

**NORTH CAROLINA
REGISTER**

IN THIS ISSUE



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NORTH CAROLINA ADMINISTRATIVE CODE CLASSIFICATION SYSTEM

The North Carolina Administrative Code (NCAC) has four major subdivisions of rules. Two of these, titles and chapters, are mandatory. The major subdivision of the NCAC is the title. Each major department in the North Carolina executive branch of government has been assigned a title number. Titles are further broken down into chapters which shall be numerical in order. The other two, subchapters and sections are optional subdivisions to be used by agencies when appropriate.

TITLE/MAJOR DIVISIONS OF THE NORTH CAROLINA ADMINISTRATIVE CODE

TITLE	DEPARTMENT	LICENSING BOARDS	CHAPTER
1	Administration	Acupuncture	1
2	Agriculture	Architecture	2
3	Auditor	Athletic Trainer Examiners	3
4	Commerce	Auctioneers	4
5	Correction	Barber Examiners	6
6	Council of State	Certified Public Accountant Examiners	8
7	Cultural Resources	Chiropractic Examiners	10
8	Elections	Employee Assistance Professionals	11
9	Governor	General Contractors	12
10	Health and Human Services	Cosmetic Art Examiners	14
11	Insurance	Dental Examiners	16
12	Justice	Dietetics/Nutrition	17
13	Labor	Electrical Contractors	18
14A	Crime Control & Public Safety	Electrolysis	19
15A	Environment and Natural Resources	Foresters	20
16	Public Education	Geologists	21
17	Revenue	Hearing Aid Dealers and Fitters	22
18	Secretary of State	Landscape Architects	26
19A	Transportation	Landscape Contractors	28
20	Treasurer	Massage & Bodywork Therapy	30
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Note: Title 21 contains the chapters of the various occupational licensing boards.

NORTH CAROLINA REGISTER
 Publication Schedule For January 2000 - December 2000

FILING DEADLINES			NOTICE OF RULE-MAKING PROCEEDINGS	NOTICE OF TEXT							TEMPORARY RULE
volume and issue number	issue date	last day for filing	earliest register issue for publication of text	earliest date for public hearing	non-substantial economic impact			substantial economic impact			270 th day from issue date
					end of required comment period	deadline to submit to RRC for review at next meeting	first legislative day of the next regular session	end of required comment period	deadline to submit to RRC for review at next meeting	first legislative day of the next regular session	
14:13	01/04/00	12/09/99	03/15/00	01/19/00	02/03/00	02/21/00	05/09/00	03/06/00	03/20/00	05/09/00	09/30/00
14:14	01/14/00	12/21/99	03/15/00	01/31/00	02/14/00	02/21/00	05/09/00	03/14/00	03/20/00	05/09/00	10/10/00
14:15	02/01/00	01/10/00	04/03/00	02/16/00	03/02/00	03/20/00	05/09/00	04/03/00	04/20/00	01/26/01	10/28/00
14:16	02/15/00	01/25/00	04/17/00	03/01/00	03/16/00	03/20/00	05/09/00	04/17/00	04/20/00	01/26/01	11/11/00
14:17	03/01/00	02/09/00	05/01/00	03/16/00	03/31/00	04/20/00	01/26/01	05/01/00	05/22/00	01/26/01	11/26/00
14:18	03/15/00	02/23/00	05/15/00	03/30/00	04/14/00	04/20/00	01/26/01	05/15/00	05/22/00	01/26/01	12/10/00
14:19	04/03/00	03/13/00	06/15/00	04/18/00	05/03/00	05/22/00	01/26/01	06/02/00	06/20/00	01/26/01	12/29/00
14:20	04/17/00	03/27/00	07/03/00	05/02/00	05/17/00	05/22/00	01/26/01	06/16/00	06/20/00	01/26/01	01/12/01
14:21	05/01/00	04/07/00	07/03/00	05/16/00	05/31/00	06/20/00	01/26/01	06/30/00	07/20/00	01/26/01	01/26/01
14:22	05/15/00	04/24/00	07/17/00	05/30/00	06/14/00	06/20/00	01/26/01	07/14/00	07/20/00	01/26/01	02/09/01
14:23	06/01/00	05/10/00	08/01/00	06/16/00	07/03/00	07/20/00	01/26/01	07/31/00	08/21/00	01/26/01	02/26/01
14:24	06/15/00	05/24/00	08/15/00	06/30/00	07/17/00	07/20/00	01/26/01	08/14/00	08/21/00	01/26/01	03/12/01
15:01	07/03/00	06/12/00	09/01/00	07/18/00	08/02/00	08/21/00	01/26/01	09/01/00	09/20/00	01/26/01	03/30/01
15:02	07/17/00	06/23/00	09/15/00	08/01/00	08/16/00	08/21/00	01/26/01	09/15/00	09/20/00	01/26/01	04/13/01
15:03	08/01/00	07/11/00	10/02/00	08/16/00	08/31/00	09/20/00	01/26/01	10/02/00	10/20/00	01/26/01	04/28/01
15:04	08/15/00	07/25/00	10/16/00	08/30/00	09/14/00	09/20/00	01/26/01	10/16/00	10/20/00	01/26/01	05/12/01
15:05	09/01/00	08/11/00	11/01/00	09/18/00	10/02/00	10/20/00	01/26/01	10/31/00	11/20/00	01/26/01	05/29/01
15:06	09/15/00	08/24/00	11/15/00	10/02/00	10/16/00	10/20/00	01/26/01	11/14/00	11/20/00	01/26/01	06/12/01
15:07	10/02/00	09/11/00	12/01/00	10/17/00	11/01/00	11/20/00	01/26/01	12/01/00	12/20/00	05/2002	06/29/01
15:08	10/16/00	09/25/00	12/15/00	10/31/00	11/15/00	11/20/00	01/26/01	12/15/00	12/20/00	05/2002	07/13/01
15:09	11/01/00	10/11/00	01/02/01	11/16/00	12/01/00	12/20/00	05/2002	01/02/01	01/22/01	05/2002	07/29/01
15:10	11/15/00	10/24/00	01/16/01	11/30/00	12/15/00	12/20/00	05/2002	01/16/01	01/22/01	05/2002	08/12/01
15:11	12/01/00	11/07/00	02/01/01	12/18/00	01/02/01	01/22/01	05/2002	01/30/01	02/20/01	05/2002	08/28/01
15:12	12/15/00	11/22/00	02/15/01	01/02/01	01/16/01	01/22/01	05/2002	02/13/01	02/20/01	05/2002	09/11/01

EXPLANATION OF THE PUBLICATION SCHEDULE

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

GENERAL

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

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

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

FILING DEADLINES

ISSUE DATE: The Register is published on the first and fifteen of each month if the first or fifteenth of the month is not a Saturday, Sunday, or State holiday for employees mandated by the State Personnel Commission. If the first or fifteenth of any month is a Saturday, Sunday, or a holiday for State employees, the North Carolina Register issue for that day will be published on the day of that month closest to (either before or after) the first or fifteenth respectively 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 RULE-MAKING PROCEEDINGS

END OF COMMENT PERIOD TO A NOTICE OF RULE-MAKING PROCEEDINGS: This date is 60 days from the issue date. An agency shall accept comments on the notice of rule-making proceeding until the text of the proposed rules is published, and the text of the proposed rule shall not be published until at least 60 days after the notice of rule-making proceedings was published.

EARLIEST REGISTER ISSUE FOR PUBLICATION OF TEXT: The date of the next issue following the end of the comment period.

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 (1) RULE WITH NON-SUBSTANTIAL ECONOMIC IMPACT: An agency shall accept comments on the text of a proposed rule for at least 30 days after the text is published or until the date of any public hearings held on the proposed rule, whichever is longer.

(2) RULE WITH SUBSTANTIAL ECONOMIC IMPACT: An agency shall accept comments on the text of a proposed rule published in the Register and that has a substantial economic impact requiring a fiscal note under G.S. 150B-21.4(b1) for at least 60 days after publication or until the date of any public hearing held on the 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.

**EXECUTIVE ORDER NO. 173
IMPLEMENTATION OF THE INTERIM
NORTH CAROLINA EMERGENCY OPERATIONS PLAN
DATED JULY 2000**

WHEREAS, the North Carolina Emergency Management Act (Chapter 166A of the North Carolina General Statutes, N.C.G.S. §166A-5(1)a.6) permits the use of services, equipment, supplies and facilities of existing departments, offices and agencies of the State; and

WHEREAS, the North Carolina Emergency Management Act (Chapter 166A of the North Carolina General Statutes) requires the officers and personnel of all such departments, offices and agencies to cooperate with and extend such services and facilities upon request; and

WHEREAS, the authority to take such actions extends to emergency management planning purposes; and

WHEREAS, the functions of the State emergency management program include preparation and maintenance of State plans for disasters and the state plans or any parts thereof may be incorporated into executive orders of the Governor; and

WHEREAS, to facilitate a coordinated, effective relief and recovery effort among state and local government entities and agencies, this order is executed.

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

Section 1. All state and local government entities and agencies are requested to cooperate in the implementation of the provisions of the Interim North Carolina Emergency Operations Plan (NCEOP) dated July 2000.

Section 2. I hereby delegate to the Secretary of the North Carolina Department of Crime Control and Public Safety, and/or the Secretary's designee, all power and authority granted to me and required of me by Chapter 166A, and Article 36A of Chapter 14 of the General Statutes for the purposes of implementing the said Interim Emergency Operations Plan.

Section 3. The Secretary of the North Carolina Department of Crime Control and Public Safety, as chief coordinating officer for the State of North Carolina, shall exercise the powers prescribed in G.S. §143B-476.

Section 4. This executive order is effective immediately and shall remain in effect until rescinded.

Done in the Capital City of Raleigh, North Carolina,
this the 5th day of
September, 2000.

s/sJames B. Hunt Jr.
Governor

ATTEST:

s/sElaine F. Marshall
Secretary of State

IN ADDITION

This Section contains public notices that are required to be published in the Register or have been approved by the Codifier of Rules for publication.

U.S. Department of Justice

Civil Rights Division

JDR:TFM:TGL:par
DJ 166-012-3
2000-2772

*Voting Section
P.O. Box 66128
Washington, D.C. 20035-6128*

September 1, 2000

Robert C. Cogswell, Jr., Esq.
City Attorney
P.O. Box 1513
Fayetteville, NC 28302-1513

Dear Mr. Cogswell:

This refers to the change to a nine-member city council elected from single-member districts, and the inclusion of the mayor as a full voting member of the city council for the City of Fayetteville in Cumberland County, North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on July 7, 2000.

The Attorney General does not interpose any objection to the specified changes. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41).

Sincerely,

Joseph D. Rich
Acting Chief
Voting Section

U.S. Department of Justice

Civil Rights Division

Voting Section

P.O. Box 66128

Washington, D.C. 20035-6128

JDR:DEBR:DCM:nj

DJ 166-012-3

2000-2758

September 5, 2000

Donald I. McRee, Jr., Esq.
County Attorney
P.O. Box 39
Elizabeth City, NC 27907-0039

Dear Mr. McRee:

This refers to the polling place change (Precinct 4A) for Pasquotank County, North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on July 7, 2000.

The Attorney General does not interpose any objection to the specified changes. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41).

Sincerely,

Joseph D. Rich
Acting Chief
Voting Section

IN ADDITION

U.S. Department of Justice

Civil Rights Division

JDR:JBG:SMC:nj
DJ 166-012-3
2000-2983

*Voting Section
PO. Box 66128
Washington, D.C. 20035-6128*

September 15, 2000

Robert E. Hornik, Jr., Esq.
The Brough Law Firm
1829 East Franklin St., Suite 800-A
Chapel Hill, NC 27514

Dear Mr. Hornik:

This refers to two annexations (Ordinance Nos. 00-11 and 00-12) and their designation to wards of the Town of Tarboro in Edgecombe County, North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on July 24, 2000.

The Attorney General does not interpose any objection to the specified changes. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41).

Sincerely,

Joseph D. Rich
Acting Chief
Voting Section

A Notice of Rule-making Proceedings is a statement of subject matter of the agency's proposed rule making. The agency must publish a notice of the subject matter for public comment at least 60 days prior to publishing the proposed text of a rule. Publication of a temporary rule serves as a Notice of Rule-making Proceedings and can be found in the Register under the section heading of Temporary Rules. A Rule-making Agenda published by an agency serves as Rule-making Proceedings and can be found in the Register under the section heading of Rule-making Agendas. Statutory reference: G.S. 150B-21.2.

TITLE 15A – DENR/ENVIRONMENTAL MANAGEMENT COMMISSION

CHAPTER 2 – ENVIRONMENTAL MANAGEMENT

Notice of Rule-making Proceedings is hereby given by DENR/Environmental Management Commission in accordance with G.S. 150B-21.2. The agency shall subsequently publish in the Register the text of the rule it proposes to adopt as a result of this notice of rule-making proceedings and any comments received on this notice.

Citation to Existing Rule Affected by this Rule-making: 15A NCAC 02S - Other rules may be proposed in the course of the rule-making process.

Authority for the Rule-making: G.S. 143-215.104A et seq

Statement of the Subject Matter: The Environmental Management Commission will consider adoption of rules necessary to implement and administer the Dry-Cleaning Solvent Cleanup Act (DSCA) Program pursuant to provisions of the Dry-Cleaning Solvent Cleanup Act of 1997 (G.S. 143-215.104A) as amended by Session Law 2000-19. These rules will include certification, site prioritization, risk-based assessment and cleanup, disbursements from the fund, and rules to administer the DSCA Program. The rules will first be adopted as temporary rules and will proceed through the permanent rulemaking process.

Reason for Proposed Action: The North Carolina General Assembly enacted G.S. 143-215.104 et seq., which is referred to as "The Dry-Cleaning Solvent Cleanup Act of 1997". This law authorizes the Environmental Management Commission (EMC) to make rules required to implement the cleanup program and administer the cleanup fund. The Division of Waste Management, Superfund Section is filing notice of its intent to develop rules on behalf of the EMC to implement the Dry-Cleaning Solvent Cleanup Act Program in accordance with North Carolina statute.

Comment Procedures: Written comments may be submitted to the Division of Waste Management, Superfund Section, Attention: Lisa Taber, 401 Oberlin Road, Suite 150, Raleigh, NC, 27605-1350.

TITLE 25 – OFFICE OF STATE PERSONNEL

CHAPTER 01 – OFFICE OF STATE PERSONNEL

Notice of Rule-making Proceedings is hereby given by State Personnel Commission in accordance with G.S. 150B-21.2. The agency shall subsequently publish in the Register the text of the rules it proposes to adopt as a result of this notice of rule-making proceedings and any comments received on this notice.

Citation to Existing Rule Affected by this Rule-making: 25 NCAC 01C .0214; 01J .0603 - Other rules may be proposed in the course of the rule-making process.

Authority for the Rule-making: G.S. 126-1A; 126-35; 126-36; 126-38

Statement of the Subject Matter: The above-referenced rules relate to unlawful workplace harassment and the appeals process. The rules set out the definitions and the grievance process. The proposed amendments relate to certain time limits in the grievance process.

Reason for Proposed Action: The proposed amendment would allow the agency/university the option to issue a final response before the (60) calendar expiration period. Should an agency/university exercise this option it waives its right to make another or different determination. A written final agency decision waiver should be issued to the grievant and the grievant should acknowledge waiver and return such written acknowledgement to the agency/university.

Comment Procedures: Written comments may be submitted on the subject matter of the proposed rulemaking to Delores A. Joyner, Rulemaking Coordinator, Office of State Personnel, 1331 Mail Service Center, Raleigh, North Carolina 27699-1331.

This Section contains the text of proposed rules. At least 60 days prior to the publication of text, the agency published a Notice of Rule-making Proceedings. The agency must accept comments on the proposed rule for at least 30 days from the publication date, or until the public hearing, or a later date if specified in the notice by the agency. The required comment period is 60 days for a rule that has a substantial economic impact of at least five million dollars (\$5,000,000). Statutory reference: G.S. 150B-21.2.

TITLE 2 – NORTH CAROLINA STRUCTURAL PEST CONTROL COMMITTEE

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Structural Pest Control Committee intends to amend the rule cited as 02 NCAC 34 .0502. Notice of Rule-making Proceedings was published in the Register on August 15, 2000.

Proposed Effective Date: March 1, 2001

Instructions on How to Demand a Public Hearing: (must be requested in writing within 15 days of notice): Any person may request a public hearing on the proposed rule by submitting a request in writing no later than October 31, 2000, to Carl Falco, Secretary, North Carolina Structural Pest Control Committee, PO Box 27647, Raleigh, NC 27611.

Reason for Proposed Action: Existing rule requires submission of efficacy data for termite-control products, but no approval is required prior to using the product. Proposed amendment would require that only those products approved by the Structural Pest Control Committee could be used for prevention and control of termites. The purpose of this change is to prevent the use of products which do not perform as claimed.

Comment Procedures: Written comments may be submitted no later than November 15, 2000, to Carl Falco, Secretary, North Carolina Structural Pest Control Committee, PO Box 27647, Raleigh, NC 27611.

Fiscal Impact

- State
Local
Substantive (>=\$5,000,000)
None

CHAPTER 34 – STRUCTURAL PEST CONTROL DIVISION

SECTION .0500 – WOOD-DESTROYING ORGANISMS

02 NCAC 34 .0502 PESTICIDES FOR SUBTERRANEAN TERMITE PREVENTION AND/OR CONTROL

(a) Through June 30, 1999, any pesticide may be used for the prevention and/or control of subterranean termites provided that it bears an EPA-approved label for such use and the pesticide is applied according to the directions of its label.

(b) Effective July 1, 1999, only those products which bear an EPA-approved label for such use and for which the Committee has received the following information may be used for subterranean termite control:

- (1) A statement from the pesticide registrant that the termiticide is primarily intended, either for use:
(A) as a supplement to or in combination with other treatment(s); or
(B) by itself, as the sole source of termite control; and
(2) For termiticides under Part (b)(1)(B) of this Rule, efficacy data in a form prescribed by the Committee, to support all efficacy claims made on the label, labeling and any promotional materials distributed by the registrant or manufacturer.

(c) Effective July 1, 2001, only those products approved by the Committee based on the requirements outlined in Paragraph (b) of this Rule may be used for the prevention or control of subterranean termites.

(d) Termiticides intended for use as a supplement to or in combination with other termiticides may not be used alone without first disclosing the registrants' recommendations to the property owner or agent.

(e) A list of approved termiticides for which information and/or data has been received may be obtained by writing the North Carolina Department of Agriculture and Consumer Services, Structural Pest Control Division, P.O. Box 27647, Raleigh, NC 27611 or by calling (919) 733-6100.

Authority G.S. 106-65.29.

TITLE 7 – DEPARTMENT OF CULTURAL RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Historical Commission intends to adopt the rules cited as 7 NCAC 4R .1501-.1503 and amend the rules cited as 7 NCAC 4M .0102, .0104-.0106, .0201-.0203, .0205, .0302, .0304, .0401, .0503, .0510-.0512; 4R .0801-.0806; 4S .0102, .0104-.0108, .0110. Notice of Rule-making Proceedings was published in the Register on August 15, 2000.

Proposed Effective Date: April 1, 2001

Public Hearing:

Date: November 9, 2000

Time: 9:00 a.m.

Location: Room 305, Archives and History Building, 109 E. Jones St., Raleigh, NC 27601

PROPOSED RULES

Reason for Proposed Action:

7 NCAC 4M .0102, .0104-.0106, .0201-.0203, .0205, .0302, .0304, .0401, .0503, .0510-.0512 – Proposed amendments to the rules for the Archives and Records Section, Archival Services Branch and Records Services Branch are largely technical or cosmetic in nature and will, for the most part, have no affect fiscally on Section operations, or federal, state, or local funding.

7 NCAC 4R .0801-.0806 – Amendments are largely technical or cosmetic in nature. The Office of State Archaeology (OSA) had responsibility for many archaeological materials acquired through federal and state sponsored excavations/explorations, and has acquired collections through such activity. These collections are maintained by the OSA's Research Center (OSARC), which provides a central repository and long term curation for such items. The national standard rate for curation per cubic foot of material now stands at approximately \$225.00 annually (based on NPS data). The OSA is requesting that a rate of \$200.00 annually be set to ensure professional curation, care, and management of materials housed by the OSA.

7 NCAC 4R .1501-.1503 – Proposed adoptions for the Survey and Planning Branch of the Archaeology and Historic Section of the NC Department of Cultural Resources are technical in nature, with the purpose of reflecting current Survey and Planning operation.

7 NCAC 4S .0102, .0104-.0108, .0110 – The amendments envisaged by the present submissions are almost entirely technical, and are intended to better reflect agency services and operations.

Comment Procedures: Written comments may be submitted through November 15, 2000, to Boyd Cathey, Division of Archives and History, NC Department of Cultural Resources, 4614 Mail Service Center, 109 E. Jones St., Raleigh, NC 27699-4614.

Fiscal Impact

- State
Local
Substantive (>=\$5,000,000)
None

CHAPTER 4 – DIVISION OF ARCHIVES AND HISTORY

SUBCHAPTER 4M – ARCHIVES AND RECORDS SECTION

SECTION .0100 – NORTH CAROLINA STATE ARCHIVES: USE AND SERVICES

07 NCAC 04M .0102 ARCHIVES SEARCH ROOM HOURS

(a) The North Carolina State Archives Search Room is open from 8:00 a.m. to 5:30 p.m. Tuesday through Friday, and from 9:00 a.m. to 5:00 p.m. on Saturday.

(b) The Search Room is closed on Sundays and Mondays and on all state holidays. If a holiday occurs on either a Friday or a Saturday, the Search Room will be closed both Friday and Saturday. If the holiday observed for either New Year's Day, July 4, or Christmas is observed on Monday, the Search Room

will be closed on the preceding Saturday. The Search Room will be closed on Saturday preceding Easter and Labor Day. The Search Room will be closed for two three days during the month of January (usually the second Tuesday and Wednesday) for inventory.

Authority G. S. 121-4(3); 121-5(d); 143B-62(2)a.

07 NCAC 04M .0104 ADMISSION TO ARCHIVES STACKS

(a) Permission for limited access to the archives stacks area may be obtained by researchers providing that an application is submitted stating the records to be consulted, the purpose of the access, and the reason why the research cannot be conducted from the Search Room. Permission shall only be granted if necessary for the researcher to accomplish his purposes.

(b) An application for limited access may be approved by the Chief, Administrator, Archives and Records Section, the Assistant State Archivist, or the head supervisor of the Reference Unit.

(c) Permission for extended access to the archives stacks area may be obtained by researchers on the same basis for limited access, except that permission can be obtained from the Chief, Administrator, Archives and Records Section, or his a designated representative only.

Authority G. S. 121-4(3); 121-5(d); 143B-62(2)a.

07 NCAC 04M .0105 ARCHIVES SEARCH ROOM REGULATIONS

Regulations governing researchers' use of the North Carolina State Archives Search Room are as follows:

- (1) Brief cases, attache cases, coats, tote bags, notebooks, envelopes, pad folders, privately owned books, maps, and old manuscripts, manuscripts and any other materials considered inappropriate by the State Archivist may not be taken into the Archives Search Room. Lockers and coat racks are provided outside the Search Room for such items.
(2) Admission to the Search Room shall only be by means of an identification card which will shall be obtained from the Security Officer Personnel in the Search Room lobby upon presentation of suitable identification, identification, providing accurate name and address. All persons entering the Search Room shall also register with the Security Officer and shall place on the registration record the number of the registration card. The initial identification card will be furnished to the researchers at no cost; additional cards will be furnished at a cost of fifty cents (\$.50) each.
(3) Researchers will shall request records by filling in completely the call slips provided; each slip must bear the identification number issued to the researcher. To receive records, the identification card will shall be surrendered to a member of the Search Room staff.
(4) A researcher may request more than one box or volume of records at the time; these will shall be held at the reference desk until the researcher is ready for them. However, only one box of loose records or up to three

PROPOSED RULES

volumes of records may be issued to the researcher at any one time. When use of the volumes or box is completed, the researcher ~~will~~ shall return the used records to the reference desk in order to obtain another box or other volumes of records.

- (5) Upon return of the records to the Search Room reference desk, they may be examined, and if the researcher has completed his work, the identification card ~~will~~ shall then be returned to him. Upon leaving the Search Room, the researcher ~~will show~~ shall surrender the identification card to the Security ~~Officer~~ Personnel who may examine any materials the researcher removes from the Search Room.
- (6) Researchers must exercise care in handling records, manuscripts, books, or other materials. In particular, the following ~~will~~ shall be observed:
 - (a) Manuscripts may not be marked or otherwise altered or defaced.
 - (b) Pencils or ~~pens~~ other items are not to be used as "pointers" when reading records.
 - (c) ~~Cellophane tape~~ Tape and ~~ink bottles~~ other office supplies, such as correction fluid and gum erasers, are not permitted in the Search Room; ~~ink and other pens~~ pencils are to be used with great care.
 - (d) Books or other materials may not be returned to Search Room shelves; these ~~will~~ shall be replaced by a Search Room ~~attendant~~ staff member.
 - (e) All manuscripts, volumes and reference books from the Search Room shelves are to be placed on the tables or reading stands provided in the Search Room; they are not to be held in the lap or propped against the edge of a table.
 - (f) Only one box or folder of loose papers may be opened at one time in order to avoid mixing.
 - (g) Papers are not to be rearranged under any circumstances. If a researcher thinks something is out of order, he should notify ~~an attendant~~ a Search Room staff member.
 - (h) Records from the stacks and reference materials from the Search Room are not permitted in the microfilm reading room.
- (7) Smoking, eating, or drinking is not permitted in the Search Room; ~~lunches are~~ food is to be left in the outer lobby of the Search Room. ~~Smoking is permitted at the lounge area near the elevator outside the Search Room.~~ A researcher wishing to leave the Search Room temporarily must turn in all records in order to obtain his identification card to leave the Search Room and ~~will be required to~~ shall verify his registration when reentering the Search Room. Eating is not permitted ~~at~~ in the ~~smoking~~ lounge near the elevators. Space is provided at the Snack Bar in the basement for this purpose.
- (8) Orders for copies placed in person by a researcher ~~are filled at a special rate of twenty cents (\$0.20) per page. The number of copies made under the special "as you wait rate" are limited to~~ shall not exceed 50 copies per researcher per day. Such orders are not ~~billed~~ billed; all

~~payments must be in cash or check, and receipts will not be issued.~~

Authority G. S. 121-4(3); 121-5(d); 143B-62(2)a.

07 NCAC 04M .0106 PHOTOCOPYING: TRANSCRIPTION: PHOTOGRAPHIC: AND DOCUMENT

The following are available in the North Carolina State Archives:

- (1) photocopies of loose ~~documents up to 11" x 17";~~ documents;
- (2) ~~photostat~~ photographic reproductions of maps, newspapers, ~~loose documents larger than 11" x 17",~~ mounted documents, and bound volumes;
- (3) paper prints from microfilm;
- (4) negative, first-generation or "original" microfilm of ~~most~~ records and manuscripts in the custody of the ~~Division~~; Division, except those under restriction;
- (5) duplicate microfilm of entire rolls of microfilm in the collections of the State Archives;
- (6) typed, certified transcripts of information from Revolutionary Army Accounts in the records of the North Carolina Treasurer and Comptroller; from "Register of the North Carolina Continental Line"; from John W. Moore's "Roster of North Carolina Troops in the War Between the States"; and from "Muster Rolls of the Soldiers of the War of 1812: Detached from the Militia of North Carolina in 1812 and 1814";
- (7) certified photocopies of public records of state agencies, counties, municipalities or other political subdivisions of North Carolina;
- (8) exemplifications prepared in accordance with the requirements of the "Ancient Writings" rule for introduction as evidence in a court of law;
- (9) prints from the photographic negatives in the State Archives iconographic ~~collection~~; collection.
- (10) ~~conservation of papers owned by individuals and institutions, including the chemical removal of acids within the paper and ink and encapsulation in mylar. More detailed descriptions of these services, procedures for requesting them, and current costs may be found in Archives Information Circular no. 5.~~

Authority G. S. 121-4(3); 121-5(d); 143B-62(2)a.

SECTION .0200 - LISTING OF PROFESSIONAL RESEARCHERS

07 NCAC 04M .0201 ARCHIVES MAY MAINTAIN LIST OF RESEARCHERS

~~The North Carolina State Archives is not able to perform extensive research for patrons. As a service, it~~ the State Archives maintains may maintain a list of professional researchers who are willing and able to undertake ~~reliable~~ research service in the ~~state archives~~ State Archives for a fee. This list is informational only and no endorsement is given or implied.

Authority 121-4(3); 121-5(d); 143B-62(2)a.

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07 NCAC 04M .0202 PROCEDURE FOR LISTING

(a) A person wishing to have his name listed as professional researcher shall make application in writing to: ~~Chief, Administrator,~~ Archives and Records Section, Division of Archives and History, ~~109 E. Jones Street, 4614 Mail Service Center,~~ Raleigh, North Carolina ~~27611, 27699-4614.~~

(1)(b) The application ~~will~~ shall include a brief resume of the applicant's experience which will demonstrate his qualifications and aid in establishing his credentials. No special form is required for the application.

(2)(c) The application must be accompanied by three letters of recommendation from persons who have engaged the applicant in the capacity of a paid researcher.

(3)(d) ~~Recommendations. The letters~~ Letters of recommendation ~~should~~ shall be from persons who are:

(a) (1) unrelated to the applicant or the applicant's spouse; and

(b) (2) unacquainted with the applicant except as a researcher.

(4)(e) The recommendations ~~may be in the form of letters and should outline:~~ shall:

(a) (1) outline the nature and extent of the research which the applicant undertook for pay; and

(b) (2) ~~should~~ attest the satisfaction of the reference with the services rendered.

