

# NORTH CAROLINA REGISTER

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November 2, 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.

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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 <sup>th</sup> 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
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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 rul



# State of North Carolina

**PAT McCrORY**  
GOVERNOR

September 30, 2015

**EXECUTIVE ORDER NO. 79**

**TERMINATING EXECUTIVE ORDER NO. 30**

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

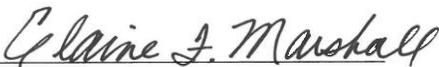
Executive Order No. 30, *Fix and Modernize Information Technology Governance in Cabinet Agencies by Collaborating as One IT*, adopted November 7, 2013, is hereby terminated.

This order is effective immediately.

**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 thirtieth day of September in the year of our Lord two thousand fifteen, and of the Independence of the United States of America the two hundred and thirty-nine.

  
Pat McCrory  
Governor

ATTEST:

  
Elaine F. Marshall  
Secretary of State





# State of North Carolina

**PAT McCRORY**  
GOVERNOR

October 1, 2015

**EXECUTIVE ORDER NO. 80**

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

**Section 1.**

I hereby declare that a state of emergency as defined in N.C.G.S. §§ 166A-19.3(6) and 166A-19.3(19) exists in North Carolina due to the approach and potential impacts from Hurricane Joaquin. These impacts include potential life threatening flooding from heavy rains on top of the several inches of rainfall that has already fallen in this state. The emergency area as defined in N.C.G.S. §§ 166A-19.3(7) and N.C.G.S. 166A-19.20(b) is the state of North Carolina.

**Section 2.**

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

**Section 3.**

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

**Section 4.**

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

**Section 5.**

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

**Section 6.**

I hereby order this declaration: (a) to be distributed to the news media and other organizations calculated to bring its contents to the attention of the general public; (b) unless the circumstances of the state of emergency prevent or impede, to be promptly filed with the Secretary of Public Safety, the Secretary of State, and the clerks of superior court in the counties to which it applies; and (c) to be distributed to others as necessary to assure proper implementation of this declaration.

**Section 7.**

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

**Section 8.**

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

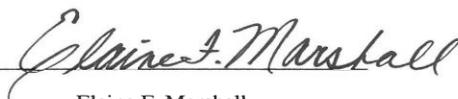
**Section 9.**

This declaration is effective immediately and shall remain in effect until rescinded.

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

  
Pat McCrory  
Governor

ATTEST:

  
Elaine F. Marshall  
Secretary of State





# State of North Carolina

**PAT McCRORY**  
GOVERNOR

October 1, 2015

**EXECUTIVE ORDER NO. 81**

**TEMPORARY SUSPENSION OF MOTOR VEHICLE REGULATIONS TO ENSURE RESTORATION OF UTILITY SERVICES, TRANSPORTATION OF ESSENTIALS AND AGRICULTURAL COMMODITIES**

**WHEREAS**, due to the approach of Hurricane Joaquin, vehicles bearing equipment and supplies for utility restoration and debris removal, carrying essentials such as food and medicine, farm equipment for movement of crops, transporting livestock and poultry and feed for livestock and poultry need to be moved on the highways of North Carolina; and

**WHEREAS**, I have declared that a state of emergency as defined in N.C.G.S. §§ 166A-19.3(6) and 166A-19.3(19) exists in North Carolina due to the likely impact of Hurricane Joaquin; and

**WHEREAS**, the prompt restoration of utility services and uninterrupted supply of electricity, gasoline and other essentials in commerce to citizens of North Carolina is essential to their safety and well-being; and

**WHEREAS**, under the provisions of N.C.G.S. § 166A-19.30(b)(3) the Governor, with the concurrence of the Council of State, may regulate and control the flow of vehicular traffic and the operation of transportation services; and

**WHEREAS**, with the concurrence of the Council of State, I have found that vehicles bearing equipment and supplies for utility restoration, carrying essentials and for debris removal must adhere to the registration requirements of N.C.G.S. § 20-86.1 and 20-382, fuel tax requirements of N.C.G.S. § 105-449.47, and the size and weight requirements of N.C.G.S. §§ 20-116, 20-118, and 20-119. I have further found that citizens in this state may suffer imminent widespread damage within the meaning of N.C.G.S. § 166A-19.3(3) and N.C.G.S. § 166A-19.21(b); and

**WHEREAS**, pursuant to N.C.G.S. § 166A-19.70(g) on the recommendation of the Commissioner of Agriculture, upon a finding that there is an imminent threat of severe economic loss of livestock or poultry, the Governor shall direct the Department of Public Safety to temporarily suspend weighing those vehicles used to transport livestock and poultry and feed for livestock and poultry; and

**WHEREAS**, 49 CFR § 390.23 allows the Governor of a state to suspend the rules and regulations under 49 CFR Parts 390-399 for up to 30 days if the Governor determines that an emergency condition exists; and

**WHEREAS**, under N.C.G.S. § 166A-19.70, the Governor may declare that the health, safety, or economic well-being of persons or property requires that the maximum hours of service for

drivers prescribed by N.C.G.S. § 20-381 should be waived for persons transporting essential fuels, food, water, medical supplies, debris removal, feed for livestock and poultry, transporting livestock and poultry and for vehicles used in the restoration of utility services.

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

**Section 1.**

The Department of Public Safety in conjunction with the North Carolina Department of Transportation shall waive the maximum hours of service for drivers prescribed by the Department of Public Safety pursuant to N.C.G.S. § 20-381.

**Section 2.**

The Department of Public Safety in conjunction with the Department of Transportation shall waive certain size and weight restrictions and penalties arising under N.C.G.S. §§ 20-116, 20-118, and 20-119. This order also waives certain registration requirements and penalties arising under N.C.G.S. §§ 20-86.1, 20-382, 105-449.47, and 105-449.49 for vehicles transporting equipment and supplies for the restoration of utility services, carrying essentials, and for equipment for any debris removal. The Department of Public Safety shall suspend weighing pursuant to N.C.G.S. § 20-118.1 vehicles used to transport livestock and poultry and carrying livestock and poultry feed in the emergency area.

**Section 3.**

Notwithstanding the waivers set forth above, size and weight restrictions and penalties have not been waived under the following conditions:

- a. When the vehicle weight exceeds the maximum gross weight criteria established by the manufacturer (GVWR) or 90,000 pounds gross weight, whichever is less.
- b. When the tandem axle weight exceeds 42,000 pounds and the single axle weight exceeds 22,000 pounds.
- c. When a vehicle and vehicle combination exceeds 12 feet in width and a total overall vehicle combination length of 75 feet from bumper to bumper.
- d. Vehicles and vehicle combinations subject to exemptions or permits by authority of this Executive Order shall not be exempt from the requirement of having a yellow banner on the front and rear measuring a total length of 7 feet by 18 inches bearing the legend "Oversized Load" in 10 inch black letters 1.5 inches wide and red flags measuring 18 inches square to be displayed on all sides at the widest point of the load. In addition, when operating between sunset and sunrise, a certified escort shall be required for loads exceeding 8 feet 6 inches in width.

**Section 4.**

Vehicles referenced under Sections 2 and 3 shall be exempt from the following registration requirements:

- a. The \$50.00 fee listed in N.C.G.S. § 105-449.49 for a temporary trip permit is waived for the vehicles described above. No quarterly fuel tax is required because the exception in N.C.G.S. § 105-449.45(a)(1) applies.
- b. The registration requirements under N.C.G.S. § 20-382.1 concerning intrastate and interstate for-hire authority is waived; however, vehicles shall maintain the required limits of insurance as required.
- c. Non-participants in North Carolina's International Registration Plan will be permitted into North Carolina in accordance with the exemptions identified by this Executive Order.

**Section 5.**

The size and weight exemption for vehicles will be allowed on all routes designated by the North Carolina Department of Transportation, except those routes designated as light traffic roads under N.C.G.S. § 20-118. This order shall not be in effect on bridges posted pursuant to N.C.G.S. § 136-72.

**Section 6.**

The waiver of regulations under Title 49 of the Code of Federal Regulations (Federal Motor Carrier Safety Regulations) does not apply to the CDL and Insurance Requirements. This waiver shall be in effect for 30 days or the duration of the emergency, whichever is less.

**Section 7.**

The North Carolina State Highway Patrol shall enforce the conditions set forth in Sections 1 through 6 of this Executive Order in a manner which will implement these provisions without endangering motorists in North Carolina.

**Section 8.**

Upon request by law enforcement officers, exempted vehicles must produce documentation sufficient to establish their loads are being used for bearing equipment and supplies for utility restoration, debris removal, carrying essentials in commerce, carrying feed for livestock and poultry, or transporting livestock and poultry in the State of North Carolina.

**Section 9.**

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

**Section 10.**

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

**Section 11.**

This Executive Order is effective immediately and shall remain in effect for thirty (30) days or the duration of the emergency, whichever is less.

**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 first day of October 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-nine.

  
Pat McCrory  
Governor

**ATTEST:**

  
Elaine F. Marshall  
Secretary of State





# State of North Carolina

**PAT McCRORY**  
GOVERNOR

October 9, 2015

## EXECUTIVE ORDER 82

### NOTICE OF TERMINATION OF EXECUTIVE ORDER 80 AND AMENDMENT OF EXECUTIVE ORDER 81

**WHEREAS**, Executive Order No. 80, issued on October 1, 2015, declared a state of emergency in North Carolina due to the approach and potential impacts of Hurricane Joaquin; and

**WHEREAS**, Executive Order No. 81, issued on October 1, 2015, waived the maximum hours of service for drivers transporting supplies and equipment for utility restoration and essentials in commerce, and with the concurrence of the Council of State temporarily suspended size and weight restrictions on vehicles used for utility restoration and carrying essentials on the interstate and intrastate highways due to anticipated damage and impacts from Hurricane Joaquin. In addition, the order also directed the Department of Public Safety to suspend weighing equipment used for movement of crops, transporting livestock and poultry and feed for livestock and poultry.

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

#### **Section 1.**

Pursuant to N.C.G.S. § 166A-19.20(c) the state of emergency that was declared by Executive Order No. 80 is hereby terminated immediately.

#### **Section 2.**

Executive Order No. 81 will remain in effect until November 1, 2015. The order is amended to repeal the following clause:

**WHEREAS**, I have declared that a state of emergency as defined in N.C.G.S. §§ 166A-19.3(6) and 166A-19.3(19) exists in North Carolina due to the likely impact of Hurricane Joaquin; and

Replacing it with the following clause:

**WHEREAS**; although I have terminated Executive Order No. 80, issued on October 1, 2015, there continues to be a state of emergency as defined in N.C.G.S. §§ 166A-19.3(6) and 166A-19.3(19) for the purposes of responding to the flooding present in the region due to the historic levels of rainfall. The emergency area as defined in N.C.G.S. §§ 166A-19.3(7) and N.C.G.S. 166A-19.20(b) is the state of South Carolina and the eastern and southeastern regions of North Carolina; and

**Section 3.**

Section 10 of Executive Order No. 81 is rewritten to read as follows:

This order will not trigger the prohibitions against excessive pricing in the emergency area in North Carolina, notwithstanding the provisions of N.C.G.S. § 166A-19.23.

**Section 4.**

The remaining provisions in Executive Order No. 81 remain in effect until the order terminates on November 1, 2015.

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 ninth day of October 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-nine.

  
Pat McCrory  
Governor



ATTEST:

  
Elaine F. Marshall  
Chris Deputy Secretary of State



**NORTH CAROLINA**  
State Board of Elections

*Mailing Address:*  
P.O. Box 27255  
Raleigh, NC 27611-7255

Phone: (919) 733-7173  
Fax: (919) 715-0135

**KIM WESTBROOK STRACH**  
*Executive Director*

October 2, 2015

Mr. Roger Knight  
8510 Six Forks Road, Suite 102  
Raleigh, NC 27615

Re: Request for Advisory Opinion

Dear Mr. Knight:

The following opinion is provided in accordance with N.C.G.S. § 163-278.23. In your request for opinion, you seek guidance as to the obligation of your clients that are registered with the Internal Revenue Service (IRS) under 26 U.S. Code Section 527 to register as North Carolina political committees and file required disclosure reports in accordance with North Carolina law. For purposes of this opinion, I will refer to your clients as "Section 527 political organizations."

As you point out in your request, in order to be eligible to register as a Section 527 political organization with the IRS, the organization must be organized for the primary purpose of carrying out "exempt functions." And, as you point out, an "exempt function" is described as "influencing or attempting to influence the selection, nomination, election or appointment of an individual to a federal, state or local public office or office in a political organization. The election of Presidential or Vice-Presidential electors is also part of the exempt function of a political organization. Activities that directly or indirectly relate to or support an exempt function are exempt function activities."

N.C.G.S. § 163-278.6(14) provides that a "political committee" means a combination of two or more individuals, such as any person, committee, association, organization, or other entity that makes, or accepts anything of value to make, contributions or expenditures and has one or more of the following characteristics:

- a) Is controlled by a candidate;
- b) Is a political party or executive committee of a political party or is controlled by a political party or executive committee of a political party;
- c) Is created by a corporation, business entity, insurance company, labor union, or professional association pursuant to G.S. 163-278.19(b); or
- d) Has the major purpose to support or oppose the nomination or election of one or more clearly identified candidates.

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441 N. Harrington Street • Raleigh, NC 27611-7255

Supporting or opposing the election of clearly identified candidates includes supporting or opposing the candidates of a clearly identified political party.

If an entity qualifies as a “political committee” under subdivision a., b., c., or d. of this subdivision, it continues to be a political committee if it receives contributions or makes expenditures or maintains assets or liabilities. A political committee ceases to exist when it winds up its operations, disposes of its assets and files a final report.

The term “political committee” includes the campaign of a candidate that serves as his or her own treasurer.

Special definitions of “political action committee” and “candidate campaign committee” that only apply in Part 1A of this Article are set forth in G.S. 163-278.38Z.

It should be noted that the special definitions of “political action committee” and “candidate campaign committee” found in N.C.G.S. § 163-278.38Z only apply to disclosure requirements for media advertisements. N.C.G.S. § 163-278.6(14) provides the relevant definition for determining North Carolina political committee status.

You pose three specific questions regarding Section 527 political organizations and the obligations of such organizations in North Carolina:

- 1. Does the IRS definition of “exempt function” automatically and conclusively establish that a 527 organization existing in this State meets the “major purpose test” under NCGS Section 163-278.6(14)?**

Not necessarily.

26 U.S. Code § 527 defines political organization as “a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.” It further defines “exempt function” as “the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed. Such term includes the making of expenditures relating to an office described in the preceding sentence which, if incurred by the individual, would be allowable as a deduction under section 162(a).”

A Section 527 political organization or any other entity that is determining whether they must register as a North Carolina political committee must consider the two prongs of the political committee definition. First, does the entity make or accept anything of value to make

contributions or expenditures? And second, does the entity have the major purpose to support or oppose the nomination or election of one or more clearly identified candidates or candidates of a clearly identified political party?

As provided in the U.S. Code, in order to qualify for Section 527 political organization status, the organization must have the primary purpose to influence the selection, nomination, election or appointment of candidates. The term “influence” is not a defined term. Guidance provided by the IRS for educational purposes<sup>1</sup> indicates that a Section 527 political organization can only engage in limited public advocacy not related to legislation or election of candidates.

The educational guidance defines three types of advocacy: political campaign activity, lobbying, and general advocacy.

Political activity-Any activities that favor or oppose candidates for public office, including: endorsements of candidates, contributions to candidates and/or PACs, public statements for/against a particular candidate and distributing materials prepared by self or others that favor or oppose candidates.

Lobbying-Attempting to influence legislation through directly contacting members of a legislative body, encouraging the public to contact members of a legislative body and advocating a position on a public referendum.

General Advocacy-Influence public opinion on issues, influence non-legislative governing bodies (the executive branch, regulators), encourage voter participation through voter registration, get out the vote drives, voter guides and candidate debates.

Section 527 organization advocacy	
Political activity	<b>Permitted as exempt activity</b>
Lobbying	<b>Limited amount permitted provided not substantial</b>
General Advocacy	<b>Limited amount permitted provided not substantial</b>

Based on the information in the table and the IRS definition of political organization, it appears that Section 527 political organizations must primarily engage in those activities defined as political activities (exempt function). The guidance defines “political activity” as any activities that favor or oppose candidates for public office. The word “support” is not used and it is unclear if “favor” would equate to our definition of support but the examples of

<sup>1</sup> The educational guidance was a PowerPoint presentation entitled “Rules for Exempt Organizations During an Election Year” by Judith Kindell, Senior Advisor to the Director, Exempt Organizations and Justin Lowe, Tax Law Specialist, Exempt Organizations.

these activities do appear to be activities that would be considered express advocacy according to North Carolina laws.

In your request for opinion, you refer to activities related to voter turnout, voter education and issue advocacy. It would appear that these types of activities would likely fall into the lobbying or general advocacy definitions and would not be considered political activity (exempt functions).

Therefore, if the registered Section 527 political organization is not primarily engaged in exempt functions, or if the activities of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to public office do not include expressly advocating for the election or defeat of a candidate, then the Section 527 political organization may not meet the definition of a North Carolina political committee.

**2. Does the State still have to make a showing as to what the major purpose is?**

In the North Carolina Right to Life v. Leake, 525 F.3d 274 (2008) decision, the United States Court of Appeals Fourth Circuit stated the following:

*“Basically, if an organization explicitly states, in its bylaws or elsewhere, that influencing elections is its primary objective, or if the organization spends the majority of its money on supporting or opposing candidates, that organization is under “fair warning” that it may fall within the ambit of Buckley’s test.”*

In consequence, a Section 527 political organization should recognize that based on their requirement to have the primary objective of influencing the selection of candidates for election in order to qualify for tax-exempt status under Section 527, the organization has “fair warning” that their activities could deem the organization a North Carolina political committee.

Ultimately, if the State believes an organization has not appropriately registered as a North Carolina political committee and the organization disagrees with that assertion, it is the State that has the burden to show that the organization meets the definition of a North Carolina political committee.

**3. Does sponsoring one ad conclusively establish the organization as a “political committee” under NCGS § 163-278.6(14)(d)?**

Not necessarily.

In order to be required to register as a North Carolina political committee, an organization must satisfy the elements of both prongs of the political committee definition. For example,

Roger Knight Advisory Opinion-North Carolina Political Committee status  
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if an organization does not have the major purpose to support or oppose candidates but makes a payment for one ad that expressly advocates for a candidate, the organization does not satisfy both prongs of the political committee definition and is therefore not required to register as a North Carolina political committee. It is also possible for an organization to have the major purpose to support clearly identified candidates for election but if their activities do not include making contributions to the candidates or spending the organization's funds on express advocacy, then the organization would also not satisfy both prongs of the North Carolina political committee definition and not be required to register and disclose as a North Carolina political committee. To further explain this scenario, if an organization stated on its website that it wanted to see candidates of a particular political party elected to office, but the organization did not make contributions to candidates or spend any money expressly advocating for those candidates, the organization would not be required to register as a North Carolina political committee.

On the other hand, if the organization did have the major purpose to support candidates and the organization sponsored an ad that expressly advocated for a candidate, then both prongs of the political committee definition would have been met and that organization would need to register and disclose as a North Carolina political committee.

This opinion is based upon the information provided in your request for opinion. If any information in that letter should change, you should consult with our office to ensure that this opinion would still be binding. Finally, this opinion will be filed with the Codifier of Rules to be published unedited in the North Carolina Register and the North Carolina Administrative Code.

Sincerely,



Kim Westbrook Strach

cc: Mollie Masich, Codifier of Rules  
Amy Strange, Deputy Director-Campaign Finance and Operations

**NORTH CAROLINA CHILD CARE COMMISSION**

**PUBLIC HEARING RESCHEDULED**

Due to the rescheduling of the NC Child Care Commission meeting, the public hearing for 10A NCAC 09 .1718 has been rescheduled for November 17, 2015. The public hearing will be held at the Dix Grill, Employee Center, 1101 Cafeteria Drive, Raleigh, NC 27603 and will begin at 1:00 p.m. The Notice of Text for this rule was previously published in the September 15, 2015 NC Register and can be found on pages 604-607. The comment period will end on November 30, 2015.

**Notice of Application for Modification of an Innovative Approval of a Wastewater System product for On-site Subsurface Use**

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

Application by: Chris Petersen  
Plastic Tubing Industries of Georgia, Inc. (PTI)  
303 Industrial Dr  
Warrenton GA 30828

For: Modification of Innovative Approval of PTI Multi-Pipe System (11-Pipe Model)

DHHS Contact: Nancy Deal  
1-919-707-5875  
Fax: 919-845-3973  
Nancy.Deal@dhhs.nc.gov

These applications may be reviewed by contacting Nancy Deal, Branch Head at 5605 Six Forks Rd., Raleigh, NC, On-Site Water Protection Branch, Environmental Health Section, Division of Public Health. Draft proposed innovative approvals and proposed final action on the application by DHHS can be viewed on the On-Site Water Protection Branch web site:  
<http://ehs.ncpublichealth.com/oswp/approvedproducts.htm>.

Written public comments may be submitted to DHHS within 30 days of the date of the Notice publication in the North Carolina Register. All written comments should be submitted to Nancy Deal, Branch Head, On-site Water Protection Branch, 1642 Mail Service Center, Raleigh, NC 27699-1642, or Nancy.Deal@dhhs.nc.gov, or fax 919-845-3973. Written comments received by DHHS in accordance with this Notice will be taken into consideration before a final agency decision is made on the innovative subsurface wastewater system application.

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

**TITLE 04 – DEPARTMENT OF COMMERCE**

*Notice is hereby given in accordance with G.S. 150B-21.2 that the Department of Commerce, Credit Union Division intends to adopt the rule cited as 04 NCAC 06C .0410 and amend the rules cited as 04 NCAC 06C .0311, .1001, .1002, .1204.*

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

**Proposed Effective Date:** March 1, 2016

**Instructions on How to Demand a Public Hearing:** (must be requested in writing within 15 days of notice): A public hearing may be demanded by written request to Tony Knox, Deputy Administrator of the North Carolina Department of Commerce/Credit Union Division within 15 days of the publication of the Notice of Text. The email address for Tony is tknox@nccud.org and the mailing address is NC Credit Union Division, 205 W Millbrook Rd., Suite 105, Raleigh, NC 27609. The fax number is 919-420-7919.

**Reason for Proposed Action:**

**04 NCAC 06C .0410 Prohibited Fees (New Rule) Moves the prohibited fees section from .0407 to provide clarity with regard to applicability.**

**04 NCAC 06C .1001 Permanent Records – To update the rule to create consistency with reasonable business practices.**

**04 NCAC 06C .1002 Non-permanent records – Updates rule to create consistency with reasonable business practices.**

**04 NCAC 06C .1204 Federal Funds – Updates rule to include any federally insured financial institution.**

**04 NCAC 06C .0311 Surety Bond and Insurance Coverage – Proposing an amendment to increase deductible limits.**

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

**Comment period ends:** January 2, 2016

**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 06 - CREDIT UNION DIVISION**

**SUBCHAPTER 06C - CREDIT UNIONS**

**SECTION .0300 - RULE-MAKING HEARINGS**

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

(a) It shall be the duty of the Board of Directors to purchase a blanket fidelity bond including such other bond coverage as required by the statutes or as may be required by the Administrator as set forth in G.S. 54-109.44(2).

(b) Every State-chartered credit union shall maintain the minimum bond and insurance coverage as required by ~~statute~~ G.S. 54-109.11(5). No form of surety bond shall be used except as is approved by the ~~Administrator~~ Administrator as set forth in G.S. 54-109.11(5). The approved bond forms are Credit Union Blanket Bond 500 Bond Series, plus faithful performance rider, Credit Union Blanket Bond, Standard Form No. 23 of the Surety Association of America, or an equivalent approved Bond Form including a faithful performance rider on a current listing on the Credit Union Division website, (www.nccud.org). ~~NCUA Optional Form 581 or its equivalent.~~ These bond forms shall be considered the minimum coverages required for the purpose of this section. The approved bond forms in this Paragraph provide faithful performance coverage for all employees and officials. Fidelity bonds ~~must~~ shall provide coverage for the fraud and dishonesty of all employees, directors, officials, and supervisory and credit committee members. Other forms, or changes in the amount of bond coverage, ~~must~~ shall be approved by the Administrator.

(c) Maximum deductible limits may be applied to the required coverage contained in 500 Bond Series, and Standard Form No. 23, as specified in this Paragraph:

Assets	Maximum Deductible
0 to \$100,000	\$0
\$100,001 to \$250,000	\$500
\$250,001 to \$500,000	\$50
\$500,001 to \$750,000	\$1,000
\$750,001 to \$1,000,000	\$1,500
\$1,000,001 to \$2,000,000	\$2,000
\$2,000,001 to \$3,000,000	\$3,000
\$3,000,001 to \$5,000,000	\$4,000
\$5,000,001 to \$50,000,000	\$5,000
\$50,000,001 to \$100,000,000	\$7,500
Over \$100,000,001	\$10,000
\$0 to \$100,000	\$0
\$100,001 to \$250,000	\$1,000
\$250,000 to \$1,000,000	\$2,000
Over \$1,000,000	\$2,000
<u>plus 1/1000 of total assets up to a maximum of \$200,000</u>	

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

(d) In considering a request to deviate from the bond coverage and deductible amounts set forth in this Rule, the Administrator shall consider the following factors about the credit union's:

- (1) financial strength;
- (2) net worth;
- (3) return on assets;
- (4) quality of assets; and
- (5) Capital, Assets, Management, Earnings, and Liquidity (CAMEL) rating, used by the Division and NCUA to evaluate the soundness of credit unions on a uniform basis.

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

**SECTION .0400 - LOANS**

**04 NCAC 06C .0410 PROHIBITED FEES**

(a) A North Carolina credit union shall not make any loan or extend any line of credit if, either directly or indirectly, any commission, fee, or other compensation is to be received by the Credit Union's directors, committee members, senior management employees, loan officers, or any immediate family members of such individuals, in connection with underwriting, insuring, servicing, or collecting the loan or line of credit. However, salary (except commissions) for employees is not a commission, fee, or other compensation for the purposes of this Rule. For the purposes of this Rule, "senior management employees" means the following:

- (1) Credit Union's chief executive officer, typically this individual holds the title of President,
- (2) Treasurer/Manager,
- (3) Vice President,
- (4) Assistant Vice President or Assistant Treasurer/Manager,
- (5) Chief Financial Officer, Comptroller, and,

(6) "Immediate family member" means a spouse or other family member living in the same household.

(b) Incentives.

- (1) For the purposes of this section of the Rule: Compensation includes non-monetary items, except those of nominal value.
- (2) This section of the Rule does not prohibit:
  - (A) Payment of an incentive or bonus to an employee based on the credit union's overall financial performance;
  - (B) Payment of an incentive or bonus to an employee other than a senior management employee in connection with a loan or loans made by the credit union, provided that the board of directors of the credit union establishes written policies and internal controls in connection with such incentive or bonus and monitors compliance with such policies and controls at least annually.

*Authority G. S. 54-109.12; 54-109.21(25); 54-109.22.*

**SECTION .1000 - RETENTION OF RECORDS**

**04 NCAC 06C .1001 PERMANENT RECORDS**

(a) Each credit union shall retain its records in a manner consistent with reasonable business practices and in accordance with this Section and applicable state and federal laws, rules, and regulations. The credit union shall permanently maintain the original records of the charter, bylaws, and any amendments to those documents.

(b) The following original records shall be retained permanently: permanently in their original form or in any electronic or digital form which permits their retrieval and replication:

- (1) minutes of meetings of members and of the board of directors;
- (2) audit reports;
- (3) copies of the examination reports of the Credit Union Division;
- (4) ~~charter, bylaws, and amendments;~~
- (4)(5) rulings and opinions from the Credit Union ~~Division~~ Division;
- (5) signature cards;
- (6) journal and cash record;
- (7) general ledger;
- (8) loan and shares subsidiary ledgers;
- (9) bank reconciliations; and
- (10) a list of all records destroyed.

*Authority G.S. 54-109.12; 54-109.17.*

**04 NCAC 06C .1002 NONPERMANENT RECORDS**

Each Credit Union shall retain its records in a manner consistent with reasonable business practices and in accordance with this Section and applicable state and federal laws, rules, and regulations. ~~The following credit union records~~ Nonpermanent

PROPOSED RULES

records will shall be kept in either the original, or on microfilm or microfiche, or any electronic or digital form, which permits their retrieval and replication. For the period indicated:

Table with 2 columns: Record Name and Retention Period. Includes categories like Ledgers: General, Journal, Subsidiary Ledgers, Registers, Record of Receipts, Payroll Deduction Records, Withdrawal Slips, Canceled Checks, Money Orders, Vouchers, Check Stubs, Bank Statements, Bank Deposit Slips, Expense Vouchers, Invoices for Sale or Purchase of Securities, Reports: Statistical Reports to Credit Union Division, Minutes of the Credit Committee Meetings, Loan Applications, Charged Off Loans, Note and Application, Ledger Sheet, Bond Claims, Tax Records, Court Orders (after case closed), Personnel Records, Registered Mail Records, Delinquent Loan Schedules, EDP Records, Members' Quarterly Statements, Transaction Records, Month End EDP Trial Balance.

Authority G.S. 54-109.12; 54-109.17.

SECTION .1200 – INVESTMENTS

04 NCAC 06C .1204 FEDERAL FUNDS

A credit union may invest in federal funds through a bank located in North Carolina and any bank insured by F.D.I.C. any federally-insured financial institution.

Authority G.S. 54-109.21(8); 54-109.21(25).

TITLE 15A – DEPARTMENT OF ENVIRONMENTAL QUALITY

Notice is hereby given in accordance with G.S. 150B-21.2 that the Coastal Resources Commission intends to adopt the rules cited as 15A NCAC 07J .1301-.1303 and amend the rules cited as 15A NCAC 07H .0305, .0306; and 07J .1201.

Link to agency website pursuant to G.S. 150B-19.1(c): http://www.nccoastalmanagement.net/web/cm/proposed-rules

Proposed Effective Date: April 1, 2016

Public Hearing:

Date: November 18, 2015

Time: 1:30 p.m.

Location: DoubleTree by Hilton, 2717 W. Fort Macon Rd., Atlantic Beach, NC 28512

Reason for Proposed Action: The Coastal Resources Commission proposes the Development Line Procedures and amendments to current rules collectively allowing local government to have less restrictive management options following a large-scale beach fill project. 15A NCAC 07J .1300 (.1301, .1302, and .1303) creates procedures for requesting, approving, and managing an oceanfront Development Line, and establishes an alternative to the Static Vegetation Line Exception (15A NCAC 07J .1200) for oceanfront communities receiving a large-scale beach fill project. Amendments to the General Use Standards for Ocean Hazard Areas (15A NCAC 07H .0306) and Static Vegetation Line Exception Procedures (15A NCAC 07J .1200) are proposed for the purpose of easing requirements by eliminating the mandatory 5-year waiting period and the 2,500 maximum square footage limit on structures.

Comments may be submitted to: Braxton Davis, 400 Commerce Avenue, Morehead City, NC 28577, phone (252) 808-2808

Comment period ends: January 2, 2016

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 07 – COASTAL MANAGEMENT

SUBCHAPTER 07H - STATE GUIDELINES FOR AREAS OF ENVIRONMENTAL CONCERN

SECTION .0300 – OCEAN HAZARD AREAS

15A NCAC 07H .0305 GENERAL IDENTIFICATION AND DESCRIPTION OF LANDFORMS

(a) This section describes natural and man-made features that are found within the ocean hazard area of environmental concern.

- (1) Ocean Beaches. Ocean beaches are lands consisting of unconsolidated soil materials that extend from the mean low water line landward to a point where either:
  - (A) the growth of vegetation occurs, or
  - (B) a distinct change in slope or elevation alters the configuration of the landform, whichever is farther landward.
- (2) Nearshore. The nearshore is the portion of the beach seaward of mean low water that is characterized by dynamic changes both in space and time as a result of storms.
- (3) Primary Dunes. Primary dunes are the first mounds of sand located landward of the ocean beaches having an elevation equal to the mean flood level (in a storm having a one percent chance of being equaled or exceeded in any given year) for the area plus six feet. The primary dune extends landward to the lowest elevation in the depression behind that same mound of sand (commonly referred to as the dune trough).
- (4) Frontal Dunes. The frontal dune is deemed to be the first mound of sand located landward of the ocean beach having sufficient vegetation, height, continuity and configuration to offer protective value.
- (5) Vegetation Line. The vegetation line refers to the first line of stable and natural vegetation, which shall be used as the reference point for measuring oceanfront setbacks. This line represents the boundary between the normal dry-sand beach, which is subject to constant flux due to waves, tides, storms and wind, and the more stable upland areas. The vegetation line is generally located at or immediately oceanward of the seaward toe of the frontal dune or erosion escarpment. The Division of Coastal Management or Local Permit Officer shall determine the location of the stable and natural vegetation line based on visual observations of plant composition and density. If the vegetation has been planted, it may be considered stable when the majority of the plant stems are from continuous rhizomes rather than planted individual rooted sets. The vegetation may be considered natural when the majority of

the plants are mature and additional species native to the region have been recruited, providing stem and rhizome densities that are similar to adjacent areas that are naturally occurring. In areas where there is no stable natural vegetation present, this line may be established by interpolation between the nearest adjacent stable natural vegetation by on ground observations or by aerial photographic interpretation.

- (6) Static Vegetation Line. In areas within the boundaries of a large-scale beach fill project, the vegetation line that existed within one year prior to the onset of initial project construction shall be defined as the static vegetation line. A static vegetation line shall be established in coordination with the Division of Coastal Management using on-ground observation and survey or aerial imagery for all areas of oceanfront that undergo a large-scale beach fill project. Once a static vegetation line is established, and after the onset of project construction, this line shall be used as the reference point for measuring oceanfront setbacks in all locations where it is landward of the vegetation line. In all locations where the vegetation line as defined in this Rule is landward of the static vegetation line, the vegetation line shall be used as the reference point for measuring oceanfront setbacks. A static vegetation line shall not be established where a static vegetation line is already in place, including those established by the Division of Coastal Management prior to the effective date of this Rule. A record of all static vegetation lines, including those established by the Division of Coastal Management prior to the effective date of this Rule, shall be maintained by the Division of Coastal Management for determining development standards as set forth in Rule .0306 of this Section. Because the impact of Hurricane Floyd (September 1999) caused significant portions of the vegetation line in the Town of Oak Island and the Town of Ocean Isle Beach to be relocated landward of its pre-storm position, the static line for areas landward of the beach fill construction in the Town of Oak Island and the Town of Ocean Isle Beach, the onset of which occurred in 2000, shall be defined by the general trend of the vegetation line established by the Division of Coastal Management from June 1998 aerial orthophotography.
- (7) Beach Fill. Beach fill refers to the placement of sediment along the oceanfront shoreline. Sediment used solely to establish or strengthen dunes shall not be considered a beach fill project under this Rule. A large-scale beach fill

project shall be defined as any volume of sediment greater than 300,000 cubic yards or any storm protection project constructed by the U.S. Army Corps of Engineers. The onset of construction shall be defined as the date sediment placement begins with the exception of projects completed prior to the effective date of this Rule, in which case the award of contract date will be considered the onset of construction.

- (8) Erosion Escarpment. The normal vertical drop in the beach profile caused from high tide or storm tide erosion.
- (9) Measurement Line. The line from which the ocean hazard setback as described in Rule .0306(a) of this Section is measured in the unvegetated beach area of environmental concern as described in Rule .0304(4) of this Section. Procedures for determining the measurement line in areas designated pursuant to Rule .0304(4)(a) of this Section shall be adopted by the Commission for each area where such a line is designated pursuant to the provisions of G.S. 150B. These procedures shall be available from any local permit officer or the Division of Coastal Management. In areas designated pursuant to Rule .0304(4)(b) of this Section, the Division of Coastal Management shall establish a measurement line that approximates the location at which the vegetation line is expected to reestablish by:
  - (A) determining the distance the vegetation line receded at the closest vegetated site to the proposed development site; and
  - (B) locating the line of stable natural vegetation on the most current pre-storm aerial photography of the proposed development site and moving this line landward the distance determined in Subparagraph (g)(1) of this Rule.

The measurement line established pursuant to this process shall in every case be located landward of the average width of the beach as determined from the most current pre-storm aerial photography.

- (10) Development Line. The line established in accordance with 15A NCAC 07J .1300 by local governments representing the seaward-most allowable location of oceanfront development. In areas that have approved development lines, the vegetation line or measurement line shall be used as the reference point for measuring oceanfront setbacks instead of the static vegetation line, subject to the provisions of Rule .0306(a)(2) of this Section.

(b) For the purpose of public and administrative notice and convenience, each designated minor development permit-letting

agency with ocean hazard areas may designate, subject to CRC approval in accordance with the local implementation and enforcement plan as defined 15A NCAC 07I .0500, a readily identifiable land area within which the ocean hazard areas occur. This designated notice area must include all of the land areas defined in Rule .0304 of this Section. Natural or man-made landmarks may be considered in delineating this area.

*Authority G.S. 113A-107; 113A-113(b)(6); 113A-124.*

**15A NCAC 07H .0306 GENERAL USE STANDARDS FOR OCEAN HAZARD AREAS**

(a) In order to protect life and property, all development not otherwise specifically exempted or allowed by law or elsewhere in the Coastal Resources Commission's Rules shall be located according to whichever of the following is applicable:

- (1) The ocean hazard setback for development is measured in a landward direction from the vegetation line, the static vegetation line or the measurement line, whichever is applicable. ~~The setback distance is determined by both the size of development and the shoreline erosion rate as defined in 15A NCAC 07H .0304. Development size is defined by total floor area for structures and buildings or total area of footprint for development other than structures and buildings. Total floor area includes the following:~~
  - ~~(A) The total square footage of heated or air conditioned living space;~~
  - ~~(B) The total square footage of parking elevated above ground level; and~~
  - ~~(C) The total square footage of non heated or non air conditioned areas elevated above ground level, excluding attic space that is not designed to be load-bearing.~~

~~Decks, roof covered porches and walkways are not included in the total floor area unless they are enclosed with material other than screen mesh or are being converted into an enclosed space with material other than screen mesh.~~

- (2) In areas with a development line, the ocean hazard setback line shall be set at a distance in accordance with Subparagraphs (a)(3) through (9) of this Rule. In no case shall new development be sited seaward of the development line.
- (3) In no case shall a development line be created or established below the mean high water line.
- (4) The setback distance is determined by both the size of development and the shoreline erosion rate as defined in Rule .0304 of this Section. Development size is defined by total floor area for structures and buildings or total area of footprint for development other than structures and buildings. Total floor area includes the following:

- (A) The total square footage of heated or air-conditioned living space;
- (B) The total square footage of parking elevated above ground level; and
- (C) The total square footage of non-heated or non-air-conditioned areas elevated above ground level, excluding attic space that is not designed to be load-bearing.

Decks, roof-covered porches and walkways are not included in the total floor area unless they are enclosed with material other than screen mesh or are being converted into an enclosed space with material other than screen mesh.

~~(2)~~(5) With the exception of those types of development defined in 15A NCAC 07H .0309, no development, including any portion of a building or structure, shall extend oceanward of the ocean hazard setback distance. This includes roof overhangs and elevated structural components that are cantilevered, knee braced, or otherwise extended beyond the support of pilings or footings. The ocean hazard setback is established based on the following criteria:

- (A) A building or other structure less than 5,000 square feet requires a minimum setback of 60 feet or 30 times the shoreline erosion rate, whichever is greater;
- (B) A building or other structure greater than or equal to 5,000 square feet but less than 10,000 square feet requires a minimum setback of 120 feet or 60 times the shoreline erosion rate, whichever is greater;
- (C) A building or other structure greater than or equal to 10,000 square feet but less than 20,000 square feet requires a minimum setback of 130 feet or 65 times the shoreline erosion rate, whichever is greater;
- (D) A building or other structure greater than or equal to 20,000 square feet but less than 40,000 square feet requires a minimum setback of 140 feet or 70 times the shoreline erosion rate, whichever is greater;
- (E) A building or other structure greater than or equal to 40,000 square feet but less than 60,000 square feet requires a minimum setback of 150 feet or 75 times the shoreline erosion rate, whichever is greater;
- (F) A building or other structure greater than or equal to 60,000 square feet but less than 80,000 square feet requires a minimum setback of 160 feet or 80 times the shoreline erosion rate, whichever is greater;

- (G) A building or other structure greater than or equal to 80,000 square feet but less than 100,000 square feet requires a minimum setback of 170 feet or 85 times the shoreline erosion rate, whichever is greater;
- (H) A building or other structure greater than or equal to 100,000 square feet requires a minimum setback of 180 feet or 90 times the shoreline erosion rate, whichever is greater;
- (I) Infrastructure that is linear in nature such as roads, bridges, pedestrian access such as boardwalks and sidewalks, and utilities providing for the transmission of electricity, water, telephone, cable television, data, storm water and sewer requires a minimum setback of 60 feet or 30 times the shoreline erosion rate, whichever is greater;
- (J) Parking lots greater than or equal to 5,000 square feet requires a setback of 120 feet or 60 times the shoreline erosion rate, whichever is greater;
- (K) Notwithstanding any other setback requirement of this Subparagraph, a building or other structure greater than or equal to 5,000 square feet in a community with a static line exception in accordance with 15A NCAC 07J .1200 requires a minimum setback of 120 feet or 60 times the shoreline erosion rate in place at the time of permit issuance, whichever is greater. The setback shall be measured landward from either the static vegetation line, the vegetation line or measurement line, whichever is farthest landward; and
- (L) Notwithstanding any other setback requirement of this Subparagraph, replacement of single-family or duplex residential structures with a total floor area greater than 5,000 square feet shall be allowed provided that the structure meets the following criteria:
  - (i) the structure was originally constructed prior to August 11, 2009;
  - (ii) the structure as replaced does not exceed the original footprint or square footage;
  - (iii) it is not possible for the structure to be rebuilt in a location that meets the ocean hazard setback criteria

- required under Subparagraph ~~(a)(2)~~ (a)(5) of this Rule;
- (iv) the structure as replaced meets the minimum setback required under Part ~~(a)(2)(A)~~ (a)(5)(A) of this Rule; and
  - (v) the structure is rebuilt as far landward on the lot as feasible.
- ~~(3)~~(6) If a primary dune exists in the AEC on or landward of the lot on which the development is proposed, the development shall be landward of the crest of the primary ~~dune or dune~~, the ocean hazard setback, or development line, whichever is farthest from vegetation line, static vegetation line or measurement line, whichever is applicable. For existing lots, however, where setting the development landward of the crest of the primary dune would preclude any practical use of the lot, development may be located oceanward of the primary dune. In such cases, the development may be located landward of the ocean hazard setback but shall not be located on or oceanward of a frontal ~~dune, dune or the~~ development line. The words "existing lots" in this Rule shall mean a lot or tract of land which, as of June 1, 1979, is specifically described in a recorded plat and which cannot be enlarged by combining the lot or tract of land with a contiguous lot(s) or tract(s) of land under the same ownership.
- ~~(4)~~(7) If no primary dune exists, but a frontal dune does exist in the AEC on or landward of the lot on which the development is proposed, the development shall be set landward of the frontal ~~dune or landward of the dune~~, ocean hazard setback ~~setback~~, or development line, whichever is farthest from the vegetation line, static vegetation ~~line~~ line, or measurement line, whichever is applicable.
- ~~(5)~~(8) If neither a primary nor frontal dune exists in the AEC on or landward of the lot on which development is proposed, the structure shall be landward of the ocean hazard ~~setback~~ setback or development line, whichever is more restrictive.
- ~~(6)~~(9) Structural additions or increases in the footprint or total floor area of a building or structure represent expansions to the total floor area and shall meet the setback requirements established in this Rule and 15A NCAC 07H .0309(a). New development landward of the applicable setback may be cosmetically, but shall not be structurally, attached to an existing structure that does not conform with current setback requirements.
- ~~(7)~~(10) Established common law and statutory public rights of access to and use of public trust lands

- and waters in ocean hazard areas shall not be eliminated or restricted. Development shall not encroach upon public accessways, nor shall it limit the intended use of the accessways.
- ~~(8)~~(11) Beach fill as defined in this Section represents a temporary response to coastal erosion, and compatible beach fill as defined in 15A NCAC 07H .0312 can be expected to erode at least as fast as, if not faster than, the pre-project beach. Furthermore, there is no assurance of future funding or beach-compatible sediment for continued beach fill projects and project maintenance. A vegetation line that becomes established oceanward of the pre-project vegetation line in an area that has received beach fill may be more vulnerable to natural hazards along the ~~oceanfront~~ oceanfront if the beach fill project is not maintained. A development setback measured from the vegetation line ~~provides~~ may provide less protection from ocean hazards. Therefore, development setbacks in areas that have received large-scale beach fill as defined in 15A NCAC 07H .0305 shall be measured landward from the static vegetation line as defined in this ~~Section~~ Section unless a development line has been approved by the Coastal Resources Commission. ~~However, in order to allow for development landward of the large scale beach fill project that is less than 2,500 square feet and cannot meet the setback requirements from the static vegetation line, but can or has the potential to meet the setback requirements from the vegetation line set forth in Subparagraphs (1) and (2)(A) of this Paragraph, a local government or community may petition the Coastal Resources Commission for a "static line exception" in accordance with 15A NCAC 07J .1200. The static line exception applies to development of property that lies both within the jurisdictional boundary of the petitioner and the boundaries of the large scale beach fill project. This static line exception shall also allow development greater than 5,000 square feet to use the setback provisions defined in Part (a)(2)(K) of this Rule in areas that lie within the jurisdictional boundary of the petitioner as well as the boundaries of the large scale beach fill project. The procedures for a static line exception request are defined in 15A NCAC 07J .1200. If the request is approved, the Coastal Resources Commission shall allow development setbacks to be measured from a vegetation line that is oceanward of the static vegetation line under the following conditions:~~
- ~~(A) Development meets all setback requirements from the vegetation line defined in Subparagraphs (a)(1) and (a)(2)(A) of this Rule;~~

- ~~(B) — Total floor area of a building is no greater than 2,500 square feet;~~
  - ~~(C) — Development setbacks are calculated from the shoreline erosion rate in place at the time of permit issuance;~~
  - ~~(D) — No portion of a building or structure, including roof overhangs and elevated portions that are cantilevered, knee braced or otherwise extended beyond the support of pilings or footings, extends oceanward of the landward-most adjacent building or structure. When the configuration of a lot precludes the placement of a building or structure in line with the landward-most adjacent building or structure, an average line of construction shall be determined by the Division of Coastal Management on a case-by-case basis in order to determine an ocean hazard setback that is landward of the vegetation line, a distance no less than 30 times the shoreline erosion rate or 60 feet, whichever is greater;~~
  - ~~(E) — With the exception of swimming pools, the development defined in 15A NCAC 07H .0309(a) is allowed oceanward of the static vegetation line; and~~
  - ~~(F) — Development is not eligible for the exception defined in 15A NCAC 07H .0309(b).~~
- (12) In order to allow for development landward of the large-scale beach fill project that cannot meet the setback requirements from the static vegetation line, but can or has the potential to meet the setback requirements from the vegetation line set forth in Subparagraphs (1) and (5) of this Paragraph, a local government, group of local governments involved in a regional beach fill project, or qualified owner's association defined in G.S. 47F-1-103-(3) that has the authority to approve the locations of structures on lots within the territorial jurisdiction of the association, and has jurisdiction over at least one mile of ocean shoreline, may petition the Coastal Resources Commission for a "static line exception" in accordance with 15A NCAC 07J .1200. The static line exception applies to development of property that lies both within the jurisdictional boundary of the petitioner and the boundaries of the large-scale beach fill project. This static line exception shall also allow development greater than 5,000 square feet to use the setback provisions defined in Part (a)(2)(K) of this Rule in areas that lie within the jurisdictional boundary of the petitioner as well as the boundaries of the large-scale beach fill project.

