assessment based upon the date of service. (T p. 42) If the Interqual criteria are met justifying in-patient treatment, then it is a non-finding and no recoupment is sought. (T p. 42) If the Interqual criteria are not met, then the file is sent back to a supervisor for assignment to a licensed physician to review. (T p. 42) If the physician finds that the admission to inpatient setting was medically necessary despite not meeting Interqual guidelines, the admission is entered as a non-finding and no recoupment is sought. (T pp. 42-43) If, on the other hand, the physician finds that admission to inpatient setting was not medically necessary, HMS seeks recoupment for the admission to a setting that is not medically necessary. (T p. 43).

17. Ms. Diamond identified the nurse reviewer in the case as a nurse licensed in North Carolina. She has no knowledge of the credentials or experience of the nurse reviewer nor how that particular nurse applied the Interqual assessment. In essence, she knows nothing about that nurse other than the name, an identifying number and which state she is licensed in. (T. pp. 55, 59)

18. Ms. Diamond acknowledges that each nurse reviewer also prepares a written summary. (T. pp. 61-62) The summary is that reviewing nurse's assertion of what was important from the file, not part of the Interqual assessment. The summary is forwarded to the reviewing physician who may or may not use the summary. No reviewing nurse appeared and testified in this hearing.

19. Ms. Diamond was not aware if an "inter-rater" was used by reviewing nurses to assure accuracy and reliability between the different professionals using the Interqual. (T. p. 58)

20. Ms. Diamond had no role in reviewing this file except and until to provide testimony in this contested case. She was not the reviewing nurse and has no underlying knowledge of anything about the particular files but is offering her opinion on the application of Interqual.
21. Laurence H. Raney, M.D. was called to testify by the Respondent. Dr. Raney is Board Certified in Emergency Medicine. He received his MD from the University of Florida in 1983 and is a member of the American College of Emergency Physicians, the American Academy of Emergency Medicine and the Air Medical Physicians Association. (Rsp. Ex. 18, T. pp. 72-77).
22. Dr. Raney has never practiced medicine of any kind in North Carolina. Dr. Raney has never served on a hospital utilization management committee. Through researching UNC Hospital and the community in which it resides, Dr. Raney was able to familiarize himself with the community standard of care at UNC Hospital and determined that the standard of care was similar to a hospital at which he previously worked. (T pp. 76-77).
23. Dr. Raney was admitted by the Court to testify as an expert in emergency medicine and hospital admissions. His testimony is to be given the weight the trier of fact deems appropriate. (T p. 108).
24. Dr. Raney had no role in reviewing this file except and until to provide testimony in this contested case. He was not the reviewing physician and has no underlying knowledge of anything about the particular files but is offering his opinion on the admission review process and his review of the particular files in preparation for this hearing.
25. Any claims for patients which were found to not meet the Interqual admission criteria were subsequently reviewed by a licensed physician. (Rsp. Exs. 10 and 15, T pp. 38, 67, 79-80).
26. For the two (2) patient admissions at issue from the audit, Respondent contends the inpatient admission did not meet the Interqual criteria for an inpatient admission and thus would appropriately be forwarded to a physician for review. (Rsp. Exs. 8 and 13, T pp. 47-49, 55-56)
27. According to Dr. Raney, once the case is before the physician for review, the doctor does not review the Interqual criteria, but does a whole new clinical review. The Interqual is in essence the first line tool which gets the particular case file to the doctor level for review. There is no prohibition to the doctor looking at the Interqual criteria.
28. According to Dr. Raney, the physician to whom this review was forwarded was a North Carolina licensed physician. (T. p.153)
29. Dr. Raney has little to no knowledge of the credentials or experience of the physician reviewer nor how that particular doctor reviewed the file nor whether the doctor reviewed the Interqual assessment. In essence, he knows very little about that doctor or how he reviewed the files at issue. No North Carolina doctor was called to present evidence in this matter.
30. The Respondent contends that the audit found that Petitioner failed to comply with the DMA Hospital Provider Manual (last revised November 1999) which was in effect at the time that services examined by the audit were rendered for the patients involved. (Rsp. Ex. 2).
31. The Respondent's argument relies in large part on the Hospital Provider Manual. The Manual states that "[m]edically necessary and non-experimental inpatient hospital services are

available to all eligible Medicaid recipients without limitation on length of stay.” (Rsp. Ex. 2, p. 63).

32. The Hospital Provider Manual states that “[t]he Medicaid program will pay the cost of inpatient services that have been determined to be covered by the program and are medically necessary.” (Rsp. Ex. 2, p. 64).

33. The Hospital Provider Manual also states that when “an entire hospital stay or any portion of an inpatient hospital stay is denied, the charges for that denied stay . . . will not be covered by Medicaid.” (Rsp. Ex. p. 128).

34. Finally, the Hospital Provider Manual states that “[p]atients who are admitted to observation status do not qualify as inpatients, even when they stay past midnight.” (Rsp. Ex. 2, p. 128).

35. Nothing has been presented to this Tribunal which elevates the Provider Manual to the status of rule. If such exists by way of exemption, or otherwise, it has not been produced. Absent such authority it would seem that the DMA Hospital Provider Manual would be relegated to the same status as the Adult Medicaid Manual which “merely explains the definitions that currently exist in federal and state statutes, rules and regulations” and that “[v]iolations of or failures to comply with the MAF [Medicaid] Manual [are] of no effect” unless the act or omission in question amounts to a “failure to meet the requirements set out in the federal and state statutes and regulations.” *Joyner v. N. Carolina Dep’t of Health & Human Servs.*, 214 N.C. App. 278, 288-89, 715 S.E.2d 498, 505-06 (2011)

36. The underlying question to be resolved is whether or not Petitioner used acceptable medical standards within the community it serves in making the determinations on in-patient versus observation status. The paramount question is whether or not the services rendered were medically necessary.

37. After the reconsideration review, the alleged overpayments for the inpatient admissions at UNC Hospital of two (2) patients remained contested between the parties, with the two (2) admissions having a total value of \$12,216.81. The alleged overpayment for patient D.D. is \$6,264.25. The alleged overpayment for patient G.B. is \$5,952.56.

38. Petitioner did not challenge the accuracy of the \$12,216.81 total figure at the hearing of this case.

~~39. Joan B. Crowson, RN, MSN, CCM is currently employed as an assistant director of utilization management with the Petitioner UNC Hospital. Ms. Crowson testified for the Petitioner and was admitted as an expert in utilization management and the use of Interqual and hospital admissions. (Pt. Ex. 2; T p. 186).~~

40. Part of Ms. Crowson’s duties are to make sure that the nurses at the various locations for utilization management are reviewing in accordance with the Code of Federal Regulations. Interqual is an integral part of utilization management. Ms. Crowson and the other UM nurses are trained every year and tested every year on Interqual. Ms. Crowson has personally been using Interqual since 1997, having reviewed possibly as many as hundreds of thousands of cases. (T p. 176)

41. While Ms. Crowson admitted that there is nothing unique about UNC's admission process for inpatient admission compared to other hospitals in North Carolina that is because every hospital in the state of North Carolina is required to comply with the Code of Federal Regulations and the federal code requires a utilization plan. (T pp. 210, 223). Ms. Crowson even drafted the utilization management plan for UNC Hospitals. (T. p. 212)
42. In her role as assistant director, Ms. Crowson does not have the ability to admit to inpatient or outpatient setting. (T p. 178) Ms. Crowson also admitted that a physician's involvement is required to make a determination on the medical necessity of an inpatient admission and that the physician has the final say in the determination if her opinion conflicted with the physician. (Rsp. Ex. 19, p. 8, T pp. 177, 225-229).
43. Ms. Crowson is not a doctor to make the determination of admittance; however, as a member of the UM committee which reviews admissions, she has a function that is part of the decision as to the appropriateness of an admission.
44. While Ms. Crowson also admitted that the services which were planned for or provided to each patient while admitted to an inpatient setting could have been done in an observation setting, she also stated that any service could be provided while in observation, including intensive care services. (T p. 247). Thus, in theory, every admission could be an "observation;" however, that would not be in keeping with the federal regulatory guidelines.
45. The fact that any service could be provided while in observation raises what is perhaps the underlying, but unspoken issue, which whether or not this is a monetary and not medical issue. Medicaid will pay the cost if hospital stay is in-patient but the cost becomes the patient's responsibility if it is an observation setting. Rhetorically, if money is not at least partially driving the bus, then why does it matter so long as the patient is receiving proper care. Also, it is very important to note that the patient has zero input into the decision-making. The patient just knows that he or she spent a night in the hospital and does not know the wrangling of the decision-making until they get a bill. In other words, the decision does not necessarily affect the treatment received by the patient, but it does affect what happens in billing. (T. p. 218)
46. Ms. Crowson did not present evidence with specificity about whether the admissions in the audit met Interqual criteria for inpatient admission, but she stated that Interqual is applied in every case in the hospital. (T pp. 179, 219). She was testifying about the process used by the hospital. The decision-making would not have reached the doctor level of review if the question about Interqual had not already been addressed. She testified that in each instance the process was followed correctly and thus the patient's records would have gone through the Interqual process. Respondent's witness Dr. Raney had stated that the doctors did not consult the Interqual reports anyway.
47. Ms. Crowson makes clear that the cases which did not meet criteria for admission at the nurse review/Interqual level are the ones that are reviewed by another doctor other than just the decision of the admitting physician. (T. p. 229)
48. If the reviewing physician and the admitting doctor are not in agreement after the initial physician review, then yet another independent physician is consulted for the review. In the hospital scheme of review, it takes two doctors to override the admitting decision of the attending physician. (T. p. 246)

49. Petitioner has complied with the federal regulatory guidelines for hospital admissions.

Based upon the foregoing Findings of Fact, this Tribunal makes the following

CONCLUSIONS OF LAW

1. All parties are properly before the Office of Administrative Hearings, and this tribunal has jurisdiction of the parties and of the subject matter at issue.
2. Respondent bears the burden of proof in this matter pursuant to N.C. Gen. Stat. §108C-12.
3. The test established by N.C. Gen. Stat. § 150B-23 is whether or not the agency “(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.”
4. It is undisputed that Petitioner is a hospital providing Acute Inpatient Hospital Services to Medicaid recipients.
5. The federal enabling authority comes from 42 CFR 456 *et. seq.* and especially Subpart C, §§456.50 *et. seq.*, which specifically deals with utilization controls for hospitals.
6. 42 CFR 456.4 places the responsibility for monitoring the utilization control program with the state agency, the Respondent. Among other requirements, the state agency must “take all necessary corrective action to ensure the effectiveness of the program; [and] establish methods and procedures to implement this section.”
7. 42 CFR 456.5 requires the state agency to have written criteria for evaluation of the appropriateness and quality of the Medicaid services rendered. Such criteria has not been produced for this contested case hearing.
8. 42 CFR 456.6 requires the Respondent to have an agreement with another agency wherein that subordinate agency “is responsible for establishing a plan for the review by professional health personnel of the appropriateness and quality of Medicaid services.” An assumption may be that it is Health Management Systems, but there is scant evidence to that effect—only that HMS conducted the audit.
9. 42 CFR 431.107 requires the State Medicaid Plan to provide for an agreement between the State Medicaid agency and each provider. This requirement is echoed in 42 CFR 456.101 which further requires the hospital which provides inpatient care to have a utilization review plan “that provides for review of each beneficiary’s need for the services that the hospital furnishes him.”
10. 42 CFR 456.105 requires each hospital to establish a committee to perform the utilization review as required. 42 CFR 456.122 requires the committee to have written criteria to assess the needs for admission. Further it requires the committee to have “more extensive written criteria” for cases which have shown to be associated with high costs, or frequently are associated with the

furnishing of excessive services, or are associated with attending physicians whose care is frequently found to be questionable.

11. There is no contention, and thus no evidence, that either the hospital or the individual doctors have been shown to have been associated with high costs, or that they are frequently associated with furnishing excessive services, or that the individual doctors care has frequently been found to be questionable.

