

# ***NORTH CAROLINA REGISTER***

**VOLUME 31 • ISSUE 14 • Pages 1372 - 1483**

**January 17, 2017**

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**NORTH CAROLINA REGISTER**  
Publication Schedule for January 2017 – December 2017

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	RRC Meeting Date	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
31:13	01/03/17	12/07/16	01/18/17	03/06/17	03/20/17	04/20/17	05/01/17	05/2018	09/30/17
31:14	01/17/17	12/20/16	02/01/17	03/20/17	04/20/17	05/18/17	06/01/17	05/2018	10/14/17
31:15	02/01/17	01/10/17	02/16/17	04/03/17	04/20/17	05/18/17	06/01/17	05/2018	10/29/17
31:16	02/15/17	01/25/17	03/02/17	04/17/17	04/20/17	05/18/17	06/01/17	05/2018	11/12/17
31:17	03/01/17	02/08/17	03/16/17	05/01/17	05/22/17	06/15/17	07/01/17	05/2018	11/26/17
31:18	03/15/17	02/22/17	03/30/17	05/15/17	05/22/17	06/15/17	07/01/17	05/2018	12/10/17
31:19	04/03/17	03/13/17	04/18/17	06/02/17	06/20/17	07/20/17	08/01/17	05/2018	12/29/17
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32:04	08/15/17	07/25/17	08/30/17	10/16/17	10/20/17	11/16/17	12/01/17	05/2018	05/12/18
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32:09	11/01/17	10/11/17	11/16/17	01/02/18	01/22/18	02/15/18	03/01/18	05/2018	07/29/18
32:10	11/15/17	10/24/17	11/30/17	01/16/18	01/22/18	02/15/18	03/01/18	05/2018	08/12/18
32:11	12/01/17	11/07/17	12/16/17	01/30/18	02/20/18	03/15/18	04/01/18	05/2018	08/28/18
32:12	12/15/17	11/22/17	12/30/17	02/13/18	02/20/18	03/15/18	04/01/18	05/2018	09/11/18

## **EXPLANATION OF THE PUBLICATION SCHEDULE**

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

### **GENERAL**

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

- (1) temporary rules;
- (2) text of proposed rules;
- (3) text of permanent rules approved by the Rules Review Commission;
- (4) emergency rules
- (5) Executive Orders of the Governor;
- (6) final decision letters from the U.S. Attorney General concerning changes in laws affecting voting in a jurisdiction subject of Section 5 of the Voting Rights Act of 1965, as required by G.S. 120-30.9H; and
- (7) other information the Codifier of Rules determines to be helpful to the public.

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

### **FILING DEADLINES**

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

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

### **NOTICE OF TEXT**

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

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

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

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



**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 07 – DEPARTMENT OF NATURAL AND CULTURAL RESOURCES**

*Notice is hereby given in accordance with G.S. 150B-21.3A(c)(2)g. that the Historical Commission intends to readopt with substantive changes the rules cited as 07 NCAC 04R .0702-.0718.*

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

**Proposed Effective Date:** June 1, 2017

**Public Hearing:**

**Date:** February 1, 2016

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

**Location:** North Carolina Department of Natural and Cultural Resources, 109 East Jones Street, 3<sup>rd</sup> Floor, Raleigh, NC 27601

**Reason for Proposed Action:** *The proposed rules are being readopted as repeals." The substance of these rules will be combined with a new Section .1600 within 07 NCAC 04R, which will govern the issuance of permits for underwater and terrestrial investigations conducted throughout the State.*

**Comments may be submitted to:** Shawn Middlebrooks, 109 East Jones Street, Raleigh, NC 27601, email [shawn.middlebrooks@ncdcr.gov](mailto:shawn.middlebrooks@ncdcr.gov)

**Comment period ends:** March 20, 2017.

**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)

**SUBCHAPTER 04R - ARCHAEOLOGY AND HISTORIC PRESERVATION SECTION**

**SECTION .0700 - ARCHAEOLOGICAL RESOURCES PROTECTION ACT**

**07 NCAC 04R .0702 DEFINITIONS**

The definitions of G.S. 70-12 apply in this Section. In addition the following terms are defined:

- (1) ~~"Emergency archaeological investigation" means any surface collection, subsurface test, excavation, or other activity that results in the disturbance or removal of archaeological resources undertaken because of:~~
  - (a) ~~the accidental discovery of archaeological resources during construction or other ground disturbing activities; or~~
  - (b) ~~immediate danger of damage or destruction to archaeological resources due to vandalism, erosion, or other causes.~~
- (2) ~~"Interim progress report" means a brief summary of archaeological work accomplished during the reporting period.~~
- (3) ~~"Land controlling agency" means the state agency with management responsibilities for state land.~~
- (4) ~~"Permit" means authorization under law to conduct archaeological investigation on state lands.~~
- (5) ~~"Preliminary field report" means a brief summary of the results of the fieldwork undertaken during the permit period, including, but not limited to:~~
  - (a) ~~a map showing the area of the permit location;~~
  - (b) ~~a brief summary of the purpose, methods, and results; and~~
  - (c) ~~recommendations concerning future work at the site or sites.~~
- (6) ~~"Report" means a formal written account of the goals, methods, and results of archaeological~~

investigations conducted under the terms of a permit.

- (a) ~~A draft report is subject to review and comment by the Secretary of the Department of Administration or his designee, the Secretary of the Department of Cultural Resources or his designee, and the head of the land controlling agency or his designee.~~
- (b) ~~A final report is complete and incorporates the comments resulting from review of the draft.~~
- (7) ~~"Risk of harm" means any disclosure of the nature or location of any archaeological resource that results, or may result, in the loss or destruction of archaeological context, or archaeological information.~~

*Authority G.S. 70-12; 70-14.*

### **07 NCAC 04R .0703      ARCHAEOLOGICAL INVESTIGATIONS ON STATE LANDS**

(a) ~~Permits are required for persons wishing to conduct archaeological investigations on state lands. Permits are issued by the Secretary of the Department of Administration or his designee. The mailing address is:~~

~~Department of Administration  
Administration Building  
116 West Jones Street  
Raleigh, N. C. 27611~~

(b) ~~Two types of permits shall be issued:~~

- (1) ~~General Permits shall be issued to those land controlling agencies that employ qualified archaeologists on a full time permanent basis to conduct archaeological investigations on state lands directly under the agency's control.~~
- (2) ~~All other permits shall be Specific Permits.~~

*Authority G.S. 70-13; 70-15(a).*

### **07 NCAC 04R .0704      EMERGENCY ARCHAEOLOGICAL INVESTIGATIONS**

(a) ~~A Specific Permit is not required for emergency archaeological investigations on state lands if the person conducting the investigation meets the minimum qualifications stated in Rule .0706 of this Section and the land controlling agency has notified the Secretary of the Department of Administration or his designee and the Secretary of the Department of Cultural Resources or his designee. Reporting requirements for emergency archaeological investigations are the same as those specified in Rule .0712 of this Section unless the investigations are conducted under a General Permit. General Permit reporting requirements are specified in Rule .0713 of this Section.~~

(b) ~~A permittee may conduct emergency archaeological investigations beyond the terms of an existing Specific Permit. However, terms of the Specific Permit shall remain in effect, including those terms pertaining to reporting schedules.~~

(c) ~~A General Permit allows emergency archaeological investigations to be conducted by the principal investigator in whose name it was issued, and only on those state lands directly under the control of the land controlling agency by whom the principal investigator is employed. Terms of the General Permit will remain in effect, including terms pertaining to reporting schedules.~~

*Authority G.S. 70-13(a),(b); 70-14.*

### **07 NCAC 04R .0705      APPLICATION FOR ARCHAEOLOGICAL PERMITS**

(a) ~~Persons wishing to apply for a permit to conduct archaeological investigations on state lands shall obtain application forms from the office of the Secretary of the Department of Administration and submit completed permit applications to the same office. After receiving an application, that office will forward copies to the State Property Office, Department of Administration; the Secretary of the Department of Cultural Resources or his designee; and the appropriate land controlling agency.~~

(b) ~~Applications for Specific Permits must be submitted to the Secretary of the Department of Administration or his designee at least 30 days prior to the proposed starting date of the archaeological investigations. Each Specific Permit application shall include:~~

- (1) ~~a written description of the location of the proposed investigations, including the county and township;~~
- (2) ~~a 1: 24,000 or larger scale map clearly depicting the location of the proposed investigations;~~
- (3) ~~a description of the exact nature, objectives and scope of the proposed investigations, including the methods to be employed and the requirements for vegetation clearing;~~
- (4) ~~the schedule for the investigations, including hours of the day and days of the week, as well as beginning and completion dates. The schedule shall include 60 days for review and comment of the draft report by the Secretary of the Department of Cultural Resources or his designee and the land controlling agency and a maximum of 30 days for response, revisions and submittal of the final report by the applicant;~~
- (5) ~~the name, address, telephone number, institutional affiliation, if any, and qualifications of the principal investigator;~~
- (6) ~~the name, address, telephone number, and qualifications of the field director, if different from the principal investigator;~~
- (7) ~~the approximate number of people proposed to carry out the investigations;~~
- (8) ~~evidence of the applicant's capability to initiate, conduct and complete the proposed investigations;~~
- (9) ~~written criteria for evaluation of requests for access to records and artifacts at the facility~~

where the records and artifacts are to be curated;

- (10) the location proposed for curation of all artifacts, records, data, photographs, and other documents or information resulting from the investigations;
- (11) written concurrence from the land-controlling agency regarding the applicant's proposed curatorial arrangements;
- (12) facilities and plans for stabilization and preservation of perishable or unstable artifacts;
- (13) the person or position in the institution or agency with responsibility for curation of artifacts, records, and other documentation or information who will determine access to this material;
- (14) a description of the type and timing of all access needs on state property, vehicular or otherwise, required to conduct the investigations;
- (15) a description of how the project will be coordinated with the site-specific land manager, including the applicant's documentation that initial contact has been made and the name of the specific person contacted;
- (16) a description of the provisions to be made to secure the permit area to assure the safety of incidental non-project personnel who may visit the permit area during and after project hours;
- (17) an indication of the length of time each excavation unit will be open and a description of a schedule for reclaiming all areas disturbed by any aspect of the archaeological investigations; and
- (18) the applicant's plans, if any, for dissemination of the results of the investigations in addition to the reporting requirements noted in Rule .0712 of this Section.

If additional information is required from the applicant by the land-controlling agency during review of the Specific Permit application, the land-controlling agency will contact the applicant directly. The information obtained will be added to the application or permit file.

(c) A land-controlling agency may be issued a General Permit to conduct archaeological investigations and emergency archaeological investigations on land directly controlled by that agency. Each General Permit application for a land-controlling agency shall include:

- (1) a written description of the lands controlled by the agency, including the county and township;
- (2) a general description of the nature and objectives of potential investigations;
- (3) the name, address, telephone number, and qualifications of the principal investigator;
- (4) evidence that the requirements of Rule .0706 of this Section are met;
- (5) written criteria for evaluation of requests for access to records and artifacts at the facility

where the records and artifacts are to be curated;

- (6) the location proposed for curation of all artifacts, records, data, photographs, and other documents or information resulting from the investigations;
- (7) facilities and plans for stabilization and preservation of perishable or unstable artifacts;
- (8) the person or position in the institution or agency with responsibility for curation of artifacts, records, and other documentation or information who will determine access to this material; and
- (9) The principal investigator's plans, if any, for dissemination of the results of the investigation in addition to the reporting requirements in Rule .0713 of this Section.

*Authority G.S. 70-13(a),(b); 70-14.*

#### **07 NCAC 04R .0706 QUALIFICATIONS FOR PERMITS**

Applicants for Specific or General Permits to conduct archaeological investigations must be qualified, as evidenced by training, education and experience, possess demonstrable competence in theoretical and methodological design, and in collecting, handling, analyzing, evaluating, and reporting archaeological data, relative to the type and scope of the investigations proposed, and meet the following minimum qualifications:

- (1) Have a postgraduate degree, or equivalent training and experience, in archaeology, anthropology, history or another related field with a specialization in archaeology; and
- (2) Have a minimum of one year's experience in conducting basic archaeological field research.

*Authority G.S. 70-13(a),(b); 70-14.*

#### **07 NCAC 04R .0707 ISSUANCE OF PERMITS**

(a) The Secretary of the Department of Administration or his designee, after consultation with the Secretary of the Department of Cultural Resources or his designee and the land-controlling agency, has decision-making authority concerning the issuance of a Specific Permit. The Specific Permit will be issued or denied within 30 days after submission of the completed application.

(b) Specific Permits will not be issued to persons who have conducted emergency archaeological investigations until receipt and acceptance of a final report pursuant to Rules .0712 and .0714 of this Section.

(c) General Permits will be issued to a land-controlling agency within 30 days following submission of the completed application provided the terms and requirements of these rules pertaining to General Permits are fulfilled.

*Authority G.S. 70-13(a),(b); 70-14.*

**07 NCAC 04R .0708 TIME LIMITS OF PERMITS**

~~(a) The Secretary of the Department of Administration or his designee will issue General Permits for five years from the date of issuance. Specific Permits shall be for an appropriate period not to exceed three years.~~

~~(b) A permittee may apply for permit renewal by following procedures under Rule .0705 of this Section.~~

~~(c) The Secretary of the Department of Administration or his designee, after consultation with the Secretary of the Department of Cultural Resources or his designee, and the head of the land controlling agency or his designee, may extend Specific Permits for up to six months, renew Specific Permits for up to three additional years, or renew General Permits for a period of five years, after review of extension requests or renewal applications and evaluation of past performance of the applicant.~~

~~(d) The Secretary of the Department of Administration or his designee may extend a Specific Permit only once, but may renew a Specific Permit any number of times.~~

~~(e) The Secretary of the Department of Administration or his designee, in consultation with the Secretary of the Department of Cultural Resources or his designee and the land controlling agency, shall review, at least annually, the permittee's performance under any permit issued for a period greater than one year:~~

- ~~(1) For Specific Permits, the review is made through interim reports submitted by the permittee or through inspections at the locations of the investigations.~~
- ~~(2) For General Permits, the review is made through annual reports prepared by the land controlling agency's principal investigator.~~

*Authority G.S. 70-13(a),(b); 70-14.*

**07 NCAC 04R .0709 TERMS AND CONDITIONS OF PERMITS**

~~(a) In all permits, the Secretary of the Department of Administration or his designee shall specify:~~

- ~~(1) the exact nature and extent of the investigations allowed under the permit, including the time, duration, scope, location, and purpose of the investigations;~~
- ~~(2) the name of the individual responsible for conducting the investigations and, if different, the name of the individual responsible for carrying out the terms and conditions of the permit;~~
- ~~(3) the name of the land controlling agency, university, museum or other scientific or educational institution in which any collected materials and data will be deposited; and~~
- ~~(4) the reporting requirements and schedule according to Rules .0712 or .0713 of this Section.~~

~~(b) The Secretary of the Department of Administration or his designee may specify terms and conditions necessary to ensure public safety and to protect other resources, both natural and cultural, to safeguard other legitimate land uses, and to limit activities incidental to investigations authorized under a permit.~~

~~(c) State officials from the Department of Administration, Department of Cultural Resources, the land controlling agency and any other agencies involved in consultation or approval of a permit may make inspections at the permit location as necessary to ensure that the terms and conditions of the permit are being fulfilled.~~

~~(d) After receipt of an approved permit, the permittee must notify the Secretary of the Department of Administration or his designee in writing within 15 days of his acceptance of the terms and conditions of the permit.~~

~~(e) The permittee will be responsible for securing the project area and will hold the Department of Administration, the Department of Cultural Resources and the land controlling agency harmless for any and all claims arising out of the project.~~

~~(f) The Department of Administration, the Department of Cultural Resources, and the land controlling agency will be held harmless for any trespass of or damage to adjacent private property caused by the permittee under the permit.~~

~~(g) The permittee shall sign a waiver of all claims against the Department of Administration, the Department of Cultural Resources, and the land controlling agency.~~

~~(h) The permittee will be held responsible for any damage to state property resulting from the permitted investigations.~~

~~(i) The permittee shall submit evidence of liability insurance upon acceptance of the terms and conditions of a permit.~~

~~(j) Archaeological investigations conducted under the auspices of a permit shall comply with all applicable state, federal, or local regulations and the rules and regulations of the land controlling agency. All such investigations shall conform with the management plans and operation practices of the land controlling agency.~~

~~(k) All physical access to state owned lands during permitted investigations shall be controlled by and coordinated with the land controlling agency and the site specific land manager.~~

~~(l) All project lands will be restored to their pre-project condition by the permittee by the conclusion of the field investigations.~~

~~(m) The land controlling agency shall report simultaneously in writing to the Secretary of the Department of Administration and the Secretary of the Department of Cultural Resources any change in the status of either the principal investigator or the field director for which a General Permit was issued within ten days of that change.~~

*Authority G.S. 70-13(c); 70-14.*

**07 NCAC 04R .0710 PERMIT DENIAL: SUSPENSION AND REVOCATION**

~~(a) A permit shall be denied if the Department of Administration, in consultation with the Department of Cultural Resources and the land controlling agency, finds that:~~

- ~~(1) the proposed investigations would represent a significant adverse effect to a unique or fragile natural resource;~~
- ~~(2) the proposed investigations would interfere with the operation and management of an area;~~
- ~~(3) the proposed investigations would pose a threat to the safety of visitors to an area;~~

- (4) ~~the criteria set forth in G.S. 70-13(b)(1) through G.S. 70-13(b)(7) have not been met by the applicant;~~
- (5) ~~the applicant, pursuant to a previous permit, has not met the purposes of the law as set forth in G.S. 70-11(b) or G.S. 70-18; or~~
- (6) ~~the applicant has not completed the terms and conditions of a previous permit.~~

(b) ~~A permit may be suspended or revoked if the Department of Administration, in consultation with the Department of Cultural Resources and the land controlling agency, finds that:~~

- (1) ~~the terms and conditions of the permit have been or are being violated; or~~
- (2) ~~the confidentiality of information relating to the nature and location of the archaeological resources is not maintained in accordance with the provisions of G.S. 70-18.~~

*Authority G.S. 70-13(c); 70-14.*

#### **07 NCAC 04R .0711 APPEALS RELATING TO PERMITS**

~~Any person may appeal permit issuance, denial, suspension or revocation through appeals procedures established in Article 3 of G.S. 150B.~~

*Authority G.S. 70-14; 150B-23 through 150B-37.*

#### **07 NCAC 04R .0712 REPORTING REQUIREMENTS FOR SPECIFIC PERMITS**

(a) ~~Reports are required for all archaeological investigations conducted under Specific Permits. All reports are to be submitted simultaneously to the Secretary of the Department of Administration, the Secretary of the Department of Cultural Resources and the head of the land controlling agency.~~

(b) ~~The permittee must submit a preliminary field report within 60 days after completion of the on site archaeological investigation. Preliminary field reports resulting from emergency archaeological investigations shall specify a date for submission of the draft report.~~

(c) ~~The permittee must submit draft reports according to the schedule established in the permit or, in the case of emergency archaeological investigations, by the date specified in the preliminary field report. Draft reports submitted for emergency archaeological investigations shall include, but not be limited to, information on storage and curation of artifacts, records and other data in accordance with the specifications in Rule .0705(b)(9)-(13) of this Section.~~

(d) ~~The permittee must submit final reports no later than 90 days after submission of the draft report.~~

(e) ~~If the specified submission date for a draft report resulting from emergency archaeological investigations extends beyond one year from the date of submission of the preliminary field report, interim progress reports shall be submitted at least annually.~~

(f) ~~Upon request, the permittee or the principal investigator, in the case of emergency archaeological investigations, shall provide in the final report information concerning:~~

- (1) ~~the permanent physical location of artifacts, records, and all other documentation;~~
- (2) ~~an itemized list of all recovered archaeological resources by type, variety, material or other appropriate description, and a list of accession numbers or other permanent identifiers applied to the recovered resources; and~~
- (3) ~~an itemized list of records, photographs and other documents, and a list of accession numbers or other permanent identifiers applied to the records and data.~~

*Authority G.S. 70-13(c); 70-14.*

#### **07 NCAC 04R .0713 REPORTING REQUIREMENTS FOR GENERAL PERMITS**

(a) ~~Reports of archaeological investigations conducted under the terms of a General Permit shall be submitted simultaneously to the Secretary of the Department of Administration and the Secretary of the Department of Cultural Resources.~~

(b) ~~The principal investigator will submit a summary of the results of all archaeological investigations as part of the annual report required under the terms of Rule .0708(e)(2) of this Section.~~

(c) ~~Final reports concerning archaeological investigations and emergency archaeological investigations shall be submitted by the end of the calendar year that immediately follows the year in which the archaeological investigations were conducted.~~

(d) ~~The principal investigator, in consultation with the Secretary of the Department of Administration or his designee and the Secretary of the Department of Cultural Resources or his designee, may delay the submission of a final report until an agreed upon date.~~

(e) ~~The principal investigator shall:~~

- (1) ~~provide information concerning the permanent physical location of artifacts, records, and all other documentation for all archaeological investigations;~~
- (2) ~~maintain an itemized list of all recovered archaeological resources by type, variety, material or other appropriate description, and a list of accession numbers or other permanent identifiers applied to the recovered resources; and~~
- (3) ~~maintain an itemized list of records, photographs and other documents, and a list of accession numbers or other permanent identifiers applied to the records and data.~~

(f) ~~As a condition of renewing a General Permit, the Secretary of the Department of Cultural Resources or his designee may require an inspection of the record and resource repository or management system.~~

*Authority G.S. 70-13(c); 70-14.*

#### **07 NCAC 04R .0714 REPORT REVIEW FOR SPECIFIC PERMITS**

(a) ~~The Secretary of the Department of Cultural Resources or his designee and the land controlling agency shall review all draft and final reports for Specific Permits to ensure that the investigations~~

~~serve the public interest and the reports meet professional standards. The Secretary of the Department of Cultural Resources or his designee may request revisions of the draft or final reports. Terms and conditions of a Specific Permit are considered satisfied only after revisions have been completed and the report accepted.~~

~~(b) The Secretary of the Department of Cultural Resources or his designee and the land controlling agency have 60 days after receipt to review and comment on draft reports and return written comments to the Secretary of the Department of Administration or his designee and the permittee.~~

~~(c) The permittee has 30 days to revise the draft report before submission of the final report.~~

*Authority G.S. 70-13(c); 70-14.*

**07 NCAC 04R .0715 REPORT REVIEW FOR GENERAL PERMITS**

~~(a) The Secretary of the Department of Cultural Resources or his designee shall review the final reports for General Permits to ensure that the reports meet professional standards. The Secretary of the Department of Cultural Resources or his designee may request revisions of the final report to ensure professional standards are maintained.~~

~~(b) The Secretary of the Department of Cultural Resources or his designee has 30 days after receipt to review and comment on reports and return written comments to the Secretary of the Department of Administration or his designee, the land controlling agency and the principal investigator.~~

~~(c) The principal investigator has 30 days to revise the final report.~~

*Authority G.S. 70-13(c); 70-14.*

**07 NCAC 04R .0716 CUSTODY OF RESOURCES UNDER THE TERMS OF A SPECIFIC PERMIT**

~~(a) The archaeological resources and associated records and data which are collected, excavated or removed from state lands under the terms of a Specific Permit shall remain the property of the State of North Carolina. The location of all records, artifacts, or other materials cannot be changed from that approved in the permit without prior approval of the Secretary of the Department of Cultural Resources or his designee and the land controlling agency. This restriction does not apply to temporary removal and relocation of artifacts or records for the purposes of scientific, historical, or educational research, nor for purposes of public display or education, so long as the artifacts or records remain under the direct control of and within the physical boundaries of the museum, university, or scientific or educational institution approved in the permittee's application.~~

~~(b) All records and artifacts must be accessible for scientific, historical, or educational research, if access does not compromise the confidentiality of the nature and location of any archaeological resources or pose a risk of harm to the resources or site. Access shall be determined by that person identified in Rule .0705(b)(13) of this Section.~~

~~(c) Transfers or loans of records and artifacts between universities, museums, and scientific or educational institutions must be approved by the Secretary of the Department of Cultural Resources or his designee and the land controlling agency and~~

~~must be preceded by demonstration that the receiving institution conforms to the conditions in this Rule. In addition, the Secretary must have been provided the information outlined in Rule .0712(f) of this Section.~~

*Authority G.S. 70-13(c); 70-14.*

**07 NCAC 04R .0717 CUSTODY/ARCHAEOLOGICAL RESOURCES UNDER/TERMS: GENERAL PERMIT**

~~(a) Under the terms of a General Permit, the location of all records, artifacts or other materials cannot be changed from that approved in the permit without prior approval of the Secretary of the Department of Cultural Resources or his designee. This restriction does not apply to temporary removal and relocation of artifacts and records for the purposes of scientific, historical, or educational research, nor for purposes of public display or education, so long as the artifacts or records remain under the direct control of the principal investigator or the land controlling agency.~~

~~(b) All records and artifacts must be accessible for scientific, historical, or educational research, if access does not compromise the confidentiality of the nature and location of any archaeological resources or pose a risk of harm to the resources or site. Access shall be determined by that person identified in Rule .0705(c)(8) of this Section.~~

~~(c) Transfers or loans of records and artifacts between land controlling agencies, universities, museums, and scientific or educational institutions must be approved by the Secretary of the Department of Cultural Resources or his designee and must be preceded by demonstration that the receiving institution conforms to the conditions in this Rule. In addition, the Secretary must have been provided the information outlined in Rule .0713(e) of this Section. This condition does not apply to the movement of artifacts within a land controlling agency, as long the artifacts remain under the direct control of the principal investigator and the land controlling agency.~~

*Authority G.S. 70-13(c); 70-14.*

**07 NCAC 04R .0718 CONFIDENTIALITY**

~~Information concerning archaeological resources that is maintained by the Department of Cultural Resources has restricted distribution. Access to records, artifacts, or other materials may be denied if it is determined that access constitutes a risk of harm.~~

*Authority G.S. 70-14; 70-18.*

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

*Notice is hereby given in accordance with G.S. 150B-21.2 that the Social Services Commission intends to amend the rules cited as 10A NCAC 70E .0602, .0702, .0805, .0902, .1101, .1103, .1107, .1116-.1117.*

**Link to agency website pursuant to G.S. 150B-19.1(c):**  
<https://www2.ncdhhs.gov/dss/sscommission/contact.htm>

**Proposed Effective Date:** *June 1, 2017*

**Public Hearing:**

**Date:** *February 8, 2017*

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

**Location:** *NC DSS, McBryde Building 1<sup>st</sup> floor, Room 151, Raleigh, NC 27603*

**Reason for Proposed Action:**

**10A NCAC 70E .0602** - *is proposed for amendment to add the definition of "reasonable and prudent" parent standard as defined in G.S. 131D-10.2.*

**10A NCAC 70E .0702** - *is proposed for amendment to clarify that the supervising agency shall submit changes that may impact the foster home license or safety of children, quantifies the time period that these requirements must be reported to the licensing authority.*

**10A NCAC 70E .0805(a), (b) & (c)** - *proposed rule amendments clarifies existing rule requirements for periodic assessments of licensed foster homes by the supervising agency. Licensed foster homes will continue to be licensed on a two year cycle, reassessment of the foster parents needs and strengths are to be conducted annually.*

**10A NCAC 70E .0902(a)(5)** - *proposed rule amendments clarifies existing rule to quantify two nights equates to 72 hours in accordance with 131D-10.2 to align with the reasonable and prudent parent standard requirements.*

**10A NCAC 70E .0902(a)(6)** - *proposed rule amendment requires that foster parent sign an agreement that they shall report to their supervising agency within 72 hours information that may impact their license and the safety of children. The duty to report this information is in existing rule, the proposed rule clarifies what is reportable and quantifies the time frame to report.*

**10A NCAC 70E .0902(a)(9)** - *proposed rule amendment is to clarify the supervision requirement agreed by the foster parent in accordance with 131D-10.2A; reasonable and prudent parent standard.*

**10A NCAC 70E .0902(a)(b)(11)** - *proposed rule amendment adds the requirement that the supervising agency must notify foster parents of their right to obtain personal liability insurance in accordance with G.S. 58-36-44.*

**10A NCAC 70E .0902(a)(12)** - *proposed rule amendment add that the foster parent agrees to comply with all applicable State and Federal laws pertaining to nondiscrimination.*

**10A NCAC 70E .1101 (a)(24)** - *proposed rule amendments add to client rights that foster parents are to insure that the foster child's confidential information is not to be shared unless proper authorization is received.*

**10A NCAC 70E .1101(a)(26)** - *proposed rule amendments gives the foster child the opportunity to participate in normal childhood activities when deemed appropriate in accordance to G.S. 131D-10.2.*

**10A NCAC 70E .1103(e)(9)** - *proposed rule amendments eliminates the use of prone or face down position restraints from crisis intervention techniques in accordance with signed written communication dated November 12, 2012 by the NC DHHS Secretary. DSS sent out written communication to all licensed*

*agencies to inform providers, this proposed rule only clarifies this practice that can place children's safety at risk.*

**10A NCAC 70E .1107(b)(3)** - *proposed rule requiring weekly supervision and support from a qualified professional is currently found in 10A NCAC 70G .0503(s). The rule also needs to be included in 10A NCAC 70E .1107 to clarify foster parent requirements.*

**10A NCAC 70E .1116(a)(5), (6) & (7)** - *proposed rule amendments are to align existing rules in 70G, there are no new requirements, adding to be consistent in rule governing both foster home licensing and child placing agencies for foster care.*

**10A NCAC 70E .1116(b)** - *proposed rule amendment is to revise the new name for the Department of Corrections.*

**10A NCAC 70E .1116(c)** - *proposed rule amendment is to align existing rules in 70G, there are no new requirements, adding to be consistent in rule governing both foster home licensing and child placing agencies for foster care.*

**10A NCAC 70E .1117(1)(p) & (q)** - *is proposed for amendment to state that foster parents pre-service training will include training components on trauma informed care and reasonable and prudent parent standard. There are no additional training hours being required only that these components be included in the 30 hours of pre-service training. Trauma Informed Partnering for Safety and Permanence Model Approach to Partnerships in Parenting (TIPS-MAPP) pre-service training provided by the Division has already revised these curriculums to include trauma informed care rewrites by the owner, Children's Alliance of Kansas, Inc. The owners of the curriculum also has confirmed they are rewriting the curriculum to include content on reasonable and prudent parent standard. The ten agencies that choose to use other approved pre-service curriculums will be required to add these two components to their pre-service curriculums.*

**10A NCAC 70E .1117(4)** - *is proposed for amendment to state that foster parents shall successfully complete certification in first aid, CPR and universal precautions. "Successfully completed" is defined as demonstrating competency, as evaluated by the instructor who has been approved by the American Heart Association, the American Red Cross, or other organizations approved by the Division of Social Services to provide first-aid, CPR and universal precautions. If foster parents cannot demonstrate competencies foster children will be at risk. (Amended rule 10A .1117 is based on child care rule 10A NCAC 09.0705).*

**Comments may be submitted to:** *Carlotta Dixon, 820 South Boylan Avenue, MSC 2402, Raleigh, NC 27603, phone (919)527-6421, fax (919)334-1198, email carlotta.dixon@dhhs.nc.gov.*

**Comment period ends:** *March 20, 2017*

**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 – 10A NCAC 70E .1117**
- ☐ **Environmental permitting of DOT affected**
- ☐ **Analysis submitted to Board of Transportation**
- ☐ **Local funds affected**
- ☐ **Substantial economic impact (≥\$1,000,000)**
- ☒ **Approved by OSBM – 10A NCAC 70E .1117**
- ☒ **No fiscal note required by G.S. 150B-21.4 – 10A NCAC 70E .0602, .0702, .0805, .0902, .1101, .1103, .1107, .1116**

**CHAPTER 70 – CHILDREN'S SERVICES**

**SUBCHAPTER 70E – LICENSING OF FAMILY FOSTER HOMES**

**SECTION .0600 – GENERAL**

**10A NCAC 70E .0602 DEFINITIONS**

Except when the context of the Rule indicates that the term has a different meaning the following definitions shall apply to the rules in Subchapter 70E:

- (1) "Agency" means a child placing agency as defined in G.S. 131D-10.2 that is authorized by law to receive children for purposes of placement in foster homes or adoptive homes.
- (2) "Family Foster Home" has the meaning as defined in G.S. 131D-10.2(8).
- (3) "Family Foster Care" means a planned, goal-directed service in which the temporary protection and care of children take place in a family foster home. Family foster care is a child welfare service for children and their parents who must live apart from each other for a period of time due to abuse, neglect, dependency, or other circumstances necessitating out-of-home care.
- (4) "Licensing Authority" means the North Carolina Division of Social Services.
- (5) "Owner" means any person who holds an ownership interest of five percent or more of the applicant. A person includes a sole proprietor, co-owner, partner or shareholder, principal or affiliate, or any person who is the applicant or any owner of the applicant.
- (6) "Supervising Agency" means a county department of social services or a private child-placing agency that is authorized by law to receive children for purposes of placement in foster homes or adoptive homes. Supervising agencies are responsible for recruiting, training, and supporting foster parents. Supervising

agencies recommend the licensure of foster homes to the licensing authority.

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

- (8) The "reasonable and prudent parent standard", as defined in G.S.131D-10.2.

*Authority G.S. 131D.10.1; 131D-10.2; 131D-10.3; 131D-10.5; 143B-153.*

**SECTION .0700 – LICENSING REGULATIONS AND PROCEDURES**

**10A NCAC 70E .0702 RESPONSIBILITY**

(a) Each supervising agency providing foster care services shall assess its applicants and licensees. Supervising agencies shall submit to the licensing authority information and reports that are used as the basis of either issuing or continuing to issue licenses.

(b) The supervising agency shall submit data to the licensing authority within 30 days of the following events to report:

- (1) significant changes in household income;
- (2) criminal charges of any household member;
- (3) changes in the composition of the household;
- (4) change of address; and
- (5) significant changes in physical or mental health.

*Authority G.S. 131D-10.1; 131D-10.3; 131D-10.5; 143B-153.*

**SECTION .0800 - MUTUAL HOME ASSESSMENT**

**10A NCAC 70E .0805 PERIODIC REASSESSMENT OF HOME**

(a) A family or therapeutic foster home shall be reassessed by the supervising agency at least ~~biennially~~ annually.

(b) Reassessment shall include a mutual assessment with the foster parents of their strengths, skills and abilities to provide care for children, including ways in which they have been able to meet the needs of children placed in their home and areas in which they need further development.

(c) Any changes in physical set up and in the foster parents' capacities for providing foster care since the original home assessment or previous reassessments shall be documented in the family's record.

(d) ~~Reassessment~~ Reassessments shall be used as a tool for relicensing the ~~home~~ home on a biennial basis.

*Authority G.S. 131D-10.3; 131D-10.5; 143B-153.*

**SECTION .0900 – FORMS**

**10A NCAC 70E .0902 AGENCY FOSTER PARENTS' AGREEMENT**

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



- (1) allow the representative of the supervising agency to visit the home in conjunction with licensing procedures, foster care planning, and placement;
  - (2) accept children into the home only through the supervising agency and not through other individuals, agencies, or institutions;
  - (3) treat a child placed in the home as a member of the family, and when so advised by the supervising agency, make every effort to support, encourage, and enhance the child's relationship with the child's parents or guardian;
  - (4) maintain continuous contact and exchange of information between the supervising agency and the foster parents about matters affecting the adjustment of any child placed in the home. The foster parents shall agree to keep these matters confidential and discuss them only with the supervising agency staff members, or with other professional people designated by the agency;
  - (5) obtain the permission of the supervising agency if the child is to be out of the home for a period exceeding two nights; 72 hours;
  - (6) report to the supervising agency any planned changes in the composition of the household, change of address before they occur, report changes in physical or mental health, criminal charges of any household member, or change in the employment status of any adult member of the household; and changes in the financial resources or income of the household within 72 hours;
  - (7) make no independent plans for a child to visit the home of the child's parents, guardian, or relatives without prior consent from the supervising agency;
  - (8) adhere to the supervising agency's plan of medical care, both for routine care and treatment, and emergency care and hospitalization; ~~and~~
  - (9) provide any child placed in the home with supervision that is appropriate for the child's age, intelligence, emotional make up, and past experience at all times while the child is in the home, not leave the child unsupervised, and adhere to the supervision requirements specified in the out-of-home family services agreement or person-centered plan; and
  - (10) agree to comply with all applicable State and Federal laws pertaining to nondiscrimination.
- (b) The supervising agency shall sign an agreement under which the supervising agency shall:
- (1) assume responsibility for the overall planning for the child and assist the foster parents in meeting their day-to-day responsibility towards the child;
  - (2) inform the foster parents concerning the agency's procedures and financial responsibility for obtaining medical care and hospitalization;
  - (3) pay the foster parents a monthly room and board payment, and if applicable, a respite care payment for children placed in the home;
  - (4) discuss with the foster parents any plans to remove a child from the foster home;
  - (5) give the foster parents notice before removing a child from the foster home;
  - (6) visit the foster home and child according to the out-of-home family services agreement or person-centered plan and be available to give needed services and consultation concerning the child's welfare;
  - (7) respect the foster parents' preferences in terms of sex, age range, and number of children placed in the home;
  - (8) provide or arrange for training for the foster parents;
  - (9) include foster parents as part of the decision-making team for a child; ~~and~~
  - (10) allow foster parents to review and receive copies of their licensing ~~record-record; and~~
  - (11) notify foster parents of their right to obtain personal liability insurance in accordance with G.S. 58-36-44.
- (c) The agreement shall also contain any other provisions mutually agreed by the parties.
- (d) The foster parents and a representative of the supervising agency shall sign and date the agreement initially and at each relicensure. The foster parents and the supervising agency shall retain copies of the agreements.

*Authority G.S. 131D.10.1; 131D-10.2; 131D-10.3; 131D-10.5; 143B-153.*

## **SECTION .1100 – STANDARDS FOR LICENSING**

### **10A NCAC 70E .1101 CLIENT RIGHTS**

(a) Foster parents shall ensure that each foster child:

- (1) has clothing to wear that is appropriate to the weather;
- (2) is allowed to have personal property;
- (3) is encouraged to express opinions on issues concerning care;
- (4) is provided care in a manner that recognizes variations in cultural values and traditions;
- (5) is provided the opportunity for spiritual development and is not denied the right to practice religious beliefs;
- (6) is not identified in connection with the supervising agency in any way that would bring the child or the child's family embarrassment;
- (7) is not forced to acknowledge dependency on or gratitude to the foster parents;
- (8) is encouraged to contact and have telephone conversations with family members, when not

- contraindicated in the child's visitation and contact plan;
- (9) is provided training and discipline that is appropriate for the child's age, intelligence, emotional makeup, and past experience;
  - (10) is not subjected to cruel or abusive punishment;
  - (11) is not subjected to corporal punishment;
  - (12) is not deprived of a meal or contacts with family for punishment or placed in isolation time-out except when isolation time-out means the removal of a child to an unlocked room or area from which the child is not physically prevented from leaving. The foster parent may use isolation time-out as a behavioral control measure when the foster parent provides it within hearing distance of a foster parent. The length of time alone shall be appropriate to the child's age and development;
  - (13) is not subjected to verbal abuse, threats, or humiliating remarks about himself/herself or his/her families;
  - (14) is provided a daily routine in the home that promotes a positive mental health environment and provides an opportunity for normal activities with time for rest and play;
  - (15) is provided training in good health habits, including proper eating, frequent bathing, and good grooming. Each child shall be provided food with nutritional content for normal growth and health. Any diets prescribed by a licensed medical provider shall be provided;
  - (16) is provided medical care in accordance with the treatment prescribed for the child;
  - (17) of mandatory school age maintains regular school attendance unless the child has been excused by the authorities;
  - (18) is encouraged to participate in neighborhood and group activities, have friends visit the home and visit in the homes of friends;
  - (19) assumes responsibility for himself/herself and household duties in accordance with his/her age, health, and ability. Household tasks shall not interfere with school, sleep, or study periods;
  - (20) is provided opportunities to participate in recreational activities;
  - (21) is not permitted to do any task which is in violation of child labor laws or not appropriate for a child of that age;
  - (22) is provided supervision in accordance with the child's age, intelligence, emotional makeup, and experience; ~~and~~
  - (23) if less than eight years of age and weighs less than 80 pounds is properly secured in a child passenger restraint system that is approved and installed in a manner authorized by the Commissioner of Motor ~~Vehicles. Vehicles;~~
  - (24) receives appropriate protection of confidential information about the child or the child's family

and that confidential information will not be shared unless properly authorized; and  
 (25) is encouraged to participate in extracurricular, enrichment, cultural, and social activities as appropriate and in accordance with 131D-10.2.