The procedures for a static line exception request are defined in 15A NCAC 07J .1200. If the request is approved, the Coastal Resources Commission shall allow development setbacks to be measured from a vegetation line that is oceanward of the static vegetation line under the following conditions:

- (A) Development meets all setback requirements from the vegetation line defined in Subparagraphs (a)(1) and (a)(5) of this Rule;
- (B) Development setbacks are calculated from the shoreline erosion rate in place at the time of permit issuance;
- (C) No portion of a building or structure, including roof overhangs and elevated portions that are cantilevered, knee braced or otherwise extended beyond the support of pilings or footings, extends oceanward of the landward-most adjacent building or structure. When the configuration of a lot precludes the placement of a building or structure in line with the landward-most adjacent building or structure, an average line of construction shall be determined by the Division of Coastal Management on a case-by-case basis in order to determine an ocean hazard setback that is landward of the vegetation line, a distance no less than 30 times the shoreline erosion rate or 60 feet, whichever is greater;
- (D) With the exception of swimming pools, the development defined in Rule .0309(a) of this Section is allowed oceanward of the static vegetation line; and
- (E) Development is not eligible for the exception defined in Rule .0309(b) of this Section.

(b) In order to avoid weakening the protective nature of ocean beaches and primary and frontal dunes, no development is permitted that involves the removal or relocation of primary or frontal dune sand or vegetation thereon which would adversely affect the integrity of the dune. Other dunes within the ocean hazard area shall not be disturbed unless the development of the property is otherwise impracticable. Any disturbance of these other dunes is allowed only to the extent permitted by 15A NCAC 07H .0308(b).

(c) Development shall not cause irreversible damage to historic architectural or archaeological resources documented by the Division of Archives and History, the National Historical Registry, the local land-use plan, or other sources with knowledge of the property.

(d) Development shall comply with minimum lot size and setback requirements established by local regulations.

(e) Mobile homes shall not be placed within the high hazard flood area unless they are within mobile home parks existing as of June 1, 1979.

(f) Development shall comply with general management objective for ocean hazard areas set forth in 15A NCAC 07H .0303.

(g) Development shall not interfere with legal access to, or use of, public resources nor shall such development increase the risk of damage to public trust areas.

(h) Development proposals shall incorporate measures to avoid or minimize adverse impacts of the project. These measures shall be implemented at the applicant's expense and may include actions that:

- (1) minimize or avoid adverse impacts by limiting the magnitude or degree of the action;
- (2) restore the affected environment; or
- (3) compensate for the adverse impacts by replacing or providing substitute resources.

(i) Prior to the issuance of any permit for development in the ocean hazard AECs, there shall be a written acknowledgment from the applicant to the Division of Coastal Management that the applicant is aware of the risks associated with development in this hazardous area and the limited suitability of this area for permanent structures. By granting permits, the Coastal Resources Commission does not guarantee the safety of the development and assumes no liability for future damage to the development.

(j) All relocation of structures requires permit approval. Structures relocated with public funds shall comply with the applicable setback line as well as other applicable AEC rules. Structures including septic tanks and other essential accessories relocated entirely with non-public funds shall be relocated the maximum feasible distance landward of the present location; septic tanks may not be located oceanward of the primary structure. All relocation of structures shall meet all other applicable local and state rules.

(k) Permits shall include the condition that any structure shall be relocated or dismantled when it becomes imminently threatened by changes in shoreline configuration as defined in 15A NCAC 07H .0308(a)(2)(B). Any such structure shall be relocated or dismantled within two years of the time when it becomes imminently threatened, and in any case upon its collapse or subsidence. However, if natural shoreline recovery or beach fill takes place within two years of the time the structure becomes imminently threatened, so that the structure is no longer imminently threatened, then it need not be relocated or dismantled at that time. This permit condition shall not affect the permit holder's right to seek authorization of temporary protective measures allowed under 15A NCAC 07H .0308(a)(2).

Authority G.S. 113A-107; 113A-113(b)(6); 113A-124.

**SUBCHAPTER 07J -PROCEDURES FOR PROCESSING AND ENFORCEMENT OF MAJOR AND MINOR DEVELOPMENT PERMITS, VARIANCE REQUESTS, APPEALS FROM PERMIT DECISIONS, DECLARATORY RULINGS, AND STATIC LINE EXCEPTIONS**

**SECTION .1200 - STATIC VEGETATION LINE EXCEPTION PROCEDURES**

**15A NCAC 07J .1201 REQUESTING THE STATIC LINE EXCEPTION**

(a) Any local ~~government~~government, group of local governments involved in a regional beach fill project, qualified owner's association defined in G.S. 47F-1-103-(3) that has the authority to approve the locations of structures on lots within the territorial jurisdiction of the association, and has jurisdiction over at least one mile of ocean shoreline, or permit holder of a large-scale beach fill project, herein referred to as the petitioner, that is subject to a static vegetation line pursuant to 15A NCAC 07H .0305, may petition the Coastal Resources Commission for an exception to the static line in accordance with the provisions of this Section.

(b) A petitioner is eligible to submit a request for a static vegetation line exception after ~~five years have passed since~~ the completion of construction of the initial large-scale beach fill project(s) as defined in 15A NCAC 07H .0305 that required the creation of a static vegetation line(s). For a static vegetation line in existence prior to the effective date of this Rule, the award-of-contract date of the initial large-scale beach fill project, or the date of the aerial photography or other survey data used to define the static vegetation line, whichever is most recent, shall be used in lieu of the completion of construction date.

(c) A static line exception request applies to the entire static vegetation line within the jurisdiction of the petitioner including segments of a static vegetation line that are associated with the same large-scale beach fill project. If multiple static vegetation lines within the jurisdiction of the petitioner are associated with different large-scale beach fill projects, then the static line exception in accordance with 15A NCAC 07H .0306 and the procedures outlined in this Section shall be considered separately for each large-scale beach fill project.

(d) A static line exception request shall be made in writing by the petitioner. A complete static line exception request shall include the following:

- (1) A summary of all beach fill projects in the area for which the exception is being requested including the initial large-scale beach fill project associated with the static vegetation line, subsequent maintenance of the initial large-scale projects(s) and beach fill projects occurring prior to the initial large-scale projects(s). To the extent historical data allows, the summary shall include construction dates, contract award dates, volume of sediment excavated, total cost of beach fill project(s), funding sources, maps, design schematics, pre- and post-project surveys and a project footprint;
- (2) Plans and related materials including reports, maps, tables and diagrams for the design and construction of the initial large-scale beach fill project that required the static vegetation line, subsequent maintenance that has occurred, and planned maintenance needed to achieve a design life providing no less than ~~25~~ 30 years of shore protection from the date of the static line

exception request. The plans and related materials shall be designed and prepared by the U.S. Army Corps of Engineers or persons meeting applicable State occupational licensing requirements for said work;

- (3) Documentation, including maps, geophysical, and geological data, to delineate the planned location and volume of compatible sediment as defined in 15A NCAC 07H .0312 necessary to construct and maintain the large-scale beach fill project defined in Subparagraph (d)(2) of this Rule over its design life. This documentation shall be designed and prepared by the U.S. Army Corps of Engineers or persons meeting applicable State occupational licensing requirements for said work; and
- (4) Identification of the financial resources or funding sources necessary to fund the large-scale beach fill project over its design life.

(e) A static line exception request shall be submitted to the Director of the Division of Coastal Management, 400 Commerce Avenue, Morehead City, NC 28557. Written acknowledgement of the receipt of a completed static line exception request, including notification of the date of the meeting at which the request will be considered by the Coastal Resources Commission, shall be provided to the petitioner by the Division of Coastal Management.

(f) The Coastal Resources Commission shall consider a static line exception request no later than the second scheduled meeting following the date of receipt of a complete request by the Division of Coastal Management, except when the petitioner and the Division of Coastal Management agree upon a later date.

*Authority G.S. 113A-107; 113A-113(b)(6); 113A-124.*

**SECTION .1300 – DEVELOPMENT LINE PROCEDURES**

**15A NCAC 07J .1301 REQUESTING THE DEVELOPMENT LINE**

(a) Any local government, group of local governments involved in a regional beach fill project or qualified owner's association with territorial jurisdiction over an area that is subject to ocean hazard area setbacks pursuant to 15A NCAC 07H .0305, may petition the Coastal Resources Commission for a development line for the purposes of siting oceanfront development in accordance with the provisions of this Section. A qualified owner's association is an owner's association defined in G.S. 47F-1-103-(3) that has authority to approve the locations of structures on lots within the territorial jurisdiction of the association and has jurisdiction over at least one mile of ocean shoreline.

(b) A development line request applies to the entire large scale project area as defined in 15A NCAC 07H .0305(a)(7), and at the petitioner's request may be extended to include the entire oceanfront jurisdiction or legal boundary of the petitioner.

(c) The petitioner shall utilize an adjacent neighbor sight-line approach, resulting in an average line of structures. In areas where the seaward edge of existing development is not linear, the petitioner may determine an average line of construction on a case-by-case basis. In no case shall a development line be

established seaward of the most seaward structure within the petitioner's oceanfront jurisdiction.

(d) An existing structure that is oceanward of an approved development line can remain in place until damaged greater than 50 percent in accordance with Rule .0210 of this Subchapter; and can only be replaced landward of the development line, and must meet the applicable ocean hazard setback requirements as defined in 15A NCAC 07H .0306(a).

(e) A request for a development line or amendment shall be made in writing by the petitioner and submitted to the CRC by sending the written request to the Director of the Division of Coastal Management. A complete request shall include the following:

- (1) A detailed survey of the development line using on-ground observation and survey, or aerial imagery along the oceanfront jurisdiction or legal boundary; any local regulations associated with the development line; a record of local adoption of the development line by the petitioner; and documentation of incorporation of development line into local ordinances or rules and regulations of an owner's association.
- (2) The survey shall include the development line and static vegetation line.
- (3) Surveyed development line spatial data in a geographic information systems (GIS) format referencing North Carolina State Plane North American Datum 83 US Survey Foot, to include Federal Geographic Data Committee (FGDC) compliant metadata.

(f) Once a development line is approved by the Coastal Resources Commission, only the petitioner may request a change or reestablishment of the position of the development line.

(g) A development line request shall be submitted to the Director of the Division of Coastal Management, 400 Commerce Avenue, Morehead City, NC 28557. Written acknowledgement of the receipt of a completed development line request, including notification of the date of the meeting at which the request will be considered by the Coastal Resources Commission, shall be provided to the petitioner by the Division of Coastal Management.

(h) The Coastal Resources Commission shall consider a development line request no later than the second scheduled meeting following the date of receipt of a complete request by the Division of Coastal Management, except when the petitioner and the Division of Coastal Management agree upon a later date.

*Authority G.S. 113A-107; 113A-113(b)(6); 113A-124.*

**15A NCAC 07J .1302 PROCEDURES FOR APPROVING THE DEVELOPMENT LINE**

(a) At the meeting that the development line request is considered by the Coastal Resources Commission, the following shall occur:

- (1) A representative for the petitioner shall orally present the request described in Rule .1301 of this Section. The Chairman of the Coastal Resources Commission may limit the time allowed for oral presentations.
- (2) Additional persons may provide written or oral comments relevant to the development line request. The Chairman of the Coastal

Resources Commission may limit the time allowed for oral comments.

(b) The Coastal Resources Commission shall approve a development line request if the request contains the information required and meets the standards set forth in Rule .1301 of this Section. The final decision of the Coastal Resources Commission shall be made at the meeting at which the matter is heard or in no case later than the next scheduled meeting. The final decision shall be transmitted to the petitioner by registered mail within 10 business days following the meeting at which the decision is reached.

(c) The decision to authorize or deny a development line is a final agency decision and is subject to judicial review in accordance with G.S. 113A-123.

*Authority G.S. 113A-107; 113A-113(b)(6); 113A-124.*

**15A NCAC 07J .1303 LOCAL GOVERNMENTS AND COMMUNITIES WITH DEVELOPMENT LINES**

A list of development lines in place for petitioners and any conditions under which the development lines exist, including the date(s) the development lines were approved, shall be maintained by the Division of Coastal Management. The list of development lines shall be available for inspection at the Division of Coastal Management, 400 Commerce Avenue, Morehead City, NC 28557.

*Authority G.S. 113A-107; 113A-113(b)(6), 113A-124.*

**TITLE 25 – OFFICE OF STATE HUMAN RESOURCES**

*Notice is hereby given in accordance with G.S. 150B-21.3A(c)(2)g. that the State Human Resources Commission intends to readopt with substantive changes the rules cited as 25 NCAC 01C .0303; .0304; .0902; .0903 and readopt without substantive changes the rule cited as 25 NCAC 01C .0405; .0407; .0504; .1007.*

*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):** <http://www.oshr.nc.gov/Guide/SPC/rulemaking.htm>

**Proposed Effective Date:** *March 1, 2016*

**Public Hearing:**

**Date:** *December 3, 2015*

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

**Location:** *Learning and Development Center, Piedmont Conference Room, 101 West Peace Street, Raleigh, NC 27603*

**Reason for Proposed Action:** *These rules are subject to readoption pursuant to the periodic review and expiration of existing rules as set forth in G.S. 150B-21.3A(c)(2)g. These rules must be readopted no later than April 30, 2016.*

**Comments may be submitted to:** *Margaret B. Duke, 1331 Mail Service Center, Raleigh, NC 27699-1331, phone 919-807-4869, email Margaret.B.Duke@nc.gov*

**Comment period ends:** *January 2, 2016*

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

**CHAPTER 01 - OFFICE OF STATE HUMAN RESOURCES**

**SUBCHAPTER 01C – PERSONNEL ADMINISTRATION**

**SECTION .0300 – PERSONNEL RECORDS AND REPORTS**

**25 NCAC 01C .0303 PUBLIC INSPECTION**

The information listed in G.S. 126-23 shall be made available for inspection and examination and copies thereof made by any person during regular business hours, subject to the following provisions:

- (1) ~~All disclosures of records shall be accounted for by keeping a written record of the following information: name of employee, information disclosed, data information requested, name and address of the person to whom the disclosure is made. The information must be retained for a period of two years. This does not apply to the processing of personnel records or credit references.~~
- (2) ~~Upon request, record of disclosure shall be made available to the employee to whom it pertains.~~

~~(3) — An individual examining a personnel record may copy the information; any available photocopying facilities may be provided and the cost may be assessed to the individual.~~

*Authority G.S. 126-24; 126-26; 126-29.*

**SECTION .0400 – APPOINTMENT**

*Authority G.S. 126-23; 126-26.*

**25 NCAC 01C .0304 CONFIDENTIAL INFORMATION IN PERSONNEL FILES**

~~(a) Except as provided in G.S. 126-23 and G.S. 126-24, personnel files of State employees are not subject to inspection and examination.~~

~~(b) Agencies shall maintain in personnel records only information that is relevant to accomplishing personnel administration purposes.~~

~~(c) Information used in making a determination about employment or other personnel actions shall, to the extent practical, be obtained directly from the individual. There may be instances where it is necessary to obtain information from other sources. This may be obtained either directly from those sources or by the use of a consumer reporting agency. If the consumer reporting agency is utilized, the requirements of the Fair Credit Reporting Act, Title VI of The Consumer Credit Protection Act (Public Law 91-508) must be followed.~~

~~(d) All information in an employee's personnel file shall be open for inspection and examination as set forth in G.S. 126-24. For this purpose, supervisor is any individual in the chain of administrative authority above a given state employee within a pertinent state agency. An official is a person who has official or authorized duties or responsibilities in behalf of an agency; it does not imply a necessary level of duty or responsibility. This right to access includes the circumstances where one state agency is considering for employment a person who is or has been employed in another state agency; the head of the latter agency may release to an official of another agency information relative to the employee's job performance.~~

~~(e) Each individual requesting access to confidential information shall submit proof of identity.~~

~~(f) A record shall be made of each disclosure except to the employee or the supervisor.~~

**25 NCAC 01C .0405 TEMPORARY APPOINTMENT (READOPTION WITHOUT SUBSTANTIVE CHANGES)**

**25 NCAC 01C .0407 TEMPORARY PART-TIME EMPLOYMENT (READOPTION WITHOUT SUBSTANTIVE CHANGES)**

**25 NCAC 01C .0504 LIMITATIONS (READOPTION WITHOUT SUBSTANTIVE CHANGES)**

**SECTION .0900 - EMPLOYEE RECOGNITION PROGRAMS**

**25 NCAC 01C .0902 AGENCY RESPONSIBILITY**

~~Agencies shall administer their programs which shall, as a minimum, recognize employee's service beginning with five years of service and in increments of five years thereafter.~~

*Authority G.S. 126-4.*

**25 NCAC 01C .0903 ELIGIBILITY REQUIREMENTS**

~~Employees with full time or part time (20 hours or more) permanent appointments shall be eligible for awards based on the employees' total state service. The calculation shall be based on the definition in 25 NCAC 01D .0112 for total state service.~~

*Authority G.S. 126-4(10).*

**SECTION .1000 - SEPARATION**

**25 NCAC 01C .1007 UNAVAILABILITY WHEN LEAVE IS EHA (READOPTION WITHOUT SUBSTANTIVE CHANGES)**

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**APPROVED RULES**

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

Rules approved by the Rules Review Commission at its meeting on September 17, 2015.

**REGISTER CITATION TO THE  
NOTICE OF TEXT**

**VETERAN AFFAIRS COMMISSION**

<u>Forms and Instructions</u>	01	NCAC	26B	.0104*	29:13
<u>Where to Obtain Forms</u>	01	NCAC	26B	.0105*	29:13
<u>Delegation of Authority</u>	01	NCAC	26B	.0106*	29:13

**HHS - HEALTH SERVICE REGULATION, DIVISION OF**

<u>Definitions</u>	10A	NCAC	14E	.0101*	29:11
<u>Plans</u>	10A	NCAC	14E	.0104*	29:11
<u>Renewal</u>	10A	NCAC	14E	.0109*	29:11
<u>Inspections</u>	10A	NCAC	14E	.0111*	29:11
<u>Building Code Requirements</u>	10A	NCAC	14E	.0201*	29:11
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These rules are subject to the next Legislative Session. (See G.S. 150B-21.3(b1))

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**TITLE 01 – DEPARTMENT OF ADMINISTRATION**

**01 NCAC 26B .0104 FORMS AND INSTRUCTIONS**

The following forms and instructions are used by the Veterans Affairs Commission (the "Commission" for purposes of this Subchapter) to administer scholarships for children of war veterans, pursuant to G.S. Chapter 165, Article 4. Forms required of the applicant to complete the scholarship package are located at: <http://www.nc4vets.com/nc-programs> or may be obtained by contacting the North Carolina Division of Veterans Affairs (NCDVA) at 919-807-4250 or by writing to the NCDVA at 1315 Mail Service Center, Raleigh, NC 27699-1315.

(1) Instruction Sheet, NCDVA-16. To be considered for selection by the Commission, an application shall be received in the Assistant Secretary's Office (NCDVA) by deadlines referenced in this Rule. Applicants for scholarships classified as Class II or Class III shall submit scholarship application on or before February 14. Applicants for scholarships classified as IA, IB, or IV as determined by United States Department of Veterans Affairs (USDVA) Certification form (NCDVA-13 if living veteran, and NCDVA-14 if veteran is deceased) shall submit scholarship application by:

- (a) June 1 in order to be awarded on the following July 1; or
- (b) December 1 in order to awarded on the following January 1.

The application shall be mailed to the North Carolina Division of Veterans Affairs 1315 Mail Service Center, Raleigh, NC 27699-1315, or emailed to: [ncdva.scholarships@doa.nc.gov](mailto:ncdva.scholarships@doa.nc.gov).

(2) The applicant shall submit the following documents to the Assistant Secretary's Office (NCDVA) for consideration:

- (a) a completed application, NCDVA-17, together with a copy of the public record of applicant's birth;
- (b) evidence of veteran's biological or adoptive relationship to applicant (which may be shown on birth certificate, court documents, payment of child support, or DNA test);
- (c) a copy of veteran's discharge or notice of separation (DD 214, member copy 4) from the armed services (if available);

- (d) a financial questionnaire, NCDVA-18;
  - (e) the most recent federal income tax return from applicant, applicant's veteran parent, and other parent;
  - (f) high school transcript through junior year of high school or, if already graduated, complete high school transcript and all college transcripts to date if applicable;
  - (g) the applicant's scholarship essay questionnaire, NCDVA-23B(2);
  - (h) two recommendations, NCDVA-23B(3); and
  - (i) a copy of any high school and college disciplinary record.
- (3) The selected applicants (all classes) shall submit the following documents to the Assistant Secretary's Office (NCDVA) no later than June 30 for a scholarship to be awarded on the following July 1 (selected applicants submitting Class IA, Class IB, or Class IV application after June 1 shall submit the following documents on or before December 1 to be awarded the following January 1):
- (a) a copy of Selective Service registration acknowledgement, if not age 18 by June 30, must be received within six months of attaining age 18 (male applicants only);
  - (b) proof of graduation from high school (high school diploma);
  - (c) final complete academic record which shall include a list of high school and college courses taken with corresponding grades earned, cumulative weighted and unweighted grade point average, and attendance and disciplinary records;
  - (d) NCDVA-11, Affidavit – School Declaration Form;
  - (e) a letter of acceptance from the school that the applicant shall attend; and
  - (f) NCDVA-17G, Permission form for access to student's academic records of the college, university, or community college he or she shall attend or attended if previously enrolled.
- (4) Application Form, NCDVA-17. A person seeking a scholarship under G.S. Chapter 165, Article 4, (Scholarships for Children of War

Veterans) shall submit a completed application form, NCDVA -17 to the NCDVA which provides:

- (a) the applicant's first name, middle initial, last name, social security number, address, telephone number, email address, and county of residence;
  - (b) the first name, middle initial, last name, USDVA File number or social security number, and address of applicant's eligible veteran parent;
  - (c) the applicant's date of birth, place of birth (city, county, and state), mother's birth place, the applicant's length of residency in North Carolina, high school attended, and graduation date from high school;
  - (d) the college, university, community college, or technical institute that applicant plans to attend;
  - (e) the legal residence of applicant's eligible veteran parent at time such veteran parent entered the Armed Forces;
  - (f) the legal residence of applicant's eligible veteran parent at time of application;
  - (g) the degree of service connected or non-service connected disability of applicant's eligible veteran parent at time of scholarship application;
  - (h) answers to questions regarding the applicant's veteran parent's purple heart medal, if any, MIA or POW status, receipt of United States Department of Veterans Affairs (USDVA) disability compensation or pension, and whether veteran parent is deceased;
  - (i) signature and date of applicant and applicant's parent or guardian;
  - (j) answers to questions about applicant's accomplishments, special honors, or awards received during high school (and post high school if applicable), submitted in resume format as referenced on NCDVA-17;
  - (k) a copy of the public record of applicant's birth, evidence of veteran's biological or adoptive relationship to applicant (which may be shown on birth certificate, court documents, payment of child support or DNA test), and a copy of veteran's discharge or notice of separation, [DD 214, member copy 4] from the armed services, if available; and
- (l) applicant's high school transcript through junior year, ACT or SAT score, a copy of all college transcripts, if applicable, and a copy of disciplinary and attendance records from high school and any other college or technical schools attended (if school does not maintain disciplinary records, then applicant shall attach a statement from high school guidance counselor or college advisor explaining that no such records exist).
- (5) Financial Questionnaire, NCDVA-18, to accompany application for scholarship. A person seeking a Class II or Class III scholarship, as defined in G.S. 165-22, shall submit a completed Financial Questionnaire, NCDVA 18, to the NCDVA which provides:
- (a) the applicant's veteran parent's first name, middle initial, and last name;
  - (b) USDVA file number or social security number of the applicant's veteran parent;
  - (c) the applicant's first name, middle initial, last name, and the last four digits of the social security number on Financial Questionnaire, NCDVA-18;
  - (d) the applicant, applicant's veteran parent, and other parent shall provide the amount of each of their:
    - (i) bonds, mutual funds, but not retirement plans, along with cash, savings, account balances including certificates of deposit;
    - (ii) liabilities (for the purpose of this sub-item, liabilities shall include education and medical expenses of applicant, veteran parent and other parent); and
    - (iii) annual income from wages, salary, USDVA disability compensation, pension, interest, dividends, military retirement, company pension, workman's compensation, net business income or loss from previous calendar year, and net farm income or loss from previous calendar year;
  - (e) the applicant's high school or college status, name of university, college, or community college attending, number of semesters completed, and source and amount of funding towards education (i.e. scholarship, grants,

- student loan, or no financial assistance);
  - (f) the relationship, age, and source of funding for any sibling of applicant who is a dependent of applicant's veteran parent while such sibling attends post high school training or college;
  - (g) the dated signature of applicant's veteran parent in the space designated on the form; and
  - (h) a copy of latest federal tax return of applicant, applicant's veteran parent, and other parent (if required to file taxes). If no return was filed, then applicant shall provide a statement as to the reason no federal tax return is attached.
- (6) Essay Questionnaire, NCDVA-23B(2), to accompany scholarship application. A person seeking a Class II or Class III scholarship, as defined in G.S. 165-22, shall submit a completed Essay Questionnaire, NCDVA 23B(2), to the NCDVA which provides:
  - (a) the reasons applicant believes he or she should be selected and awarded a scholarship;
  - (b) the first name, middle initial, and last name of applicant's veteran parent;
  - (c) the applicant's first name, middle initial, last name, and the last four digits of the social security number;
  - (d) a list of all schools to which the applicant has both applied and been accepted;
  - (e) a list of schools to which applicant applied and is awaiting an acceptance decision;
  - (f) the applicant's desired major or area of study, if known;
  - (g) essays to provide insight into applicant's character, reputation, and accomplishments by describing:
    - (i) how the applicant has prepared for college;
    - (ii) why the applicant believes he or she should be selected;
    - (iii) a kind act accomplished by the applicant that few people know about;
    - (iv) a mistake made by the applicant and what the applicant learned from this mistake;
    - (v) any other information the applicant wishes the North Carolina Veterans Affairs Commission to consider, including but not limited to unusual circumstances affecting grades, absences, outstanding achievements, special talents, or interest; and
- (7) Recommendation Form NCDVA-23B(3), to accompany scholarship application. A person seeking a Class II or Class III scholarship, as defined in G.S. 165-22, shall submit two completed Recommendation Forms, NCDVA-23B(3), at least one from applicant's guidance counselor or teacher, to the NCDVA which provides:
  - (a) an assessment of applicant's scholastic achievements, disciplinary record, and comments on applicant's character;
  - (b) the first name, middle initial, and last name of applicant's veteran parent;
  - (c) the applicant's first name, middle initial, last name, and the last four digits of the social security number;
  - (d) the first name, middle initial, last name, and relationship to applicant of person submitting a recommendation for applicant;
  - (e) the length of time the recommender has known the applicant;
  - (f) if the recommender is a guidance counselor or designated teacher, then include class rank, cumulative grade point average (weighted and unweighted), and provide a disciplinary record or describe any disciplinary issues if no disciplinary record; and
  - (g) a written evaluation of applicant including comments and examples of the applicant's character (courage, honesty, kindness, dedication, work ethic).
- (8) Affidavit-School Declaration, NCDVA-11, (All Classes). Upon receipt of a blank Affidavit-School Declaration form, NCDVA-11 from the NCDVA, the selected applicant shall return a completed NCDVA-11 form to the NCDVA no later than June 30 (to be awarded a scholarship the following July 1), to notify the NCDVA of which school the applicant would like the scholarship to apply (selected applicants classified as IA, IB, or IV after June 1 shall submit completed Affidavit-School Declaration NCDVA-11 by December 1 to be awarded a scholarship the following January 1). An additional NCDVA-11 may be requested by contacting the NCDVA at 919-807-4250. The selected applicant shall provide the following information on the NCDVA-11:
  - (h) the applicant's dated signature.

- (a) the first name, middle initial, and last name of the selected applicant's veteran parent(s);
  - (b) the first name, middle initial and last name of the selected applicant;
  - (c) the last four digits of the social security number of the selected applicant;
  - (d) the name of the school that such selected applicant plans to attend;
  - (e) the semester date the selected applicant plans to begin his or her course of study; and
  - (f) the dated signature of the selected applicant.
- (9) Permission for Access to Student Records, NCDVA-17G (All Classes). Upon receipt of a blank Permission for Access to Student Records form, NCDVA-17G from the NCDVA, the selected applicant shall return a completed NCDVA-17G form to the NCDVA no later than June 30 to be awarded a scholarship the following July 1 (selected applicants classified as IA, IB, or IV after June 1 shall submit completed Permission for Access to Student Records form, NCDVA-17G, by December 1 to be awarded a scholarship the following January 1), to permit the NCDVA access to the student's cumulative grade point average and information about the student's academic standing, including without limitation any probationary status. An additional NCDVA-17G may be requested by contacting the NCDVA at 919-807-4250. The selected applicant shall provide the following information on the NCDVA-17G:
- (a) the first name, middle initial, and last name of the selected applicant;
  - (b) the last four digits of the selected applicant's social security number;
  - (c) the identification number assigned by the school to the selected applicant;
  - (d) the selected applicant's mailing address;
  - (e) the selected applicant's email address;
  - (f) the selected applicant's telephone number;
  - (g) a grant of permission by the selected applicant for the NCDVA to access the cumulative grade point average and academic standing records (including without limitation, any information concerning probationary status) of such selected applicant from the named school that selected applicant plans to attend;
  - (h) an acknowledgment that the permission granted by the selected applicant is made with the

understanding that any records and information provided by the school attended by the selected applicant may not be made available by the NCDVA to any other agency other than the NCDVA and may only be used in the administration of the selected applicant's scholarship; and

- (i) the dated signature of the selected applicant.

*History Note: Authority G.S. 143B-399(4); 143B-400; Eff. February 1, 1976; Readopted Eff. February 27, 1979; Amended Eff. October 1, 2015.*

**01 NCAC 26B .0105 WHERE TO OBTAIN FORMS**

All forms may be obtained from the Office of the North Carolina Division of Veterans Affairs or electronically at <http://www.nc4vets.com/nc-program>.

*History Note: Authority G.S. 143B-399; 143B-400; Eff. February 1, 1976; Readopted Eff. February 27, 1979; Amended Eff. October 1, 2015.*

**01 NCAC 26B .0106 DELEGATION OF AUTHORITY**

The Veterans Affairs Commission delegates to the Assistant Secretary for Veterans Affairs the responsibility for obtaining information and making recommendations of applications for scholarship awards which the Commission administers. The following procedure has been set by the Commission for use by the Assistant Secretary in reviewing applications:

- (1) Interested parties may obtain scholarship forms and an instruction sheet from the Assistant Secretary's Office or electronically at <http://www.nc4vets.com/nc-programs>. Interested parties and applicants seeking assistance may contact the North Carolina Division of Veterans Affairs (NCDVA) scholarship coordinator at 919-807-4250, or contact a local veteran's service officer at: <http://www.nc4vets.com/personal-services>.
- (2) For purposes of G.S. 165 (Article 4), the time of application for scholarship shall be the earlier of:
  - (a) the date received in the NCDVA Assistant Secretary's Office as evidenced by NCDVA date stamp or date of electronic communication;
  - (b) the US Postal Service date identification; or
  - (c) the processing date identification from any other federal or state recognized mail carrier system that delivers mail.
- (3) In making recommendations for the award of scholarships in the competitive categories, the Assistant Secretary for Veterans Affairs shall consider the disability and other eligibility

requirements of each application in accordance with the standards enumerated in G.S. 165-22 and make his or her recommendations to members of the Commission based on the following criteria, and importance shall attach in the order named:

- (a) Need. Preference shall be given to the eligible child with the greater financial need.
  - (b) Scholastic Ability. Preference shall be given the eligible child with the higher scholastic award.
  - (c) Consideration shall be given to the character, reputation, industry, accomplishments, and handicaps (if any) of the eligible child.
  - (d) All other things being equal, the degree of service connected disability of applicant's qualified veteran parent shall be given preference.
- (4) The Assistant Secretary for Veterans Affairs shall be authorized to award Class I and Class IV (unlimited) scholarships to any applicant who meets all eligibility requirements under Class I or Class IV on or about January 1 and July 1. These awards are then ratified by the Commission at its next meeting following the award by the Assistant Secretary.

*History Note: Authority G.S. 143B-399(4); 143B-400; 165-22.1(a); Eff. February 1, 1976; Readopted Eff. February 27, 1979; Amended Eff. October 1, 2015.*

following school year, all Developmental Day services in the county shall be available as described in Paragraph (a) of this Rule.

- (b) For purposes of this Rule, a "Community-Based Developmental Day Center" means a Developmental Day Center not operated by the Local Education Agency.
- (c) Developmental Day Centers shall maintain a four or five star rated license with an average score of 5.0 on the appropriate environment rating scale in each classroom evaluated.
- (d) A child care center with a temporary license may receive certification status if all rules in this Section are met, except for Paragraph (c) of this Rule, and an application for a two to five star rated license has been submitted. At the end of the temporary license period the child care center must receive a four or five star rated license as specified in Paragraph (c) of this Rule. Failure to receive a four or five star rated license shall result in the removal of certification status as a Developmental Day Center.
- (e) The license shall indicate certification as a Developmental Day Center.
- (f) The center shall comply with the staff-child ratio and maximum group size as follows:

AGE	RATIO STAFF/CHILDREN	MAXIMUM GROUP SIZE
0-12 Months	1/4	8
1 to 2 Years	1/5	10
2 Years and Older	1/6	18

- (g) A minimum of two staff members shall be on site at all times while children are in attendance at the facility.
- (h) A child care center may appeal the removal of certification status in accordance with G.S. 110-94; however, an appeal does not preclude a Local Education Agency from removing contracted children from the program before a final decision on the appeal is reached.

*History Note: Authority G.S. 110-85; 110-88(5); 110-88(10); 110-88(14); Eff. July 1, 2010; Amended Eff. Pending Legislative Review.*

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

**10A NCAC 09 .2902 LICENSE**

(a) Developmental Day services shall be available for preschool children for a minimum of 8 hours per day, 5 days per week, Monday through Friday, and 12 months per year except in the following circumstances:

- (1) In counties where no Community-Based Developmental Day Center operates, a Developmental Day program operated by the Local Education Agency may provide services for the 10 month school year (as defined by the State Board of Education).
- (2) If a Community-Based Developmental Day center opens in a county where Developmental Day services are only provided by a Developmental Day program operated by the Local Education Agency, the Developmental Day program operated by the Local Education Agency may continue to provide services for the 10 month school year until the end of the following school year. At the end of the

**10A NCAC 09 .2903 STAFF QUALIFICATIONS**

- (a) Each center serving children ages birth to three years shall have a minimum of one staff who holds an Infant Toddler Family Specialist certification issued from the North Carolina Division of Public Health; Birth-through-Kindergarten (B-K) Standard Professional I licensure; or provisional licensure in B-K issued from the Department of Public Instruction. This staff shall provide program oversight and supervision for any caregivers in classrooms with children ages birth to three years.
- (b) In accordance with G.S. 115C-84.2(a)(1), during the 185 day school year (as defined by the State Board of Education), each child aged three years old and older on or before the initial school entry date specified in G.S. 115C-364 (school entry date) shall be served in a classroom with at least one lead teacher who holds a B-K Standard Professional I licensure or provisional licensure in B-K, or Preschool Add-on licensure issued from the Department of Public Instruction.

(c) Children who turn three years old after the school entry date who are identified as a child with a disability as evidenced by an Individualized Education Program (IEP), shall be served in a classroom with a B-K licensed teacher.

(d) For centers operating for 12 months as specified by Rule .2902(a) of this Section, during the two additional months of operation each group of preschool children shall have at least one lead teacher with a minimum of an A.A.S. degree in early childhood education or child development, or an A.A.S. degree in any major with 12 semester hours in early childhood education or child development.

(e) For centers operating for 10 months as specified by Rule .2902(a) of this Section, during the 10 month school year, (as defined by the State Board of Education), each group of school-age children shall have at least one teacher who holds State certification as a Special Education Teacher. For centers operating for 12 months as specified by Rule .2902(a) of this Section, during the two additional months of operation each group of school-age children shall have at least one teacher who has completed at least two semester hours of school-age care related coursework and has completed or is enrolled in at least two additional semester hours of school-age related coursework.

(f) Center administrators shall have a Level III North Carolina Early Childhood Administration Credential and two years of verifiable work experience with children with developmental delays or disabilities.

*History Note:* Authority G.S. 110-85; 110-88(5); 110-88(14); Eff. July 1, 2010; Amended Eff. March 1, 2014; Amended Eff. Pending Legislative Review.

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**10A NCAC 14E .0101 DEFINITIONS**

The following definitions will apply throughout this Subchapter:

- (1) "Abortion" means the termination of a pregnancy as defined in G.S. 90-21.81(1).
- (2) "Clinic" means a freestanding facility (a facility neither physically attached nor operated by a licensed hospital) for the performance of abortions completed during the first 20 weeks of pregnancy.
- (3) "Complication" includes but is not limited to hemorrhage, infection, uterine perforation, cervical laceration, or retained products of conception.
- (4) "Division" means the Division of Health Service Regulation of the North Carolina Department of Health and Human Services.
- (5) "Gestational age" means the length of pregnancy as indicated by the date of the first day of the last normal monthly menstrual period, if known, or as determined by ultrasound.
- (6) "Governing authority" means the individual, agency, group, or corporation appointed, elected or otherwise designated, in which the ultimate responsibility and authority for the

conduct of the abortion clinic is vested pursuant to Rule .0302 of this Subchapter.

- (7) "Health Screening" means an evaluation of an employee or contractual employee, including tuberculosis testing, to identify any underlying conditions that may affect the person's ability to work in the clinic.
- (8) "New clinic" means one that is not certified as an abortion clinic by the Division as of July 1, 2014, and has not been certified within the previous six months of the application for certification.
- (9) "Qualified Physician" means a licensed physician who advises, procures, or causes a miscarriage or abortion as defined in G.S. 14-45.1(g).
- (10) "Registered Nurse" means a person who holds a valid license issued by the North Carolina Board of Nursing to practice professional nursing in accordance with the Nursing Practice Act, G.S. 90, Article 9A.

*History Note:* Authority G.S. 14-45.1(a); 14-45.1(g); 143B-10; S.L. 2013-366, s. 4(c); Eff. February 1, 1976; Readopted Eff. December 19, 1977; Amended Eff. October 1, 2015; July 1, 1994; December 1, 1989; June 30, 1980.

**10A NCAC 14E .0104 PLANS**

Prior to issuance of a certificate pursuant to Rule .0107 of this Section, a clinic shall submit two copies of the building plans to the Division for certification purposes when the clinic requires a review by the Division and the Department of Insurance, according to the North Carolina Administration and Enforcement Requirements Code, 2012 edition, including subsequent amendments and editions. Copies of the North Carolina Administration Code are available from the International Code Council at [http://www.ecodes.biz/ecodes\\_support/Free\\_Resources/2012NorthCarolina/12NorthCarolina\\_main.html](http://www.ecodes.biz/ecodes_support/Free_Resources/2012NorthCarolina/12NorthCarolina_main.html) at no cost. When the local jurisdiction has authority from the North Carolina Building Code Council to review the plans, the clinic shall submit only one copy of the plans to the Division. In that case, the clinic shall submit an additional set of plans directly to the local jurisdiction.

*History Note:* Authority G.S. 14-45.1(a); 143B-10; Eff. February 1, 1976; Readopted Eff. December 19, 1977; Amended Eff. October 1, 2015.

**10A NCAC 14E .0109 RENEWAL**

Each certificate, unless previously suspended or revoked, pursuant to the applicable rules and statutes shall be renewable annually upon the filing of an application, payment of the non-refundable renewal fee as defined in G.S. 131E-269, and approval by the Division.

*History Note:* Authority G.S. 14-45.1(a); 131E-269; 143B-10;

*Eff. February 1, 1976;  
Readopted Eff. December 19, 1977;  
Amended Eff. October 1, 2015.*

**10A NCAC 14E .0111 INSPECTIONS**

- (a) Any clinic certified by the Division to perform abortions shall be inspected by representatives of the Division annually and as it may deem necessary as a condition of holding such license. An inspection shall be conducted whenever the purpose of the inspection is to determine whether the clinic complies with the rules of this Subchapter or whenever there is reason to believe that some condition exists which is not in compliance with the rules of this Subchapter.
- (b) The Division shall have authority to investigate any complaint relative to the care, treatment, or complication of any patient.
- (c) Representatives of the Division shall make their identities known to the person in charge prior to inspection of the clinic.
- (d) Representatives of the Division may review any records in any medium necessary to determine compliance with the rules of this Subchapter, while maintaining the confidentiality of the complainant and the patient, unless otherwise required by law.
- (e) The clinic shall allow the Division to have immediate access to its premises and the records necessary to conduct an inspection and determine compliance with the rules of this Subchapter.
- (f) A clinic shall file a plan of correction for cited deficiencies within 10 business days of receipt of the report of the survey. The Division shall review and respond to a written plan of correction within 10 business days of receipt of the corrective action plan.

*History Note: Authority G.S. 14-45.1(a); 14-45.1(a1); 143B-10; S.L. 2013-366, s. 4(c);  
Eff. February 1, 1976;  
Readopted Eff. December 19, 1977;  
Amended Eff. October 1, 2015; July 1, 1994.*

**10A NCAC 14E .0206 ELEMENTS AND EQUIPMENT**

The physical plant shall provide equipment to carry out the functions of the clinic with the following minimum requirements:

- (1) Mechanical requirements.
  - (a) Temperatures and humidities:
    - (i) The mechanical systems shall be designed to provide the temperature and humidities shown in this table:
 

Sub-Item:Area	Temperature	Relative Humidity
Procedure	70-76 degrees F.	50-60%
Recovery	75-80 degrees F.	30-60%
  - (b) All air supply and exhaust systems for the procedure suite and recovery area shall be mechanically operated. All fans serving exhaust systems shall be located at the discharge end of the system. The ventilation rates shown herein shall be considered as minimum acceptable rates.
    - (i) The ventilation system shall be designed and balanced to provide the pressure relationships detailed in Sub-Item (b)(vii) of this Rule.
    - (ii) All air supplied to procedure rooms shall be delivered at or near the ceiling of the room and all exhaust or return from the area shall be removed near the floor level at not less than three inches above the floor.
    - (iii) Corridors shall not be used to supply air to or exhaust air from any procedure or recovery room except to maintain required pressure relationships.
    - (iv) All ventilation or air conditioning systems serving procedure rooms shall have a minimum of one filter bed with a minimum filter efficiency of 80 percent.