12. 42 CFR 456.105 provides the hospital's committee with more specific details of the review to be conducted. If the hospital committee agrees that admission is warranted, then a date for review of that decision is assigned. If the committee does not think the criteria has been met, then the committee or a subgroup of the committee which includes at least one physician reviews the case. If the decision of the committee continues to be that admission is not warranted, then the attending physician is given an opportunity to present his reasons justifying admission. If the attending does not present further information, then the committee's decision stands. If, however, the attending physician does present further information, then at least two physicians are required to review and overturn the decision of the attending doctor.

13. The hospital fully complied with these federal requirements. (Pet. Ex. 3) UNC Hospital requires review of every case in the hospital. The reviews are being conducted twenty four hours per day, seven days per week. The evidence clearly shows that written criteria exists and that it was applied in the cases at issue. There is no evidence that any of the factors requiring more extensive criteria and review exists in these cases. The committee followed the procedure as established by federal regulations.

14. N.C. Gen. Stat. 108A, Part 6, §§ 108A-54 *et. seq.* and entitled Medical Assistance Program, is the North Carolina enabling statutes for the Medicaid program. N.C. Gen. Stat. § 108A-54 authorizes the Respondent to adopt rules to implement the state Medicaid program. (Emphasis added)

15. N.C. Gen. Stat. § 108A-54.1B(a) more specifically authorizes the Respondent to adopt both temporary and permanent rules "to implement or define the federal laws and regulations, the North Carolina State Plan of Medical Assistance" and more particularly "the audits and program integrity." (Emphasis added) N.C. Gen. Stat. § 108A-54.1B(d) acknowledges that some plans and waivers which have been approved by CMS for the North Carolina Medicaid program have the same force and effect as properly promulgated rules. There is no evidence or argument presented to this Tribunal which identifies the hospital recoupment cases as being within such plan or waivers.

16. Armed with the authority to enact rules, the Respondent should have clear and concise rules which apply to this action to recoup monies paid to participating hospitals and, if such exists, it has not been provided in the course of this contested case. N.C. Gen. Stat. § 108A-54.2 applies to "policy" and does not seem to help Respondent's position.

17. Respondent relies exclusively in its argument on rules found within 10A NCAC 22F. Subchapter 22F is entitled Program Integrity, and it is the subchapter dealing with program integrity for the entirety of Medicaid, not just the hospitals.

18. 10A NCAC 22F .0101, entitled Scope, specifically states that “[T]his Subchapter shall provide methods and procedures to ensure the integrity of the Medicaid program.” (Emphasis added). In other words, if methods and procedures exist, they should be found in this subchapter.

19. Interestingly 10A NCAC 22F .0101 cites three General Statutes and one federal regulation as the authority for this rule. The first statute cited is N.C. Gen. Stat. § 108A-25(b) which states that a program of medical assistance is to be established and shall be administered by the county departments of social services. There is no evidence that the counties have had any role at all in the process with which this contested case is concerned.

20. The remaining two references to general statutes are N.C. Gen. Stat. § 108A-63 and N.C. Gen. Stat. § 108A-64, both of which refer to provider fraud. There has not been even an inference that provider fraud is involved in this case.

21. 10A NCAC 22F .0103 also requires the Respondent to develop methods and procedures for broadly dealing in practically any manner with cases involving “fraud, abuse, error, overutilization or the use of medically unnecessary or medically inappropriate services.” The rule goes further and states that “the Division shall institute methods and procedures to recoup improperly paid claims.”

22. Also, interestingly, 10A NCAC 22F .0103 refers to the same three statutes and the same federal regulation as 10A NCAC 22F .0101, which do not apply to this contested case based on the evidence presented. There is no evidence county departments of social services have been involved in this contested case.

23. 10A NCAC 22F .0301 defines “provider abuse.” The assertion by Respondent, presumably, is that the hospital cases fit within this definition because the questioned charges were “not necessary” and that the hospital failed “to provide and maintain within accepted medical standards for the community . . . medically necessary care and services.” (Emphasis added) However, as before, the authority for 10A NCAC 22F .0301 does not apply to the evidence as presented in this contested case.

24. ~~10A NCAC 22F .0601(a) provides for restitution for improper payments, but also lacks authority from the North Carolina General Assembly that is applicable to this contested case.~~

25. 10A NCAC 22F .0403 explains the process after utilization review has determined a patient has had an excessive length of stay, but there is nothing about how the determination for excessive stay is made. This rule likewise refers to N.C. Gen. Stat. § 108A-25(b) which requires the county departments to be involved.

26. Since all references by Respondent to rules refer to Subchapter 22F, and that subchapter does not authorize action as sought in this contested case, the Respondent has failed to show that it has statutory or promulgated rule authority to do what it proposes to do in this contested case, i.e., recoup money paid to the hospital.

27. If there is any other statutory or rule authority, Respondent has failed to present such authority to this Tribunal.

28. Respondent relies in part on the DMA Hospital Provider Manual (revised November 1999). Nothing has been presented to this Tribunal which elevates the Provider Manual to the status of rule. If such exists by way of exemption, or otherwise, it has not been produced. Absent such authority it would seem that the DMA Hospital Provider Manual would be relegated to the same status as the Adult Medicaid Manual as addressed in Joyner v. N. Carolina Dep't of Health & Human Servs., which states

The principal authority upon which DHHS relied in . . . was the North Carolina Adult Medicaid Manual, which is an "internal instructional reference for DHHS employees in the application of DHHS policy and interpretation of the federal Medicaid requirements." . . . Although the provisions of the Medicaid Manual are clearly entitled to some consideration in attempts to understand the rules and regulations governing eligibility for Medicaid benefits, we have previously stated that the Medicaid Manual "merely explains the definitions that currently exist in federal and state statutes, rules and regulations" and that "[v]iolations of or failures to comply with the MAF [Medicaid] Manual [are] of no effect" unless the act or omission in question amounts to a "failure to meet the requirements set out in the federal and state statutes and regulations [.]'" (*Internal cites omitted*)

Joyner v. N. Carolina Dep't of Health & Human Servs., 214 N.C. App. 278, 288-89, 715 S.E.2d 498, 505-06 (2011)

29. It is also noted that the DMA Hospital Provider Manual, page 43, refers to a provision in the Administrative Code that has long since been repealed.

30. It is not known if Respondent is attempting to bootstrap the contract between Petitioner and Respondent into this argument. It was introduced as an exhibit, but there is no argument or reference to the contract in this case. However, assuming *arguendo* that such were the case, it would be without merit. In the contract, paragraph 3(e) makes reference to practically anything that has been reduced to writing and might remotely have relevance, including the kitchen sink. Mere reference to a writing in a contract does not rise to the level of enforceability unless the receiving party has a semblance of real notice. Further the contract requires that the contract is governed by the litany so long as it is "consistent with and expressly or implicitly authorized" and there is zero evidence of any of the contractual terms. Therefore the contract has no control in this case.

31. *Even if* it is assumed that the proper authority exists for these reviews, nothing has been presented to this Tribunal which shows the process followed to get to OAH. There is no evidence of how it was determined that these particular cases were chosen, how many cases were reviewed in total, were these cases merely randomly selected or what prompted the audit. Many unanswered questions of the process exist. With no evidence, one cannot determine what is the proper procedure as required in N.C. Gen. Stat. § 150B-23, much less whether or not it was followed.

32. *Even if* it is assumed that the proper authority exists and that the proper procedure was followed, the Respondent does not prevail on the facts of this case.

33. This contested case is not just about a comparison of Dr. Raney's testimony and Ms. Crowson's testimony; however, assuming yet again that it was, neither of Respondent's witnesses participated in an active role in the initial reviews as compared to Ms. Crowson's very direct involvement of all of the hospitals process and reviews.

34. If there is a comparison to be made, then it would be Dr. Raney's much removed review of the patients' file as opposed to the admitting physician's opinion plus that of at least one reviewing doctor, possibly two.

35. The Eleventh Circuit Court of Appeals has discussed this to a degree, and while not controlling in this district it is certainly instructive. In Moore ex rel. Moore v. Reese, 637 F.3d 1220, 1223 (11th Cir. 2011), the Court of Appeals also dealt with the extent to which a state Medicaid agency may review the treating physician's determination of medical necessity.

36. The Court found in essence that neither the state agency nor the admitting physician necessarily prevails over the other:

In sum, the Medicaid Act does not give the treating physician unilateral discretion to define medical necessity so long as the physician does not violate the law or breach ethical duties any more than it gives such discretion to the state so long as the state does not refuse to provide a required service outright. It is a false dichotomy to say that one or the other, the state's medical expert or the treating physician, must have complete control, or must be deferred to, when assessing whether a service or treatment is medically necessary under the Medicaid Act.

Moore ex rel. Moore v. Reese, 637 F.3d 1220, 1259-60 (11th Cir. 2011)

37. *Even if* the comparison was or should be Dr. Raney's testimony versus the admitting doctor and/or the first line reviewing doctor, for the Respondent at best it would be substantially equal. In other words there has not been enough evidence to carry the burden of proof.

38. Respondent's evidence has shown at best that it did basically the exact same process the hospital did on the dates of admission except the State comes back with a different result. While ~~the federal regulations require the individual states to have some form of quality and utilization management~~, this seems like Monday morning quarterbacking at its worse.

39. Based on the testimony and evidence presented in this contested case hearing, the hospital had a more extensive review at the time of the admissions than the Respondent has had after the fact. And in so doing, the hospital fully complied with the federal regulations and their own policy that was approved by the state.

40. Based on the testimony and qualifications of the parties' respective witnesses, the Court finds that the weight of the evidence supports Petitioner's contention that inpatient admission was medically necessary for the two (2) patients.

41. Ms. Crowson's testimony is given more credibility because she was actually more directly involved in the process under review. Giving Dr. Raney and Ms. Diamond the weight deemed appropriate by the finder of fact, they are giving their opinions from afar and in hind-sight and are not given as much credibility as Ms. Crowson.
42. The underlying foundation for this entire process is the monetary considerations in order to protect and safeguard Medicaid monies so that the money is not wasted but rather spent on those in actual need. The very first section of 42 C.F.R. § 456 acknowledges such:
- (1) Methods and procedures to safeguard against unnecessary utilization of care and services. Section 1902(a)(30) requires that the State plan provide methods and procedures to safeguard against unnecessary utilization of care and services.
 - (2) Penalty for failure to have an effective program to control utilization of institutional services. Section 1903(g)(1) provides for a reduction in the amount of Federal Medicaid funds paid to a State for long-stay inpatient services if the State does not make a showing satisfactory to the Secretary that it has an effective program of control over utilization of those services.
- 42 C.F.R. § 456.1
43. This and other parts of that section of the federal requirements show that the State can be penalized for not exercising proper control over the hospitalizations. The penalty is monetary. The references within the quote in paragraph 42 above are to requirements in sections of the Social Security Act.
44. This swirl of decision-making is made without any input from the patient. The patient has no idea of how these decisions may affect him or her. They are not asked if they would rather go home or if they want to be on "observation" and remain in the hospital even though it will cost them money if the in-patient is being denied.
45. Rhetorically, the question becomes is this a monetary decision or truly a medical decision. According to Ms. Diamond, HMS is the entity that seeks recoupment—not DHHS, the single state agency responsible for Medicaid in the State of North Carolina. It could be an easy jump to make that HMS has monetary incentive and thus the close calls become monetary decisions from the Respondent's perspective; however, there is not sufficient evidence from which to conclude such is the case, and the issues in this case are framed solely about the medical decisions.
46. In this contested case, the Petitioner did what was required of them by the federal regulations.
47. With regard to the two (2) patients at issue in the case, the Respondent has failed to prove that it was not medically necessary to admit the patients to inpatient status. Stated in the positive, the patients were properly admitted into hospital as inpatients. They should not have instead been admitted to observation.
48. Respondent failed to meet its burden of showing by a preponderance of the evidence that DMA's identification of any payment as having been an improper overpayment and any

subsequent action to recoup such payment was proper. Respondent failed to meet its burden of proof to show that the hospital failed to provide and maintain within accepted medical standards for the community medically necessary care and services.

49. As required in N.C. Gen. State §150B-23, Respondent exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; and failed to act as required by law or rule.

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned makes the following:

DECISION

The decision by Respondent DMA to recoup \$12,216.81 from Petitioner is not supported by the evidence and hereby is **REVERSED**.