(b) Foster parents shall initially and at relicensure sign a Discipline Agreement that specifically acknowledges their agreement as specified in Subparagraphs (a)(9), (10), (11), (12), and (13) of this Rule, as well as discipline requirements outlined in the out-of-home family services agreement or person-centered plan. The foster parents and the supervising agency shall retain copies of these agreements.

*Authority G.S 131D.10.1; 131D-10.2; 131D-10.3; 131D-10.5; 143B-153.*

#### **10A NCAC 70E .1103 PHYSICAL RESTRAINTS**

(a) Foster parents who utilize physical restraint holds shall not engage in discipline or behavior management that includes:

- (1) protective or mechanical restraints;
- (2) drug used as a restraint, except as outlined in Paragraph (b) of this Rule;
- (3) seclusion of a child in a locked room; or
- (4) physical restraint holds except for a child who is at imminent risk of harm to himself/herself or others until the child is calm.

(b) Foster parents shall not administer drugs to a foster child for the purpose of punishment, foster parent convenience, substitution for adequate supervision or for the purpose of restraining the child. A drug used as a restraint means a medication used only to control behavior or to restrict a child's freedom of movement, and is not a standard to treat a psychiatric condition.

(c) Before a foster parent shall administer physical restraint holds, each foster parent shall complete training that includes at least 16 hours of initial training in behavior management, including techniques for de-escalating problem behavior, the appropriate use of physical restraint holds, monitoring of vital indicators, and debriefing children and foster parents involved in physical restraint holds. Foster parents authorized to use physical restraint holds shall annually complete at least eight hours of behavior management training including techniques for de-escalating problem behavior. This training shall count toward the training requirements as set forth in 10A NCAC 70E .1117(6). Only foster parents trained in the use of physical restraint holds shall administer physical restraint holds.

(d) Foster parents shall be trained by instructors who have met the following qualifications and training requirements:

- (1) instructors shall demonstrate competence by scoring 100 percent on testing in a training program aimed at preventing, reducing, and eliminating the need for restrictive interventions;
- (2) instructors shall demonstrate competence by scoring 100 percent on testing in a training program teaching the use of physical restraint;
- (3) instructors shall demonstrate competence by scoring a passing grade on testing in an instructor training program as determined by

- the North Carolina Division of Mental Health, Developmental Disabilities and Substance Abuse; Abuse Services;
- (4) the instructors' training shall be competency-based, and shall include measurable learning objectives, measurable testing (written and by observation of behavior) on those objectives, and measurable methods to determine passing or failing the course;
- (5) the content of the instructor training shall be approved by the Division of Mental Health, Developmental Disabilities and Substance Abuse Services, and shall include presentation of understanding the adult learner, methods of teaching content of the course, evaluation of trainee performance and documentation procedures;
- (6) instructors shall be retrained at least annually and demonstrate competence in the use of physical restraint to the North Carolina Interventions (NCI) Quality Assurance Committee;
- (7) instructors shall be trained in CPR;
- (8) instructors shall have coached experience in teaching the use of restrictive interventions at least two times with a positive review by the coach, and trainers shall teach a program on the use of physical restraints at least once annually; and
- (9) instructors shall complete a refresher instructor training at least every two years.
- (e) In administering physical restraints, the following shall apply:
  - (1) foster parents shall use only those physical restraint holds approved by the North Carolina Interventions (NCI) Quality Assurance Committee. Approved physical restraint holds can be found at the following web site: <http://www.dhhs.state.nc.us/mhddsas/training/curricula/agencylist10-18-06web.pdf> <https://www2.ncdhhs.gov/mhddsas/providers/trainingandconferences/restraints.htm> (Reviewed Restrictive and Physical Interventions Curricula by Name) which are hereby incorporated by reference including subsequent amendments and editions;
  - (2) before employing a physical restraint hold, the foster parent shall take into consideration the child's medical condition and any medications the child may be taking;
  - (3) no child shall be restrained utilizing a protective or mechanical device;
  - (4) no child or group of children shall be allowed to participate in the physical restraint of another child;
  - (5) physical restraint holds shall:
    - (A) not be used for purposes of discipline or convenience;
    - (B) be used only when there is imminent risk of harm to the child or others and less restrictive approaches have failed;
    - (C) be administered in the least restrictive manner possible to protect the child or others from imminent risk of harm; and
    - (D) end when the child becomes calm.
  - (6) The foster parent shall:
    - (A) ensure that any physical restraint hold utilized on a child is administered by a trained foster parent with a second trained foster parent or with a second trained adult in attendance. Concurrent with the administration of a physical restraint hold and for a minimum of 15 minutes subsequent to the termination of the hold, a foster parent shall monitor the child's breathing, ascertain the child is verbally responsive and motorically in control, and ensure the child remains conscious without any complaints of pain. The supervising agency may seek a waiver from the licensing authority for a foster parent to administer a physical restraint hold without a second trained adult in attendance, and completion of the waiver request form. The licensing authority shall grant the waiver if it receives written approval from the child's parent, guardian, or custodian that the administering of a physical restraint hold without a second trained person present is acceptable, written approval from the supervising agency that the foster parent is authorized to administer a physical restraint hold without a second trained person present, and documentation that there is approval by the child and family team and documented in the person-centered plan or out-of-home family services agreement that it is acceptable for the foster parent to administer a physical restraint hold without a second trained person present;
    - (B) immediately terminate the physical restraint hold or adjust the position to ensure that the child's breathing and motor control are not restricted, if at any time during the administration of a physical restraint hold the child complains of being unable to breathe or loses motor control;
    - (C) immediately seek medical attention for the child, if at any time the child appears to be in distress; and

- (D) conduct an interview with the foster child about the incident following the use of a physical restraint hold.
- (7) The supervising agency shall interview the foster parent administering the physical restraint hold about the incident following the use of a physical restraint hold by the supervising agency.
- (8) The supervising agency shall document each incident of a child being subjected to a physical restraint hold on an incident report provided by the licensing authority. The incident report shall include:
  - (A) the child's name, age, height, and weight;
  - (B) the type of hold utilized;
  - (C) the duration of the hold;
  - (D) the trained foster parent administering the hold;
  - (E) the trained foster parent or trained adult witnessing the hold;
  - (F) the less restrictive alternatives that were attempted prior to utilizing physical restraint;
  - (G) the child's behavior that necessitated the use of physical restraint; and
  - (H) whether the child's condition necessitated medical attention.

(9) Physical restraints where a person ends up in a prone or face down position are prohibited.

(f) Foster parents shall annually receive written approval from the executive director or his/her designee of the supervising agency before administering physical restraint holds. The foster parent shall retain a copy of the written approval and a copy shall be placed in the foster home record.

*Authority G.S. 131D-10.1; 131D-10.3; 131D-10.5; 143B-153.*

**10A NCAC 70E .1107 RELATIONSHIP TO SUPERVISING AGENCY**

(a) Foster parents shall agree to work with the supervising agency in the following ways:

- (1) work with the child and the child's parent(s) or guardian(s) in the placement process, reunification process, adoption process, or any change of placement process;
- (2) consult with social workers, mental health personnel, licensed medical providers, and other persons authorized by the child's parent(s), guardian(s) or custodian who are involved with the child;
- (3) maintain confidentiality regarding children and their parent(s) or guardian(s);
- (4) keep records regarding the child's illnesses, behaviors, social needs, educational needs, and family visits and contacts; and
- (5) report to the supervising agency any changes as required by 10A NCAC 70E .0902.

(b) In addition to Subparagraphs (a)(1) through (5) of this Rule, foster parents who provide therapeutic foster care services shall:

- (1) be trained as set out in 10A NCAC 70E .1117; ~~and~~
- (2) allow weekly supervision and support from a qualified professional as defined in 10A NCAC 27G .0104 and ~~.0203~~; .0203; and
- (3) allow weekly supervision and support from a qualified professional as outlined in 10A NCAC 70G .0503(r).

*Authority G.S. 131D-10.1; 131D-10.3; 131D-10.5; 143B-153.*

**10A NCAC 70E .1116 CRIMINAL HISTORY CHECKS**

(a) The supervising agency shall complete the following activities at initial licensure for new foster parent applicants and any member of the prospective foster parents' household 18 years of age or older:

- (1) furnish the written notice as required by G.S. 131D-10.3A(e);
- (2) obtain a signed consent form for a criminal history check and submit the signed consent form to the Department of Health and Human Services, Criminal Records Check Unit;
- (3) obtain two sets of fingerprints on SBI identification cards and forward both sets of fingerprints to the Department of Health and Human Services, Criminal Records Check Unit. Once an individual's fingerprints have been submitted to the Department of Health and Human Services, Criminal Records Check Unit, additional fingerprints shall not be required; ~~and~~
- (4) conduct a local criminal history check through accessing the Administrative Office of the Courts and the Department of Corrections Offender Population Unified System and submit the results of the criminal history checks to the licensing authority on the Foster Home Application ~~form~~; form;
- (5) obtain a signed statement that the individual has no criminal, social or medical history which would adversely affect their capacity to work with children and adults; obtain a signed statement that the individual has not abused or neglected a child or been a respondent in a juvenile court proceeding that resulted in the removal of a child or had child protective services involvement that resulted in the removal of a child; and obtain a signed statement that the applicant has not abused, neglected, or exploited a disabled adult, and has not been a domestic violence perpetrator;
- (6) conduct a search of the North Carolina Sex Offender and Public Protection Registry; and
- (7) conduct a search of the North Carolina Health Care Personnel Registry (pursuant to G.S. 131E-256).

(b) The supervising agency shall conduct a local criminal history check through accessing the Administrative Office of the Courts and the ~~Department of Corrections Offender Population Unified System~~ North Carolina Department of Public Safety, Division of Adult Correction, Offender Information and submit the results of the criminal history checks to the licensing authority on the Foster Home Relicensure, Termination and Change Request Application form at relicensure for foster parents and any member of the prospective foster parents' household 18 years of age or older.

(c) Every two years, the supervising agency shall require that foster parents and any adult member of the household provide a signed statement that the individual has no criminal, social, or medical history which would adversely affect their capacity to work with children and adults; obtain a signed statement that the individual has not abused or neglected a child or been a respondent in a juvenile court proceeding that resulted in the removal of a child or had child protective services involvement that resulted in the removal of a child; obtain a signed statement that the applicant has not abused, neglected, or exploited a disabled adult, and has not been a domestic violence perpetrator; and obtain a signed statement that the applicant is not listed on the North Carolina Health Care Personnel Registry (pursuant to G.S. 131E-256).

*Authority G.S. 131D-10.1; 131D-10.3; 131D-10.5; 143B-153.*

#### **10A NCAC 70E .1117 TRAINING REQUIREMENTS**

Each supervising agency shall provide, or cause to be provided, preservice and in-service training for all prospective and licensed foster parents as follows:

- (1) Prior to licensure or within six months from the date a provisional license is issued, each applicant shall successfully complete 30 hours of preservice training. Preservice training shall include the following components:
  - (a) General Orientation to Foster Care and Adoption Process;
  - (b) Communication Skills;
  - (c) Understanding the Dynamics of Foster Care and Adoption Process;
  - (d) Separation and Loss;
  - (e) Attachment and Trust;
  - (f) Child and Adolescent Development;
  - (g) Behavior Management;
  - (h) Working with Birth Families and Maintaining Connections;
  - (i) Lifebook Preparation;
  - (j) Planned Moves and the Impact of Disruptions;
  - (k) The Impact of Placement on Foster and Adoptive Families;
  - (l) Teamwork to Achieve Permanence;
  - (m) Cultural Sensitivity;
  - (n) Confidentiality; ~~and~~
  - (o) Health and Safety. Safety;
  - (p) Trauma Informed Care; and
  - (q) Reasonable and Prudent Parent Standard as defined in G.S. 131D-10.2.

(2) Prior to licensure or within six months from the date a provisional license is issued, therapeutic foster parent applicants shall receive at least ten additional hours of preservice training in behavioral mental health treatment services including the following:

- (a) role of the therapeutic foster parent;
- (b) safety planning; and
- (c) managing behaviors.

(3) During the initial two years of licensure, each therapeutic foster parent shall receive additional training in the following areas:

- (a) development of the person-centered plan;
- (b) dynamics of emotionally disturbed and substance abusing youth and families;
- (c) symptoms of substance abuse;
- (d) needs of emotionally disturbed and substance abusing youth and families; and
- (e) crisis intervention.

(4) ~~Training in first aid, cardiopulmonary resuscitation (CPR) and universal precautions such as those provided by the American Red Cross, the American Heart Association, or equivalent organizations shall be provided to foster parents before a foster child is placed with the foster family. Training in CPR shall be appropriate for the ages of children in care. First aid, CPR, and universal precautions training shall be updated as required by the American Red Cross, the American Heart Association, or equivalent organizations. The supervising agency shall ensure that family foster parents and therapeutic foster parents are trained in medication administration before a child is placed with the foster family. Foster parents shall successfully complete certification in first-aid, cardiopulmonary resuscitation (CPR) and universal precautions provided by either the American Heart Association or the American Red Cross or other organizations approved by the Division of Social Services before a foster child is placed with the foster family. Other organizations shall be approved if the Division of Social Services determines that courses offered are substantially equivalent to those offered by the American Heart Association or the American Red Cross. First-aid, CPR and universal precautions training shall be renewed as required by the American Heart Association, the American Red Cross or equivalent organizations. Successfully completed is defined as demonstrating competency, as evaluated by the instructor who has been approved by the American Heart Association or the American Red Cross or other organizations~~

- approved by the Division of Social Services to provide first-aid, CPR and universal precautions training. Training in CPR shall be appropriate for the ages of children in care. Documentation of successful completion of first-aid, CPR and universal precautions shall be maintained by the supervising agency. Web-based trainings are not acceptable methods of successfully completing certification in first-aid, CPR and universal precautions.
- (5) Child-specific training shall be provided to the foster parents as required in the out-of-home family services agreement or person-centered plan as a condition of the child being placed in the foster home. When the child or adolescent requires treatment for abuse – reactive, sexually reactive and sexual offender behaviors, specific treatment shall be identified in his/her person-centered plan. Training of therapeutic foster parents is required in all aspects of reactive and offender specific sexual treatment and shall be made available by a provider who meets the requirements specified for a qualified professional as defined in 10A NCAC 27G .0104. When the child or adolescent requires treatment for substance abuse, specific treatment shall be identified in his/her person-centered plan. Training and supervision of therapeutic foster parents are required in all aspects of substance abuse and shall be made available by a provider who meets the requirements specified for a qualified substance abuse prevention professional as defined in 10A NCAC 27G .0104. This training shall count towards the training requirements of Item (6) of this Rule.
- (6) Prior to licensure renewal, each foster parent shall successfully complete at least twenty hours of in-service training. This training may be child-specific or may concern issues relevant to the general population of children in foster care. In order to meet this requirement:
- (a) each supervising agency shall provide, or cause to be provided, at least 10 hours of in-service training for foster parents annually;
  - (b) the training shall include subjects that would enhance the skills of foster parents and promote stability for children;
  - (c) a foster parent may complete training provided by a community college, a licensed supervising agency, or other departments of State or county governments; and, upon approval by the supervising agency, such training shall count towards meeting the requirements specified in this Item; and
  - (d) each supervising agency shall document in the foster parent record the type of activity the foster parent has completed pursuant to this Item.
- (7) A foster family caring for a child with HIV (human immunodeficiency virus) or AIDS (acquired immunodeficiency syndrome) shall complete six hours of training on issues relevant to HIV or AIDS annually. This training may count towards the training requirements Item (6) of this Rule.
- (8) Training requirements for physical restraint holds pursuant to 10A NCAC 70E .1103.
- Authority G.S. 131D-10.1; 131D-10.2; 131D-10.3; 131D-10.5; 131D-10.6A.*

## TITLE 12 – DEPARTMENT OF JUSTICE

*Notice is hereby given in accordance with G.S. 150B-21.2 that the Criminal Justice Education and Training Standards Commission intends to amend the rules cited as 12 NCAC 09B .0205, .0235, .0236; and 09C .0216.*

**Link to agency website pursuant to G.S. 150B-19.1(c):**  
<http://ncdoj.gov/About-DOJ/Law-Enforcement-Training-and-Standards/Criminal-Justice-Education-and-Training-Standards/Forms-and-Publications.aspx>

**Proposed Effective Date:** July 1, 2017

**Public Hearing:**

**Date:** May 17, 2017

**Time:** 10:30 a.m.

**Location:** Wake Technical Community College-Public Safety Training Center, 321 Chapanoke Rd., Raleigh, NC 27603

**Reason for Proposed Action:**

*12 NCAC 09B .0205 - BLET curriculum topic title change.*

*12 NCAC 09B .0235 and .0236 - modification in curricula hours and topics.*

*12 NCAC 09C .0216 - minor language revision, to specify the person authorized to recommend instructor certification.*

**Comments may be submitted to:** Charminique Branson, PO Drawer 149, Raleigh, NC 27602, phone (919) 779-8206, fax (919) 779-8210, email [cbranson@ncdoj.gov](mailto:cbranson@ncdoj.gov)

**Comment period ends:** May 17, 2017

**Procedure for Subjecting a Proposed Rule to Legislative Review:**

If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule,

the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

**Fiscal impact (check all that apply).**

- ☐ State funds affected
- ☐ Environmental permitting of DOT affected
- ☐ Analysis submitted to Board of Transportation
- ☐ Local funds affected
- ☐ Substantial economic impact (≥\$1,000,000)
- ☐ Approved by OSBM
- ☒ No fiscal note required by G.S. 150B-21.4

**CHAPTER 09 – CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION**

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

**SECTION .0200 - MINIMUM STANDARDS FOR CRIMINAL JUSTICE SCHOOLS AND CRIMINAL JUSTICE TRAINING PROGRAMS OR COURSES OF INSTRUCTION**

**12 NCAC 09B .0205 BASIC LAW ENFORCEMENT TRAINING**

(a) The basic training course for law enforcement officers consists of instruction designed to provide the trainee with the skills and knowledge to perform those tasks essential to function in law enforcement.

(b) The course entitled "Basic Law Enforcement Training" shall consist of a minimum of 616 hours of instruction and shall include the following identified topical areas and minimum instructional hours for each:

- |     |                    |   |
|-----|--------------------|---|
| (1) | LEGAL UNIT         |   |
|     | (A)                | Motor Vehicle Laws 20 Hours                               |
|     | (B)                | Preparing for Court and Testifying in Court 12 Hours      |
|     | (C)                | Elements of Criminal Law 24 Hours                         |
|     | (D)                | Juvenile Laws and Procedures 8 Hours                      |
|     | (E)                | Arrest, Search and Seizure/Constitutional Law 28 Hours    |
|     | (F)                | Alcohol Beverage Control (ABC)Laws and Procedures 4 Hours |
|     | UNIT TOTAL         | 96 Hours  |
| (2) | PATROL DUTIES UNIT |   |
|     | (A)                | Techniques of Traffic Law Enforcement 24 Hours            |
|     | (B)                | Explosives and Hazardous Materials Emergencies 12 Hours   |
|     | (C)                | Traffic Crash Investigation 20 Hours                      |
|     | (D)                | In-Custody Transportation 8 Hours                         |
|     | (E)                | Crowd Management 12 Hours                                 |

- |     |   |  |
|-----|---|--|
| (F) | Patrol Techniques                                     | 28 Hours   |
| (G) | Law Enforcement Communication and Information Systems | 8 Hours  |
| (H) | Anti-Terrorism  | 4 Hours  |
| (I) | Rapid Deployment                                      | 8 Hours  |
|     | UNIT TOTAL  | 124 Hours  |
| (3) | LAW ENFORCEMENT COMMUNICATION UNIT                    |  |
|     | (A)   | Responding to Victims and the Public 10 Hours                          |
|     | (B)   | Domestic Violence Response 12 Hours                                    |
|     | (C)   | Ethics for Professional Law Enforcement 4 Hours                        |
|     | (D)   | Individuals with Mental Illness and Developmental Disabilities 8 Hours |
|     | (E)   | Crime Prevention Techniques 6 Hours                                    |
|     | (F)   | Communication Skills for Law Enforcement Officers 8 Hours              |
|     | UNIT TOTAL  | 48 Hours   |
| (4) | INVESTIGATION UNIT                                    |  |
|     | (A)   | Fingerprinting and Photographing Arrestee 6 Hours                      |
|     | (B)   | Field Note-taking and Report Writing 12 Hours                          |
|     | (C)   | Criminal Investigation 34 Hours  |
|     | (D)   | <del>Interviews: Field and In-Custody</del><br>Interviews 16 Hours     |
|     | (E)   | Controlled Substances 12 Hours   |
|     | (F)   | Human Trafficking 2 Hours  |
|     | UNIT TOTAL  | 82 Hours   |
| (5) | PRACTICAL APPLICATION UNIT                            |  |
|     | (A)   | First Responder 32 Hours   |
|     | (B)   | Firearms 48 Hours  |
|     | (C)   | Law Enforcement Driver Training 40 Hours                               |
|     | (D)   | Physical Fitness (classroom instruction) 8 Hours                       |
|     | (E)   | Fitness Assessment and Testing 12 Hours                                |
|     | (F)   | Physical Exercise 1 hour daily, 3 days a week 34 Hours                 |
|     | (G)   | Subject Control Arrest Techniques 40 Hours                             |
|     | UNIT TOTAL  | 214 Hours  |
| (6) | SHERIFF-SPECIFIC UNIT                                 |  |
|     | (A)   | Civil Process 24 Hours   |
|     | (B)   | Sheriffs' Responsibilities: Detention Duties 4 Hours                   |
|     | (C)   | Sheriffs' Responsibilities: Court Duties 6 Hours                       |
|     | UNIT TOTAL  | 34 Hours   |
| (7) | COURSE ORIENTATION                                    | 2 Hours  |
| (8) | TESTING   | 16 Hours   |
|     | TOTAL COURSE HOURS                                    | 616 Hours  |

(c) The "Basic Law Enforcement Training Manual" published by the North Carolina Justice Academy shall be used as the curriculum for this training course. Copies of this publication may be inspected at the office of the agency:

Criminal Justice Standards Division  
North Carolina Department of Justice  
1700 Tryon Park Drive  
Post Office Drawer 149  
Raleigh, North Carolina 27602

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

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

(d) The "Basic Law Enforcement Training Course Management Guide" published by the North Carolina Justice Academy shall be used by school directors in planning, implementing, and delivering basic training courses. Copies of this guide may be obtained at the cost of printing and postage from the Justice Academy.

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

### **12 NCAC 09B .0235 BASIC TRAINING – JUVENILE COURT COUNSELORS AND CHIEF COURT COUNSELORS**

(a) The basic training course for Juvenile Court Counselors and Chief Court Counselors shall consist of a minimum of ~~154~~ 151 hours of instruction designed to provide the trainee with the skills and knowledge to perform those tasks essential to function as a Juvenile Court Counselor and a Chief Court Counselor.

(b) Each basic training course for Juvenile Court Counselors shall include training in the following topic areas:

- (1) Juvenile Justice Common Core:
  - ~~(A)~~ (A) Juvenile Justice Overview 2 hours
  - ~~(B)~~ (A) Basic Individual Counseling Skills 8 hours
  - ~~(C)~~ (B) Interpersonal Communication Skills 8 hours
  - ~~(D)~~ (C) Working with Families 3 hours
  - ~~(E)~~ (D) Characteristics of Delinquents 4 hours
  - ~~(F)~~ (E) Unlawful Workplace Harassment 2 hours
  - ~~(G)~~ (F) Career Survival: Integrity and Ethics in the North Carolina Department of Public Safety Workplace 2 hours
  - ~~(H)~~ (G) Staff and Juvenile Relationships 4 hours
  - ~~(I)~~ (H) Gang Awareness 4 hours
  - ~~(J)~~ (I) Situational Awareness and Risk Assessment 4 hours
  - ~~(K)~~ (J) Restraints, Controls and Defensive Techniques 28 hours
  - ~~(L)~~ (K) Mechanical Restraints 4 hours
  - ~~(M)~~ (L) Secure Transportation 4 hours
  - ~~(N)~~ (M) Mental Health 8 hours
  - ~~(O)~~ (N) CPR 4 hours
  - ~~(P)~~ (O) First Aid 4 hours
  - ~~(Q)~~ (P) Employee Fitness and Wellness 4 hours

- ~~(R)~~ (R) Multi-Generational Workforce 3 hours
- ~~(S)~~ (S) Understanding Workplace Differences 4 hours
- ~~(P)~~ (P) Trauma and Delinquents 6 hours
- ~~(Q)~~ (Q) Driver and Secure Transport Safety 8 hours
- ~~(R)~~ (R) DMC- Addressing DMC within the JJ System 2 hours
- ~~(S)~~ (S) Verbal De-escalation for Juvenile Justice 4 hours
- Total Hours ~~104~~ 111 hours
- (2) Juvenile Court Counselor Specific:
  - (A) Roles and Responsibilities 8 hours
  - (B) Juvenile Law 8 hours
  - (C) Intake 8 hours
  - (D) Risk and Needs Assessment 4 hours
  - (E) Report Writing and Documentation 12 hours
  - ~~(F)~~ (F) Interviewing 6 hours
  - ~~(G)~~ (G) Driver Safety 4 hours
  - Total Hours ~~50~~ 40 hours
  - Total Course Hours ~~154~~ 151 hours

(c) The "Juvenile Court Counselor Basic Training Manual" as published by the North Carolina Department of Public Safety shall be applied as the curriculum for delivery of Juvenile Court Counselor basic training courses. Copies of this publication may be inspected at or purchased at the cost of printing and postage from the office of the agency:

The Office of Staff Development and Training  
North Carolina Department of Public Safety  
2211 Schieffelin Road  
Apex, North Carolina 27502

(d) Upon completion of a Commission-certified training course for Juvenile Court Counselors and Chief Court Counselors, the Director of the school conducting the course shall notify the Commission of training completion by submitting a Report of Training Course Completion for each trainee. The Report of Training Completion Form is located on the agency's website: [http://www.ncdoj.gov/getattachment/fbf3480c-05a1-4e0c-a81a-04070dea6199/F-11-Form\\_10-2-14.pdf.aspx](http://www.ncdoj.gov/getattachment/fbf3480c-05a1-4e0c-a81a-04070dea6199/F-11-Form_10-2-14.pdf.aspx).

(e) Employees of the Division of Adult Correction and Juvenile Justice who have completed the minimum ~~152~~ 151 hour training program accredited by the Commission pursuant to Rule .0236 of this Section after January 1, 2013 who transfer from a Juvenile Justice Officer position to a Juvenile Court Counselor position shall be required to complete only the portions of the course identified as specific to the duties and responsibilities of a Juvenile Court Counselor under Subparagraph (b)(2) of this Rule.

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

### **12 NCAC 09B .0236 BASIC TRAINING - JUVENILE JUSTICE OFFICERS**

(a) The basic training course for Juvenile Justice Officers shall consist of a minimum of ~~152~~ 151 hours of instruction designed to provide the trainee with the skills and knowledge to perform those tasks essential to function as a juvenile justice officer.



(b) Each basic training course for Juvenile Justice Officers shall include training in the following identified topic areas:

- (1) Juvenile Justice Common Core:
  - (A) ~~Juvenile Justice Overview~~ 2 hours
  - ~~(B)(A)~~ Basic Individual Counseling Skills 8 hours
  - ~~(C)(B)~~ Interpersonal Communication Skills 8 hours
  - ~~(D)(C)~~ Working with Families 3 hours
  - ~~(E)(D)~~ Characteristics of Delinquents 4 hours
  - ~~(F)(E)~~ Unlawful Workplace Harassment 2 hours
  - ~~(G)(F)~~ Career Survival: Integrity and Ethics in the North Carolina Department of Public Safety Workplace 2 hours
  - ~~(H)(G)~~ Staff and Juvenile Relationships 4 hours
  - ~~(I)(H)~~ Gang Awareness 4 hours
  - ~~(J)(I)~~ Situational Awareness and Risk Assessment 4 hours
  - ~~(K)(J)~~ Restraints, Controls and Defensive Techniques 28 hours
  - ~~(L)(K)~~ Mechanical Restraints 4 hours
  - ~~(M)~~ ~~Secure Transportation~~ 4 hours
  - ~~(N)(L)~~ Mental Health 8 hours
  - ~~(O)(M)~~ CPR 4 hours
  - ~~(P)(N)~~ First Aid 4 hours
  - ~~(Q)(O)~~ Employee Fitness and Wellness 4 hours
  - ~~(R)~~ ~~Multi-Generational Workforce~~ 3 hours
  - ~~(S)~~ ~~Understanding Workplace Differences~~ 4 hours
  - ~~(P)~~ Trauma and Delinquents 6 hours
  - ~~(Q)~~ Driver and Secure Transport Safety 8 hours
  - ~~(R)~~ DMC-Addressing DMC within the JJ System 2 hours
  - ~~(S)~~ Verbal De-escalation for Juvenile Justice 4 hours
  - Total Hours ~~404~~ 111 hours
- (2) Juvenile Justice Officer Specific:
  - (A) Treatment Program Operations 4 hours
  - (B) Maintaining Documentation of Activities and Behaviors ~~6-8~~ hours
  - (C) Basic Group Leadership Skills 8 hours
  - ~~(D)~~ ~~Crisis Intervention Techniques~~ 8 hours
  - ~~(E)(D)~~ Effective Behavior Management ~~12-10~~ hours
  - (F)(E) Health Services Overview 2 hours
  - ~~(G)~~ ~~Trauma and Delinquents~~ 6 hours
  - ~~(H)(F)~~ Contraband and Search Techniques 2 hours
  - ~~(G)~~ Suicide Prevention and Response 6 hours
  - Total Hours ~~48~~ 40 hours

Total Course Hours ~~452~~ 151 hours

(c) The "Juvenile Justice Officer Basic Training Manual" as published by the North Carolina Department of Public Safety shall be applied as the curriculum for delivery of Juvenile Justice Officer basic training courses. Copies of this publication may be inspected at or purchased at the cost of printing and postage from the office of the agency:

The Office of Staff Development and Training  
North Carolina Department of Public Safety  
2211 Schieffelin Road  
Apex, North Carolina 27502

(d) Upon completion of a Commission-certified training course for Juvenile Justice Officers the Director of the school conducting the course shall notify the Commission of the training completion by submitting a Report of Training Course Completion for each trainee. The Report of Training Completion Form is located on the agency's website: [http://www.ncdoj.gov/getattachment/fbf3480c-05a1-4e0c-a81a-04070dea6199/F-11-Form\\_10-2-14.pdf.aspx](http://www.ncdoj.gov/getattachment/fbf3480c-05a1-4e0c-a81a-04070dea6199/F-11-Form_10-2-14.pdf.aspx).

(e) Employees of the Division of Adult Correction and Juvenile Justice who have completed the minimum ~~454~~ 151 hour training program accredited by the Commission under Rule .0235 of this Section after January 1, 2013 who transfer from a Juvenile Court Counselor position to a Juvenile Justice Officer position shall be required to complete only the portions of the course identified as specific to the duties and responsibilities of a Juvenile Justice Officer pursuant to Subparagraph (b)(2) of this Rule.

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

#### **12 NCAC 09C .0216 RECOMMENDATION FOR GENERAL INSTRUCTOR CERTIFICATION**

The Recommendation ~~recommendation~~ for General Instructor Certification, ~~certification~~, pursuant to ~~12 NCAC 09B .0303(b)(1)~~ is shall be completed by a ~~school-director~~ School Director or ~~agency-head~~ In-Service Training Coordinator after an instructor has finished the required probationary year. In the form the official recommends that the instructor receive general instructor certification and certifies that the official has observed and evaluated the instructor to be a teaching professional. The form (F-12) used for this recommendation is located on the agency's website: <http://www.ncdoj.gov/getdoc/f2ea275c-187d-4d7e-825d-98a8662f7443/F-12.aspx>.

Authority G.S. 17C-6; 150B-11.

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

#### **CHAPTER 16 – BOARD OF DENTAL EXAMINERS**

*Notice is hereby given in accordance with G.S. 150B-21.2 that the Board of Dental Examiners intends to adopt the rules cited as 21 NCAC 16Q .0206, .0207, .0305, .0404-.0407 and amend the rules cited as 21 NCAC 16Q .0101, .0201, .0202, .0301, .0302, .0304.*

**Link to agency website pursuant to G.S. 150B-19.1(c):** [www.ncdentalboard.org](http://www.ncdentalboard.org)

**Proposed Effective Date:** June 1, 2017

**Public Hearing:**

**Date:** February 9, 2017

**Time:** 6:30 p.m.

**Location:** 2000 Perimeter Park Drive Suite 160, Morrisville, NC 27560

**Reason for Proposed Action:**

**21 NCAC 16Q .0101** is proposed for amendment to expand and clarify the definition of terms that appear in the sedation rules.

**21 NCAC 16Q .0201** is proposed for amendment to increase the training requirements for general anesthesia permit holders and to clarify when a permit holder may perform general anesthesia at another dentist's office.

**21 NCAC 16Q .0202** is proposed for amendment to clarify what equipment must be maintained in the office of the permit holder, to clarify what information must be in the sedation record, to clarify post-operative monitoring and discharge criteria and to require two BLS certified auxiliaries to be present during all general anesthesia procedures.

**21 NCAC 16Q .0301** is proposed for amendment to increase the training requirements for applicants for moderate conscious sedation and their auxiliaries.

**21 NCAC 16Q .0302** is proposed for amendment to clarify the equipment and record keeping requirements for holders of moderate conscious sedation permits, to require two BLS certified auxiliaries to be present during every procedure and to clarify post-operative monitoring and discharge criteria.

**21 NCAC 16Q .0304** is proposed for amendment to clarify when a moderate conscious sedation permit holder may provide sedation at another dentist's office.

**21 NCAC 16Q .0206** is proposed for adoption to create a new category of itinerant general anesthesia providers.

**21 NCAC 16Q .0207** is proposed for adoption to clarify the renewal process and requirements for holders of itinerant general anesthesia permits.

**21 NCAC 16Q .0305** is proposed for adoption to clarify the requirements for renewal of a moderate conscious sedation permit and to increase training requirements for applicants and their auxiliaries.

**21 NCAC 16Q .0404** is proposed for adoption to clarify the education requirements for applicants for moderate pediatric conscious sedation permits and to clarify the evaluation and inspection procedures.

**21 NCAC 16Q .0405** is proposed for adoption to clarify the equipment requirements for moderate pediatric conscious sedation permit holders, to require two BLS certified auxiliaries to be present during every procedure, to clarify what must be in the sedation record and to clarify post-operative monitoring and discharge criteria.

**21 NCAC 16Q .0406** is proposed for adoption to clarify when a moderate conscious sedation permit holder may provide sedation at another dentist's office.

**21 NCAC 16Q .0407** is proposed for adoption to clarify what must be done to renew a moderate conscious sedation permit and to increase the continuing education requirements for permit holders and their auxiliaries.

**Comments may be submitted to:** Bobby White, 2000 Perimeter Park Drive, Suite 160, Morrisville, NC 27560, email [info@ncdentalboard.org](mailto:info@ncdentalboard.org)

**Comment period ends:** March 20, 2017

**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 ( $\geq$ \$1,000,000)
- ☐ Approved by OSBM
- ☒ No fiscal note required by G.S. 150B-21.4

**SUBCHAPTER 16Q – GENERAL ANESTHESIA AND SEDATION**

**SECTION .0100 – DEFINITIONS**

**21 NCAC 16Q .0101 GENERAL ANESTHESIA AND SEDATION DEFINITIONS**

For the purpose of these Rules relative to the administration of minimal conscious sedation, moderate conscious sedation, ~~moderate conscious sedation limited to oral routes or nitrous oxide inhalation~~, moderate pediatric conscious ~~sedation-sedation~~, or general anesthesia by or under the direction of a dentist, the following definitions shall apply:

- (1) "Analgesia" – the diminution or elimination of pain.
- (2) "Anti-anxiety sedative" – a sedative agent administered in a dosage intended to reduce anxiety without diminishing consciousness or protective reflexes.
- (3) "Anxiolysis" – pharmacological reduction of anxiety through the administration of a single dose of a minor psychosedative, possibly in combination with nitrous oxide, to children or adults prior to commencement of treatment on the day of the appointment which allows for

uninterrupted interactive ability in a totally awake patient with no compromise in the ability to maintain a patent airway continuously and without assistance. Nitrous oxide may be administered in addition to the minor psychosedative without constituting multiple dosing for purpose of these Rules.

(4) "ACLS" – Advanced Cardiac Life Support.

(5) "Administer" – to direct, manage, supervise, control, and have charge of all aspects of selection, dosage, timing, and method of delivery to the patient of any pharmacologic agent intended to reduce anxiety or depress consciousness.

(6) "ASA" – American Society of Anesthesiologists.

(7) "Auxiliaries" – non-dentist staff members involved in general anesthesia or sedation procedures.

(8) "BLS" – Basic Life Support.

(4)(9) "Behavior control" – the use of pharmacological techniques to control behavior to a level that dental treatment can may be performed without injury to the patient or dentist, effectively and efficiently.

(5)(10) "Behavioral management" – the use of pharmacological or psychological techniques, singly or in combination, to modify behavior to a level that dental treatment can may be performed effectively and efficiently, without injury to the patient or dentist.

(6)(11) "Competent" – displaying special skill or knowledge derived from training and experience.

(7)(12) "Conscious sedation" - an induced state of a depressed level of consciousness that retains the patient's ability to independently and continuously maintain an airway without assistance and respond appropriately to physical stimulation and obey verbal command, commands, and that is produced by pharmacologic or non-pharmacologic agents, or a combination thereof. In accordance with this particular definition, the drugs or techniques used shall carry a margin of safety wide enough to render unintended loss of consciousness unlikely. All dentists who perform conscious sedation shall have an unexpired sedation permit from the Dental Board.

(13) "CRNA" – Certified Registered Nurse Anesthetist.

(8)(14) "Deep sedation" – an induced state of a depressed level of consciousness accompanied by partial loss of protective reflexes, including the ability to continually maintain an airway independently or respond purposefully to verbal command, and is produced by pharmacological agents. All dentists who

perform deep sedation shall have an unexpired general anesthesia permit from the Dental Board.

(15) "Deliver" – to assist a permitted dentist in administering sedation or anesthesia drugs by providing the drugs to the patient pursuant to a direct order from the dentist and while under the dentist's direct supervision.

(9)(16) "Direct supervision" – the dentist responsible for the sedation/anesthesia—sedation or anesthesia procedure shall be physically present in the facility immediately available and shall be continuously aware of the patient's physical status and well being—being at all times.

(17) "Emergencies manual" – a written manual that documents:

(a) the location of all emergency equipment and medications in each facility;

(b) each staff member's role during medical emergencies; and

(c) the appropriate treatment for laryngospasm, bronchospasm, emesis and aspiration, respiratory depression and arrest, angina pectoris, myocardial infarction, hypertension, hypotension, allergic reactions, convulsions, syncope, bradycardia, insulin shock, cardiac arrest, and airway obstruction.