**10A NCAC 14E .0201 BUILDING CODE REQUIREMENTS**

- (a) The physical plant for a clinic shall meet or exceed minimum requirements of the North Carolina State Building Code for Group B occupancy (business office facilities) which is incorporated herein by reference including subsequent amendments and editions. Copies of the Code can be obtained from the International Code Council online at <http://shop.iccsafe.org/north-carolina-doi.discounts?ref=NC> for a cost of five hundred twenty-seven dollars (\$527.00), or accessed electronically free of charge at <http://www.ecodes.biz>.
- (b) The requirements contained in this Section shall apply to new clinics and to any alterations, repairs, rehabilitation work, or additions which are made to a previously certified facility.

*History Note: Authority G.S. 14-45.1(a); 143B-10;  
Eff. February 1, 1976;  
Readopted Eff. December 19, 1977;  
Amended Eff. October 1, 2015; July 1, 1994; December 1, 1989.*

**10A NCAC 14E .0202 SANITATION**

Clinics that are certified by the Division to perform abortions shall comply with the Rules governing the sanitation of hospitals, nursing homes, adult care homes, and other institutions, contained in 15A NCAC 18A .1300 which is hereby incorporated by reference including subsequent amendments and editions. Copies of 15A NCAC 18A .1300 may be obtained at no charge from the Division of Public Health, Environmental Health Section, 1632 Mail Service Center, Raleigh, NC 27699-1632, or accessed electronically free of charge from the Office of Administrative Hearings at <http://www.ncoah.com>.

*History Note: Authority G.S. 14-45.1(a); 143B-10;  
Eff. February 1, 1976;  
Readopted Eff. December 19, 1977;  
Amended Eff. October 1, 2015; July 1, 1994.*

- (v) Ventilation systems serving the procedure or recovery rooms shall not be tied in with the soiled holding or work rooms, janitors' closets or locker rooms if the air is to be recirculated in any manner.
- (vi) Air handling duct systems shall not have duct linings.
- (vii) The following general air pressure relationships to adjacent areas and ventilation rates shall apply:

Area	Pressure Relationship	Minimum Air Changes/Hour
Procedure	P	6
Recovery	P	6
Soiled work, Janitor's closet, Toilets, Soiled holding	N	10
Clean work or Clean holding	P	4

(P = positive pressure N = negative pressure)

(2) **Plumbing And Other Piping Systems.**

(a) **Medical Gas and Vacuum Systems**

(i) Piped-in medical gas and vacuum systems, if installed, shall meet the requirements of NFPA-99-2012, type one system, which is hereby incorporated by reference including subsequent amendments and editions. Copies of NFPA-99-2012 may be purchased from the National Fire Protection Association, 1 Batterymarch Park, P.O. Box 9101, Quincy, MA 02269-9101, or accessed electronically free of charge at <http://www.nfpa.org>.

(ii) If inhalation anesthesia is used in any concentration, the facility must meet the requirements of NFPA 70-2011 and NFPA 99-2012, current editions relating to inhalation anesthesia, which are hereby incorporated by reference including subsequent amendments and editions. Copies of NFPA 70-2011 and NFPA 99-2012 may be purchased from the National Fire Protection Association, 1 Batterymarch Park, P.O. Box 9101, Quincy, MA 02269-9101, or accessed electronically free of charge at <http://www.nfpa.org>.

(b) Lavatories and sinks for use by medical personnel shall have the water supply spout mounted so that its discharge point is a minimum distance

of five inches above the rim of the fixture with mixing type fixture valves that can be operated without the use of the hands.

(c) Hot water distribution systems shall provide hot water at hand washing and bathing facilities at a minimum temperature of 100 degrees F. and a maximum temperature of 116 degrees F.

(d) Floor drains shall not be installed in procedure rooms.

(e) Building drainage and waste systems shall be designed to avoid installations in the ceiling directly above procedure rooms.

(3) **Electrical Requirements.**

(a) Procedure and recovery rooms, and paths of egress from these rooms to the outside shall have at a minimum, listed battery backup lighting units of one and one-half hour capability that will automatically provide at least five foot candles of illumination at the floor in the event needed for a utility or local lighting circuit failure.

(b) Electrically operated medical equipment necessary for the safety of the patient shall have, at a minimum, battery backup.

(c) Receptacles located within six feet of sinks or lavatories shall be ground-fault protected.

(d) At least one wired-in, ionization-type smoke detector shall be within 15 feet of each procedure or recovery room entrance.

(4) Buildings systems and medical equipment shall have preventative maintenance conducted as recommended by the equipment manufacturers' or installers' literature to assure operation in compliance with manufacturer's instructions.

*History Note: Authority G.S. 14-45.1(a); 143B-10;*

*Eff. February 1, 1976;  
Readopted Eff. December 19, 1977;  
Amended Eff. October 1, 2015; July 1, 1994; December 1, 1989.*

**10A NCAC 14E .0207 AREA REQUIREMENTS**

The following areas shall comply with Rule .0206 of this Section, and are considered minimum requirements for clinics that are certified by the Division to perform abortions:

- (1) receiving area;
- (2) examining room;
- (3) preoperative preparation and holding room;
- (4) individual patient locker facilities or equivalent;
- (5) procedure room;
- (6) recovery room;
- (7) clean workroom;
- (8) soiled workroom;
- (9) medicine room may be defined as area in the clean workroom if a self-contained secure cabinet complying with security requirements of state and federal laws is provided;
- (10) separate and distinct areas for storage and handling clean and soiled linen;
- (11) patient toilet;
- (12) personnel lockers and toilet facilities;
- (13) laboratory;
- (14) nourishment station with storage and preparation area for serving meals or in-between meal snacks;
- (15) janitor's closets;
- (16) adequate space and equipment for assembling, sterilizing and storing medical and surgical supplies;
- (17) storage space for medical records; and
- (18) office space for nurses' charting, doctors' charting, communications, counseling, and business functions.

*History Note: Authority G.S. 14-45.1(a); 143B-10;  
Eff. February 1, 1976;  
Readopted Eff. December 19, 1977;  
Amended Eff. October 1, 2015; December 24, 1979.*

**10A NCAC 14E .0302 GOVERNING AUTHORITY**

(a) The governing authority, as defined in Rule .0101(6) of this Subchapter, shall appoint a chief executive officer or a designee of the clinic to represent the governing authority and shall define his or her authority and duties in writing. This person shall be responsible for the management of the clinic, implementation of the policies of the governing authority and authorized and empowered to carry out the provisions of these Rules.

(b) The chief executive officer or designee shall designate, in writing, a person to act on his or her behalf during his or her absence. In the absence of the chief executive officer or designee, the person on the grounds of the clinic who is designated by the chief executive officer or designee to be in charge of the clinic shall have access to all areas in the clinic related to patient care and to the operation of the physical plant.

(c) When there is a planned change in ownership or in the chief executive officer, the governing authority of the clinic shall notify the Division in writing of the change.

(d) The clinic's governing authority shall adopt operating policies and procedures that shall:

- (1) specify the individual to whom responsibility for operation and maintenance of the clinic is delegated and methods established by the governing authority for holding such individuals responsible;
- (2) provide for at least annual meetings of the governing authority, for which minutes shall be maintained; and
- (3) maintain a policies and procedures manual designed to ensure professional and safe care for the patients which shall be reviewed, and revised when necessary, at least annually, and shall include provisions for administration and use of the clinic, compliance, personnel quality assurance, procurement of outside services and consultations, patient care policies, and services offered.

(e) When the clinic contracts with outside vendors to provide services such as laundry, or therapy services, the governing authority shall be responsible to assure the supplier meets the same local and state standards the clinic would have to meet if it were providing those services itself using its own staff.

(f) The governing authority shall provide for the selection and appointment of the professional staff and the granting of clinical privileges and shall be responsible for the professional conduct of these persons.

(g) The governing authority shall be responsible for ensuring the availability of supporting personnel to meet patient needs and to provide safe patient care.

*History Note: Authority G.S. 14-45.1(a); 143B-10; S.L. 2013-366, s. 4(c);  
Eff. February 1, 1976;  
Readopted Eff. December 19, 1977;  
Amended Eff. October 1, 2015; December 1, 1989.*

**10A NCAC 14E .0303 POLICIES AND PROCEDURES AND ADMINISTRATIVE RECORDS**

(a) The following essential documents and references shall be on file in the administrative office of the clinic:

- (1) documents evidencing control and ownerships, such as deeds, leases, or incorporation or partnership papers;
- (2) policies and procedures of the governing authority, as required by Rule .0302 of this Section;
- (3) minutes of the governing authority meetings;
- (4) minutes of the clinic's professional and administrative staff meetings;
- (5) a current copy of the rules of this Subchapter;
- (6) reports of inspections, reviews, and corrective actions taken related to licensure; and
- (7) contracts and agreements related to licensure to which the clinic is a party.

(b) All operating licenses, permits, and certificates shall be displayed on the licensed premises.

(c) The governing authority shall prepare a manual of clinic policies and procedures for use by employees, medical staff, and contractual physicians to assist them in understanding their responsibilities within the organizational framework of the clinic. These shall include:

- (1) patient selection and exclusion criteria; and clinical discharge criteria;
- (2) policy and procedure for validating the full and true name of the patient;
- (3) policy and procedure for each type of abortion procedure performed at the clinic;
- (4) policy and procedure for the provision of patient privacy in the recovery area of the clinic;
- (5) protocol for determining gestational age as defined in Rule .0101(5) of this Subchapter;
- (6) protocol for referral of patients for whom services have been declined; and
- (7) protocol for discharge instructions that informs patients who to contact for post-procedural problems and questions.

*History Note:* Authority G.S. 14-45.1(a); 143B-10; S.L. 2013-366 s. 4(c);  
 Eff. February 1, 1976;  
 Readopted Eff. December 19, 1977;  
 Amended Eff. October 1, 2015; July 1, 1994.

**10A NCAC 14E .0304 ADMISSION AND DISCHARGE**

(a) There shall be on the premises throughout all hours of operation an employee authorized to receive patients and to make administrative decisions on their disposition.

(b) All patients shall be admitted only under the care of a physician who is currently licensed to practice medicine in North Carolina.

(c) Any patient not discharged within 12 hours following the abortion procedure shall be transferred to a general hospital.

(d) Following admission and prior to obtaining the consent for the procedure, representatives of the clinic's management shall provide to each patient the following information:

- (1) a fee schedule and any extra charges routinely applied;
- (2) the name of the attending physician(s) and hospital admitting privileges, if any. In the absence of admitting privileges a statement to that effect shall be included;
- (3) instructions for post-procedure problems and questions as outlined in Rule .0313(d) of this Section;
- (4) grievance procedures a patient may follow if dissatisfied with the care and services rendered; and
- (5) the telephone number for Complaint Intake of the Division.

*History Note:* Authority G.S. 14-45.1(a); 143B-10;  
 Eff. February 1, 1976;

*Readopted Eff. December 19, 1977;*

*Amended Eff. October 1, 2015; July 1, 1995; July 1, 1994; December 1, 1989.*

**10A NCAC 14E .0305 MEDICAL RECORDS**

(a) A complete and permanent record shall be maintained for all patients including:

- (1) the date and time of admission and discharge;
- (2) the patient's full and true name;
- (3) the patient's address;
- (4) the patient's date of birth;
- (5) the patient's emergency contact information;
- (6) the patient's diagnoses;
- (7) the patient's duration of pregnancy;
- (8) the patient's condition on admission and discharge;
- (9) a voluntarily-signed consent for each surgery or procedure and signature of the physician performing the procedure witnessed by a family member, other patient representative, or facility staff member;
- (10) the patient's history and physical examination including identification of pre-existing or current illnesses, drug sensitivities or other idiosyncrasies having a bearing on the procedure or anesthetic to be administered; and documentation that indicates all items listed in Rule .0304(d) of this Section were provided to the patient.

(b) All other pertinent information such as pre- and post-procedure instructions, laboratory report, drugs administered, report of abortion procedure, and follow-up instruction, including family planning advice, shall be recorded and authenticated by signature, date, and time.

(c) If Rh is negative, the significance shall be explained to the patient and so recorded. The patient in writing may reject Rh immunoglobulin. A written record of the patient's decision shall be a permanent part of her medical record.

(d) An ultrasound examination shall be performed and the results, including gestational age, placed in the patient's medical record for any patient who is scheduled for an abortion procedure.

(e) The clinic shall maintain a daily procedure log of all patients receiving abortion services. This log shall contain at least the following:

- (1) the patient name;
- (2) the estimated length of gestation;
- (3) the type of procedure;
- (4) the name of physician;
- (5) the name of Registered Nurse on duty; and
- (6) the date and time of procedure.

(f) Medical records shall be the property of the clinic and shall be preserved or retained in the State of North Carolina for a period of not less than 10 years from the date of the most recent discharge, unless the client is a minor, in which case the record must be retained until three years after the client's 18th birthday, regardless of change of clinic ownership or administration. Such medical records shall be made available to the Division upon request and shall not be removed from the premises where they are retained except by subpoena or court order.

(g) The clinic shall have a written plan for destruction of medical records to identify information to be retained and the manner of destruction to ensure confidentiality of all material.

(h) Should a clinic cease operation, arrangements shall be made for preservation of records for at least 10 years. The clinic shall send written notification to the Division of these arrangements.

*History Note: Authority G.S. 14-45.1(a); 143B-10; S.L. 2013-366, s. 4(c);*

*Eff. February 1, 1976;*

*Readopted Eff. December 19, 1977;*

*Amended Eff. October 1, 2015; July 1, 1994; December 1, 1989.*

**10A NCAC 14E .0306 PERSONNEL RECORDS**

(a) Personnel Records:

- (1) A record of each employee shall be maintained that includes the following:
  - (A) employee's identification;
  - (B) application for employment that includes education, training, experience and references;
  - (C) resume of education and work experience;
  - (D) verification of valid license (if required), education, training, and prior employment experience; and
  - (E) verification of references.
- (2) Personnel records shall be confidential.
- (3) Notwithstanding the requirement found in Subparagraph (b)(2) of this Rule, representatives of the Division conducting an inspection of the clinic shall have the right to inspect personnel records.

(b) Job Descriptions:

- (1) The clinic shall have a written description that describes the duties of every position.
- (2) Each job description shall include position title, authority, specific responsibilities, and minimum qualifications. Qualifications shall include education, training, experience, special abilities, and valid license or certification required.
- (3) The clinic shall review annually and, if needed, update all job descriptions. The clinic shall provide the updated job description to each employee or contractual employee assigned to the position.

(c) All persons having direct responsibility for patient care shall be at least 18 years of age.

(d) The clinic shall provide an orientation program to familiarize each new employee or contractual employee with the clinic, its policies, and the employee's job responsibilities.

(e) The governing authority shall be responsible for implementing health standards for employees, as well as contractual employees, which are consistent with recognized professional practices for the prevention and transmission of communicable diseases.

(f) Employee and contractual employee records for health screening as defined in Rule .0101(7) of this Subchapter,

education, training, and verification of professional certification shall be available for review by the Division.

*History Note: Authority G.S. 14-45.1(a); 14-45.1(a1); 143B-10; S.L. 2013-366, s. 4(c);*

*Eff. February 1, 1976;*

*Readopted Eff. December 19, 1977;*

*Amended Eff. October 1, 2015; July 1, 1994.*

**10A NCAC 14E .0307 NURSING SERVICE**

(a) The clinic shall have an organized nursing staff under the supervision of a nursing supervisor who is currently licensed as a Registered Nurse and who has responsibility and accountability for all nursing services.

(b) The nursing supervisor shall be responsible and accountable to the chief executive officer or designee for:

- (1) provision of nursing services to patients; and
- (2) developing a nursing policy and procedure manual and written job descriptions for nursing personnel.

(c) The clinic shall have the number of licensed and ancillary nursing personnel on duty to assure that staffing levels meet the total nursing needs of patients based on the number of patients in the clinic and their individual nursing care needs.

(d) There shall be at least one Registered Nurse with experience in post-operative or post-partum care who is currently licensed to practice professional nursing in North Carolina on duty in the clinic at all times patients are in the clinic.

*History Note: Authority G.S. 14-45.1(a); 143B-10; S.L. 2013-366, s. 4(c);*

*Eff. February 1, 1976;*

*Readopted Eff. December 19, 1977;*

*Amended Eff. October 1, 2015; December 1, 1989.*

**10A NCAC 14E .0308 QUALITY ASSURANCE**

(a) The governing authority shall establish a quality assurance program for the purpose of providing standards of care for the clinic. The program shall include the establishment of a committee that shall evaluate compliance with clinic procedures and policies.

(b) The committee shall determine corrective action, if necessary.

(c) The committee shall consist of at least one physician who is not an owner, the chief executive officer or designee, and other health professionals. The committee shall meet at least once per quarter.

(d) The functions of the committee shall include development of policies for selection of patients, approval for adoption of policies, review of credentials for staff privileges, peer review, tissue inspection, establishment of infection control procedures, and approval of additional procedures to be performed in the clinic.

(e) Records shall be kept of the activities of the committee for a period not less than 10 years. These records shall include:

- (1) reports made to the governing authority;
- (2) minutes of committee meetings including date, time, persons attending, description and results of cases reviewed, and recommendations made by the committee; and
- (3) information on any corrective action taken.

(f) Orientation, training, or education programs shall be conducted to correct deficiencies that are uncovered as a result of the quality assurance program.

*History Note: Authority G.S. 14-45.1(a); 143B-10; S.L. 2013-366, s. 4(c); Eff. October 1, 2015.*

**10A NCAC 14E .0309 LABORATORY SERVICES**

(a) Each clinic shall have the capability to provide or obtain laboratory tests required in connection with the procedure to be performed.

(b) The governing authority shall establish written policies requiring examination by a pathologist of all surgical specimens except for those types of specimens that the governing authority has determined do not require examination.

(c) Each patient shall have the following performed and a record of the results placed in the patient's medical record prior to the abortion:

- (1) pregnancy testing, except when a positive diagnosis of pregnancy has been established by ultrasound;
- (2) anemia testing (hemoglobin or hematocrit); and
- (3) Rh factor testing.

(d) Patients requiring the administration of blood shall be transferred to a local hospital having blood bank facilities.

(e) The clinic shall maintain a manual in a location accessible by employees, that includes the procedures, instructions, and manufacturer's instructions for each test procedure performed, including:

- (1) sources of reagents, standard and calibration procedures, and quality control procedures; and
- (2) information concerning the basis for the listed "normal" ranges.

(f) The clinic shall perform and document, at least quarterly, calibration of equipment and validation of test results.

*History Note: Authority G.S. 14-45.1(a); 143B-10; S.L. 2013-366, s. 4(c); Eff. February 1, 1976; Readopted Eff. December 19, 1977; Amended Eff. October 1, 2015; July 1, 1994; December 1, 1989; October 28, 1981.*

**10A NCAC 14E .0310 EMERGENCY BACK-UP SERVICES**

(a) Each clinic shall have a written plan for the transfer of emergency cases from the clinic to a nearby hospital when hospitalization becomes necessary.

(b) The clinic shall have procedures, personnel, and suitable equipment to handle medical emergencies which may arise in connection with services provided by the clinic.

(c) The clinic shall have a written agreement between the clinic and a hospital to facilitate the transfer of patients who are in need of emergency care. A clinic that has documentation of its efforts to establish such a transfer agreement with a hospital that provides emergency services and has been unable to secure such an agreement shall be considered to be in compliance with this Rule.

(d) The clinic shall provide intervention for emergency situations. These provisions shall include:

- (1) basic cardio-pulmonary life support;
- (2) emergency protocols for:
  - (A) administration of intravenous fluids;
  - (B) establishing and maintaining airway support;
  - (C) oxygen administration;
  - (D) utilizing a bag-valve-mask resuscitator with oxygen reservoir;
  - (E) utilizing a suction machine; and
  - (F) utilizing an automated external defibrillator;
- (3) emergency lighting available in the procedure room as set forth in Rule .0206 of this Subchapter; and
- (4) ultrasound equipment.

*History Note: Authority G.S. 14-45.1(a); 143B-10; S.L. 2013-366, s. 4(c); Eff. February 1, 1976; Readopted Eff. December 19, 1977; Amended Eff. October 1, 2015; July 1, 1994; December 24, 1979.*

**10A NCAC 14E .0311 SURGICAL SERVICES**

(a) The procedure room shall be maintained exclusively for surgical procedures and shall be so designed and maintained to provide an atmosphere free of contamination by pathogenic organisms. The clinic shall establish procedures for infection control and universal precautions.

(b) Tissue Examination:

- (1) The physician performing the abortion is responsible for examination of all products of conception (P.O.C.) prior to patient discharge. Such examination shall note specifically the presence or absence of chorionic villi and fetal parts, or the amniotic sac. The results of the examination shall be recorded in the patient's medical record.
- (2) If adequate tissue is not obtained based on the gestational age, ectopic pregnancy or an incomplete procedure shall be considered and evaluated by the physician performing the procedure.
- (3) The clinic shall establish procedures for obtaining, identifying, storing, and transporting specimens.

*History Note: Authority G.S. 14-45.1(a); 143B-10; Eff. February 1, 1976; Readopted Eff. December 19, 1977; Amended Eff. October 1, 2015; July 1, 1994; December 1, 1989; November 1, 1984; September 1, 1984.*

**10A NCAC 14E .0313 POST-OPERATIVE CARE**

(a) A patient whose pregnancy is terminated on an ambulatory basis shall be observed in the clinic to ensure that no post-operative complications are present. Thereafter, patients

may be discharged according to a physician's order and the clinic's protocols.

(b) Any patient having an adverse condition or complication known or suspected to have occurred during or after the performance of the abortion shall be transferred to a hospital for evaluation or admission.

(c) The following criteria shall be documented prior to discharge:

- (1) the patient shall be ambulatory with a stable blood pressure and pulse; and
- (2) bleeding and pain shall be controlled.

(d) Written instructions shall be issued to all patients in accordance with the orders of the physician in charge of the abortion procedure and shall include the following:

- (1) symptoms and complications to be looked for; and
- (2) a dedicated telephone number to be used by the patients should any complication occur or question arise. This number shall be answered by a person 24 hours a day, seven days a week.

(e) The clinic shall have a defined protocol for triaging post-operative calls and complications. This protocol shall establish a pathway for physician contact to ensure ongoing care of complications that the operating physician is incapable of managing.

*History Note: Authority G.S. 14-45.1(a); 143B-10; Eff. February 1, 1976; Readopted Eff. December 19, 1977; Amended Eff. October 1, 2015; December 24, 1979.*

**10A NCAC 14E .0315 HOUSEKEEPING**

Clinics that are certified by the Division to perform abortions shall meet the standards for sanitation as required by the Division of Public Health, Environmental Health Section, in the rules and regulations governing the sanitation of hospitals, nursing homes, adult care homes, and other institutions, set forth in 15A NCAC 18A .1300, including subsequent amendments and editions, with special emphasis on the following:

- (1) the floors, walls, woodwork and windows must be cleaned, and accumulated waste material must be removed at least daily;
- (2) the premises must be kept free from rodents and insect infestation;
- (3) bath and toilet facilities must be maintained in a clean and sanitary condition at all times; and
- (4) linen that comes directly in contact with the patient shall be provided for each individual patient. No such linen shall be interchangeable from one patient to another before being cleaned, sterilized, or laundered.

Copies of 15A NCAC 18A .1300 may be obtained at no charge from the Division of Public Health, Environmental Health Section, 1632 Mail Service Center, Raleigh, NC, 27699-1632, or accessed electronically free of charge from the Office of Administrative Hearings at <http://www.ncoah.com>.

*History Note: Authority G.S. 14-45.1(a); 143B-10; Eff. February 1, 1976; Readopted Eff. December 19, 1977;*

*Amended Eff. October 1, 2015; December 1, 1989.*

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**10A NCAC 15 .0502 DEFINITIONS**

In addition to terms found in Rule .0104 of this Chapter and 10 CFR 34.3, the following definitions shall apply to this Section. 10 CFR 34.3 is incorporated by reference to include subsequent amendments and editions, and can be accessed at: <http://www.nrc.gov/reading-rm/doc-collections/cfr/part034/part034-0003.html> at no cost:

- (1) "Collimator" means a radiation shield that is placed on the end of the guide tube or directly onto a radiographic exposure device to limit the size, shape, and direction of the primary radiation when the sealed source is cranked into position to make a radiographic exposure.
- (2) "Control device," commonly called a crank-out, means the control cable, the protective sheath, and control drive mechanism used to move the sealed source from the shielded position in the radiographic device or camera to an unshielded position outside the device for the purpose of making a radiographic exposure.
- (3) "Field examination" means a practical examination.
- (4) "Independent certifying organization" means an independent organization that meets all of the requirements of Rule .0525 of this Section.
- (5) "Periodic training" means instruction provided at least every 12 months by the licensee or registrant for operators and individuals subject to the requirements of Rule .1003 of this Chapter on radiation safety aspects of radiography. The topics shall include the results of internal inspections, new procedures or equipment, accidents or errors that have been observed, and opportunities for employees to ask safety questions.
- (6) "Projection sheath" means a guide tube.
- (7) "Radiation safety officer" means an individual named by the licensee or registrant who has knowledge of and responsibility for the overall radiation safety program on behalf of the licensee or registrant and who meets the requirements of Rule .0510(h) of this Section.

*History Note: Authority G.S. 104E-7; 10 CFR 34.3; Eff. February 1, 1980; Amended Eff. January 1, 1994; June 1, 1989; Temporary Amendment Eff. August 20, 1994, for a period of 180 days or until the permanent rule becomes effective, whichever is sooner; Amended Eff. April 1, 1999; May 1, 1995; Transferred and Recodified from 15A NCAC 11 .0502 Eff. February 1, 2015; Amended Eff. October 1, 2015.*

**10A NCAC 15 .0518 RADIATION MACHINES**

*History Note:* Authority G.S. 104E-7; 104E-12(a)(1);  
 Eff. February 1, 1980;  
 Amended Eff. June 1, 1993;  
 Temporary Amendment Eff. August 20, 1994 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;  
 Amended Eff. May 1, 1995;  
 Transferred and Recodified from 15A NCAC 11 .0518 Eff. February 1, 2015;  
 Repealed Eff. October 1, 2015.

**10A NCAC 15 .0801 PURPOSE AND SCOPE**

(a) This Section provides special requirements for use of ionizing radiation generating devices (RGDs) operating above five thousand electron volts (5 keV), but below one million electron volts (1 MeV) that are in addition to requirements in the other sections of this Chapter.

(b) This Section does not pertain to radiation safety requirements for x-ray equipment that is covered in other sections of this Chapter (e.g., x-rays in the healing arts in Section .0600 of this Chapter, and particle accelerators in Section .0900 of this Chapter).

*History Note:* Authority G.S. 104E-7;  
 Eff. February 1, 1980;  
 Transferred and Recodified from 15A NCAC 11 .0801 Eff. February 1, 2015;  
 Amended Eff. October 1, 2015.

**10A NCAC 15 .0802 DEFINITIONS**

In addition to terms found in Rule .0104 of this Chapter the following definitions shall apply to this Section:

- (1) "Accredited bomb squad" means a law enforcement agency utilizing certified bomb technicians.
- (2) "Analytical RGD equipment" means equipment that uses electronic means to generate ionizing radiation for the purpose of examining the microstructure of materials, i.e. x-ray diffraction and x-ray spectroscopy.
- (3) "Analytical RGD system" means a group of local and remote components utilizing x-rays to determine the elemental composition or to examine the microstructure of materials.
- (4) "Bomb detection RGDs" means RGDs used for the sole purpose of remotely detecting explosive devices.
- (5) "Certified bomb technician" means a member of an accredited bomb squad who has completed the FBI Hazardous Devices School. Information pertaining to this program can be found on the school website at <http://www.fbi.gov/about-us/cirg/hazardous-devices>.
- (6) "Certifiable cabinet x-ray system" means an existing uncertified RGD that has been modified to meet the certification requirements

- (7) "Certified cabinet x-ray system" means an RGD utilized in an enclosed, interlocked cabinet, such that the radiation machine will not operate unless all openings are securely closed. These systems shall be certified in accordance with 21 CFR 1010.2 as incorporated by reference in Rule .0117 of this Chapter, as being manufactured and assembled pursuant to the provisions of 21 CFR 1020.40 as incorporated by reference in Rule .0117 of this Chapter.
- (8) "Collimator" means a device or mechanism by which the x-ray beam is restricted in size.
- (9) "Control panel" means that part of the x-ray control upon which are mounted the switches, knobs, pushbuttons, and other hardware necessary for manually setting the technique factors.
- (10) "Electron Beam Device" means any device using electrons below 1MeV to heat, join, or otherwise irradiate materials.
- (11) "Enclosed beam RGD" means an RGD with all possible x-ray beam paths contained in a chamber, coupled chambers, or other beam-path-confinement devices to prevent any part of the body from intercepting the beam during normal operations. Normal access to the primary beam path, such as a sample chamber door, shall be interlocked with the high voltage of the x-ray tube or the shutter for the beam to be considered "enclosed." An open-beam device placed in an interlocked enclosure is considered an "enclosed beam" unless there are provisions for routine bypassing of the interlocks.
- (12) "Fail-safe characteristics" means a design feature that causes the radiation beam to terminate, port shutters to close, or otherwise prevents emergence of the primary beam, upon the failure of a safety or warning device. For example, if an "X-ray On" light indicator or shutter indicator or interlock fails, the radiation beam shall terminate.
- (13) "Hand-held x-ray system" means any device or equipment that is portable and used for similar purposes as analytical RGD equipment.
- (14) "Hybrid gauge" means an x-ray gauge device utilizing both x-ray and radioactive sources.
- (15) "Industrial radiography" means RGDs used to make radiographic images to examine the structure of materials by nondestructive methods. These RGDs shall not be contained in a cabinet and are not permanent installations.
- (16) "Ion implantation equipment, low-energy" means any closed device operating below 1MeV used to accelerate elemental ions and implant them in other materials.

- (17) "Leakage radiation" means radiation emanating from the source assembly housing except for:
  - (A) the primary beam;
  - (B) scatter radiation emanating from other components (e.g., shutter or collimator); and
  - (C) radiation produced when the beam on switch or timer is not activated.
- (18) "Local components" means part of an RGD x-ray system and include areas that are struck by x-rays such as radiation source housings, port and shutter assemblies, collimators, sample holders, cameras, goniometers, detectors, and shielding, but do not include power supplies, transformers, amplifiers, readout devices, and control panels.
- (19) "Mobile RGD" means RGD equipment mounted on a permanent base with wheels or casters for moving while assembled.
- (20) "Normal operating procedures" means step-by-step instructions necessary to accomplish a task. These procedures shall include sample insertion and manipulation, equipment alignment, routine maintenance by the registrant, and data recording procedures that are related to radiation safety.
- (21) "Open-beam RGD" means a device or system designed in such a way that the primary beam is not completely enclosed during normal operation and used for analysis, gauging, or imaging in which an individual could accidentally place some part of their body in the primary beam or stray radiation path during normal operation.
- (22) "Permanent radiographic installation" means an RGD utilized in an enclosed shielded room, cell, or vault that allows entry when the RGD is not energized.
- (23) "Portable RGD" means RGD equipment designed to be carried.
- (24) "Primary beam" means radiation that passes through an aperture of the source assembly housing by a direct path from the radiation source.
- (25) "Radiation generating device (RGD)" means any system, device, subsystem, or machine component that may generate by electronic means x-rays or particle radiation above 5 keV, but below 1 MeV, and not used for healing arts on humans or animals. Examples of RGDs are the following:
  - (A) analytical RGD equipment;
  - (B) certified and certifiable cabinet x-ray systems;
  - (C) gauging devices using x-ray sources;
  - (D) hybrid gauging devices;
  - (E) e-beam welders;
  - (F) baggage scanners;
  - (G) industrial radiography RGDs; and
- (H) permanent radiographic installations.
- (26) "Remote components" means parts of an RGD x-ray system that are not struck by x-rays such as power supplies, transformers, amplifiers, readout devices, and control panels.
- (27) "Scattered radiation" means radiation, other than leakage radiation, that during passage through matter, has been deviated in direction or has been modified by a decrease in energy.
- (28) "Shutter" means an adjustable device, generally made of lead or other high atomic number material, fixed to a source assembly housing to intercept, block, or collimate the primary beam.
- (29) "Source" means the point of origin of the radiation, such as the focal spot of an x-ray tube.
- (30) "Stationary RGD" means RGD equipment that is installed or placed in a fixed location.
- (31) "Stray radiation" means the sum of leakage and scatter radiation emanating from the source assembly or other components except for the primary beam, and radiation produced when the beam on switch or timer is not activated.
- (32) "X-ray generator" means the part of an x-ray system that provides the accelerating (high) voltage and current for the x-ray tube.
- (33) "X-ray gauge" means an x-ray producing device designed and manufactured for the purpose of detecting, measuring, gauging, or controlling thickness, density, level, or interface location of manufactured products.

*History Note: Authority G.S. 104E-7; Eff. February 1, 1980; Transferred and Recodified from 15A NCAC 11 .0802 Eff. February 1, 2015; Amended Eff. October 1, 2015.*

**10A NCAC 15 .0803 EQUIPMENT REQUIREMENTS**

- (a) Certified cabinet x-ray systems shall meet the requirements of 21 CFR 1020.40 as incorporated by reference in Rule .0117(a)(3) of this Chapter.
- (b) All certified and certifiable cabinet x-ray systems shall:
  - (1) be constructed so that, the radiation emitted from the system shall not exceed an exposure of 0.5 milliroentgen (mR) in one hour at any point five centimeters outside the external surface; and
  - (2) have a fail-safe interlock that prevents irradiation when the cabinet, chamber, or coupled chambers are open.
- (c) Open-beam analytical RGD systems shall be equipped with a safety device that prevents the entry of any portion of an individual's body into the primary x-ray beam path that causes the beam to be shut off upon entry into its path.
- (d) Open-beam analytical RGDs shall be provided with a visible and legible indication of:

- (1) x-ray tube status (ON-OFF) located near the radiation source housing, if the primary beam is controlled in this manner; or
  - (2) shutter status (OPEN-CLOSED) or beam status (ON-OFF) located near each port on the radiation source housing, if the primary beam is controlled in this manner.
- (e) Warning devices on open-beam analytical RGDs shall be labeled so that their purpose is identified. On open-beam analytical RGDs installed after February 1, 1980, warning devices and lights shall have fail-safe characteristics.
- (f) Unused ports on radiation source housings for open-beam RGDs shall be secured in the closed position in a manner that will prevent unintended opening.
- (g) Each port on the radiation source housing on open-beam analytical RGDs installed after February 1, 1980 and designed to accommodate interchangeable components shall be equipped with a shutter that cannot be opened unless a collimator or a component coupling is connected to the port.
- (h) Portable open-beam analytical RGDs that shall be manufactured to be used hand-held without safety devices are exempt from the requirements of Paragraph (c) of this Rule and shall be constructed according to International Standard IEC 62495 that is incorporated by reference and includes subsequent amendments. This standard can be downloaded for one hundred twenty-one dollars (\$121.00) at the following website: <http://webstore.ansi.org/FindStandards.aspx?SearchString=IEC+62495+Ed.+1.0+en%3a2011&SearchOption=0&PageNum=0&SearchTermsArray=null%7cIEC+62495+Ed.+1.0+en%3a2011%7cnull>.
- (i) A registrant may apply to the agency, as defined in Rule .0104 of this Chapter, for an exemption from the requirement of a safety device. This request shall include:
- (1) a description of the safety devices;
  - (2) the reason safety devices cannot be used; and
  - (3) a description of the alternative methods that will be employed to minimize the possibility of an accidental exposure, including procedures to assure that operators and others in the area will be informed of the absence of safety devices.
- (j) Analytical RGDs shall be provided with a visible and legible label(s) bearing the radiation symbol and the words:
- (1) "CAUTION - HIGH INTENSITY X-RAY BEAM," or words having a similar meaning, near the exit port to identify the location of the beam; and
  - (2) "CAUTION - RADIATION - THIS EQUIPMENT PRODUCES RADIATION WHEN ENERGIZED", or words having a similar meaning, near any switch that energizes an x-ray tube, if the radiation source is an x-ray tube.
- (k) Warning lights labeled with the words "X-RAYS ON," or other words having similar meaning, shall be located:
- (1) near any switch that activates the high voltage to energize an x-ray tube; or
  - (2) in a conspicuous location near the radiation source housing and radiation beam(s) and visible from all instrument access areas.

- (l) Warning lights shall activate when the x-ray tube is energized.
- (m) Each x-ray tube housing shall be:
  - (1) constructed that when all shutters are closed the leakage radiation measured at a distance of five centimeters from its surface is not capable of producing an exposure in excess of 2.5 millirem (mrem)/ (25 microsieverts  $\mu$ Sv) in one hour; and
  - (2) if the tube housing is the primary shielding for the x-ray tube, does not produce x-rays when the housing is opened or disassembled.
- (n) Each x-ray generator shall be supplied with a protection cabinet which limits leakage radiation measured at a distance of five centimeters from its surface such that it is not capable of producing an exposure in excess of 0.25 mrem/2.5 $\mu$ Sv in one hour.
- (o) Permanent radiographic installations and industrial radiography RGDs shall comply with the requirements of Rule .0807 of this Section.

*History Note: Authority G.S. 104E-7; Eff. February 1, 1980; Transferred and Recodified from 15A NCAC 11 .0803 Eff. February 1, 2015; Amended Eff. October 1, 2015.*

**10A NCAC 15 .0804 AREA REQUIREMENTS**

- (a) The local components of RGDs shall be located and arranged to include sufficient shielding or access control to ensure no radiation levels exist in any area surrounding the local components that could result in a dose to an individual present in excess of the dose limits given in Rule .1611(a) of this Chapter.
- (b) Survey Requirements
- (1) Radiation surveys, as set forth in Rule .1613(a) and (b) of this Chapter, of all RGDs sufficient to show compliance with Paragraph (a) of this Rule, shall be performed:
    - (A) within 30 days after initial operation of the device;
    - (B) prior to use following any change in the initial arrangement, including the number or type of local components in the system; and
    - (C) prior to use following any maintenance requiring the disassembly or removal of a local component in the system that could affect the radiation exposure to personnel.
  - (2) A registrant may apply to the agency for approval of procedures differing from those in Subparagraph (b)(1) of this Rule, provided that the registrant demonstrates satisfactory compliance with Paragraph (a) of this Rule.
  - (3) Surveys shall be performed with a radiation survey instrument capable of the following:
    - (A) measuring the radiation energies of the system surveyed;

- (B) confirming that the radiation limits of this Section are met; and
- (C) calibrated according to the manufacture's recommended frequency or at least annually when a frequency is not recommended.

(c) Each area of use or room containing RGDs shall be conspicuously posted with caution signs in accordance with the requirements of Rule .1623 of this Chapter, bearing the radiation caution symbol and the words "CAUTION - X-RAY EQUIPMENT," or words having a similar meaning.

*History Note: Authority G.S. 104E-7(a)(2); Eff. February 1, 1980; Amended Eff. January 1, 1994; Transferred and Recodified from 15A NCAC 11 .0804 Eff. February 1, 2015; Amended Eff. October 1, 2015.*

**10A NCAC 15 .0805 OPERATING REQUIREMENTS**

- (a) RGDs shall be operated by individuals that have completed the training requirements of Rule .0806 of this Section.
- (b) Normal operating procedures shall be written and available to all RGD operators and support staff.
- (c) No individual shall be permitted to operate RGDs in any manner other than that specified in the operating procedures unless the person has obtained written approval of the individual responsible for radiation safety, or Radiation Safety Officer (RSO) as defined in Rule .0104 of this Chapter.
- (d) No individual shall bypass a safety device unless the person has obtained the approval of the person responsible for radiation safety or RSO. This process shall be incorporated into the radiation protection program by the RSO, as set forth in Rule .1613(a) of this Chapter, and the operating procedures as set forth in Rule .0603(a)(1)(B) of this Chapter. The written approval, as granted by the RSO, shall include an expiration date. When a safety device has been bypassed, a legible sign bearing the words "SAFETY DEVICE NOT WORKING," or words having a similar meaning shall be placed on the radiation source housing and the control panel during the bypassing period.
- (e) Prior to an individual modifying the:
  - (1) x-ray tube system, resulting in the removal of tube housings, covers, or shielding materials;
  - (2) shutters;
  - (3) collimators; or
  - (4) beam stops;
 the individual shall determine the tube is off and will remain off until safe conditions have been restored.
- (f) Safety devices including interlocks, shutters, and warning lights shall be tested for proper operation on all RGDs in operation once annually. Records of the testing shall be retained by the registrant for three years.
- (g) Individuals shall not hold a sample or object being irradiated.

*History Note: Authority G.S. 104E-7; 104E-12; Eff. February 1, 1980; Transferred and Recodified from 15A NCAC 11 .0805 Eff. February 1, 2015; Amended Eff. October 1, 2015.*

**10A NCAC 15 .0806 PERSONNEL REQUIREMENTS**

- (a) Personnel operating or maintaining RGDs shall comply with the following:
  - (1) No person shall be permitted to operate or maintain RGDs unless the person has received instruction in the operating and emergency procedures for the RGD and instruction that is in accordance with Rule .1003 of this Chapter.
  - (2) Each registrant operating or maintaining RGDs shall maintain, for inspection by the agency, records of training that demonstrate the requirements of this Rule have been satisfied.
- (b) The registrant shall provide ring or wrist personnel monitoring equipment to:
  - (1) individuals using open-beam RGDs not equipped with a safety device; and
  - (2) individuals maintaining RGDs if the maintenance procedures require the presence of a primary x-ray beam when any local component in the RGD is disassembled or removed.

*History Note: Authority G.S. 104E-7; 104E-11; 104E-12; Eff. February 1, 1980; Transferred and Recodified from 15A NCAC 11 .0806 Eff. February 1, 2015; Amended Eff. October 1, 2015.*

**10A NCAC 15 .0807 PERMANENT RADIOGRAPHIC INSTALLATIONS AND INDUSTRIAL RADIOGRAPHY RGDS**

- (a) Permanent radiographic installations and industrial radiography RGDs are exempt from the requirements of the rules of this Section except Rule .0802 and Rule .0804(a), (b)(1)(A), (b)(1)(C), (b)(2), and (b)(3).
- (b) Permanent radiographic installations and industrial radiography RGDs shall comply with the following rules of this Chapter:
  - (1) .0501;
  - (2) .0502;
  - (3) .0506;
  - (4) .0509-.0520;
  - (5) .0522;
  - (6) .0523(a)(1);
  - (7) .0523(a)(3);
  - (8) .0523(a)(6) -.0523(a)(15);
  - (9) .0523(b)(1) -.0523(b)(4);
  - (10) .0523(b)(6) -.0523(b)(7);
  - (11) .0523(b)(9) -.0523(b)(12);
  - (12) .0523(c); and
  - (13) .0525.

*History Note: Authority G.S. 104E-7; Eff. October 1, 2015.*

**10A NCAC 15 .0808 APPLICABLE RULES FOR BOMB DETECTION RGDs**

Bomb detection RGDs utilized by accredited bomb squads and certified bomb technicians shall comply with the following rules of this Chapter:

- (1) .0501;
- (2) .0502;
- (3) .0509;
- (4) .0511-.0520 except for the requirements for a direct reading pocket dosimeter and operating alarm ratemeter in .0512(a);
- (5) .0522;
- (6) .0523(a)(1);
- (7) .0523(a)(3);
- (8) .0523(a)(6) -.0523(a)(15);
- (9) .0523(b)(1) -.0523(b)(4);
- (10) .0523(b)(6) -.0523(b)(7);
- (11) .0523(b)(9) -.0523(b)(12);
- (12) .0523(c); and
- (13) .0525.