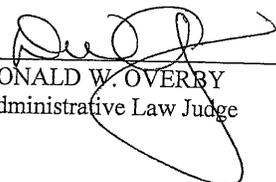
NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

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 03.0102, 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.

IT IS SO ORDERED.

This the 29th day of May, 2015.


DONALD W. OVERYBY
Administrative Law Judge

FILED

STATE OF NORTH CAROLINA
COUNTY OF WAKE

2015 MAY 29 PM 12:13 IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
OFFICE OF 13 EHR 18085

ALCOA POWER GENERATING, INC.)
)
 Petitioner,)
)
 vs.)
)
 DIVISION OF WATER RESOURCES,)
 DEPARTMENT OF ENVIRONMENT)
 AND NATURAL RESOURCES)
)
 Respondent.)

**FINAL DECISION AND ORDER
GRANTING PETITIONER'S MOTION
FOR RECONSIDERATION,
GRANTING PETITIONER'S MOTION
FOR SUMMARY JUDGMENT, AND
DENYING RESPONDENT'S MOTION
FOR RECONSIDERATION**

THE FOLLOWING MATTERS came to hearing before the undersigned, Selina M. Brooks, Administrative Law Judge, on April 9, 2015, in Cary, North Carolina. Any time the term "Court" is used within, it is in reference to the undersigned Administrative Law Judge.

MOTIONS AND BRIEFING

- (1) the Motion filed on February 12, 2015, by Petitioner Alcoa Power Generating Inc. ("APGI" or "Petitioner") for Reconsideration of this Court's January 6, 2015, Order Denying Petitioner's Motion for Summary Judgment ("Petitioner's Motion for Reconsideration");
- (2) Respondent's Motion for Reconsideration of this Court's January 6, 2015, Order Denying Summary Judgment in favor of Respondent ("Respondent's Motion for Reconsideration");
- (3) Respondent's Motion for Stay ("Stay Motion");
- (4) Petitioner's Motion for Official Notice filed April 8, 2015 ("Motion for Official Notice"); and
- (5) Petitioner's Motion for Summary Judgment filed September 2, 2014 ("SJ Motion").

The parties thoroughly briefed the pending motions prior to hearing on April 9, 2015, with both parties filing supporting briefs with their respective motions on February 12, 2015, with Petitioner filing responses to both of Respondent's Motion for Reconsideration and Stay Motion on March 12, 2015, with Respondent filing a response to Petitioner's Motion for Reconsideration on March 12, 2015, and with both parties filing replies on March 26, 2015.

SUMMARY OF RULINGS ON THE MOTIONS

The Court, after carefully reviewing the pleadings and the materials submitted by all parties in support of the pending motions, has concluded as follows:

- (1) Petitioner's Motion for Reconsideration should be granted;
- (2) Respondent's Motion for Reconsideration should be denied;
- (3) the Stay Motion should be denied;
- (4) the Motion for Official Notice should be denied; and
- (5) in view of the decision to grant Petitioner's Motion for Reconsideration, and having again reviewed the record and legal arguments of the parties, Petitioner's SJ Motion should now be granted.

The Court's reasoning with respect to its decision on matters (1), (2), and (5) is set forth below. Separate procedural orders, addressing the Court's reasoning and decision on matters (3) and (4), shall be entered contemporaneously with this Order.

PROCEDURAL HISTORY

Proceedings before the Agency

On September 28, 2012, Petitioner submitted an application for a water quality certification ("Application"), which certification is a pre-requisite under Section 401 of the federal Clean Water Act to the issuance by FERC of a renewed license to operate the series of hydroelectric dams located on the Yadkin River at issue in this case. After the filing of the Application, Respondent requested additional information from Petitioner in connection with the Application. Petitioner complied with these information requests.

On May 14, 2013, a public hearing on the Application was held before Mr. Gregson, the Regional Office Supervisor of the Respondent's Wilmington office at which evidence regarding the Application was taken. Among other things, the Yadkin Riverkeeper attempted to challenge Petitioner's ownership of the riverbed in the Yadkin Project. Pursuant to 15A N.C. Admin. Code 02H.0507(b), Respondent was required to issue a decision on the Application no later than sixty (60) days after the public hearing, unless the applicant agrees to an extension or the State's ability to condition issuance of the certification is waived.

On June 13, 2013, the Yadkin Riverkeeper filed comments on the Application.

On June 28, 2013, Petitioner sought the opportunity to submit additional information in support of the Application by July 3, 2013 and further agreed to extend the pending deadline for decision of July 13, 2013 to August 2, 2013.

On July 19, 2013, the hearing officer Mr. Gregson submitted his draft hearing officer report recommending that the Application be granted.

On July 25, 2013, Respondent's general counsel Mr. Presnell recommended certain changes to the language of the hearing officer report, but did not suggest changing the ultimate conclusion regarding the Application.

On July 29, 2013, Mr. Gregson finalized his report, incorporating the recommendations of Mr. Presnell.

On July 29, 2013, Karen Higgins, submitted draft letters of (i) denial and (ii) approval together with the final hearing officer's report to Mr. Reeder, the final decision maker for the agency.

On August 2, 2013, Mr. Reeder concluded that the Application was invalid pursuant to 15A NCAC 02H.0502(f) and stated in the denial letter ("the Denial") that "[t]he required ownership certification ensures that the applicant owns the projects dams and powerhouses and is fully capable of implementing all protections of water quality that may be imposed as conditions in a 401 certification."

Proceedings before this Court

This proceeding was timely initiated by Petitioner as a contested case on September 25, 2013, challenging the Denial.

On January 31, 2014, Petitioner moved for judgment on the pleadings ("Petitioner's Rule 12 Motion"), asking this Court to conclude, as a matter of law and based upon the pleadings alone, that the Denial was erroneous. The Court heard argument on the Petitioner's Rule 12 Motion on April 3 and 23, 2014, and thereafter entered an order denying the Petitioner's Rule 12 Motion.

Discovery followed and, after the close of discovery, Petitioner timely filed its SJ Motion which was fully briefed by the parties pursuant to an agreed schedule.

On October 29, 2014, the Court heard oral argument on Petitioner's SJ Motion and declined to grant summary judgment for either party.

On January 6, 2015, the Court entered an order denying Petitioner's SJ Motion and also ruling that summary judgment should not be granted against Petitioner under N.C. Rule Civ. P. 56(c). That same day, the Court denied Petitioner's Motion to Strike certain materials that had been attached to Respondent's Response to Petitioner's SJ Motion.

On January 13, 2015, the Court entered an Amended Scheduling Order establishing a briefing schedule for the filing of motions for reconsideration or for a stay and for briefing any such motions thereafter. Both parties timely filed motions to reconsider, and Respondent also timely filed a motion to stay. Both parties timely filed Response briefs on March 12, 2015, and Reply briefs on March 26, 2015. The Court has carefully reviewed the parties' filings and all of the documents in the record to which the parties made reference in those filings.

On April 9, 2015, the Court held a hearing on all pending Motions.

Based upon the arguments of counsel and a full review of the entire record, the Court announced at the hearing on April 9, 2015, that the Court had concluded that the Denial issued by Respondent concluding Petitioner's Application was invalid and therefore denying Petitioner a 401 certification on August 2, 2013 was improper.

The Court now enters this decision confirming its ruling on April 9, 2015: Based upon the undisputed facts in the entire record and as described in detail below, the Court has concluded that there is no genuine issue of any material fact and that Petitioner is entitled to judgment as a matter of law. Therefore, Petitioner is granted summary judgment in its favor as a matter of law on its claim that Petitioner's Application submitted in September of 2012 was a valid application and that Respondent's Denial on August 2, 2013 was improper.

APPEARANCES

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ISSUES

Whether Respondent substantially prejudiced Petitioner'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 when it denied Petitioner's Application for a 401 water

quality certification on the ground that Respondent cannot consider the Application to be a valid application because of the title and ownership issues raised by the North Carolina Department of Administration.

APPLICABLE STATUTES AND RULES

- Section 401 of the Federal Water Pollution Control Act (“Clean Water Act”), 33 U.S.C. § 1341
- N.C. GEN. STAT. § 143B-282.1
- Section .0500 of Subchapter 2H of Title 15A of the North Carolina Administrative Code, 15A N.C. Admin. Code 02H.0500, et seq. (“NC 401 Rules”)

EXHIBITS AND PRIMARY RECORD REFERENCES¹

1. Application for a water quality certification submitted by Petitioner to Respondent² on May 10, 2007 (attached to Petitioner’s Rule 12 Motion as Exh. 5) (“2007 Application”)³
2. Water quality certification issued by Respondent to Petitioner on November 16, 2007 (Petitioner’s Rule 12 Motion, Exh. 6) (“2007 401”)
3. Application for a water quality certification for the Blewett Tillery hydroelectric project filed on May 11, 2007 (Petitioner’s Rule 12 Motion, Exh. 1) (“Blewett Tillery Application”)
4. Water quality certification issued by Respondent for the Blewett Tillery Project on November 16, 2007 (Petitioner’s Rule 12 Motion, Exh. 2) (“Blewett Tillery 401”)
5. Application for a water quality certification submitted by Petitioner to Respondent on May 8, 2008 (Petitioner’s Rule 12 Motion, Exh. 7) (“2008 Application”)
6. Water quality certification issued by Respondent to Petitioner on May 7, 2009 (Petitioner’s Rule 12 Motion, Exh. 8) (“2009 401”)
7. Application for a water quality certification submitted by Petitioner to Respondent on September 28, 2012 (Petitioner’s Rule 12 Motion, Exh. 9) (“Application”)

¹ Many of the cited documents appear in multiple submissions in the record; citations here are to the primary or first introduction as the case may be. Cross-references to other record locations of the same documents are not provided.

² Petitioner submitted the 2007 Application to the Division of Water Quality, which is now known as the Division of Water Resources, with both parties being hereafter referred to as “Respondent.”

³ Petitioner filed its Rule 12 Motion on January 13, 2014 (“Petitioner’s Rule 12 Motion”) with Exhibits and a supporting memorandum (“Petitioner’s Rule 12 Brief”).

8. Letter transmitting the Application (Petitioner's SJ Motion, Exh. 9)
9. Relicensing Settlement Agreement, Yadkin Hydroelectric Project, FERC No. 2197, dated February of 2007 (Petitioner's Rule 12 Motion, Exh. 3; Admission 68) ("RSA")
10. Informal opinion by the North Carolina Attorney General, dated June 6, 2013 (SJ Motion,⁴ Exh. 22) ("AG FERC License Opinion")
11. Letter Regarding Request for Additional Information from Karen Higgins of Respondent to E. Ray Barham of Petitioner, dated October 4, 2012 (Petitioner's Rule 12 Motion, Exh. 11; Admission 72) ("AIR #1")
12. Letter Regarding Request for Additional Information from Karen Higgins of Respondent to E. Ray Barham of Petitioner, dated December 7, 2012 (Petitioner's Rule 12 Motion, Exh. 12; Admission 73) ("AIR #2")
13. Letter Regarding Request for Additional Information from Karen Higgins of Respondent to E. Ray Barham of Petitioner, dated February 27, 2013 (Petitioner's Rule 12 Motion, Exh. 13; Admission 74) ("AIR #3")
14. Handwritten notes by Lori Montgomery of telephone conference on July 3, 2013 (Petitioner's SJ Motion, Exh. 11)
15. Emails dated July 18, 2013, circulating a draft Hearing Officer Report internally within Respondent (Petitioner's SJ Motion, Exh. 12)
16. Email dated July 25, 2013, from Mr. Presnell to Ms. Higgins suggesting changes to the draft Hearing Officer Report (Petitioner's SJ Motion, Exh. 14)
17. Affidavit of Jim Gregson dated October 30, 2014, but notarized as of September 30, 2014 (filed with Respondent's Response to SJ Motion⁵) ("Gregson Aff.")
18. Hearing Officer's July 25, 2013 draft Report and Recommendations prepared by Jim Gregson and dated July 29, 2013 (Petitioner's Response to Respondent's Motion to Reconsider, Exh. 17) ("Draft Hearing Officer Report")
19. Hearing Officer's final Report and Recommendations prepared by Jim Gregson and dated July 29, 2013 (Attached to the Petition for Contested Case Hearing and as Exhibit 5 to the SJ Motion) ("Hearing Officer Report")
20. Draft Approval of Individual 401 Water Quality Certification with Additional Conditions, attached to Hearing Officer Report (See SJ Motion, Exh. 6, pp. 3-34) ("Draft Petitioner 401")

⁴ Petitioner filed its Memorandum in support of its SJ Motion on September 2, 2014 ("Petitioner's SJ Brief").