(18) "Enteral" – the administration of pharmacological agents orally, intranasally, sublingually, or rectally.

(19) "ET CO2" – end tidal carbon dioxide.

(40)(20) "Facility" – the location where a permit holder practices dentistry and provides anesthesia/sedation anesthesia or sedation services.

(44)(21) "Facility inspection" - an on-site inspection to determine if a facility where the applicant proposes to provide anesthesia/sedation anesthesia or sedation is supplied, equipped, staffed-staffed, and maintained in a condition to support provision of anesthesia/sedation anesthesia or sedation services that meet the minimum standard of care, in compliance with the Dental Practice Act set forth in Article 2 of G.S. 90 and the Board's rules of this Chapter.

(42)(22) "General anesthesia" - the intended controlled state of a depressed level of consciousness that is produced by pharmacologic agents and accompanied by a partial or complete loss of protective reflexes, including the ability to maintain an airway and respond purposefully to physical stimulation and obey or—verbal commands. All dentists who perform general anesthesia shall have an unexpired general anesthesia permit from the Dental Board.

(23) "Good standing" – a licensee whose license is not suspended or revoked and who is not

- subject to a current disciplinary order imposing probationary terms.
- (13)(24) "Immediately available" – on-site in the facility and available for ~~immediate use.~~ use without delay.
- (25) "Itinerant general anesthesia provider"- a permittee who has complied with Rule .0206 of this Subchapter and who administers general anesthesia at another practitioner's facility.
- (14)(26) "Local anesthesia" – the elimination of sensations, ~~especially including pain,~~ in one part of the body by the regional application or injection of a drug.
- (15) ~~"May" indicates freedom or liberty to follow a reasonable alternative.~~
- (16)(27) "Minimal conscious sedation" – conscious sedation characterized by a minimally depressed level of consciousness, in which patient retains the ability to independently and continuously maintain an airway and respond normally to tactile stimulation and verbal command, provided to patients 13 years or older, by oral or rectal routes of administration of a single pharmacological agent, in one or more doses, not to exceed the manufacturer's maximum recommended dose, at the time of treatment, possibly in combination with nitrous oxide. Minimal conscious sedation is provided for behavioral management.
- (17)(28) "Minor psychosedative/Minor tranquilizer" – pharmacological agents which allow for uninterrupted interactive ability in a patient with no compromise in the ability to maintain a patent airway continuously and without assistance and carry a margin of safety wide enough to render unintended loss of consciousness unlikely.
- (18)(29) "Moderate conscious sedation" – conscious sedation characterized by a drug induced depression of consciousness, during which patients ~~obey respond purposefully to~~ verbal commands, either alone or accompanied by light tactile stimulation, provided to patients 13 years ~~of age~~ or older, by oral, nasal, ~~rectal~~ rectal, or parenteral routes of administration of single or multiple pharmacological agents, in single or multiple doses, within a 24 hour period, including the time of treatment, possibly in combination with nitrous oxide. Moderate conscious sedation ~~is may be~~ provided for behavior control. control by licensed dentists who comply with the terms of Rule .0301 of this Subchapter. A moderate conscious sedation provider shall not use the following:
- (a) drugs designed by the manufacturer for use in administering general anesthesia or deep sedation; or
- (b) drugs contraindicated for use in moderate pediatric conscious sedation.
- (19) ~~"Moderate conscious sedation limited to oral routes and nitrous oxide inhalation" – conscious sedation characterized by a drug induced depression of consciousness during which patients respond purposefully to verbal commands, either alone or accompanied by light tactile stimulation, provided to patients 13 years or older, by oral routes of administration and nitrous oxide inhalation, of single or multiple pharmacological agents, in single or multiple doses, within a 24 hour period. Moderate conscious sedation limited to oral routes and nitrous oxide inhalation is provided for behavior control.~~
- (20)(30) "Moderate pediatric conscious sedation" - conscious sedation characterized by a drug induced depression of consciousness, during which patients ~~respond purposefully to obey~~ verbal commands, either alone or accompanied by light tactile stimulation, provided to patients up to 18 ~~under 13~~-years of age, or special needs patients, by oral, nasal, ~~rectal~~ rectal or parenteral routes of administration of single or multiple pharmacological agents, in single or multiple doses, within a 24 hour period, including the time of treatment, possibly in combination with nitrous oxide. Moderate pediatric conscious sedation ~~is may be~~ provided for behavior control. control by licensed dentists who comply with the terms of Rule .0404 of this Subchapter. A moderate pediatric conscious sedation permit holder shall not use the following:
- (a) drugs designed by the manufacturer for use in administering general anesthesia or deep sedation; or
- (b) drugs contraindicated for use in moderate pediatric conscious sedation.
- (21) ~~"Must" or "shall" indicates an imperative need or duty or both; an essential or indispensable item; mandatory.~~
- (22)(31) "Parenteral" - the administration of pharmacological agents intravenously, intraosseously, intramuscularly, subcutaneously, submucosally, intranasally, or transdermally.
- (32) "PALS" - Pediatric Advanced Life Support.
- (23)(33) "Protective reflexes" – includes the ability to swallow and cough.
- (34) "RN" – Registered Nurse licensed by the North Carolina Board of Nursing.
- (35) "Sedation Procedure" – begins when any pharmacological agent is first administered to a patient to induce general anesthesia or sedation and continues until the dentist permit holder determines that the patient has met the applicable recovery and discharge criteria set forth in the applicable rules in this Subchapter.

- (36) "Special needs patients" – patients with diminished mental and or physical capacity who are unable to cooperate to receive ambulatory dental care without sedation or anesthesia.
- ~~(24)~~(37) "Supplemental dosing" – the oral administration of a pharmacological agent that results in an enhanced level of conscious sedation when added to the primary sedative agent administered for the purpose of oral moderate conscious sedation, and ~~which~~, when added to the primary agent, does not exceed the maximum safe dose of either agent, separately or synergistically.
- ~~(25)~~(38) "Vested adult" – a responsible adult who is the legal parent or guardian, or designee of a legal parent or guardian, entrusted with the care of a ~~minor~~ patient following the administration of general anesthesia or conscious sedation.

*Authority G.S. 90-30.1; 90-48.*

## SECTION .0200 – GENERAL ANESTHESIA

### 21 NCAC 16Q .0201 GENERAL ANESTHESIA CREDENTIALS AND PERMIT

~~(a) No dentist shall employ or use general anesthesia on an outpatient basis for dental patients unless the dentist possesses a permit issued by the Board. A dentist holding a permit shall be subject to review and shall only employ or use general anesthesia at a facility located in the State of North Carolina in accordance with 21 NCAC 16Q .0202. Such permit must be renewed annually and shall be displayed with the current renewal at all times in a conspicuous place in the office of the permit holder.~~

(a) Before a dentist licensed to practice in North Carolina may administer or supervise a CRNA to administer general anesthesia or perform deep sedation, the dentist shall obtain a general anesthesia permit from the Board by completing an application form and paying a four hundred seventy-five dollar (\$475.00) fee. The application form is available on the Board's website: [www.ncdentalboard.org](http://www.ncdentalboard.org). The permit shall be renewed annually and shall be displayed with the current renewal at all times in the permit holder's facility where it is visible to patients receiving treatment.

(b) Any dentist who wishes to administer general anesthesia to patients must apply to the Board for the required permit on a prescribed application form, submit an application fee of one hundred dollars (\$100.00) and produce evidence showing ~~A~~ dentist applying for a general anesthesia permit shall be in good standing with the Board and demonstrate that he or she:

- (1) Has completed a minimum of ~~one year~~ two years of advanced training in anesthesiology and related academic subjects ~~(or its equivalent)~~ beyond the undergraduate dental school level; or
- (2) Has graduated from a program certified by the American Dental Association in Oral and Maxillofacial Surgery; or

- (3) Is a Diplomate of or eligible for examination by the American Board of Oral and Maxillofacial Surgery; or
- (4) Is a Fellow of the American Dental Society of Anesthesiology; ~~or and~~
- (5) ~~Is a dentist who has been administering general anesthetics in a competent manner for the five years preceding the effective date of this Rule.~~ Has an unexpired ACLS certification.

(c) Before receiving a general anesthesia permit, all applicants shall pass an evaluation and inspection as set out in Rule .0202 of this Section. Every location other than a hospital or credentialed surgery center where a general anesthesia permit holder administers general anesthesia shall pass an inspection as set out in Rule .0204 of this Section.

~~(e)(d) A dentist who is qualified to administer general anesthesia in accordance with this Section and holds a general anesthesia permit may also be authorized to administer any level of sedation without obtaining a separate sedation permit.~~

~~(d) The dentist involved with the administration of general anesthesia shall document current, successful completion of advanced cardiac life support (ACLS) training, or its age specific equivalent or other Board approved equivalent course and auxiliary personnel shall document annual, successful completion of basic life support (BLS) training.~~

(e) A dentist who does not hold a general anesthesia permit may not employ a CRNA to administer general anesthesia services. A dentist who holds a general anesthesia permit may permit a CRNA to administer general anesthesia services under direct supervision of the dentist.

(f) A general anesthesia permit holder may provide general anesthesia at the office of another licensed dentist, regardless of the permit, if any held, by the hosting dentist. The permit holder shall ensure that the facility where the general anesthesia is administered has been inspected and complies with the requirements set out in Rule .0202 of this Section or shall obtain an itinerant general anesthesia permit and comply with the provisions of Rule .0206 of this Section.

*Authority G.S. 90-28; 90-30.1.*

### 21 NCAC 16Q .0202 GENERAL ANESTHESIA EQUIPMENT AND CLINICAL REQUIREMENTS

(a) A dentist administering general anesthesia is ~~solely~~ responsible for providing ~~shall be responsible to ensure that the environment in which facility where the general anesthesia is to be administered~~ meets the following requirements:

- (1) The facility ~~is~~ shall be equipped with:
  - (A) ~~An an~~ operator of size and design to permit access of emergency equipment and personnel and to permit ~~effective~~ emergency management;
  - (B) ~~A chair or table for emergency treatment, including chair suitable for CPR or CPR Board; a CPR board or dental chair without enhancements,~~

- suitable for providing emergency treatment;
- (C) ~~Lighting~~ lighting as necessary for specific ~~procedures;~~ procedures and back-up lighting; and
- (D) ~~Suction~~ suction equipment as necessary for specific procedures, including non-electrical back-up suction;
- (2) ~~The following equipment is maintained:~~
- (A)(E) ~~Positive~~ positive pressure oxygen delivery system, including full face masks for adults and pediatric patients;
- (B)(F) ~~Oral~~ small, medium, and large oral and nasal airways ~~of various sizes;~~ airways;
- (C)(G) ~~Blood~~ blood pressure monitoring device;
- (D)(H) ~~Electrocardiograph;~~ EKG monitor; electrocardiograph;
- (E)(I) ~~Pulse~~ pulse oximeter; and
- (F)(J) ~~Defibrillator;~~ defibrillator;
- (K) precordial stethoscope or capnograph;
- (L) thermometer;
- (3) ~~The following emergency equipment is maintained:~~
- (A)(M) ~~I.V.~~ set up vascular access as necessary for specific procedures, including hardware and fluids;
- (B)(N) ~~Laryngoscope~~ aryngoscope with current working batteries;
- (C)(O) ~~Intubation~~ intubation forceps and endotracheal tubes; advanced airway devices;
- (D)(P) ~~Tonsillar~~ tonsillar suction with back-up suction;
- (E)(Q) ~~Syringes~~ syringes as necessary for specific procedures; and
- (F)(R) ~~Tourniquet & tape;~~ tourniquet and tape.
- (G) ~~Blood pressure monitoring device;~~
- (4)(2) ~~The following drugs are maintained with a current shelf life and with access from the operatory and recovery room. The following unexpired drugs shall be maintained in the facility and with access from the operatory and recovery rooms:~~
- (A) Epinephrine;
- (B) Atropine;
- (C) ~~Lidocaine;~~ antiarrhythmic;
- (D) ~~Antihistamine;~~ antihistamine;
- (E) ~~Antihypertensive;~~ antihypertensive;
- (F) ~~Bronchial dilator;~~ bronchodilator;
- (G) ~~Antihypoglycemic~~ antihypoglycemic agent;
- (H) ~~Vasopressor;~~ vasopressor;
- (I) ~~Corticosteroid;~~ corticosteroid;
- (J) ~~Anticonvulsant;~~ anticonvulsant;
- (K) ~~Muscle~~ muscle relaxant;
- (L) Appropriate reversal agents;
- (M) ~~Appropriate~~ anti arrhythmic medication;
- (N)(M) ~~Nitroglycerine;~~ nitroglycerine; and
- (O)(N) ~~Antiemetic;~~ antiemetic.
- (5)(3) ~~Written~~ The permit holder shall maintain written emergency and patient discharge protocols and training to familiarize ~~office personnel~~ auxiliaries in the treatment of clinical emergencies ~~are~~ shall be provided; and
- (6)(4) ~~The permit holder shall maintain the following records are maintained for 10 years:~~
- (A) Patient's current written medical history, including a record of known allergies and previous surgery; surgeries;
- (B) Consent to general anesthesia, signed by the patient or guardian, identifying the risks and benefits, level of anesthesia, and date signed;
- (C) Consent to the procedure, signed by the patient or guardian identifying the risks, benefits, and date signed; and
- (B)(D) Patient Base base line vital signs, including temperature, SPO2, blood pressure ~~pressure,~~ and pulse;
- (C) ~~An anesthesia record which shall include:~~
- (i) ~~Periodic vital signs taken at intervals during the procedure;~~
- (ii) ~~Drugs administered during the procedure, including route of administration, dosage, time and sequence of administration;~~
- (iii) ~~Duration of the procedure;~~
- (iv) ~~Documentation of complications or morbidity; and~~
- (v) ~~Status of patient upon discharge.~~
- (5) The anesthesia record shall include:
- (A) base line vital signs, blood pressure (unless patient behavior prevents recording), oxygen saturation, ET CO2 if capnography is utilized, pulse and respiration rates of the patient recorded in real time at 15 minute intervals;
- (B) procedure start and end times;
- (C) gauge of needle and location of IV on the patient, if used;
- (D) status of patient upon discharge; and
- (E) documentation of complications or morbidity.
- (6) The facility shall be staffed with at least two BLS certified auxiliaries, one of whom shall be

dedicated to patient monitoring and recording general anesthesia or sedation data throughout the sedation procedure. This requirement shall not apply if the dentist permit holder is dedicated to patient care and monitoring regarding general anesthesia or sedation throughout the sedation procedure and is not performing the surgery or other dental procedure.

(b) During an inspection or evaluation, the applicant or permit holder shall demonstrate the administration of anesthesia while the evaluator ~~observes. During the demonstration, the applicant or permit holder observes,~~ and shall demonstrate competency in the following areas:

- (1) ~~Monitoring~~ monitoring of blood pressure, pulse, ET CO2 if capnography is utilized, and respiration;
- (2) ~~Drug drug~~ dosage and administration;
- (3) ~~Treatment~~ treatment of untoward reactions including respiratory or cardiac depression;
- (4) ~~Sterilization;~~ sterile technique;
- (5) ~~Use use of CPR-BLS certified personnel;~~ auxiliaries;
- (6) ~~Monitoring~~ monitoring of patient during recovery; and
- (7) ~~Sufficiency~~ sufficiency of patient recovery time.

(c) During an inspection or evaluation, the applicant or permit holder shall verbally demonstrate competency to the evaluator in the treatment of the following clinical emergencies:

- (1) ~~Laryngospasm;~~ laryngospasm;
- (2) ~~Bronchospasm;~~ bronchospasm;
- (3) ~~Emesis~~ emesis and aspiration;
- (4) ~~Respiratory~~ respiratory depression and arrest;
- (5) ~~Angina~~ angina pectoris;
- (6) ~~Myocardial~~ myocardial infarction;
- (7) ~~Hypertension/Hypotension;~~ hypertension and hypotension;
- (8) ~~Syncope;~~ syncope;
- (9) ~~Allergic~~ allergic reactions;
- (10) ~~Convulsions;~~ convulsions;
- (11) ~~Bradycardia;~~ bradycardia;
- (12) ~~Insulin~~ insulin shock; ~~and~~
- (13) ~~Cardiac arrest.~~ Cardiac arrest; and
- (14) airway obstruction.

~~(d) A dentist administering general anesthesia shall ensure that the facility is staffed with auxiliary personnel who shall document annual successful completion of basic life support training and be capable of assisting with procedures, problems, and emergency incidents that may occur as a result of the general anesthetic or secondary to an unexpected medical complication.~~

(d) A general anesthesia permit holder shall evaluate a patient for health risks before starting any anesthesia procedure.

(e) Post-operative monitoring and discharge shall include the following:

- (1) vital signs shall be continuously monitored when the sedation is no longer being administered and the patient shall have direct continuous supervision until oxygenation and

circulation are stable and the patient is recovered as defined by Subparagraph (e)(2) of this Rule and is ready for discharge from the office; and

(2) recovery from general anesthesia shall include documentation of the following:

- (A) cardiovascular function stable;
- (B) airway patency uncompromised;
- (C) patient arousable and protective reflexes intact;
- (D) state of hydration within normal limits;
- (E) patient can talk, if applicable;
- (F) patient can sit unaided, if applicable;
- (G) patient can ambulate, if applicable, with minimal assistance; and
- (H) for the special needs patient or a patient incapable of the usually expected responses, the pre-sedation level of responsiveness or the level as close as possible for that patient shall be achieved; and

(3) before allowing the patient to leave the office, the dentist shall determine that the patient has met the recovery criteria set out in Subparagraph (e)(2) of this Rule and the following discharge criteria:

- (A) oxygenation, circulation, activity, skin color, and level of consciousness are sufficient, stable, and have been documented;
- (B) explanation and documentation of written postoperative instructions have been provided to the patient or a responsible adult at time of discharge; and
- (C) vested adult is available to transport the patient after discharge.

*Authority G.S. 90-28; 90-30.1; 90-48.*

## **21 NCAC 16Q .0206 ITINERANT (MOBILE) GENERAL ANESTHESIA PERMIT, EQUIPMENT AND EVALUATION**

(a) A dentist who holds a general anesthesia permit from the Board and who wishes to provide general anesthesia or other sedation services in the office of another practitioner shall obtain a mobile general anesthesia permit from the Board. The application form may be obtained on the Board's website: [www.ncdentalboard.org](http://www.ncdentalboard.org) and shall be accompanied by a one hundred dollar (\$100.00) fee. No mobile permit shall be required to administer general anesthesia in a hospital or credentialed surgery center.

(b) Before a mobile general anesthesia permit may be issued, a general anesthesia permit holder appointed by the Board shall inspect the applicant's equipment and medications to ensure that they comply with Paragraphs (c) and (d) of this Rule.

(c) The permit holder shall maintain the following equipment:

- (1) positive pressure ventilation system and back-up E cylinder portable oxygen tank;
- (2) standard ASA monitors with back-up power;
- (3) EKG monitor;
- (4) precordial stethoscope or capnograph;
- (5) small, medium, and large oral airways and nasal trumpets;
- (6) small, medium, and large laryngoscope blades and back-up laryngoscope;
- (7) small, medium, and large nasal and oral endotracheal tubes;
- (8) Magill forceps;
- (9) small, medium, and large supraglottic airway devices;
- (10) back-up suction;
- (11) defibrillator with pediatric capability;
- (12) small, medium, and large anesthesia circuits;
- (13) back-up lighting;
- (14) gastric suction device;
- (15) endotracheal tube and pulmonary suction device;
- (16) equipment for performing emergency cricothyrotomies and delivering positive pressure ventilation;
- (17) back-up ventilation measurement;
- (18) rebreathing device;
- (19) scavenging system;
- (20) intermittent compression devices;
- (21) CPR board or dental chair without enhancements suitable for providing emergency treatment;
- (22) laryngoscope with working batteries; and
- (23) tourniquet and tape.

(d) The following unexpired medications shall be immediately accessible to the permit holder:

- (1) Epinephrine;
- (2) Atropine;
- (3) antiarrhythmic;
- (4) antihistamine;
- (5) antihypertensive;
- (6) bronchodilator;
- (7) antihypoglycemic agent;
- (8) vasopressor;
- (9) corticosteroid;
- (10) anticonvulsant;
- (11) muscle relaxant;
- (12) appropriate reversal agents;
- (13) nitroglycerine;
- (14) antiemetic;
- (15) neuromuscular blocking agent; and
- (16) anti-malignant hyperthermia agent.

(e) The evaluation and on-site inspection shall be conducted as set out in Rule .0204 of this Section.

(f) Before administering general anesthesia or sedation at another provider's office, the mobile permit holder shall inspect the host facility to ensure that:

- (1) the operator's size and design permit emergency management and access of emergency equipment and personnel;

- (2) there is a CPR board or dental chair without enhancements suitable for providing emergency treatment;
- (3) there is lighting to permit performance of all procedures planned for the facility;
- (4) there is suction equipment, including non-electrical back-up suction; and
- (5) the facility shall be staffed with at least two BLS certified auxiliaries, one of whom shall be dedicated to patient monitoring and recording general anesthesia or sedation data throughout the sedation procedure. This requirement shall not apply if the dentist permit holder is dedicated to patient care and monitoring regarding general anesthesia or sedation throughout the sedation procedure and is not performing the surgery or other dental procedure.

(g) At least 24 hours before the procedure is scheduled to begin, the mobile permit holder shall send written notice to the Board office confirming that the facility where the general anesthesia or sedation will be performed meets the requirements of Paragraph (f) of this Rule and documenting when the inspection was conducted. The permit holder shall retain a copy of the written notice for 10 years following the procedure. No procedure shall be performed until the report required by this Paragraph is filed.

(h) The mobile general anesthesia permit shall be displayed in the host facility where it is visible to patients receiving treatment.

(i) All applicants for mobile general anesthesia permit shall be in good standing with the Board.

*Authority G.S. 90-28; 90-30.1; 90-39; 90-48.*

## **21 NCAC 16Q .0207 ANNUAL RENEWAL OF GENERAL ANESTHESIA AND ITINERANT (MOBILE) GENERAL ANESTHESIA PERMIT REQUIRED**

(a) General anesthesia permits shall be renewed by the Board annually at the same time as dental licenses by paying a one hundred dollar (\$100.00) fee and completing an application available from the Board's website: [www.ncdentalboard.org](http://www.ncdentalboard.org). If the completed renewal application and renewal fee are not received before January 31 of each year, a one hundred dollar (\$100.00) late fee shall be paid.

(b) Itinerant general anesthesia permits shall be renewed by the Board annually at the same time as dental licenses by paying a one hundred dollar (\$100.00) fee and completing an application available from the Board's website: [www.ncdentalboard.org](http://www.ncdentalboard.org). If the completed itinerant general sedation permit and renewal fee are not received before January 31 of each year, a one hundred dollar (\$100.00) late fee shall be paid.

(c) Any dentist who fails to renew a general anesthesia permit or itinerant general anesthesia permit before March 31 of each year shall complete a reinstatement application, pay the renewal fee, late fee, and comply with all conditions for renewal set out in this Rule. Dentists whose anesthesia permits or itinerant general anesthesia permits have been lapsed for more than 12 calendar months shall pass an inspection and an evaluation as part of the reinstatement process.



(d) A dentist who administers general anesthesia in violation of this Rule shall be subject to the penalties prescribed by Rule .0701 of this Subchapter.

(e) As a condition for renewal of the general anesthesia and itinerant general anesthesia permit, the permit holder shall maintain the clinical equipment and requirements set out in Rules .0202 and .0206 of this Section and shall document the following:

- (1) six hours of continuing education each year in one or more of the following areas, which may be counted toward fulfillment of the continuing education required each calendar year for license renewal:
  - (A) sedation;
  - (B) medical emergencies;
  - (C) monitoring IV sedation and the use of monitoring equipment;
  - (D) pharmacology of drugs and agents used in general anesthesia and IV sedation;
  - (E) physical evaluation, risk assessment, or behavioral management; or
  - (F) airway management;
- (2) unexpired ACLS certification, which shall not count towards the six hours required in Subparagraph (e)(1) of this Rule;
- (3) that the permit holder and all auxiliaries involved in anesthesia or sedation procedures have practiced responding to dental emergencies as a team at least once every six months in the preceding year;
- (4) that the permit holder and all auxiliaries involved in anesthesia or sedation procedures have read the practice's emergency manual in the preceding year; and
- (5) that all auxiliaries involved in sedation procedures have completed BLS certification and three hours of continuing education annually in any of the areas set forth in Subparagraph (e)(1) of this rule.

(f) All permit holders applying for renewal of a general anesthesia or itinerant general anesthesia permit shall be in good standing and their office shall be subject to inspection by the Board.

*Authority G.S. 90-28; 90-30.1; 90-31; 90-39(12); 90-48.*

### **SECTION .0300 - PARENTERAL CONSCIOUS SEDATION**

#### **21 NCAC 16Q .0301 CREDENTIALS AND PERMITS FOR MODERATE PARENTERAL AND ENTERAL CONSCIOUS SEDATION**

(a) Before a dentist licensed to practice in North Carolina may administer or supervise a ~~certified registered nurse anesthetist (CRNA)~~ CRNA employed to administer or RN employed to deliver moderate conscious sedation, ~~moderate pediatric conscious sedation or moderate conscious sedation limited to oral routes of administration and nitrous oxide to dental patients on an outpatient basis,~~ the dentist shall obtain a permit from the Board by completing an application form ~~provided by the Board~~ and

paying a fee of ~~one hundred dollars (\$100.00).~~ three hundred seventy five dollars (\$375.00). The application form is available on the Board's website: [www.ncdentalboard.org](http://www.ncdentalboard.org). Such ~~The~~ permit shall be renewed annually and shall be displayed with the current renewal at all times in a conspicuous place in the facility of the permit ~~holder.~~ holder where it is visible to patients receiving treatment.

(b) ~~For a dentist to employ a certified registered nurse anesthetist to administer moderate conscious sedation, moderate conscious sedation limited to oral routes and nitrous oxide or moderate pediatric conscious sedation, the dentist must demonstrate through the permitting process that he or she is capable of performing all duties and procedures to be delegated to the CRNA. The dentist must not delegate said CRNA to perform procedures outside of the scope of the technique and purpose of moderate conscious sedation, moderate pediatric conscious sedation or moderate conscious sedation limited to oral routes and nitrous oxide as defined in Rule .0101 of this Subchapter.~~

(b) The permit holder shall provide direct supervision to any CRNA employed to administer or RN employed to deliver sedation, and shall ensure that the level and duration of the sedation does not exceed the permit holder's permit.

(c) A dentist applying for a permit to administer moderate conscious sedation ~~or moderate pediatric conscious sedation must meet at least one of the following criteria: shall document the following:~~

- (1) Training which may consist of either:
  - (1)(A) Satisfactory completion of a minimum Completion of 60 hours of Board approved didactic training, including PALS (Pediatric Advanced Life Support), and instruction training in intravenous conscious sedation and satisfactory 30 hours of clinical training, that shall include successful management of a minimum of ~~40~~ 20 live patients, under supervision, supervision of the course instructor, using intravenous sedation; sedation. Training shall be provided by one or more individuals who meet the American Dental Association Guidelines for Teaching Pain Control and Sedation to Dentists that is hereby incorporated by reference, including subsequent amendments and editions. The guidelines may be found at [www.ada.org/coda](http://www.ada.org/coda); or
  - (2)(B) Satisfactory completion ~~Completion~~ of a pre-doctoral dental or postgraduate program which ~~that~~ included intravenous conscious sedation training equivalent to that defined in Subparagraph (c)(1) of this Rule; or
- (2) Unexpired ACLS certification; and
- (3) That all auxiliaries involved in sedation procedures have unexpired BLS certification.

~~(3) Satisfactory completion of an internship or residency which included intravenous conscious sedation training equivalent to that defined in Subparagraph (c)(1) of this Rule.~~

~~(d) Notwithstanding the foregoing, a dentist may also qualify for a permit to administer moderate pediatric conscious sedation by documenting, with patient names and dates of completion, at least 100 cases of moderate pediatric sedation procedures successfully completed between July 3, 2006 and July 3, 2009. A dentist who obtains a pediatric conscious sedation permit pursuant to this Paragraph may not administer sedation intravenously and such limitation shall be noted on the dentist's permit.~~

~~(e) A dentist may modify his or her moderate conscious sedation permit to include the privilege of moderate pediatric conscious sedation by completing a Board approved pediatric dental degree or pediatric dental residency program or obtaining the equivalent hours of continuing education program in pediatric dental anesthesia. If said qualifications are satisfied, it shall be so designated on the dentist's moderate conscious sedation permit and will be subject to the renewal requirements stated in Rule .0501(d) of this Subchapter.~~

~~(f) To be eligible for a moderate conscious sedation permit, moderate conscious sedation limited to oral routes and nitrous oxide inhalation permit or moderate pediatric conscious sedation permit, a dentist must operate within a facility which includes the capability of delivering positive pressure oxygen, and is staffed with supervised auxiliary personnel for each procedure performed. The dentist shall ensure that auxiliary personnel document annual, successful completion of basic life support (BLS) training and are capable of assisting with procedures, problems and emergencies incident thereto.~~

~~(d) All applicants for a moderate conscious sedation permit shall be in good standing with the Board.~~

~~(g)(e) Prior to issuance of a moderate conscious sedation permit, moderate conscious pediatric sedation permit or moderate conscious sedation permit limited to oral routes and nitrous oxide inhalation permit, the applicant shall undergo pass an evaluation which includes and a facility inspection. The Board shall direct an evaluator to perform this evaluation. The applicant shall be notified in writing that an evaluation and facility inspection is required and provided with the name of the evaluator who shall perform the evaluation and facility inspection. The applicant shall be responsible for successful completion of passing the evaluation and inspection of his or her facility within three months 90 days of notification. An extension of no more than 90 days shall be granted if the designated evaluator or applicant requests one, one by contacting the Board in writing.~~

~~(h) The evaluator shall assign a grade of pass or fail and shall report his recommendation to the Board, setting out the basis for his conclusion. The Board is not bound by the evaluator's recommendation and shall make a final determination regarding whether the applicant has passed the evaluation. The applicant shall be notified of the Board's decision in writing.~~

~~(i)(f) A dentist who holds a moderate conscious sedation, sedation moderate conscious sedation limited to oral routes and nitrous oxide inhalation or moderate pediatric conscious sedation permit shall not intentionally administer deep sedation sedation, although deep sedation may occur briefly and unintentionally.~~

~~(j) A dentist may obtain a moderate conscious sedation permit limited to oral routes of administration and nitrous oxide inhalation, including the ability to add supplemental dosing to the techniques set out in Rule .0101(23) of this Subchapter upon compliance with the following requirements:~~

~~(1) successfully complete 24 hours of didactic training and manage at least 10 adult case experiences, including at least three live clinical dental experiences. The live clinical cases shall not be handled by groups with more than five student participants. The remaining cases may include simulations, video presentations or both, but must include one experience in returning/rescuing a patient from deep to moderate sedation; or~~

~~(2) document, with patient names and dates of completion, at least 100 cases of oral moderate conscious sedation procedures successfully completed within one year preceding June 3, 2008; and fulfill all the requirements listed in Rule .0401 of this Subchapter for minimal conscious sedation.~~

~~(k) A dentist who is qualified to administer general anesthesia, moderate conscious sedation or moderate pediatric conscious sedation and holds a general anesthesia, moderate conscious sedation permit or a moderate pediatric conscious sedation permit may administer minimal conscious sedation without obtaining a separate minimal conscious sedation permit.~~

~~(l) Any dentist who holds an active parenteral conscious sedation permit as of October 1, 2007 shall be deemed to hold an active moderate conscious sedation permit. Such permits shall be subject to the renewal requirements set out in Rule .0501 of this Subchapter.~~

Authority G.S. 90-30.1; 90-39(12); 90-48.

## 21 NCAC 16Q .0302 MODERATE PARENTERAL AND ENTERAL CONSCIOUS SEDATION CLINICAL REQUIREMENTS AND EQUIPMENT

~~(a) A dentist administering moderate conscious sedation or moderate pediatric conscious sedation or supervising the administration delivery of moderate conscious sedation or moderate pediatric conscious sedation by a certified registered nurse anesthetist by a CRNA or RN shall be responsible to ensure that the facility in which where the sedation is to be administered meets the following requirements:~~

~~(1) The facility is shall be equipped with, with the following:~~

~~(A) An an operator of size and design to permit access of emergency equipment and personnel and to permit effective emergency management;~~

~~(B) A a CPR Board board or a dental chair without enhancements, suitable for providing emergency treatment;~~

~~(C) Lighting lighting as necessary for specific procedures; procedures and back-up lighting; and~~

- (D) ~~Suction~~ suction equipment as necessary for specific procedures, including non-electrical back-up suction.
- (2) ~~The following equipment is maintained:~~
- (A)(E) ~~Positive~~ positive oxygen delivery system, including full face masks for ~~adults and pediatric~~ small, medium, and large patients and back-up E-cylinder portable oxygen tank apart from the central system;
- (B)(F) ~~small, medium, and large~~ Oral oral and nasal airways of various sizes; airways;
- (C)(G) ~~Blood~~ blood pressure monitoring device;
- (D)(H) ~~Pulse~~ pulse oximeter; and
- (E)(I) ~~Automatic~~ External Defibrillator (AED); automatic external defibrillator (AED);
- (J) EKG monitor;
- (K) precordial stethoscope or capnograph;
- (L) thermometer;
- (3) ~~The following emergency equipment is maintained:~~
- (A)(M) ~~I.V.~~ vascular access set-up as necessary for specific procedures, including hardware and ~~fluids, if anesthesia is intravenous~~; fluids;
- (B)(N) ~~Syringes~~ syringes as necessary for specific procedures; and
- (C)(O) ~~Tourniquet~~ tourniquet and ~~tape~~ tape;
- (P) advanced airway devices; and
- (Q) tonsillar suction with back-up suction.
- (4)(2) ~~The following drugs are maintained with a current shelf life and with access from the operatory and recovery area. The following unexpired drugs shall be maintained in the facility and with access from the operatory and recovery rooms:~~
- (A) ~~Epinephrine~~; injectable epinephrine;
- (B) ~~Atropine~~; injectable Atropine;
- (C) ~~Appropriate~~ injectable appropriate reversal agents;
- (D) ~~Antihistamine~~; injectable antihistamine;
- (E) ~~Corticosteroid~~; injectable corticosteroid;
- (F) ~~Nitroglycerine~~; nitroglycerine;
- (G) ~~Bronchial dilator~~; bronchodilator;
- (H) ~~Antiemetic~~; and injectable antiemetic;
- (I) ~~50% Dextrose~~; Dextrose; and
- (J) injectable anti-arrhythmic.
- (5)(3) ~~Written~~ The permit holder shall maintain written emergency and patient discharge protocols ~~are maintained~~ and training to familiarize ~~office personnel~~ auxiliaries in the treatment of clinical emergencies ~~is~~ shall be provided; and
- (6)(4) ~~The dentist shall maintain the following records are maintained for at least 10 years:~~
- (A) Patient's current written medical ~~history, history and pre-operative assessment; and including known allergies and previous surgery;~~
- (B) Drugs administered during the procedure, including route of administration, dosage, strength, time and sequence of ~~administration~~; administration.
- (C) ~~A sedation record which shall include:~~
- (i) ~~blood pressure~~;
- (ii) ~~pulse rate~~;
- (iii) ~~respiration~~;
- (iv) ~~duration of procedure~~;
- (v) ~~documentation~~ of complications or morbidity; and
- (vi) ~~status of patient upon discharge~~.
- (5) ~~The sedation record shall include:~~
- (A) base line vital signs, blood pressure (unless patient behavior prevents recording), oxygen saturation, ET CO2 if capnography is utilized, pulse and respiration rates of the patient recorded in real time at 15 minute intervals;
- (B) procedure start and end times;
- (C) gauge of needle and location of IV on the patient, if used;
- (D) status of patient upon discharge;
- (E) documentation of complications or morbidity; and
- (F) consent form, signed by the patient or guardian, identifying the procedure, risks and benefits, level of sedation, and date signed.
- (6) ~~The following conditions shall be satisfied during a sedation procedure:~~
- (A) The facility shall be staffed with at least two BLS certified auxiliaries one of whom shall be dedicated to patient monitoring and recording sedation data throughout the sedation procedure. This requirement shall not apply if the dentist permit holder is dedicated to patient care and monitoring regarding general anesthesia or sedation throughout the sedation procedure and is not performing the surgery or other dental procedure.
- (B) If IV sedation is used, IV infusion shall be administered before the start of the procedure and maintained until the patient is ready for discharge.

(b) During an inspection or evaluation, the applicant or permit holder shall demonstrate the administration of moderate conscious sedation on a patient, ~~or where applicable, moderate pediatric conscious sedation on a patient,~~ including the deployment of an intravenous delivery system, while the evaluator observes. ~~Practices limited to pediatric dentistry will not be required to demonstrate the deployment of an intravenous delivery system. Instead, they will orally describe to the evaluator the technique of their training in intravenous and intraosseous deployment.~~ During the demonstration, the applicant or permit holder shall demonstrate competency in the following areas:

- (1) ~~Monitoring~~ monitoring blood pressure, pulse, ET CO2 if capnography is utilized, and respiration;
- (2) ~~Drug~~ drug dosage and administration;
- (3) ~~Treatment~~ treatment of untoward reactions including respiratory or cardiac depression, if applicable;
- (4) ~~Sterile~~ sterile technique;
- (5) ~~Use of~~ CPR-BLS certified personnel; auxiliaries;
- (6) ~~Monitoring~~ monitoring of patient during recovery; and
- (7) ~~Sufficiency~~ sufficiency of patient recovery time.

(c) During an inspection or evaluation, the applicant or permit holder shall verbally demonstrate competency to the evaluator in the treatment of the following clinical emergencies:

- (1) ~~Laryngospasm;~~ laryngospasm;
- (2) ~~Bronchospasm;~~ bronchospasm;
- (3) ~~Emesis~~ emesis and aspiration;
- (4) ~~Respiratory~~ respiratory depression and arrest;
- (5) ~~Angina~~ angina pectoris;
- (6) ~~Myocardial~~ myocardial infarction;
- (7) ~~Hypertension/Hypotension;~~ hypertension and hypotension;
- (8) ~~Allergic~~ allergic reactions;
- (9) ~~Convulsions;~~ convulsions;
- (10) ~~Syncope;~~ syncope;
- (11) ~~Bradycardia;~~ bradycardia;
- (12) ~~Insulin~~ insulin shock; and
- (13) ~~Cardiac arrest.~~ cardiac arrest; and
- (14) airway obstruction.

~~(d) A dentist administering moderate conscious sedation or moderate pediatric conscious sedation shall ensure that the facility is staffed with sufficient auxiliary personnel for each procedure performed who shall document annual successful completion of basic life support training and be capable of assisting with procedures, problems, and emergency incidents that may occur as a result of the sedation or secondary to an unexpected medical complication.~~

(d) A moderate conscious sedation permit holder shall evaluate a patient for health risks before starting any sedation procedure as follows:

- (1) a patient who is medically stable and who is ASA I or II shall be evaluated by reviewing the patient's current medical history and medication use or;

- (2) a patient who is not medically stable or who is ASA III or higher shall be evaluated by a consultation with the patient's primary care physician or consulting medical specialist regarding the potential risks posed by the procedure.