Authority G. S. 121-4(3); 121-5(d); 143B-62(2)a.

07 NCAC 04M .0203 APPROVAL OF REQUESTS

The ~~Chief, Administrator,~~ Archives and Records Section, shall review ~~all~~ applications submitted for inclusion in the list of professional researchers. If ~~he determines~~ determined that the applicant ~~meets these criteria and is a reputable researcher,~~ satisfies the procedures for listing, ~~then~~ the name of the researcher ~~will~~ shall be placed on the list of available researchers as published by the North Carolina State Archives.

Authority G. S. 121-4(3); 121-5(d); 143B-62(2)a.

07 NCAC 04M .0205 DEFINITION OF GOOD CAUSE

The words "good cause" as used in this Section shall mean:

(1) ~~the inability to provide effective service, or misrepresentation of credentials or services to be provided, or~~

(2) ~~instances of grossly unsatisfactory service, or~~

(3) (2) consistent complaints on the part of patrons about the work of the researcher.

Authority G. S. 121-4(3); 121-5(d); 143B-62(2)a.

SECTION .0300 - ACCESSIONING PROCEDURES OF OTHER THAN PUBLIC RECORDS

07 NCAC 04M .0302 VALUATION

The North Carolina State Archives ~~will,~~ shall upon request by the donor, ~~obtain a help~~ arrange for the valuation of a gift ~~from a reputable source for tax purposes and for tax purposes by an~~

independent appraiser, who will shall report that valuation to the donor.

Authority G. S. 121-4(3); 121-5(d); 143B-62(2)a.

07 NCAC 04M .0304 BIBLE RECORDS

Family bibles are not ~~accepted;~~ accepted by the State Archives; however, pages ~~listing vital statistics such as~~ containing pre-1913 information such as records of births, deaths, baptisms and marriages of North Carolina families will be ~~photocopied.~~ photocopied and accessioned by the State Archives. ~~One copy will be accessioned and one copy provided free of charge to the owner of the bible.~~

Authority G. S. 121-4(3); 121-5(d); 143B-62(2)a.

SECTION .0400 - DEACCESSIONING OF RECORDS

07 NCAC 04M .0401 REVIEW

Whenever, in the opinion of the ~~Chief, Administrator of the~~ Archives and Records Section, any accessioned records in the North Carolina State Archives should be ~~prepared for disposal,~~ destroyed, transferred to another institution, returned to the donor, or for some other reason de-accessioned, each record series of the subject records shall be inventoried in detail.

Authority G. S. 121-4(3); 121-5(d); 143B-62(2)a.

SECTION .0500 - STATE RECORDS CENTER

07 NCAC 04M .0503 PROCEDURES FOR TRANSFER OF RECORDS

(a) Physical transfer of records to the State Records Center ~~will~~ shall be initiated by the agency or organization requesting transfer. A representative of the said agency or organization will submit to the State Records Center supervisor a records transfer notice including agency name, title of records, reference to schedule, volume of records, their inclusive dates, and the name and telephone number of the representative submitting the request.

(b) Records ~~center~~ Center boxes, together with paper tape and instructions on packing and labeling, ~~will~~ shall be sent to the agency transferring ~~records.~~ records upon request, and at the expense of the agency.

(c) Only records packed in ~~records center~~ Records Center boxes ~~will~~ shall be accepted for storage in the State Records Center.

(d) The agency or organization initiating the transfer ~~is responsible for the arrangement of~~ shall arrange records in the boxes and ~~for labeling~~ label boxes in accordance with instructions. Boxes which do not comply with instructions ~~will~~ shall be returned to the agency or organization for correction.

(e) Records which cannot be identified clearly and completely by the information on the label of the ~~records center~~ Records Center box must be accompanied by a typewritten index or box list prepared by the agency or organization of origin.

(f) Records transferred from within ten miles of Capitol Square, Raleigh, ~~will~~ shall be shipped by arrangement with the Supervisor, State Records Center. Records transferred from

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beyond ten miles of Capitol Square, Raleigh, must be shipped by the agency or organization concerned, and at its expense.

Authority G.S. 121-4(2); 121-5(d); 143B-62(2)b.

07 NCAC 04M .0510 DEFINITION OF DESTRUCTION

When used in an approved records retention and disposition schedule, the provision that records are to be destroyed means that the records are to be:

- (1) ~~burned~~; burned, prohibited by local ordinance;
- (2) shredded or torn up so as to destroy the record content of the documents or materials concerned;
- (3) placed in acid vats so as to reduce the paper to pulp and to terminate the existence of the document or materials concerned;
- (4) buried under such conditions that the record nature of the documents or materials ~~will~~ shall be terminated; or
- (5) sold as waste paper, provided that the purchaser agrees in writing that the documents or materials concerned will not be resold as documents or records.

Authority G.S. 121-4(2); 121-5(b),(c),(d); 132-3; 132-8.1; 132-8.2; 143B-62(1)g; 143B-62(2)b.

07 NCAC 04M .0511 DESTRUCTION OF CERTAIN RECORDS SCHEDULED FOR ARCHIVES

Records scheduled in an approved records retention and disposition schedule to be transferred to the State Archives for review or ~~accessioned~~ accepted by the State Records Center for the State Archives may be destroyed in accordance with procedures approved by the Director of the Division of Archives and History providing:

- (1) The records are considered not to have permanent value.
- (2) The records are exact duplicates or copies of other records in the records series transferred or accessioned.

Authority G. S. 121-4(2); 121-5(b),(c),(d); 132-8.1; 132-8.2; 143B-62(1)g; 143B-62(2)b.

07 NCAC 04M .0512 RESTRICTED AREAS IN STATE RECORDS CENTER

Access to the State Records Center is limited to persons on official business. Visitors are not permitted in the records storage areas, the microfilm areas, or beyond the administrative office without an escort provided by the State Records Center. All visitors are required to sign in when entering and to sign out when leaving the State Records Center building. Visitors who are not known to the State Records Center staff will be required to produce identification before being given records requested by agencies. Access by visitors not on official business may be denied.

Authority G.S. 121-4(2); 143B-62(2)b.

SUBCHAPTER 4R – ARCHAEOLOGY AND HISTORIC PRESERVATION SECTION

SECTION .0800 – ARCHAEOLOGY SERVICES

07 NCAC 04R .0801 OPERATING HOURS

~~The Archaeology Branch offices~~ Office of State Archaeology, or OSA offices, as well as any regional offices and facilities, are open between 8:00 a.m. and 5:00 p.m. , Monday through Friday, except on state holidays. These hours may be extended to accommodate public education programs. Visitors under the age of 12 must be accompanied by an adult unless prior arrangements have been made. Pets are not allowed in the facilities. Visitors are not allowed in the offices after hours unless accompanied by, or arrangements have been made with, a member of the staff. Access to ~~certain areas is regulated~~ may be restricted for reasons of safety and security.

Authority G.S. 121-5(b); 121-8(b),(f).

07 NCAC 04R .0802 LOAN OF ARTIFACTS

(a) Artifacts possessed by the Division of Archives and History ~~will~~ shall not be loaned for uses other than museum purposes, research purposes, or non-museum public display by local, state, or federal agencies or institutions where the use is intended for public education.

(b) Loaned artifacts, specimens, documents, and records shall remain in the condition in which they were delivered. It will be the borrower's responsibility to The borrower shall insure the articles against loss or damage. The artifacts must be protectively packaged. The artifacts remain the property of the Division of Archives and History and can be withdrawn with 15 days ~~notice.~~ notice upon presentation of a written communication by the lender or its duly authorized representative.

(c) Written authorization must be issued by the Office of State Archaeology to permit photography or duplication of any artifact of any kind. An acknowledgment credit shall identify each artifact image with the Office of State Archaeology, North Carolina Division of Archives and History.

~~(e) (d) Requests~~ All requests for loans of artifacts ~~should~~ shall be submitted in writing to the Chief State Archaeologist ~~two weeks in advance.~~ at least 30 days in advance of the requested loan period.

(e) A written contract between the borrower and the Division of Archives and History containing the period and conditions of the loan ~~will~~ shall be signed prior to the lending of any artifact.

Authority G.S. 121-2(8); 121-5(d).

07 NCAC 04R .0803 CURATION OF ARCHAEOLOGICAL COLLECTIONS

~~(a) All requests for use of the curation facilities of the branch for storage should be submitted to the Chief Archaeologist. The determination of what may be accepted lies with the Curations Committee. The Curations Committee, appointed by the Director, Division of Archives and History, consists of:~~

- ~~(1) Director, Division of Archives and History – Chairman;~~
- ~~(2) Chief Archaeologist, Archaeology Branch;~~
- ~~(3) Curator of Collections, North Carolina Museum of History; and~~
- ~~(4) Other specialists appointed by the Committee Chairman as needed.~~

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~~(b) All materials will be provisionally accepted and then forwarded to the Committee for evaluation and determination of acceptance. Once accepted, the artifacts will be curated in the Archaeology Branch collection and their location recorded in the curation records.~~

(a) All requests to temporarily or permanently store collections at OSA curation facilities shall be submitted in writing to the State Archaeologist.

(b) Decisions on the acceptance of collections will be made in writing by the State Archaeologist, in consultation with the division director and other division staff members.

(c) Requests may be approved or denied, depending on available storage space, condition of the materials, and payment of applicable fees.

(d) Fees may be charged for curation and conservation services in the amount of two hundred dollars (\$200.00) per cubic foot of materials, and the revenue arising from these services shall be used to support the activities of the OSA's curation facilities. Fees may be increased on a biennial basis, adjusted pursuant to the rate of inflation established by the Consumer Price Index.

(e) Charges for the conservation, stabilization, analysis, inventory, repackaging, or other treatment of materials may be negotiated on a case-by-case basis, and set forth in service contracts mutually agreed upon between the OSA and a requesting party, if materials exceed the two hundred dollar (\$200.00) per cubic foot curation fee.

Authority G.S. 121-4(14); 121-8(b),(f).

07 NCAC 04R .0804 DEACCESSIONS

(a) An accessioned archaeological artifact owned by the Division of Archives and History may not be deaccessioned until it has been certified to have no further value for scientific research and reference purposes by the North Carolina Historical Commission.

(b) For an artifact to be deaccessioned, an Artifact Disposal Form giving artifact provenance, condition, and reason for disposal must be approved by the Director, Division of Archives and History, the Chief State Archaeologist, and the Historical Commission.

Authority G.S. 121-8(b),(f); 132-1(a); 132-3(a).

07 NCAC 04R .0805 ACCESS TO ARCHAEOLOGICAL COLLECTIONS

Collections of artifacts, photographs, field notes, records, or other data are accessible for examination and study during regular business hours, Tuesday through Thursday. Requests for access should be made in writing to the Chief State Archaeologist at least two weeks in advance, stating as specifically as possible which portions of the collections are to be studied. ~~Unless extreme need can be demonstrated, such access would create a risk of harm to such resources or to the site at which the resources are located,~~ collections shall be examined within branch facilities.

Authority G.S. 70-18; 121-8(b),(f); 132-1(a); 132-2; 132-9.

07 NCAC 04R .0806 ARCHAEOLOGICAL SITE

FILES

(a) Access to archaeological site files and other information relating to the location or nature of archaeological resources ~~will~~ shall be granted to persons in the following categories:

(1) qualified archaeologists who are conducting scientific research or compiling information for use in preservation and planning studies. Qualified archaeologist means a person with:

- (A) a postgraduate degree, or equivalent training and experience, in archaeology, anthropology, history or another related field with a specialization in archaeology;
- (B) a minimum of one year's experience in conducting basic archaeological field research; and
- (C) demonstrable competence in theoretical and methodological design and in collecting, handling, analyzing, evaluating, and reporting archaeological data.

(2) authorized representatives of federal, state, or local agencies or institutions which make planning decisions regarding archaeological resources.

(b) Persons having access to the archaeological site files must give written assurance that the confidentiality of the information ~~will~~ shall be maintained.

(c) Persons desiring to review site files ~~should~~ shall give at least 24 hours advance notice to the Chief State Archaeologist.

Authority G.S. 70-18; 121-8(b) (d),(e),(f); 132-1(a); 132-2; 132-9.

SECTION .1500 - SURVEY AND PLANNING SERVICES

07 NCAC 04R .1501 OPERATING HOURS

The Survey and Planning Branch offices are open between 8:30 AM and 5:30 PM, Monday through Friday, except on state holidays. Visitors under the age of 12 must be accompanied by an adult. Pets are not allowed in the facilities. Visitors are not allowed in the offices after hours unless accompanied by a member of the staff and with written permission of the branch supervisor. Access to areas may be restricted for reasons of safety and security.

Authority G.S. 121-4; 121-8(b),(c),(f); 150B-2(8a); 143B-62(2d).

07 NCAC 04R .1502 HISTORIC STRUCTURE SITE FILES AND MAPS

The Survey and Planning Branch is the repository of photographs, field notes, research reports, drawings, National Register of Historic Places nominations, maps, computer databases, and other materials related to the North Carolina inventory of historic structures. Survey materials are public records and are available for public inspection during office hours under staff supervision. Access to locational information may be granted by the branch supervisor to:

- (1) authorized representatives of federal, state, or local agencies which make planning decisions regarding historic resources; and

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(2) faculty or students of institutions of higher learning, staff of public history institutions, or historic preservation consultants or researchers conducting academic or professional research in North Carolina history or architecture.

Authority G.S. 70-18; 121-2(8); 121-4(13),(14); 121-4.1(a); 121-5(d); 121-8(b),(c),(f); 143B-62(2b).

07 NCAC 04R .1503 VISITATION POLICY

(a) Visitors seeking access to Survey and Planning Branch maps and files shall make an appointment through the branch supervisor or his or her designee at least 24 hours in advance of the time of the visit.

(b) Appointments for the map collection and the file collection shall be made separately.

(c) When multiple visitors seek access to the maps or files on the same day, the branch supervisor or his or her designee may limit duration of visits and limit the number of visitors using the map collection and file collection.

(d) Visitors shall switch off cell phones, pagers, and other electronic communication devices in the office area.

(e) Survey and Planning Branch staff have priority for copy machine usage.

Authority G.S. 121-4(13); 121-8(b),(c),(f); 143B-62(3).

SUBCHAPTER 4S – TRYON PALACE HISTORIC SITES AND GARDENS

SECTION .0100 – TRYON PALACE

07 NCAC 04S .0102 VISITING HOURS

(a) Tryon Palace ~~Restoration~~ Historic Sites and Gardens will be open Monday through Saturday from ~~9:30 a.m. to 4:00 p.m.~~ 9:00 a.m., with the last ticket purchased to be no later than 4:00 p.m. and on Sunday from ~~1:30 p.m. to 4:00 p.m.~~ 1:00 p.m., with the last ticket to be purchased no later than 4:00 p.m. From Memorial Day weekend through Labor Day weekend the last time to purchase a ticket to begin a tour is extended to 5:00 p.m. The Gardens will close at 7:00 p.m. during this period.

(b) Tryon Palace ~~Restoration~~ Historic Sites and Gardens will be closed on New Year's Day, Thanksgiving Day, and ~~Christmas holidays as set by the State of North Carolina for state employees.~~ December 24, 25, and 26.

Authority G.S. 121-4(8),(9); 143B-62(2)d.

07 NCAC 04S .0104 VISITATION RULES

(a) Eating and chewing gum are not permitted in the Tryon Palace ~~Restoration~~ Historic Sites and Gardens exhibition buildings. With prior ~~approval of notice to~~ approval of notice to the Chief, Tryon Palace Historic Sites and Gardens Section, refreshments may be served ~~within the exhibition area in non-exhibition and non-collection areas~~ for special pre-arranged events and meetings. These meetings must have an historical and educational purpose.

(b) Pets are not permitted in the buildings or on the grounds of the ~~restoration, site,~~ except guide dogs for legally blind persons, animals assisting disabled persons.

(c) ~~Non-commercial and personal~~ photography is permitted inside the exhibition buildings with advance approval of notice to the Chief, Tryon Palace Section Historic Sites and Gardens. With advance notice to the Chief, Tryon Palace Historic Sites and Gardens, commercial or professional photography is permitted at the site only if it benefits and promotes the goals and objectives of the Tryon Palace Historic Sites and Gardens. A staff member must accompany the photographer at all times. Requirements for ~~special~~ lighting or wiring must be cleared through the technical services director.

(d) Teachers or sponsors accompanying school or other groups ~~will~~ shall be responsible for the conduct of the group.

(e) Groups ~~will~~ shall stay together. One teacher or adult ~~should~~ shall accompany each student group for the entire tour.

(f) Teachers or sponsors ~~will~~ shall be responsible for controlling their groups when using restrooms or visiting the Tryon Palace ~~Shops, Historic Sites and Gardens shops and gardens.~~

(g) All tours of the Tryon Palace Historic Sites and Gardens exhibition buildings ~~are~~ shall be conducted supervised by guides. The general public ~~is~~ shall not be not allowed to go through the buildings without a ~~guide, guide or designated staff attendant.~~ Tours of the Kitchen Office, Stables, and the New Bern Academy Museum are self-guided, but a guide or character interpreter is available for assistance.

Authority G.S. 121-4(8),(9); 143B-62(2)d.

07 NCAC 04S .0105 USE OF THE AUDITORIUM

(a) Because of the regularly scheduled Tryon Palace orientation program, no group will be permitted to use the auditorium between the hours of 9:00 a.m. and 4:00 p.m. on days of regular operation. All use of the auditorium by outside groups needs the approval of the Chief, Tryon Palace Historic Sites and Gardens Section.

(b) Application for use must be presented to and approved by the Chief, Tryon Palace Section, Historic Sites and Gardens, according to the following regulations:

- (1) Reservations must be submitted at least two weeks prior to requested date;
- (2) The using organization will designate one person who is responsible for the meeting and the use of auditorium. This person will sign the application signifying this responsibility;
- (3) ~~No smoking~~ Smoking is permitted in the ~~lobby area only, building;~~
- (4) Priority for use will be given to governmental agencies and non-profit organizations whose aim and activities relate to the activities of the Department of Cultural Resources, Division of Archives and History; and
- (5) Microphones and any state-owned audiovisual equipment must be operated by a member of the Tryon Palace ~~Restoration~~ Historic Sites and Gardens staff.

Authority G.S. 121-4(8),(9); 143B-62(2)d.

07 NCAC 04S .0106 RESEARCH

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With ~~special~~-written permission of the Chief, Tryon Palace Historic Sites and Gardens, ~~Section~~, research may be conducted during regular hours of operation. The Chief, Tryon Palace Historic Sites and Gardens, shall grant permission if the research is conducted by qualified scholars academic researchers engaged in professional research or persons in the museum field utilizing items in the libraries and collections of the Tryon Palace ~~Restoration~~ Historic Sites and Gardens, ~~during regular hours of operation~~. Research materials shall not be taken out overnight.

Authority G.S. 121-4(8),(9); 143B-62(2)d.

07 NCAC 04S .0107 AUDIOVISUAL AIDS

Slide sets of Tryon Palace Historic Sites and Gardens are available on a loan basis ~~for a small fee through the education branch of the Tryon Palace Section~~, through the Group Sales Coordinator of the Tryon Palace Historic Sites and Gardens. The website address is www.tryonpalace.org.

Authority G.S. 121-4(8),(9); 143B-62(2)d.

07 NCAC 04S .0108 PHOTOGRAPHIC SERVICES

Duplicates of photographs ~~Photographs~~ from the Tryon Palace Historic Sites and Gardens accessioning files are available at cost. Photos ~~can~~ may be taken by a member of the Tryon Palace staff on special written order at cost. Inquiries ~~should~~ may be addressed to the Director of Research and Collections, Curator of Collections.

Authority G.S. 121-4(8),(9); 143B-62(2)d.

07 NCAC 04S .0110 OPERATION

~~Rules .0001 through .0108 in Subchapter 4N, Section .0100, Rules 7 NCAC 4N .0101-.0108~~ shall apply to the operation of the Tryon Palace ~~Restoration~~, Historic Sites and Gardens, unless otherwise covered in Subchapter 4S.

Authority G.S. 121-4(8),(9); 143B-62(2)d.

Notice is hereby given in accordance with G.S. 150B-21.2 that the Tryon Palace Commission intends to amend the rule cited as 7 NCAC 4S .0109. Notice of Rule-making Proceedings was published in the Register on August 15, 2000.

Proposed Effective Date: April 1, 2001

Public Hearing:

Date: November 9, 2000

Time: 9:00 a.m.

Location: Archives and History Building, Room 305, 109 E. Jones St., Raleigh, NC 27601

Reason for Proposed Action: *The amendments envisaged by the present submissions are almost entirely technical, and are intended to better reflect agency services and operations.*

Comment Procedures: *Written comments may be submitted through November 15, 2000, to Boyd D. Cathey, Division of Archives and History, NC Department of Cultural Resources, 4614 Mail Service Center, 109 E. Jones St., Raleigh, NC 27699-4614.*

Fiscal Impact

- State
- Local
- Substantive (≥\$5,000,000)
- None

CHAPTER 4 – DIVISION OF ARCHIVES AND HISTORY

SUBCHAPTER 4S – TRYON PALACE SECTION

SECTION .0100 – STATEMENT OF PURPOSE

07 NCAC 04S .0109 ACQUISITION OF ARTIFACTS

Furniture, art objects, artifacts, or other objects within the period of the Tryon Palace ~~Restoration~~ Historic Sites and Gardens buildings ~~are~~ shall be accepted on behalf of the state by the Tryon Palace Commission to further interpret the history and life styles of the appropriate periods. Offers of gifts or loans of furniture, art objects, and artifacts to Tryon Palace Historic Sites and Gardens must be directed to the Chief, Tryon Palace Section, Historic Sites and Gardens. The Chief ~~will~~ shall present all such offers to the Chairman of the Tryon Palace Commission with a recommendation of which artifacts shall be accepted. The Chairman ~~will~~ shall refer the recommendation to ~~the appropriate committee~~ of the Tryon Palace Commission.

Authority G.S. 121-20; 143B-71.

TITLE 10 - DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Division of Vocational Rehabilitation Services intends to adopt the rule cited as 10 NCAC 20D .0207 and amend the rule cited as 10 NCAC 20D .0201. Notice of Rule-making Proceedings was published in the Register on October 1, 1999.

Proposed Effective Date: April 1, 2001

Public Hearing:

Date: October 31, 2000

Time: 4:00 p.m.

Location: Main Conference Room – Division of Vocational Rehabilitation Services, 805 Ruggles Drive, Dorothea Dix Campus, Raleigh, NC

Reason for Proposed Action: *This rule amendment and rule adoption are being made to reflect the requirements of the Rehabilitation Act and 34 C.F.R. 361.51 and 361.52 which indicate that each State VR program must establish written minimum standards for facilities and providers of services and,*

PROPOSED RULES

as part of informed choice, provide relevant information regarding qualification of service providers to clients.

Comment Procedures: Comments may be presented orally or in writing at the hearing. Oral statements may be limited at the discretion of the hearing officer. Written comments may be submitted through November 15, 2000 to Jackie Stalnaker, Division of Vocational Rehabilitation Services, 2801 Mail Service Center, Raleigh, NC 27699-2801. To obtain additional information or indicate need for alternative communication format contact Ms. Stalnaker in writing or by phone (919) 733-3364 or (919) 733-5924 (TDD). In addition a fiscal note is available upon written request from the same address.

Fiscal Impact

- State
- Local
- Substantive (≥\$5,000,000)
- None

CHAPTER 20 – VOCATIONAL REHABILITATION

SUBCHAPTER 20D – STANDARDS FOR FACILITIES AND PROVIDERS

SECTION .0200 – STANDARDS FOR FACILITIES

10 NCAC 20D .0201 TYPES OF FACILITIES AND GENERAL REQUIREMENTS

(a) It is the policy of the Division of Vocational Rehabilitation Services to use whenever feasible facilities that are accredited by the appropriate public authority or professional organization. Facilities are selected for use in providing the client’s rehabilitation program based on the individualized rehabilitation needs of the client. Facilities may include hospitals, convalescent and nursing homes, rehabilitation centers, colleges, universities, community colleges and technical schools, community rehabilitation programs, sheltered workshops, and many others as needed by the client.

(b) Any facility in which vocational rehabilitation services are provided and any provider of vocational rehabilitation services shall meet the program accessibility and special communication requirements specified in 34 C.F.R. 361.51.

Authority G.S. 143-545.1; 143-546.1; 34 C.F.R. 361.51.

10 NCAC 20D .0207 STANDARDS FOR POSTSECONDARY TRAINING FACILITIES

Postsecondary training facilities shall be licensed by, or have their program approved by, one of the following:

- (1) Board of Governors of the University of North Carolina (G.S.116-15);
- (2) Office of Proprietary Schools, N.C. Department of Community Colleges (Article 8 of G. S. 115D);
- (3) N. C. Board of Barber Examiners (G.S. 86A-22);
- (4) N.C. Division of Motor Vehicles (G.S. Chapter 20, Article 14 Commercial Driver Training Schools);
- (5) N. C. Board of Cosmetic Art Examiners (G.S. 88B-16);

- (6) N. C. Division of Facility Services – Nurse’s Aide I Programs (G.S. 131E-104);
- (7) N. C. Board of Nursing – Nurse’s Aide II Programs (G.S. 90-171.55);
- (8) N. C. Appraisal Board (G.S. 93E-1-10);
- (9) N. C. Real Estate commission (G.S. 93A-4(d));
- (10) N. C. Board of Massage and Body Work Therapy, (G.S. 90-631); or
- (11) Other licensure boards for which a training facility has written verification that the licensure board is the appropriate licensing body and from which the facility holds a current license.

Authority G.S. 143-545.1; 143-546.1.

Notice is hereby given in accordance with G.S. 150B-21.2 that the Commission for Mental Health, Development Disabilities and Substance Abuse Services intends to amend the rule cited as 10 NCAC 45G .0306. Notice of Rule-making Proceedings was published in the Register on June 1, 1999.

Proposed Effective Date: August 1, 2002

Instructions on How to Demand a Public Hearing: A demand for public hearing must be made in writing and mailed to Charlotte F. Hall, Rulemaking Coordinator, Division of MHDDSAS, 3012 Mail Service Center, Raleigh, NC 27699. The demand must be made within 15 days of this Notice.

Reason for Proposed Action: There were many requests from Methadone programs to allow Licensed Practical Nurses (LPNs), as well as Registered Nurses (RNs) to dispense Methadone, since dispensing Methadone does not require a specific level of expertise. This would also allow a program more flexibility in its operation. This is a critical issue because of the shortage or availability of RNs.

Comment Procedures: Any interested person may submit written comments on this rule to Charlotte F. Hall, Rulemaking Coordinator, Division of MHDDSAS, 3012 Mail Service Center, Raleigh, NC 27699.

Fiscal Impact

- State
- Local
- Substantive (≥\$5,000,000)
- None

CHAPTER 45 – COMMISSION FOR MENTAL HEALTH, DEVELOPMENTAL DISABILITIES AND SUBSTANCE ABUSE SERVICES

SUBCHAPTER 45G – MANUFACTURERS: DISTRIBUTORS: DISPENSERS AND RESEARCHERS OF CONTROLLED SUBSTANCES

SECTION .0300 - PRESCRIPTIONS

PROPOSED RULES

10 NCAC 45G .0306 SUPPLYING OF METHADONE IN TREATMENT PROGRAMS BY RN

(a) Methadone or other medications approved for use in narcotic addiction treatment by the Food and Drug Administration, and under the North Carolina Controlled Substances Act, may be supplied to a bona fide patient of a methadone treatment program program. by a registered nurse employed by that program

(b) Methadone may be supplied by either a registered nurse or a licensed practical nurse employed by that program, provided the methadone is supplied pursuant to the order of the program's medical director, who director; and, further, that the medical director is a licensed physician who is registered with the Federal Drug Enforcement Administration to dispense controlled substances.

(c) The program's medical director shall countersign or sign in the medical record of the program all orders for methadone or other medications approved for use in narcotic addiction treatment by the Food and Drug Administration and under the North Carolina Controlled substances Act within 72 hours of the initiation of the order.

(d) For purposes of this Rule, supplying shall not include prescribing or compounding.

Authority G.S. 90-100; 143B-147(a)(5).

TITLE 13 – NORTH CAROLINA DEPARTMENT OF LABOR

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Department of Labor intends to amend the rules cited as 13 NCAC 15 .0420; .0502 and repeal the rules cited as 13 NCAC 15 .0105, .0501; .0601-.0613. Notice of Rule-making Proceedings was published in the Register on July 17, 2000.

Proposed Effective Date: March 1, 2001

Public Hearing:

Date: October 31, 2000

Time: 10:00 a.m.

Location: 4 West Edenton Street, Room 205, 2nd Floor Conference Room, Raleigh, North Carolina 27601

Reason for Proposed Action: To update rules to conform to current standards and current APA.

Comment Procedures: Written comments must be submitted to Ann B. Wall, N.C. Department of Labor, 4 West Edenton Street, Raleigh, NC 27601 on or before the close of business, November 15, 2000.

Fiscal Impact

- State
Local
Substantive (>=\$5,000,000)
None

CHAPTER 15 – ELEVATOR AND AMUSEMENT DEVICE DIVISION

SECTION .0100 – GENERAL PROVISIONS

13 NCAC 15 .0105 NOTATION OF SUSPENSION OR REVOCATION

Upon suspension or revocation of a certificate of operation, an authorized inspector shall affix to a prominent place on the device or equipment, a card with substantially the following language:

The certificate of operation for this device or equipment is (suspended indefinitely/permanently revoked). Further use of this device or equipment is prohibited. This card shall be signed by the Director of the Elevator and Amusement Device Division. In addition the inspector shall place seals upon the device or equipment to ensure that it is not used without the permission of the Director.

Authority G.S. 95-110.5; 95-110.6; 95-111.4; 95-111.6; 95-120; 95-124.