⁵ Respondent filed its Response to the SJ Motion on October 3, 2014 ("Respondent's SJ Response")

21. Letter from the Secretary of the Department of Administration to Karen Higgins, dated August 1, 2013 (Petitioner's Response to Respondent's Motion to Reconsider, Exh. 20) ("DOA Letter")
22. Complaint, *State ex rel N.C. Dep't of Admin. v. Alcoa Power Generating, Inc.*, 13-CV-010477 (Wake Co. Super. Ct., filed Aug. 2, 2013) (Petitioner's SJ Motion, Exh. 2) ("Lawsuit Complaint")
23. The Denial, in the form of a letter from Thomas A. Reeder of Respondent to E. Ray Barham of Petitioner, dated August 2, 2013 (attached as an Exhibit to the Petition for Contested Case Hearing filed by Petitioner on September 25, 2013; Respondent Doc. 564)
24. Email from Karen Higgins of Respondent to Ray Barham of Petitioner dated August 2, 2013, forwarding the Denial (Petitioner's SJ Motion, Exh. 1)
25. Affidavit of Lacy M. Presnell III dated October 3, 2014 (filed with Respondent's Response to Petitioner's SJ Motion) ("Presnell Aff.")
26. Memorandum to File from Lacy M. Presnell III, dated August 6, 2013 (Petitioner's SJ Motion, Exh. 18) ("Presnell File Memo")
27. Affidavit of Karen Higgins dated October 1, 2014 (filed with Respondent's Response to SJ Motion) ("Higgins Aff.")
28. Transcript of Video Deposition of Thomas Reeder on May 1, 2014 (Respondent's SJ Response, Exh. 2)
29. Memorandum of Law in Support of Plaintiff's Motion for Partial Summary Judgment, *State ex rel N.C. Dep't of Admin. v. Alcoa Power Generating, Inc.*, Civil Action No. 5:13-cv-633, filed July 21, 2014 (Petitioner's SJ Motion, Exh. 21) ("DOA Brief")
30. Letter from Donald R. Teeter, Sr. ("Teeter"), Special Deputy Attorney General of the Property Control Section of the North Carolina Department of Justice, to Kathleen Waylett, Senior Deputy Attorney General of the Environmental Section of the North Carolina Department of Justice, dated October 2, 2014 (Respondent's SJ Response, Exh. 4) ("Teeter Letter")
31. Affidavit of Teeter dated October 21, 2014 and filed and served October 22, 2014 ("Teeter Affidavit")
32. Respondent's Response to Alcoa Power Generating, Inc.'s First Set of Interrogatories, Requests for Admissions, and Requests for Production of Documents (Petitioner's SJ Motion, Exh. 3) ("Respondent's Discovery Responses")
33. The State of North Carolina's 21st Century Plan for the Use of the Yadkin River Resources, dated September 8, 2009, attached as Exhibit B to Petitioner's Discovery to Respondent ("21st Century Plan") (see Admission 67 of Respondent's Discovery Responses); the 21st Century Plan was attached as Exhibit 1 to a motion filed with FERC by Governor Perdue on September 18, 2009 ("NC Takeover Motion").

34. Respondent's Supplemental Response to Alcoa Power Generating, Inc.'s First Set of Interrogatories, Requests for Admissions, and Requests for Production of Documents (Respondent's SJ Response, Exh. 3) ("Respondent's Supplemental Discovery Responses")

35. 2012 Tailwaters Dissolved Oxygen Report, Yadkin Project, FERC Project No. 2197, submitted by Petitioner to Respondent in March of 2013 (Petitioner's Rule 12 Motion, Exh. 4) ("DO Report").

DISCUSSION

This case arises from the Denial by Respondent's Division of Water Resources ("DWR")⁶ of the Application filed by Petitioner for a Water Quality Certification pursuant to § 401 of the Clean Water Act (generally, "a 401 certification," and specifically with respect to the Application, "the 401 Certification"). Petitioner sought the 401 certification in connection with its continued operation of a series of dams on the Yadkin River – the Narrows, Falls, Tuckertown, and High Rocks Dams – which together form a hydroelectric project licensed by the Federal Energy Regulatory Commission ("FERC"), of which Petitioner is the licensee (the "Yadkin Project" or the "Project"). Petitioner has applied to renew its FERC license for the Yadkin Project and, in connection with this relicensing effort, is required by § 401 of the Clean Water Act to obtain a 401 certification from Respondent.

BASED UPON careful consideration, the undersigned hereby makes the following:

FINDINGS OF FACT⁷

Background on Yadkin Project and License

1. Petitioner is the licensee of and operates the Yadkin Project which is located along a 38-mile stretch of the Yadkin River in the counties of Davie, Davidson, Rowan, Stanly and Montgomery. (Respondent's Response to Petitioner's Request for Admis. 34;⁸ Hearing Officer Report at 2).

2. The Yadkin Project includes four hydroelectric dams and powerhouses, along with their associated reservoirs, and from north to south, these dams are the High Rocks, Tuckertown, Narrows, and Falls Dams. (Admission 35; Hearing Officer Report at 2).

⁶ As noted in Respondent's PHS, DWR is the successor to Respondent's predecessor division, DENR's Division of Water Quality ("DWQ"), effective August 1, 2013. As used herein, references to "DWR" will include "DWQ," unless the context indicates otherwise. This decision may make specific references to DWR (as opposed to other parts of DENR) for clarity, but references to "Respondent" will generally include both DWR and DENR, unless the context indicates otherwise.

⁷ See also the list of undisputed facts at pages 5-10 of Respondent's SJ Response.

⁸ Hereafter, references to Respondent's Response to Petitioner's Request for Admission shall be referred as "Admission" followed by the number of the Request.

3. The Federal Power Commission (FPC), the predecessor of the FERC, issued a license to operate these dams to Petitioner in 1958. (Admission 41).
4. Three of the four dams that comprise the Yadkin Project long predate the issuance of FERC or FPC licenses generally and the original 1958 FERC license applicable to this matter as well.
 - (a) Construction of the Narrows Dam was completed by a predecessor of Petitioner in 1917. (Admission 36; Hearing Officer Report at 2, 13).
 - (b) Falls and High Rocks Dams were constructed in 1919 and 1927, respectively. (Admission 37; Hearing Officer Report at 2, 13).
 - (c) The Tuckertown Dam, located between the High Rock and Narrows Dams and the last of the four dams built by Petitioner, was completed in 1962. (Admission 38; Hearing Officer Report at 2, 13).
5. The original Petitioner FERC license had a term of 50 years which expired on April 30, 2008. (Admissions 41 & 42).
6. In April of 2006, Petitioner timely applied for renewal of its FERC license. (Admission 43).
7. Since the expiration of Petitioner's FERC license on April 30, 2008, Petitioner has continued to operate the Yadkin Project under a series of one-year licenses that are automatically renewed. (Admission 42).
8. On September 18, 2009, the State of North Carolina filed its 21st Century Plan with FERC.⁹
9. As noted above, the process for renewing a FERC license includes the requirement, under § 401 of the Clean Water Act, that the State of North Carolina provide a certification that the continued operation of the dams will satisfy the State's water quality standards and conditions prior to FERC processing an application for license renewal. Petitioner sought such a certification by filing several applications over the period beginning in 2007 and culminating with the Application that is at issue today.

⁹ As noted in listed Exhibit 33 above, the 21st Century Plan was attached to the NC Takeover Motion which requested FERC, among other things, to "recapture" the Project from Petitioner and transfer it to the State of North Carolina.

Prior 401 Applications¹⁰

Petitioner's 2007 Application

10. On May 11, 2007, Petitioner submitted the 2007 Application to Respondent.¹¹ (Higgins Aff. ¶3). The 2007 Application was signed by William Bunker, Petitioner's then Vice President. (Admission 58). The 2007 Application indicated, on the form created by Respondent, that the Project did not involve the use of public (state) land. (Admission 61).

11. Petitioner withdrew its 2007 Application after receiving notice from Respondent that the agency intended to revoke that 401 certification due to alleged errors in the public participation process. (Higgins Aff. ¶ 3). Respondent presented the issue slightly differently in its pre-hearing statement in this case by stating that, in 2008, Respondent granted the 2007 Application and issued a 401 certification ("2008 401"), but the certification was later withdrawn and revoked due to a procedural error. (*See* Respondent's Amended Prehearing Statement, dated January 21, 2014 ("Respondent PHS"), at 2 n.1).

12. Respondent reviewed and acted on the 2007 Application without a property owner raising a conflicting claim of ownership, (Admission 16), and the 2007 Application was treated as valid throughout the process.

13. In evaluating the 2007 Application, neither Respondent nor any other state agency raised the issue of ownership of submerged lands or the correctness or sufficiency of the signatures on the applications. (Admission 16).

Petitioner 2008 Application

14. Because the 2007 Application process resulted in the withdrawal or revocation of the 2008 401 certification, on May 8, 2008, Petitioner submitted a new application for a 401 certification (Admission 70) and, after completing the review process, Respondent issued a 401 certification on May 7, 2009 (the "2009 Certification"). (Higgins Aff. ¶ 4). That second process is described below. Once again, no challenge was made to Petitioner's ownership, the application was treated as valid, and a certification was issued after Respondent reviewed and acted upon the application.

15. The 2008 Application indicated, on the form created by Respondent, that the project did not involve the use of public land. (Admission 62). Respondent reviewed and acted on the 2008 Application without a property owner raising a conflicting claim of ownership. (Admissions 19 & 20).

¹⁰ Based upon the admissions of Respondent, as well as the affidavits submitted by Respondent as described in the following paragraphs, the Court accepts as true many of the facts regarding these prior applications. A recitation of those facts is included only for context.

¹¹ Petitioner submitted this 2007 Application to Respondent's Division of Water Quality ("DWQ"), the functions of which are now performed by Respondent's Division of Water Resources ("DWR"). As previously noted, references to "Respondent" herein include DWR, and DWR is only used where it is required to distinguish DWR staff from other DENR personnel, such as those in the DENR Secretary's office.

16. In evaluating the 2008 Application neither Respondent nor any other state agency raised the issue of ownership of submerged lands or the correctness or sufficiency of the signatures on the applications. (Admission 19).

17. On May 5, 2009, Respondent granted the 2008 Application and issued a second 401 certification (“2009 401”). (Respondent’s PHS, at 2 n.1).¹² The 2009 Certification was challenged by Stanly County and the Yadkin Riverkeeper, each of which filed contested case petitions in the Office of Administrative Hearings challenging Respondent’s issuance of the 2009 Certification. (Higgins Aff. ¶ 4). Petitioner also filed a contested case petition challenging a condition of the 2009 Certification. (Higgins Aff. ¶ 4). The contested cases were consolidated for trial (“2009 Appeal”). (Higgins Aff. ¶ 4). By letter dated December 1, 2010, Respondent revoked the 2009 Certification for reasons unrelated to Petitioner’s ownership status, as certified on the prior applications. (Higgins Aff. ¶ 4 & att. B)

Blewett Tillery Application

18. Immediately downstream of the Falls Dam (the southernmost dam in the Yadkin Project) is another series of hydroelectric dams, comprising a different FERC-licensed hydroelectric project on the Yadkin River, comprised of the Tillery and Blewett Falls Dams and their associated powerhouses and reservoirs (“Blewett Tillery Project”). (Admission 54).

19. The application for a 401 certification for the Blewett Tillery Project was filed with Respondent on May 11, 2007. (Admission 55).