(e) Post-operative monitoring and discharge:

- (1) vital signs shall be continuously monitored when the sedation is no longer being administered and the patient shall have direct continuous supervision until oxygenation and circulation are stable and the patient is recovered as defined in Subparagraph (e)(2) of this Rule and is ready for discharge from the office.
- (2) recovery from moderate conscious sedation shall include documentation of the following:
  - (A) cardiovascular function stable;
  - (B) airway patency uncompromised;
  - (C) patient arousable and protective reflexes intact;
  - (D) state of hydration within normal limits;
  - (E) patient can talk, if applicable;
  - (F) patient can sit unaided, if applicable;
  - (G) patient can ambulate, if applicable, with minimal assistance; and
  - (H) for special needs patients or patients incapable of the usually expected responses, the pre-sedation level of responsiveness or the level as close as possible for that patient shall be achieved.
- (3) before allowing the patient to leave the office, the dentist shall determine that the patient has met the recovery criteria set out in Subparagraph (e)(2) of this Rule and the following discharge criteria:
  - (A) oxygenation, circulation, activity, skin color, and level of consciousness are stable, and have been documented;
  - (B) explanation and documentation of written postoperative instructions have been provided to the patient or a responsible adult at time of discharge; and
  - (C) a vested adult is available to transport the patient after discharge.

Authority G.S. 90-28; 90-30.1; 90-48.

## **21 NCAC 16Q .0304 OFF SITE USE OF MODERATE PARENTERAL AND ENTERAL CONSCIOUS SEDATION PERMITS**

~~(a) Upon request, the~~ The holder of a ~~moderate pediatric conscious sedation or moderate conscious sedation permit~~ may travel to the office of a licensed dentist ~~who does not hold such a permit and provide moderate conscious sedation services at the level for which the traveling dentist holds a valid permit, as well~~

~~as minimal sedation or moderate conscious sedation limited to oral routes for the patients of that dentist who are undergoing dental procedures. The permit holder is solely responsible for providing~~ shall be responsible to ensure that the facility in which where the sedation is administered meets the requirements established by the Board, that the required drugs and equipment are present, and that the permit holder utilizes sufficient auxiliary personnel for each procedure performed based on the standard of care who shall document annual successful completion of basic life support training and be capable of assisting with procedures, problems, and emergency incidents that may occur as a result of the sedation or secondary to an unexpected medical complication. has passed inspection by the Board and meets the requirements set out in Rule .0302 of this Section. The permit holder shall be responsible to ensure that the facility is staffed with at least two BLS certified auxiliaries, one of whom shall be dedicated to patient monitoring and recording general anesthesia or sedation data throughout the sedation procedure. This requirement shall not apply if the dentist permit holder is dedicated to patient care and monitoring regarding general anesthesia or sedation throughout the sedation procedure and is not performing the surgery or other dental procedure.

~~(b) Holders of moderate conscious sedation permits limited to oral routes and nitrous oxide inhalation may not provide sedation at the office of a licensed dentist who does not hold an appropriate sedation permit.~~

Authority G.S. 90-28; 90-30; 90-30.1; 90-48.

## **21 NCAC 16Q .0305 ANNUAL RENEWAL OF MODERATE PARENTERAL AND ENTERAL CONSCIOUS SEDATION PERMIT REQUIRED**

(a) Moderate conscious sedation permits shall be renewed by the Board annually at the same time as dental licenses by paying a one hundred dollar (\$100.00) fee and completing an application available from the Board's website: [www.ncdentalboard.org](http://www.ncdentalboard.org).

(b) If the completed permit renewal application and renewal fee are not received before January 31 of each year, a one hundred dollar (\$100.00) late fee shall be paid.

(c) Any dentist who fails to renew a moderate conscious sedation permit before March 31 of each year shall complete a reinstatement application, pay the renewal fee, late fee, and comply with all conditions for renewal set out in this Rule. Dentists whose sedation permits have been lapsed for more than 12 calendar months shall pass an inspection and an evaluation as part of the reinstatement process.

(d) A dentist who administers moderate conscious sedation in violation of this Rule shall be subject to the penalties prescribed by Rule .0701 of this Subchapter.

(e) As a condition for renewal of the moderate conscious sedation permit, the permit holder shall meet the clinical and equipment requirements of Rule .0302 of this Section and shall document the following:

- (1) six hours of continuing education each year in one or more of the following areas, which may be counted toward fulfillment of the continuing education required each calendar year for license renewal:
  - (A) sedation;

- (B) medical emergencies;
- (C) monitoring IV sedation and the use of monitoring equipment;
- (D) pharmacology of drugs and agents used in IV sedation;
- (E) physical evaluation, risk assessment, or behavioral management; or
- (F) airway management;

(2) unexpired ACLS certification, which shall not count towards the six hours of continuing education required in Subparagraph (e)(1) Rule;

(3) that the permit holder and all auxiliaries involved in sedation procedures have practiced responding to dental emergencies as a team at least once every six months in the preceding year;

(4) that the permit holder and all auxiliaries involved in sedation procedures have read the practice's emergency manual in the preceding year; and

(5) that all auxiliaries involved in sedation procedures have completed BLS certification and three hours of continuing education annually in any of the areas set forth in Subparagraph (e)(1) of this rule.

(f) All permit holders applying for renewal of a moderate conscious sedation permit shall be in good standing and their office shall be subject to inspection by the Board.

Authority G.S. 90-28; 90-30.1; 90-31; 90-39(12); 90-48.

## **SECTION .0400 - ENTERAL CONSCIOUS SEDATION**

### **21 NCAC 16Q .0404 CREDENTIALS AND PERMITS FOR MODERATE PEDIATRIC CONSCIOUS SEDATION**

(a) Before a dentist licensed to practice in North Carolina may administer moderate pediatric conscious sedation, the dentist shall obtain a general anesthesia or moderate pediatric conscious sedation permit from the Board by completing an application form and paying a fee of three hundred seventy-five dollars (\$375.00). The application form is available on the Board's website: [www.ncdentalboard.org](http://www.ncdentalboard.org). The permit shall be renewed annually and shall be displayed with the unexpired renewal at all times in the permit holder's facility where it is visible to patients receiving treatment.

(b) A dentist applying for a permit to administer moderate pediatric conscious sedation shall meet at least one of the following criteria:

- (1) completion of a postgraduate program that included pediatric intravenous conscious sedation training;
- (2) completion of a Council On Dental Accreditation (CODA) approved pediatric residency that included intravenous conscious sedation training; or
- (3) completion of a pediatric degree or pediatric residency at a CODA approved institution that includes training in the use and placement of

IVs or intraosseous vascular access. A list of CODA approved institutions that is hereby incorporated by reference, including subsequent amendments and editions, appears at [www.ada.org/coda](http://www.ada.org/coda).

(c) All applicants for moderate pediatric conscious sedation permits shall have completed the training required by Paragraph (b) of this Rule within the last two years or show evidence of moderate pediatric conscious sedation practice within the last two years in another state or U.S. Territory.

(d) All applicants for moderate pediatric conscious sedation permits shall be in good standing with the Board.

*Authority G.S. 90-30.1; 90-39(12); 90-48.*

## **21 NCAC 16Q .0405 MODERATE PEDIATRIC CONSCIOUS SEDATION CLINICAL REQUIREMENTS AND EQUIPMENT**

(a) A dentist administering moderate pediatric conscious sedation shall be responsible to ensure that the facility where the sedation is administered meets the following requirements:

(1) The facility shall be equipped with the following:

- (A) an operatory of size and design to permit access of emergency equipment and personnel and to permit emergency management;
- (B) a CPR board or a dental chair without enhancements, suitable for providing emergency treatment;
- (C) lighting as necessary for specific procedures and back-up lighting;
- (D) suction equipment as necessary for specific procedures, including non-electrical back-up suction;
- (E) positive oxygen delivery system, including full face masks for small, medium, and large and back-up E-cylinder portable oxygen tank apart from the central system;
- (F) oral and nasal airways of various sizes;
- (G) blood pressure monitoring device;
- (H) pulse oximeter;
- (I) precordial stethoscope or capnograph;
- (J) defibrillator;
- (K) EKG monitor;
- (L) thermometer;
- (M) vascular access set-up as necessary for specific procedures, including hardware and fluids;
- (N) syringes as necessary for specific procedures;
- (O) advanced-airways; and
- (P) tourniquet and tape.

(2) The following unexpired drugs shall be maintained in the facility and with access from the operatory and recovery rooms:

- (A) epinephrine;
- (B) Atropine;

(C) appropriate reversal agents;

(D) antihistamine;

(E) corticosteroid;

(F) nitroglycerine;

(G) bronchodilator;

(H) antiemetic; and

(I) Dextrose.

(3) The permit holder shall maintain written emergency and patient discharge protocols and training to familiarize auxiliaries in the treatment of clinical emergencies ~~is~~ shall be provided;

(4) The following records are maintained for at least 10 years:

(A) patient's current written medical history and pre-operative assessment;

(B) drugs administered during the procedure, including route of administration, dosage, strength, time and sequence of administration;

(C) a sedation record;

(D) a consent form, signed by the patient or a guardian, identifying the procedure, risks and benefits, level of sedation and date signed.

(5) The sedation record shall include:

(A) base line vital signs, blood pressure (unless patient behavior prevents recording); oxygen saturation, ET CO2 if capnography is utilized, pulse and respiration rates of the patient recorded in real time at 15 minute intervals;

(B) procedure start and end times;

(C) gauge of needle and location of IV on the patient, if used;

(D) status of patient upon discharge; and

(E) documentation of complications or morbidity; and

(6) The following conditions shall be satisfied during a sedation procedure:

(A) The facility shall be staffed with at least two BLS certified auxiliaries, one of whom shall be dedicated to patient monitoring and recording sedation data throughout the sedation procedure. This requirement shall not apply if the dentist permit holder is dedicated to patient care and monitoring regarding general anesthesia or sedation throughout the sedation procedure and is not performing the surgery or other dental procedure; and

(B) when IV sedation is used, IV infusion shall be administered before the commencement of the procedure and maintained until the patient is ready for discharge.

(b) During an inspection or evaluation, applicants and permit holders who use intravenous sedation shall demonstrate the administration of moderate pediatric conscious sedation on a live patient, including the deployment of an intravenous delivery system, while the evaluator observes. Applicants and permit holders who do not use IV sedation shall describe the proper deployment of an intravenous delivery system to the evaluator and shall demonstrate the administration of moderate pediatric conscious sedation on a live patient while the evaluator observes.

(c) During the demonstration, all applicants and permit holders shall demonstrate competency in the following areas:

- (1) monitoring blood pressure, pulse, and respiration;
- (2) drug dosage and administration;
- (3) treatment of untoward reactions including respiratory or cardiac depression if applicable;
- (4) sterile technique;
- (5) use of BLS certified auxiliaries;
- (6) monitoring of patient during recovery; and
- (7) sufficiency of patient recovery time.

(d) During an inspection or evaluation, the applicant or permit holder shall verbally demonstrate competency in the treatment of the following clinical emergencies:

- (1) laryngospasm;
- (2) bronchospasm;
- (3) emesis and aspiration;
- (4) respiratory depression and arrest;
- (5) angina pectoris;
- (6) myocardial infarction;
- (7) hypertension and hypotension;
- (8) allergic reactions;
- (9) convulsions;
- (10) syncope;
- (11) bradycardia;
- (12) insulin shock;
- (13) cardiac arrest;
- (14) airway obstruction; and
- (15) vascular access.

(e) A moderate pediatric conscious sedation permit holder shall evaluate patients for health risks before starting any sedation procedure as follows:

- (1) a patient who is medically stable and who is ASA I or II shall be evaluated by reviewing the patient's current medical history and medication use; or
- (2) a patient who is not medically stable or who is ASA III or higher shall be evaluated by a consultation with the patient's primary care physician or consulting medical specialist regarding the potential risks posed by the procedure.

(f) Patient monitoring:

- (1) Patients who have been administered moderate pediatric conscious sedation shall be monitored for alertness, responsiveness, breathing, and skin coloration during waiting periods before operative procedures.
- (2) Vital signs shall be continuously monitored when the sedation is no longer being

administered and the patient shall have direct continuous supervision until oxygenation and circulation are stable and the patient is recovered as defined in Subparagraph (f)(3) of this Rule and is ready for discharge from the office.

(3) Recovery from moderate pediatric conscious sedation shall include documentation of the following:

- (A) cardiovascular function stable;
- (B) airway patency uncompromised;
- (C) patient arousable and protective reflexes intact;
- (D) state of hydration within normal limits;
- (E) patient can talk, if applicable;
- (F) patient can sit unaided, if applicable;
- (G) patient can ambulate, if applicable, with minimal assistance; and
- (H) for the special needs patient or a patient incapable of the usually expected responses, the pre-sedation level of responsiveness or the level as close as possible for that patient shall be achieved.

(4) Before allowing the patient to leave the office, the dentist shall determine that the patient has met the recovery criteria set out in Subparagraph (f)(3) of this Rule and the following discharge criteria:

- (A) oxygenation, circulation, activity, skin color, and level of consciousness are sufficient and stable, and have been documented;
- (B) explanation and documentation of written postoperative instructions have been provided to a responsible adult at time of discharge;
- (C) a vested adult is available to transport the patient after discharge; and
- (D) a vested adult shall be available to transport patients for whom a motor vehicle restraint system is required and an additional responsible individual shall be available to attend to the patients.

*Authority G.S. 90-28; 90-30.1; 90-48.*

#### **21 NCAC 16Q .0406 OFF SITE USE OF MODERATE PEDIATRIC CONSCIOUS SEDATION PERMITS**

The holder of a moderate pediatric conscious sedation permit may travel to the office of a licensed dentist and provide moderate pediatric conscious sedation. The permit holder shall be responsible to ensure that the facility where the sedation is administered has been inspected by the Board as required by Rule .0404 of this Section, and that the equipment, facility, and auxiliaries meet the requirements of Rule .0405 of this Section.

Authority G.S. 90-28; 90-30.1; 90-48.

**21 NCAC 16Q .0407 ANNUAL RENEWAL OF MODERATE PEDIATRIC CONSCIOUS SEDATION PERMIT REQUIRED**

(a) Moderate pediatric conscious sedation permits shall be renewed by the Board annually at the same time as dental licenses by paying a one hundred (\$100.00) fee and completing an application available from the Board's website: [www.ncdentalboard.org](http://www.ncdentalboard.org).

(b) If the completed renewal application and renewal fee are not received before January 31 of each year, a one hundred (\$100.00) late fee shall be paid.

(c) Any dentist who fails to renew a moderate pediatric conscious sedation permit before March 31 of each year shall complete a reinstatement application, pay the renewal fee, late fee, and comply with all conditions for renewal set out in this Rule. Dentists whose sedation permits have been lapsed for more than 12 calendar months shall pass an inspection and an evaluation as part of the reinstatement process.

(d) A dentist who administers moderate pediatric conscious sedation in violation of this Rule shall be subject to the penalties prescribed by Rule .0701 of this Subchapter.

(e) As a condition for renewal of the moderate pediatric conscious sedation permit, the permit holder shall meet the clinical and equipment requirements of Rule .0405 of this Section and shall document the following:

- (1) six hours of continuing education each year in one or more of the following areas, which may be counted toward fulfillment of the continuing education required each calendar year for license renewal:
  - (A) sedation;
  - (B) medical emergencies;
  - (C) monitoring IV sedation and the use of monitoring equipment;
  - (D) pharmacology of drugs and agents used in IV sedation;
  - (E) physical evaluation, risk assessment, or behavioral management; or
  - (F) airway management;
- (2) unexpired PALS certification which shall not count towards the six hours of continuing education required in Subparagraph (e)(1) of this rule;
- (3) that the permit holder and all auxiliaries involved in sedation procedures have practiced responding to dental emergencies as a team at least once every six months in the preceding year;
- (4) that the permit holder and all auxiliaries involved in sedation procedures have read the practice's emergency manual in the preceding year; and
- (5) that all auxiliaries involved in sedation procedures have completed BLS certification and three hours of continuing education annually in any of the areas set forth in Subparagraph (e)(1) of this rule.

(f) All permit holders applying for renewal of a moderate pediatric conscious sedation permit shall be in good standing and their office shall be subject to inspection by the Board.

Authority G.S. 90-28; 90-30.1; 90-31; 90-39(12); 90-48.

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**CHAPTER 36 - BOARD OF NURSING**

*Notice is hereby given in accordance with G.S. 150B-21.2 that the Board of Nursing intends to amend the rules cited as 21 NCAC 36 .0120, .0217.*

**Link to agency website pursuant to G.S. 150B-19.1(c):** [www.ncbon.com](http://www.ncbon.com)

**Proposed Effective Date:** June 1, 2017

**Public Hearing:**

**Date:** February 23, 2017

**Time:** 9:00 a.m.

**Location:** NC Board of Nursing, 4516 Lake Boone Trail, Raleigh, NC 27607

**Reason for Proposed Action:** *The current rule places a greater procedural burden and more restriction on the Board of Nursing than is required by the Administration Procedures Act and fails to capture needed nursing practice. Amendments include technical changes throughout the rule and the creation of new violations in section (a) where a need was seen to capture acts previously outside the Board's disciplinary jurisdiction. Lastly, deletions were made of provisions in the rule that are covered in law pursuant to the North Carolina General Statutes or that generally place unnecessary burden not required by law on staff during the enforcement/disciplinary process.*

**Comments may be submitted to:** Angela H. Ellis, NC Board of Nursing, PO Box 2129, Raleigh, NC 27602-2129, phone (919)782-3211 x259, fax (919)781-9461, email [angela@ncbon.com](mailto:angela@ncbon.com).

**Comment period ends:** March 20, 2017

**Procedure for Subjecting a Proposed Rule to Legislative Review:** If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the



Commission, please call a Commission staff attorney at 919-431-3000.

**Fiscal impact (check all that apply).**

- ☐ **State funds affected**
- ☐ **Environmental permitting of DOT affected**
- ☐ **Analysis submitted to Board of Transportation**
- ☐ **Local funds affected**
- ☐ **Substantial economic impact (≥\$1,000,000)**
- ☐ **Approved by OSBM**
- ☒ **No fiscal note required by G.S. 150B-21.4**

**SECTION .0100 - GENERAL PROVISIONS**

**21 NCAC 36 .0120 DEFINITIONS**

The following definitions apply throughout this chapter unless the context indicates otherwise:

- (1) "Administrative Law Counsel" means an attorney whom the Board of Nursing has retained to serve as procedural officer for contested cases.
- ~~(4)~~(2) "Academic term" means one semester of a school year.
- ~~(2)~~(3) "Accountability/Responsibility" means being answerable for action or inaction of self, and of others in the context of delegation or assignment.
- ~~(3)~~(4) "Accredited institution" means an institution accredited by a United States Department of Education approved institutional accrediting body.
- ~~(4)~~(5) "Active Practice" means activities that are performed, either for compensation or without compensation, consistent with the scope of practice for each level of licensee as defined in G.S. 90-171.20(4), (7) and (8).
- ~~(5)~~(6) "Advanced Practice Registered Nurse (APRN)" means a nurse practitioner, nurse anesthetist, nurse-midwife or clinical nurse specialist.
- ~~(6)~~(7) "Assigning" means designating responsibility for implementation of a specific activity or set of activities to a person licensed and competent to perform such activities.
- ~~(7)~~(8) "Clinical experience" means application of nursing knowledge in demonstrating clinical judgment in a current or evolving practice setting where the student provides care to clients under the supervision of faculty or a preceptor.
- ~~(8)~~(9) "Clinical judgment" means the application of the nursing knowledge, skills, abilities, and experience in making decisions about client care.
- ~~(9)~~(10) "Competent" means having the knowledge, skills, and ability to safely perform an activity or role.
- ~~(10)~~(11) "Continuing Competence" means the on-going acquisition and application of knowledge and the decision-making, psychomotor, and interpersonal skills expected of the licensed nurse resulting in nursing care that contributes to the health and welfare of clients served.
- ~~(11)~~(12) "Contact Hour" means 60 minutes of an organized learning experience.
- ~~(12)~~(13) "Continuing Education Activity" means a planned, organized learning experience that is related to the practice of nursing or contributes to the competency of a nurse as outlined in 21 NCAC 36 .0223 Subparagraph (a)(2).
- ~~(13)~~(14) "Controlling institution" means the degree-granting organization or hospital under which the nursing education program is operating.
- ~~(14)~~(15) "Curriculum" means an organized system of teaching and learning activities directed toward the achievement of specified learning objectives and outcomes.
- ~~(15)~~(16) "Delegation" means transferring to a competent individual the authority to perform a selected nursing activity in a selected situation. The nurse retains accountability/responsibility for the delegation.
- ~~(16)~~(17) "Debriefing" means an activity that follows a clinical or simulated experience and is led by a trained faculty facilitator. Students' reflective thinking is encouraged, and feedback is provided regarding the students' performance during discussion of various aspects of the completed experiences.
- ~~(17)~~(18) "Dimensions of Practice" means those aspects of nursing practice that include professional responsibility, knowledge-based practice, ethical and legal practice, and collaborating with others, consistent with G.S. 90-171.20(4), (7) and (8).
- ~~(18)~~(19) "Distance education" means teaching and learning strategies used to meet the learning needs of students when the students and faculty are not in the same location.
- ~~(19)~~(20) "External standardized examination" means a commercially available standardized predictive test that provides individual student scores that are linked to a probability of passing the NCLEX™ examination.
- ~~(20)~~(21) "Faculty directed clinical practice" means clinical experiences provided under the accountability/responsibility and direction of nursing program faculty.
- ~~(21)~~(22) "Focused client care experience" means a clinical experience that emulates an entry-level work experience in nursing. The intent is to assist the student to transition to an entry-level nursing practice. There is no specific setting requirement. Supervision may be by faculty and preceptor dyad or direct faculty supervision.
- ~~(22)~~(23) "Interdisciplinary faculty" means faculty from professions other than nursing.

- ~~(23)~~(24) "Interdisciplinary team" means all individuals involved in providing a client's care who cooperate, collaborate, communicate, and integrate care to ensure that care is continuous and reliable.
- ~~(24)~~(25) "Learning resources" means materials that faculty use to assist students in meeting the expectations for learning defined by the curriculum.
- ~~(25)~~(26) "Level of Licensure" means practice of nursing by either a Licensed Practical Nurse or a Registered Nurse as defined in G.S. 90-171.20(7) and (8).
- ~~(26)~~(27) "Level of student" means the point in the program to which the student has progressed.
- ~~(27)~~(28) "Maximum enrollment" means the total number of pre-licensure students that can be enrolled in the nursing program at any one time. The number reflects the capacity of the nursing program based on demonstrated resources sufficient to implement the curriculum.
- ~~(28)~~(29) "Methods of Instruction" means the planned process through which teacher and student interact with selected environment and content so that the response of the student gives evidence that learning has taken place. It is based upon stated course objectives and outcomes for learning experiences in classroom, laboratory, simulation and clinical settings.
- ~~(29)~~(30) "National Credentialing Body" means a credentialing body that offers certification or re-certification in the licensed nurse's or Advanced Practice Registered Nurse's specialty area of practice.
- ~~(30)~~(31) "NCLEX-PN™" means the National Council Licensure Examinations for Practical Nurses.
- ~~(31)~~(32) "NCLEX-RN™" means the National Council Licensure Examinations for Registered Nurses.
- ~~(32)~~(33) "Nursing Accreditation body" means a national nursing accrediting body, recognized by the United States Department of Education.
- ~~(33)~~(34) "Nursing program faculty" means individuals employed full or part-time by academic institution responsible for developing, implementing, ~~evaluation~~ evaluating and updating nursing curricula.
- ~~(34)~~(35) "Nursing project" means a project or research study of a topic related to nursing practice that includes a problem statement, objectives, methodology and summary of findings.
- ~~(35)~~(36) "Participating in" means to have a part in or contribute to the elements of the nursing process.
- ~~(36)~~(37) "Pattern of noncompliance" means episodes of recurring non-compliance with one or more Rules in Section .0300.
- ~~(37)~~(38) "Preceptor" means a registered nurse at or above the level of licensure that an assigned

student is seeking, who may serve as a teacher, mentor, role model and supervisor for a faculty directed clinical experience.

- ~~(38)~~(39) "Prescribing Authority" means the legal permission granted by the Board of Nursing and Medical Board for the nurse practitioner and nurse midwife to procure and prescribe legend and controlled pharmacological agents and devices to a client in compliance with Board of Nursing rules and other applicable federal and state law and regulations.
- ~~(39)~~(40) "Program Closure" means to cease operation of a nursing program.
- ~~(40)~~(41) "Program" means a course of study that prepares an individual to function as an entry-level practitioner of nursing. The three "Program Types" are:
- (a) BSN - Curriculum components for Bachelor of Science in Nursing provides for the attainment of knowledge and skill sets in the current practice in nursing, nursing theory, nursing research, community and public health, health care policy, health care delivery and finance, communications, therapeutic interventions and current trends in health care. For this program type, the client is the individual, family, group, and community.
  - (b) Associate Degree in Nursing (ADN)/Diploma in Registered Nursing - Curriculum components for the ADN/Diploma in Registered Nursing provides for the attainment of knowledge and skill sets in the current practice in nursing, community concepts, health care delivery, communications, therapeutic interventions and current trends in health care. For this program type, client is the individual, group of individuals, and family.
  - (c) Practical Nurse Diploma - Curriculum prepares for providing direct nursing care under the supervision of a registered nurse or other health care provider as defined by the Nursing Practice Act. Curriculum components provide for the attainment of knowledge and skill sets in the current practice of practical nursing, communications, therapeutic interventions, including pharmacology, growth and development, and current trends in health care. For this program type client is the individual or group of individuals.

- (42) "Prosecuting Attorney" means the attorney representing the Board of Nursing to prepare and prosecute contested cases.
- (41)(43) "Review" means collecting and analyzing information to assess compliance with Section .0300 of this Chapter. Information may be collected by multiple methods, including review of written reports and materials, on-site observations, review of documents, and in-person or telephone interview(s) and conference(s).
- (42)(44) "Rescind Approval" means a Board action that removes the approval status previously granted by the Board.
- (43)(45) "Self Assessment" means the process whereby an individual reviews her or his own nursing practice and identifies the knowledge and skills possessed as well as those skills to be strengthened or acquired.
- (44)(46) "Simulation" means a technique, not a technology, to replace or amplify clinical experiences with guided experiences that evoke or replicate substantial aspects of the real world of nursing practice in a fully interactive manner.
- (45)(47) "Specialty" means a broad, population-based focus of study encompassing the common health-related problems of a particular group of patients and the likely co-morbidities, interventions, and responses to those problems.
- (46)(48) "Supervision" means the provision of guidance or direction, evaluation, and follow-up by a licensed nurse to accomplish an assigned or delegated nursing activity or set of activities.
- (47)(49) "Survey" means an on-site visit for the purpose of gathering data in relation to reviewing a nursing program's compliance with Section .0300 of this Chapter.

Authority G.S. 90-171.23; 90-171.38.

## SECTION .0200 – LICENSURE

### 21 NCAC 36 .0217 INVESTIGATIONS; DISCIPLINARY HEARINGS

(a) The definitions contained in G.S. 90-171.20 and G.S. 150B-2 (01), (2), (2b), (3), (4), (5), (8), (8a), and (8b) apply. In addition, the following definitions apply:

- (1) ~~"Investigation" means an exploration of the events and circumstances related to reported information in an effort to determine if there is a violation of any provisions of this Act or any rule promulgated by the Board.~~
- (2) ~~"Administrative Law Counsel" means an attorney whom the Board of Nursing has retained to serve as procedural officer for contested cases.~~
- (3) ~~"Prosecuting Attorney" means the attorney retained by the Board of Nursing to prepare and prosecute contested cases.~~

~~(b) A nursing license which has been forfeited under G.S. 15A-1331A may not be reinstated until the licensee has successfully complied with the court's requirements, has petitioned the Board for reinstatement, has appeared before the Licensure Committee, and has had reinstatement approved. The license may initially be reinstated with restrictions.~~

~~(c)(a) Behaviors and activities which may result in disciplinary action by the Board include the following:~~

- ~~(1) drug or alcohol abuse; abuse or use of any substance or other agents while on duty or on call to the extent that such use may impair the nurse's ability to safely practice nursing;~~
- ~~(2) testing positive on a drug screen for a non-prescribed drug or illicit substance;~~
- ~~(2)(3) illegally obtaining, possessing or distributing drugs or alcohol for personal or other use, or other violations of G.S. 90-86 to 90-113.8; et seq.;~~
- ~~(3)(4) commission conviction of any crime which bears on a licensee's fitness to practice nursing as set out in G.S. 90-171.48(a)(2); nursing;~~
- ~~(4)(5) failure to make available to another health care professional any client information crucial to the safety of the client's health care; information;~~
- ~~(5) delegating responsibilities to a person when the licensee delegating knows or has reason to know that the competency of that person is impaired by physical or psychological ailments, or by alcohol or other pharmacological agents, prescribed or not;~~
- ~~(6) practicing or offering to practice beyond the scope permitted by law;~~
- ~~(7) accepting and performing professional responsibilities which the licensee knows or has reason to know that he or she is not competent to perform;~~
- ~~(8) performing, without adequate supervision, professional services which the licensee is authorized to perform only under the supervision of a licensed professional, except in an emergency situation where a person's life or health is in danger; professional;~~
- ~~(9) abandoning or neglecting a an assigned client who is in need of nursing care, without making reasonable arrangements for the continuation of such equivalent nursing care;~~
- ~~(10) neglecting a client in need of nursing care;~~
- ~~(40)(11) threatening, harassing, abusing, or intimidating a client either physically or verbally; client;~~
- ~~(44)(12) failure to maintain an accurate record for each client which records of all pertinent health care information as defined in Rule .0224(f)(2) or .0225(f)(2); for each client;~~
- ~~(42)(13) failure to exercise supervision over persons who are authorized to practice only under the supervision of the licensed professional;~~
- ~~(43)(14) exercising undue influence on the client, including the promotion of the sale of services;~~

- ~~appliances, or drugs client for the financial or personal gain of the practitioner or of a third party; licensee;~~
- (14)(15) directly or indirectly offering, giving, soliciting, or receiving or agreeing to receive, any fee or other consideration to or from a third party for the referral of a client, or other violations of G.S. 90-401;
- (15)(16) failure to file a report, or filing a false report, required by law or by the ~~Board~~, Board or impeding or obstructing such filing or inducing another person to do so;
- (16)(17) ~~obtaining, accessing or revealing identifiable data, or healthcare information obtained in a professional capacity, without prior consent of the client, from a client record or other source, except as required by professional duties or authorized or required by law;~~
- (17) ~~guaranteeing that a cure will result from the performance of professional services;~~
- (18) ~~altering a license, using a license that has been altered or permitting or allowing another person to use his or her license for the purpose of nursing. Altering is defined to include changing the expiration date, certification number, or any other information appearing on the license; presenting false or fraudulent licensure information for any purpose;~~
- (19) ~~assigning or delegating professional responsibilities to a person when the licensee assigning or delegating such responsibilities knows or has reason to know that such a person is not qualified by training, by experience, experience or by licensure;~~
- (20) ~~assigning or delegating responsibilities to a person when the licensee assigning or delegating knows or has reason to know that the competency of that person is impaired by sleep deprivation, physical or psychological conditions or by alcohol or other agents, prescribed or not;~~
- (21) ~~accepting responsibility for client care while impaired by sleep deprivation, physical or psychological conditions; or by alcohol or other pharmacological agents; agents, prescribed or not;~~
- (22) ~~falsifying a client's record or the controlled substance records of the agency; or records;~~
- (23) ~~engaging in any activities of a sexual nature with a client including kissing, fondling or touching while responsible for the care of that individual. violating boundaries of a professional relationship including but not limited to physical, sexual, emotional or financial exploitation of the client or the client's significant other(s);~~
- (24) ~~misappropriating, in connection with the practice of nursing, anything of value or benefit, including but not limited to, any property, real or personal of the client, employer or any other person or entity, or failing to take precautions to prevent such misappropriation; or~~
- (20)(25) violating any term of probation, condition, or limitation imposed on the licensee by the ~~Board~~; Board.
- (d)(b) When a person licensed to practice nursing as a licensed practical nurse or as a registered nurse is also licensed or has privilege to practice in another jurisdiction and that other jurisdiction takes disciplinary action against the licensee, the North Carolina Board of Nursing may summarily impose the same or lesser disciplinary action upon receipt of the other jurisdiction's action. The licensee may request a hearing. At the hearing the issues ~~will shall~~ be limited to:
- (1) whether the person against whom action was taken by the other jurisdiction and the North Carolina licensee are the same person;
  - (2) whether the conduct found by the other jurisdiction also violates the North Carolina Nursing Practice Act; and
  - (3) whether the sanction imposed by the other jurisdiction is lawful under North Carolina law.
- (e) ~~Before the North Carolina Board of Nursing makes a final decision in any contested case, the person, applicant or licensee affected by such decision shall be afforded an administrative hearing pursuant to the provisions of G.S.150B, Article 3A.~~
- (1) ~~The Paragraphs contained in this Rule shall apply to conduct of all contested cases heard before or for the North Carolina Board of Nursing.~~
  - (2) ~~The following general statutes, rules, and procedures apply unless another specific statute or rule of the North Carolina Board of Nursing provides otherwise: Rules of Civil Procedure as contained in G.S. 1A-1 and Rules of Evidence pursuant to G.S. Chapter 8C; G.S. 90-86 through 90-113.8; 21 NCAC 36 .0224-.0225; Article 3A, Chapter 150B; and Rule 6 of the General Rules of Practice for Superior and District Court.~~
  - (3) ~~Every document filed with the Board of Nursing shall be signed by the person, applicant, licensee, or his attorney who prepares the document and shall contain his name, title/position, address, and telephone number. If the individual involved is a licensed nurse the nursing license certificate number shall appear on all correspondence with the Board of Nursing.~~
- (f)(c) ~~In accordance with G.S. 150B-3(c) a license may be summarily suspended if the public health, safety, or welfare requires emergency action. This determination is delegated to the Chairman or Executive Director of the Board pursuant to G.S. 90-171.23(b)(3). Such a finding shall be incorporated with the order of the Board of Nursing and If a summary suspension is issued pursuant to G.S. 150B-3(c), the order is effective on the date specified in the order or on service of the certified copy of the order at the last known address of the licensee, whichever is~~

later, and continues to be effective during the proceedings. Failure to receive the order because of refusal of service or unknown address does not invalidate the order. Proceedings shall be commenced in a timely manner.

(g) Board staff shall issue a Letter of Charges only upon completion of an investigation, by authorized Board staff, of a written or verbal complaint and review with legal counsel or prosecuting attorney or Executive Director.

(1) Subsequent to an investigation and validation of a complaint, a Letter of Charges shall be sent on behalf of the Board of Nursing to the person who is the subject of the complaint.

(A) The Letter of Charges shall be served in accordance with G.S. 1A-1, Rule 4, Rules of Civil Procedure.

(B) The Letter of Charges serves as the Board's formal notification to the person that an allegation of possible violation(s) of the Nursing Practice Act has been initiated.

(C) The Letter of Charges does not in and of itself constitute a contested case.

(2) The Letter of Charges shall include the following:

(A) a short and plain statement of the factual allegations;

(B) a citation of the relevant sections of the statutes or rules involved;

(C) notification that a settlement conference will be scheduled upon request;

(D) explanation of the procedure used to govern the settlement conference;

(E) notification that if a settlement conference is not requested, or if held, does not result in resolution of the case, an administrative hearing shall be scheduled; and

(F) if applicable, any sanction or remediation in accordance with Board adopted policy may be included.

(3) A case becomes a contested case after the person disputes the allegations contained in the Letter of Charges, requests an administrative hearing, or refuses to accept a settlement offer extended by the Board of Nursing.

(h) No Board member shall discuss with any person the merits of any case pending before the Board of Nursing. Any Board member who has direct knowledge about a case prior to the commencement of the proceeding shall disqualify himself from any participation with the majority of the Board of Nursing hearing the case.

(i) A settlement conference, if requested by the person, shall be held for the purpose of attempting to resolve a dispute through informal procedures prior to the commencement of formal administrative proceedings.

(1) The conference shall be held in the offices of the Board of Nursing, unless another site is

designated by mutual agreement of all involved parties.

(2) All parties shall attend or be represented at the settlement conference. The parties shall be prepared to discuss the alleged violations and the incidents on which these are based.

(3) Prior to the commencement of the settlement conference, a form shall be signed by the person which invalidates all previous offers made to the person by the Board.

(4) At the conclusion of the day during which the settlement conference is held, a form shall be signed by all parties which indicates whether the settlement offer is accepted or rejected. Subsequent to this decision:

(A) if a settlement is reached, the Board of Nursing shall forward a written settlement agreement containing all conditions of the settlement to the other party(ies); or

(B) if a settlement cannot be reached, the case shall proceed to a formal administrative hearing.

(j) Disposition may be made of any contested case or an issue in a contested case by stipulation, agreement, or consent order at any time prior to or during the hearing of a contested case.

(k) The Board of Nursing shall give the parties in a contested case a Notice of Hearing not less than 15 calendar days before the hearing. The Notice shall be given in accordance with G.S. 1A-1, Rule 4, Rules of Civil Procedure. The notice shall include:

(1) Acknowledgment of service, or attempted service, of the Letter of Charges in compliance with Part (g)(1)(A) of this Rule;

(2) Date, time, and place of the hearing;

(3) Notification of the right of a party to represent himself or to be represented by an attorney;

(4) A statement that, pursuant to Paragraph (n) of this Rule, subpoenas may be requested by the licensee to compel the attendance of witnesses or the production of documents;

(5) A statement advising the licensee that a notice of representation, containing the name of licensee's counsel, if any, shall be filed with the Board of Nursing not less than 10 calendar days prior to the scheduled date of the hearing;

(6) A statement advising the licensee that a list of all witnesses for the licensee shall be filed with the Board of Nursing not less than 10 calendar days prior to the scheduled date of the hearing; and

(7) A statement advising the licensee that failure to appear at the hearing may result in the allegations of the Letter of Charges being taken as true and that the Board may proceed on that assumption.

(l) Pre hearing conferences may be held to simplify the issues to be determined, to obtain stipulations in regards to testimony or exhibits, to obtain stipulations of agreement on nondisputed facts or the application of particular laws, to consider the proposed

witnesses for each party, to identify and exchange documentary evidence intended to be introduced at the hearing, and to consider such other matters that may be necessary or advisable for the efficient and expeditious conduct of the hearing.

- (1) ~~The pre hearing conference shall be conducted in the offices of the Board of Nursing, unless another site is designated by mutual agreement of all parties.~~
- (2) ~~The pre hearing conference shall be an informal proceeding and shall be conducted by a Board designated administrative law counsel.~~
- (3) ~~All agreements, stipulations, amendments, or other matters resulting from the pre hearing conference shall be in writing, signed by all parties, and introduced into the record at the beginning of the formal administrative hearing.~~

(m) ~~Administrative hearings conducted before a majority of Board members shall be held in Wake County or, by mutual consent in another location when a majority of the Board has convened in that location for the purpose of conducting business. For those proceedings conducted by an Administrative Law Judge the venue shall be determined in accordance with G. S. 150B 38(e). All hearings conducted by the Board of Nursing shall be open to the public.~~

(n) ~~The Board of Nursing, through its Executive Director, may issue subpoenas for the Board or a licensee, in preparation for, or in the conduct of, a contested case.~~

- (1) ~~Subpoenas may be issued for the appearance of witnesses or the production of documents or information, either at the hearing or for the purposes of discovery.~~
- (2) ~~Requests by a licensee for subpoenas shall be made in writing to the Executive Director and shall include the following:~~
  - (A) ~~the full name and home or business address of all persons to be subpoenaed; and~~
  - (B) ~~the identification, with specificity, of any documents or information being sought.~~
- (3) ~~Subpoenas shall include the date, time, and place of the hearing and the name and address of the party requesting the subpoena. In the case of subpoenas for the purpose of discovery, the subpoena shall include the date, time, and place for responding to the subpoena.~~
- (4) ~~Subpoenas shall be served as provided by the Rules of Civil Procedure, G.S. 1A-1. The cost of service, fees, and expenses of any witnesses or documents subpoenaed shall be paid by the party requesting the witnesses.~~

(e)(d) When practical, All all motions related to a contested case, except motions for continuance and those made during the hearing, shall be in writing and submitted to the Board of Nursing at least 10 calendar days before the hearing. Pre-hearing motions shall be heard at a pre-hearing conference or at the contested case hearing prior to the commencement of testimony. The designated administrative law counsel shall hear the motions and the response from the non-moving party pursuant to Rule 6 of the

General Rules of Practice for the Superior and District Courts and rule on such motions. ~~If the pre hearing motions are heard by an Administrative Law Judge from Office of Administrative Hearings the provisions of G.S. 150B 40(e) shall govern the proceedings.~~

(p)(c) Motions for a continuance of a hearing may be granted upon a showing of good cause. Motions for a continuance must shall be in writing and received in the office of the Board of Nursing no less than seven calendar days before the hearing date. In determining whether good cause exists, consideration will be given to the ability of the party requesting a continuance to proceed effectively without a continuance. A motion for a continuance filed less than seven calendar days from the date of the hearing shall be denied unless the reason for the motion could not have been ascertained earlier. Motions for continuance filed prior to the date of the hearing shall be ruled on by the Administrative Law Counsel of the Board. All other motions Motions for continuance shall be ruled on by the majority of the Board members or Administrative Law Counsel sitting at hearing, filed on the date of hearing shall be ruled on by the Board.