SECTION .0400 – AMUSEMENT DEVICES

13 NCAC 15 .0420 PUBLIC PROTECTION

An amusement device shall not be used or operated while any person is so located as to be endangered by it. Areas in which persons may be so endangered shall be fenced, barricaded, or otherwise guarded against public intrusion. Fences, when used to comply with this Rule, shall be at least 42 inches high and shall have essentially vertical mullions located to reject a ball six inches in diameter. When fences are used to comply with this Rule, the fences:

- (1) shall be at least 42 inches high;
(2) shall not have horizontal mullions; and
(3) shall have mullions located to reject a ball:
(a) Six inches in diameter if the fences were are used for amusement devices manufactured before January 1, 1993; and
(b) Four inches in diameter if the fences were are used for amusement devices manufactured after January 1, 1993.

Authority G.S. 95-111.4.

SECTION .0500 – CIVIL MONEY PENALTIES

13 NCAC 15 .0501 CIVIL PENALTIES

In civil penalty cases, the Director of the Division shall notify the owner or operator by certified mail of the following:

- (1) the nature of the violation;
(2) the amount of the civil penalty;
(3) the civil penalty determination will become final, unless within 15 days after receiving notice thereof the employer charged with a violation and penalty takes exception to the determination; and
(4) the procedure for taking exception as provided in Rule .0502 of this Section.

PROPOSED RULES

Authority G.S. 95-110.5; 95-110.10; 95-111.4; 95-111.13.

13 NCAC 15 .0502 EXCEPTIONS TO CIVIL PENALTY

(a) ~~The owner or operator must file a written exception to the civil penalty determination within 15 days after receipt of the notification of the civil penalty or the determination will become final. A civil penalty determination by the Commissioner is final unless the person charged takes exception to the determination within 15 days after receiving notice of the determination. As used in G.S. 95-110.10 and this subsection, "takes exception to the determination" means commencing a contested case pursuant to G.S. 150B, Article 3 by filing a petition with the Office of Administrative Hearings.~~

(b) ~~The exception to the determination must be filed with the Director, Elevator and Amusement Device Division, North Carolina Department of Labor, 4 West Edenton Street, Raleigh, North Carolina 27601.~~

(c) ~~No particular form is prescribed for the exception. However, the exception should be typed or clearly written, must be directed to the issue of the violations and the assessment, and must state the reasons why the owner or operator contends the determination is in error.~~

(d) ~~If an exception is filed within 15 days of receiving notification of the civil penalty the employer is entitled to an administrative hearing pursuant to Article 3 of Chapter 150B of the North Carolina General Statutes.~~

Authority G.S. 95-110.5; 95-110.10; 95-111.4; 95-111.13.

SECTION .0600 - FORMS

13 NCAC 15 .0601 APPLICATION TO INSTALL

~~The purpose of this form is to initially register new installations prior to inspection and tests. This form is also used for acceptance inspections when completed. This form contains the following information:~~

- ~~(1) physical characteristics of equipment;~~
- ~~(2) type of facility and address; and~~
- ~~(3) assigned state number.~~

Authority G.S. 95-110.5; 95-111.4; 150B-11(1).

13 NCAC 15 .0602 PERMIT FOR INSTALLATION OR ALTERATION

~~The purpose of this form is to certify that equipment has been approved and registered by the state for installation or alteration. This permit should be publicly displayed on site. This form contains the following information:~~

- ~~(1) type of equipment;~~
- ~~(2) number assigned by state and date issued; and~~
- ~~(3) name of installer.~~

Authority G.S. 95-110.5; 95-111.4; 150B-11(1).

13 NCAC 15 .0603 CERTIFICATE OF OPERATION

~~The purpose of this form is to certify equipment that has been inspected and accepted by the state in accordance with prevailing code. This form contains the following information:~~

- ~~(1) state assigned number of equipment;~~
- ~~(2) location of equipment and by whom owned; and~~
- ~~(3) test date and date of acceptance by the state.~~

Authority G.S. 95-110.5; 150B-11(1).

13 NCAC 15 .0604 LIMITED CERTIFICATE OF OPERATION

~~The purpose of this form is to certify inspection of equipment. This form contains the following information:~~

- ~~(1) state assigned number of equipment;~~
- ~~(2) name of inspector and date of inspection;~~
- ~~(3) location of equipment;~~
- ~~(4) name of owner and operator of equipment; and~~
- ~~(5) date of expiration of certificate.~~

Authority G.S. 95-110.5; 150B-11(1).

13 NCAC 15 .0605 INSPECTION FORM

~~The purpose of this form is to identify equipment and list violations of code or hazardous conditions. This form contains the following information:~~

- ~~(1) name and address of occupant and owner;~~
- ~~(2) identifying information;~~
- ~~(3) abatement date;~~
- ~~(4) fees charged and collected; and~~
- ~~(5) list of recommended corrections of violations.~~

Authority G.S. 95-110.5; 150B-11(1).

13 NCAC 15 .0606 REGISTRATION FORM

~~The purpose of this form is to initially register new chair gondola lifts, ski tows, and tramways installations prior to inspection and test. This form contains the following information:~~

- ~~(1) physical characteristics of equipment;~~
- ~~(2) type of facility and address; and~~
- ~~(3) assigned state number.~~

Authority G.S. 95-118; 150B-11(1).

13 NCAC 15 .0607 CERTIFICATE OF REGISTRATION

~~The purpose of this form is to publicly certify that chair gondola lifts, ski tows, and passenger tramways are in accordance with Article 15 of Chapter 95 of the N.C. General Statutes and to certify date of last inspection. This form contains the following information:~~

- ~~(1) equipment name and location;~~
- ~~(2) state assigned number of equipment;~~
- ~~(3) name of inspector and date of inspection;~~
- ~~(4) name of owner and operator of equipment; and~~
- ~~(5) date of expiration of certificate.~~

Authority G.S. 95-119; 150B-11(1).

PROPOSED RULES

13 NCAC 15 .0608 AMUSEMENT DEVICE INSPECTION FORM

The purpose of this form is to identify equipment and list violations of code or hazardous conditions. This form contains the following information:

- (1) name and address of owner;
- (2) present location;
- (3) inspection fees charged and collected; and
- (4) list of recommended corrections of violations.

Authority G.S. 95-111.4; 150B-11(1).

13 NCAC 15 .0609 AMUSEMENT DEVICE CERTIFICATE OF OPERATION

The purpose of this form is to publicly certify the equipment to be in accordance with Article 14B of Chapter 95 of the N.C. General Statutes and to certify date of inspection. This form contains the following information:

- (1) state number assigned to the equipment;
- (2) date of issuance and expiration of certificate;
- (3) location of the amusement device; and
- (4) name of inspector.

Authority G.S. 95-111.4; 150B-11(1).

13 NCAC 15 .0610 CHAIR-GONDOLA LIFTS/SKI TOWS INSPECTION REPORT FORM

The purpose of this form is to identify the equipment, list violations and certify inspection of equipment. This form contains the following information:

- (1) name and address of owner and operator;
- (2) location of equipment;
- (3) identifying information; and
- (4) recommended corrections of violations.

Authority G.S. 95-121; 150B-11(1).

13 NCAC 15 .0611 ROPE INSPECTION REPORT FORM

The purpose of this form is to identify information of the ski lift rope and certify conditions of the rope. This form contains the following information:

- (1) name and address of facility;
- (2) type of equipment on which rope is installed;
- (3) physical characteristics of rope; and
- (4) certification of condition of rope.

Authority G.S. 95-121; 150B-11(1).

13 NCAC 15 .0612 INCLINED RAILROAD INSPECTION REPORT FORM

The purpose of this form is for certification and inspection and to show the condition of equipment. This form contains the following information:

- (1) name and address of owner or operator;
- (2) location of equipment;
- (3) information on condition of equipment; and
- (4) recommendations for correcting violations of code.

Authority G.S. 95-121; 150B-11(1).

13 NCAC 15 .0613 DAILY AMUSEMENT DEVICE RECORD FORM

The purpose of this form is to give the Division a record of the owner maintenance program. This form contains the following information:

- (1) identification of device and name of manufacturer;
- (2) certification of owner's information of a different system;
- (3) signature of the person making the inspection; and
- (4) remarks on the condition of equipment.

Authority G.S. 95-111.5; 150B-11(1).

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Department of Environment and Natural Resources intends to amend the rule cited as 15A NCAC 1C .0402. Notice of Rule-making Proceedings was published in the Register on August 15, 2000.

Proposed Effective Date: April 1, 2001

Public Hearing:

Date: November 16, 2000

Time: 10:00 a.m.

Location: Conference Room #3, 14th Floor, Archdale Building, 512 N. Salisbury St, Raleigh, NC 27611

Reason for Proposed Action: This amendment will prohibit the NC Department of Environment and Natural Resources ("DENR") from acting on applications for permits or other DENR approvals required by a project while preparation and review of environmental documents required pursuant to the North Carolina Environmental Policy Act, G.S. 113A-100 et seq. is underway. This rule amendment would not prohibit approvals of activities undertaken to gather data needed for the SEPA process.

Comment Procedures: Comments may be submitted to Mr. Ryke Longest, Department of Justice, Attorney General's Office, PO Box 114, Edenton St., Raleigh, NC 27602, (919) 716-0942. Comments will be accepted through November 15, 2000.

Fiscal Impact

- State
- Local
- Substantive (≥\$5,000,000)
- None

CHAPTER 1 – DEPARTMENTAL RULES

SUBCHAPTER 1C - CONFORMITY WITH NORTH CAROLINA ENVIRONMENTAL POLICY ACT

PROPOSED RULES

SECTION .0400 – OTHER REQUIREMENTS

Rule-making Proceedings or following the public hearing and public comment period as indicated in this Notice.

15A NCAC 01C .0402 LIMITATION ON ACTIONS DURING NCEPA PROCESS

(a) While work on an environmental document is in progress, no agency shall undertake in the interim any action which might limit the choice among alternatives or otherwise prejudice the ultimate decision on the issue. A permit approval or other action to approve land disturbing activity or construction of part of the project or action, other than those actions necessary for gathering information needed to prepare the environmental document, limits the choice among alternatives and shall not be approved until the final environmental document for the action is published in the Bulletin and adopted by the agency through the procedures established by the Department of Administration's Rules for administering NCEPA and this Subchapter of the Department's rules.

(b) If an agency is considering a proposed action for which an environmental document is to be or is being prepared, the agency shall promptly notify the initiating party that the agency cannot take final action until the environmental documentation is completed and available for use as a decision making tool. The notification shall be consistent with the statutory and regulatory requirements of the agency and may be in the form of a notification that the application is incomplete.

(c) When an agency decides that a proposed activity, for which state actions are pending or have been taken, requires environmental documentation then the agency should promptly notify all action agencies of the decision. When statutory and regulatory requirements prevent an agency from suspending action, the agency shall deny any action for which it determines an environmental document is necessary but not yet available as a decision making tool.

Authority G.S. 113A-2; 113A-4; 113A-6; 113A-7; 143B-10.

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Wildlife Resources Commission intends to amend the rule cited as 15A NCAC 10B.0115. Notice of Rule-making Proceedings was published in the Register on August 15, 2000.

Proposed Effective Date: July 1, 2001

Public Hearing:

Date: November 9, 2000

Time: 6:00 p.m.

Location: Room: Cherokee County Courthouse, 75 Peachtree St., Murphy, NC 28657

Reason for Proposed Action: To set/amend the rules for shining lights in deer areas which are necessary to manage and conserve the resource. The Wildlife Resources Commission may adopt this as a temporary rule pursuant to G.S. 150B-21.1(a1) following the abbreviated notice as indicated in the Notice of

Comment Procedures: Interested persons may present their views either orally or in writing at the hearing. In addition, the record of hearing will be open for receipt of written comments from August 10, 2000 to November 16, 2000. Such written comments must be mailed to the NC Wildlife Resources Commission, 1701 Mail Service Center, Raleigh, NC 27699-1701.

Fiscal Impact

- State
Local
Substantive (>=\$5,000,000)
None

CHAPTER 10 – WILDLIFE RESOURCES AND WATER SAFETY

SUBCHAPTER 10B – HUNTING AND TRAPPING

SECTION .0100 – GENERAL REGULATIONS

15A NCAC 10B .0115 SHINING LIGHTS IN DEER AREAS

(a) It having been found upon sufficient evidence that certain areas frequented by deer are subject to substantial unlawful night deer hunting, or that residents in such areas have been greatly inconvenienced by persons shining lights on deer, or both, the shining of lights on deer in such areas is limited by Paragraphs (b) and (c) of this Rule, subject to the exceptions contained in Paragraph (d) of this Rule.

(b) No person shall, between the hours of 11:00 p.m. and one-half hour before sunrise, intentionally shine a light upon a deer or intentionally sweep a light in search of deer in the indicated portions of the following counties:

- (1) Beaufort -- entire county;
(2) Bladen -- entire county;
(3) Brunswick -- entire county;
(4) Camden -- entire county;
(5) Chowan -- entire county;
(6) Currituck -- entire county;
(7) Duplin -- entire county;
(8) Franklin -- entire county;
(9) Gates -- entire county;
(10) Greene -- entire county;
(11) Hertford -- entire county;
(12) Hyde -- entire county;
(13) Jones -- entire county;
(14) Lenoir -- entire county;
(15) Martin -- entire county;
(16) Nash -- entire county;
(17) Pamlico -- entire county;
(18) Pasquotank -- entire county;
(19) Pender -- entire county;
(20) Perquimans -- entire county;
(21) Pitt -- entire county;
(22) Sampson -- entire county;

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- (23) Tyrrell -- entire county;
- (24) Vance -- entire county;
- (25) Wake -- entire county;
- (26) Warren -- entire county;
- (27) Washington -- entire county;
- (28) Wayne -- entire county.

(c) No person shall, between the hours of one-half hour after sunset and one-half hour before sunrise, intentionally shine a light upon a deer or intentionally sweep a light in search of deer in the indicated portions of the following counties:

- (1) Alamance -- entire county;
- (2) Alexander -- entire county;
- (3) Alleghany -- entire county;
- (4) Anson -- entire county;
- (5) Ashe -- entire county;
- (6) Avery -- that portion south and east of Highway 221;
- (7) Buncombe County -- entire county;
- (8) Burke -- entire county;
- (9) Cabarrus -- entire county;
- (10) Caswell -- entire county;
- (11) Catawba -- entire county;
- (12) Chatham -- entire county;
- (13) Cherokee -- entire county

- ~~(13)(14)~~ Clay -- entire county;
- ~~(14)(15)~~ Cleveland -- entire county;
- ~~(15)(16)~~ Cumberland -- entire county;
- ~~(16)(17)~~ Davidson -- entire county;
- ~~(17)(18)~~ Davie -- entire county;
- ~~(18)(19)~~ Durham -- entire county;
- ~~(19)(20)~~ Edgecombe -- entire county;
- ~~(20)(21)~~ Forsyth County -- entire county;
- ~~(21)(22)~~ Gaston -- entire county;
- ~~(22)(23)~~ Granville -- entire county;
- ~~(23)(24)~~ Guilford -- entire county;
- ~~(24)(25)~~ Halifax -- entire county;
- ~~(25)(26)~~ Harnett -- entire county;
- ~~(26)(27)~~ Henderson -- entire county;
- ~~(27)(28)~~ Hoke -- entire county;
- ~~(28)(29)~~ Iredell -- entire county;
- ~~(29)(30)~~ Johnston -- entire county;
- ~~(30)(31)~~ Lee -- entire county;
- ~~(31)(32)~~ Lincoln -- entire county;
- ~~(32)(33)~~ Macon -- entire county;
- ~~(33)(34)~~ McDowell -- entire county;
- ~~(34)(35)~~ Mecklenburg -- entire county;
- ~~(35)(36)~~ Mitchell -- entire county;
- ~~(36)(37)~~ Montgomery -- entire county;
- ~~(37)(38)~~ Northampton -- entire county;
- ~~(38)(39)~~ Orange County -- entire county;
- ~~(39)(40)~~ Person -- entire county;
- ~~(40)(41)~~ Polk -- entire county;
- ~~(41)(42)~~ Randolph -- entire county;
- ~~(42)(43)~~ Robeson County -- entire county;
- ~~(43)(44)~~ Rockingham -- entire county;
- ~~(44)(45)~~ Rowan -- entire county;
- ~~(45)(46)~~ Rutherford -- entire county;
- ~~(46)(47)~~ Stanly -- entire county;
- ~~(47)(48)~~ Stokes -- entire county;
- ~~(48)(49)~~ Surry -- entire county;

- ~~(49)(50)~~ Swain -- entire county;
- ~~(50)(51)~~ Transylvania -- entire county;
- ~~(51)(52)~~ Union -- entire county;
- ~~(52)(53)~~ Watauga -- entire county;
- ~~(53)(54)~~ Yancey -- entire county.

(d) Paragraphs (b) and (c) of this Rule shall not be construed to prevent:

- (1) the lawful hunting of raccoon or opossum during open season with artificial lights designed or commonly used in taking raccoon and opossum at night;
- (2) the necessary shining of lights by landholders on their own lands;
- (3) the shining of lights necessary to normal travel by motor vehicles on roads or highways; or
- (4) the use of lights by campers and others who are legitimately in such areas for other reasons and who are not attempting to attract or to immobilize deer by the use of lights.

Authority G.S. 113-134; 113-291.1; S.L. 1981, c. 410; S.L. 1981, (Second Session 1982), c. 1180.

TITLE 18 – DEPARTMENT OF THE SECRETARY OF STATE

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Department of the Secretary of State intends to amend the rules cited as 18 NCAC 6 .1205, .1207-.1209, .1401, .1503, .1810, and repeal the rule cited as 18 NCAC 6 .1201. Notice of Rule-making Proceedings was published in the Register on August 15, 2000.

Proposed Effective Date: April 1, 2001

Instructions on How to Demand a Public Hearing: *(must be requested in writing within 15 days of notice): Request for public hearing may be addressed to David S. Massey, Deputy Securities Administrator at PO Box 29622, Raleigh, NC 27626-0525, (919) 733-3924.*

Reason for Proposed Action:

18 NCAC 6 .1201 – *This repeal removes a rules that is duplicated in 18 NCAC 6 .1210.*

18 NCAC 6 .1205, .1207 – *This proposed change would also make the disqualifications contained in 18 NCAC 6 .1207 apply equally to all state exemptions from registration where a filing is required.*

18 NCAC 6 .1208 – *The requirement of "notarization" of a document included for consistency with the requirements of 18 NCAC 6 .1205(b)(4)(A) and 18 NCAC 6 .1209(d) requiring a notarized statement. There are technical amendments that are for outdated citations.*

18 NCAC 6 .1209 – *This rule specifies that issuers should identify the "individuals" who will be selling the securities pursuant to this exemption from state registration, where no broker-dealer or other entity is involved.*

18 NCAC 6 .1401 – *This requirement is deleted because the requirement for registration as the information required by this*

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subparagraph is duplicitous and contains information easily attainable by CRD.

18 NCAC 6 .1503 – *The Form U-2A is a "Corporate Resolution" verifying action taken by a Board of Directors of a "corporation." The form is more correctly a form to be "properly executed" rather than "notarized."*

18 NCAC 6 .1810 – *This section is deleted because the Form ADV contains the consent to service of process.*

Comment Procedures: *Comments may be addressed to David S. Massey, Deputy Securities Administrator at PO Box 29622, Raleigh, NC 27626-0525, (919) 733-3924. Comments must be received no later than November 15, 2000.*

Fiscal Impact

- State
 Local
 Substantive (\geq \$5,000,000)
 None

CHAPTER 6 – SECURITIES DIVISION

SECTION .1200 – EXEMPTIONS

18 NCAC 06 .1201 DESIGNATED SECURITIES EXCHANGES

~~The national securities exchanges designated by the administrator for the purpose of G.S. 78A-16(8) shall be:~~

- ~~(1) New York Stock Exchange,~~
- ~~(2) American Stock Exchange,~~
- ~~(3) Midwest Stock Exchange,~~
- ~~(4) Pacific Stock Exchange,~~
- ~~(5) Philadelphia Stock Exchange.~~

Authority G.S. 78A-16(8).

18 NCAC 06 .1205 LIMITED OFFERINGS PURSUANT TO G.S. 78A-17(9)

(a) Any issuer relying upon the exemption provided by G.S. 78A-17(9) in connection with an offering of a security made in reliance upon Rule 505 of Regulation D promulgated by the Securities and Exchange Commission under the Securities Act of 1933, as amended, 17 C.F.R. 230.505 (1982) (and as subsequently amended) shall comply with the provisions of Rules .1206, .1207 and .1208 of this Section; provided that such compliance shall not be required if the security is offered and sold only to persons who will be actively engaged, on a regular basis, in the management of the issuer's business; and provided further, that compliance with provisions of Paragraphs (a), (b), and (c) of Rule .1208 of this Section shall not be required if the security is offered to not more than five individuals who reside in this State.

(b) Any issuer relying upon the exemption provided by G.S. 78A-17(9) in connection with an offering of a direct participation program security made solely in reliance upon an exemption from registration contained in Section 4(2) or Section 3(a)(11) of the Securities Act of 1933, as amended, or made solely in reliance upon Rule 504 of Regulation D promulgated by the Securities and Exchange Commission under the Securities

Act of 1933, as amended, 17 C.F.R. 230.504 (1982), (and as subsequently amended), shall comply with the following conditions and limitations:

- (1) No commission, discount, finder's fee or other similar remuneration or compensation shall be paid, directly or indirectly, to any person for soliciting any prospective purchaser of the security sold to a resident of this State unless such person is either registered pursuant to G.S. 78A-36 or exempt from registration thereunder or the issuer reasonably believes that such person is so registered or exempt therefrom.
- (2) In all sales of direct participation program securities, the provisions of Rule .1313 of this Chapter regarding registered offerings of direct participation program securities shall be applicable.
- (3) Any prospectus or disclosure document used in offering the securities in this state shall disclose conspicuously the legend(s) required by the provisions of Rule .1316 of this Chapter.
- (4) Not less than 10 business days prior to any sale of the securities to a resident of this State which shall include but not be limited to the receipt by the issuer, or any person acting on the issuer's behalf of a signed subscription agreement of, or the receipt of consideration from, a purchaser, the issuer shall file with the administrator, or cause to be so filed:
 - (A) A statement signed by the issuer and acknowledged before a notary public or other similar officer:
 - (i) identifying the issuer (including name, form of organization, address and telephone number);
 - (ii) identifying the person(s) who will be selling the securities in this State (and in the case of such persons other than the issuer and its officers, partners and employees, describing their relationship with the issuer in connection with the transaction and the basis of their compliance with or exemption from the requirements of G.S. 78A-36) and describing any commissions, discounts, fees or other remuneration or compensation to be paid to such persons;
 - (iii) containing a summary of the proposed offering including:
 - (I) a description of the securities to be sold;
 - (II) the name(s) of all general partners of an issuer which is a partnership and, with respect to a corporate issuer or any corporate general partner(s) of any issuer which is a partnership, the date and place of incorporation and the names of the directors and executive officers of such corporation(s);
 - (III) the anticipated aggregate dollar amount of the offering;

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(IV) the anticipated required minimum investment, if any, by each purchaser of the securities to be offered;

(V) a brief description of the issuer's business and the anticipated use of the proceeds of the offering; and

(VI) a list of the states in which the securities are proposed to be sold;

(iv) containing an undertaking to furnish to the administrator, upon written request, evidence of compliance with Subparagraphs (1), (2), and (3) of this Paragraph (b); and

(v) containing an undertaking to furnish to the administrator, upon written request, a copy of any written document or materials used or proposed to be used in connection with the offer and sale of the securities.

(B) A consent to service of process naming the North Carolina Secretary of State as service agent using the Uniform Consent to Service of Process (Form U-2) signed by the issuer and acknowledged before a notary public or other similar officer; and accompanied by a properly executed Corporate Resolution (Form U-2A), if applicable;

(C) A non-refundable filing fee in the amount of twenty-five dollars (\$25.00), payable to the North Carolina Secretary of State.

(5) Compliance with the provisions of Subparagraph (4) of this Rule shall not be required if the security is offered to not more than five individuals who reside in this State.

(c) Neither the issuer nor any person acting on the issuer's behalf shall offer, offer to sell, offer for sale or sell the securities claimed to be exempt under G.S. 78A-17(9) by any means or any form of general solicitation or general advertising.

(d) No exemption under this Rule is available for the offer or sale of securities if the issuer or any other person or entity to which Rule .1205 applies is disqualified pursuant to Rule .1207 of this Section unless the administrator, upon application and a showing of good cause by the issuer, or such other person or entity, modifies or waives the disqualification. For purposes of this Rule, "good cause" means a substantial reason amounting in law to a legal excuse for noncompliance with a restriction imposed by Rule .1207 of this Section, and shall be relevant to considerations of the public interest, the protection of the investing public, the age and nature of the particular disqualifying event, the business experience, qualifications, and disciplinary history of the disqualified person, the need for full disclosure of information relevant to investment decisions, and the burden and cost of compliance with regulatory requirements applicable to the transaction in the absence of the availability of the exemption.

~~(d)~~(e) The administrator may, by order, waive any condition of or limitation upon the availability of the exemption provided by G.S. 78A-17(9).

Authority G.S. 78A-17(9); 78A-49(a).

18 NCAC 06 .1207 DISQUALIFICATIONS FROM RELIANCE UPON CERTAIN EXEMPTIONS

(a) No exemption under G.S. 78A-17(17) or any rule promulgated thereunder, ~~G.S. 78A-16(9)~~ G.S. 78A-16(9), G.S. 78A-17(9) or any other exemption made by rule subject to the disqualifications of this Rule shall be available for the securities of any issuer if the issuer, any of its directors, executive officers, general partners or beneficial owners of ten percent or more of any class of its equity securities, any of its promoters currently connected with it in any capacity, any affiliates, or any person (other than a dealer or salesman currently registered under G.S. 78A-36) who has been or will be paid any commission, discount, finder's fee or similar remuneration or compensation directly or indirectly, for soliciting any prospective purchaser of any security of the issuer offered or sold to residents of this State:

(1) Has filed a registration statement which is the subject of a currently effective stop order entered pursuant to any state's law within five years prior to the filing of the statement required by Rule .1208 of this Section;

(2) Has been convicted within five years prior to the filing of the statement required by Rule .1208 of this Section of any felony or misdemeanor in connection with the offer, purchase or sale of any security or in connection with the making of any false filing with the United States Securities and Exchange Commission or any state securities administrator, or of any felony involving fraud or deceit, including but not limited to, forgery, embezzlement, obtaining money under false pretenses, larceny or conspiracy to defraud;

(3) Is currently subject to any state administrative enforcement order or judgment entered by that state's securities administrator within five years prior to the filing of the statement required by Rule .1208 of this Section or is subject to any state's administrative enforcement order or judgment in which fraud or deceit, including but not limited to making untrue statements of material facts and omitting to state material facts, was found and the order or judgment was entered within five years prior to the filing of the statement required by Rule .1208 of this Section;

(4) Is currently subject to any state administrative enforcement order or judgment which prohibits, denies or revokes the use of any exemption from registration in connection with the offer, purchase or sale of securities entered within five years prior to the filing of the statement required by Rule .1208 of this Section;

(5) Is currently subject to any order, judgement, or decree of any court of competent jurisdiction temporarily or preliminarily restraining or enjoining, or is subject to any order, judgment or decree of any court of competent jurisdiction, entered within five years prior to the filing of the statement required by Rule .1208 of this Section, permanently restraining or enjoining such person from engaging in or continuing any conduct or practice in connection with the offer, purchase or sale of any security or in connection with the making of any false filing with the United States Securities and Exchange Commission or any state securities administrator; or

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- (6) Is currently subject to a United States Postal Service false representation order entered within five years prior to the filing of the statement required by Rule .1208 of this Section;
- (7) The prohibitions of Subparagraphs (1), (3) and (4) of this Rule shall not apply if the person subject to the disqualifying order is duly registered or licensed to conduct securities related business in the state in which the administrative order or judgment was entered against such person;
- (8) Any disqualification caused by this Rule is automatically waived if the state which created the basis for disqualification determines upon a showing of good cause that it is not necessary under the circumstances that this exemption or a comparable exemption be denied with regard to the present offering.

(b) For purposes of this Rule only, the term issuer shall include the corporate general partner(s) or joint venturers or proposed corporate general partner(s) or joint venturers of any partnership or joint venture or proposed partnership or joint venture.

Authority G.S. 78A-17(17); 78A-49(a).

18 NCAC 06 .1208 TRANSACTIONS EXEMPT UNDER RULE .1206: FILING REQUIREMENTS

(a) Not less than 10 business days prior to any sale of a security sold in reliance upon the exemption provided by Rule .1206 of this Section which shall include but not be limited to the receipt by the issuer, or any person acting on the issuer's behalf of a signed subscription agreement of, or the receipt of consideration from, a purchaser, the issuer shall file with the administrator, or cause to be so filed, the following:

- (1) A Form D (Notice of Sales of Securities Pursuant to Regulation D...and/or Uniform Limited Offering Exemption). All parts of this form, including the Appendix, shall be completed. The Form D is to be signed by a person duly authorized to do so by the issuer, and shall be attached to a statement containing the supplemental information required by Paragraph (c) of this Rule .1208.
- (2) A copy of any written document or materials proposed to be used in connection with the offer and sale of the securities to be sold; provided, however, if any such documents or materials are not available to be filed 10 business days prior to any sale of the securities to a person who resides in this State, they shall be filed when available, but, in any event, no later than 5 business days before any such sale. Supplements or amendments to any such written document or materials shall be filed within 5 business days after delivery to any prospective purchaser of the securities.
- (3) A consent to service of process naming the North Carolina Secretary of State as service agent using the Uniform Consent to Service of Process (Form U-2) signed by the issuer and acknowledged before a notary public or similar officer; and accompanied by a properly executed Corporate Resolution (Form U-2A), if applicable.