20. Respondent granted a 401 certification for the Blewett Tillery Project on September 30, 2008 (Admission 56) which was upheld by the reviewing ALJ, the agency, and both reviewing courts. *City of Rockingham, et al v. N.C. DENR*, — N.C. App. —, 736 S.E.2d 764, 767, 772, 2012 N.C. App. LEXIS 1465, 2012 WL 6584399 (N.C. Ct. App. 2012).

Petitioner 2012 Application

21. On September 28, 2012, Petitioner submitted the Application, which was its third application to Respondent for a 401 certification for the Yadkin Project. (Higgins Aff. ¶ 5).

22. The Application included the form “FERC 401 Water Quality Certification Application,” which was labeled as “Attachment A” and which Mr. E. Ray Barham signed on behalf of Petitioner, showing his title to be “Vice-President.” (Higgins Aff. ¶ 6).

23. On page two of Attachment A to the Application, Petitioner included footnote 1 which states, among other things, that the Project does not involve “the use of state land,” and

¹² Petitioner appealed that revocation, but subsequently submitted a new application and dismissed its appeal.

further that although “[c]ertain members of the public have contended to the contrary,” Petitioner “disagrees.”¹³ (Higgins Aff. ¶ 7).

24. Ms. Higgins, who was in charge of reviewing the Application,¹⁴ relied on Mr. Barham’s signature pursuant to 15A N.C. Admin. Code 2H .0502(f) and accepted this as sufficient evidence that Petitioner was the owner of the property or had been authorized by the owner to apply for the 401 certification. (Higgins Aff. ¶ 9).

25. Respondent generally takes as true the applicant’s certification that the applicant is the owner of the property or has permission to apply for a 401 certification unless there is a conflicting claim of ownership. (Higgins Aff. ¶ 11).

26. In connection with the Application, DENR General Counsel Mr. Presnell¹⁵ became aware in January or February 2013 of contentions by the Yadkin Riverkeeper that the riverbed of the Yadkin River belonged to the State of North Carolina and of the Riverkeeper’s continuing efforts to convince the State to assert its ownership rights. (Presnell Aff. ¶ 4).

27. At some time after February 2013, Mr. Presnell learned that the North Carolina Department of Administration (“DOA”) was considering asserting the State’s purported ownership rights to segments of the riverbed associated with the Project. He did not discuss the possibility of a DOA lawsuit with DWR until late July 2013 in an effort to keep DWR “consideration of water quality concerns separated from legal issues of ownership.” (Presnell Aff. ¶ 5).

28. Mr. Presnell understood that Respondent relied on Petitioner’s certification of its ownership or right to use the submerged lands, (Presnell Aff. ¶ 19), and that Respondent did not and would not resolve title disputes. (Presnell Aff. ¶ 10). Therefore, when a title issue was first raised as set forth above, Mr. Presnell did not undertake a legal analysis of the merits of arguments set forth in the Yadkin Riverkeeper’s comments either before or after the public hearing. (Presnell Aff. ¶ 10).

29. Mr. Gregson was the Regional Office Supervisor in the DENR Wilmington office, and in that capacity, he served as the hearing officer for the public hearing held on May 14, 2013 on the 2012 APGI Application. (Gregson Aff. ¶¶ 2-5; Higgins Aff. ¶ 15; Hearing Officer Report at 7).

30. During the public hearing on May 14, 2013, the Yadkin Riverkeeper submitted comments “concerning ownership of the riverbed in the Yadkin Project,” summarized by Mr. Gregson as follows:

¹³ Petitioner removed from that footnote #1 in the Application a statement of Petitioner’s understanding of DENR’s position on ownership at Respondent’s request.

¹⁴ Ms. Higgins was, at the time of her affidavit, the 401 and Buffer Permitting Unit Supervisor with DWR. (Higgins Aff. ¶ 2). Previously, Ms. Higgins served as Supervisor of the Wetlands, Buffers, Stormwater, Compliance and Permitting Unit. (*Id.*) In each position, Ms. Higgins was responsible for overseeing the agency’s processing of applications for 401 Certifications. (*Id.*)

¹⁵ Mr. Presnell served as General Counsel for DENR from January 2013 through August 25, 2014. (Presnell Aff. ¶ 2).

The Yadkin Riverkeeper is requesting denial of the 401 Certification unless and until the applicant obtains an easement from the NC Department of Administration for its use of state-owned public trust lands. The comments state that APGI's application for certification does not meet the requirements of [Respondent's] rules because it has not obtained permission to use the property from its owner, the State of North Carolina.

(Hearing Officer Report at 7).

31. The Hearing Officer also received numerous comments regarding water quality and environmental issues, which the Hearing Officer ultimately reviewed and took into account in preparing the Hearing Officer Report. (Hearing Officer Report at 4-5 and 8-9).

32. On June 13, 2013, the Yadkin Riverkeeper filed additional written comments on Petitioner's Application reiterating his belief that the State of North Carolina was the owner of the riverbed of the Yadkin River and that Petitioner needed an easement from the State. (Higgins Aff. ¶ 10).

33. Section .0507(b) of the NC 401 Rules, 15A N.C. Admin. Code 02H.0507(b), requires that an application for a 401 certification must be granted or denied within 60 days of a public hearing, unless the applicant agrees to an extension. (Higgins Aff. ¶ 15).

34. By letter dated June 28, 2013, Petitioner requested the opportunity to provide additional information by July 3, 2013, and agreed to extend the time within which the agency was required to take a final action on the Application from the then pending deadline of July 13, 2013, until August 2, 2013 as the new deadline. (Higgins Aff. ¶ 15; Exhibit F).

35. Based on a telephone call involving DWR staff Ms. Higgins, Ms. Montgomery, and Mr. Gregson on July 3, 2013, Ms. Montgomery's handwritten notes indicate that the Application was "[s]igned by [an] authorized rep[resentative] of Company," so it was a "[v]alid application." After discussing the issue of "[d]oes Petitioner need easement from State for dams?" the notes further reflect the conclusion that, "[i]f so, still not a 401 issue." (Petitioner's SJ Motion, Exh. 11 at 2).

36. On July 16, 2013, Mr. Presnell contacted Ms. Higgins to request copies of portions of the Application file, including public comments related to ownership of the submerged lands. (Higgins Aff. ¶ 12; Presnell Aff. ¶ 6). Ms. Higgins provided this information, along with copies of the draft Hearing Officer Report, a draft 401 Certification document, a draft Denial letter, and other materials Ms. Higgins had gathered regarding the ownership issue. (Higgins Aff. ¶ 12; Presnell Aff. ¶ 6).

37. Mr. Presnell reviewed the information provided by Ms. Higgins, which included information from Petitioner's Application, the Yadkin Riverkeeper's comments, a draft Hearing Officer Report, a draft 401 Certification, and a draft Denial letter. (Presnell Aff. ¶ 6).

38. On July 19, 2013, the hearing officer, Mr. Gregson, forwarded a draft of his hearing officer report to Ms. Higgins, who, in turn, forwarded to Ms. Lori Montgomery on the DWR staff. (Petitioner's SJ Motion, Exh. 12).

39. On July 25, 2013, Ms. Higgins received an email from Mr. Presnell, which suggested revisions to the Hearing Officer Report and the draft 401 Certification, and which Ms. Higgins forwarded to the Hearing Officer, Mr. Gregson. (Presnell Aff. ¶ 9; Higgins Aff. ¶ 13).

40. The final Hearing Officer Report incorporates, verbatim, the language that the Hearing Officer received from DENR General Counsel, Mr. Presnell, regarding ownership claims and disputes concerning the Project and the Yadkin Riverbed that were raised by the Yadkin Riverkeeper. (Gregson Aff. ¶ 7). Those changes, made by Mr. Presnell and adopted by Mr. Gregson, were as follows:

Comments received stated that APGI's application for certification does not meet the requirements of DWQ (sic) rules because it has not obtained permission to use the property from its owners, the State of North Carolina. ***The comments are premised on the contention that DWQ is required to resolve submerged land issues before it can consider the application complete. Submerged land issues are outside the scope of the 401 Certification process, and a resolution of those issues is not required for the application to be considered sufficient under DWQ rules.*** 15A N.C. Admin. Code 02H.0502(f) states: that "The application shall be considered a 'valid application' only if the application bears the signature of a responsible officer of the company, municipal official, partner or owner. This signature certifies that the applicant has title to the property, has been authorized by the owners to apply for certification of is a public entity and has the power of eminent domain." ~~It is the understanding of DWQ that APGI owns the powerhouses and dams of the Yadkin project, therefore APGI is the correct applicant for the project. A review of other 401 Certification applications for FERC projects in North Carolina indicates that APGI's application for the Yadkin project was process consistent with other similar projects in North Carolina.~~ ***Consistent with its review of other applications for 401 Certification in connection with the licensing of FERC projects, DWQ deemed APGI's application sufficient for purposes of Rules .0502(f) based on APGI's representation that it owns the powerhouses and dams. APGI reiterated its claim of ownership in a letter, dated July 3, 2013, stating that "APGI owns the facilities from which the discharges originate, which are the Yadkin project's four hydroelectric dams." As stated previously, DWQ's 401 certification process focuses on the project's impact on water quality. DWQ is making no determination of ownership of submerged lands.***

Mr. Presnell's additions are shown in bolded italics and his deletions in strike-through. (Compare Petitioner's SJ Motion, Exh. 12 [draft Hearing Officer Report, p.19] with Exh. 5 [final Hearing Officer Report] and Exh. 15 [Presnell July 25, 2013 email]).

41. On July 25, 2013, Mr. Presnell also recommended the following similar changes to the draft 401 approval, which Ms. Higgins incorporated into a revised draft 401 Certification that she forwarded internally on the same day, adding the following new language to condition #6 of the draft 401:

This certification shall not be construed as addressing or making a determination with respect to title or ownership of submerged lands beneath navigable waters or public trust property. Disputes and claims involving ownership of submerged lands and public trust property are outside the scope of 401 certification and must be resolved by parties with competing claims or an appropriate court.

(Petitioner's SJ Motion, Exh. 15).

42. Mr. Presnell has stated that his suggested changes were intended to clarify that, if the 401 Certification were issued, Respondent "was not undertaking to resolve any ownership issues"; and confirmed Respondent's long-standing "position that property disputes should be resolved by parties with competing ownership claims or by a court of competent jurisdiction." (Presnell Aff. ¶ 9). Respondent relied on Petitioner's certification as sufficient. (Presnell Aff. ¶ 19).

43. On July 29, 2013, Ms. Higgins finalized both a draft Denial letter and a draft approval letter for the draft 401 Certification which she delivered to Mr. Reeder, the final decision maker, along with a copy of the final Hearing Officer Report. (Higgins Aff. ¶ 14; Admissions 65 & 81). This included a draft 401 Certification for Petitioner ("Draft 401"). (Admission 78)

44. At this point,¹⁶ Ms. Higgins and the other DWR staff who had reviewed the Application recommended that the Application, as supplemented by Petitioner during the Application review process,¹⁷ be granted. (Admission 10).

45. On July 29, 2013, Mr. Gregson finalized the Hearing Officer Report and recommended that the Application, as supplemented through the application review process,¹⁸ be granted. (Admission 10; Gregson Aff. ¶ 6). He was unaware that DOA intended to assert a claim of ownership, and he had not been informed that DOA filed the Lawsuit prior to the issuance of the Denial. (Gregson Aff. ¶ 8).

46. The Hearing Officer Report states that the "401 [c]ertification process is only to certify compliance with state water quality standards." (Hearing Off. R. at 18) The Hearing Officer Report concludes, in accordance with Mr. Presnell's suggestions, that ownership of submerged lands is not at issue in the 401 Certification and that the Application is sufficient for Respondent to act in a manner within its jurisdiction and on a proper basis. (Hearing Off. R. at 20).

47. On the morning of July 29, 2013, in response to an inquiry from the Governor's General Counsel, Mr. Presnell advised that the deadline for a decision on Petitioner's Application was August 2, 2013. (Admission 26; Presnell Aff. ¶ 12).

¹⁶ Respondent's Admission 10 says that this was true "prior to August 1, 2013."

¹⁷ Petitioner supplemented the Application primarily through responding to Respondent's requests for additional information; those responses are listed as Exhibits 11, 12, and 13 above.