(q)(f) All hearings by the Board of Nursing shall be conducted by a majority of members of the Board of Nursing, except as provided in Subparagraph (1) of this Paragraph. The Board of Nursing shall designate one of its members to preside at the hearing. The Board of Nursing shall designate an administrative law counsel who shall advise the presiding officer. The seated members of the Board of Nursing shall hear all evidence, make findings of fact and conclusions of law, and issue an order reflecting a majority decision of the Board.

(1)(g) When a majority of the members of the Board of Nursing is unable or elects not to hear a contested case, the Board of Nursing shall request the designation of an administrative law judge from the Office of Administrative Hearings to preside at the hearing. The provisions of G.S. 150B, Article 3A and 21 NCAC 36 .0217 shall govern a contested case in which an administrative law judge is designated as the Hearing Officer.

(2) ~~In the event that any party or attorney or other representative of a party engages in conduct which obstructs the proceedings or would constitute contempt if done in the General Court of Justice, the Board may apply to the applicable superior court for an order to show cause why the person(s) should not be held in contempt of the Board and its processes.~~

(3) ~~During a hearing, if it appears in the interest of justice that further testimony should be received and sufficient time does not remain to conclude the testimony, the Board of Nursing may continue the hearing to a future date to allow for the additional testimony to be taken by deposition or to be presented orally. In such situations and to such extent as possible, the seated members of the Board of Nursing and the designated administrative law counsel shall receive the additional testimony. In the event that new members of the Board or a different administrative law counsel must participate, a copy of the transcript of the hearing shall be~~

~~provided to them prior to the receipt of the additional testimony.~~

~~(f) All parties have the right to present evidence, rebuttal testimony, and argument with respect to the issues of law, and to cross examine witnesses. The North Carolina Rules of Evidence in G.S. 8C shall apply to contested case proceedings, except as provided otherwise in this Rule and G.S. 150B-41.~~

~~(h) Sworn affidavits may be introduced by mutual agreement from all parties.~~

~~(2) All oral testimony shall be under oath or affirmation and shall be recorded. Unless otherwise stipulated by all parties, witnesses are excluded from the hearing room until such time that they have completed their testimony and have been released.~~

~~(s) Any form or Board approved policy or procedure referenced in this Rule, or any rules applicable to a case, are available upon request from the Board of Nursing and shall be supplied at cost.~~

Authority G.S. 14-208.5; 15A-1331A; 90-171.23(b)(3)(7); 90-171.37; 90-171.47; 90-401; 150B-3(c); 150B-11; 150B-14; 150B-38 through 150B-42.

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## CHAPTER 48 – BOARD OF PHYSICAL THERAPY EXAMINERS

*Notice is hereby given in accordance with G.S. 150B-21.2 that the Board of Physical Therapy Examiners intends to amend the rule cited as 21 NCAC 48F .0102.*

**Link to agency website pursuant to G.S. 150B-19.1(c):**  
<https://www.ncptboard.org>

**Proposed Effective Date:** August 1, 2017

### Public Hearing:

**Date:** March 15, 2017

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

**Location:** Siena Hotel, 1505 East Franklin Street, Chapel Hill, NC 27514

**Reason for Proposed Action:** *The proposed amendments to this rule will revise license renewal fees. These fees have not been revised since 2000, however there has been a steady increase in licensees since then. The increase in the number of licensees (6502 since 2000) has required hiring additional staff personnel to provide better technology, including website resources and monitoring for consumer access to information, online complaint filing and customer service for public protection. In addition, the Board is experiencing increased legal expenses.*

**Comments may be submitted to:** Kathy O. Arney, PT, MA, NC Board of PT Examiners, 18 West Colony Place, Suite 140, Durham, NC 27705, phone (919) 490-6393, fax (919) 490-5106, email [karney@ncptboard.org](mailto:karney@ncptboard.org)

**Comment period ends:** March 20, 2017

### Procedure for Subjecting a Proposed Rule to Legislative Review:

If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

### Fiscal impact (check all that apply).

- ☐ State funds affected
- ☐ Environmental permitting of DOT affected
- ☐ Analysis submitted to Board of Transportation
- ☐ Local funds affected
- ☐ Substantial economic impact (≥\$1,000,000)
- ☐ Approved by OSBM
- ☒ No fiscal note required by G.S. 150B-21.4

## SUBCHAPTER 48F - CERTIFICATES: FEES: INVESTIGATIONS: RECORD OF LICENSEES

### SECTION .0100 - CERTIFICATES: FEES: INVESTIGATIONS: RECORD OF LICENSEES

#### 21 NCAC 48F .0102 FEES

(a) The following fees are charged by the Board:

- (1) application for physical therapist licensure, one hundred fifty dollars (\$150.00);
- (2) application for physical therapist assistant licensure, one hundred fifty dollars (\$150.00);
- (3) renewal for all persons, one hundred twenty dollars ~~(\$100.00); (\$120.00);~~
- ~~(4) penalty for late renewal, twenty dollars (\$20.00) plus renewal fee;~~
- ~~(5)~~(4) revival of license lapsed less than five years, thirty dollars (\$30.00) plus renewal fee;
- ~~(6)~~(5) transfer of licensure information fee, including either the examination scores or licensure verification or both, thirty dollars (\$30.00);
- ~~(7)~~(6) retake examination, sixty dollars (\$60.00);
- ~~(8)~~(7) certificate replacement or duplicate, thirty dollars (\$30.00);
- ~~(9) directory of licensees, ten dollars (\$10.00);~~
- ~~(10)~~(8) licensee list or labels or any portion thereof for physical therapists, sixty dollars (\$60.00);
- ~~(11)~~(9) licensee list or labels or any portion thereof for physical therapist assistants, sixty dollars (\$60.00); and
- ~~(12)~~(10) processing fee for returned checks, maximum allowed by law.

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***PROPOSED RULES***

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(b) The application fee is not refundable.

(c) Payment of application fees listed in Subparagraphs (a)(1) and (2) of this Rule must be made by certified check, cash, credit card or debit card.

*Authority G.S. 25-3-506; 90-270.29; 90-270.33.*



**Note from the Codifier:** The rules published in this Section of the NC Register are temporary rules reviewed and approved by the Rules Review Commission (RRC) and have been delivered to the Codifier of Rules for entry into the North Carolina Administrative Code. A temporary rule expires on the 270<sup>th</sup> day from publication in the Register unless the agency submits the permanent rule to the Rules Review Commission by the 270<sup>th</sup> day.

This section of the Register may also include, from time to time, a listing of temporary rules that have expired. See G.S. 150B-21.1 and 26 NCAC 02C .0500 for adoption and filing requirements.

## TITLE 04 – DEPARTMENT OF COMMERCE

**Rule-making Agency:** North Carolina Credit Union Division

**Rule Citation:** 04 NCAC 06C .0407

**Effective Date:** January 1, 2017

**Date Approved by the Rules Review Commission:** December 15, 2016

**Reason for Action:** A recent deferral regulation. 12 C.F.R. Part 723. The National Credit Union Administration has modified the Member Business Loans rule with changes that become effective January 1, 2017. State chartered credit unions will be disadvantaged without the opportunity to follow similar or the same rule. The modifications in the Rule will allow more access to commercial and business lending for consumers.

## CHAPTER 06 – CREDIT UNION DIVISION

### SUBCHAPTER 06C – CREDIT UNIONS

#### SECTION .0400 - LOANS

#### 04 NCAC 06C .0407 COMMERCIAL LENDING AND MEMBER BUSINESS LOANS

(a) ~~Prohibited fees. 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 prohibited by this Section. For purposes of this Section, "senior management employees" means the Credit Union's chief executive officer (typically this individual holds the title of President or Treasurer/Manager), any assistant chief executive officers (e.g., Assistant President, Vice President or Assistant Treasurer/Manager), and the chief financial officer (Comptroller), and "immediate family member" means a spouse or other family member living in the same household.~~

(b) ~~Member Business Loans.~~

(1) ~~Definitions:~~

(A) ~~Member business loans mean any loan, line of credit, or letter of credit, the proceeds of which will be used for commercial, corporate, business, investment property or venture, or agriculture purpose, except that the~~

~~following shall not be considered member business loans for purposes of this Section:~~

- (i) ~~A loan or loans fully secured by a lien on a one to four family dwelling that is the member's primary residence.~~
- (ii) ~~A loan that is fully secured by shares in the credit union or deposits in other financial institutions.~~
- (iii) ~~A loan meeting the general definition of member business loans under Part (b)(1)(A) of this Rule, and, made to a borrower or an associated member, which, when added to other such loans to the borrower or associated member, is less than fifty thousand dollars (\$50,000).~~
- (iv) ~~A loan, the repayment of which is fully insured or fully guaranteed by, or where there is an advance commitment to purchase in full by, any agency of the federal government or of a state or any of its political subdivisions.~~
- (v) ~~A loan granted by a corporate credit union operating under the provisions of the North Carolina General Statutes to another credit union.~~
- (B) ~~Reserves means reserve fund, undivided earnings, current earnings, and excludes the Allowance for Loan Losses.~~
- (C) ~~Associated Member means any member with a shared ownership, investment or other pecuniary interest in a business or commercial endeavor with the borrower.~~
- (D) ~~Immediate Family Member means a spouse, or other family member living in the same household.~~
- (E) ~~Loan to Value (LTV) ratio means the quotient of the aggregate amount of all sums borrowed from all sources on an~~

- ~~item of collateral divided by the market value of the collateral used to secure the loan.~~
- (F) ~~Construction or development loan means a financing arrangement for the purpose of acquisition of property or rights to property or rights to property including land or structures with the intent of conversion into income-producing property including residential housing for rental or sale, commercial or industrial use, or a similar use.~~
- (2) ~~Requirements. Member business loans, as defined in Part (b)(1)(A) of this Rule may be made by credit unions only in accordance with the applicable provisions of Rule .0409 and .0205(d) and the following additional requirements:~~
- (A) ~~Written loan policies. The Board of Directors must adopt specific business loan policies and review them at least annually. The policies shall, at a minimum, address the following:~~
- (i) ~~Types of business loans that will be made;~~

(ii) ~~The credit union's trade area for business loans;~~

(iii) ~~Maximum amount of credit union assets, in relation to reserves, that will be invested in business loans;~~

(iv) ~~Maximum amount of credit union assets, in relation to reserves, that will be invested in a given category or type of business loan;~~

(v) ~~Maximum amount of credit union assets, in relation to reserves, that will be loaned to any one member or group of associated members, subject to Subpart (b)(2)(C)(i) of this Rule;~~

(vi) ~~Qualifications and experience of personnel involved in making and administering business loans with a minimum of two years direct experience with this type of lending;~~

(vii) ~~Analysis of the ability of the borrower to repay the loan;~~

(viii) ~~Documentation supporting each request for an extension of credit or an increase in an existing loan or line of credit shall (except where the Board of Directors finds that such~~

~~documentation requirements are not generally available for a particular type of business loan and states the reasons for those findings in the credit union's written policies) include the following: balance sheet, cash flow analysis, income statement, tax data, leveraging; comparison with industry averages; receipt and periodic updating of financial statements and other documentation; including tax returns;~~

(ix) ~~Collateral requirements, including loan-to-value ratios; appraisal, title search and insurance requirements; steps to be taken to secure various types of collateral; and how often the value and marketability of collateral is reevaluated;~~

(x) ~~Appropriate interest rates and maturities of business loans;~~

(xi) ~~Loan monitoring, servicing and follow up procedures, including collection procedures;~~

(xii) ~~Provision for periodic disclosure to the credit union's members of the number and aggregate dollar amount of member business loans;~~

(xiii) ~~Identification, by position, of those senior management employees prohibited by Rule .0205(d) of this Chapter from receiving member business loans.~~
- (B) ~~Other policies. The following minimum limits and policies shall also be established in writing and reviewed at least annually for loans granted under this Section:~~
- (i) ~~Loans shall be granted on a fully secured basis by collateral as follows:~~

(I) ~~Second lien for LTV ratios of up to 70 percent;~~

(II) ~~First lien for LTV ratios of up to 80 percent;~~

(III) ~~First lien with a LTV ratio in excess~~

~~documentation requirements are not generally available for a particular type of business loan and states the reasons for those findings in the credit union's written policies) include the following: balance sheet, cash flow analysis, income statement, tax data, leveraging; comparison with industry averages; receipt and periodic updating of financial statements and other documentation; including tax returns;~~

~~of 80 percent shall be granted only where the value in excess of 80 percent is covered through acquisition of private mortgage, or equivalent type insurance provided by an insurer acceptable to the credit union or insurance or guarantees by or subject to advance commitment to purchase by, an agency of the federal government or of a state or any of its political subdivisions, and in no event shall the LTV ratio exceed 95 percent;~~

~~(ii) Loans shall not be granted without the personal liability and guarantees of the principals (natural person members) except where the borrower is a not for profit organization as defined by the Internal Revenue Service Code (26 U.S.C. 501);~~

~~(iii) All loans to non natural persons, except to other credit unions, must be secured as required in Chapter 54-109.27 of the North Carolina General Statutes.~~

~~(C) Loan Limits.~~

~~(i) Unless a greater amount is approved by the Administrator based on the factors set out in Subpart (b)(2)(C)(ii) of this Rule with the concurrence of the Regional Director of the National Credit Union Administration, the aggregate amount of outstanding member business loans to any one member or group of associated members shall not exceed 15 percent of the credit union's reserves (less the Allowance for Loan~~

~~Losses account), or seventy-five thousand dollars (\$75,000) whichever is higher. If any portion of a member business loan is secured by shares in the credit union, or deposits in another financial institution, or fully or partially insured or guaranteed by, or subject to an advance commitment to purchase by, any agency of the federal government or of a state or any of its political subdivisions, such portion shall not be calculated in determining the 15 percent limit.~~

~~(ii) Exceptions. Credit unions seeking an exception from the limits of Subpart (b)(2)(C)(i) or Subparagraph (b)(3) of this Rule must present the Administrator of Credit Unions and the Regional Director of the National Credit Union Administration with, at a minimum; the higher limit sought; an explanation of the need by the members to raise the limit and ability of the credit union to manage this activity; an analysis of the credit union's prior experience making member business loans; and a copy of its business lending policy. The analysis of credit union experience in making member business loans shall document the history of loan losses, loan delinquency, volume and cyclical or seasonal patterns, diversification, concentrations of credit to one borrower or group of associated borrowers in excess of 15 percent of reserves (less the Allowance of Loan Losses account), underwriting standards and practices, types of loans grouped by purpose and collateral and qualifications of personnel responsible for underwriting and administering member~~

- ~~business loans. The credit union must have written approval of the Administrator of Credit Unions and the Regional Director of the National Credit Union Administration to exceed the limitations contained in this Rule.~~
- (iii) ~~Maturity. Member business loans shall be granted for periods consistent with the purpose, security, creditworthiness of the borrower and sound lending policies.~~
- (iv) ~~Monitoring requirement. Credit unions with member business loans in excess of 100 percent of reserves (less the Allowance for Loan Losses account) shall submit the following information regarding member business loans to the Administrator on a quarterly basis: the aggregate total of loans outstanding; the amount of loans delinquent in excess of 30 days; the balance of the allowance for member business loan losses; the aggregate total of all concentrations of credit to one borrower or group of associated borrowers in excess of 15 percent of reserves (less the Allowance for Loan Losses account); the total number and amount of all construction, development or speculative loans; and any other information pertinent to the safe and sound condition of the member business loan portfolio.~~
- (D) ~~Allowance for loan losses.~~
- (i) ~~The determination whether a member business loan will be classified as substandard, doubtful, or loss, for purposes of the valuation allowance for loan losses, will rely on factors not limited to the delinquency of the loan. Nondelinquent loans may be classified depending on an evaluation~~
- ~~of factors, including but not limited to, the adequacy of analysis and documentation.~~
- (ii) ~~Loans classified shall be reserved as follows:~~
- (I) ~~Substandard loans at ten percent of outstanding amount unless other factors (e.g. history of such loans at the Credit Union) indicate a greater or lesser amount is appropriate. Loans classified as substandard loans are inadequately protected by the current sound worth and paying capacity of the obligor or of the collateral pledged, if any. Loans classified must have a well-defined weakness or weaknesses that jeopardize the liquidation of the debt. They are characterized by the distinct possibility that the Credit Union will sustain some loss if the deficiencies are not corrected. Loss potential, while existing in the aggregate amount of substandard loans, does not have to exist in individual loans classified substandard.~~
- (II) ~~Doubtful loans at 50 percent of outstanding amount. Loans classified as doubtful loans have all the weaknesses inherent in ones classified substandard, with the added characteristic that the weaknesses~~

~~make collection or liquidation in full, on the basis of currently existing facts, conditions, and values, highly questionable and improbable. The possibility of loss is extremely high, but because of certain important and reasonably specific pending factors which may work to the advantage and strengthening of the loan its classification as an estimated loss is deferred until its more exact status is determined.~~

~~Pending factors include: proposed merger, acquisition, or liquidation actions, capital injection, perfecting liens on additional collateral, and refinancing plans.~~

- (III) ~~Loss loans at 100 percent of outstanding amount. Loans classified as loss loans are considered uncollectible and of such little value that their continuance as loans is not warranted. This classification does not necessarily mean that the loan has absolutely no recovery or salvage value, but rather it is not practical or desirable to defer writing off this basically worthless asset even though partial recovery may occur in the future.~~

- (3) ~~Construction and development lending. Loans granted under this Section to finance the~~

~~construction or development of commercial or residential property shall be subject to the following additional provisions:~~

- (A) ~~The aggregate of all such loans, excluding any portion of a loan secured by shares in the credit union, or deposits in another financial institution, or fully or partially insured or guaranteed by, or subject to an advance commitment to purchase by, any agency of the Federal Government or of a State or any of its political subdivisions, shall not exceed 15 percent of reserves (less the Allowance for Loan Losses account);~~
- (B) ~~The borrower shall have a minimum of 35 percent equity interest in the project being financed;~~
- (C) ~~Funds for such projects shall be released following on site inspections by independent credit union personnel, qualified as in Subpart (b)(2)(A)(vi) of this Rule in accordance with a draw schedule preapproved by the credit union.~~

(4) ~~Prohibitions.~~

- (A) ~~Senior management employees. A credit union may not make member business loans to the following:~~
- (i) ~~Any member of the Board of Directors who is compensated as such;~~
- (ii) ~~The credit union's chief executive officer (typically this individual holds the title of President or Treasurer/Manager);~~
- (iii) ~~Any assistant chief executive officers (e.g. Assistant President, Vice President or Assistant Treasurer/Manager);~~
- (iv) ~~The chief financial officer (Comptroller);~~
- (v) ~~Any associated member or immediate family member of the senior management employees listed in Subparagraphs (b)(4)(A)(i) thru (iv) of this Rule.~~
- (B) ~~Equity kickers/joint ventures. A credit union shall not grant a member business loan where a portion of the amount of income to be received by the credit union in conjunction with such loan is tied to the profit or sale of the business or commercial endeavor for which the loan is made.~~

(5) ~~Recordkeeping. All loans, lines of credit, or letters of credit, the proceeds of which will be used for a commercial, corporate, business, investment property or venture, or agriculture purpose, shall be separately identified in the records of the credit union and reported as such in financial and statistical reports required by the Administrator in Subpart (b)(2)(C)(iv) of this Rule or the Regional Director of the National Credit Union Administration.~~

(a) Commercial lending and member business loans. State chartered federally insured credit unions shall adhere to the federal regulations prescribed by the National Credit Union Administration relating to commercial lending and member business loan program pursuant to 12 C.F.R. Part 723, and this Rule.

(b) Written loan policies. The Board of Directors shall give notification to the Administrator of Credit Unions prior to initiating a commercial lending and member business loan program and adopt specific commercial lending and member business loan policies and review them at least annually. The Board of Directors shall review its commercial lending and member business loan policies prior to any material change in the credit union's commercial lending and member business loan program or related organizational structure, and in response to any material change in portfolio performance or change in economic conditions. Credit unions with an asset size of two hundred fifty million dollars (\$250,000,000) or below shall have commercial lending and member business loan policies submitted to the Administrator of Credit Unions 30 days prior to initiating a commercial lending and member business loan program.

*History Note:* Authority G.S. 54-109.12; 54-109.21(25); 54-109.78; 12 C.F.R. Part 741.3; 12 C.F.R. Part 723; 12 C.F.R. Part 741.203;

*Eff. January 1, 1988;*

*Amended Eff. August 1, 1998; March 2, 1992;*

*Temporary Amendment Eff. January 1, 2017.*

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**Rule-making Agency:** North Carolina Industrial Commission

**Rule Citation:** 04 NCAC 10J .0103

**Effective Date:** January 1, 2017

**Date Approved by the Rules Review Commission:** December 15, 2016

**Reason for Action:** A recent court order. *Surgical Care Affiliates, LLC v. North Carolina Industrial Commission, No. 16-CVS-00600 (Wake County Superior Court).*

The effects of the August 9, 2016 decision in *Surgical Care Affiliates, LLC v. North Carolina Industrial Commission, No. 16-CVS-00600 (Wake County Superior Court)* necessitate the expedited implementation of this temporary rule. This recent court decision invalidated the Industrial Commission's medical fee schedule provisions for ambulatory surgery centers, which

had taken effect April 1, 2015, based on the court's interpretation of Session Law 2013-410, Section 33(a), and the application of its fiscal note exemption language. Due to the court decision, the medical fee schedule, as applied only to ambulatory surgery centers, reverts back to the pre-April 1, 2015 provisions which provided for maximum reimbursement rate of 67.15% of billed charges, resulting in a potentially retroactive and prospective multi-million dollar increase in costs to the workers' compensation system. Although the August 9, 2016 decision has been stayed by the Superior Court during the appeal to the North Carolina Court of Appeals, it is the Industrial Commission's statutory obligation to adopt a rule as quickly as possible to restore balance to the workers' compensation system pursuant to N.C. Gen. Stat. § 97-26 in the event the decision is upheld on appeal. By putting a temporary rule in place as soon as possible, the period of time subject to a potential retroactive invalidation of the ambulatory surgery center fee schedule provisions will be limited to April 1, 2015 to December 31, 2016 providing certainty regarding medical costs for 2017 and beyond.

## CHAPTER 10 - INDUSTRIAL COMMISSION

### SUBCHAPTER 10J – FEES FOR MEDICAL COMPENSATION

#### SECTION 0100 – FEES FOR MEDICAL COMPENSATION

#### 04 NCAC 10J .0103 FEES FOR INSTITUTIONAL SERVICES

(a) Except where otherwise provided, maximum allowable amounts for inpatient and outpatient institutional services shall be based on the current federal fiscal year's facility-specific Medicare rate established for each institutional facility by the Centers for Medicare & Medicaid Services ("CMS"). "Facility-specific" rate means the all-inclusive amount eligible for payment by Medicare for a claim, excluding pass-through payments. An institutional facility may only be reimbursed for hospital outpatient institutional services pursuant to this Paragraph and Paragraphs (c), (d), and (f) of this Rule if it qualifies for payment by CMS as an outpatient hospital.

(b) The schedule of maximum reimbursement rates for hospital inpatient institutional services is as follows:

- (1) Beginning April 1, 2015, 190 percent of the hospital's Medicare facility-specific amount.
- (2) Beginning January 1, 2016, 180 percent of the hospital's Medicare facility-specific amount.
- (3) Beginning January 1, 2017, 160 percent of the hospital's Medicare facility-specific amount.

(c) The schedule of maximum reimbursement rates for hospital outpatient institutional services is as follows:

- (1) Beginning April 1, 2015, 220 percent of the hospital's Medicare facility-specific amount.
- (2) Beginning January 1, 2016, 210 percent of the hospital's Medicare facility-specific amount.
- (3) Beginning January 1, 2017, 200 percent of the hospital's Medicare facility-specific amount.

(d) Notwithstanding the Paragraphs (a) through (c) of this Rule, maximum allowable amounts for institutional services provided

by critical access hospitals ("CAH"), as certified by CMS, are based on the Medicare inpatient per diem rates and outpatient claims payment amounts allowed by CMS for each CAH facility.

(e) The schedule of maximum reimbursement rates for inpatient institutional services provided by CAHs is as follows:

- (1) Beginning April 1, 2015, 200 percent of the hospital's Medicare CAH per diem amount.
- (2) Beginning January 1, 2016, 190 percent of the hospital's Medicare CAH per diem amount.
- (3) Beginning January 1, 2017, 170 percent of the hospital's Medicare CAH per diem amount.

(f) The schedule of maximum reimbursement rates for outpatient institutional services provided by CAHs is as follows:

- (1) Beginning April 1, 2015, 230 percent of the hospital's Medicare CAH claims payment amount.
- (2) Beginning January 1, 2016, 220 percent of the hospital's Medicare CAH claims payment amount.
- (3) Beginning January 1, 2017, 210 percent of the hospital's Medicare CAH claims payment amount.

(g) Notwithstanding Paragraphs (a) through (f) of this Rule, the maximum allowable amounts for institutional services provided by ambulatory surgical centers ("ASC") shall be based on the ~~Medicare ASC reimbursement amount determined by applying the most recently adopted and effective Medicare Payment System Policies for Services Furnished in Ambulatory Surgical Centers and Outpatient Prospective~~ most recently adopted and effective Medicare Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment System—Systems reimbursement formula and factors—factors, including all OPPS Hospital Outpatient Prospective Payment and ASC Ambulatory Surgical Center Payment Systems Addenda, as published annually or referenced by website in the Federal Register and on the CMS website at <https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HospitalOutpatientPPS/index.html> ("the Medicare ASC facility-specific amount"). ("the OPPS/ASC Medicare rule"). An ASC's specific Medicare wage index value as set out in the OPPS/ASC Medicare rule shall be applied in the calculation of the maximum allowable amount for any institutional service it provides. ~~Reimbursement shall be based on the fully implemented payment amount in Addendum AA, Final AA (Final ASC Covered Surgical Procedures for CY 2015, 2017) and Addendum BB, Final BB (Final ASC Covered Ancillary Services Integral to Covered Surgical Procedures for 2015, 2017) as published in the Federal Register, or their successors. The maximum reimbursement rate for institutional services provided by ambulatory surgical centers is 200 percent of the Medicare ASC facility-specific amount.~~

(h) The schedule of maximum reimbursement rates for institutional services provided by ambulatory surgical centers is as follows:

- ~~(1) Beginning April 1, 2015, 220 percent of the Medicare ASC facility-specific amount.~~
- ~~(2) Beginning January 1, 2016, 210 percent of the Medicare ASC facility-specific amount.~~
- ~~(3) Beginning January 1, 2017, 200 percent of the Medicare ASC facility-specific amount.~~
- (1) A maximum reimbursement rate of 200 percent shall apply to institutional services that are eligible for payment by CMS when performed at an ASC.
- (2) A maximum reimbursement rate of 135 percent shall apply to institutional services performed at an ASC that are eligible for payment by CMS if performed at an outpatient hospital facility, but would not be eligible for payment by CMS if performed at an ASC.

~~(h) Notwithstanding Paragraph (g) of this Rule, if surgical procedures listed in Addendum EE (Surgical Procedures Excluded from Payment in ASCs for CY 2017) to the most recently adopted and effective Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems as published in the Federal Register, or its successors, are provided at ASCs, they shall be reimbursed with the maximum amount being the usual, customary, and reasonable charge for the service or treatment rendered.~~

(i) If the facility-specific Medicare payment includes an outlier payment, the sum of the facility-specific reimbursement amount and the applicable outlier payment amount shall be multiplied by the applicable percentages set out in Paragraphs (b), (c), (e), (f), and (h) of this Rule.

(j) Charges for professional services provided at an institutional facility shall be paid pursuant to the applicable fee schedules in Rule .0102 of this Section.

(k) If the billed charges are less than the maximum allowable amount for a Diagnostic Related Grouping ("DRG") payment pursuant to the fee schedule provisions of this Rule, the insurer or managed care organization shall pay no more than the billed charges.

(l) For specialty facilities paid outside Medicare's inpatient and outpatient Prospective Payment System, the payment shall be determined using Medicare's payment methodology for those specialized facilities multiplied by the inpatient institutional acute care percentages set out in Paragraphs (b) and (c) of this Rule.

*History Note: Authority G.S. 97-25; 97-26; 97-80(a); S.L. 2013-410;*

*Eff. April 1, 2015;*

*Temporary Amendment Eff. January 1, 2017.*

*This Section contains information for the meeting of the Rules Review Commission December 15, 2016 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)  
Paul Powell  
Jeanette Doran  
Danny Earl Britt, Jr.

**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**

January 19, 2017	February 16, 2017
March 16, 2017	April 20, 2017

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**RULES REVIEW COMMISSION MEETING  
MINUTES****December 15, 2016**

The Rules Review Commission met on Thursday, December 15, 2016, in the Commission Room at 1711 New Hope Church Road, Raleigh, North Carolina. Commissioners present were: Danny Earl Britt, Jr., Bobby Bryan, Margaret Currin, Garth Dunklin, Jay Hemphill, Jeff Hyde, Jeff Poley, Paul Powell, and Stephanie Simpson.

Staff members present were Commission Counsels Amber Cronk May, Amanda Reeder, Abigail Hammond, and Jason Thomas; and Julie Brincefield and Alex Burgos.

The meeting was called to order at 10:04 a.m. with Chairman Dunklin presiding.

Chairman Dunklin read the notice required by G.S. 138A-15(e) and reminded the Commission members that they have a duty to avoid conflicts of interest and the appearances of conflicts of interest.

**APPROVAL OF MINUTES**

Chairman Dunklin asked for any discussion, comments, or corrections concerning the minutes of the November 17, 2016 meeting. There were none and the minutes were approved as distributed.

**FOLLOW UP MATTERS****Structural Pest Control Committee**

02 NCAC 34 .0328, .0502, .0503, .0505, and .0506 - All rewritten rules were unanimously approved.

**Department of Insurance**

11 NCAC 05A .0101, .0105, .0201, .0202, .0301, .0302, .0303, .0501, .0503, .0504, .0505, .0506, .0507, .0508, .0510, .0511, .0512, .0601, .0602, .0603, .0604, .0701, .0702, .0703, .0704, and .0705 - The Commission extended the period of review for the rules in accordance with G.S. 150B-21.10. They did so in response to staff recommendation to extend the period in order to allow the agency additional time to make technical changes, and to review and prepare responses to the staff opinions.



**Manufactured Housing Board**

11 NCAC 08 .0904 – The agency is addressing the objection from the November meeting. No action was required by the Commission.

**Criminal Justice Education and Training Standards Commission**

12 NCAC 09B .0203 – The rewritten rule was unanimously approved.

**Social Work Certification and Licensure Board**

21 NCAC 63 .0505 – The rewritten rule was unanimously approved.

**LOG OF FILINGS (PERMANENT RULES)**

**Medical Care Commission 10A NCAC 13B, 13C**

All rules were unanimously approved.

Prior to the review of the rules from the Medical Care Commission, Commissioner Poley recused himself and did not participate in any discussion or vote concerning the rules because he works with the agency.

**Medical Care Commission 10A NCAC 13P**

All rules were unanimously approved.

Bethany Burgon, with the Attorney General's Office, representing the agency, addressed the Commission.

Nancy Dunn, with the Attorney General's Office, representing DHHS, addressed the Commission.

Prior to the review of the rules from the Medical Care Commission, Commissioner Poley recused himself and did not participate in any discussion or vote concerning the rules because he works with the agency.

**Criminal Justice Education and Training Standards Commission**

All rules were unanimously approved.

**Sheriffs Education and Training Standards Commission**

12 NCAC 10B .2005 was unanimously approved.

**Wildlife Resources Commission**

15A NCAC 10F .0346 was unanimously approved.

**Board of Barber Examiners**

All rules were unanimously approved.

**Board of Examiners of Plumbing, Heating and Fire Sprinkler Contractors**

21 NCAC 50 .0106 was unanimously approved.

**LOG OF RULES (TEMPORARY RULES)**

**Credit Union Division**

04 NCAC 06C .0407 was unanimously approved.

Prior to the review of the temporary rule from the Credit Union Division, Commissioner Hemphill recused himself and did not participate in any discussion or vote concerning the rule because of a possible conflict of interest.

**Industrial Commission**

The Commission voted to approve 04 NCAC 10J .0103, with Commissioners Dunklin and Hyde voting against.

Meredith Henderson, the Executive Secretary of the agency, addressed the Commission.

Renee Montgomery, with the Law Office of Parker Poe Adams & Bernstein, LLP, representing Surgical Care Affiliates, LLC, addressed the Commission.

DJ Hill, on behalf of the North Carolina Ambulatory Surgical Center Association, addressed the Commission.

Andy Ellen, with the North Carolina Retail Merchants Association, addressed the Commission.

Prior to the review of the temporary rule from the Industrial Commission, Commissioner Poley recused himself and did not participate in any discussion or vote concerning the rule because his law firm is involved in a dispute with the agency.

Prior to the review of the temporary rule from the Industrial Commission, Commissioner Simpson recused herself and did not participate in any discussion or vote concerning the rule because of a possible conflict with her husband's law firm representation.

#### **EXISTING RULES REVIEW**

##### **Department of Administration**

01 NCAC 09 - The Commission unanimously approved the report as submitted by the agency.

##### **Indian Affairs Commission**

01 NCAC 15 - The Commission unanimously approved the report as submitted by the agency.

##### **Domestic Violence Commission**

01 NCAC 17 - The Commission unanimously approved the report as submitted by the agency.

##### **Department of Administration**

01 NCAC 19 - The Commission unanimously approved the report as submitted by the agency.

01 NCAC 35 - The Commission unanimously approved the report as submitted by the agency.

##### **State Board of Elections**

08 NCAC 01 - The Commission unanimously approved the report as submitted by the agency.

08 NCAC 02 - The Commission unanimously approved the report as submitted by the agency.

08 NCAC 03 - The Commission unanimously approved the report as submitted by the agency.

08 NCAC 04 - The Commission unanimously approved the report as submitted by the agency.

08 NCAC 05 - The Commission unanimously approved the report as submitted by the agency.

08 NCAC 06 - The Commission unanimously approved the report as submitted by the agency.

08 NCAC 07 - The Commission unanimously approved the report as submitted by the agency.

08 NCAC 08 - The Commission unanimously approved the report as submitted by the agency.

08 NCAC 09 - The Commission unanimously approved the report as submitted by the agency.

08 NCAC 10 - The Commission unanimously approved the report as submitted by the agency.

08 NCAC 12 - The Commission unanimously approved the report as submitted by the agency.

##### **Department of Insurance**

11 NCAC 10 - The Commission unanimously approved the report as submitted by the agency.

11 NCAC 16 - The Commission unanimously approved the report as submitted by the agency.

##### **Department of Public Safety**

14B NCAC 01 - The Commission unanimously approved the report as submitted by the agency.

14B NCAC 02 - The Commission unanimously approved the report as submitted by the agency.

14B NCAC 03 - The Commission unanimously approved the report as submitted by the agency.

14B NCAC 04 - The Commission unanimously approved the report as submitted by the agency.

##### **Crime Governor's Commission**

14B NCAC 05 - The Commission unanimously approved the report as submitted by the agency.

##### **Alcohol Law Enforcement**

14B NCAC 06 - The Commission unanimously approved the report as submitted by the agency.

Prior to the review of the report from the Alcohol Law Enforcement, Commissioner Powell recused himself and did not participate in any discussion or vote concerning the report because of a conflict of interest.

##### **Department of Public Safety**

14B NCAC 07 - The Commission unanimously approved the report as submitted by the agency.

##### **Environmental Management Commission**

15A NCAC 02A – The Commission unanimously approved the report as submitted by the agency.

15A NCAC 02C – The Commission unanimously approved the report as submitted by the agency.

15A NCAC 02E – The Commission unanimously approved the report as submitted by the agency.

**Credit Union Division**

04 NCAC 06 - As reflected in the attached letter, the Commission voted to schedule readoption of these Rules no later than February 28, 2018 pursuant to G.S. 150B-21.3A(d)(2).

Prior to the review of the readoptions from the Credit Union Division, Commissioner Hemphill recused himself and did not participate in any discussion or vote concerning the readoptions because of a possible conflict of interest.

**Department of Revenue**

17 NCAC 01, 12 - As reflected in the attached letter, the Commission voted to schedule readoption of these Rules no later than August 31, 2017 pursuant to G.S. 150B-21.3A(d)(2).

**Historical Commission**

07 NCAC 04R .0702 - .0718 – As reflected in the attached letter, the Commission extended the period for the agency to readopt these Rules to June 30, 2017.

**Local Government Commission**

20 NCAC 03 - As reflected in the attached letter, the Commission voted to reschedule 20 NCAC 03 report in Rule 26 NCAC 05 .0211, and the report will be reviewed by the Commission at the December 2017 meeting.

**Capital Facilities Finance Agency**

20 NCAC 09 - As reflected in the attached letter, the Commission voted to reschedule 20 NCAC 09 report in Rule 26 NCAC 05 .0211, and the report will be reviewed by the Commission at the December 2017 meeting.

**COMMISSION BUSINESS**

Commissioner Dunklin lead a discussion to the Commission regarding legislation discussed at the December 6, 2016 APO meeting. The Commission voted to approve proposals for changing the APA, specifically G.S. 150B-21.3A and 21.5(a).

Commissioner Dunklin recognized Commissioner Britt for being elected to the North Carolina Senate.

The meeting adjourned at 12:00 p.m.

The next regularly scheduled meeting of the Commission is Thursday, January 19<sup>th</sup> at 10:00 a.m.