*History Note: Authority G.S. 104E-7; Eff. October 1, 2015.*

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**10A NCAC 41A .0101 REPORTABLE DISEASES AND CONDITIONS**

(a) The following named diseases and conditions are declared to be dangerous to the public health and are hereby made reportable within the time period specified after the disease or condition is reasonably suspected to exist:

- (1) acquired immune deficiency syndrome (AIDS) - 24 hours;
- (2) anthrax - immediately;
- (3) botulism - immediately;
- (4) brucellosis - 7 days;
- (5) campylobacter infection - 24 hours;
- (6) chancroid - 24 hours;
- (7) chikungunya virus infection - 24 hours;
- (8) chlamydial infection (laboratory confirmed) - 7 days;
- (9) cholera - 24 hours;
- (10) Creutzfeldt-Jakob disease - 7 days;
- (11) cryptosporidiosis - 24 hours;
- (12) cyclosporiasis - 24 hours;
- (13) dengue - 7 days;
- (14) diphtheria - 24 hours;
- (15) Escherichia coli, shiga toxin-producing - 24 hours;
- (16) ehrlichiosis - 7 days;
- (17) encephalitis, arboviral - 7 days;
- (18) foodborne disease, including Clostridium perfringens, staphylococcal, Bacillus cereus, and other and unknown causes - 24 hours;
- (19) gonorrhea - 24 hours;
- (20) granuloma inguinale - 24 hours;
- (21) Haemophilus influenzae, invasive disease - 24 hours;

- (22) Hantavirus infection - 7 days;
- (23) Hemolytic-uremic syndrome - 24 hours;
- (24) Hemorrhagic fever virus infection - immediately;
- (25) hepatitis A - 24 hours;
- (26) hepatitis B - 24 hours;
- (27) hepatitis B carriage - 7 days;
- (28) hepatitis C, acute - 7 days;
- (29) human immunodeficiency virus (HIV) infection confirmed - 24 hours;
- (30) influenza virus infection causing death - 24 hours;
- (31) legionellosis - 7 days;
- (32) leprosy - 7 days;
- (33) leptospirosis - 7 days;
- (34) listeriosis - 24 hours;
- (35) Lyme disease - 7 days;
- (36) lymphogranuloma venereum - 7 days;
- (37) malaria - 7 days;
- (38) measles (rubeola) - 24 hours;
- (39) meningitis, pneumococcal - 7 days;
- (40) meningococcal disease - 24 hours;
- (41) Middle East respiratory syndrome (MERS) - 24 hours;
- (42) monkeypox - 24 hours;
- (43) mumps - 7 days;
- (44) nongonococcal urethritis - 7 days;
- (45) novel influenza virus infection - immediately;
- (46) plague - immediately;
- (47) paralytic poliomyelitis - 24 hours;
- (48) pelvic inflammatory disease - 7 days;
- (49) psittacosis - 7 days;
- (50) Q fever - 7 days;
- (51) rabies, human - 24 hours;
- (52) Rocky Mountain spotted fever - 7 days;
- (53) rubella - 24 hours;
- (54) rubella congenital syndrome - 7 days;
- (55) salmonellosis - 24 hours;
- (56) severe acute respiratory syndrome (SARS) - 24 hours;
- (57) shigellosis - 24 hours;
- (58) smallpox - immediately;
- (59) Staphylococcus aureus with reduced susceptibility to vancomycin - 24 hours;
- (60) streptococcal infection, Group A, invasive disease - 7 days;
- (61) syphilis - 24 hours;
- (62) tetanus - 7 days;
- (63) toxic shock syndrome - 7 days;
- (64) trichinosis - 7 days;
- (65) tuberculosis - 24 hours;
- (66) tularemia - immediately;
- (67) typhoid - 24 hours;
- (68) typhoid carriage (Salmonella typhi) - 7 days;
- (69) typhus, epidemic (louse-borne) - 7 days;
- (70) vaccinia - 24 hours;
- (71) vibrio infection (other than cholera) - 24 hours;
- (72) whooping cough - 24 hours; and
- (73) yellow fever - 7 days.

(b) For purposes of reporting, "confirmed human immunodeficiency virus (HIV) infection" is defined as a positive virus culture, repeatedly reactive EIA antibody test confirmed by western blot or indirect immunofluorescent antibody test, positive nucleic acid detection (NAT) test, or other confirmed testing method approved by the Director of the State Public Health Laboratory conducted on or after February 1, 1990. In selecting additional tests for approval, the Director of the State Public Health Laboratory shall consider whether such tests have been approved by the federal Food and Drug Administration, recommended by the federal Centers for Disease Control and Prevention, and endorsed by the Association of Public Health Laboratories.

(c) In addition to the laboratory reports for *Mycobacterium tuberculosis*, *Neisseria gonorrhoeae*, and syphilis specified in G.S. 130A-139, laboratories shall report:

(1) Isolation or other specific identification of the following organisms or their products from human clinical specimens:

- (A) Any hantavirus or hemorrhagic fever virus.
- (B) Arthropod-borne virus (any type).
- (C) *Bacillus anthracis*, the cause of anthrax.
- (D) *Bordetella pertussis*, the cause of whooping cough (pertussis).
- (E) *Borrelia burgdorferi*, the cause of Lyme disease (confirmed tests).
- (F) *Brucella* spp., the causes of brucellosis.
- (G) *Campylobacter* spp., the causes of campylobacteriosis.
- (H) *Chlamydia trachomatis*, the cause of genital chlamydial infection, conjunctivitis (adult and newborn) and pneumonia of newborns.
- (I) *Clostridium botulinum*, a cause of botulism.
- (J) *Clostridium tetani*, the cause of tetanus.
- (K) *Corynebacterium diphtheriae*, the cause of diphtheria.
- (L) *Coxiella burnetii*, the cause of Q fever.
- (M) *Cryptosporidium parvum*, the cause of human cryptosporidiosis.
- (N) *Cyclospora cayentanesis*, the cause of cyclosporiasis.
- (O) *Ehrlichia* spp., the causes of ehrlichiosis.
- (P) Shiga toxin-producing *Escherichia coli*, a cause of hemorrhagic colitis, hemolytic uremic syndrome, and thrombotic thrombocytopenic purpura.
- (Q) *Francisella tularensis*, the cause of tularemia.
- (R) Hepatitis B virus or any component thereof, such as hepatitis B surface antigen.

- (S) Human Immunodeficiency Virus, the cause of AIDS.
  - (T) *Legionella* spp., the causes of legionellosis.
  - (U) *Leptospira* spp., the causes of leptospirosis.
  - (V) *Listeria monocytogenes*, the cause of listeriosis.
  - (W) Middle East respiratory syndrome virus.
  - (X) Monkeypox.
  - (Y) *Mycobacterium leprae*, the cause of leprosy.
  - (Z) *Plasmodium falciparum*, *P. malariae*, *P. ovale*, and *P. vivax*, the causes of malaria in humans.
  - (AA) Poliovirus (any), the cause of poliomyelitis.
  - (BB) Rabies virus.
  - (CC) *Rickettsia rickettsii*, the cause of Rocky Mountain spotted fever.
  - (DD) Rubella virus.
  - (EE) *Salmonella* spp., the causes of salmonellosis.
  - (FF) *Shigella* spp., the causes of shigellosis.
  - (GG) Smallpox virus, the cause of smallpox.
  - (HH) *Staphylococcus aureus* with reduced susceptibility to vanomycin.
  - (II) *Trichinella spiralis*, the cause of trichinosis.
  - (JJ) Vaccinia virus.
  - (KK) *Vibrio* spp., the causes of cholera and other vibrioses.
  - (LL) Yellow fever virus.
  - (MM) *Yersinia pestis*, the cause of plague.
- (2) Isolation or other specific identification of the following organisms from normally sterile human body sites:
- (A) Group A *Streptococcus pyogenes* (group A streptococci).
  - (B) *Haemophilus influenzae*, serotype b.
  - (C) *Neisseria meningitidis*, the cause of meningococcal disease.
- (3) Positive serologic test results, as specified, for the following infections:
- (A) Fourfold or greater changes or equivalent changes in serum antibody titers to:
    - (i) Any arthropod-borne viruses associated with meningitis or encephalitis in a human.
    - (ii) Any hantavirus or hemorrhagic fever virus.
    - (iii) *Chlamydia psittaci*, the cause of psittacosis.
    - (iv) *Coxiella burnetii*, the cause of Q fever.
    - (v) Dengue virus.

- (vi) Ehrlichia spp., the causes of ehrlichiosis.
- (vii) Measles (rubeola) virus.
- (viii) Mumps virus.
- (ix) Rickettsia rickettsii, the cause of Rocky Mountain spotted fever.
- (x) Rubella virus.
- (xi) Yellow fever virus.
- (B) The presence of IgM serum antibodies to:
  - (i) Chlamydia psittaci.
  - (ii) Hepatitis A virus.
  - (iii) Hepatitis B virus core antigen.
  - (iv) Rubella virus.
  - (v) Rubeola (measles) virus.
  - (vi) Yellow fever virus.
- (4) Laboratory results from tests to determine the absolute and relative counts for the T-helper (CD4) subset of lymphocytes and all results from tests to determine HIV viral load.

*History Note: Authority G.S. 130A-134; 130A-135; 130A-139; 130A-141;*  
*Amended Eff. October 1, 1994; February 1, 1990;*  
*Temporary Amendment Eff. July 1, 1997;*  
*Amended Eff. August 1, 1998;*  
*Temporary Amendment Eff. February 13, 2003; October 1, 2002;*  
*February 18, 2002; June 1, 2001;*  
*Amended Eff. April 1, 2003;*  
*Temporary Amendment Eff. November 1, 2003; May 16, 2003;*  
*Amended Eff. January 1, 2005; April 1, 2004;*  
*Temporary Amendment Eff. June 1, 2006;*  
*Amended Eff. April 1, 2008; November 1, 2007; October 1, 2006;*  
*Temporary Amendment Eff. January 1, 2010;*  
*Temporary Amendment Expired September 11, 2011;*  
*Amended Eff. July 1, 2013;*  
*Emergency Amendment Eff. September 2, 2014;*  
*Temporary Amendment Eff. December 2, 2014;*  
*Amended Eff. October 1, 2015.*

**TITLE 14B – DEPARTMENT OF PUBLIC SAFETY**

**14B NCAC 16 .0101 PURPOSE**

The Private Protective Services Board is established within the North Carolina Department of Public Safety for the purpose of administering the licensing of and setting the education and training requirements for persons, firms, associations and corporations engaged in the private protective services businesses within this State.

*History Note: Authority G.S. 74C-4;*  
*Eff. June 1, 1984;*  
*Transferred and Recodified from 12 NCAC 07D .0101 Eff. July 1, 2015;*  
*Amended Eff. October 1, 2015.*

**14B NCAC 16 .0807 TRAINING REQUIREMENTS FOR ARMED SECURITY GUARDS**

- (a) Applicants for an armed security guard firearm registration permit shall first complete the basic unarmed security guard training course set forth in Rule .0707 of this Chapter.
- (b) Private investigator licensees applying for an armed security guard firearm registration permit shall first complete a four hour training course consisting of the courses set forth in Rule .0707(a)(1) and (2) of this Chapter and all additional training requirements set forth in that Rule.
- (c) Applicants for an armed security guard firearm registration permit shall complete a basic training course for armed security guards which consists of at least 20 hours of classroom instruction including:
  - (1) legal limitations on the use of handguns and on the powers and authority of an armed security guard, including familiarity with rules and regulations relating to armed security guards (minimum of four hours);
  - (2) handgun safety, including range firing procedures -- (minimum of one hour);
  - (3) handgun operation and maintenance -- (minimum of three hours);
  - (4) handgun fundamentals -- (minimum of eight hours); and
  - (5) night firing -- (minimum of four hours).
- (d) Applicants for an armed security guard firearm registration permit shall attain a score of at least 80 percent accuracy on a firearms range qualification course adopted by the Board and the Secretary of Public Safety, a copy of which is on file in the Director's office. Should a student fail to attain a score of 80 percent accuracy, the student shall be given three additional attempts to qualify on the course of fire the student did not pass, which additional attempts shall take place within 20 days of the completion of the initial 20 hour course. Failure to meet the qualification after three attempts shall require the student to repeat the entire Basic Training Course for Armed Security Guards.
- (e) All armed security guard training required by this Chapter shall be administered by a certified trainer and shall be completed no more than 90 days prior to the date of issuance of the armed security guard firearm registration permit.
- (f) All applicants for an armed security guard firearm registration permit shall obtain training under the provisions of this Section using their duty weapon and their duty ammunition or ballistic equivalent ammunition, to include lead-free ammunition that meets the same point of aim, point of impact, and felt recoil of the duty ammunition, for all weapons.
- (g) No more than six new or renewal armed security guard applicants per one instructor shall be placed on the firing line at any one time during firearms range training.
- (h) Applicants for re-certification of an armed security guard firearm registration permit shall complete a basic recertification training course for armed security guards that consists of at least four hours of classroom instruction and is a review of the requirements set forth in Subparagraphs (c)(1) through (c)(5) of this Rule. The recertification course is valid for 180 days after completion of the course. Applicants for recertification of an armed security guard firearm registration permit shall also complete the requirements of Paragraph (d) of this Rule.

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

(j) To be authorized to carry a standard 12 gauge shotgun in the performance of his or her duties as an armed security guard, an applicant shall complete, in addition to the requirements of Paragraphs (a), (c) and (d) of this Rule, four hours of classroom training which shall include the following:

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

(k) An applicant may take the additional shotgun training at a time after the initial training in Subparagraph (c) of this Rule. If the shotgun training is completed at a later time, the shotgun certification shall run concurrent with the armed registration permit. In addition to the requirements set forth in Paragraph (j) of this Rule, applicants shall attain a score of at least 80 percent accuracy on a shotgun range qualification course adopted by the Board and the Secretary of Public Safety, a copy of which is on file in the Director's office.

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

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

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

*History Note: Authority G.S. 74C-5; 74C-9; 74C-13; Eff. June 1, 1984;*

*Amended Eff. November 1, 1991; February 1, 1990; July 1, 1987; Temporary Amendment Eff. January 14, 2002; Amended Eff. October 1, 2013; October 1, 2010; June 1, 2009; February 1, 2006; August 1, 2002; Transferred and Recodified from 12 NCAC 07D .0807 Eff. July 1, 2015; Amended Eff. October 1, 2015.*

**14B NCAC 16 .0901 REQUIREMENTS FOR A FIREARMS TRAINER CERTIFICATE**

(a) Firearms trainer applicants shall:

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

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

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

(d) In lieu of Subparagraphs (a)(2) and (4) of this Rule, an applicant may establish that the applicant satisfies the conditions set forth in G.S. 93B-15.1(a) for firearm instruction and two years of verifiable experience within the past five years in the U.S. Armed Forces as a firearms instructor.

(e) All applicants subject to Paragraphs (c) and (d) of this Rule shall comply with the provisions of Subparagraph (a)(3), pay the application amount as set forth in Rule .0903 of this Section, and complete the eight-hour course given by the Board on rules and regulations.

(f) In addition to the requirement of Section .0200 of this Chapter, an applicant for a firearms trainer certificate who is the spouse of

an active duty member of the U.S. Armed Forces shall establish that the applicant satisfies the conditions set forth in G.S. 93B-15.1(b).

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

*History Note:* Authority G.S. 74C-5; 74C-9; 74C-13; 93B-15.1; Eff. June 1, 1984; Amended Eff. July 1, 2014; October 1, 2013; December 1, 2008; January 1, 2008; August 1, 2004; November 1, 1991; Transferred and Recodified from 12 NCAC 07D .0901 Eff. July 1, 2015; Amended Eff. October 1, 2015.

**14B NCAC 16 .0904 RENEWAL OF A FIREARMS TRAINER CERTIFICATE**

(a) Each applicant for renewal of a firearms trainer certificate shall complete a renewal form provided by the Board and available on its website at [www.ncdps.gov/PPS](http://www.ncdps.gov/PPS). This form shall be submitted not less than 30 days prior to the expiration of the applicant's current certificate and shall be accompanied by:

- (1) certification of the successful completion of a firearms trainer refresher course approved by the Board and the Secretary of Public Safety consisting of a minimum of eight hours of classroom and practical range training in handgun and shotgun safety and maintenance, range operations, control and safety procedures, and methods of handgun and shotgun firing. This training shall be completed within 180 days of the submission of the renewal application;
- (2) a certified statement of the result of a criminal records search from the appropriate governmental authority housing criminal record information or clerk of superior court in each county where the applicant has resided within the immediately preceding 48 months and, if any address history contains an out of state address, a criminal record check from the reporting service designated by the Board pursuant to G.S. 74C-8.1(a);
- (3) the applicant's renewal fee; and
- (4) the actual cost charged to the Private Protective Services Board by the State Bureau of Investigation to cover the cost of criminal record checks performed by the State Bureau of Investigation, collected by the Private Protective Services Board.

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

*History Note:* Authority G.S. 74C-5; 74C-8.1(a); 74C-13; Eff. June 1, 1984; Amended Eff. January 1, 2013; October 1, 2010; June 1, 2009; December 1, 1995; December 1, 1985; Transferred and Recodified from 12 NCAC 07D .0904 Eff. July 1, 2015; Amended Eff. October 1, 2015.

**14B NCAC 16 .0909 UNARMED TRAINER CERTIFICATE**

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

- (1) comply with the requirements of Rule .0703 of this Chapter;
- (2) have a minimum of one year of experience in security with a contract security company or proprietary security organization, or one year of experience with any federal, state, county or municipal law enforcement agency;
- (3) successfully complete a training course approved by the Board and the Secretary of Public Safety which shall consist of a minimum of 24 hours classroom instruction to include the following topic areas:
  - (A) civil liability for the security trainer -- (two hours);
  - (B) interpersonal communications in instruction -- (three hours);
  - (C) teaching adults -- (four hours);
  - (D) principles of instruction -- (one hour);
  - (E) methods and strategies of instruction - (one hour);
  - (F) principles of instruction: audio-visual aids -- (three hours); and
  - (G) student performance -- (45 minute presentation);
- (4) receive a favorable recommendation from the employing or contracting licensee; and
- (5) submit the application required by Rule .0910 of this Section, which is available on the Board's website at [www.ncdps.gov/PPS](http://www.ncdps.gov/PPS).

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

- (1) a Criminal Justice General Instructor Certificate from the North Carolina Criminal Justice Education and Training Standards Commission; or
- (2) any training certification that meets or exceeds the requirements of Subparagraph (a)(3) of this Rule and is approved by the Director of PPS.

(c) In lieu of the experience requirement of Subparagraph (a)(2) of this Rule and completing the training course set forth in Subparagraph (a)(3) of this Rule, an applicant may establish that the applicant satisfies the conditions set forth in G.S. 93B-15.1(a) for an unarmed trainer and two years of verifiable experience within the past five years in the U.S. Armed forces as an unarmed guard trainer.

(d) In addition to the requirements of Section .0200 of this Chapter, an applicant for an unarmed guard trainer certificate that is the spouse of an active duty member of the U.S. Armed Forces shall establish that the applicant satisfies the conditions set forth in G.S. 93B-15.1(b).

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

*History Note: Authority G.S. 74C-8; 74C-9; 74C-11; 93B-15.1; Eff. October 1, 2004; Amended Eff. October 1, 2013; January 1, 2013; January 1, 2008; Transferred and Recodified from 12 NCAC 07D .0909 Eff. July 1, 2015; Amended Eff. October 1, 2015.*

**14B NCAC 16 .1407 TRAINING REQUIREMENTS FOR ARMED ARMORED CAR SERVICE GUARDS**

(a) Prior to applying, applicants for an armed armored car service guard firearm registration permit shall complete the basic unarmed armored car service guard training course set forth in Rule .1307(a) of this Chapter. Private Investigator Licensees applying for an armed armored car service guard firearm registration permit shall complete a four hour training course consisting of blocks of instruction "The Security Officer in North Carolina" and "Legal Issues for Security Officers" as set forth in Rule .1307(a) of this Chapter. Private Investigator Licensees applying for an armed armored car service guard firearm registration permit are not required to complete the following training blocks found in the basic training course referenced in Rule .1307(a) of this Chapter: "Emergency Situations," "Deployment," "Armored Security Operations," and "Safe Driver Training." A Private Investigator Licensee applying for an armed armored car service guard firearm registration permit shall meet all additional training requirements set forth in Rule .1307(a) of this Chapter as well as the training requirements set forth in this Rule.

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

- (1) legal limitations on the use of handguns and on the powers and authority of an armed security guard, including familiarity with rules relating to armed security guards -- (minimum of four hours);
- (2) handgun safety, including range firing procedures -- (minimum of one hour);
- (3) handgun operation and maintenance -- (minimum of three hours);
- (4) handgun fundamentals -- (minimum of eight hours); and
- (5) night firing -- (minimum of four hours).

(c) Applicants for an armed armored service guard firearm registration permit shall attain a score of at least 80 percent accuracy on a firearms range qualification course adopted by the Board and the Secretary of Public Safety a copy of which is on file in the Director's office. Should a student fail to attain a score of 80 percent accuracy as referenced above, the student shall be

given an additional three attempts to qualify on the course of fire they did not pass, which additional attempts shall take place within 20 days of the completion of the initial 20 hour course. Failure to meet the qualification after three attempts shall require the student to repeat the entire Basic Training Course for Armed Security Guards.

(d) All armed security guard training required by this Subchapter shall be administered by a certified trainer and shall be successfully completed no more than 90 days prior to the date of issuance of the armed armored car service guard firearm registration permit.

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

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

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

(h) To be authorized to carry a standard 12 gauge shotgun in the performance of his duties as an armed armored car service guard, an applicant shall complete, in addition to the requirements of Paragraphs (a), (b) and (c) of this Rule, four hours of classroom training that shall include the following:

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

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

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

(j) Applicants for shotgun recertification shall complete an additional one hour of classroom training as set forth in Subparagraphs (h)(1) through (h)(4) of this Rule and shall also complete the requirements of Paragraph (i) of this Rule.

(k) Applicants for an armed armored car service guard firearm registration permit who possess a current firearms trainer certificate shall be given, upon their written request, a firearms registration permit that will run concurrently with the trainer

certificate upon completion of an annual qualification with their duty weapons as set forth in Paragraph (c) of this Rule.

(l) An armed armored car service guard shall qualify annually for both day and night firing with his or her duty weapon and shotgun, if applicable. If the armed armored car service guard fails to qualify on either course of fire, the guard cannot carry a firearm until such time as he or she meets the qualification requirements. Upon failure to qualify the firearm instructor shall notify the armed armored car service guard that he or she is no longer authorized to carry a firearm, and the firearm instructor shall so notify the employer and the Private Protective Services staff on the next business day.

(m) Armed armored car service guard personnel may also work as armed security guards only if they hold an unarmed or armed security guard registration.

*History Note: Authority G.S. 74C-3; 74C-5; 74C-13; Eff. January 1, 2013; Transferred and Recodified from 12 NCAC 07D .1507 Eff. July 1, 2015; Amended Eff. October 1, 2015.*

**TITLE 15A – DEPARTMENT OF ENVIRONMENTAL QUALITY**

**15A NCAC 10F .0333 MECKLENBURG AND GASTON COUNTIES**

(a) Regulated Areas. This Rule applies to the following waters of Lake Wylie in Mecklenburg and Gaston Counties:

- (1) McDowell Park – The waters of the coves adjoining McDowell Park and the Southwest Nature Preserve in Mecklenburg County, including the entrances to the coves on either side of Copperhead Island;
- (2) Gaston County Wildlife Club Cove – The waters of the cove at the Gaston County Wildlife Club on South Point Peninsula in Gaston County;
- (3) Buster Boyd Bridge- The areas 250 feet to the north and 150 feet to the south of the Buster Boyd Bridge;
- (4) Highway 27 Bridge – The area beginning 50 yards north of the NC 27 Bridge and extending 50 yards south of the southernmost of two railroad trestles immediately downstream from the NC 27 Bridge;
- (5) Brown's Cove – The area beginning at the most narrow point of the entrance to Brown's Cove and extending 250 feet in both directions;
- (6) Paradise Point Cove – The waters of the Paradise Point Cove between Paradise Circle and Lakeshore Drive as delineated by appropriate markers;
- (7) Withers Cove - The area 50 feet on either side of Withers Bridge;
- (8) Sadler Island west- beginning at a line formed from a point on the western shore of Lake Wylie at 35.27481N, 81.0138W to a point on

the eastern shore at 35.27423N, 81.01111W extending south on the Lake to a line formed from a point on the western shore of Lake Wylie at 35.2708N, 81.01525W to a point on the western side of Sadler Island at 35.27056N, 81.01393W;

- (9) Sadler Island east- beginning at a line formed from a point on the western shore of Lake Wylie at 35.27481N, 81.0138W to a point on the eastern shore at 35.27423N, 81.01111W extending south on the Lake to a line formed from a point on the eastern side of Sadler Island at 35.2663N, 81.0143W to a point on the eastern shore of Lake Wylie at 35.26501N, 81.01374W; and

- (10) other bridges – the areas that are within 50 feet of any bridge in North Carolina that crosses the waters of Lake Wylie that is not otherwise specifically mentioned in this Paragraph.

(b) Speed Limit Near Ramps. No person shall operate a vessel at greater than no-wake speed within 50 yards of any public boat-launching ramp, dock, pier, marina, boat storage structure, or boat service area.

(c) Speed Limit Near All Other Bridges. No person shall operate a vessel at greater than no-wake speed within 50 feet of any bridge in North Carolina that crosses the waters of Lake Wylie that is not otherwise specifically mentioned in Paragraph (a) of this Rule.

(d) Speed Limit in Marked Swimming or Mooring Areas. No person shall operate a vessel at greater than no-wake speed within 50 yards of any marked mooring area or marked swimming area.

(e) Placement and Maintenance of Markers. The Lake Wylie Marine Commission is designated a suitable agency for placement and maintenance of markers implementing this Rule.

*History Note: Authority G.S. 75A-3; 75A-15; Eff. July 1, 1980; Amended Eff. July 1, 1994; June 1, 1985; June 1, 1984; March 1, 1983; Temporary Amendment Eff. January 1, 1998; Amended Eff. July 1, 1998; Temporary Amendment Eff. February 4, 2000; Amended Eff. April 1, 2009; June 1, 2004; July 1, 2000; Temporary Amendment Eff. May 1, 2015; Amended Eff. October 1, 2015.*

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

**CHAPTER 02 – BOARD OF ARCHITECTURE**

**21 NCAC 02 .0703 SUBPOENAS**

(a) Requests for subpoenas for the attendance and testimony of witnesses or for the production of documents, either at a hearing or for the purposes of discovery, shall be made in writing to the Board, shall identify any document sought with sufficient particularity, and shall include the full name and home or business address of all persons to be subpoenaed and, if known, the date, time, and location in which the witness is commanded to appear.

The Board shall issue the requested subpoenas within five days of receipt of the request.

(b) Subpoenas shall contain:

- (1) the caption of the case;
- (2) the name and address of the person subpoenaed;
- (3) the date, hour, and location of the hearing in which the witness is commanded to appear;
- (4) a particularized description of the books, papers, records or objects the witness is directed to bring with him to the hearing, if any;
- (5) the identity of the party on whose application the subpoena was issued;
- (6) the date of issue;
- (7) the signature of one of the members of the Board or the Board's Secretary; and
- (8) a "return of service." The "return of service" form, as filled out pursuant to Paragraph (c) of this rule shall include:
  - (A) the name and capacity of the person serving the subpoena,
  - (B) the date on which service was made,
  - (C) the person on whom service was made,
  - (D) the manner in which service was made, and
  - (E) the signature of the person making service.

(c) The subpoena shall be issued in duplicate, with a "return of service" form attached to each copy. A person serving the subpoena shall fill out the "return of service" form, as required in Subparagraph (b)(8) of this Rule for each copy and return one copy of the subpoena, with the attached "return of service" form completed, to the Board.

(d) Any person receiving a subpoena from the Board may object thereto by filing a written objection to the subpoena with the Board's office.

(e) Such objection shall include a concise, but complete, statement of reasons why the subpoena should be revoked or modified. These reasons may include lack of relevancy of the evidence sought or any other reason sufficient in law for holding the subpoena invalid, such as that the evidence is privileged, that appearance or production would be so disruptive as to be unreasonable in light of the significance of the evidence sought or other undue hardship.

(f) Any such objection to a subpoena must be served on the party who requested the subpoena simultaneously with the filing of the objection with the Board.

(g) The party who requested the subpoena, in such time as may be granted by the presiding officer, may file a written response to the objection. The written response shall be served by the requesting party on the objecting witness simultaneously with filing the response with the Board.

(h) After receipt of the objection and response thereto, if any, the presiding officer shall issue a notice to the party who requested the subpoena and the party challenging the subpoena, and may notify any other party or parties, of an open hearing, to be scheduled as soon as practicable, at which time evidence and testimony may be presented, limited to the narrow questions raised by the objection and response.

(i) After the close of such hearing, a majority of the Board members hearing the contested case shall rule on the challenge and issue a written decision. A copy of the decision shall be issued to all parties and made a part of the record.

*History Note: Authority G.S. 83A-6; 150B-38; 150B-39; Eff. February 1, 1976; Readopted Eff. September 29, 1977; Amended Eff. November 1, 2010; May 1, 1989; Readopted Eff. October 1, 2015.*

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**CHAPTER 19 – BOARD OF ELECTROLYSIS EXAMINERS**

**21 NCAC 19 .0501 SUPERVISING PHYSICIAN**

(a) Supervision by Physician – It is the licensed laser practitioner's responsibility to perform procedures solely within his or her professional scope of practice. A laser hair practitioner licensed under this Chapter shall perform laser hair removal only under the supervision of a physician licensed by the State of North Carolina to perform surgical services. The laser hair practitioner shall receive physician supervision both before and after the laser treatment procedure. The laser hair practitioner shall perform services only after a physician or other practitioner licensed by the NC Medical Board (NCMB) under G.S. 1, Article 90 has examined the patient. This examination shall include a medical history and focused physical examination. The laser hair practitioner shall ensure that the supervising physician is available during services so that the supervising physician is able to respond to patient emergencies and questions by the laser practitioner.

(b) Supervisory Agreement – A laser hair practitioner shall not operate any laser equipment without a signed Supervisory Agreement in accordance with Rule .0202 of this Chapter in place and on file with the Board. The Supervisory Agreement shall include the following elements:

- (1) the supervising physician's name, business address, business telephone number, NCMB license\_number, and medical specialty;
- (2) an attestation that the supervising physician is licensed to practice medicine in North Carolina and plans to maintain\_licensure during the timeframe of the agreement;
- (3) a list of devices, makes, and models being used by the laser hair practitioner;
- (4) an attestation that the supervising physician is knowledgeable in the use of the listed devices;
- (5) an attestation that the supervising physician ensures the laser hair practitioner has training to perform laser hair reduction with the listed devices;
- (6) an attestation that the supervising physician will provide personal and responsible direction to the laser hair practitioner;
- (7) an attestation that the supervising physician will be available and able to respond to patient emergencies and to questions by the laser hair practitioner under supervision; and

- (8) the geographical distance between the supervising physician and the laser hair practitioner.

(c) A laser hair practitioner shall notify the Board within 30 days of the termination of the Supervisory Agreement with the supervising physician.

*History Note: Authority G.S. 88A-11.1; Eff. October 1, 2010; Amended Eff. October 1, 2015.*

**21 NCAC 19 .0701 CONTINUING EDUCATION REQUIREMENTS, LICENSE RENEWAL, REINSTATEMENT AND REACTIVATION**

(a) Requirements for practitioners;

- (1) Each electrologist and laser hair practitioner licensed in this State shall complete one CEU, as defined in Rule .0103 of this Chapter, per renewal period as a requirement for renewal of the electrology license and one CEU per renewal period as a requirement for renewal of the laser hair practitioner license. Over any two renewal periods, the Board shall give credit for no more than one-half CEU in the area of business management.
- (2) An electrologist or laser hair practitioner who has been placed on the inactive list by the Board for less than five years and desires to return to active status, shall present evidence of completion of one CEU within the 12 months preceding the reactivation application in satisfaction of the competency requirement of G.S. 88A-14..
- (3) An electrologist or laser hair practitioner whose license has been expired for 90 days or more but less than five years shall present certification of completion of one CEU for each renewal period or part of a renewal period that has elapsed since the electrologist's or laser hair practitioner's license was last current in satisfaction of the competency requirement of G.S. 88A-12. At least one of the CEUs offered in satisfaction of a competency requirement shall have been completed within the 12 months immediately preceding the application for reinstatement.
- (4) Not more than one CEU may be carried over per renewal period.
- (5) No more than one CEU of home study may be credited for continuing education in each renewal period. "Home study" is defined as an educational activity undertaken by an individual, completed by correspondence or online with little to no supervision, and with a certification of completion awarded at the end of the course. Continuing education hours obtained through home study may not be carried over to a subsequent renewal period.

- (6) In the initial year of licensure, new licensees tested after the sixth month of the calendar year shall not be required to obtain CEUs until the following renewal year.

(b) Requirements for instructors:

- (1) An instructor whose certification has been placed on the inactive list for more than 90 days and less than 3 years shall present certification of completion of one CEU within the 12 months immediately preceding the application for reactivation of certification.
- (2) An instructor whose certification has been expired for more than 90 days, but less than 3 years shall present certification of completion of one CEU for each renewal period or part of a renewal period that has elapsed since the instructor's license was last current. At least one of the CEUs offered in satisfaction of a competency requirement shall have been completed within the 12 months immediately preceding the application for reinstatement of certification.

*History Note: Authority G.S. 88A-6; 88A-12; 88A-13; 88A-18; Eff. March 1, 1995; Amendment Eff. October 1, 2015; December 1, 2010.*

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**CHAPTER 30 – BOARD OF MASSAGE AND BODYWORK THERAPY**

**21 NCAC 30 .0201 APPLICATION AND SCOPE**

(a) Each applicant for a license as a massage and bodywork therapist shall complete an application. The application shall include the following:

- (1) full name (last name, first name, middle name and maiden name, if applicable);
- (2) name as the applicant wants it to appear on license (must be part or all of applicant's legal name);
- (3) current residence;
- (4) mailing address;
- (5) city, state, zip code and county;
- (6) Social Security Number;
- (7) city and state of birth;
- (8) date of birth;
- (9) telephone number (e.g. home, mobile and business);
- (10) email address;
- (11) trade name or business name (if applicable);
- (12) business address;
- (13) type of license applying for (Regular, License by Endorsement A or License by Endorsement B);
- (14) examination agency (FSMTB, NCCAOM or NCBTMB, if applicable);

**APPROVED RULES**

- (15) exam taken (MBLEx, NCETMB, NCETM or ABTE, if applicable);
  - (16) whether or not a U.S. citizen;
  - (17) physical description (gender, height, eye color, race, weight and hair color);
  - (18) place of residence for the previous 10 years including date, street address, city, state, zip code and county;
  - (19) professional experience for the previous 10 years including date, job title, type of business, hours worked per week, employer's name, address, state, zip code, area code and phone number and reason for leaving, if applicable;
  - (20) education (high school, college/university, graduate or professional) including name of educational institution, city, state, zip code, whether or not you were issued a certificate, diploma or degree and month and year of graduation;
  - (21) previous or current licensure, registration or certification in another state or territory, including state, license, registration or certification type, license or credential number, date issued and date of expiration;
  - (22) professional affiliations and achievements;
  - (23) whether the applicant has had any of the following situations and explain such instances:
    - (A) charged with, arrested for, convicted of, or plead guilty or no contest to a violation of any law;
    - (B) had a driver's license canceled, suspended or revoked;
    - (C) pending charges in any state or jurisdiction;
    - (D) violated any federal or state statute or rule which relates to massage and bodywork therapy or any other healthcare profession;
    - (E) obtained or attempted to obtain compensation by fraud or deceit;
    - (F) involved in a civil suit related to your practice of massage and bodywork therapy or other healthcare profession;
    - (G) had any judgments entered against you;
    - (H) expelled, fired, asked to resign or otherwise suspended from any educational institution;
    - (I) fired, asked to resign or otherwise suspended from employment;
    - (J) denied a massage therapy license or a license for any other healthcare profession;
    - (K) had a license revoked or suspended;
    - (L) have any formal disciplinary charges pending or action taken by any massage or bodywork therapy licensing board or medical board;
    - (M) been diagnosed with a mental illness;
  - (N) been diagnosed as being dependent on alcohol or drugs;
  - (O) abused alcohol or drugs;
  - (P) been evaluated or treated for mental health or substance abuse issues;
  - (Q) used any drug or alcohol to the extent it adversely affected your professional competence or employment;
  - (24) an attestation under oath before a notary that the information on the application is true and also complete an affidavit of applicant to the Board of all information pertaining to the application.
- (b) This application shall be submitted to the Board and shall be accompanied by:
- (1) One original color photograph of the applicant taken within six months preceding the date of the application of sufficient quality for identification. The photograph shall be of the head and shoulders, passport type, two inches by two inches in size;
  - (2) The proper fees, as required by Rule .0204 of this Section and G.S. 90-629.1(b);
  - (3) Documentation that the applicant has earned a high school diploma or equivalent;
  - (4) Documentation that the applicant is 18 years of age or older;
  - (5) Documentation that the applicant has completed a course of study at a school approved by the Board according to these rules and consisting of a minimum of 500 classroom hours of supervised instruction. If the applicant attended a school that is not approved by the Board, the Board may elect to review that applicant's curriculum on a case-by-case basis. The documentation of such training shall come from a school that is licensed by the educational licensing authority in the state, territory or country in which it operates. In North Carolina the documentation shall come from a proprietary school approved by the Board or a college-based massage program that is exempt from Board approval. The curriculum shall meet or be substantially equivalent to the standards set forth in Rule .0620(2) of this Chapter;
  - (6) Documentation that the applicant has achieved a passing score on a competency assessment examination administered by the Board or approved by the Board that meets generally accepted psychometric principles and standards;
  - (7) Signed statements from four persons attesting to the applicant's good moral character;
  - (8) Fingerprint card executed by a fingerprinting agency, and
  - (9) Consent to a criminal history record check by the North Carolina Department of Justice.

*History Note: Authority G.S. 90-626(2); 90-629;*

Temporary Adoption Eff February 15, 2000;  
Eff. April 1, 2001;  
Amended Eff. October 1, 2008;  
Readopted Eff. October 1, 2015.

**21 NCAC 30 .0701 CONTINUING EDUCATION REQUIREMENTS**

(a) Pursuant to G.S. 90-632, a licensee, when renewing a license, shall document that they have completed at least 24 contact hours of approved continuing education during the immediately preceding licensure period, provided the licensure period is two years or more. If the licensure period is less than two years, but more than one year, the licensee shall document that they have completed at least 12 contact hours of approved continuing education.

(b) For the purposes of this Section, "approved continuing education" means a course offered as follows:

- (1) by an approved provider as defined in Rule .0702 of this Section; or
- (2) a course in anatomy, physiology, pathology, psychology, pharmacology, massage and bodywork therapy or business management taken at a post secondary institution of higher learning.

(c) Distance learning, as defined in Rule .0702 of this Section, shall not comprise more than 12 hours of the required continuing education hours per licensure period.

(d) Licensees shall document that they have completed at least three contact hours of continuing education in professional ethics as defined in Rule .0702 of this Section, out of the minimum of 24 hours of approved continuing education required for license renewal. This may be obtained through supervised classroom instruction or distance learning.

(e) Business management, as defined in Rule .0702 of this Section, shall not comprise more than eight hours of the minimum 24 hours of approved continuing education required for license renewal.

(f) Licensees shall ensure that each continuing education course for which they claim credit on their application for renewal of licensure is consistent with the definitions and requirements set forth in this Section.

(g) The Board may audit licensees at random to assure compliance with these requirements.

History Note: Authority G.S. 90-626(9); 90-632(a)(1);  
Temporary Adoption Eff. February 15, 2000;  
Eff. April 1, 2001;  
Amended Eff. November 1, 2008; September 2, 2005;  
Readopted Eff. October 1, 2015.

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**CHAPTER 37 – BOARD OF EXAMINERS FOR NURSING HOME ADMINISTRATORS**

**21 NCAC 37D .0202 INITIAL LICENSURE FEE**

Prior to licensure, the applicant shall send an initial licensure non-refundable fee of five hundred dollars (\$500.00) when the

applicant has successfully passed the examinations required by the Board under Sections .0600 and .0700 of this Subchapter.

History Note: Authority G.S. 90-280;  
Eff. February 1, 1976;  
Amended Eff. August 1, 1977;  
Readopted Eff. October 1, 1981; December 15, 1977;  
Amended Eff. December 30, 1981;  
Temporary Amendment Eff. July 13, 1982 for a period of 120 days to expire on November 9, 1982;  
Amended Eff. February 1, 1991; October 1, 1982;  
Transferred and Recodified from 21 NCAC 37A .0302 Eff. April 1, 1996;  
Amended Eff. August 1, 1996;  
Temporary Amendment Eff. August 15, 1996;  
Amended Eff. July 1, 1998;  
Temporary Amendment Eff. August 15, 1999;  
Amended Eff. July 1, 2014; September 1, 2004; July 1, 2000;  
Readopted Eff. October 1, 2015.

**21 NCAC 37D .0303 REQUIRED COURSE**

(a) The course prescribed by the Board pursuant to G.S. 90-278(1)c shall be comprised of in-class instruction, including all the domains of practice as described in Rule .0605 of this Subchapter.

(b) An applicant with a health care administration degree may request in writing that the Board approve college courses as substantially equivalent to portions of the required course, provided the applicant's college transcripts validate the long term care courses were passed with a minimum of a 2.0 GPA.

History Note: Authority G.S. 90-278(1)c;  
Eff. April 1, 1996;  
Amended Eff. July 1, 2004; July 1, 2000;  
Readopted Eff. October 1, 2015.

**21 NCAC 37D .0402 APPLICATION TO BECOME ADMINISTRATOR-IN-TRAINING (AIT)**

(a) The applicant shall submit to the Board an application containing:

- (1) name;
- (2) education;
- (3) employment history;
- (4) questions pertaining to moral character;
- (5) criminal history; and
- (6) an affidavit stating that the applicant if granted a license, shall obey the laws of the state and the rules of the Board, and shall maintain the honor and dignity of the profession.

(b) The applicant shall submit a resume.

(c) The applicant shall submit three reference forms (one employer and two character) as set forth in Rule .0203 of this Subchapter:

- (1) the Employer Reference Form shall include the address of employment and duties assigned; and
- (2) the Character Reference Form shall include how this individual knows the applicant and

whether the applicant is capable to supervise the care of residents of a skilled facility. No character reference shall be from a relative of the applicant.

(d) The applicant shall submit an official transcript issued by the institution indicating the courses completed and hours earned, specifying whether semester or quarter hours. The applicant shall supply documentation of his or her supervisory experience in a nursing home if the applicant is utilizing the experience substitute for the education requirement as allowed by G.S. 90-278(1)b.

(e) The applicant and the preceptor shall appear before the Board for a personal interview.

(f) The preceptor shall submit to the Board three weeks prior to the personal interview:

- (1) a Facility Survey Form stating the facility license number, address and the number of beds;
- (2) a letter accepting individual as an AIT;
- (3) a Preceptor Disclosure Form stating number of years the individual has served as an administrator and number of AITs precepted;
- (4) a curriculum outline for the AIT program that provides the AIT with job experience in each department. A curriculum outline shall include each department in the facility and the information that will be covered, including the recommended number of weeks in the program as outlined on the AIT Curriculum Request and Rationale Form;
- (5) an AIT Curriculum Request and Rationale Form shall be based on education and experience of the AIT applicant. The preceptor shall be responsible for providing a rationale for all subject areas with the recommended number of weeks for the AIT; and
- (6) the directions to the facility.

(g) The owner or governing board of the facility shall submit to the Board three weeks prior to the personal interview a letter of approval for the AIT applicant to train in the facility.

(h) A non-refundable processing fee of two hundred fifty dollars (\$250.00) shall be submitted with the application.

(i) An AIT applicant shall maintain at all times a current residential mailing address with the Board office.

(j) The applicant may obtain an application and forms from the Board's website or from the Board office.

*History Note: Authority G.S. 90-278; 90-280; 90-285; 90-288.01;*

*Eff. February 1, 1976;*

*Amended Eff. August 1, 1977; April 8, 1977;*

*Readopted Eff. December 15, 1977;*

*Amended Eff. February 1, 1980;*

*Readopted Eff. October 1, 1981;*

*Amended Eff. August 1, 1995; August 2, 1993; February 1, 1991; May 1, 1989;*

*Transferred and Recodified from 21 NCAC 37A .0502 Eff. April 1, 1996;*

*Amended Eff. July 1, 2014; July 1, 2004; April 1, 1996;*

*Readopted Eff. October 1, 2015.*

**21 NCAC 37D .0404 ADMINISTRATOR-IN-TRAINING SELECTION OF PRECEPTOR**

(a) AIT applicants shall select a preceptor prior to submitting application to the Board. Lists of preceptors approved by the Board can be found on the Board's website [www.ncbenha.org](http://www.ncbenha.org),

(b) It shall be the responsibility of the AIT applicant to contact a preceptor to ensure that the preceptor accepts the AIT applicant.

(c) The AIT shall notify the Board of any change in preceptor. Any change in preceptor shall be from the approved list.

*History Note: Authority G.S. 90-278; 90-285;*

*Eff. February 1, 1976;*

*Amended Eff. April 8, 1977;*

*Readopted Eff. October 1, 1981; December 15, 1977;*

*Amended Eff. August 2, 1993; February 1, 1991; May 1, 1989;*

*Transferred and Recodified from 21 NCAC 37A .0505 Eff. April 1, 1996;*

*Amended Eff. July 1, 2004; April 1, 1996;*

*Readopted Eff. October 1, 2015.*

**21 NCAC 37D .0602 NATIONAL EXAM APPLICATION**

To sit for the National Exam, a person shall submit an exam application electronically to the National Association of Long Term Care Administrators Board (NAB) through their website [www.nabweb.org](http://www.nabweb.org). After the applicant has completed the National Exam Application, the NAB will notify the Board for approval of the applicant. Prior to the Board approving the applicant's eligibility to sit for the National Exam and in order to release the results of the NAB exam score, the applicant shall pay to the Board a processing fee of fifty dollars (\$50.00).