¹⁸ See footnote 17 above.

48. Later that day, July 29, 2013, Mr. Presnell attended a second meeting, or a portion of a meeting, which was also attended by DOA representatives and by the Governor's General Counsel. (Presnell Aff. ¶ 12). Mr. Presnell informed the attendees that he expected Respondent to act on the Application by the August 2, 2013, deadline and that he did not expect to extend that deadline. (Presnell Aff. ¶ 12).

49. During these July 29, 2013 meetings, Mr. Presnell indicated to those present that he did not know what action Respondent would take with respect to the Application. (Presnell Aff. ¶ 12).

50. On August 1, 2013, Mr. Presnell learned that Secretary of Respondent, had received a letter earlier in the day dated August 1, 2013 from the Secretary of DOA, setting out objections and comments to the Application ("DOA Letter"). (Presnell Aff. ¶ 14 & Exhibit C).

51. The DOA Letter makes clear DOA's contention that the Application should be denied and provides guidance as to the basis to be used for that denial. (Presnell Aff. ¶ 14 & Exhibit C). In summary, the DOA Letter contains the following key components:

(a) First, the DOA Letter explains DOA's objections and comments to the Application and asserts that the State of North Carolina, not Petitioner, is the owner of the land comprising the submerged bed of relevant portions of the Yadkin River, including the portion of the bed lying beneath the four dams comprising the Yadkin Hydroelectric Project.

(b) Second, the DOA Letter states that DOA has not authorized Petitioner to apply for a 401 certification and directly challenges the validity of Petitioner's certification of ownership or permission.

(c) Third, the DOA Letter refers to and includes a draft complaint captioned, "State of North Carolina, by and through its agency, the North Carolina Department of Administration v. Alcoa Power Generating, Inc." as an attachment.

(d) Fourth, and most critically, the DOA Letter directly states that Respondent should determine that the Application was not a "valid application" because, according to DOA, the Application was incomplete and "invalid" due to DOA's competing ownership claims.

52. The DOA Letter concludes:

Therefore, DOA believes that Alcoa's application for a Section 401 Certification regarding the Yadkin River and the submerged lands referred to above is not a "valid application" under the relevant statutes and administrative rules governing DWQ's and DENR's assessment of such applications and that DWQ and DENR should thus deny Alcoa's application for a section 401 Certification and therefore the DOA objects to the granting of any such certification to Alcoa. At the very minimum DENR should deny the application without prejudice to Alcoa's ability to renew its

application when and if the relevant title questions are finally resolved in its favor in the North Carolina General Court of Justice.

(Presnell Aff., Exhibit C at 3).

53. DENR Secretary Skvarla scheduled a meeting later on August 1, 2013 with DOA Secretary Daughtridge, DOA's legal counsel, and Mr. Presnell. (Presnell Aff. ¶ 15). DOA Secretary Daughtridge and counsel for DOA informed them that DOA would be filing a complaint in Wake County Superior Court, possibly that afternoon. (Presnell Aff. ¶ 16). No one from Petitioner was invited or included in this meeting.

54. After the meeting with Secretary Daughtridge on August 1, 2013, Mr. Presnell met with Secretary Skvarla, DWR Director Reeder, Assistant Secretary Mitch Gillespie, and legal counsel to discuss Respondent's options in light of what had been learned that day from the DOA Letter and the meetings with DOA. (Presnell Aff. ¶ 17).

55. The group discussed various options available to Respondent in ruling on Petitioner's Application, if, in fact, DOA filed the complaint on or before the decision deadline of August 2, 2013: (1) issue the 401 Certification, specifically conditioned on Petitioner establishing its ownership rights in the lawsuit, as well as any other conditions deemed appropriate by the Director; (2) "conditionally" deny the 401 Certification and set forth the conditions of a 401 certification, which Respondent would issue upon a settlement or court ruling establishing Petitioner's ownership rights; (3) deny Petitioner's Application; and (4) seek an extension of time to grant or deny the certification under 15A N.C. Admin. Code 21-I .0507(a). (Presnell Aff. ¶ 17).

56. Mr. Presnell has indicated that Respondent rejected the option of extending the time to grant or deny the 401 Certification under Rule .0507(a) because neither additional time nor other information would have enabled Respondent to make a different decision. (Presnell Aff. ¶ 21).

57. On the morning of August 2, 2013, Mr. Presnell met again with DENR Secretary Skvarla, DWR Director Reeder, DOA's legal counsel, and DENR General Counsel Mr. Presnell; during the meeting, Respondent's attendees learned that DOA had, in fact, filed the Lawsuit earlier that morning. (Presnell Aff. ¶ 18; Admissions 22, 23 & 24).

58. During this meeting on August 2, 2013, the decision was made to deny Petitioner's Application on the basis that it was an "invalid application" until the issues and conflicting claims of ownership were resolved by the parties or by the Court. (Presnell Aff. ¶ 19)

59. DWR Director Reeder issued the Denial in the form of a letter from him to E. Ray Barham of Petitioner on the last day by which Respondent had to act on the Application within hours of the filing of the Lawsuit. (Exhibit to the Petition for Contested Case Hearing filed by Petitioner on September 25, 2013; see Exh. 1 to the Petitioner's SJ Motion)

60. Petitioner was given no opportunity to review or respond to the DOA Letter before or after the Denial.

61. To the best of Mr. Presnell's knowledge, the Hearing Officer was never requested to revise his final Hearing Officer's Report to reflect the basis for the Denial. (Presnell Aff. ¶ 22).

62. Respondent admits that:

(a) the Denial was based solely on the title and ownership issues raised by the DOA through the DOA Letter and the Lawsuit. (Admissions 1-4, 7-8).

(b) the Denial was not based on water quality issues. (Admission 9).

(c) Respondent made no determination that Petitioner did not own the submerged lands. (Admission 6)

(d) in issuing the Denial, DWR Director Reeder did not undertake any determination concerning the allegations in the Complaint. (Admission 7).

63. The Denial, among other things, states that:

(a) “Under 15A NCAC 02H.0502(f) your signature on the certification application ‘certifies that the applicant has title to the property, has been authorized by the owner to apply for certification or is a public entity and has the power of eminent domain.’ The required ownership certification ensures that the applicant owns the project’s dams and powerhouses and is fully capable of implementing all protections of water quality that may be imposed as conditions in a 401 certification.”

(b) “In the pending lawsuit, the North Carolina Department of Administration asserts that the State of North Carolina owns . . . the submerged bed of the Yadkin River and portions of the project’s dams standing on the State’s riverbed land.”

(c) “With the filing of the pending lawsuit and the issues of ownership raised, the Division cannot consider the application to be a valid application until the issues and conflicting claims of ownership are resolved by the parties or by a final order of the Court in the pending lawsuit.”

(Petitioner’s SJ Motion, Exh. 1)

64. In stating that the certification requirement in §.0502(f) of the NC 401 Rules “ensures that the applicant owns the project’s dams and powerhouses,” the Denial interpreted that provision to impose a substantive requirement of ownership of the submerged bed of the river.

65. Prior to August 1, 2013 and the filing of the Lawsuit, Respondent’s staff recommended that the application be granted. (Admission 10).

66. Prior to the issuance of the Denial on August 2, 2013, Respondent’s staff involved in reviewing Petitioner’s Application, as supplemented with supporting documentation, did not take the position that the Application should be denied. (Admission 11).

67. Prior to the issuance of the Denial, no one on the Respondent’s staff recommended denying the Application. (Admission 12).

68. Mr. Reeder issued the Denial based upon his determination that Petitioner's Application was invalid because of title and ownership issues raised by the DOA through the DOA Letter and the Lawsuit. (Admissions 1-4 & 7-8; Reeder Depo. 49, ll. 19-20 and at 51, ll. 3-4)

69. On July 21, 2014, the State of North Carolina filed its DOA Brief¹⁹ in the Lawsuit²⁰ (initially filed in North Carolina State Court, but removed to the United States District Court for Eastern District of North Carolina). In that DOA Brief, although the State of North Carolina indicated that the Lawsuit was "to remove a slander of the title" to the bed of the Yadkin River, the Brief clarified the scope of the Lawsuit's purpose and its requested remedy "is NOT an attempt to force the demolition of the hydroelectric dams now existing; NOR is it an attempt to take those dams or reservoirs; NOR is it an attempt to supplant Alcoa as the licensed operator of the project via litigation" (DOA Brief at 4; capitalized words are in the original).

70. The DOA Brief indicated that its second purpose was to determine that Petitioner must pay money to continue to operate the Project, rather than to continue to operate "gratis, in disregard of our State's Constitution." (Id.) While the Brief says that the purpose of the Lawsuit is not to determine the exact amount that Petitioner is to be required to pay, the DOA Brief makes clear that the purpose of the Lawsuit is to establish that Petitioner must make those payments to the State of North Carolina "to rebalance the benefits to the people of the State and to Alcoa, which balance must be present to fulfill the mandates of the North Carolina Constitution." (Id.)

71. Respondent has filed as an exhibit to its SJ Response a letter dated October 4, 2014, written by Mr. Donald R. Teeter, Special Deputy Attorney General in the Department of Justice to Ms. Waylett, Senior Deputy Attorney General in the Department of Justice ("Teeter Letter").²¹ Mr. Teeter is counsel of record for DOA in the Lawsuit and a signatory of the DOA Brief described previously. Among other things, the Teeter Letter reaffirms the statements in the DOA Brief that there is nothing in the Lawsuit "that would immediately require Alcoa or Petitioner to quit the site or result in the State's vested rights in the project structures becoming immediately possessory."²²

72. The Teeter Letter clarifies that the Lawsuit is to require that Petitioner "reach agreement with the State to rebalance the value of their continued use of the public resource that is the historic bed of the Yadkin River with a restored public benefit through fair rentals or otherwise" Finally, the Teeter Letter provides the connection between DOA's filing of the Lawsuit and Respondent's consideration of the Application: "Once such a rebalancing has been agreed to, and only then, might Petitioner be otherwise free to obtain its 401 Permit and, if successful before FERC, its re-licensure as the operator of the Yadkin Project."

¹⁹ See Exhibit 29 listed above.

²⁰ See Exhibit 22.

²¹ The Teeter Letter is listed as Exhibit 30 above.

²² The Teeter Letter clarified that the Lawsuit did "not seek immediate or summary effect of its prayed-for declarations, but instead asks for 'an Order directing Alcoa to take actions to respect the State's rights in and to the Riverbed Portions of the Dams and the bed of the Relevant Segment of the Yadkin River.'"

73. The Court reviewed the DOA Brief submitted by Petitioner and the Teeter Letter submitted by Respondent, and considered both documents in ruling on the parties' motions for reconsideration and for summary judgment.

74. Based on the foregoing Findings of Fact, the Lawsuit cannot be reasonably interpreted to negatively affect Petitioner's ability to satisfy the conditions concerning water quality that might reasonably be included in a 401 certification from Respondent.

75. As stated above,²³ the Denial Letter states that the certification requirement in §.0502(f) of the NC 401 Rules "ensures that the applicant . . . is fully capable of implementing all protections of water quality that may be imposed as conditions in a 401 certification." By making that statement, the Denial Letter linked the ownership requirement that it found in §.0502(f) to Respondent's view that the applicant is required to show it is fully capable of implementing all protections of water quality that may be imposed as conditions in a 401 certification.

76. Petitioner has undertaken improvements to increase and improve water quality in the Yadkin River, particularly by increasing levels of dissolved oxygen ("DO") in the waters below the Narrows and Falls dams by installing DO enhancement technology at three of the four turbines at Narrows (Units 1, 2 and 4); those upgrades were installed on Unit 4 in January 2001, on Unit 2 in July 2008 and on Unit 1 in April 2009. (Admissions 48 & 49).

77. Using information from monitoring of DO concentrations in the Dams tailwaters that Petitioner has been performing beginning in 2009; Petitioner has submitted annual reports to Respondent summarizing that monitoring and its indications of the efficacy of the equipment installed by Petitioner in the Narrows dam to increase those levels of DO to enhance water quality in the Yadkin River; Petitioner introduced into the record the annual report that it submitted to Respondent in March of 2013, based on DO monitoring data for 2009-2012 ("2012 DO Report").²⁴ (Admissions 50 & 51). That 2012 DO Report describes, for example, the achievement of significant increases in DO in the waters below the Falls Dam, where Petitioner has installed DO enhancement equipment. (Admissions 52 & 53).