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

Respectfully Submitted,

\_\_\_\_\_  
Alexander Burgos, Paralegal

Minutes approved by the Rules Review Commission:

\_\_\_\_\_  
Garth Dunklin, Chair

**December 15, 2016**

Rules Review Commission  
Meeting  
Please **Print** Legibly

Name	Agency
Judith Estevez	DOJ
Tony Knox	NCCUD
Loretta Bunch	NCDOJ
Joy Strickland	DOJ
Jennifer Everett	DEQ
Rick McIntyre	NCDOJ
Micki Lilly	N.C. Social Work Board
Meredith Henderson	NCIC
Azzie Conkey	NC DHHS / DHSR
Tom Mitchell	NC DHHS / DHSR
Nadine Pfeiffer	NC DHHS / DHSR
Wally Airgood	NC DHHS / DHSR
Dennis Slavers	BBE
Steven Combs	CS Standards
Charmaine Branson	CJETS
Keneé Montgomery	Counsel for JCA
DS Hill	Compass / NCASCA
Bethany Burgon	DOJ / MCC / IC
Victor Lennon	NCDA & CS
Jim Burnette	NCDA & CS
Daniel Longstaff	NCOR

[illegible]



**STATE OF NORTH CAROLINA  
OFFICE OF ADMINISTRATIVE HEARINGS**

Mailing address:  
6714 Mail Service Center  
Raleigh, NC 27699-6714

Street address:  
1711 New Hope Church Rd  
Raleigh, NC 27609-6285

December 15, 2016

Antonio Knox, Rulemaking Coordinator  
Commerce - Credit Union  
4314 Mail Service Center  
Raleigh, NC 27699-4314

Re: Readoption pursuant to G.S. 150B-21.3A(c)(2)g of **04 NCAC 06**

Dear Mr. Knox:

Attached to this letter are the rules 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. After consultation with your agency, this set of rules was discussed at the December 15, 2016 Rules Review Commission meeting regarding the scheduling of these rules for readoption. Pursuant to G.S. 150B-21.3A(d)(2), the rules identified on the attached printout shall be readopted by the agency no later than February 28, 2018.

If you have any questions regarding the Commission's action, please let me know.

Sincerely,

Abigail M. Hammond  
Commission Counsel

Administration  
919/431-3000  
fax: 919/431-3100

Rules Division  
919/431-3000  
fax: 919/431-3104

Judges and  
Assistants  
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Clerk's Office  
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**RRC DETERMINATION  
PERIODIC RULE REVIEW**

August 18, 2016

APO Review: September 06, 2016

Commerce, Department of - Credit Union Division

Total: 31

**RRC Determination: Necessary with substantive public interest**

<b>Rule</b>	<b>Determination</b>
04 <a href="#"><u>NCAC 06B .0402</u></a>	Necessary with substantive public interest
04 <a href="#"><u>NCAC 06C .0101</u></a>	Necessary with substantive public interest
04 <a href="#"><u>NCAC 06C .0201</u></a>	Necessary with substantive public interest
04 <a href="#"><u>NCAC 06C .0202</u></a>	Necessary with substantive public interest
04 <a href="#"><u>NCAC 06C .0203</u></a>	Necessary with substantive public interest
04 <a href="#"><u>NCAC 06C .0209</u></a>	Necessary with substantive public interest
04 <a href="#"><u>NCAC 06C .0301</u></a>	Necessary with substantive public interest
04 <a href="#"><u>NCAC 06C .0302</u></a>	Necessary with substantive public interest
04 <a href="#"><u>NCAC 06C .0304</u></a>	Necessary with substantive public interest
04 <a href="#"><u>NCAC 06C .0306</u></a>	Necessary with substantive public interest
04 <a href="#"><u>NCAC 06C .0307</u></a>	Necessary with substantive public interest
04 <a href="#"><u>NCAC 06C .0311</u></a>	Necessary with substantive public interest
04 <a href="#"><u>NCAC 06C .0312</u></a>	Necessary with substantive public interest
04 <a href="#"><u>NCAC 06C .0313</u></a>	Necessary with substantive public interest
04 <a href="#"><u>NCAC 06C .0401</u></a>	Necessary with substantive public interest
04 <a href="#"><u>NCAC 06C .0402</u></a>	Necessary with substantive public interest
04 <a href="#"><u>NCAC 06C .0404</u></a>	Necessary with substantive public interest
04 <a href="#"><u>NCAC 06C .0407</u></a>	Necessary with substantive public interest
04 <a href="#"><u>NCAC 06C .0409</u></a>	Necessary with substantive public interest
04 <a href="#"><u>NCAC 06C .0501</u></a>	Necessary with substantive public interest
04 <a href="#"><u>NCAC 06C .0502</u></a>	Necessary with substantive public interest
04 <a href="#"><u>NCAC 06C .0601</u></a>	Necessary with substantive public interest
04 <a href="#"><u>NCAC 06C .0707</u></a>	Necessary with substantive public interest
04 <a href="#"><u>NCAC 06C .0801</u></a>	Necessary with substantive public interest
04 <a href="#"><u>NCAC 06C .0901</u></a>	Necessary with substantive public interest
04 <a href="#"><u>NCAC 06C .1001</u></a>	Necessary with substantive public interest
04 <a href="#"><u>NCAC 06C .1002</u></a>	Necessary with substantive public interest
04 <a href="#"><u>NCAC 06C .1201</u></a>	Necessary with substantive public interest
04 <a href="#"><u>NCAC 06C .1204</u></a>	Necessary with substantive public interest
04 <a href="#"><u>NCAC 06C .1301</u></a>	Necessary with substantive public interest
04 <a href="#"><u>NCAC 06C .1302</u></a>	Necessary with substantive public interest



**STATE OF NORTH CAROLINA  
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Raleigh, NC 27699-6714

Street address:  
1711 New Hope Church Rd  
Raleigh, NC 27609-6285

December 15, 2016

David Lingerfelt, Rulemaking Coordinator  
Laura Lansford, Rulemaking Coordinator  
Department of Revenue  
Post Office Box 871  
Raleigh, North Carolina 27602

Re: Readoption pursuant to G.S. 150B-21.3A(c)(2)g of **17 NCAC 01, 12**

Dear Mr. Lingerfelt and Ms. Lansford:

Attached to this letter are the rules 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. After consultation with your agency, this set of rules was discussed at the December 15, 2016 Rules Review Commission meeting regarding the scheduling of these rules for readoption. Pursuant to G.S. 150B-21.3A(d)(2), the rules identified on the attached printout shall be readopted by the agency no later than August 31, 2017.

If you have any questions regarding the Commission's action, please let me know.

Sincerely,

A handwritten signature in dark ink, appearing to read "Abigail M. Hammond". The signature is fluid and cursive, with the first name being the most prominent.

Abigail M. Hammond  
Commission Counsel

Administration  
919/431-3000  
fax: 919/431-3100

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**RRC DETERMINATION  
PERIODIC RULE REVIEW  
June 16, 2016  
APO Review: August 20, 2016  
Revenue, Department of  
Total: 30**

**RRC Determination: Necessary with substantive public interest**

<b>Rule</b>	<b>Determination</b>
17 <a href="#"><u>NCAC 01C .0308</u></a>	Necessary with substantive public interest
17 <a href="#"><u>NCAC 01C .0502</u></a>	Necessary with substantive public interest
17 <a href="#"><u>NCAC 01C .0503</u></a>	Necessary with substantive public interest
17 <a href="#"><u>NCAC 01C .0504</u></a>	Necessary with substantive public interest
17 <a href="#"><u>NCAC 01C .0505</u></a>	Necessary with substantive public interest
17 <a href="#"><u>NCAC 01C .0507</u></a>	Necessary with substantive public interest
17 <a href="#"><u>NCAC 01C .0508</u></a>	Necessary with substantive public interest
17 <a href="#"><u>NCAC 01C .0509</u></a>	Necessary with substantive public interest
17 <a href="#"><u>NCAC 01C .0510</u></a>	Necessary with substantive public interest
17 <a href="#"><u>NCAC 01C .0511</u></a>	Necessary with substantive public interest
17 <a href="#"><u>NCAC 01C .0601</u></a>	Necessary with substantive public interest
17 <a href="#"><u>NCAC 12A .0201</u></a>	Necessary with substantive public interest
17 <a href="#"><u>NCAC 12A .0202</u></a>	Necessary with substantive public interest
17 <a href="#"><u>NCAC 12A .0303</u></a>	Necessary with substantive public interest
17 <a href="#"><u>NCAC 12A .0503</u></a>	Necessary with substantive public interest
17 <a href="#"><u>NCAC 12B .0106</u></a>	Necessary with substantive public interest
17 <a href="#"><u>NCAC 12B .0107</u></a>	Necessary with substantive public interest
17 <a href="#"><u>NCAC 12B .0402</u></a>	Necessary with substantive public interest
17 <a href="#"><u>NCAC 12B .0403</u></a>	Necessary with substantive public interest
17 <a href="#"><u>NCAC 12B .0404</u></a>	Necessary with substantive public interest
17 <a href="#"><u>NCAC 12B .0410</u></a>	Necessary with substantive public interest
17 <a href="#"><u>NCAC 12B .0412</u></a>	Necessary with substantive public interest
17 <a href="#"><u>NCAC 12B .0413</u></a>	Necessary with substantive public interest
17 <a href="#"><u>NCAC 12B .0414</u></a>	Necessary with substantive public interest
17 <a href="#"><u>NCAC 12B .0502</u></a>	Necessary with substantive public interest
17 <a href="#"><u>NCAC 12C .0301</u></a>	Necessary with substantive public interest
17 <a href="#"><u>NCAC 12C .0302</u></a>	Necessary with substantive public interest
17 <a href="#"><u>NCAC 12C .0304</u></a>	Necessary with substantive public interest
17 <a href="#"><u>NCAC 12D .0102</u></a>	Necessary with substantive public interest
17 <a href="#"><u>NCAC 12D .0103</u></a>	Necessary with substantive public interest



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1711 New Hope Church Rd  
Raleigh, NC 27609-6285

December 21, 2016

Shawn Middlebrooks  
Department of Cultural and Natural Resources  
4605 Mail Service Center  
Raleigh, North Carolina 27699-4605

Re: Readoption pursuant to G.S. 150B-21.3A(c)(2)g of **07 NCAC 04 .0702 - .0718**

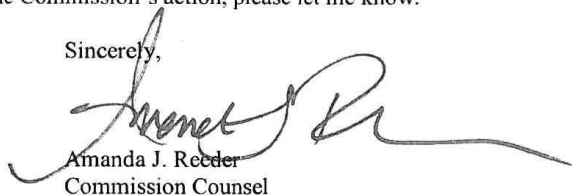
Dear Mr. Middlebrooks:

At its meeting on December 15, 2016, the Rules Review Commission considered the Historical Commission's request to extend the schedule for the readoption of the above-referenced rules.

Pursuant to G.S. 150B-21.3A(d)(2), these rules shall be readopted by the agency no later than June 30, 2017.

If you have any questions regarding the Commission's action, please let me know.

Sincerely,



Amanda J. Reeder  
Commission Counsel

cc: Ashley Snyder, Agency Legal Specialist

Administration  
919/431-3000  
fax: 919/431-3100

Rules Division  
919/431-3000  
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Street address:  
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Raleigh, NC 27609-6285

December 15, 2016

**Sent via electronic mail**

Patrice Alexander, Rulemaking Coordinator  
Local Government Commission  
3200 Atlantic Avenue  
Raleigh, North Carolina 27604

Re: Existing Rules Review Report for 20 NCAC 03

Dear Ms. Alexander:

At its meeting on November 17, 2016, the Rules Review Commission (RRC) reviewed the above-referenced Periodic Review and Expiration of Existing Rules Report pursuant to G.S. 150B-21.3A. Based upon an inquiry at that meeting, the RRC requested clarification as to the identity of the agency that actually conducted the analysis, made the initial determinations, posted the report for the 60-day comment period, and made the final determinations. A response has been provided that the actions were not taken by the Local Government Commission.

The periodic review of the rules set forth in the report for 20 NCAC 03 needs to be rescheduled to ensure proper compliance with G.S. 150B-21.3A(c)(1). This report shall be rescheduled in Rule 26 NCAC 05 .0211 as follows: the report for 20 NCAC 03 must be completed and filed with the Office of Administrative Hearings by the rulemaking agency by November 15, 2017. The report will be reviewed by the RRC at the **December 2017** meeting.

If you have any questions regarding the RRC's actions, please let me know.

Sincerely,

A handwritten signature in dark ink, appearing to read "Abigail M. Hammond". The signature is fluid and cursive, written over the printed name.

Abigail M. Hammond  
Commission Counsel

Administration  
919/431-3000  
fax: 919/431-3100

Rules Division  
919/431-3000  
fax: 919/431-3104

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6714 Mail Service Center  
Raleigh, NC 27699-6700

Street address:  
1711 New Hope Church Rd  
Raleigh, NC 27609-6285

December 15, 2016

**Sent via electronic mail**

Patrice Alexander, Rulemaking Coordinator  
Capital Facilities Finance Agency  
3200 Atlantic Avenue  
Raleigh, North Carolina 27604

Re: Existing Rules Review Report for 20 NCAC 09

Dear Ms. Alexander:

At its meeting on November 17, 2016, the Rules Review Commission (RRC) reviewed the above-referenced Periodic Review and Expiration of Existing Rules Report pursuant to G.S. 150B-21.3A. Based upon an inquiry at that meeting, the RRC requested clarification as to the identity of the agency that actually conducted the analysis, made the initial determinations, posted the report for the 60-day comment period, and made the final determinations. A response has been provided that the actions were not taken by the Capital Facilities Finance Agency.

The periodic review of the rules set forth in the report for 20 NCAC 09 needs to be rescheduled to ensure proper compliance with G.S. 150B-21.3A(c)(1). This report shall be rescheduled in Rule 26 NCAC 05 .0211 as follows: the report for 20 NCAC 09 must be completed and filed with the Office of Administrative Hearings by the rulemaking agency by November 15, 2017. The report will be reviewed by the RRC at the **December 2017** meeting.

If you have any questions regarding the RRC's actions, please let me know.

Sincerely,

A handwritten signature in dark ink, appearing to read "Abigail M. Hammond", is written over the typed name and title.  
Abigail M. Hammond  
Commission Counsel

Administration  
919/431-3000  
fax: 919/431-3100

Rules Division  
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fax: 919/431-3104

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Civil Rights  
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fax: 919/431-3103

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**LIST OF APPROVED PERMANENT RULES  
December 15, 2016 Meeting**

**STRUCTURAL PEST CONTROL COMMITTEE**

<u>Records: Pesticides and Application Equipment Used</u>	02	NCAC	34	.0328
<u>Pesticides for Subterranean Termite Prevention and/or Con...</u>	02	NCAC	34	.0502
<u>Subterranean Termite Control: Buildings After Constructed</u>	02	NCAC	34	.0503
<u>Subterranean Termite Preventions/Res Bldgs Under Const</u>	02	NCAC	34	.0505
<u>Min Require/Subterranean Termite Prev/Commercial Bldgs Un...</u>	02	NCAC	34	.0506

**MEDICAL CARE COMMISSION**

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<u>Reporting Requirements</u>	10A	NCAC	13C	.0206
<u>Abbreviations</u>	10A	NCAC	13P	.0101
<u>Definitions</u>	10A	NCAC	13P	.0102
<u>EMS System Requirements</u>	10A	NCAC	13P	.0201
<u>Air Medical Ambulance: Vehicle and Equipment Requirements</u>	10A	NCAC	13P	.0209
<u>EMS Non-transporting Vehicle Permit Conditions</u>	10A	NCAC	13P	.0214
<u>Weapons and Explosives Forbidden</u>	10A	NCAC	13P	.0216
<u>Staffing for Medical Ambulance/Evacuation Bus Vehicles</u>	10A	NCAC	13P	.0219
<u>Patient Transportation Between Hospitals</u>	10A	NCAC	13P	.0221
<u>Transport of Stretcher Bound Patients</u>	10A	NCAC	13P	.0222
<u>Required Disclosure and Reporting Information</u>	10A	NCAC	13P	.0223
<u>Specialty Care Transport Program Criteria</u>	10A	NCAC	13P	.0301
<u>Air Medical Specialty Care Transport Program Criteria for...</u>	10A	NCAC	13P	.0302
<u>Responsibilities of the Medical Director for EMS Systems</u>	10A	NCAC	13P	.0403
<u>EMS Peer Review Committee for Specialty Care Transport Pr...</u>	10A	NCAC	13P	.0409
<u>Educational Programs</u>	10A	NCAC	13P	.0501
<u>Initial Credentialing Requirements for EMR, EMT, AEMT, Pa...</u>	10A	NCAC	13P	.0502
<u>Term of Credentials for EMS Personnel</u>	10A	NCAC	13P	.0503
<u>Renewal of Credentials for EMR, AEMT, Paramedic, and EMD</u>	10A	NCAC	13P	.0504
<u>Practice Settings for EMS Personnel</u>	10A	NCAC	13P	.0506
<u>Credentialing Requirements for Level 1 EMS Instructors</u>	10A	NCAC	13P	.0507
<u>Credentialing Requirements for Level II EMS Instructors</u>	10A	NCAC	13P	.0508
<u>Renewal of Credentials for Level I and Level II EMS Instr...</u>	10A	NCAC	13P	.0510
<u>Criminal Histories</u>	10A	NCAC	13P	.0511
<u>Reinstatement of Lapsed EMS Credential</u>	10A	NCAC	13P	.0512
<u>Refresher Courses</u>	10A	NCAC	13P	.0513
<u>Continuing Education EMS Educational Institution Requirem...</u>	10A	NCAC	13P	.0601
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<u>Advanced EMS Educational Institution Requirements</u>	10A	NCAC	13P	.0603
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<u>Level I Trauma Center Criteria</u>	10A	NCAC	13P	.0901
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<u>State Trauma System</u>	10A	NCAC	13P	.1101
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<u>Conditions for Restricted Practice with Limited Privileges</u>	10A	NCAC	13P	.1403
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<u>Admission of Trainees</u>	12	NCAC	09B	.0203
<u>General Instructor Certification</u>	12	NCAC	09B	.0302
<u>Terms and Conditions of General Instructor Certification</u>	12	NCAC	09B	.0303
<u>Terms and Conditions of Specialized Instructor Certification</u>	12	NCAC	09B	.0305
<u>Instructor Certification Renewal</u>	12	NCAC	09B	.0312
<u>Evaluation for Training Waiver</u>	12	NCAC	09B	.0403
<u>Definitions</u>	12	NCAC	09G	.0102
<u>General Instructor Certification</u>	12	NCAC	09G	.0308
<u>Terms and Conditions of General Instructor Certification</u>	12	NCAC	09G	.0309
<u>Terms and Conditions of Specialized Instructor Certification</u>	12	NCAC	09G	.0311
<u>Instructor Certification Renewal</u>	12	NCAC	09G	.0312

**SHERIFFS EDUCATION AND TRAINING STANDARDS COMMISSION**

<u>Minimum Training Requirements</u>	12	NCAC	10B	.2005
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**WILDLIFE RESOURCES COMMISSION**

<u>Chowan County</u>	15A	NCAC	10F	.0346
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<u>Form Bar-4</u>	21	NCAC	06N	.0105
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<u>Location of office</u>	21	NCAC	50	.0106
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December 15, 2016 Meeting**

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04 NCAC 06C .0407

**INDUSTRIAL COMMISSION**

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04 NCAC 10J .0103

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**RRC Determination  
Periodic Rule Review  
December 15, 2016  
Necessary without substantive public interest**

**Administration, Department of**

01 NCAC 09 .0501	08 NCAC 06B .0104
01 NCAC 09 .0502	08 NCAC 06B .0105
01 NCAC 35 .0102	08 NCAC 08 .0104
01 NCAC 35 .0103	08 NCAC 09 .0106
01 NCAC 35 .0201	08 NCAC 09 .0107
01 NCAC 35 .0202	08 NCAC 09 .0108
01 NCAC 35 .0203	08 NCAC 09 .0109
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01 NCAC 35 .0304	08 NCAC 10B .0106
01 NCAC 35 .0306	08 NCAC 10B .0107
01 NCAC 35 .0307	08 NCAC 10B .0108

11 NCAC 16 .0603
11 NCAC 16 .0604
11 NCAC 16 .0605
11 NCAC 16 .0606
11 NCAC 16 .0607
11 NCAC 16 .0701
11 NCAC 16 .0702
11 NCAC 16 .0703
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14B NCAC 01C .0401
14B NCAC 01C .0402
14B NCAC 05 .0201
14B NCAC 05 .0202
14B NCAC 05 .0203
14B NCAC 05 .0204
14B NCAC 05 .0205
14B NCAC 05 .0206
14B NCAC 05 .0207
14B NCAC 05 .0208
14B NCAC 05 .0301
14B NCAC 05 .0302
14B NCAC 05 .0303
14B NCAC 05 .0304
14B NCAC 05 .0305
14B NCAC 05 .0306
14B NCAC 05 .0307
14B NCAC 05 .0310
14B NCAC 05 .0311
14B NCAC 05 .0401
14B NCAC 05 .0402
14B NCAC 05 .0501
14B NCAC 05 .0502
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14B NCAC 05 .0504
14B NCAC 07A .0104
14B NCAC 07A .0105
14B NCAC 07A .0106
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**Elections, Board of**

08 NCAC 01 .0104	11 NCAC 16 .0101
08 NCAC 02 .0110	11 NCAC 16 .0103
08 NCAC 02 .0111	11 NCAC 16 .0105
08 NCAC 02 .0112	11 NCAC 16 .0106
08 NCAC 02 .0113	11 NCAC 16 .0107
08 NCAC 03 .0101	11 NCAC 16 .0108
08 NCAC 03 .0102	11 NCAC 16 .0201
08 NCAC 03 .0103	11 NCAC 16 .0202
08 NCAC 03 .0104	11 NCAC 16 .0203
08 NCAC 03 .0105	11 NCAC 16 .0204
08 NCAC 03 .0106	11 NCAC 16 .0205
08 NCAC 03 .0201	11 NCAC 16 .0206
08 NCAC 03 .0202	11 NCAC 16 .0207
08 NCAC 03 .0301	11 NCAC 16 .0208
08 NCAC 03 .0302	11 NCAC 16 .0401
08 NCAC 04 .0301	11 NCAC 16 .0402
08 NCAC 04 .0302	11 NCAC 16 .0403
08 NCAC 04 .0304	11 NCAC 16 .0501
08 NCAC 04 .0305	11 NCAC 16 .0502
08 NCAC 04 .0306	11 NCAC 16 .0503
08 NCAC 04 .0307	11 NCAC 16 .0504
08 NCAC 06B .0103	11 NCAC 16 .0601
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14B NCAC 07A .0108	15A NCAC 02C .0201	15A NCAC 02C .0305
14B NCAC 07A .0109	15A NCAC 02C .0202	15A NCAC 02C .0306
14B NCAC 07A .0110	15A NCAC 02C .0203	15A NCAC 02C .0307
14B NCAC 07A .0111	15A NCAC 02C .0204	15A NCAC 02C .0308
14B NCAC 07A .0112	15A NCAC 02C .0206	15A NCAC 02E .0106
14B NCAC 07A .0113	15A NCAC 02C .0207	15A NCAC 02E .0107
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14B NCAC 07A .0116	15A NCAC 02C .0210	15A NCAC 02E .0402
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14B NCAC 07A .0119	15A NCAC 02C .0217	15A NCAC 02E .0502
14B NCAC 07C .0101	15A NCAC 02C .0218	15A NCAC 02E .0503
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	15A NCAC 02C .0220	15A NCAC 02E .0505
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	15A NCAC 02C .0225	15A NCAC 02E .0603
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	15A NCAC 02C .0227	15A NCAC 02E .0605
	15A NCAC 02C .0228	15A NCAC 02E .0606
	15A NCAC 02C .0229	15A NCAC 02E .0607
	15A NCAC 02C .0230	15A NCAC 02E .0608
	15A NCAC 02C .0240	15A NCAC 02E .0609
	15A NCAC 02C .0241	15A NCAC 02E .0610
	15A NCAC 02C .0242	15A NCAC 02E .0611
	15A NCAC 02C .0301	15A NCAC 02E .0612
	15A NCAC 02C .0302	15A NCAC 02E .0613
	15A NCAC 02C .0303	15A NCAC 02E .0614
	15A NCAC 02C .0304	15A NCAC 02E .0615

**Environmental Management  
Commission**

**RRC Determination  
Periodic Rule Review  
December 15, 2016  
Necessary without substantive public interest**

**Indian Affairs, Commission of**

01 NCAC 15 .0102  
01 NCAC 15 .0105  
01 NCAC 15 .0201  
01 NCAC 15 .0202  
01 NCAC 15 .0203  
01 NCAC 15 .0204  
01 NCAC 15 .0205  
01 NCAC 15 .0207  
01 NCAC 15 .0208  
01 NCAC 15 .0209  
01 NCAC 15 .0212

**Domestic Violence Commission**

01 NCAC 17 .0701  
01 NCAC 17 .0703  
01 NCAC 17 .0704  
01 NCAC 17 .0705  
01 NCAC 17 .0706  
01 NCAC 17 .0707

01 NCAC 17 .0708  
01 NCAC 17 .0709  
01 NCAC 17 .0710  
01 NCAC 17 .0711  
01 NCAC 17 .0712  
01 NCAC 17 .0713  
01 NCAC 17 .0714  
01 NCAC 17 .0715  
01 NCAC 17 .0716  
01 NCAC 17 .0717  
01 NCAC 17 .0718

**Administration, Department of**

01 NCAC 19A 0103  
01 NCAC 35 .0101  
01 NCAC 35 .0305  
01 NCAC 35 .0309

**Elections, Board of**

08 NCAC 01 .0101

08 NCAC 10B .0102

**Insurance, Department of**

11 NCAC 10 .0104  
11 NCAC 10 .0105  
11 NCAC 10 .0305  
11 NCAC 10 .0306  
11 NCAC 10 .0307  
11 NCAC 10 .0313  
11 NCAC 10 .0406  
11 NCAC 10 .0602  
11 NCAC 10 .0603  
11 NCAC 10 .0605  
11 NCAC 10 .0606  
11 NCAC 10 .0701  
11 NCAC 10 .0703  
11 NCAC 10 .0713  
11 NCAC 10 .0717  
11 NCAC 10 .1001  
11 NCAC 10 .1002



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**RULES REVIEW COMMISSION**

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11 NCAC 10 .1003	11 NCAC 10 .1208	14B NCAC 01C .0102
11 NCAC 10 .1004	11 NCAC 10 .1209	14B NCAC 01C .0103
11 NCAC 10 .1006	11 NCAC 10 .1301	14B NCAC 01C .0201
11 NCAC 10 .1007	11 NCAC 10 .1302	14B NCAC 01C .0301
11 NCAC 10 .1101	11 NCAC 10 .1303	14B NCAC 01C .0302
11 NCAC 10 .1102	11 NCAC 10 .1401	14B NCAC 01C .0303
11 NCAC 10 .1104	11 NCAC 10 .1402	14B NCAC 02 .0101
11 NCAC 10 .1105	11 NCAC 10 .1403	14B NCAC 02 .0102
11 NCAC 10 .1106	11 NCAC 10 .1601	14B NCAC 02 .0103
11 NCAC 10 .1107	11 NCAC 10 .1602	14B NCAC 02 .0104
11 NCAC 10 .1108	11 NCAC 10 .1603	14B NCAC 02 .0105
11 NCAC 10 .1109	11 NCAC 10 .1604	14B NCAC 02 .0106
11 NCAC 10 .1110	11 NCAC 10 .1701	14B NCAC 07A .0101
11 NCAC 10 .1111	11 NCAC 10 .1702	14B NCAC 07A .0102
11 NCAC 10 .1112		14B NCAC 07A .0103
11 NCAC 10 .1113	<b>Public Safety, Department of</b>	14B NCAC 07A .0117
11 NCAC 10 .1114	14B NCAC 01A .0104	14B NCAC 07A .0120
11 NCAC 10 .1201	14B NCAC 01B .0401	
11 NCAC 10 .1202	14B NCAC 01B .0402	<b>Environmental Management</b>
11 NCAC 10 .1204	14B NCAC 01B .0403	<b>Commission</b>
11 NCAC 10 .1205	14B NCAC 01B .0404	15A NCAC 02A .0102
11 NCAC 10 .1206	14B NCAC 01B .0405	15A NCAC 02A .0105
11 NCAC 10 .1207	14B NCAC 01C .0101	15A NCAC 02A .0107

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**RRC DETERMINATION  
PERIODIC RULE REVIEW  
December 15, 2016  
Unnecessary**

<b>Indian Affairs, Commission of</b>	01 NCAC 15 .0406	08 NCAC 05 .0101
01 NCAC 15 .0301	01 NCAC 15 .0407	08 NCAC 05 .0102
01 NCAC 15 .0302	01 NCAC 15 .0501	08 NCAC 05 .0103
01 NCAC 15 .0303	01 NCAC 15 .0502	08 NCAC 05 .0104
01 NCAC 15 .0304	01 NCAC 15 .0503	08 NCAC 05 .0105
01 NCAC 15 .0306	01 NCAC 15 .0504	08 NCAC 05 .0106
01 NCAC 15 .0401	01 NCAC 15 .0505	08 NCAC 05 .0107
01 NCAC 15 .0402		08 NCAC 05 .0108
01 NCAC 15 .0403	<b>Elections, Board of</b>	08 NCAC 05 .0109
01 NCAC 15 .0404	08 NCAC 02 .0109	08 NCAC 05 .0110
01 NCAC 15 .0405	08 NCAC 04 .0303	

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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	A. B. Elkins II
Don Overby	Selina Brooks
J. Randall May	Phil Berger, Jr.
J. Randolph Ward	David Sutton
Stacey Bawtinheimer	

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>DATE</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
<b><u>ALCOHOLIC BEVERAGE CONTROL COMMISSION</u></b>			
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NC Alcoholic Beverage Control Commission v. Brewsers LLC T/A Two Doors Down	16 ABC 0290	06/01/16	
NC Alcoholic Beverage Control Commission v. Dasab LLC T/A D and S Kwik Stop	16 ABC 01759	05/25/16	
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NC Alcoholic Beverage Control Commission v. Aaway Inc. T/A Jacks Tap	16 ABC 02702	06/01/16	
NC Alcoholic Beverage Control Commission v. B2 Inc. T/A Cadillac Ranch the Other Side	16 ABC 02703	06/02/16	
NC Alcoholic Beverage Control Commission v. Los Amigos of Shelby Inc. T/A Los Amigos of Shelby	16 ABC 03354	06/21/16	
NC Alcoholic Beverage Control Commission v. Susan Michelle Cloninger T/A Dallas Pub	16 ABC 07133	10/11/16	
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William B. Shannon v. NC Social Work Certification and Licensure Board	16 BSW 09247	10/17/16	
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Thomas Anthony Tyger v. Victim Services Janice Carmichael	15 CPS 08771	05/17/16	
George Dudley v. NC Department of Public Safety, Victim Services	16 CPS 01651	05/05/16	
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For the Love of Dogs, Max and wife Della Fitz-Gerald v. Department of Agriculture and Consumer Services	15 DAG 09366	09/22/16	31:11 NCR 1147
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**CONTESTED CASE DECISIONS**

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WP-Beulaville Health Holdings LLC v. DHHS, Division of Health Service Regulation, Adult Care Licensure Section	15 DHR 02422	06/29/16	31:05 NCR 440
Lavonnie Simmons v. DHHS, Division of Health Service Regulations	15 DHR 05374	10/31/16	
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East Cove Psychiatric Services PC, Dr. Joanna Wolicki-Shannon, and Dr. Walter Shannon v. DHHS, Division of Medical Assistance and its Agent, Eastpointe	15 DHR 06260	09/20/16	
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Kathleen B. McGuire v. Department of Health Service Regulation MH Licensure Section	16 DHR 03015	05/13/16	
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HAL-082-018 Clinton Health Holdings LLC, Clinton House v. DHHS, Division of Health Service Regulation	16 DHR 03203	08/04/16	
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10/04/2016 2:23 PM

STATE OF NORTH CAROLINA  
  
COUNTY OF PERQUIMANS

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
15 EHR 07012

<p>STEPHEN E. OWENS and JILLANNE G. BADAWI, Petitioners,</p> <p>v.</p> <p>N.C. DEPARTMENT OF ENVIRONMENTAL QUALITY, DIVISION OF ENERGY MINERAL AND LAND RESOURCES, Respondent,</p> <p>and</p> <p>WEYERHAEUSER COMPANY, Respondent-Intervenor,</p> <p>and</p> <p>PASQUOTANK COUNTY, Respondent-Intervenor.</p>	<p><b>FINAL DECISION SUMMARY JUDGMENT FOR RESPONDENT</b></p>
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#### **PROCEDURAL BACKGROUND**

This matter is before the undersigned Administrative Law Judge on the parties' Cross-Motions for Summary Judgment. This contested case involves Petitioner's appeal of the March 18, 2015 determination by Respondent Department of Environmental Quality ("DEQ"), Division of Energy, Mineral, and Land Resources ("DEMLR") that Iberdrola Renewables' Desert Wind Project is not subject to the permitting provisions of N.C. Gen. Stat. §§ 143-215.115, *et seq.*

The undersigned has considered the motions, the supporting memoranda and responses filed by the parties, the arguments presented by all parties at the April 13, 2016 hearing on this matter, the applicable statutes and North Carolina Session Law, relevant legal precedent, and the entire record in this case. On June 15, 2016, the undersigned issued an Order Granting Summary Judgment for Respondent, because:

Respondent acted properly in determining that the Iberdrola Renewables' Desert Wind Project is not subject to the permitting provisions of N.C. Gen. Stat. § 143-215.115 through -215.226 ("The Wind Act"). The plain language of N.C. Gen. Stat. § 143-215.115, including Session Law 2013-51, s. 2 ("the Grandfather

Clause”) exempted the Desert Wind Project from The Wind Act’s permitting requirements. . . .

Even if the language of The Wind Act and the Grandfather Clause are construed to be ambiguous, the purpose of the Grandfather Clause, the circumstances surrounding The Wind Act’s enactment, and the structure and language of The Wind Act show that the N.C. General Assembly intended for the Desert Wind Project to be exempt from The Wind Act, notwithstanding the minor changes to the Desert Wind Project after the May 21, 2013 effective date of The Wind Act.

(June 15, 2016 Order)

**APPEARANCES**

For Petitioner:	David W. Schnare Energy & Environment Legal Institute 722 12 <sup>th</sup> Street, NW, 4 <sup>th</sup> Floor Washington, DC 20005
For Respondent:	Asher P. Spiller Assistant Attorney General North Carolina Department of Justice Environmental Division 9001 Mail Service Center Raleigh, NC 27699-9001
For Respondent-Intervenors:	Jesse Schaefer Womble Carlyle Sandridge & Rice, LLP 150 Fayetteville Street, Suite 2100 Raleigh, NC 27601  Todd Roessler Kilpatrick Townsend & Stockton, LLP 4208 Six Forks Road, Suite 1400 Raleigh, NC 27609

**ISSUE**

Did Respondent properly determine that, pursuant to N.C. Session Law 2013-51, sec. 2, the Desert Wind Project is exempt from the permitting requirements of N.C. Gen. Stat. §§ 143-215.115, *et seq.*?

**UNDISPUTED FACTS**

N.C. Gen. Stat. § 150B-34(e) authorizes an administrative law judge to grant Summary Judgment, pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, “that disposes of all issues in a contested case.” A decision granting summary judgment “need not include findings



of fact or conclusions of law,” except as determined by the administrative law judge. Under that authority, the undersigned hereby finds the following undisputed facts are relevant to the summary disposition of this contested case:

1. Petitioners Stephen E. Owens and Jillanne G. Badawi own property near the Desert Wind Project, and appealed Respondent’s determination on September 25, 2015 by filing a petition for a contested case hearing.

2. Respondent-Intervenor Weyerhaeuser Company (“Weyerhaeuser”) leases land for the project to Iberdrola Renewables, and intervened in this case in support of Respondent’s determination. Pasquotank County, which has entered into an economic development agreement with Iberdrola Renewables, also intervened in support of Respondent’s determination, with its intervention limited in scope to the proper interpretation and construction of Session Law 2013-51.

3. On or before 2013, the U.S. Department of Defense’s (“DOD”) was concerned when another wind energy project developer leased site for wind turbines directly in military training paths used by Seymour Johnson Air Force Base for low altitude flight training. DOD’s concerns with that project and with future wind energy projects in North Carolina caused the N.C. Department of Environment and Natural Resources (“NCDENR”) and the North Carolina General Assembly to draft the Wind Act to give NCDENR authority to review the proposed siting of wind energy projects based on considerations of potential environmental and military impacts.

4. On May 17, 2013, the North Carolina General Assembly enacted Session Law 2013-51 (“S.L. 2013-51” or “Wind Act”), creating a new wind energy permitting program under which developers of future wind energy projects in North Carolina are required to apply for and receive permits to build and operate wind energy facilities. *See* An Act to Establish a Permitting Program for the Siting and Operation of Wind Energy Facilities, Ch. 51, 2013 N.C. Sess. Law 51 (codified at N.C. Gen. Stat. §§ 143-215.115, *et seq.*).

5. Iberdrola Renewables (“Iberdrola”) and its wholly-owned subsidiary Atlantic Wind, LLC (“Atlantic Wind”) had been developing the Desert Wind Project, a 300 megawatt wind energy facility, for several years before the May 17, 2013 passage of S.L. 2013-51. As of May 17, 2013, Iberdrola had:

- secured Determinations of No Hazard to Air Navigation (“DNHs”) from the Federal Aviation Administration (“FAA”) for 166 proposed wind turbines in Pasquotank and Perquimans Counties;
- obtained DNH extensions from the FAA for 150 wind turbines in Pasquotank and Perquimans Counties;
- entered into an economic development agreement with Pasquotank County;
- entered into an economic development agreement with Perquimans County;

- obtained a conditional use permit (“CUP”) from the Board of Commissioners of Pasquotank County;
- obtained a CUP from the Board of Commissioners of Perquimans County;
- obtained a Water Quality Certification under section 401 of the Clean Water Act from the North Carolina Division of Water Quality;
- obtained a Certificate of Public Convenience and Necessity from the North Carolina Utilities Commission (“NCUC”);
- obtained a Certificate of Environmental Compatibility and Public Convenience and Necessity from the NCUC for construction of a transmission line to connect the Desert Wind Project with the Virginia Electric and Power Company;
- obtained a letter from the North Carolina Division of Coastal Management on March 5, 2012 (“Consistency Determination”), determining that the Desert Wind Project is consistent with North Carolina’s coastal management program; and
- entered into various property agreements with landowners to site turbines and supporting infrastructure for the Desert Wind Project on landowners’ property.

6. NCDENR agreed with DOD that it would be unfair to subject the Desert Wind Project to the proposed wind energy permitting program, so NCDENR and the General Assembly negotiated a provision of the Wind Act (Section 2) to specifically exclude the Desert Wind Project from the statutory permitting program.

7. When the Wind Act became law, the Desert Wind Project was the only facility in North Carolina that had received DNHs from the FAA.

8. DNHs are issued by the FAA in response to the filing of an FAA Form 7460 Notice of Proposed Construction or Alteration (“Notice”) if the FAA determines that the proposed construction or alteration poses no hazard to air navigation, among other considerations. *See* 49 U.S.C. § 44718; 14 C.F.R. § 77.31.

9. On June 29, 2011, the FAA issued DNHs to Iberdrola for 166 wind turbines. The DNHs were valid for eighteen months, expiring on December 29, 2012, unless extended or construction commenced. Iberdrola filed Notices for an extension of 150 of the 166 initial DNHs. On November 21, 2012, the FAA extended these DNHs for an additional eighteen months, with an expiration date of May 21, 2014.

10. On February 20, 2014, Iberdrola filed Notices with the FAA for 150 wind turbines with the same locations and maximum tip heights as specified in the 150 DNHs that the FAA issued in 2011 and extended in 2012.

11. On June 27, 2014, to accommodate the use of a more efficient turbine model, Iberdrola filed a second set of Notices for 150 wind turbines with a maximum tip height of 499 feet above ground level ("AGL"), an increase of thirteen feet (less than three percent) from the 486 foot AGL maximum tip height in the previously-issued DNHs. On December 2, 2014, in response to Iberdrola's FAA Notices filed on June 27, 2014, Iberdrola received DNHs from the FAA for 104 wind turbines with a 499 foot above ground maximum tip height.