*History Note: Authority G.S. 90-280; 90-285;*

*Eff. April 1, 1996;*

*Amended Eff. September 1, 2004;*

*Readopted Eff. October 1, 2015.*

**21 NCAC 37D .0703 STATE EXAMINATION ADMINISTRATION**

(a) The State Examination shall be administered on dates to be determined and published by the Board on the State Examination Application form located on the Board's website. It may also be offered to reciprocity applicants and to AIT applicants who passed the National Examination but previously failed the State Examination on different dates if the applicants show good cause, such as unavailability due to illness, inclement weather, employment, or survey.

(b) An applicant shall pay a non-refundable processing fee of one hundred fifty dollars (\$150.00) each time the applicant takes the State Examination.

(c) To sit for the State Examination, the applicant shall submit a Test Confidentiality and Attestation Form, which is a release form stating the applicant will keep test questions confidential. This form is provided by the Board on the website and in the information package.

(d) An applicant shall pass the State Exam within one year of the date of completion of the AIT program.

*History Note: Authority G.S. 90-280; 90-285; Eff. April 1, 1996; Amended Eff. July 1, 2014; July 1, 2004; Readopted Eff. October 1, 2015.*

**21 NCAC 37E .0101 APPLICATION PROCESS**

(a) The Board may issue a license to a nursing home administrator who holds a nursing home administrator license issued by the licensing authorities of any other state, upon payment of the current licensing fee, successful completion of the state examination, and submission of evidence to the Board that the applicant for licensure:

- (1) has personal qualifications, education, training, and experience substantially equivalent to those required in this state;
- (2) holds a valid active license as a nursing home administrator in the state from which he or she is transferring; and
- (3) shall appear before the Board for a personal interview.

(b) If the applicant for reciprocity does not submit the information required by Subparagraph (a)(1) of this Rule, but is otherwise qualified for licensure in North Carolina, the Board shall issue a temporary reciprocal license that will allow the applicant to practice in one nursing home designated by the applicant at the time of issuance for six months provided that the applicant agrees to the following conditions:

- (1) within one month prior to the expiration of the temporary reciprocal license, submission of a statement that the temporary licensee has administered the nursing home in a manner satisfactory to the nursing home owner or representative of the owner; and
- (2) completion of continuing education course(s) that the Board may require as a condition of issuance of a temporary reciprocal license, if the applicant does not possess education substantially equivalent to the qualifications required by this state.

(c) If a temporary reciprocal license is issued pursuant to Paragraph (b) of this Rule and the applicant notifies the Board prior to the expiration of the six-month term that the circumstances have changed such that the applicant cannot comply with the conditions imposed in Paragraph (b) of this Rule, the Board may extend the temporary reciprocal license for an additional period not to exceed six months upon consideration of the following:

- (1) the period of extension requested;
- (2) the extent of control the applicant had over the situation causing the request for extension;
- (3) the applicant's good faith effort at compliance with the original term imposed; and
- (4) any issues arising during the term of the applicant at the facility identified during a survey conducted by the Division of Health Service Regulation or a federal surveying agency.

*History Note: Authority G.S. 90-278; 90-280; 90-285; 90-287; Eff. February 1, 1976; Readopted Eff. December 15, 1977; Amended Eff. February 1, 1980; Readopted Eff. October 1, 1981; Amended Eff. August 1, 1995; August 2, 1993; February 1, 1991; May 1, 1989; Transferred and Recodified from 21 NCAC 37A .0912(a) Eff. April 1, 1996; Amended Eff. July 1, 2004; July 1, 2000; April 1, 1996; Readopted Eff. October 1, 2015.*

**21 NCAC 37E .0102 APPLICATION CONTENTS**

An applicant for reciprocity/endorsement shall submit the following items that shall be received by the Board three weeks prior to the next scheduled Board Meeting posted on the Board's website:

- (1) a completed application;
- (2) a resume;
- (3) certified college transcript(s);
- (4) three reference forms (one employer and two character) located on the Board's website as set forth in Rule 21 NCAC 37D .0203:
  - (a) the Employer Reference Form shall include the address of employment and duties assigned; and
  - (b) the Character Reference Form shall include how the individual knows the applicant and whether the applicant is capable of supervising the care of residents of a skilled facility. No character reference shall be from a relative of the applicant.
- (5) a licensing questionnaire(s) from every state where the applicant held a license. The questionnaire is available on the Board's website;
- (6) a non-refundable processing fee of two hundred fifty dollars (\$250.00); and
- (7) a fingerprint card, necessary forms, and required fee for criminal background check. Information regarding the forms and fees for the criminal background check is available in the Board office.

*History Note: Authority G.S. 90-280; 90-285; 90-287; 90-288.01; Eff. February 1, 1976; Readopted Eff. December 15, 1977; Amended Eff. February 1, 1980; Readopted Eff. October 1, 1981; Amended Eff. August 1, 1995; August 2, 1993; February 1, 1991; May 1, 1989; Transferred and Recodified from 21 NCAC 37A .0912(b) Eff. April 1, 1996; Amended Eff. April 1, 1996; Temporary Amendment Eff. August 15, 1999; Amended Eff. July 1, 2014; July 1, 2004; July 1, 2000;*

*Readopted Eff. October 1, 2015.*

**21 NCAC 37F .0102 ISSUANCE OF TEMPORARY LICENSE**

(a) An applicant for a temporary license shall submit the following items:

- (1) a completed application;
- (2) a resume;
- (3) three reference forms (one employer and two character) located on the Board's website as set forth in Rule 21 NCAC 37D .0203:
  - (A) the Employer Reference Form shall include the address of employment and duties assigned; and
  - (B) the Character Reference Form shall include how the individual knows the applicant and whether the applicant is capable of supervising the care of residents of a skilled facility. No character reference shall be from a relative of the applicant;
- (4) a letter from the owner or regional manager requesting the issuance of a Temporary License for the facility stating the circumstances necessitating the issuance of the license; and
- (5) the processing fee of three hundred dollars (\$300.00).

(b) After an applicant is issued a temporary license he or she shall submit a fingerprint card, necessary forms, and the required fee for a criminal background check, and successfully pass the state examination administered by the Board at the next exam date to retain the temporary license. Information regarding the forms and fees for the criminal background check is available in the Board office.

(c) A temporary license may be extended at the discretion of the Board in accordance with the requirements of Rule .0101(d) of this Section.

(d) A temporary license shall be issued to the applicant to permit him or her to practice only in the nursing home to which the applicant is assigned on the date of issuance.

(e) If the Board extends the temporary license, no further fee shall be required.

*History Note: Authority G.S. 90-278; 90-280; 90-285; 90-288.01;*

*Eff. February 1, 1980;*

*Amended Eff. April 15, 1980;*

*Readopted Eff. October 1, 1981;*

*Amended Eff. May 1, 1989; December 1, 1983; October 1, 1982;*

*Transferred and Recodified from 21 NCAC 37A .1003 Eff. April 1, 1996;*

*Amended Eff. April 1, 1996;*

*Temporary Amendment Eff. August 15, 1999;*

*Amended Eff. July 1, 2014; July 1, 2000;*

*Readopted Eff. October 1, 2015.*

**21 NCAC 37G .0102 RENEWAL FEE**

Upon making application for renewal, a licensee shall pay a biennial licensure fee of five hundred dollars (\$500.00).

*History Note: Authority G.S. 90-280; 90-285; 90-286; Eff. February 1, 1976; Amended Eff. August 1, 1977; April 8, 1977; Readopted Eff. December 15, 1977; Readopted w/change Eff. October 1, 1981; Temporary Amendment Eff. July 13, 1982 for a period of 120 days to expire on November 9, 1982; Amended Eff. February 1, 1991; May 1, 1989; December 1, 1983; October 1, 1982; Transferred and Recodified from 21 NCAC 37A .0904 Eff. April 1, 1996; Amended Eff. August 1, 1996; Temporary Amendment Eff. August 15, 1996; Amended Eff. July 1, 1998; Temporary Amendment Eff. August 15, 1999; Amended Eff. July 1, 2014; September 1, 2004; July 1, 2000; Readopted Eff. October 1, 2015.*

**21 NCAC 37G .0201 INACTIVE REQUIREMENTS**

(a) An administrator who desires to be placed on the inactive list shall make a written request on the biennial renewal form provided by the Board and submit a non-refundable inactive fee of one hundred dollars (\$100.00) per year fee to the Board.

(b) A request to be placed on the inactive list shall be submitted to the Board no later than 30 days after expiration of the license under Rule .0101(a) of this Subchapter. Failure to submit the request and payment of the fee within 30 days after expiration shall result in automatic expiration of the license retroactive to the expiration date.

(c) If an administrator makes a request to be placed on the inactive list pursuant to Paragraph (b) of this Rule, an administrator may remain on the inactive list for a period not to exceed four years provided the licensee pays an inactive fee of one hundred dollars (\$100.00) for each additional year prior to expiration of the inactive period.

*History Note: Authority G.S. 90-280; 90-285;*

*Eff. February 1, 1976;*

*Amended Eff. April 8, 1977;*

*Readopted Eff. December 15, 1977;*

*Readopted with Change Eff. October 1, 1981;*

*Amended Eff. February 1, 1991;*

*Transferred and Recodified from 21 NCAC 37A .0906 Eff. April 1, 1996;*

*Amended Eff. April 1, 1999;*

*Temporary Amendment Eff. August 15, 1999;*

*Amended Eff. July 1, 2014; July 1, 2000;*

*Readopted Eff. October 1, 2015.*

**21 NCAC 37G .0401 DUPLICATE LICENSE REQUIREMENTS**

(a) When the Board has been notified by a licensee in a written statement that a license or certificate of registration has been lost, mutilated, or destroyed, the Board shall issue a duplicate license or certificate of registration upon payment of a fee of twenty five dollars (\$25.00).

(b) Licensees seeking a duplicate certificate following a legal name change from the name under which the individual was

licensed shall furnish copies of the documents legally authorizing the name change, along with the twenty-five dollar (\$25.00) fee, when requesting a duplicate certificate.

*History Note: Authority G.S. 90-280(d); Eff. February 1, 1976; Readopted Eff. October 1, 1981; December 15, 1977; Amended Eff. May 1, 1989; Transferred and Recodified from 21 NCAC 37A .0914 Eff. April 1, 1996; Amended Eff. April 1, 1996; Readopted Eff. October 1, 2015.*

**21 NCAC 37H .0102 CONTINUING EDUCATION PROGRAMS OF STUDY**

(a) The Board shall certify and administer courses in continuing education for the professional development of nursing home administrators and to enable persons to meet the requirements of the Rules in this Chapter. The licensee shall keep a record of his or her continuing education hours. Certified courses, including those sponsored by the Board, an accredited university, college or community college, associations, professional societies, or organizations shall:

- (1) contain a minimum of one classroom hour of academic work and not more than eight classroom hours within a 24-hour period; and
- (2) include instruction in one or more of the following general subject areas or their equivalents:
  - (A) Resident Care and Quality of Life;
  - (B) Human Resources;
  - (C) Finance;
  - (D) Physical Environment and Atmosphere; or
  - (E) Leadership and Management.

(b) In lieu of certifying each course offered by a provider, the Board may certify the course provider for an annual fee not to exceed four thousand dollars (\$4,000.00). The Board Office shall conduct a review annually of the number of courses each provider presented in the prior year. The annual fee shall be set at one hundred dollars (\$100.00) for every course offered in the prior year. The course provider shall submit a list of courses offered for credit and agree to comply with the requirements of Paragraph (a) of this Rule.

(c) Certified courses not administered by the Board shall be:
 

- (1) submitted to the Board for approval 30 days prior to the presentation of the program; and

(2) accompanied with a processing fee to cover the cost of reviewing and maintaining records associated by the continuing education program. The fee schedule is as follows:

- (A) any course submitted for review, up to and including six hours, shall be accompanied by a non-refundable fee of one hundred dollars (\$100.00); and
- (B) the sponsor shall pay ten dollars (\$10.00) for each additional hour for any course submitted for review that is greater than six hours.

(d) Courses shall be approved for a period of one year from the date of initial presentation.

(e) In order to receive Board approval for distance learning programs that are via printed material, cd, dvd, videotape, or web-based, the course shall have tests before and after the session. For every credit hour claimed, the course shall include five questions on each test administered before and after the course. These questions may be the same.

(f) Continuing education credit for licensees may include up to 10 hours for participation in distance learning courses only if:

- (1) the distance learning course is approved by the Board or the National Association of Boards of Examiners of Long Term Care Administrators (NAB). The NAB is a certifying association of continuing education across the nation; and
- (2) the approved course sponsor sends to the Board a verification of the individual's completion of the distance learning course.

(g) The Board shall charge a fee covering the cost of continuing education courses it sponsors, not to exceed five hundred dollars (\$500.00).

*History Note: Authority G.S. 12-3.1(c)(3); 90-278; 90-280; 90-285; 90-286; Eff. February 1, 1976; Amended Eff. April 8, 1977; Readopted Eff. December 15, 1977; Readopted w/change Eff. October 1, 1981; Amended Eff. August 2, 1993; February 1, 1991; May 1, 1989; February 1, 1986; Transferred and Recodified from 21 NCAC 37A .0404 Eff. April 1, 1996; Temporary Amendment Eff. August 15, 1999; Amended Eff. July 1, 2014; September 1, 2004; July 1, 2000; Readopted Eff. October 1, 2015.*

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**RULES REVIEW COMMISSION**

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*This Section contains information for the meeting of the Rules Review Commission November 19, 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 2<sup>nd</sup> business day before the meeting. Please refer to RRC rules codified in 26 NCAC 05.*

**RULES REVIEW COMMISSION MEMBERS**

**Appointed by Senate**  
Jeff Hyde (1<sup>st</sup> Vice Chair)  
Robert A. Bryan, Jr.  
Margaret Currin  
Jay Hemphill  
Jeffrey A. Poley

**Appointed by House**  
Garth Dunklin (Chair)  
Stephanie Simpson (2<sup>nd</sup> 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**

November 19, 2015      December 17, 2015  
January 21, 2016      February 18, 2016

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**AGENDA**

**RULES REVIEW COMMISSION  
THURSDAY, NOVEMBER 19, 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. Environmental Management Commission – 15A NCAC 02B .0227, .0311 (May)
  - B. Property Tax Commission – 17 NCAC 11 .0216, .0217 (Hammond)
  - C. Board of Massage and Bodywork Therapy – 21 NCAC 30 .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 September 22, 2015 and October 20, 2015
  - Child Care Commission (Reeder)
  - Board of Cosmetic Art Examiners (May)
  - Onsite Wastewater Contractors and Inspectors Certification Board (Hammond)
  - Board of Pharmacy (Reeder)
  - Veterinary Medical Board (Reeder)
  - Building Code Council (Thomas)
- V. Existing Rules Review
  - Review of Reports
    - 1. 10A NCAC 14J - DHHS – Division of Health Service Regulation (Thomas)
    - 2. 10A NCAC 46 – Commission for Public Health (Hammond)
    - 3. 10A NCAC 48 – Commission for Public Health (Hammond)
    - 4. 13 NCAC 15 – Department of Labor (May)
    - 5. 13 NCAC 20 – Department of Labor (May)
    - 6. 15A NCAC 12H – Department of Environmental Quality (Reeder)
- VI. Commission Business

- Legislative Update
- Next meeting: Thursday, December 17, 2015

**Commission Review**  
*Log of Permanent Rule Filings*  
**September 22, 2015 through October 20, 2015**

**CHILD CARE COMMISSION**

The rules in Chapter 9 are child care rules and include definitions (.0100); general provisions related to licensing (.0200); procedures for obtaining a license (.0300); issuance of provisional and temporary licenses (.0400); age and developmentally appropriate environments for centers (.0500); safety requirements for child care centers (.0600); health and other standards for center staff (.0700); health standards for children (.0800); nutrition standards (.0900); transportation standards (.1000); building code requirements for child care centers (.1300); space requirements (.1400); temporary care requirements (.1500); family child care home requirements (.1700); discipline (.1800); special procedures concerning abuse/neglect in child care (.1900); rulemaking and contested case procedures (.2000); religious-sponsored child care center requirements (.2100); administrative actions and civil penalties (.2200); forms (.2300); child care for mildly ill children (.2400); care for school-age children (.2500); child care for children who are medically fragile (.2600); criminal records checks (.2700); voluntary rated licenses (.2800); developmental day services (.2900); and NC pre-kindergarten services (.3000).

<u>Petitions for Rulemaking</u> Amend/*	10A NCAC 09 .2001
<u>Rulemaking Procedures</u> Amend/*	10A NCAC 09 .2002
<u>Declaratory Rulings</u> Amend/*	10A NCAC 09 .2003
<u>Contested Cases: Definitions</u> Amend/*	10A NCAC 09 .2004
<u>Contested Cases: Requests for Determination</u> Amend/*	10A NCAC 09 .2005
<u>Contested Cases: Record</u> Repeal/*	10A NCAC 09 .2006
<u>Contested Cases: Exceptions to Recommended Decision</u> Repeal/*	10A NCAC 09 .2007

**COSMETIC ART EXAMINERS, BOARD OF**

The rules in Subchapter 14H are sanitation rules for both operators and facilities including sanitation (.0100); shop licensing and physical dimensions (.0200); cosmetic art shop and equipment (.0300); sanitation procedures and practices (.0400); and enforcement, maintenance of licensure (.0500).

<u>First Aid</u> Amend/*	21 NCAC 14H .0404
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The rules in Subchapter 14T concern cosmetic art schools including the scope of the rules and school applications (.0100); physical requirements for cosmetic art schools (.0200); school equipment and supplies (.0300); student equipment (.0400); record keeping (.0500); curricula for all cosmetic art disciplines (.0600); school licensure, operations, closing and relocating schools (.0700); school inspections (.0800); and disciplinary actions (.0900).

<u>Natural Hair Care Schools</u> Readopt with Changes/*	21 NCAC 14T .0205
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<u>Equipment for Cosmetology Schools</u> Amend/*	21	NCAC 14T .0302
<u>Equipment for Esthetics Schools</u> Amend/*	21	NCAC 14T .0303
<u>Equipment for Manicuring Schools</u> Amend/*	21	NCAC 14T .0304
<u>Equipment for Natural Hair Care Styling Schools</u> Readopt with Changes/*	21	NCAC 14T .0305
<u>Cosmetic Art Curriculum</u> Amend/*	21	NCAC 14T .0601
<u>Cosmetology Curriculum</u> Readopt with Changes/*	21	NCAC 14T .0602
<u>Apprentice Cosmetology Curriculum</u> Readopt with Changes/*	21	NCAC 14T .0603
<u>Esthetics Curriculum</u> Readopt with Changes/*	21	NCAC 14T .0604
<u>Manicuring Curriculum</u> Readopt with Changes/*	21	NCAC 14T .0605
<u>Natural Hair Care Curriculum</u> Readopt with Changes/*	21	NCAC 14T .0606
<u>Instruction Guidelines</u> Amend/*	21	NCAC 14T .0612
<u>School Operations/Licensure Maintenance</u> Readopt with Changes/*	21	NCAC 14T .0701

**ONSITE WASTEWATER CONTRACTORS AND INSPECTORS CERTIFICATION BOARD**

The rules in Chapter 39 are from the Onsite Wastewater Contractors and Inspectors Certification Board and include definitions (.0100); certification of onsite wastewater contractors or inspectors (.0200); onsite wastewater contractor or inspector fees (.0300); certification by examination (.0400); certification renewal (.0500); continuing education requirements (.0600); and procedures for disciplinary actions (.0700).

<u>Definitions</u> Amend/*	21	NCAC 39 .0101
<u>Schedule of Certification Fees</u> Amend/*	21	NCAC 39 .0301
<u>Onsite Wastewater Contractor or Inspector Examinations</u> Amend/*	21	NCAC 39 .0401
<u>Requirements</u> Amend/*	21	NCAC 39 .0601
<u>Approval of Continuing Education Courses</u> Amend/*	21	NCAC 39 .0602
<u>Revocation, or Suspension of Certification</u> Amend/*	21	NCAC 39 .0701
<u>Code of Ethics</u> Amend/*	21	NCAC 39 .0801
<u>General Requirements</u> Amend/*	21	NCAC 39 .1002
<u>General Exclusions of an Inspection</u> Amend/*	21	NCAC 39 .1004
<u>Minimum On-Site Wastewater System Inspection</u> Amend/*	21	NCAC 39 .1006

**PHARMACY, BOARD OF**

The rules in Chapter 46 cover organization of the board (.1200); general definitions (.1300); hospitals and other health facilities (.1400); admission requirements and examinations (.1500); licenses and permits (.1600); drugs dispensed by nurse and physician assistants (.1700); prescriptions (.1800); forms (.1900); administrative provisions (.2000); elections (.2100); continuing education (.2200); prescription information and records (.2300); dispensing in health departments (.2400); miscellaneous provisions (.2500); devices (.2600); nuclear pharmacy (.2700); compounding (.2800); product selection (.2900); disposal of unwanted drugs (.3000); clinical pharmacist practitioner (.3100); impaired pharmacist peer review program (.3200); and registry of pharmacist technicians (.3300).

Remote Medication Order Processing Services 21 NCAC 46 .1417  
Amend/\*

**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).

Fees 21 NCAC 66 .0108  
Amend/\*

**BUILDING CODE COUNCIL**

2012 NC Building Code/Required Separation of Occupancies 508.4  
Amend/\*

2012 NC Building Code/Fire Walls 706  
Amend/\*

2012 NC Building Code/Exterior Area for Assisted Rescue 1007.7  
Amend/\*

2012 NC Building Code/Recreational and Sports Facilities 1109.14  
Amend/\*

2012 Energy Conservation Code/Fenestration 402  
Amend/\*

2012 NC Fire Code/Sky Lanterns 308.1.6.3  
Amend/\*

2012 NC Residential Code/Existing Structures R102.7  
Amend/\*

2012 NC Residential Code/Garage Separation R302.6  
Amend/\*

2012 NC Residential Code/Hazardous Locations R308.4  
Amend/\*

2012 NC Residential Code/Vertical Egress R311.4  
Amend/\*

2012 NC Residential Code/Ground Vapor Retarder R408.2  
Amend/\*

2012 NC Residential Code/Bracing Methods Table R602.10.1  
Amend/\*

2012 NC Residential Code/Adhered Stone or Masonry Veneer ... R703.12  
Amend/\*

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**CONTESTED CASE DECISIONS**

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*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  
Don Overby  
J. Randall May

A. B. Elkins II  
Selina Brooks  
Phil Berger, Jr.

J. Randolph Ward

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<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>DATE</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
<b><u>ALCOHOLIC BEVERAGE CONTROL COMMISSION</u></b>			
Chief's Inc. v. Alcoholic Beverage Control Commission	13 ABC 18939	02/19/15	
American Legion, T/A Linton J Sutton Post 223-1 v. Alcoholic Beverage Control Commission	14 ABC 03686	12/23/14	
Alcoholic Beverage Control Commission v. AMH Diana Market Corp., T/A Green's Market	14 ABC 05071	01/14/15	
Alcoholic Beverage Control Commission v. Nick and Nates Pizzeria Inc T/A Nick and Nates Pizzeria	14 ABC 07115	01/14/15	
Alcoholic Beverage Control Commission v. Nick and Nates Pizzeria Inc T/A Nick and Nates Pizzeria	14 ABC 07116	01/14/15	
The Geube Group, Michael K Grant Sr v. Alcoholic Beverage Control Commission	14 ABC 08696	02/16/15	
Alcoholic Beverage Control Commission v. Bhavesh Corp T/A K and B Foodmart	14 ABC 09023	02/04/15	
Alcoholic Beverage Control Commission v. Greenleaf Food and Beverage Inc T/A Bunker Jacks	14 ABC 09037	03/07/15	
Alcoholic Beverage Control Commission v. S.D.C. Group Inc T/A Perkeo Wine Bistro	14 ABC 09039	02/09/15	
Alcoholic Beverage Control Commission v. Alquasem Mustafa Salameh T/A KP Mini Mart	14 ABC 09231	02/04/15	
<b><u>BOARD OF ARCHITECTURE</u></b>			
Board of Architecture v. Anthony Hunt	14 BOA 04954	03/03/15	30:01 NCR 77
<b><u>BOARD OF BARBER EXAMINERS</u></b>			
Arthur Donald Darby Jr v. Board of Barber Examiners - Staff	14 BBE 04565	12/05/14	
<b><u>BOARD OF FUNERAL SERVICES</u></b>			
Board of Funeral Services v. Mitchell's Funeral Home, Vivian Cummings, Corrine Culbreth	14 BMS 05389	02/23/15	
Board of Funeral Services v. Mitchell's Funeral Home, Vivian Cummings, Corrine Culbreth	14 BMS 07597	02/23/15	
Board of Funeral Services v. Mitchell's Funeral Home, Vivian Cummings, Corrine Culbreth	14 BMS 08028	02/23/15	
<b><u>BOARD FOR THE LICENSING OF GEOLOGISTS</u></b>			
Robert Payne, P.G. v. NC Board for the Licensing of Geologists	14 BOG 03255	06/11/15	30:07 NCR 780
<b><u>DEPARTMENT OF COMMERCE</u></b>			
Hog Slat, Inc v. Department of Commerce	13 COM 20122	12/05/14	
<b><u>DEPARTMENT OF PUBLIC SAFETY</u></b>			
Kimberly H. Oliver v. Victims Compensation Commission	13 CPS 14371	04/17/15	30:03 NCR 354
Jose Guadalupe Munoz Nunez v. Victims Compensation Commission	14 CPS 02633	02/16/15	
Jack Norris v. Victims Compensation Commission	14 CPS 06019	03/30/15	30:01 NCR 89

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**CONTESTED CASE DECISIONS**

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Yessika Murga Martinez v. Crime Victims Compensation Commission	14 CPS 07544	05/29/15	
Joanne Sanon v. Department of Public Safety	14 CPS 07995	01/16/15	
Bonnie Hall v. Crime Victims Compensation Commission	14 CPS 08618	01/23/15	

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

Strategic Interventions Inc. v. Western Highlands Network A LME-MCO	13 DHR 05119	06/21/13	
Kenneth Terrell Ford v. DHHS, Division of Facility Services	13 DHR 10745	05/04/15	30:03 NCR 360
Joyce Carol Hunter v. DHHS, Division of Health Service Regulation	13 DHR 17855	01/03/14	
Rex Hospital v. DHHS, Division of Medical Assistance	13 DHR 18151	05/29/15	30:03 NCR 372
Paul M Stella v. DHHS, Division of Public Health	13 DHR 19269	02/06/14	
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
A+ Residential Care, Daniel Saft v. NCDHHS, Division of Health Service Regulation	13 DHR 19835	05/22/15	
Stepping Stone Counseling v. NCDHHS, Division of Medical Assistance	13 DHR 19837	05/12/15	

Carolina Community Support Services, Inc. v. Alliance Behavioral Healthcare, NCDHHS	14 DHR 01500	04/02/15	30:04 NCR 480
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
Genesis Project 1, Inc v. DHHS, Division of Medical Assistance, and Mecklink Behavioral Healthcare	14 DHR 02198	06/17/15	30:07 NCR 794
Regina Joyner v. Division of Child Development and Early Education, DHHS	14 DHR 04463	12/10/14	
Cumberland County Hospital System, Inc d/b/a Cape Fear Valley Health System and Hoke Healthcare LLC v. NCDHHS, Division of Health Service Regulation, Certificate of Need Section	14 DHR 04692	01/21/15	
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
First Image Grace Court/RHCC and Shirley Williams v. DHHS, Division of Health Service Regulation	14 DHR 06332	02/12/15	
Carrie's Loving Hands, Felicia McGee v. NCDHHS, Division of Health Service Regulation, Certification	14 DHR 06565	02/13/15	
Erica Chante Johnson v. NCDHHS, Division of Health Service Regulation, Healthcare Personnel Registry	14 DHR 06571	03/10/15	30:02 NCR 236
Brenda Buck v. NCDHHS, Division of Health Service Regulation	14 DHR 07027	01/02/15	
Humble Beginnings Child Care Inc v. Division of Child Development and Early Education	14 DHR 07029	05/22/15	
Peace Of Mind Adult Group Home Kimberly Goolsby v. NCDHHS, Division of Health Service Regulation, Mental Health Licensure and Certification Section	14 DHR 07325	05/22/15	
Peace of Mind Adult Group Home Kimberly Goolsby, v. NCDHHS, Division of Health Service Regulation, Mental Health Licensure and Certification Section	14 DHR 07327	05/22/15	
Dennis Reid v. NCDHHS	14 DHR 07992	04/17/15	
Hanna Lawrence v. DHHS	14 DHR 08026	01/09/15	
Sharda R Wilkes v. NCDHHS, Division of Health Service Regulation	14 DHR 08575	01/21/15	
Sandy's Playschool LLC, Michelle Bailey-Motley v. DHHS, Division of Child Development	14 DHR 08580	02/16/15	
Alicia Staton v. Department of Health and Human Services	14 DHR 08589	02/02/15	
Tiffany Leary v. NCDHHS, Division of Health Services, Health Care Personnel Registry	14 DHR 08785	01/06/15	
Patrician Shearin v. NCDHHS	14 DHR 09012	06/29/15	
Tomika Jones Moore v. NCDHHS, Division of Health Service Regulation	14 DHR 10137	04/06/15	
Jones Country Mart, Inesar M Ahmad v. NCDHHS, WIC	14 DHR 10138	02/03/15	
Theresa L Greene v. DHHS, Division of Health Service Regulation	14 DHR 10160	02/10/15	
Jeanette Peele v. Health Care Personnel Registry, Nurse Aide I	14 DHR 10162	05/18/15	
The Janice Mae Hawkins Foundation Inc, Sheryl A Lyons v. DHHS, Division of Health Service Regulation, Mental Health Licensure and Certification	14 DHR 10167	04/27/15	
The Janice Mae Hawkins Foundation Inc, Sheryl A Lyons v. DHHS, Division of Health Service Regulation, Mental Health Licensure and Certification	14 DHR 10171	04/27/15	
Shawn Williams v. Rutherford-Polk-McDowell District Health Department, Environmental Health Division	14 DHR 10277	08/21/15	
Sophia B Pierce and Associates d/b/a Sunny Acres Group Home v. DHHS, Division of Facility Services, Mental Health Licensure and Certification Section	14 DHR 10281	04/02/15	
The Janice Mae Hawkins Foundation Inc, Sheryl A Lyons v. DHHS, Division of Health Service Regulation, Mental Health Licensure and Certification	15 DHR 00462	04/27/15	

**DEPARTMENT OF JUSTICE**

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**CONTESTED CASE DECISIONS**

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Thomas Eliza Anderson v. Private Protective Services Board	11 DOJ 10367	06/24/14	
Daniel Joseph Steele v. NC Private Protective Services Board	13 DOJ 03346	06/29/15	30:07 NCR 838
Ronnie Earl Smith Jr. v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 04114	04/09/15	30:02 NCR 243
Aisha Christina Burston v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 04118	01/13/15	
Susan Maney v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 05067	04/14/15	30:02 NCR 252
Dewayne Rosean Ward v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 05116	05/16/15	
Tobias La'Trell Clagon v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 05117	07/01/15	
Arthur Randall Griffin v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 05118	04/27/15	
Rachel Elisabeth Hoffman v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 05502	03/11/15	30:04 NCR 513
Rayburn Darrell Rowe v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 05503	04/20/15	30:06 NCR 692
Robert Boyce Sherrill Jr. v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 05504	03/04/15	
Michelle Wiggins Morings v. NC Sheriff's Education and Training Standards Commission	14 DOJ 07719	03/17/15	
Billy Ray Bureson v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 07924	07/28/15	30:09 NCR 1034
Darin Clay Whitaker v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 07925	06/12/15	
Ahmad Malik Lance v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 08050	01/27/15	
Bobby Andrew Boudreau v. NC Private Protective Services Board	14 DOJ 08155	12/19/14	
Waseen Abdul-Haqq v. NC Sheriff's Education and Training Standards Commission	14 DOJ 08259	07/21/15	30:06 NCR 699
Donald Earl Schwab v. NC Sheriff's Education and Training Standards Commission	14 DOJ 08347	05/28/15	30:04 NCR 518
Brandon Tyler Josey v. NC Sheriff's Education and Training Standards Commission	14 DOJ 08348	08/08/15	30:09 NCR 1040
Kia Rena Graham v. NC Private Protective Services Board	14 DOJ 08582	01/28/15	
Martin Luther Locklear v. NC Criminal Justice Education and Training Standards Commission	15 DOJ 00052	06/05/15	30:05 NCR 580
Ronald Corbett Jr. v. NC Criminal Justice Education and Training Standards Commission	15 DOJ 00055	05/04/15	30:05 NCR 587
Billy-Dee Greenwood v. NC Private Protective Services Board	15 DOJ 00520	06/02/15	30:07 NCR 833
<b><u>DEPARTMENT OF TRANSPORTATION</u></b>			
Barnhill Contracting Co. Inc v. Department of Transportation, Division of Highways	12 DOT 04647	02/03/15	
<b><u>DIVISION OF EMPLOYMENT SECURITY</u></b>			
Kendra Marie Halsey v. Elizabeth City State University	14 DSC 09486	03/17/15	
<b><u>DEPARTMENT OF STATE TREASURER</u></b>			
Stephanie T. Treio v. NC Department of State Treasurer	14 DST 06380	05/08/15	30:04 NCR 531
Candace Collins v. NC Retirement Agency	14 DST 06428	12/02/14	
Lloyd McRae Herring v. NC Department of State Treasurer Retirement Systems Division	14 DST 06724	01/20/15	
Trina Parker v. State of NC Department Treasurer Retirement Division Disability Section	14 DST 06732	02/16/15	
<b><u>STATE BOARD OF EDUCATION</u></b>			
Danny Lorenzo Scott v. Public Schools of NC, Department of Public Instruction	14 EDC 09883	07/10/15	30:06 NCR 705
<b><u>DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES</u></b>			
Alcoa Power Generating Inc. v. Division of Water Resources, DENR	13 EHR 18085	05/29/15	30:03 NCR 402
Bannor Michael Macgregor v. Durham County Department of Health, Environmental Health Division	14 EHR 02900	04/13/15	
Brian T Jackson, Rosemary Jackson v. NCDHHS, Environmental Health Section, Doug Mevey and/or Harry Lewis	14 EHR 02843	01/13/15	
David Frank Crisp v. NC Department of Environment and Natural Resources	14 EHR 03870	08/14/15	30:09 NCR 1046
Garrett Adam Couick v. Cabarrus County Health Alliance	14 EHR 07603	07/24/15	
<b><u>DEPARTMENT OF INSURANCE</u></b>			
Thelma Grant POA Marilyn Howard v. State Health Plan for Teachers and State Employees	13 INS 20396	05/22/15	
<b><u>BOARD OF LICENSED PROFESSIONAL COUNSELORS</u></b>			
Beth Ford v. NC LPC Board	14 LPC 05203	08/01/14	
Beth Ford v. NC Board of Licensed Professional Counselors	14 LPC 07355	05/20/15	
<b><u>MISCELLANEOUS</u></b>			
Thomas Charles Fogarty v. Town of Maggie Valley	13 MIS 19252	01/14/14	

**OFFICE OF STATE HUMAN RESOURCES (formerly OFFICE OF STATE PERSONNEL)**

Linda Huggins v. Department of Administration, NC Human Relations Commission	08 OSP 01153	01/23/15	
Lauren Wilson Burch v. NC Alcohol Law Enforcement	12 OSP 08548	04/14/15	30:06 NCR 0681
Deni Crawley v. NCDPS Foothills Correctional Institution	13 OSP 11438	04/28/15	30:01 NCR 62
Sue Michaud v. Kieran Shanahan; Mikael R Gross, Department of Public Safety	13 OSP 14194	08/14/14	
Sue Michaud v. Kieran Shanahan; Mikael R Gross, Department of Public Safety	13 OSP 14195	08/14/14	
Willie Joyce Partin v. DOT, Division of Motor Vehicles, Traffic Records, Crash Report Unit	13 OSP 17728	12/04/13	
Deni Crawley v. NCDPS Foothills Correctional Institution	13 OSP 19135	04/28/15	30:01 NCR 62
Matthew Lennon v. NC Department of Justice and NC Department of Public Safety	14 OSP 06377	02/16/15	
Estate of Todd McCracken v. Department of Revenue	14 OSP 07170	08/24/15	30:09 NCR 1076
Raymond Gene Gonzales v. NCDHHS, Division of Vocational Rehabilitation Services	14 OSP 07804	02/27/15	30:04 NCR 534
Joseph Tenhagen v. NC Department of Public Safety, Employee Advisory Committee	14 OSP 07837	03/23/15	30:05 NCR 571
Hope Freeman v. NC Department of Public Safety	14 OSP 07967	07/28/15	30:09 NCR 1086
Stephen Dale Brown v. NC State University	14 OSP 09759	06/25/15	30:07 NCR 812
Zoila Brock v. Nanette Outlaw, Director Duplin County Social Services	14 OSP 10048	04/17/15	30:06 NCR 711

**OFFICE OF THE SECRETARY OF STATE**

Carolyn Marie Aikens v. Secretary of State, Notary Public	13 SOS 15500	11/05/13	
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FILED

STATE OF NORTH CAROLINA

IN THE OFFICE OF  
2015 JUN 23 10 58 AM  
ADMINISTRATIVE HEARINGS  
14 DOJ 7924

COUNTY OF STANLY

Billy Ray Burleson, )  
Petitioner, )  
vs. )  
North Carolina Criminal Justice Education )  
And Training Standards Commission, )  
Respondent. )

PROPOSAL FOR DECISION

**THIS MATTER** came before the undersigned Selina M. Brooks, Administrative Law Judge, for hearing on May 4, 2015 in Charlotte, North Carolina. This case was heard at Respondent's request pursuant to N.C. Gen. Stat. § 150B-40(e) for the designation of an Administrative Law Judge to preside at a hearing of a contested case under Article 3A, Chapter 150B of the North Carolina General Statutes.

**APPEARANCES**

For Petitioner:

Kirk L Bowling Law Firm PLLC  
Bowling Law Firm PLLC  
120 King Av  
PO Box 891  
Albemarle, NC 28002

For Respondent:

Matthew L Boyatt  
Assistant Attorney General  
NC Department of Justice  
9001 Mail Service Center  
Raleigh, NC 27699-9001

Jeremy Griffin  
Morton and Griffin  
115 S Central Av  
PO Box 422  
Locust, NC 28097

**ISSUE**

Whether Respondent had probable cause to find that Petitioner's certification as a law enforcement officer should be suspended?

**APPLICABLE LAW**

The applicable statute and rules:

- N.C. Gen. Stat. § 14-33(c)(2)
- 12 NCAC 09A .0103(23)(b)
- 12 NCAC 09A .0204(b)(3)(A) & (c)
- 12 NCAC 09A .0204(c)
- 12 NCAC 09A .0205(b)(1)

**EXHIBITS ADMITTED INTO EVIDENCE**

Petitioner's Exhibits 1 and 2 were admitted.

Respondent's Exhibits 1 through 14 were admitted.

**WITNESSES**

**For Petitioner:** Billy Ray Burlison, Petitioner  
Kenneth Austin, Charlotte-Mecklenburg Police Department  
John Hartsell, Friend  
Sgt. Ken Jones, Charlotte-Mecklenburg Police Department

**For Respondent:** Julie Moore Burlison  
Sgt. Matthew Russell, Stanly County Sheriff's Office  
Sgt. Michael Sloop, Charlotte-Mecklenburg Police Department

**BASED UPON** careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making the findings of fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interest, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case. In the absence of a transcript, the Undersigned relied upon her notes in writing this decision.

**FINDINGS OF FACT**

1. Petitioner and Julie Moore Burlison have been married for 21 years.
2. During the five years prior to August 2013, Petitioner and his wife had separated on two occasions in which Mrs. Burlison had moved to her parent's home in Greensboro.
3. In August 2013, Petitioner and his wife continued to have difficulties, and Petitioner became fearful that she would leave him again.
4. In August 2013, Petitioner worked first shift as a law enforcement officer for the Charlotte-Mecklenburg Police Department while Mrs. Burlison worked third shift as a certified nursing assistant at a local hospital.
5. On August 23, 2013, Petitioner decided to take a vacation day from his job and parked his car nearby at his mother's house.

6. Meanwhile, Mrs. Burleson returned home from work, observed that Petitioner's car and uniform were missing, and she thought that Petitioner had gone to work. She packed some of her belongings in her car with the intention of leaving her husband the next day.
7. Petitioner called Mrs. Burleson from his cellphone and asked her whether she was planning to leave him. She confirmed that she was and an argument ensued.
8. Petitioner told Mrs. Burleson that he was at work, but in actuality he was walking into the garage attached to their home. Mrs. Burleson was in the garage and when she saw Petitioner walk in she hung up the phone.
9. Petitioner picked up a pogo stick and began hitting Mrs. Burleson's car with it, breaking windows and denting the body of the car. (R. Ex. 13)
10. Mrs. Burleson testified that it was a child's pogo stick, approximately one foot long.
11. Petitioner did not swing the pogo stick at Mrs. Burleson or threaten her with it.
12. Petitioner did not physically assault his wife.
13. Petitioner directed his anger at his wife's car, a Chevrolet Malibu, which had been recently purchased by the couple for Mrs. Burleson but which Petitioner felt that they could ill afford and was meant to appease his wife.
14. Mrs. Burleson ran inside the house, locked herself in the bathroom, and called 911.
15. Mrs. Burleson heard Petitioner enter the house from the garage and heard the sounds of him opening the gun safe.
16. Mrs. Burleson also heard Petitioner tell her that "I'm not going to hurt you."
17. Petitioner did not verbally threaten his wife.
18. Petitioner knew that Mrs. Burleson had called the police and that upon their arrival, the police would remove all firearms from the house. Petitioner took his father's firearms from the gun safe and took them nearby to his brother's house so that they would not be impounded. Petitioner left his personal firearms in the gun safe.
19. Petitioner returned home and waited in the living room for the arrival of the police and met them on the front porch.
20. After twenty to thirty minutes, Officers from the Stanfield Police Department and the Stanly County Sheriff's Office arrived and Mrs. Burleson came out of the bathroom. (R. Ex. 4)
21. Petitioner cooperated with the officers and admitted to damaging the car.

22. In his Incident Report on August 23, 2013, Deputy Russell reported that Mrs. Burleson stated that Petitioner “started hitting and breaking the windows of the vehicle and swinging the pogo stick at her.” (R. Ex. 4)
23. The deputy sheriff took Mrs. Burleson to a magistrate where she filed a Victims First Domestic Violence Incident Report and a Warrant For Arrest was issued for Petitioner. (R. Exs. 5 & 8)
24. Petitioner was taken into custody and detained in the Stanly County Jail. He was released on August 25, 2013 and served with a Domestic Violence Order of Protection. (R. Ex. 7)
25. On August 29, 2013, Petitioner informed his superior officers of the criminal investigation. He cooperated fully with the Charlotte-Mecklenburg Police Department’s internal investigation and with Respondent’s investigation. (R. Ex. 14)
26. Mrs. Burleson filed a Complaint for a Domestic Violence Order of Protection on August 27, 2013 at the urging of her father and an Ex Parte Domestic Violence Order of Protection was entered. (R. Exs. 9 & 10)
27. The Domestic Violence Order of Protection entered on October 2, 2013, states that the Parties “agree and consent ... [that] the minor children of the parties reside with the [Petitioner]”. (R. Ex. 11; *and see* R. Ex. 2)
28. On October 13, 2013, Petitioner was suspended by Charlotte-Mecklenburg Police Department for Unbecoming Conduct for a period of 40 hours without pay, 24 hours active and 16 hours inactive for a one-year period pending no additional sustained violations.
29. The Report of the Internal Affairs Bureau for the Charlotte-Mecklenburg Police Department, dated October 16, 2013, states that “[a]lthough Mrs. Burleson was not physically assaulted during this incident she felt threatened.” (R. Exs. 6 & 7)
30. On December 5, 2013, Mrs. Burleson filed a Motion To Set Aside the Domestic Violence Order of Protection which was granted. (R. Ex. 12)
31. On September 10, 2014, Respondent’s Probable Cause Committee notified Petitioner of its intention to suspend his law enforcement certification on the ground that probable cause exists to believe that he committed the offense of Assault On A Female when “by holding a large metal pogo stick and swung the metal stick toward [Mrs. Burleson]”.
32. In the administrative hearing, Mrs. Burleson testified that Petitioner swung the pogo stick at the car and did not testify that he swung at her or threatened her with it.
33. Mrs. Burleson testified that she “felt threatened” because Petitioner was hitting the car and not because he threatened to hit her.

34. Mrs. Burleson testified that she does not fear Petitioner, and since the incident they have reconciled.
35. Petitioner has remained an active police officer with the Charlotte-Mecklenburg Police Department since October 31, 2013 with no further sustained violations of policy.
36. Petitioner's personnel record spans 24 years during which he has met or exceeded expected performance ratings as well as received numerous letters of commendation and recognition. (P. Ex. 1)
37. After careful consideration of all of the evidence, including the demeanor and testimony of the witnesses, and giving particular attention to the testimony of Mrs. Burleson, the alleged victim, the Undersigned finds as fact that the Petitioner did not threaten or harm Mrs. Burleson.