(4) A non-refundable filing fee in the amount of seventy-five dollars (\$75.00), payable to the North Carolina Secretary of State.

(b) The issuer shall promptly file or caused to be filed with the administrator any amended Form D filed with the U.S. Securities and Exchange Commission in connection with the transaction.

(c) To comply with Subparagraph (a)(1) of this Rule .1208, the issuer shall file with the administrator a statement notarized and signed by a person duly authorized to execute such statement on its behalf containing the following representations:

- (1) that the securities will be sold in reliance upon an exemption from the registration requirements of Section 5 of the Securities Act of 1933, as amended;
- (2) that, to the best of the issuer's knowledge, the issuer is not disqualified by the provisions of Rule .1207 of this Section from relying upon the exemption provided by Rule .1206 of this Section;
- (3) that the issuer will furnish to the administrator, upon written request, evidence of compliance with ~~Subparagraphs (2), (3) and (4)~~ Paragraphs (c), (d) and (e) of Rule .1206~~(a)~~ of this Section;
- (4) that all persons who will be selling the securities in this state are in compliance with or exempt from the requirements of G.S. 78A-36; and
- (5) that the issuer will notify the administrator in writing of the names and titles of all officers, directors, partners, or employees of the issuer who will be engaged in the offer or sale of the securities in this state. Such notice to the administrator shall be made prior to any offer of securities in this state.

(d) Any filing pursuant to this Rule .1208 shall be amended by filing with the administrator such information and changes as may be necessary to correct any material misstatement or omission in the filing.

(e) The provisions of this Rule .1208 shall not apply to offers or sales of a security made pursuant to Rule .1206 of this Section if the security is offered to not more than five individuals who reside in this State.

Authority G. S. 78A-17(17); 78A-49(a).

18 NCAC 06 .1209 NONPROFIT SECURITIES

(a) The exemption provided by G.S. 78A-16(9) from the registration requirements of G.S. 78A-24 for securities offered, or to be offered, and sold by any person operated not for private profit but exclusively for religious, educational, benevolent, charitable, fraternal, social, athletic, or reformatory purposes, or as a chamber of commerce or trade or professional association shall not be available where:

- (1) The issuer is disqualified by Rule .1207 of this Section. For the purposes of determining the availability of the exemption provided by G.S. 78A-16(9), the issuer also shall be disqualified under Rule .1207 of this Section where the trustee of a trust indenture under which the securities are to be issued is subject to the disqualifications of Subparagraphs (a)(1) through (6) of Rule .1207 of this Section.

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- (2) The issuer, or any affiliate or predecessor has had any material default within five years prior to commencement of the offering in the payment of:
 - (A) principal, interest, dividend or sinking fund installment on any security or indebtedness for borrowed money; or
 - (B) rentals under material leases with terms of three years or more.
- (3) Any part of the net earnings of the nonprofit issuer inures to the benefit of any other person.
- (4) The issuer fails to comply with the requirements of Paragraph (b) of this Rule and, if applicable or appropriate, Paragraphs (c) and (d) of this Rule.

Provided, however, that the administrator may modify or waive, upon the showing of good cause in writing, any disqualification that results from Subparagraphs (a), (1), (2) or (3) of this Rule.

(b) No commission, discount, finder's fee or other similar remuneration or compensation shall be paid, directly or indirectly, to any person for soliciting any prospective purchaser of any security sold to a resident of this State in reliance upon this exemption unless such person is either registered pursuant to G.S. 78A-36 or exempt from registration thereunder or the issuer reasonably believes that such person is so registered or exempt therefrom.

(c) The nonprofit issuer should provide each offeree a written document providing full disclosure of all material facts. A prospectus, pamphlet, circular or similar literature providing the following minimum disclosures, if applicable, normally will suffice for this purpose; provided, however that nothing in this Paragraph shall be construed as in any manner relieving any person from the full disclosure requirements of G.S. 78A-8(2):

- (1) The Cover or First Page:
 - (A) The name of the issuer;
 - (B) Title of securities;
 - (C) In tabular form, the per unit and aggregate price to the public, underwriting or selling commissions and expenses, and net proceeds to the issuer;
 - (D) Name of dealer or financial adviser;
 - (E) Names of trustee and paying agent;
 - (F) If the offering is being made only to certain persons, a description of such offerees;
 - (G) The appropriate disclaimer and/or legend, pursuant to the provisions of Rule .1316 of this Chapter, shall appear in boldface type;
 - (H) If appropriate, the following statement shall appear in boldface: **THIS OFFERING IS SUBJECT TO CERTAIN RISKS.** (See "Risk Factors"); and
 - (I) The date of the disclosure document.
- (2) A Table of Contents.
- (3) The Issuer:
 - (A) The name, address, organization (state in which organized, date organized, statute under which organized, and form of organization) and purpose of the issuer;
 - (B) The history of the issuer;
 - (C) A description of the general area and location of the issuer;
 - (D) Accreditation and regulation of the issuer;

- (E) The number of paid employees and a description of any employee benefit plans;
 - (F) Any affiliation between the issuer and the dealer, or any officers, directors or general partners or any person holding a similar position of either, with any building contractor or supplier who has an interest in or may receive any of the proceeds of the offering or with any trustee of a trust indenture under which the securities are to be issued.
- (4) Risk Factors: Where appropriate, risk factors in connection with the offering must be disclosed. Reference to risk factors should note the page number of the disclosure document at which they may be found or further disclosure is made. Risk factors that should be considered include, but are not limited to, the following examples:
- (A) There is no market for the securities, and there is no assurance that a market will develop. Consequently, investors may not be able to resell any securities purchased should they need to or wish to do so for emergency purposes or otherwise.
 - (B) The issuer is primarily dependent upon contributions of the membership to meet expenses for operation of the issuer and payments of principal and interest of the securities. The issuer may not receive sufficient funds to meet these obligations.
 - (C) During the past . . . fiscal years, the issuer has operated at a loss, and is currently not earning sufficient income to pay the principal and interest on the securities offered hereby. There is no assurance the issuer will be able to meet debt service requirements in the future.
 - (D) These securities will mature and become payable on . . . and it is anticipated the issuer will attempt to refinance them at that time. There is no assurance that refinancing funds will be available at that time or that such funds will be available at terms acceptable to the issuer.
 - (E) These securities are not secured by land, buildings or equipment of the issuer. In the event of default, the investor has the status of an unsecured creditor.
 - (F) The issuer has defaulted on a previous issue of securities. This issue is for the purpose of refinancing.
 - (G) The trust indenture permits the issuer further to encumber the property securing these securities through the future issuance of additional securities.
- (5) Use of Proceeds:
- (A) An itemized statement as to the application of the proceeds of the offering. If additional funds are needed to accomplish the stated purposes, this should be disclosed, together with a statement showing how such funds will be obtained.
 - (B) If there is to be an escrow of funds, a description of the escrow arrangements.
- (6) Description of Property:
- (A) In addition to describing physical properties, a valuation of mortgaged property should be

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included as follows: Total valuation of existing land, buildings, improvements and equipment before the offering: \$____.; and total valuation of land, buildings, improvements and equipment after the offering and upon completion of construction: \$____.

(B) The person preparing any appraisals shall be identified, and his qualifications for serving as such shall be indicated.

(7) Management and Control:

(A) The name and principal occupation of each officer, trustee, director, general partners or other persons holding similar positions. In the case of religious organizations, a brief summary of the background of the minister(s) and any other important church officials should be included.

(B) A description of any material transactions or proposed transactions between the issuer and such persons or any affiliate of such persons.

(8) Material Litigation and Transactions. Any pending or threatened litigation which may materially affect the issuer's income. Any contracts with the issuer which, if terminated, would materially affect the issuer's income.

(9) Description of Securities:

(A) Description of the indenture under which the securities are to be issued should include information as to:

- (i) interest and interest payment dates,
- (ii) default,
- (iii) redemption,
- (iv) subordination,
- (v) sinking fund,
- (vi) subsequent issues,
- (vii) modification of the indenture,
- (viii) insurance coverage on properties of the issuer, and
- (ix) any other material facts regarding the rights of holders.

(B) A pay-back or maturity schedule.

(C) If guarantees of payment are made by any other person, information describing the ability of that person to guarantee, including financial statements, shall be included. Note: - A guarantee in and of itself involves the offering of a separate security which may require registration.

(10) Plan of Distribution:

(A) The name and address of the dealer and fund raising adviser.

(B) The aggregate underwriting or selling commissions or similar compensation or remuneration.

(C) A brief description of any underwriting arrangements or distribution plan, including whether best efforts or firm commitment, and whether exclusive or nonexclusive.

(11) Financial Statement:

(A) Balance sheet, within four months prior to the date of the first offer in reliance upon this exemption, prepared in accordance with generally accepted accounting principles.

(B) Income and expense statements for each of the three fiscal years preceding the date of the balance sheet and for any period between the close of the last fiscal year and the date of the balance sheet or such shorter period as the issuer has been in existence prepared in accordance with generally accepted accounting principles.

(C) Any statements or information necessary to explain extraordinary or non-recurring fluctuations in the statements supplied.

(D) If applicable, the number of pledging units and the average annual contribution per pledging unit.

In lieu of the disclosure document as described in this Paragraph, the issuer may use a disclosure document prepared in accordance with the Church Bond Guidelines prepared by NASAA published at Par. 1001 of CCH NASAA Reports, as may be amended from time to time, where such guidelines are applicable.

(d) Not less than five business days prior to any sale of a security in reliance upon the exemption provided by G.S. 78A-16(9) which shall include but not be limited to the receipt by the issuer, or any person acting on the issuer's behalf of a signed subscription agreement of, or the receipt of consideration from, a purchaser, the issuer shall file with the administrator, or cause to be so filed, the following information unless the content or time of filing is modified or waived by the administrator; provided, however that the filing is not required, unless requested by the administrator, where the offering is to be made exclusively to members of the nonprofit issuer and occupants of such members' households:

- (1) A statement, signed by the issuer and acknowledged before a notary public or other similar officer:
 - (A) Identifying the issuer, including the name, form of organization, date and state of organization, the nonprofit purpose for which the issuer is organized, address, telephone number and the appropriate representative to respond to questions;
 - (B) Identifying the individuals or entities who will be selling the securities in this state and whether commissions, remuneration or compensation will be paid and the terms thereof;
 - (C) Describing the securities to be sold, including the type, aggregate offering amount to be offered in this state and the issue of which they are a part;
 - (D) Representing that the issuer is not disqualified by Paragraph (a) of this Rule from reliance upon this exemption;
 - (E) Representing that a disclosure document as may be required by Paragraph (c) of this Rule will be delivered to each purchaser prior to consummation of a sale or execution of a subscription agreement, or a statement as to the reasons the issuer believes that the disclosure document is unnecessary or inappropriate;
 - (F) Representing that in the event of any material change in the security or offering or if the disclosure document becomes incomplete in any material respect or contains any statement which is in the light of the circumstances under which it is

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made, false or misleading with respect to any material fact, the sale or offer for sale pursuant to this exemption will immediately cease, and will not be resumed until corrective disclosures are prepared and all prior purchasers are provided rescission offers pursuant to G.S. 78A-56(g).

- (2) An opinion of counsel relating to the "not for private profit" status of the issuer, the formation and good standing of the issuer, legality of the securities to be issued, and the validity of the indenture under which the securities are to be issued, or a letter of determination of tax exempt status issued by the Internal Revenue Service.
- (3) A consent to service of process (Form U-2) signed by the issuer and verified by a notary public or similar officer, naming the Secretary of State as service agent and accompanied by a corporate resolution of the board of directors, (Form U-2A), if applicable, authorizing the consent.

(e) Nothing in this Rule .1209 is intended to or should be construed as in any way relieving the issuer or any person acting on behalf of the issuer from providing disclosure to prospective investors adequate to satisfy the antifraud provisions of the Act.

(f) Should for any reason, an offer and sale of securities made in reliance upon the exemption provided by G.S. 78A-16(9) fail to comply with all of the conditions hereof, the issuer may claim the availability of any other applicable exemption.

(g) Any offer or sale shall be deemed to have been made in compliance with the exemption provided by G.S. 78A-16(9) if the issuer has substantially complied in all material respects with this Rule and G.S. 78A-16(9) would otherwise be available.

(h) In view of the objective of this Rule and the purpose and policies underlying the Act, the exemption provided by G.S. 78A-16(9) is not available to any issuer with respect to any transaction which although in technical compliance with the exemption provided by G.S. 78A-16(9) and this Rule, is part of a plan or scheme to evade registration or the conditions or limitations explicitly stated in this Rule.

Authority G.S. 78A-16(9); 78A-49(a).

SECTION .1400 – REGISTRATION OF DEALERS AND SALESMEN

18 NCAC 06 .1401 APPLICATION FOR REGISTRATION OF DEALERS

(a) The application for registration as a dealer shall contain the following:

- (1) an executed Uniform Application for Registration as a Dealer (Form BD) and the appropriate schedules thereto or the appropriate successor form;
- (2) a fee in the amount of two hundred dollars (\$200.00);
- ~~(3) evidence of current registration as a dealer with the Securities and Exchange Commission under the Securities Exchange Act of 1934;~~
- ~~(3)~~(4) evidence of compliance with Rule .1410 of this Section; and
- ~~(4)~~(5) any other information the administrator may from time to time require which is relevant to the

applicant's qualifications to engage in the business of acting as a dealer in securities.

(b) The application for registration as a dealer shall be filed as follows:

(1) NASD member dealers shall file applications for initial registration in the State of North Carolina with the NASAA/NASD Central Registration Depository, P.O. Box 37441, Washington, D.C. 20013 and shall file a manually executed Form BD directly with the Securities Division. Applications for renewal of registration shall be filed only with the Central Registration Depository (see Rule .1406 of this Section);

(2) Non-NASD member dealers shall file all applications for registration in the State of North Carolina directly with the Securities Division.

(c) The dealer shall file with the administrator, as soon as practicable but in no event later than 30 days following such event, notice of any disciplinary action taken against the dealer by any exchange of which the dealer is a member; the Securities and Exchange Commission; the Commodity Futures Trading Commission; any national securities association registered with the Securities and Exchange Commission pursuant to Section 15A of the Securities Exchange Act of 1934 or any state securities commission and of any civil suit filed against the dealer alleging violation of any federal or state securities laws. If the information contained in any document filed with the administrator is or becomes inaccurate or incomplete in any material respect, the dealer shall file a correcting amendment as soon as practicable but in no event later than 30 days following the date on which such information becomes inaccurate or incomplete.

(d) Registration becomes effective at noon of the 30th day after a completed application is filed or such earlier time upon issuance of a license or written notice of effective registration, unless proceedings are instituted pursuant to G.S. 78A-39. The administrator may by order defer the effective date after the filing of any amendment but no later than noon of the 30th day after the filing of the amendment.

(e) Every dealer shall notify the administrator of any change of address, the opening or closing of any office (including the office of any salesman operating apart from the dealer's premises) or any material change thereto, in writing as soon as practicable or by filing concurrently upon filing with NASD an appropriate amendment or schedule to Form BD or any successor form.

Authority G.S. 78A-36(a); 78A-37(a); 78A-37(b); 78A-37(d); 78A-38(c); 78A-49(a).

SECTION .1500 – MISCELLANEOUS PROVISIONS

18 NCAC 06 .1503 FORM OF CONSENT TO SERVICE OF PROCESS

If the filing of a consent to service of process is required by statute or rule, the consent shall name the Secretary of State as service agent and ~~shall~~ shall, in cases of securities offerings, be filed using the Uniform Consent to Service of Process (Form U-2) and if applicable, the Uniform Form of Corporate

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Resolution (Form U-2A). ~~The Both Form U-2 and Form U-2A shall be properly signed and acknowledged before a notary and the Form U-2A shall be properly executed. For purposes of filing a consent to service of process for dealers and salesmen, the consent to service of process contained within the Form BD and the Form U-4, respectively, will satisfy the requirement of filing an irrevocable consent to service of process with the administrator under G.S. 78A-63(f), if properly executed.~~

Authority G.S. 78A-49(a); 78A-63(f).

SECTION .1800 – MISCELLANEOUS PROVISIONS – INVESTMENT ADVISORS

18 NCAC 06 .1810 FORM OF CONSENT TO SERVICE OF PROCESS

If the filing of a consent to service of process is required by ~~G.S. Chapter 78C statute and the or rule rules promulgated thereunder,~~ the consent shall name the Secretary of State as service agent and shall be filed using the Uniform Application for Investment Adviser Registration (Form ADV). ~~Consent to Service of Process (Form U2). And if applicable, the Uniform Form of Corporate resolution (Form U-2A). Both Form U-2 and Form U-2A shall be properly signed and acknowledged before a notary.~~

Authority G.S. 78C-30(a); 78C-30(b); 78C-46(b).

TITLE 20 – DEPARTMENT OF STATE TREASURER

Notice is hereby given in accordance with G.S. 150B-21.2 that the Department of State Treasurer intends to adopt the rules cited as 20 NCAC 8 .0110-.0112, .0503 and, amend the rules cited as 20 NCAC 8 .0101-.0105, .0108-.0109, .0203-.0206, .0301-.0302, .0401-.0403, .0501-.0502. Notice of Rule-making Proceedings was published in the Register on February 15, 2000.

Proposed Effective Date: February 1, 2001

Public Hearing:

Date: November 2, 2000

Time: 10:00 a.m.

Location: Conference Room, Room 100, Albemarle Building, 325 N. Salisbury St., Raleigh, NC 27603

Reason for Proposed Action: *The passage of SL 1999-460 required the adoption of temporary rules which were effective February 22, 2000. Certain other rules are to be amended to conform to the current law and the nation-wide practices of the National Association of Unclaimed Property Administrators in order that the State may take advantage of the national databases to increase the number of true owners found to whom we can refund their property.*

Comment Procedures: *Written comments should be submitted to Stephen F. Albright, Rule-making Coordinator, 325 N.*

Salisbury St., Raleigh, NC 27603. Written comments will be accepted through November 15, 2000.

Fiscal Impact

- State
- Local
- Substantive (≥\$5,000,000)
- None

CHAPTER 8 – ESCHEATS AND ABANDONED PROPERTY

SECTION .0100 – GENERAL AND ADMINISTRATION

20 NCAC 08 .0101 ORGANIZATION AND FUNCTIONS

(a) The Escheat Fund is operated by the Escheat and Unclaimed Property Section of the Department of State Treasurer. This section is charged with the collection of escheats and abandoned property from all holders, the administration of the fund and the processing of claims for escheated property.

(b) The following is general information about the Escheat Fund:

- (1) The chief officer is the Escheat ~~Officer.~~ Administrator.
- (2) The mailing address is Department of State Treasurer, 325 North Salisbury Street, Raleigh, North Carolina ~~27614~~ 27603.
- (3) The office is located in the Albemarle Building, 325 North Salisbury Street, Raleigh, North Carolina.

(c) Examination of records may be made from 9:00 a.m. to 11:30 a.m. and ~~2:00~~ 1:00 p.m. to 4:00 p.m., ~~Tuesday~~ Monday through ~~Thursday~~ Friday.

Authority G.S. 116B-80.

20 NCAC 08 .0102 DEFINITIONS

(a) The words defined in G.S. ~~116B-10~~ 116B-52 shall have the same meaning when used in this Chapter.

(b) The following words and phrases defined in this Rule will have the meanings indicated when used in this Chapter, unless the context clearly requires another meaning:

- (1) "Escheats" includes all property, real and personal, tangible and intangible which is subject to Chapter 116B of the General Statutes.
- (2) "Interest-bearing property" means property that accrues interest to the owner at a predetermined rate from the onset of the contract as explicitly provided in the contract.
- (3) "Dividend-paying property" means shares of ownership issued by a corporation or an investment company registered under the Investment Company Act of 1941 or a master limited partnership which is treated as stock by a major security market in which it is bought and sold.
- (4) "Checking account" means a non-interest-bearing account with a financial institution.
- (5) "Savings account" means an interest-bearing account with a financial institution.
- (6) "Date of claim" means the date on which a completed, signed, and notarized claim with all required

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documentation attached is received by the Department from the party claiming ownership.

Authority G.S. 116B-80.

20 NCAC 08 .0103 RULE-MAKING PROCEDURES

- (a) 20 NCAC 1F .0100 shall govern the issuance of rules by the State Treasurer.
- (b) All correspondence shall be addressed to the Escheat Officer Administrator at the mailing address of the fund.

Authority G.S. 116B-80.

20 NCAC 08 .0104 DECLARATORY RULES

- (a) 20 NCAC 1F .0200 shall govern the issuance of declaratory rules by the State Treasurer.
- (b) All correspondence shall be addressed to the Escheat Officer Administrator at the mailing address of the fund.

Authority G.S. 116B-80.

20 NCAC 08 .0105 CONTESTED CASE PROCEDURES

- (a) 20 NCAC 1F .0300 shall govern the hearings and decisions in contested cases.
- (b) All correspondence shall be directed to the Escheat Officer Administrator at the mailing address of the fund.

Authority G.S. 116B-80.

20 NCAC 08 .0108 FEES TO BE COLLECTED

The following fees for reproduction of records shall be collected prior to the delivery of copies:

- (1) ~~Dry copy reproduction~~ Reproduction in office by dry copying or computer printing per request: one dollar (\$1.00) for the first page up to three pages and twenty cents (\$0.20) for each additional page for each request;
- (2) ~~Reproduction from microform: requests will be processed by the State Archives as provided in their rules; and~~
- (2) Copies prepared by the Departmental Computer Center: Twenty dollar \$20.00 flat fee, plus Twenty-one dollars and twenty-five cents (\$21.25) per quarter hour or part thereof for application programming required to create the programs needed to produce the copies; and
- (3) ~~Computer provided output: Costs will be computed by job as follows: Actual computer time used X average rate for computer time for prior three month period plus cost of any supplies furnished. Each request must be accompanied by a deposit of two hundred (\$200.00) dollars per file requested.~~
- (3) Special reproduction by other entities: Five dollar (\$5.00) flat fee, plus the cost billed to the Department for the work.
- (4) ~~Requests for copies to be mailed must be accompanied by the total required fee and a self-addressed stamped envelope.~~

Authority G.S. 12-3.1; 116B-80.

20 NCAC 08 .0109 ANNUAL FILING WITH CLERKS OF SUPERIOR COURT

On or before ~~November 4~~ June 30 of each year, the State Treasurer shall deliver to each clerk a listing of the property escheated for each owner whose address of record is within the county for which the clerk serves; and which were reported during the calendar year 12-month period ending on June 30 next preceding ~~preceding~~ the filing of the list.

Authority G.S. 116B-62; 116B-80.

20 NCAC 08 .0110 EARLY ESCHEATMENT

(a) If remitted to the State Treasurer, property subject to the provisions of G.S. Chapter 116B but which has not been presumed abandoned under said statute will be returned to the holder unless the holder the holder has received in writing permission from the State Treasurer to remit the property prior to the date of presumed abandonment.

(b) To request permission to remit property to the State Treasurer before its presumed abandonment date, the holder must send a letter to the Escheat Officer requesting permission to remit the property prior to the date of presumed abandonment. The letter must clearly identify the nature and extent of the property to be remitted and the reasons for requesting permission to remit the property before its required payment date.

(c) The State Treasurer does not expect to grant permission unless its is clearly demonstrated that the early transfer of the property is for the benefit of the owner or of the State.

Authority G.S. 116B-80; 116B-69(b).

20 NCAC 08 .0111 REGISTRATION UNDER G.S. 116B-78(f)

(a) Registration under G.S. 116B-78(f) shall be for a period of a calendar year. Unless the request states that the request is for a specified calendar year, the registration will be presumed to be for the current calendar year.

(b) All requests to register must be submitted on the form supplied by the Department for that purpose.

(c) Forms not accompanied by the required one hundred dollar (\$100) fee will not be processed.

Authority G.S. 116B-80; 116B-78(f).

20 NCAC 08 .0112 INTEREST RATE DETERMINATION

The interest rate charged under G.S.-116B-77(a) shall be at the rate established by the Secretary of Revenue pursuant to G.S. 105-241.1(i).

Authority G.S.116B-80; 116B-77(a).

SECTION .0200 - INTANGIBLE PERSONAL PROPERTY

20 NCAC 08 .0203 ESCHEAT REPORT

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Each holder shall report intangible personal property to the Escheat Fund on Form ASD-21 together with Form ASD-159 which together shall include as a minimum:

- (1) Holder's legal name and address;
- (2) Holder's federal tax identification number;
- (3) A contact person and his or her telephone number;
- (4) The date on which the property became payable, demandable or returnable;
- (4)(5) Separately for each person with property in each property class in excess of the amount specified in G.S. 116B-29(b)(1) 116B-60(b)(3):
 - (a) The name(s) of the owner(s);
 - (b) The last known address(es) of the owner(s);
 - (c) The social security or tax identification number(s) of the owner(s), if known;
 - (d) A description of the property, including the property classification code set out in 20 NCAC 8 .0204;
 - (e) Serial number(s) or other identification number(s) of the property, if any; and
 - (f) The amount money amount, if any, being transferred;
- (5)(6) Aggregate by property classification code pursuant to G.S. 116B-29(b)(1) 20 NCAC 8 .0204; and
- (6)(7) Verification pursuant to G.S. 116B-29(e). 116B-60(f); and
- (8) Verification that the Holder has complied with the requirements of G.S. 116B-69(b).

This Rule does not apply to property claimed by the Escheat Fund pursuant to an audit which shall be reported as provided in 20 NCAC 4. 0206.

Authority G.S. 116B-60; 116B-80.