78. In his Report, the Hearing Officer indicates that while the Project is currently "not meeting the instantaneous or average minimum DO standards during all times of the year or during all periods of operation," he concluded that "[c]ontinued operation of the Yadkin Project is not expected to result in degradation of surface or groundwaters." (Hearing Officer Report at 15, 17). The Hearing Officer Report notes further that, "DO upgrades at Narrows have shown a significant increase in tailwater DO and it is expected, as other upgrades are installed at the four powerhouses that continued improvement in tailwater DO will be realized." (Id. at 17).

79. The Denial has had the unavoidable effect of preventing the further improvements that would be made, once a 401 issued. ("AG 2013 Opinion").²⁵ The expiration of the Project's FERC license in 2008 means that the Petitioner's Project is operating under annual licenses issued

²³ See Finding of Fact 63(a) above.

²⁴ The 2012 DO Report is listed as Exhibit 35 above.

²⁵ The AG 2013 Opinion is listed as Exhibit 10 at the beginning of this Final Decision.

by FERC, which do not allow for any further upgrades. Thus, until Petitioner receives a 401 that leads to a new FERC license, the DO enhancements that are to be made under a new 401 cannot be installed. (AG 2013 Opinion at 2-3).

80. Respondent offered no evidence to rebut any of the findings in Findings of Fact 82 - 85 above.

BASED UPON the foregoing Findings of Fact, the undersigned Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings and this Court have jurisdiction over the parties and the subject matter pursuant to Chapter 150B of the North Carolina General Statutes ("APA").

Petitioner's Motion for Reconsideration Should Be Granted

The Court's initial decision to deny summary judgment was based upon an assumption that it should not take into account information in the record concerning events that occurred after the issuance of the Denial; however, based on additional briefing and submittals by the Parties, Petitioner has persuaded the Court otherwise, and, therefore, the Court makes the following conclusions in reaching the decision to grant Petitioner's Motion for Reconsideration as follows:

2. On January 6, 2015, this Court entered an order denying summary judgment, and motions to reconsider based upon the Court's view that it could not and had not considered certain submissions made by the parties relating to events occurring after Respondent's issuance of the Denial.

3. The denial of summary judgment did not constitute a final decision, and this Court may reconsider that decision. Compare 26 N.C. Admin. Code 03.0129.

4. Even if the denial of summary judgment were a final order or decision, the Court can correct orders due to mistake or inadvertence, among other things. 26 N.C. Admin. Code 03.0101(b); N.C. GEN. STAT. § 1A-1, Rule 60.

5. The Court's order of January 6, 2015 denying summary judgment was filed in contemplation of the entry of a scheduling order shortly thereafter, which scheduling order provided, among other things, a deadline of February 12, 2015, by which any motions for reconsideration pursuant to applicable rules were required to be filed. Both parties filed motions for reconsideration on that date.

6. Both parties included in their respective filings in support of and in opposition to the SJ Motion information that each party contended was uncontroverted evidence concerning the scope, purpose, and potential impacts of events occurring after August 2, 2013, including events in the Lawsuit. In previously denying Petitioner's SJ Motion, the Court gave no weight to that evidence, although that evidence had been properly admitted into the record. The Court now

concludes that it may and should take such evidence into account in rendering its decision on summary judgment.

7. The final “decision in a contested case hearing must be based on the ‘official record prepared pursuant to N.C. GEN. STAT. § 150B-37.’” *Everhart & Assocs. v. DENR*, 127 N.C. App. 693, 697, 493 S.E.2d 66, 69 (1997), *cert. denied*, 347 N.C. 575, 502 S.E.2d 590 (1998) (quoting G.S.150B-36(b) of the APA). This holding is consistent with the wording of the APA and the OAH Rules. The APA requires the official record to include the collection of information upon which the ALJ makes the final decision. *See Deep River Citizens Coal. v. DEHNR*, 119 N.C. App. 232, 234, 457 S.E.2d 772, 774 (1995) (contents of record on appeal in a contested case). For example, the Court of Appeals has approved an ALJ’s reliance on an expert’s testimony that was not available to the agency when it made its decision, noting that “[t]he agency has failed to cite and we have found no applicable case law or statutory authority for the proposition that the ALJ erred by considering Dr. Timmons’s expert testimony regarding Robinson’s medical needs in rendering his decision.” *Robinson ex rel. Robinson v. N.C. Dep’t of Health & Human Servs.*, 215 N.C. App. 372, 377, 715 S.E.2d 569, 572 (2011).

8. The essence of the *Robinson* decision was that a contested case hearing before an independent ALJ is essential to provide a “way to remedy deficiencies” in the agency process and for a person aggrieved by an agency decision “to have a meaningful opportunity to be heard.” *Id.* at 378, 715 S.E.2d at 572. Here, the State did not formally raise its claim of ownership of the riverbed until the DOA Letter was issued on August 1, 2013 and the filing of the Lawsuit on August 2, 2013, the day by which Respondent was required to make a decision on the Application. As a result of the timing and circumstances of how the issue of ownership was raised by DOA, Petitioner did not have a meaningful opportunity to be heard on whether the Lawsuit was a proper basis for the Denial prior to the Denial’s issuance. Consequently, Petitioner’s only opportunity to raise the issue of whether the Lawsuit was a proper basis for the Denial was before this Court.

9. In 2011, the General Assembly amended the APA to give ALJs final decision-making authority. S.L. 2011-398, s.18. However, those 2011 amendments did not alter the APA’s provisions regarding creating and considering the whole or official record in any manner that would indicate that the General Assembly intended to change those provisions regarding creation and consideration of the contested case official record.

10. In its pleadings, Respondent cited two North Carolina appellate cases that consider the issue of evidence to be considered by an ALJ in a contested case, *Stark v. Dep’t of Env’t & Natural Resources*, – N.C. App. –, 736 S.E.2d 553 (2012), and *Clark Stone Co. v. Dep’t of Env’t & Natural Resources*, 164 N.C. App. 34, 594 S.E.2d 832 (1984). However, the *Clark Stone* case is inapplicable to this matter and the *Stark* opinion, properly interpreted, does not support Respondent’s position. The *Stark* opinion affirms the proposition in the APA that parties should be assured meaningful input and ample opportunity to provide evidence and participate as the issues are being considered. The petitioners in *Stark* were given such an opportunity and were not permitted to provide additional evidence of more recent events. However, in this case, Petitioner was given no opportunity to offer evidence to Respondent or discuss the implications of the impact of the filing of the Lawsuit on August 2, 2013 only hours before Respondent issued the Denial. Petitioner’s only avenue to challenge the Denial was to file this contested case and to present

evidence about the Lawsuit, some of which arose after August 2, 2013, since the Lawsuit is ongoing still today.

11. Like the subsequently developed expert report admitted by the ALJ and approved by the Court of Appeals in the *Robinson* decision cited above, this Court has determined that it should consider evidence introduced at the summary judgment hearing regarding developments that occurred after the Denial, including developments in the Lawsuit occurring on and after it was filed on August 2, 2013, which was the date of the Denial.

12. Therefore, the Court concludes it should have considered the evidence introduced into the record by the parties regarding events occurring on and after August 2, 2013, even though it was not available for consideration by Respondent in issuing the Denial. This post-Denial evidence is composed primarily of the Reeder deposition testimony, the DOA Brief, and the Teeter Letter; all of which clarify the scope, purpose, and potential impacts of the Lawsuit. While some of this post-Denial evidence was introduced by Petitioner and some was introduced by Respondent, all of the evidence is transcriptions of or written statements of representatives of the State of North Carolina communicating in their official capacity. Each statement is either under oath or subject to the pleading requirements of Rule 11.

13. Further, after considering the post-Denial evidence described in the previous paragraph, the Court concludes that the Lawsuit cannot reasonably be interpreted to negatively affect Petitioner's ability to satisfy the conditions concerning water quality that might reasonably be included in a 401 certification from Respondent. In addition, after considering those documents, as well as the facts found herein concerning contacts with Respondent by DOA and the Governor's General Counsel, the Court concludes that it should grant Petitioner's Motion for Reconsideration.²⁶

Respondent's Motion for Reconsideration Should be Denied

14. Respondent identified no error requiring reconsideration and for this reason and the reasons set forth below, Respondent's Motion for Reconsideration should be denied.

Petitioner's Summary Judgment Motion Should be Granted

15. Upon careful review of the entire record, the material facts set forth above are undisputed and those facts lead the Court to conclude, as a matter of law, that Petitioner is entitled to judgment in its favor as stated below.

16. An administrative law judge is authorized to "grant summary judgment, pursuant to a motion made in accordance with N.C. GEN. STAT. § 1A-1, Rule 56, that disposes of all issues in the contested case." N.C. GEN. STAT. § 15B-34(e). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. GEN. STAT. § 1A-1, Rule 56(c). "Summary judgment, like judgment on the pleadings, is appropriately granted only where no disputed issues

²⁶ See Finding of Facts 53-68.

of fact have been presented and the undisputed facts show that any party is entitled to judgment as a matter of law.” *Minor v. Minor*, 70 N.C. App. 76, 79, 318 S.E.2d 865, 867 (1984). However, summary judgment differs from judgment on the pleadings in that “judgment on the pleadings is not favored and the trial court is required to view the facts and permissible inferences in the light most favorable to the nonmovant,” on a motion for judgment on the pleadings, *see Flexolite Elec., Ltd. v. Gilliam*, 55 N.C. App. 86, 88, 284 S.E.2d 523, 524 (1981), whereas in a summary judgment motion, a party may, by producing evidence, shift the burden of proof to the non-moving party, *see e.g., Boyce & Isley, PLLC v. Cooper*, 211 N.C. App. 469, 710 S.E.2d 309, 315 (2011).

17. Respondent argues that its interpretation of its own NC 401 Rules should be given “due deference unless it is plainly erroneous or inconsistent with the regulation.” Respondent’s SJ Response, at 20, citing *Pamlico Marine Co. v. N.C. Dep’t of Natural Resources & Cmty. Dev.*, 30 N.C. App. 201, 206, 341 S.E.2d 108, 112 (1986). However, when an agency announces an interpretation of a law for the first time in a particular case, a judge may view that interpretation “skeptically.” *Rainey v. N.C. Dep’t of Pub. Instruction*, 361 N.C. 679, 681, 652 S.E.2d 251, 252-3 (2007).

18. Respondent has consistently said that it has never before faced the issues raised in this case, saying that this was the “first time Respondent was required to consider an application for a §401 Certification, where the State of North Carolina, through its Department of Administration, challenged an applicant’s certification of ownership” (Respondent PHS at 4). Respondent characterizes this situation as “the first 401 application submitted to Respondent in which the applicant’s certification of ownership has been directly challenged by what is essentially a title dispute.”²⁷

19. Reviewing courts make clear that deference is not due “when ‘the only authority for the agency’s interpretation of the law is the decision in that case, that interpretation may be viewed skeptically on judicial review [I]f the agency’s interpretation of the law is not simply a ‘because I said so’ response to the contested case, then the agency’s interpretation should be accorded ... deference.” *Cashwell v. Dep’t of State Treasurer*, 196 N.C. App. 80, 89, 675 S.E. 2d 73, 78 (2009). In such a case, “[t]he court may freely substitute its own judgment for that of the agency.” *Friends of Hatteras Island*, 117 N.C.App. 556, 567, 452 S.E.2d 337, 344 (1995) (internal quotation marks omitted).

20. Because the Denial issued in this case was a clear change of approach by the agency in interpreting and applying §.0502(f) of the NC 401 Rules, 15A NCAC 02H.0502(f), Respondent’s interpretation of that rule is not entitled to the deference ordinarily afforded to an agency decision and to which it might have otherwise been entitled has this not been the first time the Agency faced this particular situation.