**CONCLUSION OF LAW**

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case. The parties received proper notice of the hearing in the matter. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.
2. Both parties are properly before this Administrative Law Judge, in that jurisdiction and venue are proper, both parties received Notice of Hearing, and Petitioner received the notification of Proposed Suspension of Law Enforcement Officer Certification through a letter mailed by Respondent on September 10, 2014.
3. The North Carolina Criminal Justice Education and Training Standards Commission has the authority granted under Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 9A, to certify criminal justice officers and to revoke, suspend, or deny such certification. The Commission may take such action when the certified officer
  - (3) ... has committed or been convicted of a: (A) criminal offense or unlawful act defined in 12 NCAC 09A .0103 as a Class B misdemeanor.

12 NCAC 09A .0204(b)
4. The party with the burden of proof in a contested case must establish the facts required by N.C.G.S. § 150B 23(a) by a preponderance of the evidence. N.C.G.S. § 150B 29(a). The administrative law judge shall decide the case based upon the preponderance of the evidence. N.C.G.S. § 150B 34(a).

5. Assault on a Female in violation of N.C.G.S. § 14-33 (c)(2) is classified as a Class B misdemeanor pursuant to 12 NCAC 10B .0103 (10)(b) and the Class B Misdemeanor Manual adopted by Respondent.
6. A preponderance of the evidence presented at the administrative hearing establishes that Petitioner did not assault Mrs. Burleson on August 23, 2013.
7. The findings of the Probable Cause Committee of the Respondent are not supported by substantial evidence and are arbitrary and capricious.
8. Respondent has not met the burden of proof in the case at bar. Respondent has not shown by a preponderance of the evidence that Petitioner committed the offense of Assault On A Female.

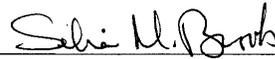
**PROPOSAL FOR DECISION**

BASED UPON the foregoing Findings of Fact and Conclusions of Law, it is proposed that Petitioner's criminal justice certification NOT be suspended.

**NOTICE**

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this Proposal for Decision, to submit proposed Findings of Fact and to present oral and written arguments to the agency pursuant to N.C. Gen. Stat. § 150B-40(e). The agency that will make the final decision in this contested case is North Carolina Criminal Justice Education and Training Standards Commission

This the 28th day of July, 2015.



\_\_\_\_\_  
Selina M. Brooks  
Administrative Law Judge

FILED  
OFFICE OF ADMINISTRATIVE HEARINGS  
8/5/2015 12:37 PM

STATE OF NORTH CAROLINA  
COUNTY OF GASTON

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
14DOJ08348

<p>Brandon Tyler Josey Petitioner,</p> <p>v.</p> <p>N C Sheriffs' Education And Training Standards Commission Respondent.</p>	<p><b>PROPOSAL FOR DECISION</b></p>
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THIS MATTER came on for hearing before Hon. J. Randolph Ward on April 8, 2015, in Morganton, North Carolina, upon Respondent's request, pursuant to N.C. Gen. Stat. § 150B-40(e), for designation of an Administrative Law Judge to preside at the hearing of this contested case under Article 3A, Chapter 150B of the North Carolina General Statutes.

**APPEARANCES**

Petitioner: *Pro se*

Respondent: Matthew L. Boyatt, Assistant Attorney General  
N.C. Department of Justice  
Raleigh, North Carolina

**ISSUE**

Does Petitioner possess the good moral character required of a sworn justice officer, as defined by 12 NCAC 10B .0301(a)(8)?

**RULES AT ISSUE**

12 NCAC 10B .0204(b)(2), 12 NCAC 10B .0204(d)(2), 12 NCAC 10B .0204(g), 12 NCAC 10B .0205(3), and 12 NCAC 10B .0301(a)(8).

**WITNESSES**

For Petitioner: Sgt. Brandon Tyler Josey, N.C. National Guard, Petitioner

For Respondent: Sgt. Spencer Cline, Newton Police Department  
Sgt. Thad Scronce, Catawba Co. Sheriff's Office

**EXHIBITS ADMITTED INTO EVIDENCE**

Respondent's Exhibits ("R. Exs.") 1, 2, 3, 4, 5, 7 and 8 were admitted into evidence. The Parties did not move for admission of R. Ex. 6.

Notes of interviews with "friends of [Petitioner's] wife" who did not appear as witnesses subject to cross-examination and were offered to put into the record statements made under circumstances indicating a lack of trustworthiness -- i.e., having their origin in their ultimate source's period of marital strife -- were excluded from evidence pursuant to the hearsay rule. N.C. Gen. Stat. § 8C-1, Rules 802 & 803(8). "Public records and reports that are not admissible under section (8) are not admissible as business records exception (6)." Rule 803(8), Official Commentary.

**UPON DUE CONSIDERATION** of the arguments of counsel; the exhibits admitted; the sworn testimony of each of the witnesses in light of their opportunity to see, hear, know, and recall relevant facts and occurrences, any interests the witnesses may have, and whether their testimony is reasonable and consistent with other credible evidence; and upon assessing the greater weight of the evidence from the record as a whole in accordance with the applicable law, the undersigned Administrative Law Judge makes the following:

**FINDINGS OF FACT**

1. The North Carolina Sheriffs' Education and Training Standards Commission (hereinafter referred to as the "Commission" or "Respondent") has the authority granted under Chapter 17E of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 10B, to certify justice officers and to deny, revoke, or suspend such certifications for cause.
2. Petitioner is a combat veteran of the Iraq War, honorably discharged in April 2010 after four years' service. He led an eight-man squad in battle and was wounded in action. The U.S. Army awarded him the Army Achievement Medal, the Army Commendation Medal with Valor Device, a Purple Heart, and a Good Conduct Medal. Following the events discussed below, he accepted fulltime duty with the N.C. National Guard and currently holds a security clearance that allows him to be entrusted with \$2 million of "equipment and sensitive items." As of the date of the hearing, Petitioner was 28 years old, married, and the father of a 5 year old son. His conviction record consisted of three speeding tickets and a littering citation.
3. Petitioner creditably testified that he had a difficult post-war transition back to civilian life, complicated by post-traumatic stress disorder, for which he received therapy and medication. His transition was further complicated by the inability to obtain employment with remuneration adequate to support his young family. His application listed \$81,300 in debt. He described himself as estranged from his wife in 2013, though they still lived in the same home. He was remorseful about that situation, his online flirtations with other women, and untruthful or misleading statements made in the course of applying for

positions with the Newton Police Department and the Catawba County Sheriff's Office. Since those episodes, he has become "symptom-free" of his PTSD condition. He described his current marital situation as being markedly improved, though imperfect, and of having "reformed myself." He gave the general impression of being back on course in his new full-time duties with the N.C. National Guard and thinking about his future.

4. Petitioner applied for a police officer position with the Newton Police Department following his completion of Basic Law Enforcement Training at Catawba County Community College in February 2013. Sgt. Spencer Cline, who carried out the background investigation of Petitioner for the Newton Police Department, reported that "[t]he majority of the individuals contacted provided positive feedback about Mr. Josey," and that his "peers and instructors in BLET" described him "as being top-notch, squared away and trustworthy." However, another officer in the Department, Investigator Hill, whose wife was a coworker of Petitioner's wife, told Sgt. Cline about her accounts of strife in the Joseys' marriage and speculation among her friends that he had cheated on his wife with multiple women.
5. Sgt. Cline found that Petitioner had a page on a social website, tagged.com, on which he had been "friended" by about dozen young women. He contacted one of them, who allowed him to take photos and messages she had exchanged with Petitioner from her smart phone. In light of the other information he was receiving, Sgt. Cline concluded that they had had an extramarital affair, but she denied that. A texting exchange between them, which Sgt. Cline felt was incriminating, reveals that Petitioner told her he was married. Petitioner denied having a physical relationship with her or any of the other women he "met" online.
6. When Sgt. Cline and Investigator Hill confronted Petitioner, he initially falsely denied having the tagged.com webpage and knowing the woman who had cooperated with Sgt. Cline. Petitioner testified that he was untruthful because he was surprised and flustered by the questions, badly needed the job because of his financial situation, and was still suffering from PTSD, a condition that is notorious for making sufferers emotionally labile. His interviewers concluded that Petitioner told "several lies" and recommended against his employment.
7. In March 2013, Petitioner applied for a Deputy Sheriff position at the Catawba County Sheriff's office. His application disclosed that he had been rejected at the Newton Police Department because he "didn't pass the background [check]." Sgt. Thad Scronce, who was screening Petitioner for the Catawba Sheriff, contacted the Newton police and was told that Petitioner was denied employment because of untruthful statements he provided during the interview process.
8. When Sgt. Scronce interviewed him on March 6, 2013, Petitioner was generally forthcoming, including confessing to a theft when he was eight years old and, more recently, accidentally running a red light. However, Sgt. Scronce testified that Petitioner tried to mislead him about the reasons the Newton Police Department declined his

application by suggesting it was the result of a personal matter with Investigator Hill, relating to statements he had made about Petitioner's wife. Due to the "integrity issues" Sgt. Scroner identified in the interviews for both jobs, he recommended against hiring Petitioner to work for the Catawba County Sheriff's Office.

9. Petitioner subsequently applied to Respondent for Justice Officer Certification to work with the Alexander County Sheriff's Office in a sworn capacity. Petitioner received Respondent's *Notification of Probable Cause to Deny Justice Officer Certification*, dated September 12, 2014, and made a timely request for a contested case hearing. The stated grounds for the proposed denial were the untruthful statements in the two employment interviews referenced above.
10. The preponderance of the evidence, including the Petitioner's admissions, shows that he made false or misleading statements during his interviews for law enforcement positions with the Newton Police Department and the Catawba County Sheriff's Office.
11. The preponderance of the competent and credible evidence of record shows that Petitioner was not untruthful when he denied having physical extramarital relations during his employment interviews with the Newton Police Department and the Catawba County Sheriff's Office.
12. Petitioner testified at hearing that he had accepted a full-time position with the N.C. National Guard and could not also serve as a sworn peace officer while in that capacity, but that it remained his ambition to serve as a law enforcement officer following his service in the Guard, and thus he had appealed the denial of certification to address the questions about his character.
13. The evidence shows, as extenuating circumstances, that Petitioner's poor behavior while burdened with post-traumatic stress disorder, which required extensive treatment, and his marital difficulties caused or exacerbated by that condition, sharply contrasts with his honorable and meritorious wartime service in the Armed Forces, the reputation he had previously established in his community, and his well-regarded performance in Basic Law Enforcement Training.
14. To the extent that portions of the following Conclusions of Law include findings of fact, such are incorporated by reference into these Findings of Fact.

Upon the foregoing Findings of Fact, the undersigned makes the following:

**CONCLUSIONS OF LAW**

1. To the extent that portions of the foregoing Findings of Fact include Conclusions of Law, such are incorporated by reference into these Conclusions of Law.

2. The parties and the subject matter of this hearing are properly before the Office of Administrative Hearings. N.C. Gen. Stat. §150B-40(e).
3. Pursuant to 12 NCAC 10B .0204(d)(2), the Commission may deny justice officer certification when the Commission finds that the applicant “fails to meet or maintain any of the employment or certification standards required by 12 NCAC 10B .0300.”
4. N.C. Administrative Code, Title 12, Chapter 10B .0301 requires:

(a) Every Justice Officer employed or certified in North Carolina shall: \* \*  
 \* (8) be of good moral character as defined in: *In re Willis*, 288 N.C. 1, 215 S.E.2d 771 (1975), *appeal dismissed* 423 U.S. 976 (1975); *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1940); *In re Legg*, 325 N.C. 658, 386 S.E.2d 174 (1989); *In re Applicants for License*, 143 N.C. 1, 55 S.E. 635 (1906); *In re Dillingham*, 188 N.C. 162, 124 S.E. 130 (1924); *State v. Benbow*, 309 N.C. 538, 308 S.E.2d 647 (1983); and their progeny[.]

“Good moral character has many attributes, but none are more important than honesty and candor. \*\*\* Whether a person is of good moral character is seldom subject to proof by reference to one or two incidents.” *In re Legg*, 325 N.C. 658, 386 S.E.2d 174 (1989).

5. Willfully making untruthful statements during two interviews for law enforcement officer positions portrays a lack of the good moral character required for certification as a law enforcement officer.
6. When “the Commission does ... deny the certification of a justice officer pursuant to [12 NCAC 10B .0204], the period of such sanction shall be as set out in 12 NCAC 10B .0205,” i.e., “(3) for an indefinite period, but continuing so long as the stated deficiency... continues to exist, where the cause of sanction is: (b) failure to meet or maintain the minimum standards of employment or certification[.]” However, “The Commission may ... substitute a period of probation in lieu of ... denial following an administrative hearing. This authority to reduce or suspend the period of sanction may be utilized by the Commission when extenuating circumstances brought out at the administrative hearing warrant such a reduction or suspension.”
7. “[W]hen one seeks to establish restoration of a character which has been deservedly forfeited, the question becomes essentially one of time and growth.” *In re Dillingham*, 188 N.C. 162, 124 S.E. 130 (1924).

Upon the foregoing Findings of Fact and Conclusions of Law, the undersigned makes the following:

**PROPOSAL FOR DECISION**

The undersigned respectfully recommends that the Commission deny Petitioner's right to apply for Law Enforcement Officer Certification for a period of three (3) to five (5) years from his misrepresentations in March 2013.

**NOTICE AND ORDER**

The North Carolina Sheriffs' Education and Training Standards Commission is the agency that will make the Final Decision in this contested case. As the final decision-maker, that agency is required to give each party an opportunity to file exceptions to this proposal for decision, to submit proposed findings of fact, and to present oral and written arguments to the agency pursuant to N.C. Gen. Stat. § 150B-40(e).

It hereby is ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6714.

This the 5th day of August, 2015.



J. Randolph Ward  
Administrative Law Judge

FILED  
OFFICE OF ADMINISTRATIVE HEARINGS  
8/14/2015 4:06 P.M.

STATE OF NORTH CAROLINA  
COUNTY OF GRAHAM

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
14 EHR 03870

DAVID FRANK CRISP, )  
Petitioner, )  
v. )  
NORTH CAROLINA DEPARTMENT OF )  
ENVIRONMENT AND NATURAL )  
RESOURCES, NCDENR )  
Respondent. )

**FINAL DECISION**

This matter came before Administrative Law Judge Donald W. Overby in Waynesville, North Carolina on January 8, 2015, April 9, 2015, and April 10, 2015. The case involved the appeal of a compliance order with administrative penalty. Respondent assessed Petitioner an administrative penalty in the amount of \$14,625.00 and investigative costs of \$2,103.41 for violations of N.C. Gen. Stat. §§ 130A, Article 9, The Solid Waste Management Act, and the Rules promulgated thereunder at 15A N.C.A.C. 13B.

At the conclusion of the evidentiary hearing, the parties were given an opportunity to present a proposed decision including findings of fact and conclusions of law within thirty days of receiving a copy of the transcription of the hearing. Respondent timely and appropriately submitted a proposed Order. Petitioner has presented no proposed findings of fact and conclusions of law, or other proposal for consideration.

APPEARANCES

For Petitioner:  
Eric W. Stiles  
260 Bryson Walk  
P. O. Box 1565  
Bryson City, NC 28713

For Respondent:  
Teresa L. Townsend  
Assistant Attorney General  
N.C. Department of Justice  
9001 Mail Service Center  
Raleigh, NC 27699-9001

And

Russell L. McLean, III  
244 North Main Street  
Waynesville, NC 28786

ISSUES

1. Whether Respondent has jurisdiction to issue septage management permits and to enforce any violations of those permits on property owned by the Tennessee Valley Authority?

2. Whether Petitioner violated N.C. Gen. Stat. § 130A-291.1(d) by disposing of septage into Fontana Lake rather than at a wastewater system approved by the Respondent or at a site permitted by the Department for disposal?
3. Whether Petitioner violated 15A N.C.A.C. 13B .0832(a)(6) by failing to follow conditions of his permit by allowing septage to flow into the surface waters of Fontana Lake, including not notifying Respondent of a spill event that contacted surface waters?
4. Whether Petitioner violated 15A N.C.A.C. 13B .0841(e) by failing to maintain his septage detention facility to ensure that leaks or the flow of septage are prevented from flowing into the surface waters of Fontana Lake?
5. Whether Petitioner violated 15A N.C.A.C. 13B .0841(j) by failing to transfer septage to a detention system in a safe and sanitary manner so that septage, including septage in pipes used for transferring waste, flowed into the surface waters of Fontana Lake?
6. Whether Petitioner met his burden of proving that Respondent exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule?
7. Whether Respondent acted properly in assessing a \$14,625.00 penalty and \$2,103.41 investigative costs against Petitioner for violations of N.C. Gen. Stat. § 130A, Article 9, and its attendant rules?

STATUTORY SECTIONS IN QUESTION

N.C. Gen. Stat. § 130A, Article 9, Solid Waste Management Act, 15A N.C.A.C. 13B, and the Administrative Procedure Act, Article 3, N.C. Gen. Stat. §§ 150B-22 through 150B-37.

EXHIBITS RECEIVED INTO EVIDENCE

PETITIONER:

Petitioner's 6	Photograph of cut off valve at facility platform
Petitioner's 7	Photograph of pipe at facility platform
Petitioner's 8	Photograph of pipe at facility platform
Petitioner's 9-16	Photographs of jon boat tank
Petitioner's 17-20	Photographs of pipes and platform of facility
Petitioner's 21-22	Photographs of pipes attached to tank of facility
Petitioner's 23	Photograph of facility
Petitioner's 24	Receipt for Graham County Sanitation
Petitioner's 25	Open Burning Permit for lumber
Petitioner's 26	e letter to Troy Harrison re: May 12, 2010 Notice of Violation
Petitioner's 27	Fontana Lake Waste Recovery, Inc. June, 2005 Facility Plans

RESPONDENT:

Respondent's 1	Resume of Michael Scott
Respondent's 2	May 8, 2014 Compliance Order issued to Petitioner
Respondent's 3-1	Photograph of Crisp Boat Dock floating platform/septage detention facility
Respondent's 3-2	Aerial photograph of Lake Fontana
Respondent's 3-3	Photograph of pipe from tank of facility over platform to Lake Fontana
Respondent's 4	October 21, 2013 Facility Compliance Inspection Report & Notice of Violation
Respondent's 5	Petitioner's Response to Notice of Violation dated November 7, 2013
Respondent's 6	Investigative Costs Worksheet
Respondent's 7	Roane Photographs of Petitioner at facility/floating platform showing septage flow on June 27, 2013 (3)
Respondent's 7A	Roane Photograph of facility/floating platform on June 27, 2013
Respondent's 8	Resume of Martin Gallagher
Respondent's 9	Permit to Operate a Septage Detention and Treatment Facility issued to Crisp Boat Dock/Fontana Lake Waste Recovery, Inc. on July 17, 2012
Respondent's 10	Application for a Permit to Operate a Septage Detention or Treatment Facility signed by Petitioner on November 18, 2011
Respondent's 11	15A NCAC 13B .0702 Standards
Respondent's 12	Solid Waste Section Penalty Computation Worksheet for Mr. David Crisp d/b/a Crisp Boat Dock
Respondent's 13	Penalty Computation Procedure Guidance Document for Penalty Computation Worksheet
Respondent's 14	April 28, 2010 Notice of Violation for Open Burning issued by Division of Air Quality to Mr. David Crisp
Respondent's 15	May 12, 2010 Notice of Violation for operating an open dump issued by the Solid Waste Section, Division of Waste Management to Mr. David Crisp
Respondent's 16	August 2, 2011 Compliance Order with Administrative Penalty and Penalty Worksheet issued to Claude Ferguson, d/b/a C.W. Ferguson Pumping and Septic Tank Service
Respondent's 17	July 6, 2011 Compliance Order with Administrative Penalty and Penalty Worksheet issued to Mr. Gary Mitchell Scott, d/b/a Scott Septic Ser.
Respondent's 18	June 25, 2010 Compliance Order with Administrative Penalty and Penalty Worksheet issued to Mr. and Ms. White, d/b/a K-N-J Mobile Home Park

**JURISDICTION ISSUE**

At the beginning of the contested case hearing, Petitioner raised the issue of whether or not Respondent has jurisdiction to issue septage management permits and to enforce any violations of those permits on property owned by the Tennessee Valley Authority? Both parties presented argument, and the issue was taken under advisement.

Lake Fontana is a man-made reservoir in Graham and Swain Counties in North Carolina and is impounded by the Fontana Dam on the Little Tennessee River. Over 90 percent of the land surrounding the lake is owned either by the National Park Service or the U.S. Forest Service.

The Tennessee Valley Authority (“TVA”) was established in 1933 by the U.S. Congress primarily to reduce flood damage, improve navigation on the Tennessee River, provide electric power, and promote “agricultural and industrial development” in the region. The TVA, under the Act, is entrusted with the possession, operation, and control of the dams and all related buildings, machinery and lands with the exception of the navigation locks which are operated by the U.S. Army Corps of Engineers. The Act specifically provides “that nothing in this section shall be construed to ... affect any right of a State or a political subdivision thereof to exercise civil and criminal jurisdiction on or within lands or facilities owned or leased by the Corporation (TVA).”

In December, 2001, a Memorandum of Agreement for Concurrent Jurisdiction at TVA units within the State of North Carolina was executed between the Governor of North Carolina and TVA which provides that “... both the United States and the State of North Carolina will concurrently exercise law enforcement jurisdiction within those units of the TVA system ... and that within such units local services of the State government shall be available.”

In as much as the issue was under advisement, both parties were to present briefs and case law for consideration within ten days of the conclusion of the evidentiary hearing. Respondent properly and timely filed its brief and case law. Petitioner did not submit anything to this Tribunal for consideration and to substantiate his argument and thus Petitioner is deemed to have abandoned this issue.

Based upon careful consideration of the testimony, evidence, arguments, and legal briefs received during the contested case hearing, as well as the entire record of this proceeding, including pleadings, the undersigned makes the following:

#### FINDINGS OF FACT

1. Petitioner is the owner and operator of a Septage Detention and Treatment Facility (“SDTF”) doing business as Crisp Boat Dock on Fontana Lake in Graham County, North Carolina.
2. Respondent is a State agency established pursuant to N.C. Gen. Stat. §§ 143B-279.1 *et. seq.* Pursuant to N.C. Gen. Stat. § 143B-279.2(1b), the Respondent Department shall “provide for the protection of the environment and public health through the regulation of solid waste and hazardous waste management and the administration of environmental health programs.”
3. The Division of Waste Management is a division of Respondent Department created by statutory mandate pursuant to N.C. Gen. Stat. § 130A, Article 9 to promote and preserve an environment that is conducive to public health and welfare. The Department is

tasked with establishing and maintaining a statewide solid waste management program. N.C. Gen. Stat. § 130A-291.

4. At all times relevant to this action, Petitioner owned and operated Crisp Boat Dock which is located at 1095 Lower Panther Branch Road, Almond, North Carolina.

5. The renewal application for a permit to operate a septage detention or treatment facility was filed with Respondent on November 18, 2011. The renewal application lists Petitioner David Crisp as applicant with Crisp Boat Dock, as well as the contact person for the site operation. Petitioner signed the Application as owner, certifying that 1) the information provided on the application was true, complete, and correct to the best of his knowledge; 2) he had read and understood the NC Septage Management Rules; and 3) he was aware of the potential consequences, including penalties and permit revocation, for failing to follow all applicable rules and the conditions of a Septage Detention or Treatment Facility permit. (Rsp. Ex. 10)

6. The renewal application had a notation on the back signed by Tony Sherrill with FLWR and dated 11/21/11. FLWR, the initials for Fontana Lake Waste Recovery, Inc., attached a "Major Spill Contingency Plan" to the application. Also attached to the application is a purported authorization from the United States Department of Agriculture which authorizes the necessities for the sewage collection process. (Rsp. Ex. 10) Neither Tony Sherrill nor FLWR are listed as applicants in any regard on the application. Petitioner contends that Sherrill paid the filing fee for the application and that he, Mr. Crisp, did not pay nor file the application.

7. The November 18, 2011 Application specified the type of septage to be stored or treated as "portable toilet waste." Petitioner described the detention facility as a "containment tank, flotation unit and security structure" with a 1,000 gallon containment tank on a flotation unit. The pump-out boat used to discharge into the facility is equipped with a 450 gallon holding tank attached to a gas powered pump. The pump is used to remove the septage from houseboats into the holding tank on the pump boat and then pump into the containment tank. (Rsp. Ex. 10)

8. Respondent's application asks the applicant to explain how any leaks or spills will be handled, an acknowledgement that leaks and spills are a likely occurrence. The question is not "if" they will occur, but what does the operator do "when" they occur.

9. Respondent issued a renewal permit to "Crisp Boat Dock" and "Fontana Lake Waste Recovery, Inc." to operate a septage detention and treatment facility on July 17, 2012, some eight months after the application was turned in. As noted above, FLWR appended some matters to the application but Fontana Lake Waste Recovery, Inc. (FLWR) did not sign as the applicant on this application. Although not a signatory to the application, FLWR was a co-permittee. FLWR should have been cited along with the Petitioner in this matter. (Rsp. Ex. 9)

10. The renewal permit states that the storage facility and pumping devices will be operated under the supervision of "Prince Boat Dock Staff." There is no evidence of who "Prince" is or how such entity came to be listed on the permit when he/it was not on the application at all. If Prince has an undisclosed part in this operation, then Prince too should have

been cited and noticed of the violations. Respondent erred in either listing Prince in the permit or failing to notice them of the violation.

11. The Petitioner and FLWRs permit states that the operations are to be conducted in accordance with the representations made in the application, with all conditions attached to the permit, and with the provisions of the Septage Management Rules at 15A NCAC 13B .0800. By the terms of the permit, the Department is given the authority for various sanctions and penalties for operation outside the terms of the permit, including the penalties provided in Chapter 130A, Article 1, Part 2 of the North Carolina General Statutes. (Rsp. Ex. 9)

12. The permit also states that “[a]ny back flow of water from the storage tank to adjacent surface waters shall be considered a violation of the N.C. septage management rules.” (Rsp. Ex. 9)

13. Mr. Troy Harrison is an Environmental Senior Specialist with the Division of Waste Management of DENR. Mr. Harrison has been in that position for 8 years. Prior to that employment, he worked with the federal forest service and with the North Carolina Division of Air Quality. Mr. Harrison has a Bachelor of Arts degree from Warren Wilson College where he double-majored in environmental studies and business and economics. Further, he has continued his education by taking various training sessions at DENR, including septage training sessions.

14. As an Environmental Senior Specialist, Mr. Harrison inspects for compliance with all state solid waste management regulations related to the handling, storage, treatment and disposal of septage in the Western part of North Carolina. His job duties include inspecting for compliance with regulations, investigating suspected violations of regulations, recording observations and interviewing people as part of those investigations, and assisting with enforcement of regulations.

15. Mr. Harrison first received a complaint on September 11, 2013 concerning the location of the septage detention and treatment platform near boat docks and swimming platforms. Mr. Harrison visited the site where Petitioner had located his floating platform with the septage treatment and detention containment tank on three occasions in 2013: September 20, 2013, October 11, 2013, and October 16, 2013.

16. Upon his initial inspection on September 20, Mr. Harrison determined that the platform was not located at the original latitude and longitude of the permitted area, which was the basis of the original complaint.

17. On that initial inspection of September 20, Mr. Harrison observed that the roof of the building on the floating platform showed severe deterioration with portions of the roof system being missing. From the photographs it appears that roughly half of the tin roof is missing on one side. Based on photographs taken on June 27, 2013 which he received later, it would appear that the roof had been in a deteriorated condition for at least three months.

18. According to Mr. Harrison, the missing portions of the roof could have caused infiltration of storm-water into/onto the tank and secondary containment areas of the facility. At

the inspection, there is no report that there actually was any infiltration or that there was any threat of a spill or other danger. The design of the interior holding tank was such that rain water could not have gotten into that tank despite the condition of the roof.

19. Mr. Harrison's first trip to the area was concerning the location of the platform. On that occasion, he spoke with Petitioner. He asked Petitioner whether any spillage had occurred at the floating platform and Petitioner indicated that a small amount had spilled into his boat. On that first trip to the platform, Mr. Harrison did not take any water samples and did not observe anything in the water out of the ordinary. Mr. Harrison did not inquire about how any of the process worked. He did not write his report that day.

20. Mr. Harrison was aware that Mr. Crisp had been one of the primary people responsible for cleaning up Fontana Lake. Houseboats had been dumping their septage holding tanks straight into the lake making it perhaps the dirtiest lake in the state of North Carolina. Petitioner, and a very few others, were responsible for establishing the process at issue here in, which included working through the federal government process for approval and even obtaining federal grants to fund the project. Their efforts ultimately have made Fontana Lake one of the cleanest lakes in the state.

21. On Fontana Lake, even today, there is no prohibition on houseboats dumping their waste water, including sewage, straight into the lake.

22. On October 10, 2013, Mr. Harrison visited Petitioner's SDTF facility and took photographs of the floating platform with its damaged roof and other photographs of the facility from various positions and other residences located on Fontana Lake as part of his inspection duties. Mr. Harrison later obtained an aerial photo of the Lake and a GIS from Graham County to pinpoint the location of the SDTF facility platform, as well as the residences of some of the neighbors located near the platform.

23. On October 10, 2013, Mr. Harrison met with the original complainant, Ms. Hawkins and other residents of Fontana Lake at her residence. On that date, Mr. Harrison first met Mr. and Mrs. Larry Roane who told him what they observed on June 27, 2013, gave him the photographs they had taken of the discharge incident, and agreed to give eyewitness testimony if it became necessary.

24. Mr. and Mrs. Larry Roane live on Fontana Lake. According to Mr. Roane, on June 27, 2013 and throughout the spring and summer of 2013, Petitioner had tied the floating platform containing his septage and detention containment tank directly across from Mr. Roane's residence.

25. According to Mr. Roane, on the morning of June 27, 2013, he was working in his yard and observed Petitioner pull up to the platform by boat, tie the boat to the platform, get out of the boat, hook a hose from the boat to the floating platform's pipe that extends out of the tank, turn the valve on the pipe, get back into the boat, and start the pump on the boat. When the pump was engaged, the hose "blew off or came off." Mr. Roane observed a brownish-orange liquid coming out of the pipe into the Lake and smelled an odor "kind of like rotten eggs." Mr.

Roane observed that Petitioner was in the boat and had his back to the platform as the pump was running and the discharge was flowing into the lake.

26. Upon observing the discharge, Mr. Roane stepped into his house and asked his wife to retrieve the camera. Mrs. Roane stepped out to see what had occurred and then went back into the house to find the camera. After a couple of minutes, she returned with the camera and proceeded to take pictures of Petitioner and the discharge. Mr. Roane estimated that at least three minutes elapsed between the time he first observed the discharge and the time his wife returned with the camera. He then observed Petitioner leave the boat and get up onto the platform to turn the valve and to stop the flow.

27. According to Mrs. Roane, on the morning of June 27, 2013, her husband asked her to retrieve their camera. She first stepped out to see what was happening, saw the discharge and then returned to the house, located the camera and upon attempting to turn it on, discovered that it would not operate because of a low battery. She then sought out batteries, put them in the camera, checked that it was working, then went back outside. Mrs. Roane testified that it took approximately five minutes before she got the camera operational and returned outside.

28. Upon returning outside, Mrs. Roane took four photographs of Petitioner and the discharge and one of the platform itself, which showed the deterioration of the roof on June 27, 2013. She further testified that she not only observed the discharge but that it smelled like "poop," or "feces."

29. Mr. Roane says that he had his wife take the photographs because his children and grandchildren swim within 30 feet of the floating platform and he considered it a safety hazard. Following the incident, he would not let the grandchildren into the Lake to swim for about a month and warned his neighbors of the spill. It is worthy of note that there had been a disagreement for some time between Mr. Crisp and Mr. and Mrs. Roane concerning fees Mr. Crisp was seeking to collect for harbor rights.

30. Following the incident, Mr. Roane did not immediately report the spill to anyone. He contends that he did not know whom to contact about the spill. Approximately two weeks later, Mr. Roane contacted Graham County. At some later time, but not the same day, Mr. Roane contacted TVA. Neither entity seemed concerned. Apparently, none of the neighbors he allegedly told of the spill contacted Respondent either.

31. On October 10, 2013, Mr. Roane met Mr. Harrison when he came to a meeting with Ms. Hawkins. Mr. Roane told Mr. Harrison about the discharge and provided Mr. Harrison with the photographs that his wife had taken. The current enforcement action by the Solid Waste Section followed shortly thereafter.

32. After being told of the spill, Mr. Harrison did not attempt to test the water in any regard. There had been an intervening period of several months and, presumably, any problem would have abated.

33. The Roanes version of the incident is not in accord with the more believable testimony of Petitioner, which is borne out by the photographs. If the hose had blown off after the pump was first engaged the matter would have continued to be blown out of the holding tank on the boat through the pump. There is no evidence that the pump continued to pump the matter from the holding tank.

34. According to Petitioner, after he had finished unloading into the floating dock tank, he inadvertently did not engage the shut-off valve, which would have prevented a spill. By leaving the valve open, when he removed the hose, which connected the boat tank to the 1 ½ inch PVC pipe to the holding tank, then the substance in the pipe emptied.

35. The amount of the back flow would be only the amount in the pipe, approximately 15 feet total length. The design of the detention facility was such that it would not be pulling from the tank itself. Respondent's witnesses acknowledged that the amount would be less than ten gallons.

36. Having received the photographs from the Roanes and knowing of the discharge that occurred on June 27, 2013, on October 16, 2013 Mr. Harrison inquired of Petitioner as to whether any spills had occurred. Petitioner denied that septage had discharged into Fontana Lake. Mr. Harrison then showed Petitioner the photographs taken by Mrs. Roane. Petitioner then recanted his denial and admitted that a discharge had occurred, but stated that it was only a small amount of septage. He further stated that he had not reported it because it was such a small amount.

37. On October 21, 2013, Mr. Harrison sent a Facility Compliance Inspection Report and Notice of Violation to Petitioner, d/b/a Crisp Boat Dock/Fontana Lake Waste Recovery, Inc., SDTF-38-01, requiring that Petitioner immediately repair the deteriorated roof, and noticing Petitioner of violations for allowing the disposal of septage into the waters of Fontana Lake and for not informing the Solid Waste Section of the spill event as required under Petitioner's permit. The Petitioner repaired the roof on the floating dock immediately.

38. On November 8, 2013, Petitioner sent a written response to Mr. Harrison in which he admitted that on June 27, 2013, "when I was pumping from my boat to the storage tank, I unhooked the line and forgot to turn off the cut off valve. Most of the sewage in the 15 feet of 1.5 inch line ran back into the boat. Only a small amount ran into the lake, maybe 2-3 gallons."

39. Based on Petitioner's admission of being responsible for septage flowing into Fontana Lake, the photographic evidence of the spill event into Fontana Lake, and the eyewitnesses, Mr. and Mrs. Roane's agreement to testify, Mr. Harrison prepared a compliance package and sent it to the Section's Central Office in Raleigh, North Carolina for further enforcement.

40. Mr. Harrison explained the method he used for calculating the costs associated with his investigation. The total of all of the investigative costs was \$2,103.41. The method used, the items included and the amounts used to determine the costs were both reasonable and appropriate.

41. Mr. Michael Scott is the Deputy Director of the Division of Waste Management of the North Carolina Department of Environment and Natural Resources and has worked for the Division of Waste Management for the past 13 years. Prior to employment as the Deputy Director, he served as the Section Chief for the Solid Waste Section in the Division of Waste Management for three years. As Section Chief, he reviewed every request for enforcement regarding the Solid Waste Management Act and its regulations and rules. Mr. Scott made the final decision regarding the issuance of any Compliance Order and the amount of any Administrative Penalty considered by any of the branches of the Solid Waste Section after reviewing all documentation provided by an inspector, as well as all applicable regulations. During his term as Section Chief, he reviewed 25 compliance orders, 15 of which issued as Compliance Orders with Administrative Penalties, and with over 50% of those dealing with septage management violations.

42. Prior to his position as Section Chief, Mr. Scott was the Branch Head for the Composting and Land Application Branch of the Solid Waste Section for 4 years. As Branch Head, he was supervisor of the septage management program and was responsible for issuing over 2,000 septage management-related permits, including permits for septage detention and treatment facilities, for supervising all septage management enforcement, for inspecting for compliance, and for conducting training for site operators regarding the management of septage. As Deputy Director, Section Chief, and as Branch Head, he is/was a supervisor responsible for the enforcement of the Solid Waste Management Act and its attendant regulations and rules.

43. Mr. Scott has a Bachelor of Science and Masters of Science degrees from North Carolina State University in agronomy and crop science, is a graduate of the Natural Resources Leadership Institute, and is a licensed Soil Scientist. Mr. Scott is an expert in septage management permitting, septage management enforcement, and the determination of solid waste administrative penalty assessments by virtue of his education, training, and experience.

44. According to Mr. Scott, there are two permits related to this matter. One was issued to Petitioner d/b/a Crisp Boat Dock/Fontana Lake Waste Recovery, Inc. as a septage detention and treatment facility (SDTF-38-91) and one to Fontana Lake Waste Recovery, Inc. as a septage management firm (NCS-01004). The septage management firm (Fontana Lake Waste Recovery, Inc.) is an operational permit that covers the boat (operated by Petitioner) that is used to pump the waste from the houseboats, then that waste is transferred from the boat by Petitioner to the floating septage detention and treatment facility owned and operated by Petitioner d/b/a Crisp Boat Dock. Permit SDTF-38-91 is the only permit at issue in this contested case, which covers the detention facility. No evidence was introduced concerning the permit with FLWR. Petitioner had no knowledge of the second permit until evidence was presented in this hearing.

45. During the conduct of this hearing, a question was raised concerning the legal status of Fontana Lake Waste Recovery, Inc. and whether or not it continued to exist as a viable legal corporation or whether it remained in business at all. While this was a renewal application, apparently there is no attempt to even find out if the applicants are viable corporations, or what the legal status of any applying individual or company may be. There is no evidence before this Tribunal to determine the viability of the business at all and its status is unknown.

46. Mr. Scott contends that every permit contains conditions designed to ensure that the requirements of the Administrative Code and the statutory requirements for septage management are met and to ensure the protection of public welfare and the environment are maintained. In the case of septage permits, the conditions ensure that waste or septage does not come into contact with humans or wildlife that could carry that material elsewhere and potentially contaminate others or the environment.

47. Mr. Scott offered his definition of septage as a solid waste that is comprised of liquid and solid fractions of human and domestic origin that originate from wastewater systems. Septage is defined by statute. "Grey water" is a material that must be properly managed in a septic system or in a municipal sewer and may not be directly discharged. In this case, Petitioner's septage detention and treatment facility is permitted to receive septage; any other material other than septage placed in the facility would be a violation of Petitioner's permit. Under the solid waste regulations, when any other material such as grey water is mixed into a septage waste-hauling vehicle, it becomes septage.

48. According to Mr. Scott, septage has the potential for pathogens and viruses. It contains heavy metals and other contaminants that the agency does not want introduced into the waters of the state or to come into contact with wildlife or domestic animals because of its potential for spreading disease or viruses.

49. In that regard, the Respondent treats septage the same as the most toxic substances known to man, including substances for which dissemination is a crime in this state; for example, antifreeze. *See* N. C. Gen. Stat. 14-401.

50. Despite the toxicity of septage and the purported concern of Respondent, there is no control over the houseboats discharging directly into Fontana Lake or any other lake in North Carolina, which lead to the deplorable conditions in Fontana to begin with. Any single houseboat emptying its holding tank would pump considerably more septage into the lake than did Petitioner in this instance.

51. Mr. Scott correctly observes that the volume of septage that went into Fontana Lake is not the determining factor of whether or not a violation occurred. Petitioner's permit specifies that any discharge into a surface water like Fontana Lake constitutes a violation. There is no question that there was a backflow from the pipe on the floating dock into Petitioner's boat and into the water of Fontana Lake. However, quantity or volume should be an important factor in determining the amount of the penalty.

52. According to Mr. Scott, Section Chief of the Solid Waste Section, in conformity with the standard procedure, he received the enforcement request in this case from Mr. Harrison and his direct supervisor. Mr. Scott received and reviewed the electronic paper file, which included Mr. Harrison's inspection report, the notice of violation, Petitioner's response to the notice of violation, Petitioner's compliance history, photographs taken by Mr. Harrison, photographs taken by the Roanes, and the Roanes' eyewitness report to Mr. Harrison.

53. Based on a review of the evidence, Mr. Scott determined that a Compliance Order with Administrative Penalty should be issued to Petitioner, d/b/a Crisp Boat Dock, as the owner and operator of the septage detention and treatment facility where the violation occurred.

54. Mr. Scott explained, in his opinion, why each of the violations in the Compliance Order were cited:

- a) 15A NCAC 13B .0841 (e) requires that each detention and treatment facility be designed, constructed and maintained in a manner to prevent leaks or the flow of septage out of the facility into any surface water; in this case, a violation occurred because the manner in which the facility was maintained did not prevent waste from leaving the facility and flowing into the lake.
- b) 15A NCAC 13B .0841(j) requires that septage be transferred to and from the septage detention system in a safe and sanitary manner that prevents leaks or spills of septage, including septage in pipes used for transferring waste to and from vehicles, in this case, a violation occurred because septage left the inlet side of the septage detention and treatment facility and entered the lake.
- c) 15A NCAC 13B .0832(a)(6) requires that all conditions for permits be followed, in this case, a violation occurred because Petitioner did not contact the Solid Waste Section of the spill as required under his permit. Mr. Scott explained that the notification of a septage spill into a surface water is required so that the Section can coordinate what, if any, clean-up activities would be required. Without notification, the Section was unable to take any action to address the potential consequences, and any suggestion of what might have been required is pure speculation. It is quite possible that no action would have been required. Once the Respondent had knowledge of the spill, the Section immediately proceeded to enforcement.
- d) N.C. Gen. Stat. § 130A-291.1 (d) requires that septage be treated and disposed only at a wastewater system approved by the Department under rules adopted by the Commission, or at a site permitted by the Section. In this case, a violation occurred because Fontana Lake is not an approved location for the disposal of septage.

55. According to Mr. Scott, as Section Chief he was responsible for the amount of the penalty assessed and how that amount was determined. The maximum authority of the solid waste section to assess penalties is \$15,000 per day, per violation. In calculating the penalty, Mr. Scott stated that he referred to the Administrative Code standards found in 15A NCAC 13B .0702; and utilized the Section's penalty computation worksheet and the Section's penalty computation procedure that were all entered into evidence as exhibits at the hearing. In addition to these standards and documents, Mr. Scott stated that he also reviewed Petitioner's previous compliance history.

56. Strict liability is a prospective approach to encourage adherence to certain standards so that our environment will be protected. It is used to act as a deterrent to future repetition of like conduct. The assessment of penalties or any type of "punishment" is a look

back at events after the fact and when there has been a violation. Use of a penalty assessment matrix such as the one developed and used by Respondent is a well-accepted practice. It may be a useful tool designed to insure consistency in meting out civil penalties. The Penalty Computation Procedure is a guidance tool. It is for guidance, not rigid application.

57. Mr. Scott has on other occasions assessed a penalty for each violation cited, but in this case, he only assessed a penalty for one consolidated violation, not for four violations. He contends that his penalty assessment in this matter was consistent with other civil penalties he has assessed for similar violations. Respondent introduced three cases as examples of other instances where the Respondent contends the penalty assessed was consistent with the penalties assessed in this case and that the violations were similar to this case.

58. According to Mr. Scott, the first part of the penalty computation worksheet addresses the potential for harm to the environment and/or public health. The first section of Part One deals with the type of waste involved. Mr. Scott testified that septage is a very dangerous type of waste and warrants the highest point value of three on the penalty computation worksheet as opposed to other less dangerous solid wastes such as brick or inert material.

59. In the computation guidance manual, which translates to the worksheets, Part One is for consideration of "potential for harm to the environment and/or public health." Question one is to assess the type of waste. In these instances, for all of the three cases cited, as well as Mr. Crisp, septage is at issue. Thus, all should receive a "3" for that question.

60. In justifying the assignment of the "3", Mr. Scott notes that Mr. Crisp did not report and that he did not admit. Mr. Harrison contradicts this and admitted that Mr. Crisp was cooperative in the investigation and that Mr. Crisp's rationalization for not reporting was because of the very small amount of the spillage. The contention that the quantity is unknown is true but it is known that the amount is extremely small. The amount of the spill could have been calculated because of the amount of the backflow was only what was in the PVC pipe about 15 feet in length and 1 ½ inches in diameter. Respondent made no effort to do that calculation. Respondent acknowledged the amount as small, no more than 10 gallons, possibly 5 gallons or less and especially since most of the backflow went into Petitioner's boat.

61. According to Mr. Scott, the second section of Part One deals with site variables and the increased potential for harm. In reviewing this section, he testified that this violation posed a potential for harm both to the environment and to public health due to the septage being discharged into a recreational lake where people swim, fish, and have private boat docks, as well as, the risk of people and animals, including Petitioner's dog, coming into contact with this untreated waste and spreading the pathogens to others. Mr. Scott, therefore, warranted another high point value of 3 on the worksheet.