20 NCAC 08 .0204 PROPERTY CLASSIFICATION CODE

The following property classification codes shall be used:

Code	Description
(1) 1001	Checking accounts;
(2) 1002	Savings or shares greater than one thousand dollars (\$1,000);
(3) 1003	Savings or shares less than one thousand dollars (\$1,000);
(4) 1004	Certificates of deposits greater than one thousand dollars (\$1,000);
(5) 1005	Certificates of deposits less than one thousand dollars (\$1,000);
(6) 1006	IRA's greater than one thousand dollars (\$1,000);
(7) 1007	IRA's less than one thousand dollars (\$1,000);
(8) 1008	Christmas club accounts;
(9) 1009	Money on deposit to secure funds;
(10) 1010	Security deposits;
(11) 1011	Unidentified deposits;
(12) 1012	Suspense accounts;
(13) 2001	Paying agent accounts;
(14) 2002	Undelivered dividends or uncashed dividends;

(15) 2003	Funds held in a fiduciary capacity;
(16) 2004	Suspense liabilities;
(17) 2005	Escrow accounts;
(18) 2006	Trust vouchers;
(19) 3001	Cashier's checks;
(20) 3002	Certified checks;
(21) 3003	Registered checks;
(22) 3004	CD interest checks;
(23) 3005	Drafts;
(24) 3006	Warrants;
(25) 3007	Money orders;
(26) 3008	Traveler's checks;
(27) 3009	Foreign exchange checks;
(28) 3010	Expense checks;
(29) 3011	Pension checks;
(30) 3012	Credit checks or memos;
(31) 3013	Vendor checks;
(32) 3014	Any checks that have been written off to income or surplus;
(33) 3015	Any other outstanding checks;
(34) 4001	Utility deposits;
(35) 4002	Membership fees;
(36) 4003	Refunds or rebates;
(37) 4004	Capital credit distributions;
(38) 5001	Amounts due and payable under terms of life insurance policies;
(39) 5002	Amount due and payable under terms of other insurance policies;
(40) 5003	Claim payments;
(41) 5004	Drafts not presented for payment;
(42) 5005	Matured whole life, term or endowment insurance policies, annuity or supplementary contracts;
(43) 5006	Premium refunds;
(44) 5007	Agent credit balances;
(45) 5008	Unidentified remittances;
(46) 5009	Other amounts due under policy terms;
(47) 6001	Trust funds;
(48) 6002	Cash bonds;
(49) 6003	Partial payments;
(50) 6004	Judgments;
(51) 6005	Any other funds held by governmental agency;
(52) 7001	Dividends;
(53) 7002	Interest;
(54) 7003	Principal payments;
(55) 7004	Equity payments;
(56) 7005	Profits;
(57) 7006	Funds paid toward the purchase of shares, or interest in a financial or business organization;
(58) 7007	Funds received for the redemption of stocks and bonds;
(59) 7008	Bonds;
(60) 7009	Shares of stock including underlying shares;
(61) 7010	Cash for fractional shares;
(62) 7011	Unexchanged stock of successor corporation;
(63) 7012	Mutual funds;
(64) 7013	Dividend reinvestment plans;
(65) 7014	Any other sum owing to a shareholder, certificate holder, member, bond holder or

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	other security holder, or participating member of a cooperative;		<u>dollars (\$50.00)</u>
(66) 7015	Any other certificates of ownership;	(28) MI01	<u>Net Revenue Interest;</u>
(67) 8001	Wages, payroll or salary;	(29) MI02	<u>Royalties;</u>
(68) 8002	Commissions;	(30) MI03	<u>Overriding Royalties;</u>
(69) 8003	Workers' compensation benefits;	(31) MI04	<u>Production Payments;</u>
(70) 8004	Payments for goods and services;	(32) MI05	<u>Working Interest;</u>
(71) 8005	Customer overpayments;	(33) MI06	<u>Bonuses;</u>
(72) 8006	Unidentified remittances;	(34) MI07	<u>Delay Rentals;</u>
(73) 8007	Unrefunded overcharges;	(35) MI08	<u>Shut-In Royalties;</u>
(74) 8008	Accounts payable;	(36) MI09	<u>Minimum Royalties;</u>
(75) 8009	Credit balances in accounts receivable;	(37) MI99	<u>Aggregate Mineral Interests Under fifty dollars (\$50.00)</u>
(76) 8010	Discounts due;	(38) MS01	<u>Wages, Payroll, Salary</u>
(77) 8011	Refunds due;	(39) MS02	<u>Commissions;</u>
(78) 8012	Unredeemed gift certificates;	(40) MS03	<u>Workers' Compensation Benefits;</u>
(79) 8013	Unclaimed loan collateral;	(41) MS04	<u>Payment for Goods & Services;</u>
(80) 8014	Sums payable under pension and profit sharing plans (IRA, Keogh, etc.);	(42) MS05	<u>Customer Overpayments;</u>
(81) 8015	Mineral proceeds;	(43) MS06	<u>Unidentified Remittances;</u>
(82) 8016	Royalties;	(44) MS07	<u>Unrefunded Overcharges;</u>
(83) 8017	Rents;	(45) MS08	<u>Accounts Payable;</u>
(84) 8018	Any other miscellaneous intangible personal property;	(46) MS09	<u>Credit Balances - Individuals</u>
(85) 8019	Any property distributable in the course of voluntary or involuntary dissolution;	(47) MS10	<u>Discounts Due;</u>
(86) 8020	Undelivered shares of stock following a merger;	(48) MS11	<u>Refunds Due;</u>
(87) 9001	Real property which succeeds to the state through Escheat;	(49) MS12	<u>Unredeemed Gift Certificates;</u>
(88) 9002	Personal property which succeeds to the state;	(50) MS13	<u>Unclaimed Loan Collateral;</u>
(89) 9003	Safe deposit box contents.	(51) MS14	<u>Pension & Profit Sharing Plans (IRA, KEOGH);</u>
(1) AC01	<u>Checking Accounts;</u>	(52) MS15	<u>Dissolution or Liquidation;</u>
(2) AC02	<u>Savings Accounts;</u>	(53) MS16	<u>Misc Outstanding Checks;</u>
(3) AC03	<u>Matured CD or Sav Cert;</u>	(54) MS17	<u>Misc Intangible Prop;</u>
(4) AC04	<u>Christmas Club Fund;</u>	(55) MS18	<u>Suspense Liabilities;</u>
(5) AC05	<u>Money on Dep to Secure Fund;</u>	(56) MS19	<u>Layaway Deposits & Payments;</u>
(6) AC06	<u>Security Deposits;</u>	(57) MS20	<u>Rents;</u>
(7) AC07	<u>Unidentified Deposits;</u>	(58) MS99	<u>Aggregate Misc Checks & Intangible Personal Property Under fifty dollars (\$50.00);</u>
(8) AC08	<u>Suspense Accounts;</u>	(59) SD01	<u>Safe Deposit Box Contents;</u>
(9) AC09	<u>Individual Retirement Accounts;</u>	(60) SD02	<u>Other Safekeeping;</u>
(10) AC99	<u>Aggregate Account Balances Under fifty dollars (\$50.00);</u>	(61) SD03	<u>Other Tangible Property;</u>
(11) CK01	<u>Cashier's Checks;</u>	(62) CT01	<u>Escrow Funds;</u>
(12) CK02	<u>Certified Checks;</u>	(63) CT02	<u>Condemnation Awards;</u>
(13) CK03	<u>Registered Checks;</u>	(64) CT03	<u>Missing Heirs' Fund;</u>
(14) CK04	<u>Treasurer's Checks;</u>	(65) CT04	<u>Suspense Accounts;</u>
(15) CK05	<u>Drafts;</u>	(66) CT05	<u>Other Court Deposits;</u>
(16) CK06	<u>Warrants;</u>	(67) CT06	<u>Real Property Proceeds;</u>
(17) CK07	<u>Money Orders;</u>	(68) CT07	<u>Cash Bonds;</u>
(18) CK08	<u>Traveler's Checks;</u>	(69) CT08	<u>Partial Payments;</u>
(19) CK09	<u>Foreign Exchange Checks;</u>	(70) CT09	<u>Judgments;</u>
(20) CK10	<u>Expense Checks;</u>	(71) CT10	<u>Trust Funds;</u>
(21) CK11	<u>Pension Checks;</u>	(72) CT99	<u>Aggregate Court Deposits Under fifty dollars (\$50.00);</u>
(22) CK12	<u>Credit Checks or Memos;</u>	(73) IN01	<u>Individual Policy Benefits or Claim Payments;</u>
(23) CK13	<u>Vendor Checks;</u>	(74) IN02	<u>Group Policy Benefits or Claim Payments;</u>
(24) CK14	<u>Checks Written Off to Income;</u>	(75) IN03	<u>Proceeds Due Beneficiaries;</u>
(25) CK15	<u>Other Outstanding Official Checks;</u>	(76) IN04	<u>Proceeds From Matured Policies, Endowments or Annuities;</u>
(26) CK16	<u>CD Interest Checks;</u>	(77) IN05	<u>Premium Refunds;</u>
(27) CK99	<u>Aggregate Uncashed Checks Under fifty</u>	(78) IN06	<u>Unidentified Remittances;</u>
		(79) IN07	<u>Other Amounts Due Under Policy Terms;</u>
		(80) IN08	<u>Agent Credit Balances;</u>

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- (81) IN99 Aggregate Insurance Policy Under fifty dollars (\$50.00)
- (82) SC01 Dividends;
- (83) SC02 Interest (Bond Coupons);
- (84) SC03 Principal Payments;
- (85) SC04 Equity Payments;
- (86) SC05 Profits;
- (87) SC06 Funds Paid to Purchase Shares;
- (88) SC07 Funds for Stocks and Bonds;
- (89) SC08 Shares of Stock (Returned by Post Office);
- (90) SC09 Cash for Fractional Shares;
- (91) SC10 Unexchanged Stock & Fractional Shares of Successor Corp;

- (92) SC11 Other Cert of Ownership;
- (93) SC12 Underlying Shares or Other Outstanding Certificates;

- (94) SC13 Funds for Liquidation Redemption;
- (95) SC14 Debentures;
- (96) SC15 US Gov't Securities;
- (97) SC16 Mutual Fund Shares;
- (98) SC17 Warrants (Rights);
- (99) SC18 Matured Bond Principal;
- (100) SC19 Dividend Reinvestment Plans;
- (101) SC20 Credit Balances;
- (102) SC99 Aggregate Security Related Cash Under fifty dollars (\$50.00);

- (103) TR01 Paying Agent Accounts;
- (104) TR02 Undelivered or Uncashed Dividends;
- (105) TR03 Funds Held In Fiduciary Capacity;
- (106) TR04 Escrow Accounts;
- (107) TR05 Trust Vouchers;
- (108) TR99 Aggregate Trust Property Under fifty dollars (\$50.00);

- (109) UT01 Utility Deposits;
- (110) UT02 Membership Fees;
- (111) UT03 Refunds or Rebates;
- (114) UT04 Capital Credit Distributions;
- (115) UT99 Aggregate Utility Property Under fifty dollars (\$50.00);

- (116) ZZZZ Properties Not Identified Above

Authority G.S. 116B-60; 116B-80.

20 NCAC 08 .0205 LATE FILING OF REPORT

- (a) Payments on account of property reported to the Escheat Fund as abandoned property after the date which the law requires that the sums of money be paid to the State Treasurer shall be assessed interest ~~penalties~~ as provided in G.S. ~~116B-41(e)~~ 116B-77(a). Interest ~~penalties~~ shall be assessed for each day after the due date until the monies are received by the Escheat Fund. Billings for interest penalties totaling ten dollars (\$10.00) or less will not be made because it is uneconomical to do so.
- (b) If a holder wishes to avoid the penalties of G.S. ~~116B-41(a)~~ 116B-77(a), he may file a request for an extension pursuant to G.S. 116B-60(e) in writing prior to the time the report is due. The request must include the holder's name and address, the holder's principal business, ~~and~~ a valid reason for the ~~delay~~ delay, and the statutory fee. Reasons for delay will only be

considered valid if the reasons stem from circumstances which are unforeseen and unforeseeable. Each extension will not exceed three months, but may be renewed upon reapplication for up to six months. If an extension is granted, the holder will not be subject to the penalties in G.S. ~~116B-41(a)~~ 116B-77(b) during the extension period.

Authority G.S. 116B-77; 116B-80.

20 NCAC 08 .0206 REPORTING PROPERTY FOUND ON AUDIT

- (a) Claims for abandoned property resulting from an audit shall be made on Form ASD-160.
- (b) The holder shall send the notice required by G.S. ~~116B-28~~ 116B-59 unless the Form ASD-160 shows that notice is not required.
- (c) The holder shall transfer any property to lawful owners ~~which that~~ are identified.
- (d) The holder shall complete the form showing property no longer escheatable because of transfer to the lawful owner and property still subject to transfer to the custody of the State Treasurer for the Escheat fund.
- (e) Transfer by payment or delivery of non-cash property shall be made with the return of Form ASD-160. Penalties shall be calculated and re-mitted at the same time.
- (f) Copies of payment vouchers or other proof that the items are no longer escheatable shall be sent with the return of Form ASD-160.

Authority G.S. 116B-72; 116B-80-42.

SECTION .0300 - TANGIBLE PERSONAL PROPERTY

20 NCAC 08 .0301 NOTIFICATION BY HOLDER TO ESCHAT FUND

- (a) Each holder shall notify the Escheat Fund of the existence of tangible property when it becomes subject to the custody of the State Treasurer and shall maintain the property in a manner which will prevent undue loss of value until directions for either disposition or transfer to the State Treasurer are received. The Escheat Fund will hold the holder liable for any loss resulting from the breach of a fiduciary duty by the holder.
- (b) The notification shall be made on Form ASD-127 or its equivalent and shall show as a minimum:
 - (1) Holder's legal name and address;
 - (2) A contact person and his or her telephone number;
 - (3) The date of presumed abandonment;
 - (~~3~~)4) Separately for each item of tangible property:
 - (A) A sequence number;
 - (B) The name of the owner(s);
 - (C) The last known address(es) of the owner(s);
 - (D) The social security or tax identification number(s) of the owner(s), if known;
 - (E) A description of the property, including the property classification code set out in 20 NCAC 8 .0204;
 - (F) Serial number(s) or other identification number(s), if any, and
 - (G) The approximate value of the property; ~~and~~

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- ~~(4)~~(5) Verification pursuant to G.S. ~~116B-29(e)~~, 116B-60(f); and
- (6) Verification that the holder has complied with the requirements of G.S. 116B-69(b).

Authority G.S. 116B-69; 116B-80.

20 NCAC 08 .0302 NOTIFICATION BY ESCHEAT FUND TO HOLDER

(a) The Escheat Fund will provide to the holder a letter which will identify the property to be transferred to the custody of the State Treasurer. The holder may dispose of any property ~~which that~~ that is not required to be transferred to the custody of the State Treasurer. ~~Treasurer at his sole discretion.~~

Authority G.S. 116B-69; 116B-80.

SECTION .0400 - REFUNDS

20 NCAC 08 .0401 APPLICATION FOR REFUNDS

(a) The following persons may apply for refunds on behalf of an owner of property transferred to the Escheat Fund:

- (1) the owner or a personal representative of an owner,
- (2) the holder or a successor to the holder, and
- (3) an attorney in fact under a written power of attorney from the owner.

(b) Claims will be approved only for specified property delivered to the Escheat Fund by named holders and only for in named years.

(c) Every claimant shall agree to the indemnification provisions of G.S. ~~116B-38(e)~~ 116B-67(e) before a claim will be approved.

(d) Whenever the holder of property rejects, or otherwise refuses to process in a timely manner, a claim made by a person claiming ownership, the claimant may appeal, in writing, to the Escheat ~~Officer~~ Administrator.

(e) Whenever the Escheat ~~Officer~~ Administrator rejects, or otherwise refuses to process a claim in a timely manner, a claim by a person claiming ownership, the claimant may appeal, in writing, to the State Treasurer.

Authority G.S. 116B-67; 116B-80.

20 NCAC 08 .0402 REQUIRED DOCUMENTATION OF APPLICATION FOR REFUND

(a) All applications shall be made on Form ASD-111, and shall identify:

- (1) the property claimed;
- (2) the owner as shown on the Escheat records;
- (3) the holder when transferred to the Escheat Fund; and
- (4) the current owner, which may be either (2) or (3).

(b) Personal representatives, and other fiduciaries, custodians, and attorneys in fact shall submit a certified true copy of their appointment and authority.

(c) Claims must include adequate evidence that the person ~~in~~ on behalf of whom the claim is made is the true and actual owner of the property claimed. There is a rebuttable presumption that property of a business association is not lost in the ordinary course of business.

(d) Any person who received or will receive a fee for the identification of the owner, the location of the missing property or the preparation of a claim form shall sign the form as indicated therein, and shall insert his or her license number, if licensed by the Private Protective Services Board.

Authority G.S. 116B-67; 116B-78; 116B-80.

20 NCAC 08 .0403 PAYMENT OF REFUNDS

(a) When the holder has certified in Form ASD-111, that he has already made payment to the owner, the refund will be made by warrant on the State Treasurer ~~in the name to the order~~ of the holder.

(b) All other refunds will be made by warrant on the State Treasurer ~~in the name to the order~~ of the owner.

Authority G.S. 116B-67; 116B-80.

SECTION .0500 - RECORDS

20 NCAC 08 .0501 PUBLIC ACCESS TO RECORDS

(a) ~~Any person desiring to search the records shall register with the Escheat Office. Owner records that are capable of clear identification are listed at the following websites:~~

- (1) <http://www.treasurer.state.nc.us>; and
- (2) <http://www.missingmoney.com>

(b) ~~Prior to being given access to the public records the registrant must: Because the statute excludes access to certain records at certain periods of time, any person desiring to be given access to the records must register and:~~

- (1) Provide his or her name and address;
- (2) Provide ~~his or her reason for desiring access to the records, the names and address of all persons for whom a search is being requested;~~
- (3) Agree not to remove, deface or destroy any records;
- (4) Observe hours outlined by the State Treasurer, and act without disturbing the statutory duty of the State Treasurer to administer and protect the Escheat Fund and its ~~records; records; and~~
- (5) State whether he or she is in a business for which the file search is being requested; and
- ~~(5)(6) Produce proof~~ Proof of his identity may be requested.

(c) ~~Any If the registrant is requesting access to the records for the benefit of a business, other than the owner, in addition to the requirements in this Rule, must sign a statement that the registrant must agree to the following in writing that:~~

- (1) He or she has read G.S. ~~116B-43~~ 116B-78 and is fully aware of its meaning;
- (2) He or she is aware that the Private Protective Services Board has ruled that G.S. 74C-3(a)(8)b. is applicable to persons searching for owners of escheated property and a license is required by said board; and
- (3) He or she is or, is not, licensed by said ~~board~~ board; and if ~~licensed~~ licensed, he or she must furnish his or her license number.

(d) All searches will be conducted by a member of the staff of the section. Registrants will be permitted to access all records permitted by the statutes at the time requested.

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~~(d)~~(e) No person other than the staff of the Escheat Office shall enter the records area. The registrant may be required to request records by name and he or she will be allowed to view them only in a place designated by personnel of the Escheat Office.

~~(e)~~(f) The person in charge of the records may at any time in his sole discretion restrict the use of brief cases, files, etc., in the area in which the registrants view the escheat records.

Authority G.S. 116B-62(f); 116B-80.

20 NCAC 08 .0502 REQUESTS FOR INFORMATION FROM RECORDS

~~Searches may be made when the following facts are received from the owner:~~ Searches of the database of owner property will be made for potential owners to the extent that information is provided. Successful searches normally require that the following information, in order of importance, is available:

- (1) Name and address of the owner;
- (2) Name and address of the holder;
- (3) Date property became escheatable; and escheatable, if known;
- (4) Description of escheated property, including value or amount, amount, if known.

Authority G.S. 116B-62(f); 116B-80.

20 NCAC 08 .0503 REQUESTS FOR LISTINGS OF OWNERS AND/OR PROPERTY

(a) Listings of clearly identifiable owners within the media's coverage area will be provided to news media in North Carolina on request at no cost to the news media.

(b) Listings of clearly identifiable owners will be provided to others after payment of the fees required by 20 NCAC 8 .0108.

(c) Listings will include only records not considered confidential under the statute at the time of preparation.

Authority G.S. 116B-62(f); 116B-80.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS

CHAPTER 33 – MIDWIFERY JOINT COMMITTEE

Notice is hereby given in accordance with G.S. 150B-21.2 that the Midwifery Joint Committee intends to amend the rule cited as 21 NCAC 33 .0106. Notice of Rule-making Proceedings was published in the Register on August 15, 2000.

Proposed Effective Date: April 1, 2001

Public Hearing:

Date: November 15, 2000

Time: 12:00 noon

Location: NC Medical Board Office, 1201 Front Street, Raleigh, NC

Reason for Proposed Action: An amendment to the General Statutes by the 2000 Legislature Session.

Comment Procedures: *Comments regarding this action should be directed to Jean H. Stanley, CPS, APA Coordinator/Administrative Assistant, Midwifery Joint Committee, P.O. Box 2129, Raleigh, NC 27609-2129 by November 15, 2000.*

Fiscal Impact

- State
- Local
- Substantive (≥\$5,000,000)
- None

SECTION .0100 – MIDWIFERY JOINT COMMITTEE

21 NCAC 33 .0106 NURSE MIDWIFE APPLICANT STATUS

(a) Graduate Nurse Midwife Applicant status may be granted by the Midwifery Joint Committee under the following circumstances:

- (1) a nurse licensed to practice as a registered nurse in North Carolina who meets all of the following criteria:
 - ~~(A)~~(a) has graduated from a nurse midwifery education program which meets the criteria of the American College of Nurse Midwives for graduates to seek certification;
 - ~~(B)~~(b) has applied to take or is waiting for results of the certification exam; and
 - ~~(C)~~(c) whose application for approval as a certified nurse midwife has been received by the Midwifery Joint Committee.
- (2) nurse midwife applicant status may not exceed a period of six months beyond date of completion of nurse midwifery education program or until notice of certification is received, whichever occurs first.
- (3) a nurse midwife applicant, described in Item (1) and (2) ~~Paragraph (a)~~ of this Rule, may function in accordance with 21 NCAC 33.0004 .0104 and 21 NCAC 33.0005 .0105 with the following limitations:
 - ~~(A)~~(a) wear identification as a “Graduate Nurse Midwife”;
 - ~~(B)~~(b) have no prescribing privileges;
 - ~~(C)~~(c) practice only in situations where the supervising physician or a Certified Nurse Midwife approved to practice in the state of North Carolina is physically present in the practice site in which the applicant is working; and
 - ~~(D)~~(d) have supervising physician or a Certified Nurse Midwife approved to practice in the state of North Carolina countersign all medical notations in patient records on a daily basis.
- (4) In the event the individual leaves the job in which he/she has worked as a nurse midwife applicant before approval as a certified nurse midwife is granted, the individual must submit a written explanation to the Midwifery Joint Committee before he/she may apply to work in the nurse midwife applicant status in another job.

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(b) ~~Certified Nurse Midwife Applicant status may be granted by the Midwifery Joint Committee under the following circumstances:~~

- (1) ~~a registered nurse previously approved as a Certified Nurse Midwife by the Midwifery Joint Committee and whose application for approval in a new job has been received by the Midwifery Joint Committee. Prior to approval, the Certified Nurse Midwife applicant may function in accordance with Rules .0004 and .0005 of this Chapter with the following limitations:
(A) wear identification as a "Certified Nurse Midwife";
(B) have no prescribing privileges; and
(C) have supervising physician or Certified Nurse Midwife approved to practice in the state of North Carolina countersign all medical notations in patient records on a daily basis.~~

Authority G.S. 90-178.2; 90-178.3; 90-178.5; 90-171.83.

CHAPTER 58 – REAL ESTATE COMMISSION

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Real Estate Commission intends to amend the rules cited as 21 NCAC 58A .0104, .0106, .0110, .1706, .1708; 58C .0207; 58E .0505. Notice of Rule-making Proceedings was published in the Register on August 15, 2000.

Proposed Effective Date: May 1, 2001

Public Hearing:

Date: November 15, 2000

Time: 3:00 p.m.

Location: 1313 Navaho Dr., Raleigh, NC 27609

Reason for Proposed Action: The Commission is considering relaxing the rule requiring written agency in certain situations involving real estate sales transactions. It would also like to clarify some existing continuing education issues.

Comment Procedures: Comments regarding the rules may be made orally or in writing at the public hearing. Comments may also be submitted at the email address below. Any comments submitted after the public hearing may be done so through any of the above methods, but must be received by November 19, 2000. Address comments to: Pamela Millward, c/o NCREC, PO Box 17100, Raleigh, NC 27619-7100.

Fiscal Impact

- State
Local
Substantive (>=\$5,000,000)
None

SUBCHAPTER 58A – REAL ESTATE BROKERS AND SALESMEN

SECTION .0100 – GENERAL BROKERAGE

21 NCAC 58A .0104 AGENCY AGREEMENTS AND DISCLOSURE

(a) Every listing agreement, buyer agency agreement or other agreement for brokerage services in a real estate sales transaction other than a buyer agency agreement shall be in writing, writing from the time of its inception. Every buyer agency agreement which seeks to bind the buyer for a period of time or to restrict the buyer's right to work with other agents or without an agent shall be in writing from its inception. A broker or salesperson who undertakes to represent a buyer in a real estate sales transaction without a written buyer agreement shall clearly disclose his or her agency relationship to the buyer. In any event, a buyer agency agreement must be in writing not later than the time an offer to purchase is presented to a seller or the seller's agent. A broker or salesperson shall not continue to represent a buyer without a written agreement when such agreement is required by this rule. Every written agreement for brokerage services of any kind in a real estate sales transaction shall provide for its existence for a definite period of time and shall provide for its termination without prior notice at the expiration of that period.

(b) Every listing agreement, written buyer agency agreement or other written agreement for brokerage services in a real estate sales transaction shall contain the following provision: The broker shall conduct all his brokerage activities in regard to this agreement without respect to the race, color, religion, sex, national origin, handicap or familial status of any buyer, prospective buyer, seller or prospective seller. The provision shall be set forth in a clear and conspicuous manner which shall distinguish it from other provisions of the agreement. For the purposes of this Rule, the term, familial status, shall be defined as it is in G.S. 41A-3(1b).

(c) Every listing agreement, buyer agency agreement or other agreement for brokerage services in a real estate sales transaction shall incorporate the "Description of Agent Duties and Relationships" prescribed by the Commission which shall be set forth in a clear and conspicuous manner and shall not include or be accompanied by any additional text which contradicts its meaning and substance. The "Description of Agent Duties and Relationships" shall read as follows:

DESCRIPTION OF AGENT DUTIES AND RELATIONSHIPS

Before you begin working with any real estate agent, you should know who the agent represents in the transaction. Every listing agreement, buyer agency agreement or other agreement for brokerage services in a real estate sales transaction in North Carolina must contain this "Description of Agent Duties and Relationships" [N.C. Real Estate Commission Rule 21 NCAC 58A .0104(c), eff. 7/1/95]. Real estate agents should carefully review this information with you prior to entering into any agency agreement.

AGENTS' DUTIES

When you contract with a real estate firm to act as your agent in a real estate transaction, the agent must help you obtain the best

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~~price and terms possible, whether you are the buyer or seller. The agent also owes you the duty to: Safeguard and account for any money handled for you. Be loyal and follow reasonable and lawful instructions. Act with reasonable skill, care and diligence. Disclose to you any information which might influence your decision to buy or sell. Even if the agent does not represent you, the agent must still be fair and honest and disclose to you all "material facts" which the agent knows or reasonably should know. A fact is "material" if it relates to defects or other conditions affecting the property, or if it may influence your decision to buy or sell. *This does not require a seller's agent to disclose to the buyer the minimum amount the seller will accept, nor does it require a buyer's agent to disclose to the seller the maximum price the buyer will pay.*~~

AGENTS WORKING WITH SELLERS

~~A seller can enter into a "listing agreement" with a real estate firm authorizing the firm and its agent(s) to represent the seller in finding a buyer for his or her property. The listing agreement should state what the seller will pay the listing firm for its services, and it may require the seller to pay the firm no matter who finds the buyer.~~

~~The listing firm may belong to a listing service to expose the seller's property to other agents who are members of the service. Some of those agents may be working with buyers as buyers' agents; others will be working with buyers but still representing the seller's interests as an agent or "subagent." When the buyer's agents and seller's subagents desire to share in the commission the seller pays to the listing firm, the listing agent may share the commission with the seller's permission.~~

AGENTS WORKING WITH BUYERS

~~A buyer may contract with an agent or firm to represent him or her (as a **buyer's agent**), or may work with an agent or firm that represents the seller (as a **seller's agent or subagent**). All parties in the transaction should find out at the beginning who the agent working with the buyer represents.~~

~~If a buyer wants a buyer's agent to represent him or her in purchasing a property, the buyer should enter into a "buyer agency agreement" with the agent. The buyer agency agreement should state how the buyer's agent will be paid. **Unless some other arrangement is made which is satisfactory to the parties, the buyer's agent will be paid by the buyer.** Many buyer agency agreements will also obligate the buyer to pay the buyer's agent no matter who finds the property that the buyer purchases.~~

~~A buyer may decide to work with a firm that is acting as agent for the seller (a **seller's agent or subagent**). If a buyer does not enter into a buyer agency agreement with the firm that shows him or her properties, that firm and its agents will show the buyer properties as an agent or subagent working on the seller's behalf. Such a firm represents the seller (**not** the buyer) and must disclose that fact to the buyer.~~

~~A seller's agent or subagent must still treat the buyer fairly and honestly and disclose to the buyer all material facts which the agent knows or reasonably should know. The seller's agent typically will be paid by the seller. **If the agent is acting as**~~

~~**agent for the seller, the buyer should be careful not to give the agent any information that the buyer does not want the seller to know.**~~

DUAL AGENTS

~~A real estate agent or firm may represent more than one party in the same transaction only with the knowledge and written consent of all parties for whom the agent acts. "Dual Agency" is most likely to occur when a buyer represented by a buyer's agent wants to purchase a property listed by that agent's firm. A dual agent must carefully explain to each party that the agent and the agent's firm are also acting for the other party.~~

~~In some situations, the agents may practice a form of dual agency known as "designated agency:" an agent in a firm is designated to represent the interests of the seller, and another agent in the same firm is designated to represent the interests of the buyer. This form of dual agency allows the designated agent to more fully represent the interests of the party with whom the agent is working.~~

~~In any dual agency situation, the agent must obtain a written agreement from the parties which fully describes the obligations of the agent and the agent's firm to each of them.~~

~~Immediately after the "Description of Agent Duties and Relationships", every listing and buyer agency agreement shall contain the following provision, including a box which the agent shall check when the provision is applicable: "_____ This firm represents both sellers and buyers. This means that it is possible that a buyer we represent will want to purchase a property owned by a seller we represent. When that occurs, the agent and firm listed above will act as **dual agents** if all parties agree."~~

~~(c) In every real estate sales transaction, a broker or salesperson shall, at his or her first substantial contact directly with a prospective buyer or seller, provide the prospective buyer or seller with a copy of the publication "Working with Real Estate Agents," review it with him or her, and determine whether the agent will act as the agent of the buyer or seller in the transaction. If the first substantial contact with a prospective buyer or seller occurs by telephone or other electronic means of communication where it is not practical to provide the "Working with Real Estate Agents" publication, the broker or salesperson shall at the earliest opportunity thereafter, but in no event later than three days from the date of first substantial contact, mail or otherwise transmit a copy of the publication to the buyer or seller and review it with him or her at the earliest practicable opportunity thereafter.~~

~~(d) A broker or brokerage firm real estate broker or salesperson representing one party in a transaction shall not undertake to represent another party in the transaction without the express, written authority of each party. Such authority must be obtained not later than the time one of the parties represented by the broker or salesperson makes an offer to purchase, sell, rent, lease, or exchange real estate to the other party.~~

~~(e) In every real estate sales transaction, a broker or salesperson working directly with a prospective buyer as a seller's agent or subagent shall disclose in writing to the prospective buyer at the first substantial contact with the prospective buyer that the broker or salesperson represents the interests of the seller. The broker or salesperson shall make the disclosure on the~~

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~~"Disclosure to Buyer from Seller's Agent or Subagent" form prescribed by the Commission.~~ If the first substantial contact occurs by telephone or by means of other electronic communication where it is not practical to provide written disclosure, the broker or salesperson shall immediately disclose by similar means whom he represents and shall immediately, but in no event later than three days from the date of first substantial contact, mail or otherwise transmit a copy of the ~~form~~ written disclosure to the buyer.

(f) In every real estate sales transaction, a broker or salesperson representing a buyer shall, at the initial contact with the seller or seller's agent, disclose to the seller or seller's agent that the broker or salesperson represents the buyer's interests. In addition, in every real estate sales transaction other than auctions, the broker or salesperson shall, no later than the time of delivery of an offer to the seller or seller's agent, provide the seller or seller's agent with a written confirmation disclosing that he represents the interests of the buyer. The written confirmation may be made in the buyer's offer to purchase.

(g) The provisions of Paragraphs (c), (d) and (e) of this Rule shall not apply to real estate licensees representing sellers in auction sales transactions.

(h) A broker or salesperson representing a buyer in an auction sale transaction shall, no later than the time of execution of a written agreement memorializing the buyer's contract to purchase, provide the seller or seller's agent with a written confirmation disclosing that he represents the interests of the buyer. The written confirmation may be made in the written agreement.

(i) A firm which represents both the buyer and the seller in the same real estate sales transaction is a dual agent and, through the brokers and salespersons associated with the firm, shall disclose its dual agency to the buyer and seller.