12. On November 5, 2014, Iberdrola entered into an agreement with the DOD and the U.S. Department of the Navy at the conclusion of approximately three years of studies regarding potential impacts of the Desert Wind Project on radar. By its own terms, the agreement was "structured to enable Iberdrola Renewables and Atlantic Wind to *proceed immediately* with the construction and operation of the Wind Project." The agreement provided that the coordinate locations of the Project's turbines could change by plus or minus 100 feet in longitude or latitude.

13. On March 18, 2015, Brad Atkinson, Energy Section Chief for DEQ, sent a letter to Craig Poff, Director of Business Development for Iberdrola Renewables, stating, "DENR has determined that Iberdrola's Desert Winds Project is subject to the State's wind energy facility permitting process."

14. On March 26, 2015, Mr. Atkinson sent Mr. Poff a subsequent letter inviting Iberdrola to submit additional information to demonstrate that the Desert Wind Project did not require a state wind energy permit. The letter stated, "[o]nce your response is received, we will expeditiously reevaluate the permit applicability." On April 2, 2015, counsel for Iberdrola sent a response letter to DEQ providing up-to-date information regarding (1) the status of the DNHs for the Desert Wind Project, (2) changes to the project boundary from the date of the Wind Act's enactment, and (3) modifications to the wind turbine specifications from the date of the enactment.

15. Upon receiving this information, DEQ reevaluated the applicability of the Wind Act to the Desert Wind Project. DEQ considered that the Desert Wind Project had DNHs in place when the Wind Act became effective; the geographical area of the project had not increased since the effective date of the Wind Act; and the number of wind turbines planned for the project had actually decreased. The Division also considered that the heights of the wind turbines had increased slightly, and that the coordinate locations of some turbines had changed slightly by less than plus or minus 100-feet in longitude or latitude. The Division determined that the change in projected turbine height and in coordinate locations of some turbines did not implicate the permitting provisions of the Act.

16. On April 29, 2015, Brad Atkinson sent a letter to Craig Poff stating:

DENR has renewed its review of the Act and has determined that Iberdrola's Desert Wind Project is not subject to permitting provisions of the Act based on a plain reading of the Act. This is true because the FAA issued determinations to Iberdrola, for its Desert Wind Project, on June 29, 2011, prior to the Act becoming law,

despite the fact that these FAA issued determinations subsequently expired on May 21, 2014. Likewise, the fact that individual turbines within the Desert Wind Project have both increased in heights and changed coordinate locations from Iberdrola's June 2011 FAA issued determinations does not implicate the permitting provisions of the Act.

### **CONCLUSIONS OF LAW**

1. The N.C. Office of Administrative Hearings has jurisdiction over the parties and subject matter of this contested case pursuant to N.C. Gen. Stat. §150B-23 et seq., and there is no question as to misjoinder or nonjoinder. The parties received proper notice of the hearing in this matter. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law contain Findings of Fact, they should be so considered without regard to the given labels.

2. Summary judgment is proper when the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [the moving party] is entitled to judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c). A material fact is one that may “affect the result of the action.” *N.C. Farm Bureau Mut. Ins. Co. v. Sadler*, 365 N.C. 178, 182, 711 S.E.2d 114, 116 (2011). A “genuine issue” about a material fact must be “supported by substantial evidence.” *DeWitt v. Eveready Battery Co., Inc.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002). “Substantial evidence” is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,” and means “more than a scintilla or a permissible inference.” *Id.* (citations omitted).

3. The North Carolina Administrative Procedure Act (“APA”) provides the applicable standard for reviewing state agency decisions. This Court must determine whether the petitioner has shown that the agency deprived the petitioner of property, ordered the petitioner to pay a fine or civil penalty, or otherwise substantially prejudiced the petitioner’s rights and:

- (1) Exceeded its authority or jurisdiction;
- (2) Acted erroneously;
- (3) Failed to use proper procedure;
- (4) Acted arbitrarily or capriciously; or
- (5) Failed to act as required by law or rule.

N.C. Gen. Stat. 150B-23(a).

4. In *Strickland v. Hedrick*, 194 N.C. App. 1, 10, 669 S.E.2d 61, 68 (2008) (quoting *Leete v. County of Warren*, 341 N.C. 116, 119, 462 S.E.2d 476, 478 (1995)), the Court noted that in deciding cases under the APA:

[i]t is well settled that 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.’

The presumption of good faith “places a heavy burden on the party challenging the validity of public officials’ actions to overcome this presumption by competent and substantial evidence.” *Id.*

5. Courts are further required to accord deference to an agency’s interpretation of the statutes it is authorized to administer. Indeed, “even when reviewing a case de novo, courts recognize the long-standing tradition of according deference to the agency’s interpretation.” *County of Durham v. North Carolina Dep’t of Env’t. & Natural Res.*, 131 N.C. App. 395, 396-97, 507 S.E.2d 310, 311 (1998), *disc. rev. denied*, 350 N.C. 92, 528 S.E.2d 361 (1999) (citations omitted); *see also Total Renal Care of N.C., LLC v. North Carolina Dept. of Health and Human Services*, \_\_\_ N.C. App. \_\_\_, 776 S.E.2d 322, 324 (2015) (stating that courts must defer to the agency’s interpretation of a statute “as long as the agency’s interpretation is reasonable and based on a permissible construction of the statute.”)

**The plain language of the Wind Act exempts the Desert Wind Project from the statute’s permitting requirements.**

6. “Statutory interpretation properly begins with an examination of the plain words of the statute.” *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992) (citations omitted). “When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning.” *Id.* (quoting *Lemons v. Boy Scouts of America, Inc.*, 322 N.C. 271, 276, 367 S.E.2d 655, 688, *reh’g denied*, 322 N.C. 610, 370 S.E.2d 247 (1988)).

7. According to the plain language of Section 2 of the Wind Act, the statute applies *only* to wind energy facilities or expansions that had not already received a written DNH from the FAA the time the law became effective. *See* S.L. 2013-51, sec. 2 (“Section 2” or “Grandfather Clause”). Specifically, Section 2 of the Wind Act provides:

Section 2. This act is effective when it becomes law and applies only to those wind energy facilities or wind energy facility expansions that have not received a written “Determination of No Hazard to Air Navigation” issued by the Federal Aviation Administration on or before that date.

8. It is undisputed that the Desert Wind Project had received “a written Determination of No Hazard to Air Navigation” prior to May 17, 2013. It received 166 DNHs on June 29, 2011, and received extensions on 150 DNHs on November 21, 2012. Therefore, under the plain language of the Grandfather Clause, the Desert Wind Project is exempted from the Wind Act’s permitting requirements.

9. Petitioners made various arguments, each in the alternative, challenging this straightforward reading of the statutory text. First, Petitioners contend that minor adjustments to the specifications of the Desert Wind Project’s wind turbines caused the Desert Wind Project to become a “new” wind energy facility for purposes of applying the Grandfather Clause. They alternatively argue that each individual turbine constitutes a separate Wind Energy Facility for purposes of applying the Grandfather Clause. Neither reading is supported by the plain language of the statute.

10. According to the definitions section of the Wind Act, the term “wind energy facility” refers to a project as a whole. The Wind Act defines “wind energy facility” as:

the turbines, accessory buildings, transmission facilities, and any other equipment necessary for the operation of the facility that *cumulatively*, with any other wind energy facility whose turbines are located within one-half mile of one another, have a rated capacity of one megawatt or more of energy.

N.C. Gen. Stat. § 143-215.115(2) (emphasis added). By defining wind energy facility “cumulatively” as the combination of the above-mentioned structures, the statute makes clear that it is a project as whole that matters for purposes of the Grandfather Clause.

11. Petitioners alternatively contend that the Desert Wind Project should be considered a “wind energy facility expansion,” notwithstanding the fact that the number of turbines and the overall size of the project’s geographic footprint have decreased since the Wind Act’s enactment. Again, Petitioners’ argument is not supported by the plain language of the statute, which defines “Wind Energy Facility Expansion” as a “substantial” change to turbines or a facility’s geographic footprint “beyond that which was initially permitted.” Petitioners’ argument fails for two reasons.

a. First, the Desert Wind Project was never “permitted” under the Wind Act; in fact, it was excluded from permitting requirements, because the Project had DNHs in place on May 17, 2013. Therefore, the Project, cannot meet the definition for “expansion” set forth in N.C. Gen. Stat. § 143-215.115(2).

b. Second, the term “expansion” as used in the Wind Act plainly contemplates changes to a permitted project, and not minor adjustments to a project plan for a proposed wind energy facility.

12. The Grandfather Clause requires *only* that a wind energy facility have received a DNH before May 17, 2013 to qualify for exemption. In this case, it is undisputed that the Desert Wind Project had “a written Determination of No Hazard to Air Navigation” as of May 17, 2013. Therefore, the plain language of the N.C. Gen. Stat. §§ 143-215.115 and the Grandfather Clause of the Wind Act exempted the Desert Wind Project from the Wind Act’s permitting requirements.

13. The purpose and structure of the Wind Act and the circumstances surrounding its enactment demonstrate that Respondent’s determination is consistent with legislative intent.

14. When the plain language of a statute is clear and unambiguous, “courts must give effect to the plain meaning of the statute and judicial construction of legislative intent is not required.” *N. Carolina Dep’t of Correction v. N. Carolina Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009) (citations omitted). Only when the language of a statute is ambiguous will North Carolina Courts consider “the purpose of the statute and the intent of the legislature in its enactment” when determining the proper construction of the statute. *Id.* In such cases courts must look to “the spirit of the act and what the act seeks to accomplish” and also to the harm that

the act seeks to avoid. *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980); *In re Hardy*, 294 N.C. 90, 96, 240 S.E.2d 367, 372 (1978)

15. Because the plain language of the Wind Act resolves this matter, consideration of legislative intent is not required here. However, even if the language of the Wind Act and the Grandfather Clause are construed to be ambiguous, the purpose of the Grandfather Clause, the circumstances surrounding the Wind Act's enactment, and the structure and language of the Wind Act show that the N.C. General Assembly intended the Desert Wind Project to be exempt from the Wind Act, notwithstanding the minor changes to the Desert Wind Project after the May 21, 2013 effective date of the Wind Act.

16. The purpose of the Wind Act's Grandfather Clause is self-evident. By exempting projects that have received DNHs from the FAA, the Wind Act ensures that wind energy projects that had already invested significant resources in development, including obtaining regulatory approvals, would not be subjected to an unforeseen and potentially costly permitting process. *See, e.g., State ex rel. Utilities Comm'n v. Fleming*, 235 N.C. 660, 668, 71 S.E.2d 41, 47 (1952) ("the purpose of a grandfather clause is to protect and preserve bona fide rights existing at the time of the passage of the legislation which contains such clause"). Respondent's interpretation is reasonable and consistent with this purpose.

17. Respondent's interpretation is also consistent with the goals that the Wind Act seeks to achieve: 1) minimizing impacts to military operations and air navigation, *see*, N.C. Gen. Stat. §§ 143-215.117(c), -215.118(b), -215.119(a), & -215.119(c); 2) minimizing environmental impacts, *see* N.C. Gen. Stat. §§ 143-215.117(a), -215.117(b)(4), -215.119(a)(10); 3) providing public notice and opportunity for comment, *see* N.C. Gen. Stat. § 143-215.119(e); and 4) obtaining financial assurance from developers for the decommissioning of renewable energy infrastructure, *see* N.C. Gen. Stat. 143-215.121.

18. As of May 22, 2013, Iberdrola had secured DNHs for 166 turbines from the FAA; entered into economic development agreements with and obtained conditional use permits from Perquimans and Pasquotank Counties requiring *inter alia* consideration of environmental impacts and compliance with financial assurance obligations; obtained a 401 water quality certification from the Division of Water Resources; obtained a Certificate of Public Convenience and Necessity from NCUC; received a Consistency Determination from the Division of Coastal Management imposing various conditions for environmental protection; held three public hearings in Pasquotank and Perquimans Counties; and entered into property agreements with landowners to site the wind facilities and supporting infrastructure on landowners' property. Iberdrola has since entered into an agreement with the US Department of Defense and the US Department of Navy authorizing Iberdrola to commence construction on the Desert Wind Project immediately. Requiring Iberdrola to go through the permitting process would frustrate the legislature's purpose in enacting the Grandfather Clause, and promote the very harm the legislature sought to avoid.

19. Respondent's interpretation is further supported by the circumstances surrounding the enactment of the statute. Clearly, as of May 17, 2013, Iberdrola was the only project that could have fallen within the purview of the Grandfather Clause. Under Petitioners' desired reading of the statute, Section 2 will have no application whatsoever to any wind facility in the State.



20. Finally, Respondent's interpretation is supported by the structure of the Wind Act. The Act allows for changes to a proposed wind energy facility's plans during the application phase of a permit without requiring the applicant to submit a new application, *i.e.* the statute does not treat changes to a project plan as creating a new facility or expansion warranting a new permit application. *See* N.C. Gen. Stat. § 143-215.119(d) (recognizing that there may be "supplements, changes, or amendments to the permit application"); N.C. Gen. Stat. § 143-215.120(c) (discussing consideration of a reconfigured project).

21. Respondent's determination that the Desert Wind Project is not subject to the Wind Act's permitting requirements is thus consistent with the purpose of the Wind Act's Grandfather Clause and the Wind Act as a whole.

22. Respondent therefore did not exceed its authority or jurisdiction, did not act erroneously, did not fail to use proper procedure, did not act arbitrarily or capriciously, and did not fail to act as required by law or rule.

#### **FINAL DECISION BY SUMMARY JUDGMENT**

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby **GRANTS** summary judgment to Respondent and Respondent-Intervenors.

#### **NOTICE**

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34. Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.**

In conformity with 26 N.C.A.C. 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.**

N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.



This the 4th day of October, 2016.

A handwritten signature in black ink, reading "Melissa Owens Lassiter". The signature is written in a cursive style with a large initial "M".

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Melissa Owens Lassiter  
Administrative Law Judge

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STATE OF NORTH CAROLINA  
COUNTY OF PENDER

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
16 EHR 02397

Ronald Sheffield Petitioner,  v.  NCDMF Respondent.	<b>FINAL DECISION</b>
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This contested case was heard by Administrative Law Judge Donald W. Overby on July 14, 2016 at the Brunswick County Government Complex in Bolivia, North Carolina. Based upon the pleadings, testimony, items admitted into evidence, and all other matters before it, the Court makes the following Final Decision:

**APPEARANCES**

For Petitioner: Kurt B. Fryar  
106 N. Water St., Suite 110  
Wilmington, NC 28401

For Respondent: Scott A. Conklin  
Thomas Hill Davis  
Assistant Attorneys General  
NC Department of Justice  
Post Office Box 629  
Raleigh, North Carolina 27602

**ISSUE**

Whether the Respondent deprived the petitioner of property or has otherwise substantially prejudiced the petitioner's rights and exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule as required by N.C.G.S. § 150B-23 when it denied the Petitioner's shellfish bottom lease and associated water column lease?

### **EXHIBITS**

The Petitioner offered the following exhibits into evidence, which were received and accepted into evidence: Exhibits numbered 1 – 8. Exhibit 7 was accepted into evidence and is to be given the weight the finder of fact deems appropriate.

The Respondent offered the following exhibits into evidence, which were received and accepted into evidence: Exhibits numbered 1 – 5, 7 – 8, 10. Exhibit 1 is a statute for which official notice was given. Exhibit 7 was accepted into evidence and is to be given the weight the finder of fact deems appropriate.

### **FINDINGS OF FACT**

**BASED UPON** careful consideration of the sworn testimony of 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 interests, bias or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether such testimony is consistent with all other believable evidence in the case.

### **PROPOSED LEASE APPLICATIONS AND LEASE SITE**

1. On October 14, 2015, the Petitioner applied for a shellfish bottom lease and associated water column lease (hereinafter referred to collectively as the “proposed lease”). (Pet.’s Exhs 1 and 2)
2. Page 6 of Respondent’s Exhibit No. 3 is a satellite photograph which shows a very general overhead view of the proposed lease site and surrounding area. The lease site is to the southwest of New Topsail Inlet. Topsail Beach is to the northeast of the inlet.
3. Respondent’s Exhibit No. 4 is an aerial close-up of the proposed lease site and immediately surrounding area. This includes a main channel, which begins at the middle-bottom of the exhibit, and opens into the New Topsail Inlet. In the exhibit, Lea Island is seen to the left of the main channel, and boats are anchored along the beach on Lea Island.
4. As can be seen in Exhibit 4, this so called main channel does not open to any other body of water visible in the picture other than New Topsail Inlet. In the top left of the picture, boats can be seen either anchored or tied off so that the visitors to the island may walk across to the ocean. Very few boats go that far up the channel.
5. In the middle of Exhibit 4, a sandbar to the right of the main channel is visible with three

boats anchored close by. This sandbar is on the end of a marsh island and is almost if not entirely under water at high tide. The three boats are anchored on the opposite side of the small marsh island from Petitioner's proposed lease site.

6. Directly in front of this sandbar is another channel veering off to the right from the main channel, referred to hereinafter as the "cut-through." The cut-through connects back into a channel or creek to the south. That channel and the cut through do not open into any other significant water. It does not open to any water that opens to the ocean or the Intercoastal Waterway.

7. The entrance into the area designated as the "Proposed Lease Site" and the cut-through are barely navigable if at all on low tide due to the sand bars. At best the area is navigable to flat bottom boats and skiffs, as well as personal watercraft or jet skis.

8. Lea Island has heavy recreational use during the summer months. Fishing continues in the area throughout most of the rest of the year. (T pp 260-261) The main channel can get congested during the summer months. (T pp 129, 261) According to one witness, on rare occasions on weekends and holidays, boats may line up two deep around Lea Island, whereas during the week there will be 10 or less boats in the area. (T p 261)

9. As evidenced by the boaters who go to the far end of that channel and walk over to the ocean, the main channel remains open even during the heaviest days of use.

10. Also visible in the photograph of Respondent's Exhibit No. 4 is the Petitioner's existing lease, which has been in existence since 2008. The existing lease has posed no significant problems for tourist, boaters, crabbers or fishermen or anyone else who continue to use that area.

11. The designation of "proposed Lease site" superimposed onto the photograph in Exhibit 4 is misleading in that it would lead one to think the equipment Petitioner proposes to use will be almost to where the cut-through widens once one crosses the sand bar to the leeward side of the marsh.

12. Respondent's Exhibit 5 is a better representation of the location of the site. Although faint in the photograph, the poles placed by Petitioner are visible. It can readily be seen that the placement of the bags by Petitioner would not have any infringement on the cut through.

13. Respondent's Exhibit 5 also clearly shows the boats tied up to walk over to the ocean as well as Petitioner's existing lease area.

14. The proposed lease site is approximately one acre and is three to four feet deep, even at low tide. (T p 28)

15. There is some credible evidence that the proposed lease site may be a productive location for fishing. (T pp 182, 189, 223) The evidence is also clear that Petitioner's lease would still permit fishing around his equipment just as is currently done on his existing lease. Fishing and crabbing would not be prohibitive because of Petitioner's use of the lease site.

16. According to Wildlife Officer Simon Sabella, since 2008 when Petitioner was granted his existing lease the population in the vicinity has increased significantly. A new NC Wildlife boat ramp was opened north of the town of Hampstead on the Intercoastal Waterway, contributing perhaps to an increase of recreational boating. (T p 204) There is a water route between Topsail Inlet and the Intercoastal Waterway at Hampstead.

17. The Petitioner uses floating bags referred to as “grow-out bags” in a portion of his current lease in order to grow juvenile oysters. These bags are hard structures that are never totally submerged. Respondent’s Exhibit No. 8 shows a number of the floating bags used in the Petitioner’s current lease. (T pp 72, 72, 86)

18. According to Petitioner, each floating bag is approximately three feet by two-and-a-half feet, and the bags are arranged on 80-foot ropes with buoys attached. (T pp 24, 88) Four-foot long submerged screw anchors hold the ropes in place. (T p 90) Floats are placed on the ends of all rope ends.

19. As part of an application for a shellfish and water column lease, the applicant must submit a management plan for the area to be leased. As part of the management plan, the applicant must state the methods through which the applicant will cultivate and produce shellfish. 15A N.C.A.C. 03O.0202(b). In the application for the proposed lease in this case, the Petitioner stated his intent to employ a system that is substantially the same as the floating bag system used in his current lease, which is shown in Respondent’s Exhibit 8, with the possibility of bags and cages in future years. (Pet.’s Exh. 1, page 7 of 18, Pet.’s Exh. 2, page 6 of 20).

#### **REVIEW OF APPLICATION AND RESPONDENT’S EVIDENCE**

20. As is standard practice with all lease applications, the Petitioner’s applications were reviewed internally by three separate and distinct sections of the Division of Marine Fisheries: the Shellfish Sanitation, the Fisheries Management, and the Marine Patrol. (T pp 140, 144-147)

21. The Shellfish Lease Investigation Report is Respondent’s Exhibit 3. Page 1 of the report notes that the “exposure” is “protected.” Page 1 of the report also notes that Mr. Samuel Corbett, a commercial crab pot fisherman, had stated that there might be complaints on the lease site.

22. The report also includes three emails which are referenced in the letter from Steve Murphey to Director Louis Daniel, dated February 10, 2016 which became the denial letter for Mr. Sheffield. Mr. Murphey erroneously states that the three emails are opposed to this lease.

23. Clearly reading the first two emails, they are referring to any potential expansion of Mr. Sheffield’s current lease, and not the lease under consideration. It may reasonably be assumed that the authors of the first two emails have a familial relationship, although that is of no consequence since their complaint is not with this proposed lease.

24. The third email is a generic opposition to Mr. Sheffield leasing any area where that person’s family spends its free time.

25. The Shellfish Sanitation Section is primarily concerned with the public health aspect of the lease. (T p 145) The Shellfish Sanitation Section is not asked to provide an opinion as to whether a lease will interfere with other activities or uses of the proposed lease site. (T pp 145, 169-170)

26. In this case, the Shellfish Sanitation Section determined that the proposed lease is in an area currently approved by that section for the harvest of shellfish, that the status of the area has not changed in the last year, and that the status of the area is not expected to change in the near future. (Resp.'s Exh. 4, p 7)

27. The Fisheries Management Section had very specific questions to answer which were very much on point to the current controversy:

- i. Question 1: "Would this lease be compatible with fishing, boating and other recreational interest in the area?" Answer: "Yes. The relatively small footprint of this lease should not pose any major conflicts."
- ii. Question 2: "Would this lease adversely affect navigation in the area?" Answer: "No. The lease is located out of the main channel and behind a small marsh island."
- iii. Question 3: "Would this lease be compatible with commercial fishing and shell-fishing interests in the area?" Answer: "Yes. "Would probably only interfere with crab pots, but the small footprint of the lease makes that impact minimal." (Resp.'s Exh. 4, p 8)

28. The Fisheries Management Section also noted that it had received no public comments concerning this proposed lease and that this lease is located across the channel from another larger existing lease.

29. Marine Patrol is the only section which provided comments stating that the lease would create user conflict. (Resp.'s Exh. 4, page 9)

30. Officer Simon Sabella provided comments on behalf of the Marine Patrol on the proposed lease application. Officer Sabella has been a Marine Patrol officer for the Division of Marine Fisheries for approximately twelve years and has a longstanding familiarity with the area. (T p 197) Officer Sabella patrols the area around Topsail Inlet. In the warmer months, Officer Sabella will patrol the area at least two or three times a week. (T p 198) Officer Sabella is familiar with the proposed lease site, and has seen the poles marking the site. (T p 199)

31. Officer Sabella has seen boats and swimmers in the proposed lease site. In particular Officer Sabella testified that he has seen individuals fish for trout and drum in the proposed lease site, often using a trolling motor. (T pp 201-202) Officer Sabella has also seen more boats pass through the cut-through.

32. Officer Sabella also states that he sees a few jet skis per week pass through the proposed

lease site during the summer months. (T p 217) According to Officer Sabella, he was on the lease site on Saturday, July 9, 2016—the weekend after the 4<sup>th</sup> of July holiday—and saw zero boats on the lease site. He offered no evidence of anyone in the lease area for any reason on that date. According to Officer Sabella, access to the area of the proposed site even by jet skiers was dependent on the tide. (T pp 205-206)

33. Officer Sabella was concerned that the floating gear would restrict access to the proposed lease site and cut-through for boaters, swimmers, jet skis, and fishermen. (T pp 200, 209) However, when looking at the location of the lease site as opposed to the channel for the cut-through, the lease would not restrict use of the cut-through.

34. Officer Sabella was also concerned that recreational boats and jet skis may run into the gear and poles that would be placed in the proposed lease site. (T pp 201, 216-217)

35. It is true that a boat could be damaged if it ran into or over the floating bags or associated ropes present in the current lease and described in the management plan for the proposed lease. (T p 73) However, these structures are readily visible to boaters and anyone in the immediate vicinity. The damage caused by hitting these structures are no more, and probably less, than would be to a likewise inattentive water craft operator who runs into a sandbar or piling or other obstruction in the water. The operator has an affirmative duty to see what should be seen.

36. People cannot always be protected from their own stupidity and/or inattention with consequences. This location is about as hidden as it could possibly be and still be accessible and usable just about any purpose. The area is not easily accessible, especially at low tide.

37. In Officer Sabella's opinion there would be potential conflict between the lease and recreational boaters and swimmers, especially in the summer months. He expressed concern for potential conflict with crab pot fishermen and hook and line anglers that fish the area as well as some navigation problems. (Resp.'s Exh. 4, p 9) His comments and concerns of potential problems are completely speculative.

38. Officer Sabella confirmed that Mr. Samuel Corbett was the "commercial crab pot fisherman" to whom he spoke and is referenced in his report on behalf of Marine Patrol division. Mr. Corbett is likewise the commercial fisherman referenced in the Shellfish Lease Investigation Report in finding of fact number 21 above. (Resp.'s Exh. 3, p 1)

39. Mr. Corbett is the only commercial fisherman of any kind that anyone spoke with who is involved in any regard with these lease applications during the review process, including Officer Sabella.

40. Samuel Corbett is a commercial fisherman who has fished the area for approximately 51 years. Mr. Corbett is also the chairman of the North Carolina Marine Fisheries Commission. (T pp 177-178)

41. Mr. Corbett works crab pots in the area of the proposed lease site approximately 150 to 175 days a year. (T p 180) During those days, Mr. Corbett works his crab pots in the area

surrounding the proposed lease site for about 30 to 40 minutes. (T p 180)

42. Mr. Corbett informed Officer Sabella during the review process that he would not object to the proposed lease but that he has seen people in the lease site and that he believed that there would be complaints if the proposed lease applications were approved. (T p 186)

43. Mr. Corbett testified that he sees about 10 to 15 recreational boats and another 10 to 15 commercial boats in the proposed lease site per year. (T pp 182, 183) That is the equivalent of approximately two boats per month, which should not be cause for alarm.

44. One boat that Mr. Corbett specifically mentioned during the hearing was the Oak Winds. Mr. Corbett testified that the Oak Winds fishes with gillnets in the proposed lease site and works the site from “maybe the middle of October to the middle of November.” (T p 182) It is not known if the Oak Winds is a commercial fisherman or an individual fisherman. This is further indication that there is minimal use by either recreational fishermen or commercial fishermen.

45. Officer Sabella seems to question Mr. Corbett’s observations, contending that he sees a significant number of boats in the lease area, mostly passing through. In comparing the number of days that Mr. Corbett is in the area as compared to Officer Sabella, it seems Mr. Corbett is in the area more often than Officer Sabella. As a commercial fisherman with 51 years of experience, as well as chair of North Carolina Marine Fisheries Commission, Mr. Corbett is entitled to significant more deference than Officer Sabella who has 12 years of experience and who’s attention while on the water would be most directed at boater and water safety and violations.

46. Mr. Corbett further mentioned that he has seen individuals fish for drum and speckled trout in the proposed lease site. (T p 182-183) Those fish are not generally found to be in the same locations for much of the year. While they are desirable fish, there is no evidence that the lease would prohibit anyone from fishing for those particular fish in and around the Petitioner’s gear.

47. Mr. Corbett also testified that the proposed lease would make it “a lot tougher” to place crab pots in the lease site. (T p 181) However, Mr. Corbett acknowledged that he could put crab pots in the area and that he has done so around Petitioner’s current lease site.

48. Mr. Corbett is the only commercial fisherman about or from whom there is evidence concerning the proposed lease, and Mr. Corbett is not opposed to the lease. He stated “I don’t care if he puts a lease in there. . .” a position he has repeated often. (T-180)

49. Mr. Corbett observed that recreational use in the area has increased since 2008, but he did not think that recreational use specifically in the Petitioner’s current lease had increased because of the bags already floating in the site. (T p 184-185) If that logic is to hold true, then once the Petitioner’s bags are in the water, then the recreational use should decrease in the proposed lease site. Just as with the current lease site, boat traffic would not be hampered for those wanting to use the cut-through when tides allow.

50. Mr. Corbett observed that he had received complaints from swimmers in the area who were injured by his crab pots and that recreational fishermen had gotten tangled in his pots. There is no



evidence that he has quit putting his crab pots out, and he acknowledges that people could still fish around Petitioners gear should the lease be granted. (T 188, 192).

51. After receiving internal comment and passing initial review, the Division sent notice of a public hearing and solicited public comment. (T 147-148)

52. The Division received comments from the public at the public hearing as well as three emails. As noted in the Memorandum from Steven Murphey to Director Louis Daniel, dated February 10, 2016, all who appeared at the public hearing and spoke were in favor of the lease. (Resp.'s Exh 3, p.19) Also attached to the memo are the three emails referenced above in Findings of Fact 22, 23, and 24; two of which do not speak to this lease, and the third which is in essence against Petitioner having any lease in some undefined area. (Resp.'s Exh. 3, pp 11-18, including unnumbered page between 14 and 15)

53. Steven Smith, a Commissioner for Topsail Beach, commented on the lease during the public comment period. (T p 254) Mr. Smith questioned the amount of notice in that he had only seen it in the local newspaper the night before and that his town hall apparently did not even know about the meeting.

54. Mr. Smith was shown the map on page 6 of Respondent's Exhibit 3 at the public hearing and is familiar with the Area. (T pp 147, 259) From that map it is practically impossible to discern with any degree of certainty where the boundaries of the lease are located. One may at best get an idea of the general location of the lease.

55. At the public hearing, Mr. Smith observed that the proposed lease is in a high traffic area from May through October. (Resp.'s Exh. 3, unnumbered page between page 14 and 15) Mr. Smith also observed that he is in favor of anything that will bring back the oysters and clams that have been in decline for many years. While Mr. Smith did not object to the lease, he commented that he was concerned that the proposed lease would create conflicts by visitors to the area tampering with Petitioner's equipment. (*Id.*)

56. Mr. Smith has seen kayaks and rafts as well as fishermen using their trolling motors going up and down through the cut-through. (T pp 257-258)

57. According to Mr. Smith, even during the non-summer months, when there is very little tourist traffic there is still "always somebody in there. I don't think I've ever been by there I haven't seen somebody back there doing something, whether it's fishing or netting or crabbing. There is always somebody, and that's a good area." (T pp 260-261)

58. In Mr. Smith's sworn testimony, he is primarily concerned with the prospect that the visitors to the area's curiosity would cause damage to Petitioner's gear. His concern is different from the conflict with which Officer Sabella was concerned. In his sworn testimony, Mr. Smith continues to be in favor of the lease.

59. Dr. Louis Daniel served as the Director of the Division of Marine Fisheries from February 1, 2007 to March 1, 2016. (T p 220)

60. Dr. Daniel reviewed the application packet, public hearing comments, public meeting comments summary, information from Fisheries Management and Marine Patrol, and discussed all of these materials with Steve Murphey, Section Chief for the Habitat Enhancement Section of the Division of Marine Fisheries, and Mr. Corbett prior to making a decision on whether to approve or deny the lease application. Dr. Daniel stated that this was “the level of detail” that he reviewed prior to making his decision. (T p 221)

61. When specifically asked “why did you deny the application,” Dr. Daniel launched into a description of a whole host of reasons why he denied Petitioner’s application, specifically:

- a) That this lease is not in the “best interests of aquaculture”
- b) That there are moratoriums in Brunswick and Carteret Counties which are based on conflicts with this same type of equipment (This proposed lease is in Pender County and there is no moratorium)
- c) That putting in the oyster gear will render the site less photogenic
- d) That “this” is going to cause “substantive problems throughout North Carolina” (presumably using this type of gear in the oyster leases)
- e) That he has started receiving complaints about this type of gear in front of people’s homes, obstructing their view. (T pp 222-223)

62. Dr. Daniel admits that he was not just looking at the Petitioner’s lease, but the cumulative effect of complaints that he has heard from across the state. According to Dr. Daniel the foregoing litany in finding of fact number 60 “weighed significantly in my decision-making, along with the observations of Officer Sabella.” (T. pp 223, 248-250)

63. Dr. Daniel completely discounts the report from Ms. Murphey and Fisheries Management, speculating that they did not actually go to the proposed lease site, was unfamiliar with the location, and had based their recommendations on the size of the lease alone. There is no evidence whether anyone from Fisheries Management actually went to the site, although their duty would have been to actually visit the site. Dr. Daniels does not know whether they did or not. Dr. Daniels contention that he relies heavily on the recommendations of his staff is obviously not true, except to the extent that he apparently relied almost exclusively on Officer Sabella. (T pp 224-225, 247)

64. Dr. Daniel also opines that he would have approved the lease but for the water column component, an option which was available to Dr. Daniel but not offered to Petitioner. (T. p 225)

65. Of all the lease applications in any given year, approximately 10% are for the same type of gear as requested in this application; i.e., the floating bag type. Dr. Daniel has never denied a permit request using the same gear as in this proposal. (T. p 251)

66. Dr. Daniel also acknowledges that he gets very few comments against shellfish leases. (T. p 225) That begs the question of where, from whom and when has he received the myriad of complaints that was instrumental in forming his decision as noted in Findings of Fact #60 and 61 above.

67. Although Dr. Daniel had been out in the general area with Mr. Corbett approximately 10 to 11 times, from Dr. Daniel's testimony, it is not clear if he is even aware of the exact location of the proposed lease at the times that he has physically been in the area. (T. p 228, 233)

68. In coming to his decision, Dr. Daniel states that he relied heavily on the comments from Officer Sabella and the comments from Mr. Corbett that there would be complaints about the lease. (T p 238)

69. Dr. Daniel states that he has been around water column leases that use the floating bag method. He acknowledges that one can navigate around such leases, but speculates that one might lose fishing tackle around the structures, especially if a sizeable fish is on the line. (T p 223)

70. The undersigned has been in, on and under the coastal waters of North Carolina for more than fifty years, including as a boat owner, a certified SCUBA diver and having fished in marlin tournaments for more than 20 years. As a recreational fisherman, the undersigned is of the opinion that most fishermen are not going to fish in a place where there are obvious obstructions which pose a problem for losing tackle, or at the very least be extremely cautious. It might also depend on what type of fish one is fishing for and thus the type of tackle used. For example, submerged structures are more apt to cause loss of tackle especially for someone using bottom rigs. It would not be a surprise that Petitioner would find fishing tackle caught in his gear, but it would not be an indication that the lease would be prohibitive to fishing and should be denied.

71. Dr. Daniel also says that he took into account that the general area is heavily used by the recreational fishing and boating community. (T p 224) There is no evidence to support the contention that the general area is "heavily" used by recreational fishermen. There is some evidence of commercial fishing from the one commercial fisherman Dr. Daniel spoke to, but the evidence does not support a finding that such use is "heavy." The evidence is that one crab fisherman and perhaps one gill-netter use this particular area with any degree of regularity.

72. Dr. Daniel denied the lease application "due to significant user conflict and traditional use by commercial and recreational constituents." (Emphasis added) (Resp.'s Exh. 3, p 19) (T p 226) There was no acknowledgement that Petitioner's existing lease has been in use since 2008 without conflict or complaint.

73. Dr. Daniel's decision was communicated to Petitioner by letter from Valerie Wunderly, Program Manager Shellfish Leasing, dated February 19, 2016. Ms. Wunderly's letter mirrors Dr. Daniel's decision by stating that "the site was determined to have significant user conflict and traditional use by commercial and recreational constituents." (Emphasis added) (Resp.'s Exh. 7)

74. While an option to Petitioner was to work with the Respondent to try to find an alternate site, he only had 20 days within which to exercise his right of appeal to the Office of Administrative Hearings. Dr. Daniel's testimony indicates that he was of a mind at that time to not approve any floating bag leases because of state-wide problems. Even though Petitioner would not have been aware of that rationale, it is obvious from his testimony that Dr. Daniel would not have approved this type of lease anywhere.

**TESTIMONY FROM PETITIONER'S WITNESSES**

75. The Petitioner claims that the proposed lease would not interfere with boats. He acknowledged when asked hypothetically what would happen if a boat drove over one of the floating bags in his current lease, that it was quite possible that the nylon line could wrap around the propeller and probably shut the engine down.” (T p 74)

76. Interestingly, there is no evidence that anyone has run into his current lease bags in the 8 years they have been in existence. It is inconceivable to the undersigned, as an experienced boater, that an even quasi-vigilant boater would run into the floating bags where they would be located in the proposed site. Beyond that, you cannot protect everyone from their own stupidity.

77. The Petitioner also claims that the proposed lease would not interfere with kayakers. This contention is confirmed by Jay Styron who testified that kayakers typically avoid his shellfish lease sites that have floating bags like those Petitioner intends to use at the proposed lease. (T p 98)

78. Based on the evidence presented, there is no evidence that boaters and kayakers access to the area will be hampered other than to go to the specific area of the lease. Access to the cut through will have no impediment. Naturally, waders and swimmers would be deterred from the specific area where the bags are located. However, there is little to no evidence of actual swimming or wading in the area where the bags are located. Some few boats may pull up to the small island separating this lease area and the channel for Lea Island, especially during low tide, but the small island is almost totally marsh area, not exactly ideal for traditional beach activities.

79. There will indeed be sharp objects on the bottom of the proposed lease (T p 76), and Petitioner has had to warn a family that was walking through his current lease site (T pp 70-71). These areas are clearly marked and the bags are obvious. The Petitioner is in the area almost daily and has used the bags as teachable moments to the curious.

80. Jay Styron is the Director of Marine Operations for the University of North Carolina Wilmington. He has been with the University for 24 years in various capacities. He is also the President of the North Carolina Shellfish Growers Association.

81. Mr. Styron only visited the proposed lease site one time about two years prior. (T p 95) Mr. Styron’s attention was focused mainly on the Petitioner’s existing lease, and he estimated that he spent only about 10 to 15 minutes looking in the general direction of the proposed lease site, since that site had not been even proposed at that time. (T p 97)

82. Mr. Styron has a lease near Cedar Island in Carteret County, North Carolina. (T p 97) When asked whether boaters go through his lease, Mr. Styron testified that “most reasonable people wouldn’t be going through the lease to start with when they see floating gear all around because they don’t want to get entangled in it.” (T pp 97-98)

83. Mr. Styron also stated that he has commercial crabbers and commercial gillnetters who set close to his bags as well. (T. p 93)

84. Romulus McCoy testified on behalf of Petitioner. He has been fishing in the area behind Lea Island one to two times per week since 2012. He has not seen any recreational fishermen in the lease area. He has seen recreational fishermen fishing further up the creeks. He has seen Mr. Corbett's crab pots in the lease area.

85. According to Mr. McCoy, he currently fishes in the proposed lease area. He also stated that if the floating bag system is used in the proposed lease site that it would not affect his fishing in the site. When he fishes in the Petitioner's current lease site, Mr. McCoy does not go into the current lease site and fishes only on the outer perimeter because he does not want to get hung up on the "baskets." (T pp 107-08) That is only common sense.