62. The second question in Part One refers to site variables and the increased potential for harm. Part b) would be applicable to Mr. Crisp because the floating dock is a permitted site. The issue is over the spillage into the lake which would be unpermitted. In addressing the "size of site" it is not clear whether or not it refers to, in this instance, the entire lake or just the size of the spill site. If it is referring to the entire lake then the amount of the spill

would of necessity have to be considered at some point because a spill of even 10 gallons is infinitesimal in relationship to the entirety of the lake. Whereas, a spill of 10,000 gallons could make a considerable impact. Quantity was not considered at all. According to Mr. Scott, quantity does not matter at all in these spills.

63. The question speaks of potential for harm by the spill, but in this instance it was clear that no actual harm had occurred and would not occur.

64. The floating dock was located close to other private docks at the time Mr. Harrison took his pictures; however, there is no evidence of where the floating dock was located on the date of the spill or how close it was to other "receptors." It is obvious from Mr. Harrison's pictures and those from the Roanes that there was considerable more water in the lake in June than in October. Thus, this factor reasonably should have been a "0".

65. The last consideration in question two is completely discretionary. By the time Mr. Roane even started calling there was no interest to come see the sight because the spill would have dissipated. By the time the Respondent started investigating, Mr. Harrison took no measurements because it would have been a waste of time. There was no evidence of harm to wildlife or fish, so the "potential" for harm was negligible. By the time the Respondent got around to the calculations, these quantities were known. It would not have been unreasonable to assign a "0" or a "1" for question 2.

66. The third section of Part One of the worksheet deals with responsive measures taken by the violator. In reviewing Petitioner's responsive measures, Mr. Scott testified that he considered the fact that Petitioner did eventually turn off the valve and ultimately stopped the flow of further waste into the lake and therefore gave that section a medium point value of two on the worksheet.

67. The question relates to the response of Mr. Crisp. When the spill occurred, he immediately got out of the boat and closed the shut-off valve. He and his dog were in the boat and much of the back-flow went into his boat. He immediately went to his dock and got bleach and came back to the site and poured the bleach in the water. There were no solids of any kind in the water from the spill.

68. Mr. Crisp did exactly as he should have done. The renewal application had a handwritten note from Mr. Sherrill which described what should be done in a spill, and Mr. Crisp followed those instructions.

69. The guidance manual states that a "0" should be given if the violator "took a good, effective action to correct the violation. There was nothing else Mr. Crisp could have done. The manual also states that a "1" or "2" should be given if the person took some action but "did not respond as ultimately directed." There is zero evidence that Mr. Crisp failed in any regard to respond as ultimately directed; however, Mr. Crisp was given a "2".

70. The guidance manual Part Two is titled "Intent"; however on the worksheet it is labeled "Nature of Past and Current Violations." The guidance manual speaks of "lower to

higher degree of negligence” but the worksheet makes no reference to negligence at all. Intentional acts are only referenced specifically for unpermitted sites. There is no language which applies to unintentional acts such as in this case. Thus, the fact that this was an unintentional spill is given no consideration at all.

71. Part Two, question one in the manual speaks to the deviation from the rules. The guidance manual lumps any spill without regard to amount into “primary violation” which is scored a “3”. The Respondent scored Mr. Crisp a “3” but justifies it based on prior history and without regard to the actual factors in the manual. Question one has nothing to do with prior history.

72. Mr. Scott notes that Part Two of the worksheet addresses the nature of past and current violations, with the first section dealing with the type of the violation and the deviation from the rules, which is not in accord with the manual. In reviewing the first section of Part Two, Mr. Scott noted that Petitioner had received two notices of violation for operating an open dump and for open burning of waste at two separate sites on his property and, therefore, accorded him a point value of three for those violations which demonstrated a propensity to deviate from the rules. The fact that someone has had a prior indiscretion of any sort does not in and of itself demonstrate a propensity to deviate from the rules, laws or social mores.

73. In reviewing the second section of Part Two dealing with the cause or degree of control over the violation, Mr. Scott noted that the release of the septage into the lake could have easily been prevented with the proper operation and maintenance of the valve by Petitioner and thus warranted a point value of three. Thus, Mr. Crisp is assigned the highest value for a minor, unintentional spill.

74. While question two speaks of negligence in the unpermitted sites, nothing really fits the situation here. Respondent assessed a “3” using the language for permitted sites for failing to properly operate the floating platform. Nothing addresses inadvertence or lack of intent. The instructions in the manual even state that there is no “zero” in this part; thus, even if lack of intent was to be considered, it would of necessity have to be assigned a numerical value if following the manual.

75. For question three of Part Two, Mr. Scott uses the scoring for permitted sites and gives Petitioner a “3”. Mr. Scott noted that he had two Notices of Violations for noncompliance with two separate regulators within the three years prior to this violation and assigned him a point value of 3, which is labeled “considerable history.” While Mr. Crisp did indeed have a notice of violation (NOV) from SWS and a separate NOV from the Division of Air Quality, both NOVs were for the same act, i.e. one “occurrence” of burning. Mr. Crisp had obtained two burning permits, including one from the State of North Carolina, Division of Forestry, just not from every agency he needed to.

76. Mr. Crisp found it more economical to merely pay the assessments than to contest them; however, paying the assessment acts as admission.

77. Assuming the Respondent would have used the “permitted sites” in considering this factor, then at most he should have received “2.” However, according to the manual, question three has a third category for consideration wherein the reviewer is to consider specific facts about the prior instances. In this case, the previous violation by Mr. Crisp was not similar at all to this violation. There had been an intervening three years between the two occurrences. There was only one event though it spawned two NOVs, and the violation was for burning a dilapidated building on his own property for which he had obtained some permits. He complied with everything asked of him and there have been no repeat of that violation. It appears discretionary and that these matters can be considered in mitigation as well as aggravation. Mr. Crisp could reasonably have received a “0” or a “1” based upon those considerations.

78. Part three of the manual and thus the worksheet addresses “duration of the violation.” The manual notes “It is rarely practical to increase penalties per day of violation for the types of case handled by the Solid Waste Section.” While it is not known, a reasonable assumption would be that the “practical” consideration is monetary. However, the practical effect, as in this case, is that someone who unintentionally spills septage for a matter of a few minutes at most and who spills only a maximum of 10 gallons is treated the exact same as someone who spills 10,000 gallons on purpose for monetary gain over an extended period of time—a gross inequity.

79. Rhetorically, why have “duration” as a consideration at all if it is not going to be used. It is obvious that if it is not going to be used in the similar cases cited by Respondent then it is not going to be used at all.

80. In speaking of whether or not to use the “duration” multiplier, the manual makes reference to the base penalty being a deterrent. The concept of deterrent is the very basis for the entire penalty scheme—to serve as a deterrent to future violations and damages to our state’s environment.

81. In this particular instance, the violator, Mr. Crisp, is a person who spent considerable time, energy and his own money to clean up this very lake. Prior to the efforts of Mr. Crisp and a few others, the uncontroverted evidence is that Fontana Lake was the dirtiest lake in the state, primarily because of the unregulated dumping of houseboats emptying their holding tanks straight into the lake. Because of the involvement of TVA in the lake, Mr. Crisp had to work through the United States government in order to get approval of the project and in order to seek and obtain federal grant money to begin the project. As a result of the efforts of Mr. Crisp and those few others, the lake became one of the cleanest lakes in the state. It is inconceivable that someone who has devoted so much of his life to make this lake clean would do anything to harm the lake. This is a person whose violation was unintentional and he does not need any deterrent. His biggest indiscretion was failure to report the incident.

82. When Mr. Scott placed those values as he determined them to be in his sole discretion within the matrix, the amount of the penalty was determined to be \$14,625.00.

83. Respondent introduced three examples of other instances where the Respondent contends that the penalty assessed was consistent with the penalties assessed in this case and that

the violations were similar to this case. Two of the three were signed off on by Mr. Scott. In actuality, these three cases show the great degree of discretion exercised in determining the amount of the civil penalties.

84. The first similar case was concerning Ferguson Pumping and Septic Tank Service. On at least one occasion, Mr. Ferguson emptied his pump truck of sewage onto the ground without a permit to do so. The septage was flowing onto the property of another landowner. At one point Mr. Ferguson did own up to some culpability, but he was not cooperative with the solid waste section investigation. He did not self-report to SWS. Ferguson tried to clean up the mess but did not do so completely. (Rsp. Ex. 16)

85. The numbers assigned to Mr. Ferguson on the computation worksheet were 8 points for Part 1 and 6 points for Part 2. Mr. Crisp was given 8 points for Part 1 and 9 points for Part 2. Part 3 was left blank for the duration of the violation for both.

86. By contrast, Mr. Crisp did have a permit. He did not do anything intentionally as Mr. Ferguson did. Mr. Crisp was responsible for 10 gallons at the absolute maximum whereas Mr. Ferguson emptied an entire pump truck load on the ground which ran onto another's property. An accidental dump, which at the most lasted a few minutes, is equated with the conscious and intentional dumping of a pump truck load of septage.

87. The guidance manual states that a "0" should be given if the violator "took a good, effective action to correct the violation." Mr. Ferguson was given a "0" because he made a statement that the pumping of the septic tanks and the repairs would be made—prospectively, and they were not. Mr. Crisp did everything he was supposed to do and was given a "2".

88. Ferguson's penalty was \$13,125.00, approximately \$1500 less than Mr. Crisp's.

89. The second case similar to Mr. Crisp's case is concerning Scott Septic. In this case, Mr. Scott was pumping septage into woodland areas near a creek and a pond and in close proximity to several residential water wells. He had no permit, thus the pumping was for his personal gain. There were at least five dump sites with twelve discharges. Respondent's witness Mr. Michael Scott actually went to this site and he testified that at least 10,000 gallons of septage was pumped on the ground, which is noted on the worksheet. It was noted in the report that the amount of septage pumped in this case was sufficient to constitute a felony. There were documented instances of fish and turtles being killed. Mr. Scott consistently and continuously lied to the SWS investigators and was never cooperative with the investigation. He did not self-report and was dishonest. Mr. Scott even continued to pump on the ground after being ordered by SWS to cease. He made no effort to clean up the mess. (Rsp. Ex 17)

90. Two different computation worksheets were used and Mr. Scott was given 9 points on Part 1 and 6 points on Part 2 on each of them, less than Mr. Crisp's points. As with Mr. Crisp and Mr. Ferguson, Part 3 was left blank. Although Part 3 offers the Respondent the ability to increase the penalty because of the duration of the violation, none was assessed Scott's case despite the fact that it had obviously been going on for some time and in substantial quantities.

91. Contrasting with Mr. Crisp, Mr. Crisp had a permit whereas Scott did not. Crisp's discharge was accidental and Scott's was intentional. Crisp's spill lasted a few minutes while Scott's took place over a considerable length of time and over several locations. Scott continued even after being ordered to stop and Crisp's was an isolated incident. In Scott's case, there was documented damage to wildlife and none in Crisp's case. Crisp spilled a maximum of 10 gallons and Scott purposefully dumped 10,000 gallons. Scott did not self-report and was uncooperative with the SWS investigation. Scott did the illegal pumping for personal financial gain; Crisp did not. Thus, an accidental spill of 10 gallons is equated to an intentional dumping of 10,000 gallons. Mr. Michael Scott actually testified with a straight face that Crisp's spill was worse because it was in water.

92. Scott Septic's civil penalty was \$13,500 for each worksheet.

93. The third case presented by Respondent as similar to Mr. Crisp's is regarding Mr. and Mrs. White dba as K-N-J Mobile Home Park. Problems had existed with the septic systems for some extended period of time, seemingly for years. There was no permit. Places around the park stayed wet for extended periods of time. The smell was awful. There were numerous problems with various septic tanks in the park. The maintenance worker for the park would routinely pump the septic tanks into the woods and ditches around the park. Neither the maintenance man nor the Whites ever owned up to the pumping. Neither the maintenance man nor the Whites ever cooperated with the SWS investigators. The pumping was for the economic gain of the Whites. The pumping continued after Mr. White had told SWS that the pumping would stop. (Rsp. Ex. 18)

94. Two different computation worksheets were used. On the first worksheet the Whites were given 9 points on Part 1 and 6 points on Part 2. On the second worksheet they were given 6 points on Part one and 6 points on Part 2. On each of the worksheets, they scored less than Mr. Crisp's points. As with Mr. Crisp, Mr. Ferguson and Mr. Scott, Part 3 was left blank. Although Part 3 offers the Respondent the ability to increase the penalty because of the duration of the violation, none was assessed in the White's case despite the fact that it had obviously been going on for some time and in substantial quantities.

95. Contrasting with Mr. Crisp, again Crisp had a permit and the Whites did not. Crisp's discharge was accidental and the White's was intentional. The Whites were uncooperative. Crisp's spill lasted a few minutes and the White's was over a very lengthy period of time. The White's continued even after being told to stop whereas Crisp's was an isolated incident. Crisp's was a minimal amount and the Whites have to have been a considerable amount even though there is no given amount. The White's pumping was for personal financial gain. Thus, again, a very minimal amount of accidental spill is equated with an extended and extensive intentional pumping.

96. The Whites were assessed a penalty of \$13,500 on the first worksheet and \$9,000 on the second worksheet.

97. The Penalty Computation Procedure is a guidance tool. It is for guidance, not rigid application with blinders on. On its face there are areas of discretion, and it is obvious from the three examples above that discretion is used in determining what number to assign to a particular block which will increase the amount of the penalty

98. The conclusion that Respondent draws that these three cases are comparable to the spill by Mr. Crisp is incomprehensible when the facts are considered. It does not take a scientist to conclude that a purposeful and intentional pumping of 10,000 gallons of septage over an extended period of time and in several sites for personal gain with reported fish and turtle kills is not the same, let alone worse, than an unintentional spill of less than 10 gallons for a couple of minutes with no documented hazard to wildlife or humans.

99. Pursuant to N. C. Gen. Stat. 130A-22, investigative costs may be assessed against a violator. Investigative costs, as explained in Mr. Harrison's testimony and confirmed by Mr. Scott totaled \$2,103.41. The total amount for the penalty and investigative costs as determined by Mr. Scott was \$16,728.41.

#### **CONCLUSIONS OF LAW**

1. To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein by reference as Conclusions of Law. Similarly, to the extent that some of these Conclusions of Law are Findings of Fact, they should be so considered without regard to the given label.

2. All parties are properly before the Office of Administrative Hearings, and the OAH has jurisdiction over the parties and the subject matter.

3. Petitioner raised the issue of jurisdiction. In as much as the issue was taken under advisement, both parties were to present briefs and case law for consideration within ten days of the conclusion of the evidentiary hearing. Respondent properly and timely filed its brief and case law. Petitioner did not submit anything to this Tribunal for consideration and to substantiate his argument and thus Petitioner is deemed to have abandoned this issue. Further, in as much as the facts and case law from the Respondent are the only submissions for consideration, based on those considerations, Respondent's argument prevails and it is concluded as a matter of law that this Tribunal has jurisdiction.

4. Although the majority of Fontana Lake is owned by either the National Park Service, the U.S. Forest Service, or the Tennessee Valley Authority, the State of North Carolina has reserved concurrent jurisdiction within those areas and the Solid Waste Section of the Division of Waste Management, Department of Environment and Natural Resources is vested with the statutory authority to enforce the State's environmental pollution laws, including laws enacted to regulate solid waste, including septage, within those areas.

5. All parties have been correctly designated, and there is no question as to misjoinder or non-joinder.

6. The burden of proof rests on the Petitioner to present evidence showing that the agency acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, or failed to act as required by law or rule.

7. N. C. Gen. Stat. § 130A-290 (35) defines “solid waste.”

(35) “Solid waste” means any hazardous or nonhazardous garbage, refuse or sludge from a waste treatment plant, water supply treatment plant or air pollution control facility, domestic sewage and sludges generated by the treatment thereof in sanitary sewage collection, treatment and disposal systems, and other material that is either discarded or is being accumulated, stored or treated prior to being discarded, or has served its original intended use and is generally discarded, including solid, liquid, semisolid or contained gaseous material resulting from industrial, institutional, commercial and agricultural operations, and from community activities. The term does not include:

N.C. Gen. Stat. § 130A-290(35)

8. N. C. Gen. Stat. § 130A-290 (32) defines “septage” as “solid waste that is a fluid mixture of untreated and partially treated sewage solids, liquids, and sludge of human or domestic origin which is removed from a wastewater system” including “domestic septage, which is either liquid or solid material removed from a septic tank ...portable toilet, or similar treatment works receiving only domestic sewage.”

9. While the word “septage” is not specifically used in N.C. Gen. Stat. § 130A-290(35), the definition is sufficiently incorporated in the definition of “solid waste” so that “septage” is included in the definition.

10. “Solid waste management” is the purposeful, systematic control of the generation, storage, collection, transport, separation, treatment, processing, recycling, recovery and disposal of solid waste. N. C. Gen. Stat. § 130A-290 (38)

11. A “Solid waste management facility” is land, personnel and equipment used in the management of solid waste. N. C. Gen. Stat. § 130A-290 (39)

12. N.C. Gen. Stat § 130A-291.1 requires that all septage be treated and disposed only at a wastewater system approved by Respondent or at a site permitted by the Department for land application.

13. 15A N.C.A.C. 13B .0841(e) requires that each septage detention and treatment facility be designed, constructed, and maintained in such a manner as to prevent leaks or the flow of septage out of the facility into any surface waters.

14. 15A N.C.A.C. 13B .0841(j) states that “[s]eptage shall be transferred to and from a detention system in a safe and sanitary manner that prevents leaks or spills of septage, including septage in pipes used for transferring waste to and from vehicles.”

15. 15A N.C.A.C. 13B .0832(a)(6) states that “All conditions for permits issued in accordance with this Section shall be followed.”

16. At all times relevant to this action, Petitioner owned and operated Crisp Boat Dock which is located at 1095 Lower Panther Branch Road, Almond, North Carolina.

17. The Division of Waste Management is a division of Respondent Department created by statutory mandate pursuant to N.C. Gen. Stat. § 130A, Article 9 to promote and preserve an environment that is conducive to public health and welfare. The Department is tasked with establishing and maintaining a statewide solid waste management program. N.C. Gen. Stat. § 130A-291.

18. Petitioner is the owner and operator of the septage detention and treatment facility which is the site of the septage discharge that occurred on June 27, 2013. The permit is issued to Crisp Boat Dock/Fontana Lake Waste Recovery, Inc. Although it is not known if Fontana Lake Waste Recovery, Inc. is a viable corporation, Petitioner has not shown that it is not.

19. Petitioner signed the application for the septage detention and treatment facility as the owner and certified that the applicant was Crisp Boat Dock (David Crisp). Fontana Lake Waste Recovery, Inc. is the permit holder for a septage management firm (NCS-01004) which is the operational permit that covers the jon boat operated by Petitioner that is used to pump the waste from houseboats, then the waste is transferred by the Petitioner from the boat to the floating septage detention and treatment facility owned and operated by Petitioner d/b/a Crisp Boat Dock under permit SDTF-38-91. The Compliance Order with Administrative Penalty was issued to Mr. David Crisp, d/b/a Crisp Boat Dock.

20. Fontana Lake Waste Recovery, Inc. is a co-permittee but was not cited for the violation. There is no explanation from Respondent as to why a co-permittee is not cited or held equally liable. Likewise there is no evidence about Prince Boat Dock as having any authority over Petitioner, and thus some culpability, although the permit specifically states that Prince has some supervision of the operation of the SDTF. The fact that Mr. Crisp was operating the boat at the time of the spill is not the determinative factor. Respondent erred in either listing Prince in the permit or failing to notice them of the violation. If an agency is going to rely on “strict liability” to enforce regulations then it is incumbent on the agency to be correct as well.

21. Respondent committed error by not including Fontana Lake Waste Recovery, Inc., the co-permittee, in the citation and holding it responsible as well.

22. Petitioner is a “person” as defined by N.C. Gen. Stat. § 130A-2(7) who may be assessed a civil penalty pursuant to N.C. Gen. Stat. § 130A-22 for the violations of N.C. Gen. Stat. § 130A, Article 9, and the Rules promulgated thereunder, including 15A NCAC 13B .0841(e), .0841(j), .0832(a)(6), and N. C. Gen. Stat. § 130A-291.1.

23. The waste contained in the septic tank on the boat which was to be pumped into and disposed of at the septage detention and treatment facility was septage under N.C. Gen. Stat. § 130A-290(32). Pursuant to N.C. Gen. Stat. § 130A-290(35) that septage was a “solid waste” subject to regulation by Respondent.

24. N.C. Gen. Stat. § 130A-22 (a) states “The Secretary of Environment and Natural Resources may impose an administrative penalty on a person who violates Article 9 of this Chapter, rules adopted by the Commission pursuant to Article 9, or any term or condition of a permit or order issued under Article 9.” Article 9 is Solid Waste Management.

25. Michael Scott, then Chief of the Solid Waste Section of the Division of Waste Management of the Department of Environment and Natural Resources was apparently designated to assess civil penalties under N.C. Gen. Stat. § 130A, Article 9.

26. Respondent’s statutory authority mandates that it protect the public health and the environment and therefore its duty to issue and approve permits for septage storage methods is cautionary. In this case, because Petitioner’s septage detention and treatment facility is located on the surface water of Fontana Lake. A condition of Petitioner’s permit mandates that no back flow of waste from the “storage tank” to any surface water occur, including Fontana Lake, or it is a violation. (Rsp. Ex. 9)(Emphasis added) Although there is an argument to be made that the back flow was not from the storage tank, it is not necessary to this decision to discuss that point.

#### ***STRICT LIABILITY AND PENALTY***

27. This condition in the permit imposes a type of strict liability on Petitioner to not discharge any waste into the surface water of Fontana Lake, no matter how small, or it would be a violation of Petitioner’s permit and the Solid Waste Management Act authorizing the permit.

28. To say that a spill of any size is a violation is correct, but the inquiry does not stop there. There has to be a determination of a commensurate penalty. Running a stop light does not place the driver in jeopardy of being imprisoned as a serious felon simply because he violated a strict liability “criminal” offense. Likewise, in assessing a penalty for an environmental violation the penalty must fit the offense.

29. Strict liability is a prospective approach to encourage adherence to certain standards so that our environment will be protected. Strict liability simply means that any deviation from the regulation will be subject to some form of remonstrance. The term “strict liability” standing alone does not determine what the “punishment” will be for any violation; it only means that there will be some form of punishment for violation. There should be an equal regulation establishing the punishment for violation.

30. N.C. Gen. Stat. § 130A-22 is the statutory authority for establishing penalties for violations herein. It states:

In determining the amount of a penalty under this subsection . . . , the Secretary shall consider all of the following factors:

- (1) The degree and extent of harm to the natural resources of the State, to the public health, or to private property resulting from the violation.
- (2) The duration and gravity of the violation.
- (3) The effect on air quality.
- (4) The cost of rectifying the damage.
- (5) The amount of money the violator saved by noncompliance.
- (6) The prior record of the violator in complying or failing to comply with Article 19 of this Chapter or a rule adopted pursuant to that Article.
- (7) The cost to the State of the enforcement procedures.
- (8) If applicable, the size of the renovation and demolition involved in the violation.

N.C. Gen. Stat. § 130A-22 (Emphasis added)

31. In this case the degree and extent of harm was negligible or none. The duration of the violation was a few minutes. Numbers 3 and 8 do not apply. The cost of rectifying the damage was zero. The violator did not save any money by the violation. He does have a prior violation for improper burning. Costs were involved in the investigation.

32. N.C. Gen. Stat. Ann. § 130A-291.1(b) is the statutory authority which allows for the adoption of rules governing septage. It states: "For the protection of the public health, the Commission shall adopt rules governing the management of septage. The rules shall include, but are not limited to, criteria for the sanitary management of septage, including standards for the transportation, storage, treatment, and disposal of septage; . . ."

N.C. Gen. Stat. § 130A-291.1

33. Among the rules which have been properly promulgated and adopted and are applicable here is 15A NCAC 13B .0702 "STANDARDS" which states:

In determining the amount of the administrative penalty, the Division shall consider the following standards:

- (1) Nature of the violation and the degree and extent of the harm, including at least the following:
  - (a) For a violation of the Solid Waste Management Act, Article 9 of Chapter 130A of the North Carolina General Statutes, and the rules adopted thereunder:
    - (i) type of violation;
    - (ii) type of waste involved;
    - (iii) duration of the violation;

- (iv) cause (whether resulting from a negligent, reckless or intentional act or omission);
- (v) potential effect on public health and the environment;
- (vi) effectiveness of responsive measures taken by the violator;
- (vii) damage to private property.

(2) Cost of rectifying any damage.

(3) The violator's previous record in complying or not complying with the Solid Waste Management Act and the regulations promulgated thereunder.

(Respondent's Exhibit 11)

34. Respondent attempts to incorporate the standards of 15A NCAC 13B .0702 in developing the Penalty Computation Procedure which is the matrix used to calculate the penalty assessed against Mr. Crisp. In application or in practice the rule is not followed. For example, "duration" or "negligence" are not given any consideration. Further, the guide for use of the matrix does not coincide with the worksheet. Even if use of the matrix was correct, if the guide and worksheet were consistent and if it had been used correctly, Mr. Crisp's scores and thus penalty should have been lower.

35. The matrix does not in practice account for the volume or amount of the spill. Thus, Mr. Crisp's spill of a few gallons is equated to one who intentionally dumped 10,000 gallons. If volume does not matter then Mr. Crisp's spill is conceivably of the same magnitude of Duke Energy's coal ash spill into the water ways.

36. The Penalty Computation Procedure is a guidance tool. It is for guidance, not rigid application with blinders on. On its face there are areas of discretion, and it is obvious from the three examples of cases that were deemed similar to Mr. Crisp's that discretion is used in determining what number to assign to a particular block which will increase the amount of the penalty.

37. Of paramount importance is the fact that the Penalty Computation Procedure does not have to be followed at all. The mandatory requirements within the statutes and the rules must be taken into account, but looking at the statute and the rule, applying the worksheet to the facts of this case does not fully and appropriately take into account what happened in this particular instance. It does not take into account a very small unintentional spill by a man who has devoted a huge portion of his life cleaning up the Fontana Lake. Obviously he would not do anything to intentionally harm the lake.

38. Respondent's rule-makers envisioned that there would be a fact pattern that did not fit within the confines of 15A NCAC 13B .0702, and thus the matrix. Rule 15A NCAC 13B .0703(d) states:

"The Division or its delegates may modify a penalty upon finding that additional or different facts should have been considered in determining the amount of the

assessment or upon finding that the respondent has corrected or mitigated the harm cause by the violation.”

39. The assessment of penalties or any type of “punishment” is a look back at events after the fact when there is a violation. Use of a matrix such as the one developed and used by Respondent is a well-accepted practice in determining a penalty. It is a useful tool designed to insure consistency in meting out civil penalties. However, the matrix cannot address every conceivable set of circumstances that might arise, and 15A NCAC 13B .0703(d) addresses that potentiality.

40. At the heart of any form of punishment meted out in our system of justice is a sense of moral blameworthiness on the part of the offender and that offender committed some act that needs punishment. Basically all theories of punishment center on general deterrence (to deter others), specific deterrence (to deter this particular offender), rehabilitation, incapacitation and retribution.

41. The Penalty Computation Procedure guidance manual affirmatively states that the purpose of assessing penalties and thus punishment is for a deterrence. The use of “deterrence” in the manual implies the assessment is to be a deterrent to the particular violator. In this particular instance, and based on the facts and circumstances of this case, there does not need to be any specific deterrence aimed at this particular offender.

42. Respondent committed error in the computation of the penalty assessed.

#### ***ARBITRARY AND CAPRICIOUS***

43. The “arbitrary or capricious” standard is a difficult one to meet. *Blalock v. N.C. Dep't of Health and Human Servs.*, 143 N.C. App. 470, 475, 546 S.E.2d 177, 181 (2001). Administrative agency decisions may be reversed as arbitrary or capricious if they are “patently in bad faith,” *id.*, or “whimsical” in the sense that “they indicate a lack of fair and careful consideration” or “fail to indicate ‘any course of reasoning and the exercise of judgment’....” *Comm'r of Ins. v. Rate Bureau*, 300 N.C. at 420, 269 S.E.2d at 573 (citations omitted).

44. Other jurisdictions have found that imposing procedural requirements—even those “within the letter of the statut[e]” may be arbitrary and capricious if that imposition “result[s] in manifest unfairness in the circumstances.” *Id.* (citing Cooper, 2 *State Administrative Law* 761-69 (1965)). *Lewis v. N. Carolina Dep't of Human Res.*, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989)

45. A decision is arbitrary when it is not predicated upon a fair consideration of all necessary facts and factors. Courts have defined arbitrary and capricious as “willful and unreasonable action without consideration or in disregard of facts or without determining principle.” *Blacks Law Dictionary* 96 (5th ed. 1979). See *U.S. v. Carmack*, 329 U.S. 230, 243 n.14 (1946). Arbitrary is defined as “without adequate determining principle . . . [or] fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with

reference to principles, circumstances, or significance... decisive but unreasoned.” *Id.*; *Flower Cab Co. v. Petite*, 658 F. Supp. 1170, 1179 (N.D. Ill. 1987) (defining arbitrary as a decision reached “without adequate determining principle or was unreasoned.”); *U.S. v. Euordif S.A.*, 555 U.S. 305, 316 at n.7 (2009)(“Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act.”); *Watts-Hely v. U.S.*, 82 Fed. Cl. 615, 615 (Claims Court, 2008)(“the very definition arbitrary and capricious action is decision making that ignores the relevant factors critical to the decision.”)

46. Under the particular facts and circumstances of this contested case, Respondent put blinders on and applied the matrix to determine the penalty to be assessed “without consideration or in disregard of facts or without determining principle.” The rigid application of the matrix indicates “a lack of fair and careful consideration” of the facts and “fails to indicate ‘any course of reasoning and the exercise of judgment.’” By the very nature of blindly using the matrix as in this contested case, the Respondent exercises no judgment, contrary to the dictates of administrative rule 15A NCAC 13B .0703(d). This is especially true in light of the fact that use of the matrix is not mandatory as evidenced by the rule. In this contested case, Respondent’s decision was made that “ignores the relevant factors critical to the decision.”

47. At some point common sense and reason have to prevail—or at the very least be considered—and 15A NCAC 13B .0703(d) is the rule that allows common sense and reason to be applied to these cases.

48. Respondent’s decision on the amount of assessed penalty is arbitrary and capricious.

#### **DEFERENCE AND DUE REGARD**

49. Respondent contends that it is entitled to particular deference. The Agency's interpretation and application of the statutes and rules it is empowered to enforce are entitled to deference, as long as the agency's interpretation is reasonable and based on a permissible construction of the statute. *Craven Regional Medical Authority v. N.C. Dept. of Health and Human Services*, 176 N.C. App. 46, 58, 625 S.E.2d 837, 844 (2006); *Good Hope Health Sys., L.L.C. v. N.C. Dept. of Health & Human Services, Div. of Facility Services, Certificate of Need Section*, 189 N.C. App. 534, 544, 659 S.E.2d 456, 463 (N.C. Ct. App. 2008), *aff'd sub nom. Good Hope Health Sys., L.L.C. v. N.C. Dept. of Health & Human Services, Div. of Facility Services*, 362 N.C. 504, 666 S.E.2d 749 (2008).

50. The question arises as to whether or not the agency is entitled to any particular “deference” in how it has addressed the issues in a particular contested case. It is true that North Carolina law gives great weight to the Agency's interpretation of a law it administers. *Frye Regional Med. Center v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999). Further, the Agency's interpretation and application of the statutes and rules it is empowered to enforce are entitled to deference, as long as the Agency's interpretation is reasonable and based on a permissible construction of the statute. *Good Hope Health Sys., LLC v. N.C. Dep't of Health &*

*Human Servs.*, 189 N.C. App. 534, 544, 659 S.E.2d 456, 463 (2008), *aff'd*, 362 N.C. 504, 666 S.E.2d 749 (2008); *Craven Reg. Medical Authority v. N.C. Dep't of Health and Human Servs.*, 176 N.C. App. 46, 58, 625 S.E.2d 837, 844 (2006); *see also Carpenter v. N.C. Dep't of Human Res.*, 107 N.C. App. 278, 279, 419 S.E.2d 582, 584 (1992)

51. Far and away the majority if not all of appellate cases on “agency deference” speak in terms of the reviewing court looking at what the agency did as a “final decision.” These decisions were prior to OAH having final decision making authority.

52. Essentially, so long as the agency gives a reasonable interpretation of statute or rule, then the agency may be afforded “deference”. The reviewing appellate court does not have to adopt the agency's interpretation, especially if it is clearly erroneous. The reviewing appellate court does not have to adopt the agency's interpretation if the statute or rule is plain, unambiguous and not subject to interpretation; i.e., the agency is not free to interpret what the General Assembly intended unless there is ambiguity. *See for example: Rainey v. N.C. Dep't of Pub. Instruction*, 361 N.C. 679, 681, 652 S.E.2d 251, 252-3 (2007); *Cashwell v. Dep't of State Treasurer, Ret. Sys. Div.*, 196 N.C. App. 81, 89, 675 S.E.2d 73, 78-79 (2009); *Hensley v. N. Carolina Dep't of Env't & Natural Res.*, 201 N.C. App. 1, 34, 685 S.E.2d 570, 593-94 (2009) *rev'd sub nom. Hensley v. N. Carolina Dept. of Env't & Natural Res., Div. of Land Res.*, 364 N.C. 285, 698 S.E.2d 41 (2010). *Britthaven, Inc. v. N.C. Dept. Of Human Resources*, 118 N.C. App. 379, 385, 455 S.E.2d 455, 461; *Total Renal Care Of N. Carolina, LLC v. N. Carolina Dept. of Health & Human Services, Div. of Facility Services, Certificate of Need Section*, 171 N.C. App. 734, 740, 615 S.E.2d 81, 85 (2005)

53. *Wells v. Consol. Judicial Ret. Sys. of N. Carolina*, 354 N.C. 313, 319-20, 553 S.E.2d 877, 881 (2001) states:

Nevertheless, it is ultimately the duty of courts to construe administrative statutes; courts cannot defer that responsibility to the agency charged with administering those statutes. This does not mean, however, that courts, in construing those statutes, cannot accord great weight to the administrative interpretation, especially when, as here, the agency's position has been long-standing and has been met with legislative acquiescence. (Internal citations omitted).

54. None of the appellate cases impute deference to staff and the day to day operations of any agency. The interpretation of the policies or rules or statutes by the individual person doing the work is not the concern of the appellate courts in “agency deference.” In *Canady v. N. Carolina Coastal Res. Comm'n*, 206 N.C. App. 329, 698 S.E.2d 557 (2010), an unpublished opinion, the Court of Appeals acknowledged that typically the deference was to the agency's appellate panel and not the staff. While the unpublished opinion is not cited as legal authority, the Canady case is consistent with the reported cases on agency deference.

55. The methodology used in calculating the amount of penalty is not entitled to any particular deference.

56. A standard which is different from the “deference” standard is found in N.C. Gen. Stat. Ann. § 150B-34 which states that “[t]he administrative law judge shall decide the case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency.” It must be emphasized that this statutory directive is to the “facts and inferences” that are particularized to the “specialized knowledge” of the agency.

57. North Carolina law also presumes that the Agency has properly performed its duties. *In re Broad & Gales Creek Community Assoc.*, 300 N.C. 267, 280, 266 S.E.2d 645, 654 (1980); *Adams v. N.C. State Bd. Of Reg. for Prof. Eng. & Land Surveyors*, 129 N.C. App. 292, 297, 501 S.E.2d 660, 663 (1998) (stating “proper to presume administrative agency has properly performed its official duties”); *In re Land and Mineral Co.*, 49 N.C. App. 529, 531, 272 S.E.2d 6, 7 (1980) (stating that “the official acts of a public agency ... are presumed to be made in good faith and in accordance with the law.”).

58. In rendering the decision herein, due regard has been given to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency.

#### ***DISPARATE TREATMENT***

59. The essence of Respondent’s mission is stated in N.C. Gen. Stat. § 130A-291(a), which states:

For the purpose of promoting and preserving an environment that is conducive to public health and welfare, and preventing the creation of nuisances and the depletion of our natural resources, the Department shall maintain a Division of Waste Management to promote sanitary processing, treatment, disposal, and statewide management of solid waste and the greatest possible recycling and recovery of resources, and the Department shall employ and retain qualified personnel as may be necessary to effect such purposes.

60. Hopefully we all want to preserve the environment, but the Respondent in particular is tasked with doing so for the benefit of the public health and welfare. In this case the uncontroverted evidence is that Petitioner has spent many years, much effort and considerable resources in cleaning up Fontana Lake which had become extremely polluted in some large part due to houseboats dumping their holding tanks straight into the lake. According to Mr. Scott, to his knowledge no section of the North Carolina Department of Environment and Natural Resources attempts to control the straight dumping of septage by houseboats into the public waters. Thus it is left to private citizens such as Mr. Crisp to undertake efforts to control that dumping and keep the lake clean, a task which might more appropriately belong to the state. In this arrangement, the State’s only task is to issue permits and punish those who might run afoul of the regulations, exercising no control over the worst polluters.

61. The effect of this arrangement is that Mr. Crisp and others similarly situated are left to do the cleanup and are punished should they violate a regulation, even if unintentional;

however, even today a houseboat owner is completely free to continue to dump septage into the waters of the State of North Carolina without consequence. Any dumping by a houseboat of its holding tank is most likely to be more than the spillage by Mr. Crisp.

62. While it is recognized that the State's financial resources are not without limits, this current situation is blatantly unfair in the facts circumstances of this particular case. It is obvious that there is a tremendous disparate treatment between the houseboat owners and Mr. Crisp whose operation is to clean the lake.

63. Further, the manner in which the matrix is applied, including among other things that volume and duration does not matter, creates a disparate treatment in comparing Mr. Crisp's actions to those of the three "similar" cases. Ten gallons is not the same as 10,000 gallons despite what Respondent contends.

64. Petitioner violated N.C. Gen. Stat. § 130A-291.1(d) by having a back flow of septage of ten gallons or less into Fontana Lake. The septage was not disposed at a wastewater system approved by the Respondent or at a site permitted by the Department for disposal. The backflow was human error and was totally unintentional.

65. Petitioner did violate 15A N.C.A.C. 13B .0832(a)(6) by not notifying Respondent of a spill event that contacted surface waters. The rule tracks the provision of GS § 130A-291.1(d), but is cited as a separate violation for the same event for failing to follow a condition of his permit by allowing backflow of septage to flow into the surface waters of Fontana Lake

66. Petitioner did not violate 15A N.C.A.C. 13B .0841(e) by failing to maintain his septage detention facility to ensure that leaks or the flow of septage are prevented from flowing into the surface waters of Fontana Lake. With the exception of the roof problems which he promptly fixed, Mr. Crisp's facility was properly maintained and did not contribute to the spill at all.

67. Petitioner did violate 15A N.C.A.C. 13B .0841(j) by failing to transfer septage to a detention system in a safe and sanitary manner so that septage, including septage in pipes used for transferring waste, flowed into the surface waters of Fontana Lake.

68. Petitioner did violate the statute and rules as concluded above; however, all of the violations were in one event which lasted at most a matter of a few minutes and at most spill less than 10 gallons of septage into a very large body of moving water.

69. Although Petitioner violated the provisions as set forth above, Petitioner met his burden of proving that Respondent acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, and failed to act as required by law or rule in assessing a monetary civil penalty.

70. Respondent did not act properly in assessing a \$14,625.00 penalty; however, some appropriate penalty should be assessed. Respondent acted properly in assessing \$2,103.41

investigative costs against Petitioner for violations of N.C. Gen. Stat. § 130A, Article 9, and its attendant rules?

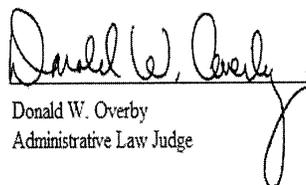
**DECISION**

Based upon the facts and circumstances of this particular contested case, the Office of Administrative Hearings upholds the agency's decision that a violation occurred and that a civil penalty should be assessed against Petitioner for violations of the Solid Waste Management Act, N.C. Gen. Stat. §130A, Article 9 and its attendant Rules; however the agency's decision as to the amount of the civil penalty is **REVERSED**. Under the particular facts and circumstances of this contested case alone, a reasonable civil penalty is assessed in the amount of \$1,000, and investigative costs of \$2,103.41 are reasonable and appropriate for Petitioner to incur for a total of \$3,102.41.

**NOTICE**

Pursuant to N.C.G.S. § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge may commence such appeal by filing 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 party seeking review must file the petition within thirty (30) days after being served with a written copy of the Administrative Law Judge's Decision and Order. Pursuant to N.C.G.S. 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.

This the 14<sup>th</sup> day of August, 2015.

  
Donald W. Overby  
Administrative Law Judge

FILED

STATE OF NORTH CAROLINA

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
14 OSP 07170

COUNTY OF WAKE

2015 AUG 24 PM 5:30

ESTATE of TODD MCCRACKEN, )  
ADMIN HEARINGS

Petitioner, )

)

v. )

FINAL DECISION

)

NC DEPARTMENT OF REVENUE, )

Respondent. )

)

This contested case was commenced by the filing of a petition on behalf of Todd McCracken on September 18, 2014. The hearing on the case commenced on February 11, 2015, before the Honorable Donald Overby, Administrative Law Judge. Respondent presented its witnesses, but Petitioner only had time to present one witness within the scheduled time allotted for the hearing. The hearing was continued to March 18, 2015. Via phone conference on March 17, 2015, Petitioner closed his case without further testimony, due in part to Petitioner's hospitalization. Petitioner died on April 2, 2015. An Order Substituting Party was entered on April 24, 2015, substituting the Estate of Todd McCracken as the Petitioner.

**ISSUE**

Whether Petitioner was discharged from his employment with the North Carolina Department of Revenue without just cause for unacceptable personal conduct.

**BURDEN OF PROOF**

The burden of proof is on the Respondent to show by the greater weight of the evidence that it had just cause to dismiss Petitioner for disciplinary reasons for unacceptable personal conduct.

**APPEARANCES**

For Petitioner: Michael C. Byrne  
Wells Fargo Capitol Center, Suite 1130  
150 Fayetteville Street  
Raleigh, NC 27601

For Respondent: Peggy S. Vincent  
Special Deputy Attorney General  
NC Department of Justice  
P.O. Box 629  
Raleigh, NC 27602-0629

**EXHIBITS ADMITTED INTO EVIDENCE**

For Petitioner: Exhibits 1, 5, 9, 10B, 10C and 11.

For Respondent: 1 through 15.

**WITNESSES**

For Petitioner: Melanie Tew, MD (*via phone*)

For Respondent: Thomas L. Dixon, Jr.  
April Day  
Donna Powell  
Michael J. Wenig (*Offer of Proof*)  
Stu Lockerbie (*de benne esse deposition*)  
Corey Blay (*de benne esse deposition*)

**FINDINGS OF FACT**

1. Petitioner was a career status employee and had been employed by the North Carolina Department of Revenue ("Department") since November 14, 1988, serving as a Revenue Administration Officer III or Auditor-Advanced in the corporate division from October 1, 2004, until his termination, effective April 19, 2014. Prior to the events of this case, Petitioner had no prior disciplinary action in his record.

2. The primary purpose of Petitioner's job was to research and answer technical, highly complex and controversial tax inquiries and to resolve protested tax assessments and denied refunds prior to formal administrative hearings in the administration of corporate taxes. As a corporate tax auditor, he was required to provide an objective, fair and equitable responses to complex issues of taxation.

3. A function of Petitioner's job duties was interaction with "taxpayer representatives," or persons who represent a taxpayer in matters involving DOR.

4. In the regular course of his duties, the Petitioner had been assigned to research and prepare a response to a protest of a tax assessment by a large, multistate corporate taxpayer ("Taxpayer").

5. On February 18, 2014, the Petitioner had a telephone conversation with Mr. Corey Blay, an employee and representative of the corporate taxpayer. The phone call was initiated by Petitioner.

6. The discussion concerned Stuart (Stu) Lockerbie, a CPA from an international "Big Four" accounting firm and a representative of this particular taxpayer. Petitioner had had previous interactions with Mr. Lockerbie. Mr. Lockerbie had a reputation among people with whom he had worked in DOR for very aggressively representing his clients. Some staff, including Mr. Tom Dixon, Assistant Secretary for Tax Administration, spoke of Mr. Lockerbie in derogatory terms.

7. In 2011, during the course of prior cases in which Mr. Lockerbie was dealing with Petitioner, Mr. Lockerbie had spoken to Mr. John Sadoff, an Assistant Secretary for the Department of Revenue, about Petitioner's handling of his cases. There is some evidence that Mr. Lockerbie also spoke directly with the Secretary of DOR and the chief financial officer for DOR in 2012. Mr. Lockerbie was not speaking merely to immediate nor second level supervisors.

8. When the issue arose in 2011 between Mr. Lockerbie and Petitioner and Mr. Lockerbie became aware that Petitioner was upset with him, Mr. Lockerbie called Petitioner and apologized. Seemingly the issue was resolved and they continued to work together on cases.