(j) When a firm represents both the buyer and seller in the same real estate transaction, the firm may, with the prior written approval of its buyer and seller clients, designate one or more individual agents associated with the firm to represent only the interests of the seller and one or more other individual brokers and salespersons associated with the firm to represent only the interests of the buyer in the transaction. An individual broker or salesperson shall not be so designated and shall not undertake to represent only the interests of one party if the broker or salesperson has actually received confidential information concerning the other party in connection with the transaction. A broker-in-charge shall not act as a designated agent for a party in a real estate sales transaction when a salesperson under his or her supervision will act as a designated agent for another party with a competing interest.

(k) When a firm acting as a dual agent designates an individual broker or salesperson to represent the seller, the broker or salesperson so designated shall represent only the interest of the seller and shall not, without the seller's permission, disclose to the buyer or a broker or salesperson designated to represent the buyer:

- (1) that the seller may agree to a price, terms, or any conditions of sale other than those established by the seller;

- (2) the seller's motivation for engaging in the transaction unless disclosure is otherwise required by statute or rule; and
- (3) any information about the seller which the seller has identified as confidential unless disclosure of the information is otherwise required by statute or rule.

(l) When a firm acting as a dual agent designates an individual broker or salesperson to represent the buyer, the broker or salesperson so designated shall represent only the interest of the buyer and shall not, without the buyer's permission, disclose to the seller or a broker or salesperson designated to represent the seller:

- (1) that the buyer may agree to a price, terms, or any conditions of sale other than those offered by the buyer;
- (2) the buyer's motivation for engaging in the transaction unless disclosure is otherwise required by statute or rule; and
- (3) any information about the buyer which the buyer has identified as confidential unless disclosure of the information is otherwise required by statute or rule.

(m) A broker or salesperson designated to represent a buyer or seller in accordance with Paragraph (j) of this Rule shall disclose the identity of all of the brokers and salesperson so designated to both the buyer and the seller. The disclosure shall take place no later than the presentation of the first offer to purchase or sell.

(n) When an individual broker or salesperson represents both the buyer and seller in the same real estate sales transaction pursuant to a written agreement authorizing dual agency, the parties may provide in the written agreement that the broker or salesperson shall not disclose the following information about one party to the other without permission from the party about whom the information pertains:

- (1) that a party may agree to a price, terms or any conditions of sale other than those offered;
- (2) the motivation of a party for engaging in the transaction, unless disclosure is otherwise required by statute or rule; and
- (3) any information about a party which that party has identified as confidential, unless disclosure is otherwise required by statute or rule.

Authority G.S. 41A-3(1b); 41A-4(a); 93A-3(c).

21 NCAC 58A .0106 DELIVERY OF INSTRUMENTS

(a) Except as provided in Paragraph (b) of this Rule, every broker or ~~salesman~~ salesperson shall immediately, but in no event later than five days from the date of execution, deliver to the parties thereto copies of any required written agency agreement, contract, offer, lease, or option affecting real property.

(b) A broker or ~~salesman~~ salesperson may be relieved of his duty under Paragraph (a) of this Rule to deliver copies of leases or rental agreements to the property owner, if the broker:

- (1) obtains the express written authority of the property owner to enter into and retain copies of leases or rental agreements on behalf of the property owner;
- (2) executes the lease or rental agreement on a pre-printed form, the material terms of which may not be changed

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- by the broker without prior approval by the property owner except as may be required by law;
- (3) promptly provides a copy of the lease or rental agreement to the property owner upon reasonable request; and
 - (4) delivers to the property owner within 45 days following the date of execution of the lease or rental agreement, an accounting which identifies the leased property and which sets forth the names of the tenants, the rental rates and rents collected.

Authority G.S. 93A-3(c).

21 NCAC 58A .0110 BROKER-IN-CHARGE

(a) Every real estate firm shall designate a broker to serve as the broker-in-charge at its principal office and a broker to serve as broker-in-charge at any branch office. No broker shall be broker-in-charge of more than one office or branch office. If a firm shares office space with one or more other firms, one broker may serve as broker-in-charge of each firm at that location. No office or branch office of a firm shall have more than one designated broker-in-charge. A broker practicing alone shall designate himself or herself as a broker-in-charge. Each broker-in-charge shall make written notification of his or her status as broker-in-charge to the Commission on a form prescribed by the Commission within 10 days following the broker's designation as broker-in-charge. The broker-in-charge shall assume the responsibility at his or her office for:

- (1) the retention and display of current license renewal pocket cards by all brokers and salespersons employed at the office for which he or she is broker-in-charge; the proper display of licenses at such office in accordance with Rule .0101 of this Section; and assuring that each licensee employed at the office has complied with Rules .0503, .0504 and .0506 of this Subchapter;
- (2) the proper notification to the Commission of any change of business address or trade name of the firm and the registration of any assumed business name adopted by the firm for its use;
- (3) the proper conduct of advertising by or in the name of the firm at such office;
- (4) the proper maintenance at such office of the trust or escrow account of the firm and the records pertaining thereto;
- (5) the proper retention and maintenance of records relating to transactions conducted by or on behalf of the firm at such office, including those required to be retained pursuant to Rule .0108 of this Section;
- (6) the proper supervision of salespersons associated with or engaged on behalf of the firm at such office in accordance with the requirements of Rule .0506 of this Subchapter; ~~and~~
- (7) the verification to the Commission of the experience of any salesperson at such office who may be applying for licensure as a ~~broker.~~ broker; and
- (8) the proper supervision of all brokers and salespersons employed at the office for which he or she is broker-in-charge with respect to adherence to agency agreement and disclosure requirements.

(b) When used in this Rule, the term:

- (1) "Branch Office" means any office in addition to the principal office of a broker which is operated in connection with the broker's real estate business; and
- (2) "Office" means any place of business where acts are performed for which a real estate license is required.

(c) A broker-in-charge must continually maintain his or her license on active status.

(d) Each broker-in-charge shall notify the Commission in writing of any change in his or her status as broker-in-charge within 10 days following the change. Upon written request of a salesperson within five years after termination of his or her association with a broker-in-charge, the broker-in-charge shall provide the salesperson, in a form prescribed by the Commission, an accurate written statement regarding the number and type of properties listed, sold, bought, leased, or rented for others by the salesperson while under the supervision of the broker-in-charge.

(e) A licensed real estate firm which demonstrates on a form prescribed by the Commission that it has qualified for licensure solely for the purpose of receiving compensation for brokerage services furnished by its principal broker through another firm, and that no person is affiliated with it other than its principal broker, shall not be required to designate a broker-in-charge.

(f) Every broker-in-charge shall complete the Commission's broker-in-charge course at least once every five years following the effective date of this Rule. Every broker designated as a broker-in-charge after the effective date of this Rule shall complete the Commission's broker-in-charge course within 90 days following designation and at least once every five years thereafter for so long as he or she remains broker-in-charge.

Authority G.S. 93A-2; 93A-3(c); 93A-4.

SECTION .1700 – MANADATORY CONTINUING EDUCATION

21 NCAC 58A .1706 REPETITION OF COURSES

A continuing education course may be taken only once for continuing education credit within ~~a single the current license period.~~ period or immediately preceding two license periods.

Authority G.S. 93A-3(c); 93A-4A.

21 NCAC 58A .1708 EQUIVALENT CREDIT

(a) A licensee may request that the Commission award continuing education credit for a course taken by the licensee that is not approved by the Commission, or for some other real estate education activity, by making such request on a form prescribed by the Commission and submitting a nonrefundable evaluation fee of thirty dollars (\$30.00) for each request for evaluation of a course or real estate education activity. In order for requests for equivalent credit to be considered and credits to be entered into a licensee's continuing education record prior to the June 30 license expiration date, such requests and all supporting documents must be received by the Commission on or before June 10 preceding expiration of the licensee's current license, with the exception that requests from instructors desiring equivalent credit for teaching Commission-approved continuing

education courses must be received by June 30. Any equivalent continuing education credit awarded under this Rule shall be applied first to make up any continuing education deficiency for the previous ~~two~~ license ~~periods~~ period and then to satisfy the continuing education requirement for the current license period; however, credit for an unapproved course or educational activity, other than teaching an approved elective course, that was completed during a previous license period may not be applied to a subsequent license period.

(b) The Commission may award continuing education elective credit for completion of an unapproved course which the Commission finds equivalent to the elective course component of the continuing education requirement set forth in Section .0300 of Subchapter 58E. Completion of an unapproved course may serve only to satisfy the elective requirement and cannot be substituted for completion of the mandatory update course.

(c) Real estate education activities, other than teaching a Commission-approved course, which may be eligible for credit include, but are not limited to: developing a Commission-approved elective continuing education course, authorship of a published real estate textbook; and authorship of a scholarly article, on a topic acceptable for continuing education purposes, which has been published in a professional journal. The Commission may award continuing education elective credit for activities which the Commission finds equivalent to the elective course component of the continuing education requirement set forth in Section .0300 of Subchapter 58E. No activity other than teaching a Commission-developed mandatory update course shall be considered equivalent to completing the mandatory update course.

(d) The Commission may award credit for teaching the Commission-developed mandatory update course and for teaching an approved elective course. Credit for teaching an approved elective course shall be awarded only for teaching a course for the first time. Credit for teaching a Commission-developed mandatory update course may be awarded for each licensing period in which the instructor teaches the course. The amount of credit awarded to the instructor of an approved continuing education course shall be the same as the amount of credit earned by a licensee who completes the course. Licensees who are instructors of continuing education courses approved by the Commission shall not be subject to the thirty dollar (\$30.00) evaluation fee when applying for continuing education credit for teaching an approved course. No credit toward the continuing education requirement shall be awarded for teaching a real estate prelicensing course.

(e) A licensee completing a real estate appraisal prelicensing, precertification or continuing education course approved by the North Carolina Appraisal Board may obtain real estate continuing education elective credit for such course by submitting to the Commission a written request for equivalent continuing education elective credit accompanied by a nonrefundable processing fee of twenty dollars (\$20.00) and a copy of the certificate of course completion issued by the course sponsor for submission to the North Carolina Appraisal Board.

Authority G.S. 93A-3(c); 93A-4A.

EDUCATION

SECTION .0200 – PRIVATE REAL ESTATE SCHOOLS

21 NCAC 58C .0207 FACILITIES AND EQUIPMENT

~~(a) The applicant for a license to operate a private real estate school shall either own the school facilities or possess a lease or other agreement for the use of facilities for school purposes which will assure the availability of adequate facilities until the next June 30 following license issuance or renewal. If facilities are to be leased or rented, the applicant need not execute such lease or other agreement until notification is received that the school application has been approved; however, such lease or agreement must be executed and a copy provided to the Commission prior to issuance of a license.~~

~~(b)(a)~~ All school facilities and equipment shall be in compliance with all applicable local, state and federal laws and regulations regarding safety, health, and sanitation. Schools shall furnish the Commission with inspection reports from appropriate local building, health and fire inspectors upon request of the Commission.

~~(c)(b)~~ Classrooms shall be of sufficient size to accommodate comfortably all students enrolled in a course, shall have adequate light, heat, cooling and ventilation and shall be free of distractions which would disrupt class sessions.

~~(d)(c)~~ Classrooms shall contain, at a minimum, an overhead projector and student desks or worktables sufficient to accommodate all students enrolled in a course.

Authority G.S. 93A-4(a),(d); 93A-33.

SUBCHAPTER 58E – REAL ESTATE CONTINUING EDUCATION

SECTION .0500 – COURSE OPERATIONAL REQUIREMENTS

21 NCAC 58E .0505 ADVERTISING; PROVIDING COURSE INFORMATION

(a) Course sponsors must not utilize advertising of any type that is false or misleading in any respect. If the number of continuing education credit hours awarded by the Commission for an approved elective course is less than the number of scheduled hours for the course, any course advertisement or promotional materials which indicate that the course is approved for real estate continuing education credit in North Carolina must specify the number of continuing education credit hours awarded by the Commission for the course.

(b) Any flyers, brochures or similar materials utilized to promote a continuing education course must clearly describe the fee to be charged and the sponsor's cancellation and fee refund policies. Course sponsors must provide prospective students with a full description of the sponsor's cancellation and fee refund policies prior to accepting payment for any course(s).

(c) Course sponsors of any elective course must, upon request, provide any prospective student a description of the course content sufficient to give the prospective student a general understanding of the instruction to be provided in the course.

SUBCHAPTER 58C – REAL ESTATE PRELICENSING

PROPOSED RULES

Authority G.S. 93A-3(c); 93A-4A.

CHAPTER 68 – CERTIFICATION BOARD FOR SUBSTANCE ABUSE PROFESSIONALS

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Substance Abuse Professional Certification Board intends to adopt the rules cited as 21 NCAC 68 .0220-.0224, .0615, and amend the rules cited as 21 NCAC 68 .0101, .0206, .0503-.0505, .0507-.0511. Notice of Rule-making Proceedings was published in the Register on August 15, 2000.

Proposed Effective Date: April 1, 2001

Public Hearing:

Date: November 17, 2000

Time: 10:00 a.m.

Location: Nick's Cuisine, 2699 Ramada Rd., Burlington, NC 27216, (see Maitre d' for room designation)

Reason for Proposed Action: To add definitions and clarify procedures.

Comment Procedures: The public is invited to attend the public hearing and submit comments. Written comments may be submitted through November 15, 2000 to Ms. Ann Christian, Rule-making Coordinator, NC Substance Abuse Professional Certification Board, PO Box 2455, Raleigh, NC 27602.

Fiscal Impact

- State
Local
Substantive (>=\$5,000,000)
None

SECTION .0100 – GENERAL

21 NCAC 68 .0101 DEFINITIONS

As used in the General Statutes or this Chapter, the following terms have the following meaning:

- (1) "Approved Supervisor" means a person who fulfills or is in the process of fulfilling the requirements for this Board designation pursuant to Rule .0211 of this Chapter by completing its academic, didactic and experiential requirements.
(2) "Assessment" means identifying and evaluating an individual's strengths, weaknesses, problems and needs for the development of a treatment or service plan for alcohol, alcohol, tobacco and drug abuse.
(3) "Board" means the North Carolina Substance Abuse Professional Certification Board.
(4) "Complainant" means a person who has filed a complaint pursuant to these Rules.
(5) "Consultation" means a meeting for discussion, decision-making and planning with other service providers for the purpose of providing substance abuse services.

- (6) "Crisis" means a decisive, crucial event in the course of treatment that threatens, either directly or indirectly related to alcohol or drug use, to compromise or destroy the rehabilitation effort.
(7) "Deemed Status Group" means those persons who are credentialed as a clinical addictions specialist because of their membership in a deemed status discipline.
(8) "Education" means a service which is designed to inform and teach various groups; including clients, families, schools, businesses, churches, industries, civic and other community groups about the nature of substance abuse disorders and about available community resources. It also serves to improve the social functioning of recipients by increasing awareness of human behavior and providing alternative cognitive or behavioral responses to life's problems.
(8)(9) "Full Time" means 2,000 hours per year.
(9)(10) "Letter of Reference" means a letter that recommends a person for certification.
(10)(11) "Membership In Good Standing" means a member's certification is not in a state of revocation, lapse, or suspension. However, an individual whose certification is suspended and the suspension is stayed is a member in good standing during the period of the stay.
(11)(12) "Passing score" means the score set by the entity administering the exam.
(12)(13) "President" means the President of the Board.
(14) "Prevention" means a proactive process which empowers individuals and systems to meet the challenges of life events and transitions by creating and reinforcing healthy behavior and lifestyles by reducing risks contributing to alcohol, tobacco and other drug misuse.
(15) "Prevention Consultation" means a service provided to other mental health, human service, and community planning/development organizations or to individual practitioners in other organizations to assist in the development of insights and skills of the practitioner necessary for prevention.
(16) "Prevention domains" means program coordination, education and training, community organization, community based process, public policy, professional growth and responsibility, planning and evaluations.
(13)(17) "Referral" means identifying the needs of an individual that cannot be met by the counselor or agency and assisting the individual to utilize the support systems and community resources available.
(14)(18) "Reprimand" means a formal written warning from the Board to a person making application for certification by the Board or certified by the Board.
(15)(19) "Respondent" means a person who is making application for certification by the Board or is certified by the Board against whom a complaint has been filed.
(16)(20) "Sexual activity" means:

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- (a) Contact between the penis and the vulva or the penis and the anus;
- (b) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or
- (c) The penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

~~(17)~~(21) "Sexual Contact" means the intentional touching, either directly or indirectly, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

~~(18)~~(22) "Substance Abuse Counseling Experience" means approved supervised experience that may be full time or part-time, paid or voluntary, and must include all of the 12 core functions (Rule .0205 of this Chapter) as documented by a job description and supervisor's evaluation.

(23) "Substance Abuse Prevention Consultant Experience" means approved supervised experience that may be full time or part-time, paid or voluntary, and must include all of the prevention domains referenced by Rule .0206 and as documented by a job description and supervisor's evaluation.

~~(19)~~(24) "Supervised Practical Training" means supervision to teach the knowledge and skills related to substance abuse professionals at a ratio of one hour of supervision to every 10 hours of practice for 300 practice hours.

~~(20)~~(25) "Suspension" means a loss of certification or the privilege of making application for certification.

Authority G.S. 90-113.30; 90-113.33; 90-113.40; 90-113.41; 90-114.41A.

SECTION .0200 – CERTIFICATION

21 NCAC 68 .0206 PROCESS FOR PREVENTION CONSULTANT CERTIFICATION

(a) This certification shall be offered to those persons whose primary responsibilities are to provide substance abuse ~~prevention~~ information and education, environmental approaches, alternative activities, community organization, networking, and referral. Prevention consultants may be either based in human service agencies or other settings.

- (b) Require ments for certification shall be as follows:
- (1) 10,000 hours (five years) without a baccalaureate degree or 4,000 hours (two years) with a baccalaureate degree in a human services field from a regionally accredited college or university;
 - (2) 270 hours of board approved academic and didactic training divided in the following manner:

- (A) 170 hours ~~in the area of~~ primary and secondary prevention and in the area of the prevention domains; and life skills training; and
- (B) 100 hours in substance abuse specific ~~studies;~~ studies, which includes 12 hours in HIV training and six hours in professional ethics training;
- (3) A minimum of 300 supervised practice hours documented by a Board approved ~~alcohol, drug or~~ substance abuse professional;
- (4) Evaluations from a supervisor on this practice as well as two evaluations from colleagues or co-workers;
- (5) Successful completion of an IC&RC/AODA, Inc. or its successor organization written examination;
- (6) A signed form attesting to the applicant's adherence to the Ethical Standards of the Board;
- (7) A registration and testing fee of two hundred twenty-five dollars (\$225.00), twenty-five dollars (\$25.00) of which is due when the request is made for the application packet and the remainder at the time of filing.

Authority G.S. 90-113.30; 90-113.31; 90-113.33; 90-113.34; 90-113.40; 90-113.41.

21 NCAC 68 .0220 NOTICE TO APPLICANT OF FAILURE TO SATISFY BOARD

Whenever the Board has determined that a person who has duly made application for certification showing the person's education, training and other qualifications required by the Board has failed to satisfy the Board of the applicant's qualifications to be issued a certificate of certification for any cause other than failure to pass an examination, the Board shall notify such person of its decision and indicate in what respect the applicant has failed to satisfy the Board. The applicant may inquire with the Board Administrator if more information is needed to clarify the nature of the deficiency.

Authority G.S. 90-113.30; 90-113.33; 90-113.39; 90-113.40.

21 NCAC 68 .0221 APPLICANT HEARING

If the applicant so requests and provides the Board with a statement of the reason for the request, this person shall be given a formal hearing before the Board. Notice of the time and place of the public hearing shall be provided to the applicant. The burden of satisfying the Board of the applicant's qualifications for certification shall be upon the applicant. Following the hearing, the Board shall determine whether he or she is qualified to be examined or is entitled to be certified, whichever is the next appropriate step in the process.

Authority G.S. 90-113.30; 90-113.33; 90-113.39; 90-113.40.

21 NCAC 68 .0222 ETHICS INQUIRY

Information which is the basis for an inquiry into the issue of whether the applicant meets the ethical standards of the Board may be referred to the Chairperson of the Ethics Committee for review and further investigation. The Chairperson may pursue the investigation of this matter pursuant to the procedures used to investigate ethics complaints against applicants and certified

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professionals. Once the investigation is completed, the Ethics Chairperson shall report the results of the investigation to the Standards Committee for its review.

Authority G.S. 90-113.30; 90-113.33; 90-113.39; 90-113.40; 90-113.44.

21 NCAC 68 .0223 STANDARDS COMMITTEE ACTION

The Standards Committee may take any of the following actions:

- (1) Approve the application;
- (2) Remand the matter to the Ethics Chairperson for further inquiry in order to obtain additional information upon which to base a decision;
- (3) Schedule a hearing by the Committee wherein the applicant may appear to answer questions or provide a statement to the Committee regarding the matter under inquiry;
- (4) Request that the applicant undergo any psychological or physical testing or assessment which the Committee deems necessary to determine competency, provide the results to the Committee for its review, and, in the discretion of the Committee, require that the applicant document corrective action;
- (5) Following notification to the applicant and the opportunity for the applicant to request a hearing by the Board, the Committee may make a recommendation to the Board that the applicant shall not be certified.

Authority G.S. 90-113.30; 90-113.33; 90-113.39; 90-113.40.

21 NCAC 68 .0224 REGISTRANT STATUS DENIED IF SERVING SENTENCE

Individuals making application for certification who are serving any part of a court-ordered sentence; including community service, supervised or unsupervised probation, or making restitution, shall not be considered a registrant by the Board. If any person is serving or begins serving such sentence during the course of the application process, this person shall notify the Board. Once the Board ascertains that the applicant is serving a sentence, all fees shall be refunded and the applicant shall not be considered a registrant by the Board. Once the sentence is completed the applicant may become a registrant.

Authority G.S. 90-113.30; 90-113.33; 90-113.39; 90-113.40; 90-113.44.

SECTION .0500 – ETHICAL PRINCIPLES OF CONDUCT

21 NCAC 68 .0503 COMPETENCY

(a) The substance abuse professional shall recognize that the profession is founded on national standards of competency which promote the best interests of society, of the client and of the profession as a whole. The substance abuse professional shall obtain continuing education as a component of professional competency.

- (1) The substance abuse professional shall assist in ~~the prevention of~~ eliminating prevention, intervention, and

treatment practices by unqualified or unauthorized persons in the field.

- (2) The substance abuse professional who is aware of unethical conduct or of unprofessional modes of practice shall report such violations to the appropriate certifying authority.
- (3) The substance abuse professional shall recognize boundaries and limitations of his or her competencies and not offer services or use techniques outside of these professional competencies.
- (4) The substance abuse professional shall recognize the effect of impairment on professional performance and shall be willing to seek appropriate treatment for oneself or for a colleague. The substance abuse professional shall support peer assistance programs in this respect.

(b) The application of this Rule is limited to actions by substance abuse professionals acting within the substance abuse professional ~~fields,~~ field.

(c) No person shall be certified as a substance abuse professional who is sentenced to an active or probationary term by the courts of this land and any part of the sentence is unserved.

Authority G.S. 90-113.30; 90-113.34; 90-113.36; 90-113.37; 90-113.39; 90-113.40; 90-113.41; 90-113.43; 90-113.44.

21 NCAC 68 .0504 LEGAL STANDARDS AND MORAL STANDARDS

The substance abuse professional shall uphold the legal and accepted moral codes which pertain to professional conduct.

- (1) The substance abuse professional shall not claim either directly or by implication, professional qualifications or affiliations that the ~~counselor~~ substance abuse professional does not possess.
- (2) The substance abuse professional shall not use the affiliation with the North Carolina Substance Abuse Professional Certification Board for purposes that are not consistent with the stated purposes of the Board.
- (3) The substance abuse professional shall not associate with or permit the ~~counselor's~~ substance abuse professional's name to be used in connection with any services or products in a way that is misleading.
- (4) The substance abuse professional associated with the development or promotion of books or other products offered for commercial sale shall be responsible for ensuring that such books or products are presented in a professional and factual way.

Authority G.S. 90-113.30; 90-113.33; 90-113.43; 90-113.44; 90-113.45.

21 NCAC 68 .0505 PUBLIC STATEMENTS

The substance abuse professional shall respect the limits of present understanding in public statements concerning alcoholism and other forms of drug addiction.

- (1) The substance abuse professional who represents the field of alcoholism and other drug abuse ~~counseling~~ prevention, intervention, and treatment to clients, other

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professionals or to the general public shall report fairly and accurately the appropriate information.

- (2) The substance abuse professional shall acknowledge and document materials and techniques used.
- (3) The substance abuse professional who conducts training in alcoholism or drug abuse ~~counseling~~ prevention, intervention, and treatment skills or techniques shall indicate to the audience the requisite training and qualifications required to properly perform these skills and techniques.

Authority G.S. 90-113.30; 90-113.33; 90-113.44.

21 NCAC 68 .0507 CLIENT WELFARE

The substance abuse professional shall respect the integrity and protect the welfare of the person or group with whom he or she is working.

- (1) The substance abuse professional shall define for self and others the nature and direction of loyalties and responsibilities and keep all parties concerned informed of these commitments.
- (2) The substance abuse professional, in the presence of professional conflict, shall be concerned primarily with the welfare of the client.
- (3) The substance abuse professional shall end a professional relationship under the following conditions:
 - (a) The substance abuse professional shall end a counseling or consulting relationship when the professional knows or should know that the client is not benefiting from it.
 - (b) The substance abuse professional shall withdraw services only after giving consideration to all factors in the situation and taking care to minimize adverse actual or possible effects.
 - (c) The substance abuse professional who anticipates the cessation or interruption of service to a client shall notify the client promptly and seek the cessation, transfer, referral, or continuation of service in relation to the client's needs and preferences.
- (4) The substance abuse professional who asks a client to reveal personal information from or about other professionals or allows information to be divulged shall inform the client concerning the duties and responsibilities resulting from dissemination of the information. The information released or obtained with informed consent shall be used for expressed purposes only, unless the release is otherwise required by law.
- (5) The substance abuse professional shall not use a client in a demonstration role in a workshop setting where such participation would foreseeably seriously harm the client.
- (6) The substance abuse professional shall ensure the presence of an appropriate setting for pre-clinical or clinical work to protect the client from harm and the substance abuse professional and the profession from censure.

- (7) The substance abuse professional shall collaborate with other health care professionals in providing a supportive environment for the client who is receiving prescribed medications.

Authority G.S. 90-113.30; 90-113.33; 90-113.39; 90-113.40; 90-113.43; 90-113.44.

21 NCAC 68 .0508 CONFIDENTIALITY

The substance abuse professional shall embrace, as a primary obligation, the duty of protecting the privacy of clients and shall not disclose confidential information acquired, in teaching, practice or investigation.

- (1) The substance abuse professional shall inform the client and obtain agreement in areas likely to affect the client's participation including the recording of an interview, the use of interview material for training purposes and observation of an interview by another person.
- (2) The substance abuse professional shall make provisions for the maintenance of confidentiality and the ultimate disposition of confidential records.
- (3) The substance abuse professional shall reveal information received in confidence only:
 - (a) when there is clear and imminent danger to the client or to other persons and then only to the appropriate professional worker or public authorities; or
 - (b) when compelled by law to provide such information.
- (4) The substance abuse professional shall discuss the information obtained in a clinical or consulting ~~relationships~~ relationship only in an appropriate ~~settings~~ setting and only for a professional ~~purpose~~ purpose clearly concerned with the case. Written and oral reports shall present only data germane to the purpose of the evaluation.
- (5) The substance abuse professional shall use ~~clinical and other~~ material in classroom teaching and writing only when the identity of the ~~persons~~ person involved is adequately ~~disguised~~ or disguised, documented permission is given by the ~~party~~ party or the information is in the public domain.

Authority G.S. 90-113.30; 90-113.43; 90-113.44.

21 NCAC 68 .0509 CLIENT RELATIONSHIPS

The substance abuse professional shall inform the prospective client of the important aspects of the potential relationship.

- (1) The substance abuse professional shall inform the client and the client's agreement in areas likely to affect the client's participation including the recording of an interview, the use of interview material for training purposes, or the observation of an interview by another person.
- (2) The substance abuse professional shall inform the designated guardian or responsible person of the circumstances that may influence the relationship, when the client is a minor or incompetent.

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- (3) The substance abuse professional shall not enter into a professional relationship with members of one's immediate family, friends or close associates. ~~The substance abuse professional may enter into a counseling relationship with others where there was a pre-existing relationship involving the welfare of that person that will not be jeopardized by this dual relationship.~~ The professional shall make every effort to avoid dual relationships that could impair professional judgment or increase the risk of client exploitation.
- (4) Sexual activity or contact of a substance abuse professional with a client shall be restricted as follows:
- The substance abuse professional shall not engage in or solicit sexual activity or sexual contact with a current client.
 - The substance abuse professional shall not engage in or solicit sexual activity or sexual contact with a former client for at least two years after the termination of the counseling or consulting relationship.
 - The substance abuse professional shall not engage in or solicit sexual activity or sexual contact with any person the professional knows to be a current client of his or her own agency or place of professional employment.
 - The substance abuse professional shall not engage in or solicit sexual activity or sexual contact with any person the professional knows to be a former client of his or her own agency or place of professional employment for at least two years after the termination of the counseling or consulting relationship if both the professional was employed at the agency and the former client was a client of the agency during the same time period.

Authority G.S. 90-113.30; 90-113.33; 90-113.34; 90-113.44.

21 NCAC 68 .0510 INTERPROFESSIONAL RELATIONSHIPS

The substance abuse professional shall treat colleagues with respect, courtesy and fairness and shall afford the same professional courtesy to other professionals.

- The substance abuse professional shall not offer professional services to a client in counseling or consulting with another professional except with the knowledge of the other professional or after the termination of the client's relationship with the other professional.
- The substance abuse professional shall cooperate with duly constituted professional ethics committees and promptly supply necessary information unless prohibited by law.

Authority G.S. 90-113.30; 90-113.33; 90-113.44.