21. An agency action violates the APA if it is shown that the agency, in taking the challenged action or decision, (1) exceeded its authority; (2) acted erroneously; (3) failed to use proper procedure; (4) acted arbitrarily or capriciously; (5) failed to act as required by law or rule; or (6) acted in a manner unsupported by substantial evidence admissible under N.C. Gen. Stat. §§

²⁷ Respondent’s SJ Response, at 29.

150B-29(a), -30, or -31 in view of the entire record as submitted. N.C. GEN. STAT. § 150B-23(a), see N.C. GEN. STAT. § 150B-51(b).

22. Thus, in reviewing an agency decision under the APA, “[t]he administrative law judge must, therefore, ‘determine whether the petitioner has met its burden in showing that the agency substantially prejudiced petitioner’s rights,’ as well as whether ‘the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule.’” *CaroMont Health, Inc. v. N.C. Dept. Health & Human Servs.*, – N.C. App. –, 751 S.E.2d 244, 248 (2013) (citations omitted); *The Charlotte-Mecklenburg Hospital Auth. v. N.C. Dep’t of Health & Human Servs.*, 09 DHR 6116, 2010 WL 3283837 (July 26, 2010) (same conclusion).

23. A decision by an administrative agency is “arbitrary and capricious” if it “clearly evinces a lack of fair and careful consideration or want of impartial, reasoned decision making.” *Joyce v. Winston-Salem State Univ.*, 91 N.C. App. 153, 156, 370 S.E.2d 866, 868 (1988). As the North Carolina Supreme Court recognized,

Agency decisions have been found arbitrary and capricious, inter alia, when such decisions are “whimsical” because they indicate a lack of fair and careful consideration; when they fail to indicate “any course of reasoning and the exercise of judgment” . . . or when they impose or omit procedural requirements that result in manifest unfairness in the circumstances though within the letter of statutory requirements.

State ex rel Comm’r of Ins. v. N.C. Rate Bureau, 300 N.C. 381, 420 (1980); see *Richard Lee Taylor v. City of Charlotte*, 11 MIS 14140, 2012 WL 2673270 (May 14, 2012) (citing *N.C. Rate Bureau* for the same conclusion); *Charlotte-Mecklenburg Hospital Auth.*, 2010 WL 3283837 (recognizing standard for arbitrary and capricious agency actions).

24. Based on the undisputed facts in the record, the Denial reflected a last-minute determination based upon the actions and opinions of persons outside of Respondent that the Application was invalid, rather than a fair and impartial ruling on the merits of the Application itself and could not have been a careful or deliberate ruling on the merits of the Application.

25. While the undisputed facts show that government officials outside of Respondent affected the 401 decision-making process at Respondent, this Court expressly does not conclude that any person communicated or acted improperly in doing so or attempting to do so. In short, this Court’s conclusion does not require and expressly does not rely upon a legal conclusion that the influence was “undue” or improper in any respect.

26. Because, as noted previously, this case involves, at least in some respects, the correctness of Respondent’s interpretation of the NC 401 Rules adopted by the Environmental Management Commission, it raises the issue of the degree of deference properly to be given to Respondent’s interpretation of the NC 401 Rules, for which reviewing courts traditionally accord deference to the agency’s interpretation of its own rules.²⁸

²⁸ See Conclusion of Law 17.

27. In its papers and before this Court, Respondent acknowledged that this contested case and the Denial were unique. According to Respondent, there has never been a case with a conflicting claim of ownership asserted by another state agency on the very day that a decision from Respondent was required to be issued. When an agency announces an interpretation of a law for the first time in a particular case, such deference need not be accorded, and the interpretation may properly be viewed “skeptically.”²⁹

28. Further, because the Denial issued in this case was a clear change of approach by the agency in interpreting and applying section .0502(f) of the NC 401 Rules, the Denial is not entitled to the deference ordinarily afforded by this Court to an agency decision and to which it might have otherwise been entitled.³⁰ Nevertheless, even if the Court were to afford such deference, the clearly arbitrary and capricious nature of the circumstances surrounding the issuance of the Denial and lack of an explicit regulatory basis for it support the Court’s conclusion that in issuing the Denial, Respondent exceeded its authority; acted erroneously; acted arbitrarily or capriciously and failed to act as required by law or rule, contrary to N.C. GEN. STAT. § 150B-23(a).

29. Based on the foregoing and the Court’s findings of fact, the Court concludes that the decision of Respondent to issue the Denial on the basis that the Application was not valid was made incorrectly, was not made according to law, and was arbitrary and capricious because it was based upon improper consideration of a dispute over ownership of submerged land.

30. An agency exceeds its authority or jurisdiction when it acts outside the powers granted to it by statute or the powers that are necessarily implied by the statutory grant of authority. *Mehaffey v. Burger King*, – N.C. –, 749 S.E.2d 252, 256 (2013); *High Rock Lake Partners, LLC v. N.C. Dep’t of Transp.*, 366 N.C. 315, 318-19, 735 S.E.2d 300, 303 (2012).

31. In supporting a decision, an agency may not rely on facts or factors that it is not authorized by statute to consider or that are irrelevant to the agency’s decision. *See, e.g., R.J. Reynolds Tobacco Co. v. N.C. Dep’t of Env’t & Natural Res.*, 148 N.C. App. 610, 618, 560 S.E.2d 163, 169 (2002) (holding that DENR considered irrelevant facts that did not support its decision); *Williams v. N.C. Dep’t of Env’t & Natural Res.*, 144 N.C. App. 479, 485, 548 S.E.2d 793, 797-98 (2001), *superseded by statute on other grounds*, N.C. GEN. STAT. § 113A-120.1, *as recognized by Riggings Homeowners, Inc. v. Coastal Res. Comm’n of State*, – N.C. App. –, 747 S.E.2d 301, 313 (2013) (holding that an impermissible consideration was “irrelevant and insufficient to support [the Coastal Resources Commission’s] conclusion of law”).

32. Respondent based the Denial on an ownership dispute over submerged land³¹ and therefore based its decision upon an improper factor beyond the scope of its authority under § 401 of the Clean Water Act, 33 U.S.C. § 1341; N.C. GEN. STAT. § 143B-282.1; and the NC 401 Rules, as discussed below.

²⁹ See Conclusions of Law 17.

³⁰ See Conclusion of Law 20.

³¹ See, e.g., Findings of Fact 62.

33. The Denial specifically notes that, in reviewing the purposes of the certification provision in §.0502(f) of the NC 401 Rules, “[t]he required ownership certification ensures that the applicant owns the project’s dams and powerhouses and is fully capable of implementing all protections of water quality that may be imposed as conditions in a 401 certification.”³² That is, in describing the purposes of the certification, the Denial itself makes clear that the ownership of the bed of the river is irrelevant to the issuance of the 401 certification.

34. Respondent failed to properly construe and apply its enabling statutes and the NC 401 Rules in issuing the Denial. Up until the issuance of the Denial, the agency consistently asserted that there was no need to resolve such disputes in order to effectuate its duties to protect water quality through its implementation of the 401 program under the Clean Water Act.³³

35. As reflected in the Hearing Officer Report and its recommendation of issuance of the 401 Certification, there appears to be no factual dispute that Petitioner satisfied the substantive requirements for issuance of a water quality certification.

36. Petitioner cannot install water quality capital enhancements until it receives a FERC license as discussed in the previous paragraph, and because the FERC license cannot be issued until Petitioner receives a 401 water quality certification, the Denial has resulted in additional and unnecessary delay to Petitioner’s ability to install those water quality capital enhancements, which, in turn, has delayed the improvements to the water quality below the Project dams and in the Yadkin River generally, contrary to purposes and intent of §401 of the CWA and the NC 401 Rules to protect and enhance water quality. Due to these limitations, the Denial has had the effect of delaying the water quality improvements that would be included in a 401 certification and a new FERC license that could be issued (and that would reflect the improvements mandated in the 401 Certification).³⁴

37. The plain language of the NC 401 Rules does not include a land ownership requirement. No provision of the NC 401 Rules requires, treatment of the claims in the Lawsuit any differently than other competing claims or assertions as to ownership. Compare 15A NCAC 02H.0500, particularly §§.0502 and .0506.

38. Even if the Lawsuit had originally provided any basis to deny the Application, it no longer does so, as there is no longer any basis for a concern that a resolution of the Lawsuit would impair Petitioner’s ability to comply with the conditions of a water quality certification.

39. An agency action violates the APA if it is shown that the agency failed to use proper procedure, or failed to act as required by law or rule. N.C. GEN. STAT. § 150B-23(a), see N.C. GEN. STAT. § 150B-51(b).

40. In issuing the Denial in the manner reflected in the uncontroverted facts in this record, Respondent failed to avail itself of the opportunity under the NC 401 Rules to seek

³² See Findings of Fact 63(a)

³³ See Admissions 16-21, ; Exhibit 19 at 20; and Respondent’s Response to SJ Motion at 21-24.

³⁴ See Finding of Fact **Error! Reference source not found.**

information about ownership and also failed to accord Petitioner an opportunity to submit such information, and, thus, failed to use proper procedure, or failed to act as required by law or rule.

41. Petitioner has met its burden of showing that Respondent acted in an arbitrary and capricious manner in issuing the Denial, because it was not the result of a careful consideration of Petitioner's Application or of an impartial decision-making process and because it resulted in manifest unfairness to Petitioner. Respondent provided insufficient substantial evidence in the Record to support the Denial in the face of uncontradicted evidence provided by both Parties that demonstrated deficiencies in the manner and bases underlying the Denial. Respondent exceeded its authority, acted erroneously, and failed to act as required by law or rule, because the Denial was based upon a factor that Respondent is not authorized by statute and its rules to consider. Respondent failed to use proper procedure by acting on the basis of ownership issues without requesting information from Petitioner about those issues or otherwise providing Petitioner with an opportunity to address them before issuing the Denial. Respondent failed to act as required by law or rule and in a manner unsupported by substantial admissible evidence because it had no basis to conclude that Petitioner would be unable to comply with the water quality provisions in a water quality certification such as the draft 401 that Respondent had prepared. The Denial has resulted in the delay of the water quality protections and improvements that ultimately follow the issuance of a 401 certification. While any one of these errors or deficiencies would likely be sufficient to justify overturning the Denial, the collection of all of the errors and deficiencies clearly establish that the Denial should be reversed under N.C. GEN. STAT. § 150B-23(a) and other provisions of the APA

BASED UPON the foregoing Findings of Fact and Conclusions of Law, the Undersigned makes the following:

DECISION

Respondent's decision on August 2, 2013, to deny Petitioner's Application is REVERSED.

REMEDY

Pursuant to N.C. GEN. STAT. § 150B-23(a4), Respondent is directed to proceed to review Petitioner's Application as expeditiously as possible and in no event shall issue a decision later than thirty days after the date of this Order based upon the record before the agency as it existed as of August 2, 2013; provided, however, the parties may mutually agree to an extension of such thirty day period.

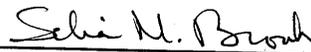
NOTICE

This is a Final Decision issued under the authority of N.C. GEN. STAT. § 150B-34(e).

Under the provisions of N.C. GEN. STAT. § 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 the county where the person aggrieved by the administrative decision resides, or in the

case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. 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 03.0102, 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. 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 29th day of May, 2015.



Selina M. Brooks
Administrative Law Judge

STATE OF NORTH CAROLINA
COUNTY OF STANLY

FILED
IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
2015 JUN 10 PM 12:13 EHR 18085

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| ALCOA POWER GENERATING, INC., |) | OFFICE OF |
| Petitioner |) | ADMINISTRATIVE HEARINGS |
| vs. |) | |
| DIVISION OF WATER RESOURCES, |) | ORDER AMENDING |
| NORTH CAROLINA DEPARTMENT OF |) | FINAL DECISION |
| ENVIRONMENT AND NATURAL |) | |
| RESOURCES, |) | |
| Respondent |) | |

Pursuant to 26 NCAC 3.0129, for the purpose of correcting a clerical error, IT IS HEREBY ORDERED that the above-captioned Final Decision, issued from this Office on May 29, 2015, is amended as follows:

Finding of Fact 80. Respondent offered no evidence to rebut any of the findings in Findings of Fact 75-79.

This the 10th day of June, 2015.


Selina M. Brooks
Administrative Law Judge