9. Petitioner was unhappy, however, with Mr. Lockerbie for going to senior management and expressed his desire to not work with Mr. Lockerbie in his conversation

with Mr. Blay in 2014. At the time of the conversation in 2014, the issue was raised over a power attorney which gave Mr. Lockerbie and three others the ability to handle matters for the taxpayer with DOR.

10. In his conversation with Mr. Blay, Petitioner told him that he was willing to work with any of the other CPAs in the firm retained by the Taxpayer, but would not or could not work with Mr. Lockerbie. (Blay dep. pp. 9,10). Mr. Blay could not remember whether Petitioner said "would" or "could." Three others were on the power of attorney to represent the taxpayer with DOR.

11. In referring to Mr. Lockerbie speaking to senior management with DOR, the Petitioner explained to Mr. Blay that he felt Mr. Lockerbie had "thrown him under the bus" in previous dealings. (Blay dep. pp. 9, 11) Further, because of Mr. Lockerbie going to senior management, the Petitioner felt that Mr. Lockerbie's previous accusations about Petitioner were inaccurate, that Mr. Lockerbie was looking after the best interest of his clients without considering the ramifications to Petitioner, and that Mr. Lockerbie was questioning Petitioner's abilities. (Blay dep. p. 9).

12. The phone conversation of February 18, 2014, caused Mr. Blay to question his company's decision to hire Mr. Lockerbie or the particular accounting firm only "a little bit." Neither he nor his company took any action at all in regards to the professional relationship and especially in severing the relationship. (Blay dep. p. 13, T.p. 32). The professional relationship was not harmed. (Lockerbie dep. p. 17)

13. When Mr. Lockerbie learned of the February 18, 2014 phone conversation between Petitioner and Mr. Blay, he offered to his client that he, Lockerbie, would withdraw from the case if necessary to insure that the Taxpayer was best represented. (Lockerbie dep. p. 12) While he and Mr. Blay had that conversation, there does not appear to have been any real interest in changing the relationship

14. When Mr. Lockerbie learned of the February 18, 2014 phone conversation, he was perplexed because he had never had any other person, "and certainly not a person from the Department of Revenue" call a client and say they could not work with him. (Lockerbie dep. pp. 13-14). Mr. Lockerbie is rather disingenuous in being shocked that Petitioner called his client but seeing absolutely nothing wrong in discussing Petitioner's work with senior management.

15. According to Mr. Lockerbie, the remarks that Petitioner had made to Mr. Blay caused Mr. Lockerbie concern about what Petitioner might have told any of Mr. Lockerbie's other taxpayer clients and about whether Petitioner's prejudice against Mr. Lockerbie might have negatively impacted the resolution of taxes in cases of other clients of Mr. Lockerbie. (Lockerbie dep. pp. 18-19). There had been several years intervening since the problem between Petitioner and Mr. Lockerbie had arisen and Lockerbie had not seen or heard of any negative repercussions at all. Mr. Lockerbie and Petitioner continued to work well together on the same cases about which Mr. Lockerbie had complained.

16. Mr. Lockerbie acknowledges that the ill will between Petitioner and him arose from an inquiry Mr. Lockerbie had made to the Department's management about the slow progress being made on some of the cases of Mr. Lockerbie's clients back in 2011. (Lockerbie dep. pp. 7 – 11).

17. Mr. Lockerbie feels he should be able to go to any supervisor at the Department to voice concerns about his client's case, and states he has been encouraged by persons at the Department to do so. (Lockerbie dep. p. 27). If indeed that is policy at DOR, it would seem to set an incredibly bad precedent for any taxpayer representative to be able to go directly to an Assistant Secretary of the Department of Revenue, and possibly even to the Secretary. Alternatively, Mr. Lockerbie is entitled to special privileges to which no other taxpayer in North Carolina is entitled.

18. Both Mr. Lockerbie and Mr. Blay felt that they had had a good working relationship with Petitioner and that the comments were out of character for Mr. McCracken. Both Mr. Blay and Mr. Lockerbie seemed satisfied with the Petitioner's apology.

19. Petitioner attempted to explain to his supervisor, Mr. Dixon, that his medical issues may have been a factor in the inappropriate statements to Mr. Blay; however, Mr. Dixon was not interested in hearing about any medical issues. Mr. Dixon felt that it was a "complete lack of professional judgement" and had nothing to do with the medical problems Petitioner was having. It appears that indeed the medical issues were a factor.

20. The Petitioner's physician, Dr. Melanie Tew, stated that on February 18, 2014, Petitioner was experiencing a combination of high stress, anxiety, and the effects of increased dosage of a prescription anti-anxiety drug. Dr. Tew testified that this combination of factors more likely than not led to cognitive issues on the part of the Petitioner.

21. Immediately upon learning of the February 18 phone conversation, Tom Dixon, Assistant Secretary of Tax Administration at the Department, removed Petitioner from the case and ordered that Petitioner have no further contact with the Taxpayer or Mr. Lockerbie. (T.p. 29).

22. When Mr. Dixon found out about the conversation between Mr. Blay and Petitioner, he called both Mr. Blay and Mr. Lockerbie. According to Mr. Lockerbie, Mr. Dixon told him there had been other "instances" concerning Petitioner and that he (Dixon) would deal with them. Mr. Dixon's statement is highly inappropriate and appears to be revealing what should be confidential personnel information.

23. Petitioner is a CPA and had worked for the Department for more than twenty years. He knew or should have known that his comments were inappropriate.

24. The Department terminated the employment of Petitioner effective April 19, 2014, for unacceptable personal conduct alleging that it was conduct for which no reasonable person should expect to receive a prior warning and conduct that was unbecoming to a state employee that is detrimental to State service.

25. There is no evidence to support the contention that Petitioner's statements in his phone conversation were seriously damaging to the reputation of the Department or that his statements would or could cause serious harm to the reputation of the Department. The evidence does not support the contention that his statements called into question prior and future business of the Department with North Carolina taxpayers.

26. Any allegation or assertion that Petitioner's comments exposed DOR to a potential action for defamation is not supported.

27. Petitioner passed away on April 2, 2015 during the pendency of this contested case.

#### **CONCLUSIONS OF LAW**

Based on the Findings of Fact the undersigned makes these Conclusions of Law:

1. The parties are properly before the Office of Administrative Hearings on a Petition pursuant to Chapter 126 of the General Statutes, and the Office of Administrative Hearings has jurisdiction over both the parties and the subject matter.

2. Petitioner was a career State employee at the time of his dismissal. Because he is entitled to the protections of the North Carolina State Personnel Act, and has alleged that Respondent lacked just cause for his dismissal, the Office of Administrative Hearings has jurisdiction to hear this appeal and issue a Final Agency Decision.

3. N.C.G.S. § 126-35(a) provides that "No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." In a career State employee's appeal of a disciplinary action, the department or agency employer bears the burden of proving that "just cause" existed for the disciplinary action. N.C.G.S. § 126-35(d) (2007).

4. 25 NCAC 11.2301(c) enumerates two grounds for disciplinary action, including dismissal, based upon just cause: (1) unsatisfactory job performance, including grossly inefficient job performance; and (2) unacceptable personal conduct. Petitioner was dismissed only for Grossly Inefficient Job Performance and Unacceptable Personal Conduct.

5. N.C.D.E.N.R. v. Clifton Carroll, 358 N.C. 649, 599 S.E.2d 888 (2004), states that the fundamental question in determining just cause is whether the disciplinary action taken was just. Citing further, "Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations." Our Supreme Court said that there is no bright line test to determine "just cause"—it depends upon the specific facts and circumstances in each case. Furthermore, "not every violation of law gives rise to 'just cause' for employee discipline."

6. In Warren v. Crime Control and Public Safety, the Court of Appeals held that in just cause cases:

The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken. Just cause must be determined based "upon an examination of the facts and circumstances of each individual case.

Warren v. N.C. Dep't of Crime Control & Pub. Safety, 726 S.E.2d 920, 925 (N.C. Ct. App. 2012).

**Step One: Did the Petitioner Commit The Conduct Alleged?**

7. The Petitioner did commit the conduct alleged to the extent that he made inappropriate remarks to Mr. Blay as set forth in the findings of fact above. Respondent's contention in the dismissal letter that Mr. McCracken exposed the Respondent to "unnecessary risk" is not supported by competent evidence.

8. Respondent's contention in the dismissal letter that Mr. McCracken exposed the Respondent to a "risk of litigation for defamation of character" is not supported by competent evidence.

**Step Two: Did Petitioner's Actions Constitute Unacceptable Personal Conduct?**

9. While DOR established that Petitioner made remarks that were either poor judgment and/or were unprofessional, establishing unacceptable personal conduct, as opposed to simply poor job performance, based on those remarks is not warranted.

10. Each agency in our State government has an expectation that its employees, will exercise sound judgment and decorum in dealing with others, particularly

those who interact with the public on important issues as Petitioner certainly did. As noted, Petitioner by his own admission used poor judgment in making the comments.

11. It is difficult to place Petitioner's actions in the specific category of unacceptable personal conduct that merits the kind of discipline handed down to Petitioner. Employees are reasonably expected to act professionally at all times. Stated alternatively, while one would not reasonably expect to have to be warned to not act unprofessionally, the mere fact that one does indeed act unprofessionally does not in and of itself mean the person's acts warrant dismissal. Such acts may indeed be more appropriately job performance issues which would require warnings or some lesser form of discipline rather than dismissal.

### Step 3: Did The Unacceptable Personal Conduct Justify The Discipline Imposed?

12. Assuming *arguendo* that the conduct of Petitioner constitutes unacceptable personal conduct, the next required step in the Warren analysis is determining whether the discipline imposed for that conduct was just. "If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken." Just cause must be determined based "upon an examination of the facts and circumstances of each individual case." The Warren Court refers to this process as "balancing the equities". Here the discipline imposed was dismissal. Accordingly, the question is: does the personal conduct violation established justify dismissal?

13. In conducting this process, the Court notes Petitioner's substantial, discipline-free employment history with Respondent See Warren, referencing N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 666, 599 S.E.2d 888, 898 (2004): "In reaching this result, the Court examined the petitioner's exemplary employment record as well as the circumstances under which the petitioner exceeded the posted speed limit."

14. In relying on Warren and Carroll as quoted above, this Tribunal must look at the "circumstances" under which Petitioner committed the conduct alleged. This requires consideration of "mitigating factors" in the employee's conduct. See Warren, citing Roger Abrams and Dennis Nolan, TOWARD A THEORY OF "JUST CAUSE" IN EMPLOYEE DISCIPLINE CASES, 1985 Duke L.J. 594 (September 1985).

15. The mitigating factors in this case are well established by the evidence cited above in the Findings of Fact. Petitioner's physician, who is found to be credible, testified, without contradiction, that the conditions under which Petitioner operated on the day in question more likely than not led to cognitive difficulties on the part of Petitioner. There is no evidence nor even inference that makes reference to any identical or even substantially similar conduct in Petitioner's twenty plus years of employment with this agency, which also lends credence to Dr. Tew's conclusions. Petitioner attempted to explain to Mr. Dixon that he felt his medical condition might have had an effect on his

judgment causing this inappropriate conduct, but Mr. Dixon was not interested in hearing anything about his medical condition.

16. While Mr. Blay and Mr. Lockerbie expressed some concerns based upon Mr. McCracken's statements, neither took any affirmative actions to change anything as a result of Petitioner's statements. Respondent's witnesses uniformly stated that Mr. McCracken's actions were uncharacteristic and not the norm.

17. Finally, as noted, DOR's own witness testified that in the view of the agency the conduct did not rise to the level of dismissal, but that DOR had intended merely to demote Petitioner.

18. In consideration of all of these factors, to the extent unacceptable personal conduct was proven with respect to Petitioner's conduct, DOR did not establish just cause for Petitioner's dismissal. Petitioner's inappropriate comments to Mr. Blay are more appropriately poor job performance.

19. The Respondent did not meet its burden of proof by showing that Mr. McCracken engaged in unacceptable personal conduct by conduct for which no reasonable person should expect to receive a prior warning and conduct that was unbecoming to a state employee that is detrimental to State service.

20. Based upon the facts and circumstances of this case, an appropriate remedy would have been for Petitioner to be suspended for one week without pay.

21. Retroactively reinstating a State government employee is a remedy which in essence is a finding that the termination was improvident, and thus, the reinstatement is as though the severance in service never happened. Therefore, with the unusual circumstances in this case of the Petitioner's death, he obviously cannot return to state service; however, his estate is entitled to any back pay to which he would have been entitled. The period of "reinstatement" for which he would have been entitled is from the date of his termination until the date of his death.

22. It is found as fact and concluded as a matter of law that extraordinary factors exist which justify having exceeded the statutory deadlines for completion of this contested case, including but not limited to, the Petitioner's health issues which ultimately led to his death prior to the conclusion of this contested case.

The Court makes the following:

#### **FINAL DECISION**

Based upon the foregoing Findings of Fact and Conclusions of Law, and all the competent evidence at hearing, Respondent's decision to dismiss Petitioner is **reversed** and Petitioner is entitled to be retroactively reinstated by Respondent to the same or similar

position held prior to his dismissal to the date of his death, with back pay less one week's pay paid to Petitioner's estate, as well as reasonable attorney's fees paid to Petitioner's counsel upon a properly supported fee petition.

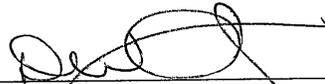
**NOTICE**

THIS IS A FINAL DECISION issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statutes Chapter 150B, Article 4, any party wishing to appeal the Final Decision of the Administrative Law Judge must file a notice of appeal as provided in G.S. 7A-29(a). Appeal of right lies directly with the North Carolina Court of Appeals. The appealing party must file the Notice of Appeal within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision. A copy of the Notice of Appeal must be filed with the Office of Administrative Hearings and requires service on all parties.

In conformity with the Office of Administrative Hearings' Rules, 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.

This the 24<sup>th</sup> day of August, 2015.

  
\_\_\_\_\_  
Donald Overby  
Administrative Law Judge

STATE OF NORTH CAROLINA  
COUNTY OF BLADEN

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
14 OSP 07967

HOPE FREEMAN, )  
Petitioner, )  
V. )  
NORTH CAROLINA DEPARTMENT OF )  
PUBLIC SAFETY, )  
Respondent. )

FINAL DECISION

2015 JUN 23 PM 4:14  
Office of  
Administrative Hearings

Filed

This contested case was heard by Administrative Law Judge Phil Berger, Jr. on March 16, 2015, March 17, 2015, May 26, 2015 and May 27, 2015 at the Office of Administrative Hearings in Raleigh, North Carolina.

**APPEARANCES**

For Petitioner: Richard D. Allen  
Attorney at Law  
205 Lloyd Street, Suite 209  
Carrboro, North Carolina 27510

For Respondent: Vanessa N. Totten  
Assistant Attorney General  
North Carolina Department of Justice  
Post Office Box 629  
Raleigh, North Carolina 27602

**PRELIMINARY MATTERS**

*Motion to Dismiss*

On March 3, 2015, Respondent filed a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to N.C.G.S. §§1A-1, 12(b) (1), 12(b) (2) and 12(b) (6). Petitioner filed an Amended Prehearing Statement on March 11, 2015. Petitioner filed a response on March 12, 2015. The matter was heard before the Undersigned on March 16, 2015. Upon careful consideration of Respondent's motion and Petitioner's response, the motion was granted in part and denied in part.

The Undersigned dismissed all claims with prejudice except for Petitioner's claims for sexual discrimination and retaliation. Petitioner presented evidence throughout the course of the hearing on whether she was unlawfully discriminated against based upon sex and entitled to relief for retaliation including relief pursuant to N.C.G.S. § 126-84, *et. seq.*, Whistleblower Act. At the close of Petitioner's case, Respondent moved for a directed verdict under N.C.G.S. § 1A-1, Rule 50 or in the alternative involuntary dismissal under N.C.G.S. § 1A-1, Rule 41. For purposes of this hearing, Respondent's motion is treated as a motion for involuntary dismissal under N.C.G.S. § 1A-1, Rule 41.

Respondent's motion is allowed.

*Extraordinary Cause*

The Petition in this matter was filed October 16, 2014. This matter was extended beyond the mandated 180 days due to extraordinary cause.

Hearing of the contested case began March 16, 2015, within the 180 day mandated time frame. The hearing did not conclude on March 16, 2015, and was scheduled to resume March 17, 2015. Petitioner was involved in an automobile accident on the morning of March 17, 2015, prior to resumption of the hearing. Additional evidence was presented by Petitioner's attorney that morning, but the Petitioner did not appear as she was being treated in a local emergency room. Petitioner and her passenger were scheduled to be witnesses on the morning of the accident.

The contested case hearing was continued until April 16, 2015. The matter was again continued due to Petitioner's health and effects related to the automobile accident. Hearing in the matter concluded on May 27, 2015.

Extraordinary cause did in fact exist which necessitated additional time for hearing of this matter.

**WITNESSES**

Called by Petitioner:

Petitioner  
Loretta Bell (aka Loretta Hooks)  
Anjanette Kinston-Ingram  
Gearonie Locklear  
Deb Long

Called by Respondent:

None

**EXHIBITS**

The following were exhibits admitted on behalf of Petitioner except as otherwise indicated ("P. Ex."): A, D, E, F, H, I (redacted), J,K,L,M,P,Q,R and S.

The following were exhibits admitted on behalf of Respondent except as otherwise indicated ("R. Ex."): 2,5,6,12,14,15,16,19 and 20.

Upon careful consideration of the sworn testimony of witnesses presented at the hearing, documents received and admitted into evidence, and the entire record in this proceeding as appropriate for consideration, the undersigned makes the following findings of fact. In making the findings of fact, the undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness; any interest, bias or prejudice the witness may have; the opportunity of the witness to see, hear, know and remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether such testimony is consistent with all other believable evidence in the case.

Based upon the evidence presented and the arguments of counsel, the undersigned makes the following findings of fact by a preponderance or greater weight of the evidence:

1. The parties are properly before the Office of Administrative Hearings on a Petition for Contested Case pursuant to Chapters 126 and 150B of the North Carolina General Statutes, and the Office of Administrative Hearings has jurisdiction over both parties and subject matter as such. To the extent that Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.
2. Petitioner Hope Freeman ("Petitioner") was a female who formerly was employed by the North Carolina Department of Public Safety ("NCDPS" or "Respondent") formerly Department of Correction.
3. Petitioner alleged that she was discriminated against on the basis of her sex and retaliated against by Respondent.
4. Petitioner began work for Respondent on May 17, 2010 as a Probation/Parole Officer in the Division of Community Corrections ("DCC") in Cumberland County.
5. Sharon Phillips ("Phillips") was a female. At all relevant times, she was employed as the Judicial District 12 Manager for the Cumberland County Office.
6. Phillips' supervisory chain of command included Petitioner, Deb Young ("Young"), Gearonie Locklear ("Locklear") and Anjanette Kinston-Ingram ("Kinston-Ingram").
7. Petitioner's immediate supervisor in the Cumberland County Office was Kathy Blackmon ("Blackmon"), Chief Probation/Parole Officer.
8. Petitioner alleged that Phillips had made comments about Petitioner's appearance on an unspecified date. She further stated that she was sent home by Phillips from a training based on her appearance and clothing on an unspecified date. (T p 380)
9. Young was a female who formerly was employed by the NCDPS as a Probation/Parole Officer in the Cumberland County Office. Young resigned from NCDPS.

10. The credible evidence showed that Young disagreed with the NCDPS professional dress code for officers. However, Young denied that Phillips discriminated against employees on the basis of sex. Phillips was gender neutral. (T pp 139-140, 165, 176, 184)
11. Gearonie Locklear (“Locklear”) was a male who retired from NCDPS as a Chief Probation/Parole Officer. The credible evidence showed that Locklear and Phillips disagreed about management styles. Locklear denied that Phillips discriminated against employees on the basis of sex. (T p 239)
12. Anjanette Kinston-Ingram (“Kinston-Ingram”) was a female employed with NCDPS as a Probation/Parole Officer in the Cumberland County Office. The credible evidence showed that Kinston-Ingram denied that Phillips or Blackmon discriminated against employees on the basis of sex. (T p 261)
13. Loretta Bell (“Bell”) was a female employed with NCDPS as a Probation/Parole Officer in the Bladen County Office. She was dismissed from NCDPS.
14. The credible evidence showed that Bell had a pending lawsuit against NCDPS based on her employment in the Bladen County office. (T p 349)
15. Petitioner contradicted Bell’s testimony concerning the Bladen County Office. Petitioner testified that she enjoyed working in that office. (T pp 619-621)
16. Bell made no references to any sexual allegations in her testimony. (T pp 347-348)
17. Bell had no personal knowledge concerning Petitioner’s allegations or grievances. (T pp 347-348)
18. The testimonial evidence showed that Phillips and Blackmon treated all NCDPS staff the same. (T p 261)
19. The Undersigned finds that the substantial evidence shows that Phillips and Blackmon did not discriminate against the employees in their supervisory chain of command on the basis of their sex.
20. The totality of evidence in the record shows that Petitioner has failed to show that she was unlawfully discriminated against by Respondent because of her sex.
21. Petitioner alleged that she was subjected to internal investigations, written warnings and a reassignment in retaliation for her engaging in protected activity by filing grievances.
22. The credible evidence in the record showed that Petitioner filed one grievance on June 15, 2011 alleging violence in the workplace. An internal investigation revealed that the allegations were unsubstantiated.
23. Petitioner was issued three written warnings based on unacceptable personal conduct for violating Departmental policies and procedures.
24. NCDPS Personnel Policy, Section 6, Failure to Cooperate During or Hindering an Internal Investigation, states in part, “discussing any aspect of the investigation with anyone other than the investigative personnel also constitutes unacceptable personal conduct and is

representative of those causes considered for disciplinary action up to and including dismissal.” (R. Ex. 14;T pp 598)

25. On December 6, 2010, Petitioner was issued a written warning for failure to follow the NCDPS Personnel Policy, Section 6, Failure to Cooperate During or Hindering an Internal Investigation, by discussing an internal investigation. The credible evidence showed that Petitioner did violate the policy by discussing an internal investigation with other staff. (R. Exs. 14-15, T pp 598-601)
26. Following the December 6, 2010 written warning, Petitioner was placed on Employee Action Plan to ensure that she followed Departmental policies and procedures. (R. Ex. 16)
27. The Division of Community Corrections (“DCC”) Policy and Procedure Manual, Chapter B, Section .0401 states that State-owned vehicles will be used for official state business only. (R. Ex. 19)
28. The Division of Community Corrections (“DCC”) Policy and Procedure Manual, Chapter B, Section .0403 provides that:

(a) Off Duty Travel

With the exception of employees whose home is designated as the official workstation or employees authorized to commute, no state-owned vehicle will be driven to an employee’s home or used during non-working hours except with the permission of the employee’s supervisor when one or both of the following conditions exist:

- (1) State business requires an authorized trip by vehicle the following workday; the employee’s residence is closer to the destination than the official workstation; and the employee does not have to return to the work station prior to beginning the trip; and/or
- (2) The employee needs the use of the vehicle after completion of the regular workday to conduct state business on the same day or before usual working hours on the next work day.

(R. Ex. 19, T pp 608-609)

29. On May 31, 2011, Petitioner was issued a written warning for failure to follow DCC Policy and Procedure, Chapter B, Sections .0401 and .0403 by using her state assigned vehicle for personal use. The credible evidence showed that Petitioner did violate the policies by driving her state vehicle, without permission from her supervisor, to another county. (R. Ex. 19, T p 607)
30. NCDPS Personnel Manual, Section 6, page 38, Appendix C states in part:

A. POLICY:

All employees of the Department of Correction shall maintain personal conduct of an acceptable standard as an employee and member of the community. Violations of this policy may result in disciplinary action

including dismissal without prior warning.

B. EXAMPLES:

9. Refusal to accept a reasonable and proper assignment from an authorized supervisor. Insubordination: Refusal to follow the orders of a superior or supervisor, or refusal to follow established policy or practice.
31. On September 14, 2011, Petitioner was issued a written warning for insubordination after she accompanied another officer on a parole pick up when she had not been approved by her supervisor Chief Probation/Parole Officer, Kathy Blackmon. (T pp 615-616, 618)
32. On September 14, 2011, Petitioner was administratively reassigned to Division 1, Judicial District 4. (P.Ex. L)
33. Petitioner's title, pay grade and salary were not affected by the reassignment and/or written warnings. (T pp 611, 617-619)
34. The Undersigned finds that on December 21, 2011 Petitioner was placed on Family Medical Leave ("FML") Status. Her FML exhausted on January 12, 2012. She was then placed on leave without pay until September 20, 2012 when she was separated for unavailability. Petitioner did not appeal her separation from NCDPS.
35. The credible evidence showed that Petitioner failed to prove that she engaged in a protected activity while employed with Respondent that led to an adverse employment action.
36. Petitioner presented insufficient evidence to support that her complaints related to her employment caused or led to NCDPS internal investigations, issuance of the written warnings, and/or reassignment.

Based upon the foregoing findings of fact and upon the preponderance or greater weight of the evidence in the whole record, the undersigned makes the following:

**CONCLUSIONS OF LAW**

1. This matter is properly before the Office of Administrative Hearings for consideration pursuant to Chapters 126 and 150 B of the North Carolina General Statutes.
2. A court need not make findings as to every fact that arises from the evidence and need only find those facts which are material to the settlement of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611,612, *aff'd*, 335 N.C. 234, 436 S.E.2d 588 (1993).
3. Petitioner has the burden of proving that Respondent unlawfully discriminated against her because of her sex and/or retaliated against her.

4. Because Petitioner presented no direct evidence of sex discrimination, her discrimination claim is subject to the burden-shifting scheme of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973), and its progeny. See also *North Carolina Dep't of Corr. v. Gibson*, 308 N.C. 131, 301 S.E.2d 78 (1983).
5. Under the *McDonnell Douglas* burden-shifting scheme, a Petitioner must first establish a prima facie case of discrimination. If a Petitioner establishes her prima facie case, the burden then shifts to the Respondent to articulate a legitimate, non-discriminatory reason for its decision. If the Respondent articulates a legitimate, non-discriminatory reason for the decision, then the burden shifts back to the Petitioner to prove that the reason given by the Respondent was a pretext for discrimination. *Hoyle v. Freightliner, LLC*, 650 F.3d 321, 337 (4th Cir. 2011); *North Carolina Dep't of Crime Control & Pub. Safety v. Greene*, 172 N.C. App. 530, 537-38, 616 S.E.2d 594, 600 (2005).
6. The "ultimate burden" of proving that the employer intentionally discriminated against the employee remains with the employee at all times. *Gibson*, 308 N.C. at 138, 301 S.E.2d at 83.
7. Petitioner did not meet her burden of proof that Respondent's reasons were a pretext for discrimination. In particular, she presented no evidence of a discriminatory animus on the part of the decision makers involved.
8. As to Petitioner's claim for retaliation/Whistleblower claim for her engaging in protected activity, "[t]o establish a prima facie case of retaliation, it must be shown that (1) the plaintiff engaged in a protected activity, (2) the employer took adverse action, and (3) there existed a causal connection between the protected activity and the adverse action." *Salter v. E & J Healthcare Inc.*, 155 N.C. App. 685, 693, 575 S.E.2d 46, 51 (2003) (quoting *Brewer v. Cabarrus Plastics, Inc.*, 130 N.C. App. 681, 690, 504 S.E.2d 580, 586 (1998), *disc. rev. denied*, 350 N.C. 91, 527 S.E.2d 662 (1999)); *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 788, 618 S.E.2d 201, 206 (2005); *Demurry v. N.C. Dept. Of Corrections (sic)*, 195 N.C. App. 485, 297, 673 S.E.2d 374, 383 (2009).
9. Federal courts use the same burden-shifting schemes for retaliation claims. See, e.g., *Hoyle*, 650 F.3d at 337.
10. Petitioner failed to establish a prima facie case of retaliation, because she failed to establish that she engaged in any protected activity. Even if she had demonstrated she engaged in any protected activity, she failed to establish a causal connection between the protected activity and the adverse action.
11. The preponderance of evidence showed that Petitioner failed to present evidence to support that her complaints were causally related to the internal investigations, written warnings and reassignment.

12. Petitioner failed to present any evidence that Respondent's legitimate non-retaliatory reason for its employment actions were pretextual, or that retaliation was the real reason for the action.
13. In accord with *Painter v. Wake County Bd. Of Ed.*, 217 S.E.2d 650, 288 N.C. 165 (1975), absent evidence to the contrary, it will always be presumed that "public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. Every reasonable intendment will be made in support of the presumption." See also *Huntley v. Potter*, 122 S.E.2d 681, 255 N.C. 619 (1961).
14. In cases without a jury, after the party with the burden of proof has completed the presentation of its evidence, the responding party may move for dismissal on the grounds that on the facts and the law there has been no showing of a right to relief. N.C.G.S. § 1A-1, Rule 41.
15. Based upon the facts and law in this case, the Petitioner has shown no right to relief.
16. In weighing all of the competent evidence, the credibility of the witnesses, the weight to be given to the testimony, and the reasonable inferences to be drawn therefrom, the Respondent is entitled to judgment on the merits.
17. Petitioner's case is based solely upon speculation and innuendo; there is no evidence that the Petitioner was the victim of sexual discrimination or discrimination based on sex.
18. There is no evidence that any adverse employment action took place against this Petitioner.
19. Even if a written warning, reprimand, or transfer under the circumstances and evidence presented could be considered an adverse employment action, such action was not taken in retaliation to any reporting activity undertaken by Petitioner.
20. The Undersigned concludes that Petitioner has failed to meet her burden in her contested case and her claims should be dismissed.

**DECISION**

Based upon the foregoing Findings of Fact and Conclusions of Law the Petitioner's claims are dismissed with prejudice.

**NOTICE AND ORDER**

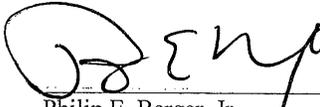
This is a final decision issued under the authority of N.C.G.S. § 150B-34. Under the provisions of N.C.G.S. § 126-34.02(a): "An aggrieved party in a contested case under this section shall be entitled to judicial review of a final decision by appeal to the Court of Appeals as provided in G.S. 7A-29(a). The procedure for the appeal shall be as provided by the rules of appellate procedure. The appeal shall be taken within 30 days of receipt of the written notice of final

decision. A notice of appeal shall be filed with the Office of Administrative Hearings and served on all parties to the contested case hearing.”

In conformity with the Office of Administrative Hearings' Rules, and the Rules of Civil Procedure, N.C.G.S. § 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.G.S. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of the Court of Appeals 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 23rd day of July, 2015.



Philip E. Berger, Jr.  
Administrative Law Judge

STATE OF NORTH CAROLINA  
COUNTY OF BLADEN  
2015 JUL 28 PM 6:02  
IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
14 OSP 07967

Office of  
Administrative Hearings  
HOPE FREEMAN,  
Petitioner,  
V.  
NORTH CAROLINA DEPARTMENT OF  
PUBLIC SAFETY,  
Respondent.  
AMENDED  
FINAL DECISION

This contested case was heard by Administrative Law Judge Phil Berger, Jr. on March 16, 2015, March 17, 2015, May 26, 2015 and May 27, 2015 at the Office of Administrative Hearings in Raleigh, North Carolina.

APPEARANCES

For Petitioner: Richard D. Allen  
Attorney at Law  
205 Lloyd Street, Suite 209  
Carrboro, North Carolina 27510

For Respondent: Vanessa N. Totten  
Assistant Attorney General  
North Carolina Department of Justice  
Post Office Box 629  
Raleigh, North Carolina 27602

PRELIMINARY MATTERS

*Motion to Dismiss*

On March 3, 2015, Respondent filed a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to N.C.G.S. §§1A-1, 12(b) (1), 12(b) (2) and 12(b) (6). Petitioner filed an Amended Prehearing Statement on March 11, 2015. Petitioner filed a response on March 12, 2015. The matter was heard before the Undersigned on March 16, 2015. Upon careful consideration of Respondent's motion and Petitioner's response, the motion was granted in part and denied in part.

The Undersigned dismissed all claims with prejudice except for Petitioner's claims for sexual discrimination and retaliation. Petitioner presented evidence throughout the course of the hearing on whether she was unlawfully discriminated against based upon sex and entitled to relief for retaliation including relief pursuant to N.C.G.S. § 126-84, *et. seq.*, Whistleblower Act. At the close of Petitioner's case, Respondent moved for a directed verdict under N.C.G.S. § 1A-1, Rule 50 or in the alternative involuntary dismissal under N.C.G.S. § 1A-1, Rule 41. For purposes of this hearing, Respondent's motion is treated as a motion for involuntary dismissal under N.C.G.S. § 1A-1, Rule 41.

Respondent's motion is allowed.

*Extraordinary Cause*

The Petition in this matter was filed October 16, 2014. This matter was extended beyond the mandated 180 days due to extraordinary cause.

Hearing of the contested case began March 16, 2015, within the 180 day mandated time frame. The hearing did not conclude on March 16, 2015, and was scheduled to resume March 17, 2015. Petitioner was involved in an automobile accident on the morning of March 17, 2015, prior to resumption of the hearing. Additional evidence was presented by Petitioner's attorney that morning, but the Petitioner did not appear as she was being treated in a local emergency room. Petitioner and her passenger were scheduled to be witnesses on the morning of the accident.

The contested case hearing was continued until April 16, 2015. The matter was again continued due to Petitioner's health and effects related to the automobile accident. Hearing in the matter concluded on May 27, 2015.

Extraordinary cause did in fact exist which necessitated additional time for hearing of this matter.

**WITNESSES**

Called by Petitioner:

Petitioner  
Loretta Bell (aka Loretta Hooks)  
Anjanette Kinston-Ingram  
Gearonie Locklear  
Deb Long

Called by Respondent:

None

**EXHIBITS**

The following were exhibits admitted on behalf of Petitioner except as otherwise indicated ("P. Ex."): A, D, E, F, H, I (redacted), J,K,L,M,P,Q,R and S.

The following were exhibits admitted on behalf of Respondent except as otherwise indicated ("R. Ex."): 2,5,6,12,14,15,16,19 and 20.

Upon careful consideration of the sworn testimony of witnesses presented at the hearing, documents received and admitted into evidence, and the entire record in this proceeding as appropriate for consideration, the undersigned makes the following findings of fact. In making the findings of fact, the undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness; any interest, bias or prejudice the witness may have; the opportunity of the witness to see, hear, know and remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether such testimony is consistent with all other believable evidence in the case.

Based upon the evidence presented and the arguments of counsel, the undersigned makes the following findings of fact by a preponderance or greater weight of the evidence:

1. The parties are properly before the Office of Administrative Hearings on a Petition for Contested Case pursuant to Chapters 126 and 150B of the North Carolina General Statutes, and the Office of Administrative Hearings has jurisdiction over both parties and subject matter as such. To the extent that Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.
2. Petitioner Hope Freeman ("Petitioner") was a female who formerly was employed by the North Carolina Department of Public Safety ("NCDPS" or "Respondent") formerly Department of Correction.
3. Petitioner alleged that she was discriminated against on the basis of her sex and retaliated against by Respondent.
4. Petitioner began work for Respondent on May 17, 2010 as a Probation/Parole Officer in the Division of Community Corrections ("DCC") in Cumberland County.
5. Sharon Phillips ("Phillips") was a female. At all relevant times, she was employed as the Judicial District 12 Manager for the Cumberland County Office.
6. Phillips' supervisory chain of command included Petitioner, Deb Young ("Young"), Gearonie Locklear ("Locklear") and Anjanette Kinston-Ingram ("Kinston-Ingram").
7. Petitioner's immediate supervisor in the Cumberland County Office was Kathy Blackmon ("Blackmon"), Chief Probation/Parole Officer.
8. Petitioner alleged that Phillips had made comments about Petitioner's appearance on an unspecified date. She further stated that she was sent home by Phillips from a training based on her appearance and clothing on an unspecified date. (T p 380)
9. Young was a female who formerly was employed by the NCDPS as a Probation/Parole Officer in the Cumberland County Office. Young resigned from NCDPS.

10. The credible evidence showed that Young disagreed with the NCDPS professional dress code for officers. However, Young denied that Phillips discriminated against employees on the basis of sex. Phillips was gender neutral. (T pp 139-140, 165, 176, 184)
11. Gearonie Locklear (“Locklear”) was a male who retired from NCDPS as a Chief Probation/Parole Officer. The credible evidence showed that Locklear and Phillips disagreed about management styles. Locklear denied that Phillips discriminated against employees on the basis of sex. (T p 239)
12. Anjanette Kinston-Ingram (“Kinston-Ingram”) was a female employed with NCDPS as a Probation/Parole Officer in the Cumberland County Office. The credible evidence showed that Kinston-Ingram denied that Phillips or Blackmon discriminated against employees on the basis of sex. (T p 261)
13. Loretta Bell (“Bell”) was a female employed with NCDPS as a Probation/Parole Officer in the Bladen County Office. She was dismissed from NCDPS.
14. The credible evidence showed that Bell had a pending lawsuit against NCDPS based on her employment in the Bladen County office. (T p 349)
15. Petitioner contradicted Bell’s testimony concerning the Bladen County Office. Petitioner testified that she enjoyed working in that office. (T pp 619-621)
16. Bell made no references to any sexual allegations in her testimony. (T pp 347-348)
17. Bell had no personal knowledge concerning Petitioner’s allegations or grievances. (T pp 347-348)
18. The testimonial evidence showed that Phillips and Blackmon treated all NCDPS staff the same. (T p 261)
19. The Undersigned finds that the substantial evidence shows that Phillips and Blackmon did not discriminate against the employees in their supervisory chain of command on the basis of their sex.
20. The totality of evidence in the record shows that Petitioner has failed to show that she was unlawfully discriminated against by Respondent because of her sex.
21. Petitioner alleged that she was subjected to internal investigations, written warnings and a reassignment in retaliation for her engaging in protected activity by filing grievances.
22. The credible evidence in the record showed that Petitioner filed one grievance on June 15, 2011 alleging violence in the workplace. An internal investigation revealed that the allegations were unsubstantiated.
23. Petitioner was issued three written warnings based on unacceptable personal conduct for violating Departmental policies and procedures.
24. NCDPS Personnel Policy, Section 6, Failure to Cooperate During or Hindering an Internal Investigation, states in part, “discussing any aspect of the investigation with anyone other than the investigative personnel also constitutes unacceptable personal conduct and is

representative of those causes considered for disciplinary action up to and including dismissal.” (R. Ex. 14;T pp 598)

25. On December 6, 2010, Petitioner was issued a written warning for failure to follow the NCDPS Personnel Policy, Section 6, Failure to Cooperate During or Hindering an Internal Investigation, by discussing an internal investigation. The credible evidence showed that Petitioner did violate the policy by discussing an internal investigation with other staff. (R. Exs. 14-15, T pp 598-601)
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(2) The employee needs the use of the vehicle after completion of the regular workday to conduct state business on the same day or before usual working hours on the next work day.

(R. Ex. 19, T pp 608-609)

29. On May 31, 2011, Petitioner was issued a written warning for failure to follow DCC Policy and Procedure, Chapter B, Sections .0401 and .0403 by using her state assigned vehicle for personal use. The credible evidence showed that Petitioner did violate the policies by driving her state vehicle, without permission from her supervisor, to another county. (R. Ex. 19, T p 607)
30. NCDPS Personnel Manual, Section 6, page 38, Appendix C states in part:

A. POLICY:

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including dismissal without prior warning.

**B. EXAMPLES:**

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32. On September 14, 2011, Petitioner was administratively reassigned to Division 1, Judicial District 4. (P.Ex. L)
33. Petitioner's title, pay grade and salary were not affected by the reassignment and/or written warnings. (T pp 611, 617-619)
34. The Undersigned finds that on December 21, 2011 Petitioner was placed on Family Medical Leave ("FML") Status. Her FML exhausted on January 12, 2012. She was then placed on leave without pay until September 20, 2012 when she was separated for unavailability. Petitioner did not appeal her separation from NCDPS.
35. The credible evidence showed that Petitioner failed to prove that she engaged in a protected activity while employed with Respondent that led to an adverse employment action.
36. Petitioner presented insufficient evidence to support that her complaints related to her employment caused or led to NCDPS internal investigations, issuance of the written warnings, and/or reassignment.

Based upon the foregoing findings of fact and upon the preponderance or greater weight of the evidence in the whole record, the undersigned makes the following:

**CONCLUSIONS OF LAW**

1. This matter is properly before the Office of Administrative Hearings for consideration pursuant to Chapters 126 and 150 B of the North Carolina General Statutes.
2. A court need not make findings as to every fact that arises from the evidence and need only find those facts which are material to the settlement of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611,612, *aff'd*, 335 N.C. 234, 436 S.E.2d 588 (1993).
3. Petitioner has the burden of proving that Respondent unlawfully discriminated against her because of her sex and/or retaliated against her.

4. Because Petitioner presented no direct evidence of sex discrimination, her discrimination claim is subject to the burden-shifting scheme of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973), and its progeny. See also *North Carolina Dep't of Corr. v. Gibson*, 308 N.C. 131, 301 S.E.2d 78 (1983).
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6. The "ultimate burden" of proving that the employer intentionally discriminated against the employee remains with the employee at all times. *Gibson*, 308 N.C. at 138, 301 S.E.2d at 83.
7. Petitioner did not meet her burden of proof that Respondent's reasons were a pretext for discrimination. In particular, she presented no evidence of a discriminatory animus on the part of the decision makers involved.
8. As to Petitioner's claim for retaliation/Whistleblower claim for her engaging in protected activity, "[t]o establish a prima facie case of retaliation, it must be shown that (1) the plaintiff engaged in a protected activity, (2) the employer took adverse action, and (3) there existed a causal connection between the protected activity and the adverse action." *Salter v. E & J Healthcare Inc.*, 155 N.C. App. 685, 693, 575 S.E.2d 46, 51 (2003) (quoting *Brewer v. Cabarrus Plastics, Inc.*, 130 N.C. App. 681, 690, 504 S.E.2d 580, 586 (1998), *disc. rev. denied*, 350 N.C. 91, 527 S.E.2d 662 (1999)); *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 788, 618 S.E.2d 201, 206 (2005); *Demurry v. N.C. Dept. Of Corrections (sic)*, 195 N.C. App. 485, 297, 673 S.E.2d 374, 383 (2009).
9. Federal courts use the same burden-shifting schemes for retaliation claims. See, e.g., *Hoyle*, 650 F.3d at 337.
10. Petitioner failed to establish a prima facie case of retaliation, because she failed to establish that she engaged in any protected activity. Even if she had demonstrated she engaged in any protected activity, she failed to establish a causal connection between the protected activity and the adverse action.
11. The preponderance of evidence showed that Petitioner failed to present evidence to support that her complaints were causally related to the internal investigations, written warnings and reassignment.

12. Petitioner failed to present any evidence that Respondent's legitimate non-retaliatory reason for its employment actions were pretextual, or that retaliation was the real reason for the action.
13. In accord with *Painter v. Wake County Bd. Of Ed.*, 217 S.E.2d 650, 288 N.C. 165 (1975), absent evidence to the contrary, it will always be presumed that "public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. Every reasonable intendment will be made in support of the presumption." See also *Huntley v. Potter*, 122 S.E.2d 681, 255 N.C. 619 (1961).
14. In cases without a jury, after the party with the burden of proof has completed the presentation of its evidence, the responding party may move for dismissal on the grounds that on the facts and the law there has been no showing of a right to relief. N.C.G.S. § 1A-1, Rule 41.
15. Based upon the facts and law in this case, the Petitioner has shown no right to relief.
16. In weighing all of the competent evidence, the credibility of the witnesses, the weight to be given to the testimony, and the reasonable inferences to be drawn therefrom, the Respondent is entitled to judgment on the merits.
17. Petitioner's case is based solely upon speculation and innuendo; there is no evidence that the Petitioner was the victim of sexual discrimination or discrimination based on sex.
18. There is no evidence that any adverse employment action took place against this Petitioner.
19. Even if a written warning, reprimand, or transfer under the circumstances and evidence presented could be considered an adverse employment action, such action was not taken in retaliation to any reporting activity undertaken by Petitioner.
20. The Undersigned concludes that Petitioner has failed to meet her burden in her contested case and her claims should be dismissed.

**DECISION**

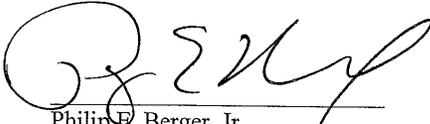
Based upon the foregoing Findings of Fact and Conclusions of Law the Petitioner's claims are dismissed with prejudice.

**NOTICE AND ORDER**

This is a final decision issued under the authority of N.C.G.S. § 150B-34. Under the provisions of N.C.G.S. § 126-34.02(a): "An aggrieved party in a contested case under this section shall be entitled to judicial review of a final decision by appeal to the Court of Appeals as provided in G.S. 7A-29(a). The procedure for the appeal shall be as provided by the rules of appellate procedure. The appeal shall be taken within 30 days of receipt of the written notice of final

decision. A notice of appeal shall be filed with the Office of Administrative Hearings and served on all parties to the contested case hearing.”

This the 28th day of July, 2015.



Philip D. Berger, Jr.  
Administrative Law Judge