21 NCAC 68 .0511 REMUNERATION

The substance abuse professional shall establish financial arrangements in professional practice and in accord with the

professional standards that safeguard the best interests of the client, of the individual professional and of the profession.

- The substance abuse professional shall consider the ability of the client to meet the financial cost in establishing rates for professional services.
- The substance abuse professional shall not send or receive any commission or rebate or any other form of remuneration for referral of clients for professional services. The substance abuse professional shall not engage in fee splitting.
- The substance abuse professional shall not accept a private fee or any other gift or gratuity having a cumulative value of twenty-five dollars (\$25.00) or more for professional work with a person who is receiving such services through the professional's institution or agency. The policy of a particular agency may make written provisions for private work with its clients by members of its staff and in such instances the client must be fully apprised of all policies affecting the client.

Authority G.S. 90-113.30; 90-113.33; 90-113.44.

SECTION .0600 – GROUNDS FOR DISCIPLINE AND DISCIPLINARY PROCEDURES

21 NCAC 68 .0615 INFORMAL PROCEEDINGS

(a) In addition to formal hearings pursuant to G.S. 90-113.33 and G.S. 90-113.34, the Board may conduct certain informal proceedings in order to settle on an informal basis certain matters of dispute. A substance abuse professional practicing pursuant to a certification of other authority granted by the Board may be invited to attend a meeting with the Board or a committee of the Board on an informal basis to discuss matters as the Board may advise in its communication to the person inviting him or her to attend such meeting. No public record of such proceeding shall be made nor shall any individual be placed under oath to give testimony. Matters discussed by a person appearing informally before the Board may, however, be used against such person in a formal hearing if a formal hearing is subsequently initiated.

(b) As a result of such informal meeting, the Board may recommend that certain actions be taken by a person, may offer a person the opportunity to enter into a consent order, may institute a formal public hearing concerning a person, or may take other public or non-public action as the Board may deem appropriate in each case.

(c) Attendance at such an informal meeting is not required and is at the sole discretion of the person so invited. A person invited to attend an informal meeting shall be entitled to have counsel present at such meeting.

Authority G.S. 150B-22; 150B-38(h).

TITLE 25 – DEPARTMENT OF STATE PERSONNEL

Notice is hereby given in accordance with G.S. 150B-21.2 that the State Personnel Commission intends to adopt the rules cited

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as 25 NCAC 1E .1601-.1607 and repeal the rules cited as 25 NCAC 1E .1003, .1201-.1205, .1501-.1506. Notice of Rule-making Proceedings was published in the Register on August 15, 2000.

Proposed Effective Date: April 1, 2001

Public Hearing:

Date: November 2, 2000

Time: 10:00 a.m.

Location: 116 W. Jones St., Third Floor Conference Room, Administration Building, Raleigh, NC

Reason for Proposed Action: On April 13, 2000, Governor Hunt signed Executive Order 168, which provides employees with time off for certain school and community activities. The Order recognizes the diverse and distinct needs of its school, communities, and citizens and recognizes that employees of state government represent a significant source of volunteers. The employee, although committed to volunteering time and effort, often are unable to meet those needs during regularly scheduled work hours. The Executive Order directs the OSP to establish a program for awarding community service leave to state employees subject to the State Personnel Act. The proposed rules for repeal will be incorporated into the new community service leave program.

Comment Procedures: Written comments may be submitted to Ms. Valerie Ford, Hearing Officer, Office of State Personnel, 1331 Mail Service Center, Raleigh, NC 27699-1331. Oral comments will be received at the public hearing. Written comments must be received no later than November 15, 2000.

Fiscal Impact

- State
- Local
- Substantive (≥\$5,000,000)
- None

CHAPTER 1 – OFFICE OF STATE PERSONNEL

SUBCHAPTER 1E – EMPLOYEE BENEFITS

SECTION .1000 – MISCELLANEOUS LEAVE

25 NCAC 01E .1003 EMPLOYEE PARTICIPATION IN VOLUNTEER EMERGENCY SERVICES

~~(a) Agency heads are authorized to establish a policy providing time off with pay to employees participating in volunteer emergency and rescue services within a limited area around their work station. Each agency head is responsible for determining that a bona fide need for such services exist within a given area. A bona fide need should be defined as real or eminent danger to life or property. Each policy should require sufficient proof of the employee's membership in an emergency volunteer organization and that the performance of such emergency services will not be an undue drain on the government activities which would be affected.~~

~~(b) Employees are encouraged to use the privilege and opportunity to participate in life giving through blood donorship. Participating employees shall be given reasonable time off with pay for whole blood donation, pheresis procedure or bone marrow transplant.~~

Authority G.S. 126-4.

SECTION .1200 - COMMUNITY INVOLVEMENT

25 NCAC 01E .1201 POLICY

~~To accommodate such participation in community volunteer services, the state will:~~

- ~~(1) Cooperate with employees who request flexibility in work schedules in order to perform volunteer community services;~~
- ~~(2) Upon application approved by immediate supervisor, allow an employee time away from regular duties to perform significant community service activities with provisions for the employee to make up the time;~~
- ~~(3) Allow a period of up to 60 days in which all time allowed for volunteer activities should be made up.~~

Authority G.S. 126-4(5),(10).

25 NCAC 01E .1202 ELIGIBILITY

~~(a) Any public or private non-profit, non-partisan organization may be considered for volunteer activity. If a request for volunteer participation is approved, employees will receive consideration for time off during work hours to participate in such volunteer activity, and will be given an opportunity to make up such time off in order to avoid charging this time to the appropriate leave.~~

~~(b) All full time, permanent employees will be eligible to participate in this policy.~~

~~(c) Employees participating in approved volunteer activities must continue satisfactory job performance. At the discretion of the supervisor, temporary changes in job assignments can be made.~~

Authority G.S. 126-4(5),(10).

25 NCAC 01E .1203 TIME GUIDELINES

~~(a) The amount of time which any employee may be allowed to pursue community service efforts is left to the discretion of the department head.~~

~~(b) When agency operations require it, all arrangements for volunteer time may be interrupted or suspended. Notice should be given as far in advance as possible.~~

~~(c) Consideration of employee requests for community service time should include:~~

- ~~(1) Nature of work, not all jobs will permit rearrangement of the work schedule;~~
- ~~(2) The quality of the employee's job performance with the agency;~~
- ~~(3) Indication from the supervisor that unit performance can be maintained;~~

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~~(4) Any special circumstances such as the importance of the volunteer activity to community relations needs of the department as determined by the department head.~~

Authority G.S. 126-4(5),(10).

25 NCAC 01E .1204 RECORDS

~~Records indicating the number of employees involved, types of volunteer service and extent of participation should be maintained by supervisors who approve such activities.~~

Authority G.S. 126-4(5),(10); 126-13.

25 NCAC 01E .1205 PARTISAN POLITICAL INVOLVEMENT

~~Partisan political activity during state time and the use of state equipment or supplies for such a purpose are not permitted. Special care must be taken to avoid any possible interpretation that the state is, in fact, permitting time off and in so doing supporting a political candidacy. Political activity must be in accordance with G.S. 126-13 of the State Personnel Act.~~

Authority G.S. 126-4(5),(10).

SECTION .1500 - CHILD INVOLVEMENT LEAVE

25 NCAC 01E .1501 PURPOSE AND USES

~~The purpose of child involvement leave is to promote employees' involvement in the education of youth and to promote employees' assistance to schools. Employees may take leave under this Section to:~~

- ~~(1) Meet with a teacher or administrator of any elementary school, middle school, high school or child care program authorized to operate under the laws of the State of North Carolina concerning the employee's children, step-children, or children over whom the employee has custody.~~
- ~~(2) Attend any function sponsored by the school or child care program as defined in Item (1) of this Rule in which the children, step children, or children over whom the employee has custody are participating. This provision shall only be utilized in conjunction with nonathletic programs that are a part or supplement to the school's or day care's academic or artistic program.~~
- ~~(3) To perform, by any employee without regard to parental status, school approved volunteer work approved by the teacher, school administrator, or program administrator.~~

Authority G.S. 126-4(5).

25 NCAC 01E .1502 AMOUNT OF LEAVE

~~(a) Full-time permanent, probationary, and trainee employees may take up to eight hours of paid leave each calendar year regardless of the number of children. The eight hours of leave shall be credited to employees on January 1 of each year. The eight hours of leave for part-time employees shall be prorated based on the proportion they work of full-time.~~

~~(b) New employees shall be credited with the full eight hours of leave immediately upon their employment.~~

Authority G.S. 126-4(5).

25 NCAC 01E .1503 APPROVAL OF LEAVE

~~(a) Employees must receive approval from their supervisor to use child involvement leave. The agency may require acceptable proof that leave taken is within the purpose of this Section; however, such a procedure shall be set forth by the agency and administered consistently.~~

~~(b) Time away from work, pursuant to this Section, shall not exceed eight hours. An agency may require that the leave be taken at a different time, based on the needs of the agency.~~

Authority G.S. 126-4(5).

25 NCAC 01E .1504 INTER-AGENCY TRANSFER

~~If any employee transfers to another State agency, any balance of the eight hours not used shall be transferred to the new agency.~~

Authority G.S. 126-4(5).

25 NCAC 01E .1505 NON-CUMULATIVE

~~Leave not taken in a calendar year shall be forfeited; it shall not be carried over into the next calendar year.~~

Authority G.S. 126-4(5).

25 NCAC 01E .1506 SEPARATION

~~Employees shall not be entitled to payment for unused child involvement leave upon separation from State government.~~

Authority G.S. 126-4(5).

SECTION .1600 – COMMUNITY SERVICES LEAVE

25 NCAC 01E .1601 PURPOSE

In recognition of the State's diverse needs for volunteers to support schools, communities, citizens and non-profit organizations, and recognizing the commitment of State employees to engage in volunteer service, Community Service Leave, within the parameters outlined in this Section, may be granted to:

- (1) parents for child involvement in the schools (as defined in this Section);
- (2) any employee for volunteer activity in the schools or in a Community Service Organization (as defined in this Section), or
- (3) any employee for tutoring and mentoring in the schools.

Authority G.S. 126-4.

25 NCAC 01E .1602 DEFINITIONS

(a) School - One that is authorized to operate under the laws of the State of North Carolina and is an elementary school, a middle school, a high school, or a child care program.

PROPOSED RULES

(b) Child - A son or daughter who is a biological child, an adopted child, a foster child, a step-child, a legal ward, or a child of an employee standing in loco parentis.

(c) Community Service Organization - A non-profit, non-partisan community organization which is designated as an IRS Code 501(c)(3) agency, or a human service organization licensed or accredited to serve citizens with special needs including children, youth, and the elderly.

Authority G.S. 126-4.

25 NCAC 01E .1603 COVERED EMPLOYEES AND LEAVE CREDITS

(a) An employee with a permanent, probationary, trainee or time-limited (pro-rated for part-time employees) whose service is satisfactory may be granted:

- (1) 24 hours of community service leave each year; or
- (2) In lieu of the 24 hour award as noted above, an employee may elect to receive one hour of community service leave for each week that schools are in session as documented by the elected board of the local education agency or the governing authority of any non-public school. This leave award shall be used exclusively for tutoring or mentoring a student in accordance with established standards, rules and guidelines for such arrangements as determined and documented by joint agreement with the employee's agency or university and the school.

(b) The 24 hours of paid leave shall be credited to employees on January 1 of each year, unless they choose the tutoring/mentoring option. New employees shall be credited with leave immediately upon their employment, prorated at two hours per month for the remainder of the calendar year.

Authority G.S. 126-4.

25 NCAC 01E .1604 USES OF COMMUNITY SERVICE LEAVE

Community service leave may be used for:

- (1) meeting with a teacher or administrator concerning the employee's child;
- (2) attending any function sponsored by the school in which the employee's child is participating. This provision shall only be utilized in conjunction with nonathletic programs that are a part or supplement to the school's academic or artistic program;
- (3) donating time to perform school-approved volunteer work approved by a teacher, school administrator, or program administrator; or
- (4) donating time to perform a service for a community service organization. It does not include attendance or participation in an event in which no service is performed.

Authority G.S. 126-4.

25 NCAC 01E .1605 AGENCY POLICY

Each agency shall set forth a policy and procedure that shall be administered consistently and shall include:

- (1) Employees must receive approval from their supervisor to use this leave. The agency may require that the leave be taken at a time other than the one requested, based on the needs of the agency. The agency may require acceptable proof that leave taken is within the purpose of this policy.
- (2) If an employee transfers to another State agency, any balance of the community service leave not used shall be transferred to the new agency.
- (3) Leave not taken in a calendar year is forfeited; it shall not be carried over into the next calendar year.
- (4) Employees shall not be paid for this leave upon separation from State government.
- (5) Supervisors who approve community service leave shall maintain records indicating the number of employees involved and the number of hours used.

Authority G.S. 126-4.

25 NCAC 01E .1606 ADDITIONAL TIME FOR COMMUNITY SERVICE ACTIVITIES

The agency may allow an employee additional time away from regular duties above the 24 hours of paid leave to perform significant community service activities with provisions for the employee to make up the time.

Authority G.S. 126-4.

25 NCAC 01E .1607 SPECIAL LEAVE PROVISIONS

(a) Emergency Services.

- (1) Agency heads are authorized to establish a policy providing time off with pay to employees participating in volunteer emergency and rescue services within a limited area around their workstation. Each agency head is responsible for determining that a bonafide need for such services exists within a given area. A bonafide need should be defined as real or eminent danger to life or property.
- (2) Each policy should require sufficient proof of the employee's membership in an emergency volunteer organization and that the performance of such emergency services will not unreasonably hinder agency activity for which the employee is responsible.

(b) Blood and Bone Marrow Donorship - Employees are encouraged to use the privilege and opportunity to participate in life giving through blood and bone marrow donorship. Participating employees shall be given reasonable time off with pay for whole blood donation, pheresis procedure and bone marrow transplant.

Authority G.S. 126-4.

Notice is hereby given in accordance with G.S. 150B-21.2 that the State Personnel Commission intends to amend the rules cited as 25 NCAC 01I .2302-.2304, .2306-.2308, .2310. Notice of Rule-making Proceedings was published in the Register on August 15, 2000.

Proposed Effective Date: April 1, 2001

Public Hearing:

Date: November 16, 2000

Time: 10:00 a.m.

Location: 116 W. Jones St., Third Floor Conference Room, Administration Building, Raleigh, NC

Reason for Proposed Action: These rules propose new language which provides for a "Designated Management Representative" to conduct a predisciplinary conference as a result of unsatisfactory job performance or unacceptable personal conduct. This proposed amendment has already been applied to existing rules for state employees subject to the State Personnel Act. These rules are also proposed to be amended in order to be consistent with the legislation passed by the General Assembly, SB 78 Unlawful Workplace Harassment. SB 78 added new grounds for a contested case hearing to those listed in G.S. 126-34.1.

Comment Procedures: Written comments may be submitted to Mr. Patrick McCoy, Hearing Officer, Office of State Personnel, 1331 Mail Service Center, Raleigh, NC 27699-1331. Oral comments will be received at the public hearing. Written comments must be received no later than November 15, 2000.

Fiscal Impact

- State
Local
Substantive (>=\$5,000,000)
None

CHAPTER 1 - OFFICE OF STATE PERSONNEL

SUBCHAPTER II - SERVICE TO LOCAL GOVERNMENT

SECTION .2300 - DISCIPLINARY ACTION: SUSPENSION, DISMISSAL AND APPEALS

25 NCAC 01I .2302 DISMISSAL FOR UNSATISFACTORY PERFORMANCE OF DUTIES

(a) Unsatisfactory Job Performance is work related performance that fails to satisfactorily meet job requirements as specified in the relevant job description, work plan or as directed by the management of the work unit or agency.
(b) The intent of this Section is to assist and promote improved employee performance, rather than to punish. This Rule covers all types of performance-related inadequacies. This Section does not require that successive disciplinary actions all concern the same type of unsatisfactory performance. Disciplinary actions related to personal conduct may be included in the successive system for performance-related dismissal provided that the employee receives at least the number of disciplinary actions, regardless of the basis of the disciplinary actions, required for dismissal on the basis of inadequate performance. Disciplinary actions administered under this Section are intended to bring about a permanent improvement in job performance. Should the

required improvement later deteriorate, or other inadequacies occur, the supervisor may deal with this new unsatisfactory performance with further disciplinary action.

(c) In order to be dismissed for a current incident of unsatisfactory job performance, an employee must first receive at least two prior disciplinary: First, one or more written warnings; followed by a warning or other disciplinary action which notifies the employee that failure to make the required performance improvements may result in dismissal.

(d) Prior to the decision to dismiss an employee, the agency director or designated management representative must conduct a pre-dismissal conference with the employee in accordance with the procedural requirements of the Section.

(e) An employee who is dismissed must receive written notice of the specific reasons for the dismissal as well as notice of any applicable appeal rights.

(f) Failure to give specific written reasons for the dismissal, failure to give written notice of applicable appeal rights, or failure to conduct a pre-dismissal conference constitute procedural violations with remedies as provided for in 25 NCAC 1B.0432. Time limits for filing a grievance do not start until the employee receives written notice of any applicable appeal rights.

Authority G.S. 126-4; 126-35.

25 NCAC 01I .2303 DISMISSAL FOR GROSSLY INEFFICIENT JOB PERFORMANCE

(a) Gross Inefficiency (Grossly Inefficient Job Performance) occurs in instances in which the employee fails to satisfactorily perform job requirements as specified in the job description, work plan, or as directed by the management of the work unit or agency and that failure results in:

- (1) the creation of the potential for death or serious harm to a client(s), an employee(s), members of the public or to a person(s) over whom the employee has responsibility; or
(2) The loss of or damage to agency property or funds that result in a serious impact on the agency and/or work unit.

(b) Dismissal on the basis of grossly inefficient job performance is administered in the same manner as for unacceptable personal conduct. Employees may be dismissed on the basis of a current incident of grossly inefficient job performance without any prior disciplinary action.

(c) Prior to dismissal of an employee with permanent status on the basis of grossly inefficient job performance, there shall be a pre-dismissal conference between the employee and the agency director or designated management representative. This conference shall be held in accordance with the provisions of 25 NCAC II .2308.

(d) Dismissal for grossly inefficient job performance requires written notification to the employee. Such notification must include specific reasons for the dismissal and notice of the employee's right of appeal.

(e) Failure to give specific written reasons for the dismissal, failure to give written notice of applicable appeal rights, or failure to conduct a pre-dismissal conference constitute procedural violations with remedies as provided for in 25 NCAC

PROPOSED RULES

1B .0432. Time limits for filing a grievance do not start until the employee receives written notice of any applicable appeal rights.

Authority G.S. 126-4(7a).

25 NCAC 01I .2304 DISMISSAL FOR PERSONAL CONDUCT

- (a) Employees may be dismissed for a current incident of unacceptable personal conduct.
- (b) Unacceptable personal conduct is:
 - (1) conduct for which no reasonable person should expect to receive prior warning; or
 - (2) job related conduct which constitutes violation of state or federal law; or
 - (3) conviction of a felony or an offense involving moral turpitude that is detrimental to or impacts the employee's service to the agency; or
 - (4) the willful violation of known or written work rules; or
 - (5) conduct unbecoming an employee that is detrimental to the agency's service; or
 - (6) the abuse of client(s), patient(s), student(s) or a person(s) over whom the employee has charge or to whom the employee has a responsibility, or of an animal owned or in the custody of the agency; or
 - (7) falsification of an employment application or other employment documentation; or
 - (8) Insubordination which is the willful failure or refusal to carry out a reasonable order from an authorized supervisor. Insubordination is considered unacceptable personal conduct for which any level of discipline, including dismissal, may be imposed without prior warning; or
 - (9) Absence from work after all authorized leave credits and benefits have been exhausted.
- (c) Prior to dismissal of an employee with permanent status on the basis of unacceptable personal conduct, there shall be a pre-dismissal conference between the employee and the agency director or designated management representative. This conference shall be held in accordance with the provisions of 25 NCAC 1I .2308.
- (d) Dismissals for unacceptable job performance require written notification to the employee. Such notification must include specific reasons for the dismissal and notice of the employee's right of appeal.
- (e) Failure to give specific written reasons for the dismissal, failure to give written notice of applicable appeal rights, or failure to conduct a pre-dismissal conference constitute procedural violations with remedies as provided for in 25 NCAC 1B .0432. Time limits for filing a grievance do not start until the employee receives written notice of any applicable appeal rights.

Authority G.S. 126-4; 126-34.

25 NCAC 01I .2306 DISCIPLINARY SUSPENSION WITHOUT PAY

- (a) An employee may be suspended without pay for disciplinary purposes for unsatisfactory job performance after the receipt of at least one prior disciplinary action or for causes relating to any form of unacceptable personal conduct or grossly inefficient job

performance. A disciplinary suspension without pay for an employee who is subject to the overtime compensation provisions of the Fair Labor Standards Act (FLSA) must be for at least one full week, but not more than two full work weeks. Prior to placing any employee on disciplinary suspension without pay the agency director or designated management representative shall conduct a pre-suspension conference with the employee in accordance with the procedural requirements of this Section. An employee who has been suspended without pay must be furnished a statement in writing setting forth the specific acts or omissions that are the reasons for the suspension and the employee's appeal rights.

- (b) An agency has the option of imposing the same periods of disciplinary suspension without pay for all employees as long as the period is the same as for employees exempt from the overtime provisions of the FLSA as set forth in this Section.

Authority G.S. 126-4(6); 126-35.

25 NCAC 01I .2307 DEMOTION

- (a) Any employee may be demoted as a disciplinary measure. Demotion may be made on the basis of either unsatisfactory or grossly inefficient job performance or unacceptable personal conduct.
- (b) Unsatisfactory Job Performance. An employee may be demoted for unsatisfactory job performance after the employee has received at least one prior disciplinary action.
- (c) Grossly Inefficient Job Performance. An employee may be demoted for grossly inefficient job performance without any prior disciplinary action.
- (d) Personal Conduct. An employee may be demoted for unacceptable personal conduct without any prior disciplinary action.
- (e) An employee who is demoted must receive written notice of the specific reasons for the demotion, as well as notice of any applicable appeal rights.
- (f) Disciplinary demotions may be accomplished in three ways:
 - (1) The employee may be demoted to a lower pay grade with a reduction in salary rate as long as the new salary rate does not exceed the maximum of the salary range for the new lower pay grade;
 - (2) The employee may be demoted to a lower pay grade without a reduction in salary rate as long as the new salary rate does not exceed the maximum of the salary range for the new lower pay grade; or
 - (3) The employee may be demoted while retaining the same pay grade with a reduction in salary rate. In no event shall an employee's salary rate be reduced to less than the minimum salary rate for the applicable pay grade or the special entry rate, if in effect.
- (g) Prior to the decision to demote an employee for disciplinary reasons, the agency director or designated management representative must conduct a pre-demotion conference with the employee in accordance with the procedural requirements of this Section.

Authority G.S. 126-4(3).

25 NCAC 01I .2308 PROCEDURAL

PROPOSED RULES

REQUIREMENTS

The following procedural requirements must be followed to issue disciplinary action under this Section:

- (1) **WRITTEN WARNING**-to issue a written warning to an employee a supervisor must issue the employee a written warning, detailing the matters referenced in 25 NCAC II .2305, and including any applicable appeal rights.
- (2) **DISCIPLINARY SUSPENSION WITHOUT PAY**-to place an employee on disciplinary suspension without pay, the agency director or designated management representative must comply with the following procedural requirements:
 - (a) In matters of unsatisfactory job performance, insure that the employee has received at least one prior disciplinary action. In matters of grossly inefficient job performance or unacceptable personal conduct no prior disciplinary actions are required so an employee may be suspended without pay for a current incident of grossly inefficient job performance or unacceptable personal conduct;
 - (b) Schedule and conduct a pre-suspension conference. Advance oral or written notice of the appropriate disciplinary conference must be given to the employee of the time, location, and the issue for which discipline has been recommended. The amount of advance notice shall be as much as is practical under the circumstances;
 - (c) Furnish the employee a statement in writing setting forth the specific acts or omissions that are the reasons for the suspension;
 - (d) Advise the employee of any applicable appeal rights in the document affecting the suspension.
- (3) **DEMOTION** – to demote an employee the agency director or designated management representative must comply with the following procedural requirements:
 - (a) In matters of unsatisfactory job performance, insure that the employee has received at least one prior disciplinary action;
 - (b) In matters of grossly inefficient job performance or unacceptable personal conduct, there is no requirement for previous disciplinary action, so an employee may be demoted for a current incident of grossly inefficient job performance or unacceptable personal conduct without any prior disciplinary action;
 - (c) Give an advance oral or written notice of the appropriate pre-disciplinary conference to the employee of the time, location, and the issue for which discipline has been recommended. The amount of advance notice shall be as much as is practical under the circumstances;
 - (d) Give an employee who is demoted written notice of the specific acts or omissions that are the reasons for the demotion;
 - (e) Advise the employee of how and to what extent the demotion will affect the employee's salary rate or pay grade; and
 - (f) Advise the employee of any applicable appeal rights in the document affecting the demotion.
- (4) **DISMISSAL**-Before an employee may be dismissed, an agency must comply with the following procedural requirements:
 - (a) The supervisor recommending dismissal shall discuss the recommendation with the agency director or designated management representative who shall conduct a pre-dismissal conference with the employee. The person conducting the pre-dismissal conference must have the authority to decide what, if any, disciplinary action shall be imposed on the employee.
 - (b) The supervisor or designated management representative shall schedule a pre-dismissal conference with the employee.
 - (c) Give an advance oral or written notice of the appropriate pre-disciplinary conference to the employee of the time, location, and the issue for which discipline has been recommended. The amount of advance notice shall be as much as is practical under the circumstances;
 - (d) The agency director or designated management representative shall conduct a pre-dismissal conference with the employee, limiting attendance to the employee and the person conducting the conference; a second management representative may be present at management's discretion. The purpose of the pre-dismissal conference is to review the recommendation for dismissal with the affected employee and to listen to and to consider any information put forth by the employee, in order to insure that a dismissal decision is sound and not based on misinformation or mistake. Security personnel may be present when, in the discretion of the person conducting the conference, a need for security exists. No attorney representing either side may attend the conference.
 - (e) In the conference, management shall give the employee oral or written notice of the recommendation for dismissal, including specific reasons for the proposed dismissal and a summary of the information supporting that recommendation. The employee shall have an opportunity to respond to the proposed dismissal action and to offer information or arguments in support of the employee's position. Every effort shall be made by management to assure that the employee has a full opportunity during the conference to set forth any available information in opposition to the recommendation to dismiss prior to the end of the conference. This opportunity does not include the option to present witnesses.
 - (f) Following the conference, management shall review and consider the response of the employee and reach a decision on the proposed recommendation. If management's decision is to dismiss the employee, a written letter of dismissal containing the specific reasons for dismissal, the

PROPOSED RULES

effective date of the dismissal and the employee's appeal rights shall be issued to the employee in person or by certified mail, return receipt requested, to the last known address of the employee. To minimize the risk of dismissal upon erroneous information, and to allow time following the conference for management to review all necessary information, the decision to dismiss should not be communicated to the employee in accordance with the Sub-item, prior to the beginning of the next business day following the conclusion of the pre-dismissal conference or after the end of the second business day following the completion of the pre-dismissal conference.

- (g) The effective date of a dismissal for unsatisfactory job performance shall be determined by management. An employee with permanent status who is dismissed for unsatisfactory job performance may, at management's discretion, be given up to two weeks working notice of his dismissal. Instead of providing up to two weeks working notice and at the discretion of management an employee may be given up to two weeks pay in lieu of working notice. Such working notice or pay in lieu of notice is applicable only to dismissal for unsatisfactory job performance. The effective date of the dismissal shall not be earlier than the letter of dismissal nor more than 14 calendar days after the notice of dismissal.

Authority G.S. 126-35; 126-36; 126-38; 150B, Article 3, 150B-23.

25 NCAC 01I .2310 APPEALS

(a) An employee with permanent status who has been demoted, suspended or dismissed shall have 15 calendar days from the date of his receipt of written notice of such action to file an appeal with his agency or county grievance procedure, whichever is applicable. Grievances which do not allege discrimination must follow the agency or county grievance procedure. An appeal of a final agency decision must be filed in accordance with G.S. 150B-23 within 30 calendar days of receipt of the final agency decision. Grievances which allege unlawful workplace harassment must be submitted in writing to agency management, within 30 calendar days of the alleged harassing action, and the agency must be given 60 calendar days in which to take appropriate remedial action, if any, unless the agency has waived the 60-day period, and the employee has acknowledged such waiver. The acknowledgement and waiver shall be in writing. An appeal to the State Personnel Commission of unlawful workplace harassment must be filed with the Office of Administrative Hearings in accordance with G.S. 150B-23 and within 30 calendar days of written notification of the remedial action, if any, taken by the agency.

(b) Grievances which allege discrimination not including unlawful workplace harassment may at the election of the employee, proceed through the agency or county procedure or proceed directly to the State Personnel Commission (SPC) for a hearing by the Office of Administrative Hearings (OAH) and a

decision by the SPC. A direct appeal to the SPC (such appeal involving a contested case hearing by the OAH and a recommended decision by that agency to the SPC) alleging discrimination not including unlawful workplace harassment must be filed in accordance with G.S. 150B-23 and must be filed within 30 calendar days of receipt of notice of the alleged discriminatory act.

(c) Grievances filed on an untimely basis (see G.S. 126-35, G.S. 126-36, and G.S. 126-38) must be dismissed. Allegations of discrimination, if raised more than 30 calendar days after the party alleging discrimination became aware or should have become aware of the alleged discrimination, must be dismissed. Grievances alleging unlawful workplace harassment raised more than 30 calendar days after written notification of the remedial action, if any, taken by the agency must be dismissed.

Authority G.S. 126-35; 126-36; 126-38; 150B, Article 3.