86. Two other witnesses testified on behalf of the Petitioner, Kenneth Garvey and James Milne. Mr. Garvey testified that he fishes the "back creek" and goes to Lea Island with his family. When asked whether he has observed anyone in the proposed lease site, Mr. Garvey testified that he has never seen anybody "in that particular area." (T pp 110, 111) Mr. Milne testified that he travels to Lea Island to recreate in the area, but is not a big fisherman. (T p 118) Mr. Milne testified that the proposed lease site is fairly close to the main boating channel, but that he has not observed anyone in the site. (T p 117, 121, 121)

#### **CONCLUSIONS 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 this matter. To the extent that the findings of fact contain conclusions of law, or that the conclusions of law are findings of fact, they should be so considered without regard to their given labels.

2) The Petitioner bears the burden of proof by a greater weight or preponderance of the evidence of showing that the Respondent erred when it denied the Petitioner's shellfish lease and associated water column lease by exceeding its authority or jurisdiction, acting erroneously, failing to use proper procedure, acting arbitrarily or capriciously, or failing to act as required by law or rule. *See* N.C. Gen. Stat. § 150B-23(a); *See also Overcash v. N.C. Dep't of Env't & Natural Res.*, 635 S.E.2d 442, 447 (2006), *disc. rev. denied*, 361 N.C. 220, 642 S.E.2d 445 (2007) ("unless a statute provides otherwise, petitioner has the burden of proof in OAH contested cases").

3) "[W]here the waters covering land are navigable in law, those lands are held in trust by the State for the benefit of the public." *State ex rel. Rohrer v. Credle*, 322 N.C. 522, 527, 369 S.E.2d 825, 828 (1988).

4) The Secretary of the Department of Environmental Quality may, in his discretion, authorize shellfish bottom and associated water column leases when he determines that the public interest

will benefit from issuance of such a lease and the proposed lease otherwise meets certain minimum standards. N.C. Gen. Stat. §§ 113-202(a), 202.1(a)) The Administrative Code provides in 15 N.C.A.C. 03O .0203 “the Secretary shall consider the lease application, the Division’s proposed lease area analysis, and public comments, and may in his discretion lease or decline to lease the proposed lease area or any part thereof.”.

5) The Secretary has delegated his authority for issuing leases to the Director of the Division of Marine Fisheries. *See* N.C. Gen. Stat. § 143B-10; (T p 165).

6) Absent conflicting provisions, the procedures and requirements pertaining to shellfish bottom leases apply to water column leases as well. N.C. Gen. Stat. § 113-202.1(h).

7) One minimum standard a shellfish lease must meet before it can be approved by the Secretary is that “[c]ultivation of shellfish in the leased area will be compatible with lawful utilization by the public of other marine and estuarine resources. Other public uses which may be considered include, but are not limited to, navigation, fishing, and recreation.” N.C. Gen. Stat. § 113-202(a)(3).

8) At issue in this particular contested case is whether or not the proposed shellfish lease is “compatible” with the other uses of the area for navigation, fishing and recreation.

9) Neither the general statutes nor associated Marine Fisheries Commission regulations define or indicate how much use within a proposed lease site must be present in order for the lease to warrant denial as being incompatible with those public uses. There is no definition to define what constitutes the area of the lease, or how it might actually impact navigation, fishing or recreational use.

10) There is no question that Lea Island itself is a heavy recreated area, especially during summer months. There is not sufficient evidence to show that the proposed lease sight is heavily recreated at any time. Although just across the main channel from Lea Island, the proposed lease area is tucked away behind a small marsh island, not subject to the heavy tourist traffic visiting Lea Island. It is hard to imagine a more secluded, and protected area that could still be accessible to a potential lease holder. The mere fact that the site is relatively close to a heavily used area is not sufficient in and of itself to designate this area as heavily used.

11) Petitioner’s current lease which is roughly 100 yards away from the proposed site is completely open and easily accessible, much more so than the proposed lease site. There has been very little to no problems between Petitioner’s current lease and other visitors to the area.

12) There is some evidence that a single commercial fisherman/crabber, Mr. Corbett, puts his pots in the area, but that one fisherman says that he has no objection to the lease and that he will still be able to put crab pots in the area. That same one commercial fisherman is the only person upon whom Dr. Daniel and Officer Sabella relied, and he testified in-person in this contested case hearing. The only direct evidence also offers that gill-netters can still fish around this gear.

13) There is no substantial evidence that this lease would interfere with recreational fishing to any significant degree. In fact, the most direct evidence is to the contrary. Mr. Corbett states that one can indeed still fish around the type of gear proposed in this lease request.

14) There is no substantial evidence that this lease would interfere with navigation. The proposed site is tucked in behind a marsh island and away from the main channel running beside Lea Island. Nothing about this proposed site interferes with the boaters' access to Lea Island. There is a cut through beside the proposed site that leads to other creeks, and the proposed site does not interfere with use of that cut-through

15) The letter from Ms. Wunderly to Petitioner dated February 19, 2016 is the letter from Respondent formally denying Petitioner's request for a lease. (Resp Exhibit 7) The letter states that the proposed site was determined "to have" conflicts, phraseology which means in actuality not speculation. The only evidence in this contested case hearing of any conflict is totally speculative.

16) Ms. Wunderly's letter goes on to state that the conflict is with commercial and recreational users and that the conflict is "significant." The evidence does not support a finding that any conflict was significant. The only evidence concerning commercial fishing comes from Mr. Corbett, who's testimony is essentially that it will pose no problem for him. The evidence is that gill-netters will continue to be able to use the area. Concerns were expressed by Mr. Corbett that the recreational folks might tamper with Petitioner's equipment is belied by the fact that his current lease is completely open and available with very little to any problems. Concern for jet-skiers is not well founded in that the actual numbers of users is not known but apparently relatively small, and they have a duty to see whatever is to be seen as with any other obstruction in the water.

17) Ms. Wunderly's letter articulates the only reasoning given to Petitioner as to why his applications were denied. It is obvious that Dr. Daniel, the decision maker, relied upon a whole host of reasons for denying the applications, reasons that apparently were not known to anyone else in the State of North Carolina except Dr. Daniel.

18) Dr. Daniel's reliance on factors not contained in the denial letter is a blatant denial of procedural due process. Perhaps over-simplified but the essence of procedural due process is that when the government is going to take or deny a property interest, then the process must be fair. It is the essence of the Administrative Procedure Act. There was no way for Petitioner to defend against reasons for denying his application that were not known to him until they were testified to in the course of this hearing.

19) The question becomes whether or not Dr. Daniel, acting in the stead of the Secretary, has absolute discretion in making his decision. The answer to that question is a resounding "no."

20) *In Maines v. Greensboro*, 300 N.C. 126, 265 S.E.2d 155, 158-9 (1980), the North Carolina Supreme Court held that "an ordinance which vests unlimited or unregulated discretion in a municipal officer is void." The United States Supreme Court has explained that "[d]iscretion without a criterion for its exercise is authorization of arbitrariness." *Brown v. Allen*, 344 U.S. 443, 496 (1953).



21) In this present contested case, the statute itself, N. C. Gen. Stat. 113-202, vests discretion to the Secretary of the Department, and sets out what is to be considered in making the decision. The statute is not unconstitutionally vague. What is problematic in this contested case is the application of the statute. A rule for application of the discretionary decision-making has been promulgated, 15A NCAC 03O .0203. The statute and the rule directs the Secretary in what is to be considered. The rule states that there “shall” be an inspection of the site by agents of the Division. Once the application is determined to be “consistent with all applicable requirements” then public notice is given in order to get feedback from any interested parties. A process was in place wherein the Director, acting for the Secretary, received information from three sections within his division, as well as the public comment.

22) In this contested case, the Director, Dr. Daniels, was given discretion but the discretion was not unbridled and unregulated so that he could do anything that he wanted to. There was statutory regulation and rule, as well as a process in place, to guide him in the decision making process.

23) The Petitioner reasonably followed the process. There was nothing in the process to reasonably put him on notice of what the Respondent now says were the reasons for which his applications were denied because the discretionary decision making went far beyond those parameters set forth in the statute and rule. The defined criteria or standards applicable to the decision making in this process are there to provide an applicant with reasonable notice of what is expected and to govern the process. The denial letter is to specifically detail why Petitioner’s applications were denied. It did not.

24) Respondent claims that it has discretion, and it does, but complete discretion without criteria renders a decision as arbitrary. There is nothing that demonstrates the accuracy of the information upon which Dr. Daniels claims to have made his decision. It is completely anecdotal. If that process is allowed, then the Director can continue to allow or deny applications for whatever reasons he or she might desire.

25) In *Lewis v. City of Kinston*, the Court of Appeals invalidated a public employment policy on North Carolina constitutional grounds when the challenged policy contained no standards or criteria, which essentially afforded the city manager “practically unlimited discretion. . .” *Lewis v. City of Kinston*, 127 N.C. App. 150, 155; 488 S.E.2d 274, 277 (1997). The Court explained that “[a]n ordinance which vests unlimited or unregulated discretion in a municipal officer is void.” *Id.* at 154, 488 S.E.2d at 277.

26) Here, there are standards and criteria and process, and thus are not “unlimited or unregulated.” Dr. Daniel went beyond the scope of those regulations and criteria to render his decision as though he had complete and unbridled discretion.

27) “An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision.” *Venters v. Albritton*, 184 N.C. App. 230, 234, 645 S.E.2d 839, 842 (2007), citing *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998).



28) "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Treants v. Onslow County*, 94 N.C. App. 453, 458, 380 S.E.2d 602 (1989), quoting *City of Mesquite v. Aladdin's*, 455 U.S. 283 (1982) and *Grayned v. City of Rockford*, 408 U.S. 104 (1972). A vague regulation "fails to inform those to whom it is directed of its application to them and therefore violates due process of law." *Connally v. General*, 269 U.S. 385, 391 (1926). It is equally a violation of due process to have guidance in rule and law, and then not follow it. The process that Respondent used is flawed.

29) It is recognized that the contested case hearing at the Office of Administrative Hearings is ultimately the "due process" hearing guaranteed to the Petitioner; however, Petitioner should have been provided at least a modicum of procedural due process in the steps that gets him to this hearing, and he was not.

30) 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.")

31) Respondent's actions in denying Petitioner's application were predicated upon arbitrary factors and considerations. The totality of the facts and circumstances demonstrate that Petitioner was needlessly and arbitrarily denied his shellfish applications.

32) "Administrative decisions may be reversed as arbitrary or capricious if they are 'patently in bad faith,' 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.'" *ACT-UP Triangle*, 345 N.C. at 707, 483 S.E.2d at 393 (quoting *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977)). The decision by Dr. Daniel reciting reasons beyond the denial letter and beyond the scope of any rule or law indicates "a lack of fair and careful consideration."

33) The APA requires that an Administrative Law Judge "giv[e] due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency." N.C. Gen. Stat. § 150B-34(a). There is no evidence in this case that recites facts and inferences that require any specialize knowledge of the agency or anyone else. The agency is not entitled to any particular special consideration or regard above the ordinary.

34) The evidence shows that certain areas close to the proposed site are more heavily used than the exact footprint of the proposed lease site. Fact that there is heavy traffic nearby the proposed lease does NOT necessarily make that area inappropriate for leasing, just as his existing lease has co-existed for all these years. The evidence shows that very few boats go through that cut through, quite possibly because one can obviously just as easily go around the marsh islands harboring the proposed site without the possibility of running aground. The law does not require an area to be traffic free to be approvable because it would not make any sense and would be an almost impossible requirement to meet.

35) It is the policy of the State of North Carolina to encourage the development of private and commercial shellfish cultivation so long as it is done in a manner compatible with other public uses of the marine and estuarine resources. The evidence is substantial that this proposed lease is compatible with the other uses. The evidence before Dr. Daniel was not substantial evidence that this area was incompatible with the other uses but relied primarily on the opinion of Officer Sabella who hypothesizes that there will be problems. The other person upon whom he relied is Chair of the Marine Fisheries Commission and he had no objection to the lease. Dr. Daniel off-handedly rejected the opinion of a section of his own agency who had a statutory duty to visit the site and render a report. Most troubling is that Dr. Daniel relied in large degree upon factors known only to himself.

36) The Petitioner met his burden of showing that the Agency exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, and failed to act as required by law or rule as required in N.C. Gen. Stat. § 150B-23(a) when denying the Petitioner's lease applications.

#### **FINAL DECISION**

BASED UPON the Findings of Fact and Conclusions of Law above, the undersigned makes the following decision:

The Respondent's decision to deny the Petitioner's Application for Lease of Shellfish Bottom and an Application for Lease of Water Column is **REVERSED**. Respondent is directed to issue Petitioner shellfish leases for which he applied and are at issue herein.

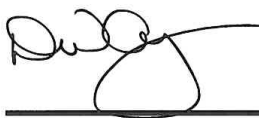
#### **NOTICE**

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision

resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' Rule 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 5th day of October, 2016.

A handwritten signature in black ink, appearing to read 'D. Overby', is written over a solid horizontal line.

Donald W Overby  
Administrative Law Judge

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STATE OF NORTH CAROLINA  
COUNTY OF BURKE

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
16 OSP 03894

Mark Stout Petitioner,  v.  N C Department Of Public Safety Respondent.	<b>FINAL DECISION</b>
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This matter was heard before the Honorable David F. Sutton, Administrative Law Judge, at the Catawba County Courthouse in Newton, North Carolina on August 3, 2016.

**APPEARANCES**

Petitioner: Michael C. Byrne  
Law Offices of Michael C. Byrne  
150 Fayetteville Street, Suite 1130  
Raleigh, NC 27601

Respondent: Tamika L. Henderson  
Assistant Attorney General  
North Carolina Department of Justice  
Post Office Box 629  
Raleigh, NC 27602

**WITNESSES**

The following witnesses testified for the Petitioner:

Mark Stout

The follow witnesses testified for the Respondent:

Mark Stout;  
Gregory Bullard;  
Benjamin Edwards;  
William McFalls;  
Helen Harringer;  
Carlos Hernandez;  
Michael Slagle.

**EXHIBITS**

Petitioner's exhibits ("P. Exs.") 1 and 7 were admitted into evidence. Respondent's exhibits ("R. Exs.") 1-13 and 15-20 were admitted into evidence. Respondent's Ex. 14 was presented as an offer of proof.

**PARTY REPRESENTATIVES**

The Petitioner's party representative was Petitioner, Mark Stout. The Respondent's party representative was Superintendent Michael Slagle.

**PRE-HEARING MOTIONS**

Petitioner filed three written pre-hearing motions styled First Motion in Limine, Second Motion in Limine, and Third Motion in Limine on August 1, 2016. Respondent objected to the written motions as they were filed less than ten (10) days before hearing. The Respondent's objection was overruled. Petitioner's First Motion in Limine, to sequester witnesses, was granted. Petitioner's Section Motion in Limine, to limit evidence strictly to the four corners of the dismissal letter was taken under advisement and addressed as specific evidentiary objections were raised during the course of the hearing. Petitioner's Third Motion in Limine, to exclude all evidence of a polygraph examination was granted in part. Specifically, any evidence related to the opinion of the examiner or the results were excluded. Evidence related to the polygraph examination used as an investigative tool was admitted. (T. p. 26).

**ISSUE**

Whether Respondent had just cause to dismiss the Petitioner, a career status State employee subject to the State Human Resources Act, for disciplinary reasons.

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 and Conclusions of Law. In making the Findings of Fact, the undersigned has weighed all the evidence and assessed the credibility of the witnesses. The undersigned has taken into account the appropriate factors for judging credibility of witnesses, including but not limited to the demeanor of the witness, any interests, bias, or prejudice the witness may have. Further, the undersigned has carefully considered 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. After careful consideration of the sworn witness testimony presented at the hearing, the documents and exhibits admitted into evidence, and the entire record in this proceeding, the undersigned makes the following:

**FINDINGS OF FACT**

1. Petitioner Mark Stout was employed with the Respondent North Carolina Department of Public Safety ("Respondent" or "DPS") in its prison facility at Mountain View Correctional Center. At the time of his dismissal Petitioner was a Correctional Sergeant, having been promoted from Correctional Officer. (T. p. 47-48, 90). Petitioner as of the events discussed herein had been employed with DPS since January 18, 2005. (P. Ex. 7).

2. In his nearly 11 years of employment with DPS, Petitioner had received no prior disciplinary action. (T. p. 91).

3. Petitioner attended Basic Training and was trained annually thereafter regarding NCDPS policies and procedures including NCDPS' Conduct of Employees Policy and Unlawful Workplace Harassment Policy. (R. Ex. 19, 20; T. p. 48).

4. An essential job function of Petitioner's position was to ensure that his subordinates followed all DPS policy. (T. p. 48).

5. Petitioner was aware that as a Correctional Sergeant he was held to a higher level of conduct. (T. p. 48).

6. Petitioner's work performance was rated under the DPS "TAPS" system, which is a kind of rolling performance review where entries regarding work performance are made by multiple supervisors. (T. p. 91). During his 11 years of employment, Petitioner had good TAPS entries with no "below good" performance incidents noted. (T. p. 92).

7. Petitioner's most recent TAPS forms were admitted as (P. Ex 7); they show good ratings as well as written comments from Petitioner's superiors that were highly complementary of his overall work performance. (T. pp: 93-97).

8. Petitioner served at the prison as a "relief sergeant." Rather than serving on a specific shift, Petitioner filled in for sergeant on various shifts on an as needed basis. (T. p. 96).

9. The incidents giving rise to this case took place on the night of May 3, 2015. On that date Petitioner was working in the 2A West unit of the prison, which is a medium custody unit. (T. p. 97).

10. Petitioner supervised various Correctional Officers that night. Among them were Officers McFalls, Edwards, and Manning. McFalls was a new officer.

11. During the shift, Petitioner normally worked in an office doing paperwork on a computer. (T. p. 98). Petitioner was very busy with paperwork during a shift and at times had problems getting all his paperwork done. (T. p. 99).

12. At the vantage point from the computer on which he was working in his office, Petitioner had a line of sight to part of "B Wing" and the inmate closet, which is a supply closet.

(T. p. 99). He did not have visual line of sight for the whole unit, including the cell, cell #B-313, which is in large part the focus of events for this case. (T. pp. 99-100, 102).

13. At some point during the evening, Petitioner received an anonymous note claiming that the inmate in cell B313 was in possession of contraband materials. (T. p. 100). The alleged contraband was “strips,” or pieces of paper containing a small amount of illegal drugs. (T. p. 100). The drug in question is a drug called “Suboxone,” a form of methamphetamine. (T. p. 162).

14. The smuggling of contraband, including “strips,” was a recurring issue at the prison. (T. p. 100). That an inmate suspected of having contraband did not receive visitors was not, for Petitioner, a reason not to search the inmate, as inmates who did receive visitors passed contraband to inmates who did not in an effort to avoid detection. (T. pp. 101-102).

15. Petitioner had no substantial prior interaction with Inmate Bullard, did not dislike him, and had no desire to humiliate or embarrass him. (T. p. 102).

16. Petitioner ordered that Inmate Bullard, the occupant of cell B-313, be strip searched. Petitioner ordered two officers, Edwards and McFalls, to conduct the search. (T. pp. 103-104). Two officers were sent because McFalls was a new officer and Petitioner wanted Edwards, the more experienced officer, to observe. (T. pp. 104-105).

17. On May 5, 2015, Gregory Bullard (“Bullard”), an African American inmate at MCI filed a grievance related to a strip search that was conducted by Officer William McFalls (“McFalls”) and Officer Benjamin Edwards (“Edwards”). Bullard alleged that the staff laughed at him and humiliated him during the strip search. (R. Ex. 17).

18. Among the issues Bullard complained about was that McFalls directed the inmate to lift the foreskin of the inmate’s genitalia during the search. (T. p. 106). However, policy requires this action during a strip search. (R. Ex. 16; T. p. 107).

19. During the strip search staff laughed at Bullard causing him embarrassment and humiliation. (T. p. 33). Bullard observed McFalls and Edwards go to the Petitioner’s office after the search and continue to laugh and look up to his cell. (T. p. 35). McFalls and Edwards laughing was visible to the Petitioner and caused him further humiliation. (Id.)

20. Petitioner was not present for the search and had no involvement in the actual search activity (T. p. 107). Petitioner did not hear anything that McFalls or Edwards may have said during the search. (T. p. 108). Petitioner did not know any specific details of the search (barring that no contraband was not found) until the matter was later investigated. (T. pp. 113-114).

21. Petitioner, both during the investigation and at hearing, consistently and emphatically denied ever using the term “Alabama black snake” in reference to Bullard’s genitalia. (T. pp. 111-112). No one else used the term within Petitioner’s hearing. (T. p. 112).

22. Petitioner likewise denied using the term “snake hunt” in reference to Bullard’s genitalia, and no witness testified that they heard Petitioner make that comment. (T. p. 112).

23. During the initial investigation of the incident in May, Petitioner was asked whether he had heard anyone use the term “Alabama black snake” in connection with the Bullard search. Petitioner said he had not. (T. p. 113). Petitioner was not asked whether he had heard anyone use the “snake hunt” term. (T. p. 114).

24. The instructions given to Petitioner at the start of the investigation interview process stated that questions would “relate specifically and narrowly to the performance of official duties and/or personal conduct.” (T. p. 116). Petitioner interpreted these instructions as directions to simply answer the questions asked. (T. pp. 116-117).

25. During the first interview in May, Petitioner was not asked whether he looked up an inmate on OPUS (the prison information system) in connection with the Bullard search. (T. p. 119). Petitioner testified that he would have no reason to conceal the fact that he looked Bullard up on OPUS, and DPS did not advance one at hearing, nor did they produce evidence that doing so was contrary to policy. (T. pp. 111-112). In short, Petitioner initially omitted something that wasn’t wrong.

26. In his subsequent interview, Petitioner stated that he heard someone reference a “snake hunt,” which he did not state in his initial interview. However, as shown, Petitioner in his initial interview was asked only about the “Alabama black snake” comment. (T. pp. 116, 119-120).

27. Petitioner heard the comment on one occasion only while doing paperwork in his office after the search. (T. pp. 121-122). Petitioner considered that addressing the comment, which again was only made once, was of lesser importance than completing the paperwork that he was required to do. (T. pp. 122-123).

28. Petitioner likewise stated later, though not in his first interview, that he’d opined that the suspected contraband might have come through via visitation. Petitioner likewise said he had no reason to conceal this information initially and, given DPS does not fault Petitioner for ordering the strip search of the inmate, DPS produced no evidence of any culpability on Petitioner’s part in not concealing this information. (T. pp. 124-125).

29. Moreover, Petitioner’s understanding – confirmed by Slagle’s testimony – was that the focus of the questions in May was whether the inmate was humiliated during the search itself, as part of some (unfounded) suspicion of officer hazing. (T. pp. 125-126).

30. Had Petitioner wished to conceal the additional information at issue, he simply could have stayed silent. (T. p. 127). Petitioner was given no contact information for the investigators so that he could add additional information to his statement and indeed was ordered specifically not to discuss the investigation with anyone. (T. pp. 127-128).

31. Petitioner volunteered the additional information because, upon being interviewed again, he thought it “the right thing to do.” (T. p. 127). Petitioner also stated that he did not identify Manning as the source of the “snake hunt” comment because he was unsure that it was Manning who said it. (T. p. 134). DPS counters that Petitioner volunteered the previously concealed information because he was worried about being polygraphed. However, DPS produced no



evidence that Petitioner would have been asked, or was asked, during the polygraph about any of the information he allegedly “concealed” in the first interview.

32. McFalls claimed he was unable to tell whether Edwards was laughing during the search because “my back was to him.” (T. p. 147). This was despite Edwards, by McFalls’ own testimony, being “four or five feet” away. (T. p. 152).

33. McFalls claimed that Petitioner after the search asked him what he thought of his “first Alabama black snake,” an apparent reference to the inmate’s genitalia. (T. p. 148). McFalls said he laughed at the question. (T. p. 149). No evidence was presented that McFalls reported or attempted to report the remark at the time he claims it was made. (T. p. 150).

34. McFalls’ entire service as DPS was slightly more than a month. (T. p. 150). McFalls said he resigned from DPS because of “the drama from this situation” (apparently the inmate search). (T. p. 150). When asked what kind of “drama,” McFalls said “what it [this incident] stirred up,” noting that he had already been in trouble with management because of some off duty conduct. (T. pp. 150-151).

35. McFalls said the inmate was “lying” in claiming that McFalls had made the inmate shake his penis back and forth, and also was lying about McFalls’ general conduct during the search. (T. pp. 151, 155).

36. McFalls knew that in the initial investigation it was his conduct, primarily, that was being investigated. (T. p. 154). McFalls conceded that there was “enough drama” connected with the incident that he chose to resign his job. (T. p. 154).

37. McFalls claimed that Petitioner too was “lying” in denying the “Alabama black snake” comment. (T. pp. 155-156).

38. Edwards agreed with Petitioner’s testimony that there was an issue with the drug “strips” being smuggled into the prison via the visitation process, and that a common way for inmates to avoid interception of the contraband was to pass it along to an inmate who did not receive visitors. (T. pp. 163-164).

39. Edwards testified that in ordering the search Petitioner conducted himself normally and professionally, and said nothing negative about the inmate. (T. p. 164).

40. Edwards agreed that from his position in the office Petitioner would have been unable to observe the search. (T. p. 166).

41. Edwards did not hear Petitioner say anything about an “Alabama black snake,” either then or at any other time. (T. p. 167).

42. Edwards conceded during the internal investigation that he was laughing during the cell search. (R. Ex. 13, Bates Nos. 000013) Edwards also conceded that he was laughing with the Petitioner at Petitioner’s office after and during the search of Bullard. (Id, T. p. 161-162). However, Edwards contended that he was laughing with the Petitioner about a video game. (R.

Ex. 13, Bates Nos. 000014) Edwards proffered basis for laughing is not credible. The Undersigned notes that Petitioner denied laughing with Edwards or even witnessing the laughter. (R. Ex. 9, Bates. No. 000027; T. p. 65). The Undersigned finds as fact that Edwards was laughing in the presence of Petitioner after the strip search and Bullard witnessed the same.

43. Petitioner conceded that it would constitute unacceptable and unprofessional conduct for staff to laugh about conducting a strip search of an inmate. (T.p. 60).

44. Petitioner conceded that he would have a duty to correct his subordinate staff if they were laughing about conducting a strip search in his presence. (T. p. 61). Petitioner further conceded that he heard Manning reference a “snake hunt.” (T. p. 63).

45. There was conflicting evidence about whether the term “snake hunt” or “Alabama black snake” was used. The substantial weight of the evidence demonstrates that at least one of Petitioner’s subordinates made reference to Bullard’s genitals as a “snake” while in the presence of Petitioner.

46. Furthermore, the substantial weight of the evidence is that Petitioner witnessed his subordinates laugh about conducting an evasive strip search on an inmate under their charge.

47. Petitioner did not take any steps to correct the unacceptable conduct of his subordinates.

48. Slagle, though he testified that he concurred with Petitioner’s dismissal, never spoke with Petitioner about the incident and never reviewed Petitioner’s disciplinary or work history. (T. p. 267).

49. Slagle testified that in deciding whether to dismiss an employee, DPS managers were not required to consider, among other factors, the employee’s disciplinary history and performance history. (T. p. 234).

50. Slagle did not dispute that Petitioner had a very good work history with DPS. (T. p. 236).

51. The original investigation of the incident, per Slagle, was twofold: to investigate the inmate’s grievance and conduct the required PREA (Prison Rape Elimination Act) investigation. (T. pp. 239-240). In that investigation, the only person suspected of engaging in PREA-related activity was Officer McFalls. (T. pp. 239-240). However, Slagle subsequently stated that the primary focus of the original investigation was to determine whether McFalls, a rookie officer, was being hazed – and not whether anyone was making inappropriate comments about “snakes” (T. pp. 261-262).

52. Slagle confirmed that DPS interviewed various persons on the shift concerned to see if they had seen any evidence of hazing; all confirmed that they had not. (T. pp. 260-261).

53. Slagle conceded that Petitioner had nothing to do with any inappropriate conduct during the search of Inmate Bullard. (T. p. 250). However, Slagle testified that he would expect

Petitioner to correct any staff that used a term like Alabama Black snake, snake hunt or that laughed during or immediately after a strip search. (T. p. 220).

54. Slagle testified that there was no place in the prison workplace for “inappropriate comments.” (T. p. 263). However, prior to the incidents involving Petitioner, Slagle could not recall a single past incident where an employee had been fired for failing to “crack down” on inappropriate comments in the work place. (T. p. 264).

55. On December 4, 2015, Petitioner received a written notice of a scheduled pre-disciplinary conference from Slagle. (R. Ex. 1). This written notice stated that Slagle intended to recommend that DPS terminate its employment of Petitioner for unacceptable personal conduct.

56. The pre-disciplinary conference occurred as scheduled on December 7, 2015, at MCI. (R. Ex. 4). During the pre-disciplinary conference Petitioner was provided the specific reasons supporting the recommendation for his dismissal and Petitioner was given an opportunity to explain his side of the story and respond to the reasons specified. (R. Ex. 4).

57. Following the conference, DPS management approved the recommendation that Petitioner be dismissed. The Petitioner was notified by letter from Slagle dated December 8, 2015, that his employment was terminated based on unacceptable personal conduct. (R. Ex. 5).

58. The dismissal letter states that its finding that Petitioner engaged in unacceptable personal conduct was “based on the statements of Officers McFalls, Edwards, and Manning.” However, DPS’s own investigator, Helen Harringer, in her report, found those officers not to be credible – which she confirmed in her hearing testimony. (T. pp. 252-253). Everything that Petitioner was faulted for by DPS, except for the allegation of concealing information, was based on statements made by persons that DPS itself found not to be credible. (T. p. 253).

59. After completing his internal agency appeals, the Employee Advisory Committee unanimously recommended that Petitioner’s dismissal be upheld. On March 17, 2016, Petitioner was sent the Final Agency Decision upholding his dismissal. (R. Ex. 7).

### **CONCLUSIONS OF LAW**

Based on the Findings of Fact the undersigned makes these Conclusions of Law:

1. All parties are properly before this Administrative Law Judge and jurisdiction and venue are proper. 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. State Personnel Act (N.C. Gen. Stat. § 126-1 *et seq.*), and specifically the just cause provision of N.C. Gen. Stat. §126-35.

3. Because Petitioner has alleged that Respondent lacked just cause for his dismissal, the Office of Administrative Hearings has jurisdiction to hear his appeal and issue the final decision in this matter.

4. 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).

5. To demonstrate just cause, a State employer may show “unacceptable personal conduct” 25 NCAC 1J.0604(b)(2) or “grossly inefficient job performance” 25 NCAC 1J.0606.

6. The dismissal letter specified that the Petitioner was being dismissed for Unacceptable Personal Conduct.

7. Respondent complied with the procedural requirements for dismissal for unacceptable personal conduct pursuant to 25 N.C.A.C. 01J .0606, .0608 and .0613.

8. 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.”

9. In Wetherington v. N.C. Department of Crime Control and Public Safety, 368 N.C. 583; 780 S.E.2d 543 (2015), the Supreme Court re-affirmed its previous ruling in Carroll. Wetherington also specifically held that matters that must be considered in determining whether just cause exists to discipline a career state employee include:

[The] severity of the violation, the subject matter involved, the resulting harm, the [employee’s] work history, or discipline imposed in other cases involving similar violations. We emphasize that consideration of these factors is an appropriate and necessary component of a decision to impose discipline upon a career State employee for unacceptable personal conduct.

Wetherington at 12-13, see also In re Enterprise Wire Co. & Enterprise Indep. Union, 46 Lab. Arb. Rep. (BNA) 359 (Mar 28, 1966).

10. Analyzing these factors, the Undersigned notes Petitioner’s history, over ten years, of good work performance and lack of any prior formal disciplinary action. On the issue of the resulting harm, the evidence presented of any actual harm was limited to that of Inmate Bullard suffering unnecessary humiliation.

11. As for the charges of impeding an investigation, Slagle conceded that the focus of the initial investigation was not alleged inappropriate comments by staff, but rather whether some sort of hazing practices was at work with respect to a new employee's involvement in a search. The additional apparent focus of the initial investigation was on the inmate's treatment during the search – a search that Petitioner did not conduct and did not participate in other than ordering the search and receiving the results. Though DPS attempts (at least to some extent) to now question the search, Slagle stated that under circumstances where he suspected a prisoner possessed drug contraband of the kind alleged here, he himself would have ordered not only a search, but a strip search.

12. As DPS concedes that Petitioner's actions in ordering the search were proper, and the initial investigation had no focus on allegedly inappropriate comments outside the inmate search context, it is difficult to see how the information allegedly "concealed" by Petitioner (DPS's contention) or simply omitted through lack of initial recall (Petitioner's contention) operated to frustrate those goals.

13. Indeed, it is hard to determine what, if any, consideration DPS itself gave to the mitigating factors in deciding whether to dismiss Petitioner or impose some lesser form of discipline such as demotion, if merited. Slagle testified he gave no recommendation for dismissal to DPS upper management, stating that the information relevant to the dismissal came from the investigative team.<sup>1</sup> Harringer, the investigator, did not testify that she, or her team, made any kind of recommendation to DPS – indeed, she testified to the contrary.

14. In Warren v. Crime Control and Public Safety, the Court of Appeals, construing Carroll, 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, 221 N.C. App. 376; 726 S.E.2d 920 (2012); review denied, 366 N.C. 408, 735 S.E.2d 175, 2012 N.C. LEXIS 1195 (2012). The Court of Appeals followed the "Warren Test" in Clark v. N.C. Department of Public Safety, 2016 N.C. App. LEXIS 897 (September 6, 2016). Whether "just cause" existed for a given disciplinary action is reviewed by this Court as a question of law, under a *de novo* standard: "Not every instance of unacceptable personal conduct as defined by the Administrative Code provides just cause for

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<sup>1</sup> It is noted that Slagle stated his belief that DPS was not required to consider the employee's performance and disciplinary history in making a decision as to what level of discipline was appropriate in a given case. T. p. 234.

discipline." Warren, at 382, 726 S.E.2d at 925 (citing Carroll, 358 N.C. at 669, 599 S.E.2d at 901. See also Clark at 31: "Whether just cause exists is a conclusion of law, which the ALJ had authority to review de novo. See, e.g., Carroll, 358 N.C. at 666, 599 S.E.2d at 898 (citations omitted)."

Employing this analysis:

**Step One: Did the Petitioner Commit The Conduct Alleged?**

15. The conduct alleged by DPS concerns essentially three issues. First, did Petitioner use the term "Alabama black snake" in reference to the inmate's genitalia? Second, did Petitioner impede or obstruct the DPS internal investigation by failing, initially, to give DPS information that DPS would have found useful or valuable in investigating the inmate search? Third, did Petitioner fail to properly supervise his subordinates by not taking corrective action when he allowed staff to laugh regarding a strip search of an inmate and allowed staff to reference an inmate search as a "snake hunt"?

16. On the first issue, the Undersigned does not find that DPS proved, by the greater weight of the evidence, that Petitioner used the term "Alabama black snake." The sole evidentiary support for this claim is the testimony of McFalls, who himself was the primary suspect of wrongdoing (and knew himself to be such) in the initial investigation, and who himself resigned over the incident, citing "drama." The DPS investigator found in her final report that neither McFalls nor Edwards were credible persons – a finding not made in reference to the Petitioner. Under such evidence, the Undersigned cannot find that DPS has proven, by the greater weight of the evidence, that Petitioner used the "black snake" phrase. It is thus unnecessary to proceed further with respect to this allegation.

17. With respect to the second allegation, Petitioner testified that in the time between his initial interview in May, 2015, and his polygraph examination several months later, he recalled additional details of some of the matters being investigated and informed the polygraph examiner of his desire to provide that additional information. Petitioner wrote an additional written statement on these issues. Accordingly, assuming *arguendo* that Petitioner's failure to share this information at the time of the initial interview was deliberate, the Undersigned will proceed to analyze the next step with respect to this allegation.

18. With respect to the third allegation, Petitioner failed to correct the behavior of his subordinate staff which violated the department's conduct policy and Operational Searches policy, despite Petitioner's knowledge that it was his essential job function to do so. Petitioner was obligated to intervene and correct the conduct and language of his subordinates, and having failed to do so, the Undersigned is obligated to proceed to analyze the next step with respect to this allegation.

**Step Two: Was the Conduct Committed Unacceptable Personal Conduct?**

19. With respect to the second allegation, failure to be complete and forthright during the investigation, the evidence shows that Petitioner omitted details that were (or were eventually)

deemed pertinent by DPS to matters it was investigating, and that Petitioner did not supplement his response until ordered to a polygraph test.

20. DPS suggests that Petitioner was afraid that being subjected to a polygraph test prompted Petitioner to come forward with additional information. Without more, this theory is merely an assumption. “Assumptions are simply not evidence.” Richmond v. City of Asheville, 775 S.E.2d 925; 2015 N.C. App. LEXIS 551 (2015).

21. Petitioner maintains that he came forward with the additional information out of a desire to be complete.

22. Further, with respect to the “snake hunt” allegation, Petitioner was not asked about usage of that term, as opposed to “Alabama black snake,” in May – in the course of an investigation focused on possible hazing and PREA (Prison Rape Elimination Act) issues.

23. Without more, the Undersigned cannot conclude that Petitioner committed unacceptable personal conduct by failing to reveal his knowledge of a comment he wasn’t asked about.

24. Further militating against an intention on Petitioner’s part to obstruct or impede the investigation is the idea that the Petitioner, had he truly had such an intention, merely could have stayed silent. Instead, Petitioner volunteered to the examiner that he had additional information he wished to share and wanted to correct some of his earlier statements.

25. With respect to the allegations relative to the Petitioner’s failure to correct the conduct and language of his subordinates, DPS contends that Petitioner’s failure to intervene constituted unacceptable personal conduct. The Undersigned agrees with DPS. DPS policies cited at hearing require officers to use professional language and to maintain a quiet but firm demeanor in dealing with inmates. Referring to an inmate search as a “snake hunt” and laughing while conducting a strip search violates the stated policies. Petitioner’s failure to correct the behavior of his subordinates given the circumstance in which Inmate Bullard was placed is unacceptable personal conduct by Petitioner.

26. The Petitioner’s failure to correct the inappropriate conduct only increases the likelihood that the actions will be repeated in the future.

27. Under these facts, formal discipline, in the form of a suspension without pay, would have been warranted. However, the Undersigned concludes that due to the following noted factors: (a) a good performance and discipline-free work history; (b) a lack of prior conduct of a similar nature; and (c) the lack of prior incidents where officers were dismissed for failing to “crack down” on similar behavior by subordinates, Respondent did not have just cause to dismiss Petitioner from his employment.

**DECISION AND ORDER**

Based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned determines that the Respondent acted erroneously and as required by law when Respondent dismissed the Petitioner for "just cause," however, the Respondent has sufficiently proven that it had just cause to suspend the Petitioner based on his unacceptable personal conduct. The Respondent's Final Decision, terminating Petitioner's employment is therefore, REVERSED; however, it is ORDERED that Petitioner shall be suspended for a period of two weeks without pay beginning December 8, 2015. Following the period of suspension, DPS is ordered to retroactively reinstate Petitioner to the same or similar position, with all back pay and benefits. Respondent shall pay Petitioner's reasonable attorney's fees following receipt of a petition for the same.

**NOTICE**

This Final Decision is issued under the authority of N.C.G.S. § 150B-34. Pursuant to N.C.G.S. § 126-34.02, any party wishing to appeal the Final Decision of the Administrative Law Judge may commence such appeal by filing a Notice of Appeal with the North Carolina Court of Appeals as provided in N.C.G.S. § 7A-29 (a). 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 11th day of October, 2016.

A handwritten signature in dark ink, reading "David F. Sutton". The signature is written in a cursive style with a horizontal line underneath the name.

David F Sutton  
Administrative Law Judge