TITLE 26 – DEPARTMENT OF ADMINISTRATIVE HEARINGS

Notice is hereby given in accordance with G.S. 150B-21.2 that the Office of Administrative Hearings – Hearings Division intends to amend the rules cited as 26 NCAC 03 .0101, .0105, .0107, .0120, .0127, .0129, .0202-.0208. Notice of Rule-making Proceedings was published in the Register on August 15, 2000.

Proposed Effective Date: April 1, 2001

Public Hearing:

Date: November 2, 2000

Time: 9:30 a.m.

Location: Lee House, 422 N. Blount St., Raleigh, NC 27604

Reason for Proposed Action: Amended rules implanting Statewide Mediated Settlement Conferences in Superior Court Civil Action adopted by North Carolina Supreme Court on September 1, 2000.

Comment Procedures: The public is invited to attend the public hearing and submit comments. Written comments may be submitted through November 15, 2000 to Ms. Carol Johnson, Rule-making Coordinator, Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, 424 N. Blount St., Raleigh, NC 27604.

Fiscal Impact

- State
- Local
- Substantive (≥\$5,000,000)
- None

CHAPTER 3 – HEARINGS DIVISION

SECTION .0100 – HEARING PROCEDURES

26 NCAC 03 .0101 GENERAL

PROPOSED RULES

Governed by the principles of fairness, uniformity, and punctuality, the following general rules apply:

- (1) The Rules of Civil Procedure as contained in G.S. 1A-1, the General Rules of Practice for the Superior and District Courts as authorized by G.S. 7A-34 and found in the Rules Volume of the North Carolina General Statutes ~~and Canons 1, 2 and 3 of the Code of Judicial Conduct adopted in accordance with G.S. 7A-10.1~~ shall apply in contested cases in the Office of Administrative Hearings (OAH) unless another specific statute or rule of the Office of Administrative Hearings provides otherwise.
- (2) The Office of Administrative Hearings may supply, at the cost of reproduction, forms for use in contested cases. These forms shall conform to the format of the Administrative Office of the Courts' Judicial Department Forms Manual.
- (3) The Office of Administrative Hearings shall permit the filing of contested case documents and other pleadings by facsimile (fax) or electronic transmission during regular business hours. The faxed or electronic documents shall be deemed a "filing" within the meaning of 26 NCAC 3 .0102(a)(2) provided the original document and one copy is received by OAH within five business days following the faxed or electronic transmission. Electronic transmissions submitted for filing under Item (3) of this Rule with OAH shall use the electronic forms available on the Office of Administrative Hearings internet web site: <http://www.oah.state.nc.us/>. Other electronic transmissions, for example, electronic mail, shall not constitute a valid filing with the OAH under this Rule.
- (4) Electronic transmissions filed by licensed North Carolina attorneys shall be in accordance with the *Electronic Commerce Act*, G.S. 66, Article 11A. Attorneys shall register for an account on the Office of Administrative Hearings internet web site: <http://www.oah.state.nc.us/>. Electronic filings submitted under Item (4) of this Rule shall be deemed an original "filing" within the meaning of 26 NCAC 3 .0102(a)(2). Electronic transmissions submitted for filing under Item (4) of this Rule with the OAH shall use the electronic forms available on the Office of Administrative Hearings internet web site. Other electronic transmissions, for example, electronic mail, shall not constitute a valid filing with the OAH under this Rule.
- (5) Every pleading and other documents filed with OAH shall be signed by the attorney who prepared the document, if it was prepared by an attorney, and shall contain his name, address, telephone number, and North Carolina State Bar number. An original and one copy of each document shall be filed.
- (6) Except as otherwise provided by statutes or by rules adopted under G.S. 150B-38(h), the rules contained in this Chapter shall govern the conduct of contested case hearings under G.S. 150B-40 when an Administrative Law Judge has been assigned to preside in the contested case.

Authority G.S. 7A-750; 7A-751(a); 150B-40(c).

26 NCAC 03 .0105 DUTIES OF THE ADMINISTRATIVE LAW JUDGE

In conjunction with the powers of administrative law judges prescribed by G.S. 150B-33 and G.S. 150B-36, the administrative law judge shall perform the following duties, consistent with law:

- (1) Hear and rule on motions;
- (2) Grant or deny continuances;
- (3) Issue orders regarding prehearing matters, including directing the appearance of the parties at a prehearing conference;
- (4) Examine witnesses when deemed necessary to make a complete record and to aid in the full development of material facts in the case;
- (5) Make preliminary, interlocutory, or other orders as deemed appropriate;
- (6) ~~Recommend a summary disposition of the case or any part thereof when there is no genuine issue as to any material fact or recommend~~ Grant dismissal when the case or any part thereof has become moot or for other reasons; and
- (7) Apply sanctions in accordance with Rule .0114 of this Section.

Authority G.S.; 8C-1, Rule 614; 7A-751(a); 150B-33; 150B-36.

26 NCAC 03 .0107 SETTLEMENT CONFERENCE

- (a) A settlement conference is for the primary purpose of assisting the parties in resolving disputes and for the secondary purpose of narrowing the issues and preparing for hearing.
- (b) A settlement conference shall be held at the request of any party, the administrative law judge, or the Chief Administrative Law Judge. Upon receipt of the request, the Chief Administrative Law Judge shall assign the case to another administrative law judge for the purpose of conducting a settlement conference. Unless both parties and the administrative law judge agree, a unilateral request for a settlement conference will not constitute good cause for a continuance. The conference shall be conducted at a time and place agreeable to all parties and the administrative law judge. It shall be conducted by telephone if any party would be required to travel more than 50 miles to attend, unless that party agrees to travel to the location set for the conference. If a telephone conference is scheduled, the parties must be available by telephone at the time of the conference.
- (c) All parties shall attend or be represented at a settlement conference under the same requirements as provided for in a mediation settlement conference under Rule .0204(a) of this Chapter. Parties or their representatives shall be prepared to participate in settlement discussions.
- (d) The parties shall discuss the possibility of settlement before a settlement conference if they believe that a reasonable basis for settlement exists.
- (e) At the settlement conference, the parties shall be prepared to provide information and to discuss all matters required in Rule .0104 of this Section.

PROPOSED RULES

(f) If, following a settlement conference, a settlement has not been reached but the parties have reached an agreement on any facts or other issues, the administrative law judge presiding over the settlement conference shall issue an order confirming and approving, if necessary, those matters agreed upon. The order is binding on the administrative law judge who is assigned to hear the case.

Authority G.S. 7A-751(a); 150B-22; 150B-31(b).

26 NCAC 03 .0120 RIGHTS AND RESPONSIBILITIES OF PARTIES

(a) All parties shall have the right to present evidence, rebuttal testimony, and argument with respect to the issues of law and policy, and to cross-examine witnesses, including the author of a document prepared by, on behalf of, or for use of the agency and offered in evidence.

(b) A party shall have all evidence to be presented, both oral and written, available on the date for hearing. Requests for subpoenas, depositions, or continuances shall be made within a reasonable time after their need becomes evident to the requesting party. In cases when the hearing time is expected to exceed one day, the parties shall be prepared to present their evidence at the date and time ordered by the administrative law judge or agreed upon at a prehearing conference.

(c) The administrative law judge shall send copies of all orders or decisions to all parties simultaneously. Any party sending a letter, exhibit, brief, memorandum, or other document to the administrative law judge shall simultaneously send a copy to all other parties.

(d) All parties have the continuing responsibility to notify the Office of Administrative Hearings of their current address and telephone number.

(e) A party need not be represented by an attorney. If a party has notified other parties of that party's representation by an attorney, all communications shall be directed to that attorney.

(f) With ~~the approval of~~ prior notice to the administrative law judge, any person may offer testimony or other evidence relevant to the case. Any nonparty offering testimony or other evidence may be questioned by parties to the case and by the administrative law judge.

(g) Prior to issuing a ~~recommended~~ decision, the administrative law judge may order any party to submit proposed findings of fact and written arguments.

Authority G.S. 7A-751(a); 150B-25; 150B-33; 150B-34.

26 NCAC 03 .0127 ADMINISTRATIVE LAW JUDGE'S DECISION

(a) An administrative law judge shall issue a ~~recommended~~ decision or order in a contested case within 45 days after the later of the date the administrative law judge receives any proposed findings of fact and written arguments submitted by the parties and the date the contested case hearing ends. The administrative law judge shall serve a copy of the decision on each party. When an administrative law judge issues a ~~recommended~~ decision, the Office of Administrative Hearings shall promptly serve a copy of the official record on the agency making the final decision by hand delivery or certified mail.

(b) ~~A recommended~~ An administrative law judge's decision shall be based exclusively on:

- (1) competent evidence and arguments presented during the hearing and made a part of the official record;
- (2) stipulations of fact;
- (3) matters officially noticed;
- (4) any proposed findings of fact and written arguments submitted by the parties under Paragraph (g) of Rule .0119 of this Section; and
- (5) other items in the official record that are not excluded by G.S. 150B-29(b).

(c) ~~A recommended~~ An administrative law judge's decision shall fully dispose of all issues required to resolve the case and shall contain:

- (1) ~~an appropriate~~ a caption;
- (2) the appearances of the parties;
- (3) a statement of the issues;
- (4) references to specific statutes or rules at issue;
- (5) findings of fact;
- (6) conclusions of law based on the findings of fact and applicable constitutional principles, statutes, rules, or federal regulations;
- (7) in the discretion of the administrative law judge, a memorandum giving reasons for his findings of fact and conclusions of law;
- (8) a statement identifying the agency that will make the final decision; and
- (9) a statement that each party has the right to file exceptions to the ~~recommended~~ administrative law judge's decision with the agency making the final decision and has the right to present written arguments on the decision to the agency making the final decision.

(d) For good cause shown, the chief administrative law judge may extend the 45-day time limit for issuing a ~~recommended~~ decision. An administrative law judge who needs an extension must submit a request for extension to the chief administrative law judge before the 45-day period has expired.

Authority G.S. 7A-751(a); 150B-34.

26 NCAC 03 .0129 RECONSIDERATION OR REHEARING

After an administrative law judge issues a ~~recommended~~ decision in a contested case, the administrative law judge loses jurisdiction to amend the decision except to correct clerical or mathematical errors.

Authority G.S. 7A-750; 7A-751(a); 150B-34.

SECTION .0200 – MEDIATION SETTLEMENT CONFERENCE

26 NCAC 03 .0202 SELECTION OF MEDIATOR

(a) Selection of Certified Mediator by Agreement of Parties. The parties may select a certified mediator by agreement within 21 days of the Chief Administrative Law Judge's order. The petitioner's attorney shall file with the Office of Administrative Hearings a Notice of Selection of Mediator by Agreement within 21 days of the Chief Administrative Law Judge's order. Such

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notice shall include: the name, address and telephone number of the mediator selected; the rate of compensation of the mediator; the agreement of the parties as to the selection of the mediator and rate of compensation; and whether or not the mediator is certified.

(b) **Nomination and the Office of Administrative Hearings Approval of a Non-Certified Mediator.** The parties may select a mediator who is not certified but who, in the opinion of the parties and the presiding Administrative Law Judge, is otherwise qualified by training or experience to mediate all or some of the issues in the action and who agrees to mediate indigent cases without pay. If the parties select a non-certified mediator, the petitioner's attorney shall file with the presiding Administrative Law Judge a Nomination of Non-Certified Mediator within 21 days of the Chief Administrative Law Judge's order. Such nomination shall include: the name, address and telephone number of the mediator; the training, experience or other qualifications of the mediator; the rate of compensation of the mediator; and the agreement of the parties as to the selection of the mediator and rate of compensation. The presiding Administrative Law Judge shall rule on the nomination without a hearing, shall approve or disapprove of the parties' nomination and shall notify the parties of the presiding Administrative Law Judge's decision.

(c) **Appointment of Mediator by the presiding Administrative Law Judge.** If the parties cannot agree upon the selection of a mediator, the petitioner's attorney shall so notify the presiding Administrative Law Judge and request, on behalf of all parties, that the presiding Administrative Law Judge appoint a mediator. The motion must be filed within 21 days of the date of the Chief Administrative Law Judge's order and shall state that the attorneys for the parties have had a full and frank discussion concerning the selection of a mediator and have been unable to agree. The motion shall state whether any party prefers a certified attorney mediator, and if so, the presiding Administrative Law Judge shall appoint a certified attorney mediator. The motion may state that all parties prefer a certified non-attorney mediator, and if so, the presiding Administrative Law Judge shall appoint a certified non-attorney mediator. If no preference is expressed, the presiding Administrative Law Judge may appoint a certified attorney mediator or a certified non-attorney mediator. Upon receipt of a motion to appoint a mediator, or in the event the petitioner's attorney has not filed a Notice of Selection or Nomination of Non-Certified Mediator with the presiding Administrative Law Judge within 21 days of the Chief Administrative Law Judge's order, the presiding Administrative Law Judge shall appoint a certified mediator. Only mediators who agree to mediate indigent cases without pay shall be appointed.

(d) **Mediator Information Directory.** To assist the parties in the selection of a mediator by agreement, the Office of Administrative Hearings shall prepare and keep current a list of certified mediators who wish to mediate contested cases. The list shall be kept in the Office of Administrative Hearings and made available to the parties upon request.

(e) **Disqualification of Mediator.** Any party may move for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected by the parties or appointed by the

presiding Administrative Law Judge pursuant to this Rule. Nothing in this Paragraph shall preclude mediators from disqualifying themselves.

Authority G.S. 7A-751(a); 150B-23.1.

26 NCAC 03 .0203 MEDIATION SETTLEMENT CONFERENCE

(a) **Where Conference is to be Held.** Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in the courthouse or other public building in the county where the contested case is pending. The mediator shall ~~be responsible for reserving a place and making~~ reserve a place and make arrangements for the conference and ~~for giving~~ give timely notice to all attorneys and unrepresented parties of the time and location of the conference.

(b) **When Conference is to be Held.** The Chief Administrative Law Judge's order issued pursuant to Paragraph (b) of Rule .0201 of this Section shall clearly state a date of completion for the conference. Such date shall not be less than 90 days or more than 120 days after the issuance of the Chief Administrative Law Judge's order. The Chief Administrative Law Judge may shorten these time limits in order to meet statutorily imposed deadlines for the hearing of certain types of contested cases.

(c) **Request to Extend Date of Completion.** A party, or the mediator, may request the presiding Administrative Law Judge to extend the deadline for completion of the conference. Such request shall state the reasons the continuance is sought and shall be served by the moving party upon the other parties and the mediator. The presiding Administrative Law Judge may grant the request and enter an order setting a new date for the completion of the conference, which date may be set at any time prior to hearing. Such order shall be served upon the parties and the mediator.

(d) **Recesses.** The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set before the conference is recessed, no further notification is required for persons present at the recessed conference.

(e) **The Mediated Settlement Conference Is Not To Delay Other Proceedings.** The mediated settlement conference shall not be cause for the delay of other proceedings in the contested case, including the completion of discovery, the filing or hearing of motions, or the hearing of the contested case, except by order of the presiding Administrative Law Judge.

Authority G.S. 7A-751(a); 150B-23.1.

26 NCAC 03 .0204 DUTIES OF PARTIES, REPRESENTATIVES, AND ATTORNEYS

(a) **Attendance.** The following persons shall physically attend a mediated settlement conference:

- (1) All individual parties; or an officer, employee of a party who is not a natural person or agent who is not such party's outside counsel and who has been authorized to decide on behalf of such party whether and or what terms to settle the contested case; ~~having authority to settle the claim for a corporate party;~~ or in the case of a governmental ~~agency~~ entity, an employee or agent who

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~~is not such party's outside counsel and who has authority to decide on behalf of such party whether and what terms to settle the contested case; provided if under law proposed settlement terms can be approved only by a Board, the representative shall have authority to negotiate on behalf of the party and to make a recommendation to that Board. a representative of that agency with full authority to negotiate on behalf of the agency and to recommend settlement to the appropriate decision making body of the agency; and~~

- ~~(2) The party's counsel of record, if any; At least one counsel of record for each party or other participant whose counsel has appeared in the contested case; and~~
- (3) For any insured party against whom a claim is made, a representative of the insurance carrier who is not such carrier's outside counsel and who has ~~full~~ authority to ~~settle the claim~~ make a decision on behalf of such carrier or who has been authorized to negotiate on behalf of the carrier and can promptly communicate during the conference with persons who have such decision-making authority.

(b) Any party or person required to attend a mediated settlement conference shall physically attend until an agreement is reduced to writing and signed as provided in Paragraph (c) of this Rule or an impasse has been declared. Such party or person may have the attendance requirement excused or modified including the allowance of that party's or person's participation without physical attendance by order of the presiding Administration Law Judge, upon motion of a party and notice to all parties and persons required to attend and the mediator.

~~(b)(c) Finalizing Agreement. Upon reaching agreement, If an agreement is reached in the conference parties shall reduce the agreement its terms to writing and sign it along with their counsel. By stipulation of one or more of the parties and at their expense, the agreement may be electronically or stenographically recorded. A consent judgment, voluntary dismissal, dismissals, or withdrawal of petition shall be filed with the Office of Administrative Hearings by such persons as the parties shall designate.~~

~~(c)(d) Payment of Mediator's Fee. The parties shall pay the mediator's fee as provided by Rule .0207 of this Section.~~

Authority G.S.7A-751(a); 150B-23.1.

26 NCAC 03 .0205 SANCTIONS FOR FAILURE TO ATTEND

~~If a person fails to attend a duly ordered mediated settlement conference without good cause, the presiding Administrative Law Judge may impose upon the party or his principal any lawful sanction authorized by G.S. 150B-33(b)(8) or (10). If a party or other person required to attend a mediated settlement conference fails to attend without good cause, the presiding Administrative Law Judge may impose upon the party or person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference as authorized by G.S. 150B-33(b)(8) or (10). A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought.~~

The motion shall be served upon all parties and on any person against whom sanctions are being sought. If the presiding Administrative Law Judge imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

Authority G.S. 7A-751(a); 150B-23.1.

26 NCAC 03 .0206 AUTHORITY AND DUTIES OF MEDIATORS

(a) Authority of Mediator.

- (1) Control of Conference. The mediator shall at all times be in control of the conference and the procedures to be followed.
- (2) Private Consultation. The mediator may ~~meet and consult~~ communicate privately with any ~~party or parties~~ participant or ~~their~~ counsel prior to and during the conference. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the conference.
- (3) Scheduling the Conference. The mediator shall make a good faith effort to schedule the conference at a time that is convenient with the ~~parties, participants,~~ attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

(b) Duties of Mediator.

- (1) The mediator shall define and describe the following ~~to the parties~~ at the beginning of the conference:
 - (A) The process of mediation;
 - (B) The differences between mediation and other forms of conflict resolution;
 - (C) The costs of the mediated settlement conference;
 - (D) The ~~facts~~ fact that the mediated settlement conference is not a hearing, the mediator is not a judge, and the parties retain their right to a hearing if they do not reach settlement;
 - (E) The circumstances under which the mediator may ~~meet alone with either of the parties and~~ communicate privately with any of the parties or with any other person;
 - (F) Whether and under what conditions communications with the mediator will be held in confidence during the conference;
 - (G) The inadmissibility of conduct and statements as provided by Rule 408 of the North Carolina Rules of Evidence;
 - (H) The duties and responsibilities of the mediator and the ~~parties; participants;~~ and
 - (I) The ~~facts~~ fact that any agreement reached will be reached by mutual consent, ~~consent of the parties.~~
- (2) Disclosure. The mediator has a duty to be impartial and to advise all ~~parties~~ participants of any circumstances bearing on possible bias, prejudice or partiality.
- (3) Declaring Impasse. It is the duty of the mediator ~~to timely~~ timely to ~~determine, determine, when mediation is not viable,~~ that an impasse ~~exists~~ exists, or ~~that mediation should end, and that the conference should end.~~

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- (4) Reporting Results of Conference. The mediator shall file a written report with the parties and presiding Administrative Law Judge within 10 days as to whether or not agreement was reached by the parties. ~~If a full an agreement was reached, the report shall state whether the action will be concluded by consent judgment, voluntary dismissal, or withdrawal of petition and shall identify the persons designated to file such pleadings. If a full agreement is not reached, the report shall state the nature of any partial agreement and set out the terms of those matters agreed upon. The mediator's report shall inform the presiding Administrative Law Judge of the absence of any party, attorney, or insurance representative known to the mediator to have been absent from the mediated settlement conference without permission.~~ A copy of the Mediator's report shall also be provided to the Attorney General of North Carolina or his designee responsible for evaluating the mediation program pursuant to the 1993 N.C. Session Laws, c. 363, s. 2.
- (5) Scheduling and Holding the Conference. It is the duty of the mediator to schedule the conference and conduct it prior to the conference completion deadline set out in the Chief Administrative Law Judge's order. Deadlines for completion of the conference shall be strictly observed by the mediator unless said time limit is changed by a written order of the presiding Administrative Law Judge.

Authority G.S. 7A-751(a); 150B-23.1.

26 NCAC 03 .0207 COMPENSATION OF THE MEDIATOR

- (a) By Agreement. When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator.
- (b) By Order. When the mediator is appointed by the Office of Administrative Hearings, the mediator shall be compensated by the parties at the uniform hourly rate and a one-time, per contested case, administrative fee, due upon appointment, as set by the Chief Administrative Law Judge. The Chief Administrative Law Judge will set the rate at the same rate set by Rule 7 of the Rules of the North Carolina Supreme Court Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions.
- (c) Change of Appointed Mediator. Pursuant to Rule .0202 of this Section, the parties have 21 days to select a mediator. Parties who fail to select a mediator within that time frame and then desire a substitution after the presiding Administrative Law Judge has appointed a mediator, shall obtain approval from the presiding Administrative Law Judge for the substitution. If the presiding Administrative Law Judge approves the substitution, the parties shall pay the presiding Administrative Law Judge's original appointee the one time, per case administrative fee provided for in Paragraph (b) of this Rule.
- ~~(e)(d)~~ Indigent Cases. No party found to be indigent by the presiding Administrative Law Judge for the purposes of these Rules shall be required to pay a mediator ~~appointed or selected pursuant to these Rules~~ fee. Any mediator conducting a

settlement conference pursuant to these Rules shall waive the payment of fees from parties found by the presiding Administrative Law Judge to be indigent. Any party may move the presiding Administrative Law Judge for a finding of indigence and to be relieved of the obligation to pay that party's share of the mediator's ~~compensation fee~~. Such motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their contested case, subsequent to the conclusion of the contested case hearing but prior to the issuance of the Administrative Law Judge's ~~recommended or final~~ decision. The presiding Administrative Law Judge may take into consideration the outcome of the contested case. The presiding Administrative Law Judge shall enter an order granting or denying a party's request.

(e) Postponement Fees. As used in this Paragraph, the term "postponement" shall mean reschedule or not proceed with a settlement conference once a date for the settlement conference has been agreed upon and scheduled by the parties and the mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference. A conference may be postponed only after notice to all parties of the reason for the postponement, payment of a postponement fee to the mediator, and consent of the mediator and the opposing attorney. If a mediation is postponed within seven business days of the scheduled date, the fee shall be set at a rate established by the Chief Administrative Law Judge. Postponement fees shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Paragraph (b) of this Rule. The Chief Administrative Law Judge will set the rate at the same rate set by Rule 7 of the Rules of the North Carolina Supreme Court Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions.

~~(d)(f)~~ Payment of Compensation by Parties. Unless otherwise agreed to by the parties or ordered by the presiding Administrative Law Judge, ~~costs of the mediated settlement conference mediator's fee shall be paid: one share by the petitioner, one share by the respondent and an equal share by any intervenor paid in equal shares by the parties. For purposes of this Rule, multiple parties shall be considered one party when they are represented by the same counsel.~~ Parties obligated to pay a share of the costs shall pay them equally. Payment shall be due upon completion of the conference unless there is a pending motion for determination of indigency. In such case, payment shall be due upon a ruling on the motion.

Authority G.S. 7A-751(a); 150B-23.1.

26 NCAC 03 .0208 MEDIATOR

For purposes of this Section the term "certified mediator" shall mean a person who is currently certified as a mediator by the Administrative Office of the Courts pursuant to Rule 8 of ~~the North Carolina Supreme Court's~~ Rules of the North Carolina Supreme Court Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions, 329 N.C. 795, effective December 1, 1993 and as may be subsequently amended.

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Authority G.S. 7A-751(a); 150B-23.1.

This Section includes temporary rules reviewed by the Codifier of Rules and entered in the North Carolina Administrative Code and includes, from time to time, a listing of temporary rules that have expired. See G.S. 150B-21.1 and 26 NCAC 2C .0500 for adoption and filing requirements. Pursuant to G.S. 150B-21.1(e), publication of a temporary rule in the North Carolina Register serves as a notice of rule-making proceedings unless this notice has been previously published by the agency.

TITLE 10 – DEPARTMENT OF HEALTH & HUMAN SERVICES

Rule-making Agency: DHHS – Division of Medical Assistance

Rule Citation: 10 NCAC 26H .0212-.0213

Effective Date: September 21, 2000

Findings Reviewed and Approved by: Judge Melissa Owens Lassiter

Authority for the rulemaking: G.S. 108A-25(b); 108A-54; 108A-55; 42 C.F.R. 447, Subpart C

Reason for Proposed Action: This change is necessary to ensure the continuing availability of an adequate level of services to Medicaid and uninsured persons.

Comment Procedures: Written comments concerning this rule-making action must be submitted to Portia W. Rochelle, Rule-making Coordinator, Division of Medical Assistance, 1985 Umstead Drive, 2504 Mail Service Center, Raleigh, NC 27699-2504.

CHAPTER 26 - MEDICAL ASSISTANCE

SUBCHAPTER 26H - REIMBURSEMENT PLANS

SECTION .0200 - HOSPITAL INPATIENT REIMBURSEMENT PLAN

10 NCAC 26H .0212 EXCEPTIONS TO DRG REIMBURSEMENT

(a) Covered psychiatric and rehabilitation inpatient services provided in either specialty hospitals, Medicare recognized distinct part units (DPU), or other beds in general acute care hospitals shall be reimbursed on a per diem methodology.

(1) For the purposes of this Section, psychiatric inpatient services are defined as admissions where the primary reason for admission would result in the assignment of DRGs in the range 424 through 432 and 436 through 437.

For the purposes of this Section, rehabilitation inpatient services are defined as admissions where the primary reason for admissions would result in the assignment of DRG 462. All services provided by specialty rehabilitation hospitals are presumed to come under this definition.

(2) When a patient has a medically appropriate transfer from a medical or surgical bed to a psychiatric or

rehabilitative distinct part unit within the same hospital, or to a specialty hospital the admission to the distinct part unit or the specialty hospital shall be recognized as a separate service which is eligible for reimbursement under the per diem methodology.

Transfers occurring within general hospitals from acute care services to non-DPU psychiatric or rehabilitation services are not eligible for reimbursement under this Section. The entire hospital stay in these instances shall be reimbursed under the DRG methodology.

- (3) The per diem rate for psychiatric services is established at the lesser of the actual cost trended to the rate year or the calculated median rate of all hospitals providing psychiatric services as derived from the most recent as filed cost reports.
(4) Hospitals that do not routinely provide psychiatric services shall have their rate set at the median rate.
(5) The per diem rate for rehabilitation services is established at the lesser of the actual cost trended to the rate year or the calculated median rate of all hospitals providing rehabilitation services as derived from the most recent filed cost reports.
(6) Rates established under this Paragraph are adjusted for inflation consistent with the methodology under Rule .0211 Subparagraph (d)(5) of this Section.

(b) To assure compliance with the separate upper payment limit for State-operated facilities, the hospitals operated by the Department of Health and Human Services and all the primary affiliated teaching hospitals for the University of North Carolina Medical Schools shall be reimbursed their reasonable costs in accordance with the provisions of the Medicare Provider Reimbursement Manual. This Manual referred to as, (HCFA Publication #15-1) is hereby incorporated by reference including any subsequent amendments and editions. A copy is available for inspection at the Division of Medical Assistance, 1985 Umstead Drive, Raleigh, NC. Copies may be obtained from the U.S. Department of Commerce, National Technical Information Service, Subscription Department, 5285 Port Royal Road, Springfield, VA 22161 at a cost of one hundred forty seven dollars (\$147.00). Purchasing instructions may be received by calling (703) 487-4650. Updates are available for an additional fee. The Division shall utilize the DRG methodology to make interim payments to providers covered under this Paragraph, setting the hospital unit value at a level which can best be expected to approximate reasonable cost. Interim payments made under the DRG methodology to these providers shall be retrospectively settled to reasonable cost.

(c) When the Norplant contraceptive is inserted during an inpatient stay the current Medicaid fee schedule amount for the Norplant kit shall be paid in addition to DRG reimbursement. The additional payment for Norplant shall not be paid when a

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cost outlier or day outlier increment is applied to the base DRG payment.

(d) Hospitals operating Medicare approved graduate medical education programs shall receive a per diem rate adjustment which reflects the reasonable direct and indirect costs of operating these programs. The per diem rate adjustment shall be calculated in accordance with the provisions of Rule .0211 Paragraph (f) of this Section.

(e) Hospitals licensed by the State of North Carolina and reimbursed under the DRG methodology for more than 50 percent of their Medicaid inpatient discharges for the 12-month period ending September 30, ~~1999~~ 2000 shall be entitled to an additional payment for inpatient and outpatient hospital services in an amount determined by the Director of the Division of Medical Assistance, subject to the following provisions:

(1) To ensure that the payments authorized by this Subparagraph for qualified public hospitals that qualify under the criteria in Part (A) of this Subparagraph, do not exceed the upper limits established by 42 C.F.R. 447.272 and 42 C.F.R. 447.321, the maximum payments authorized for qualified public hospitals shall be determined for all such qualified public hospitals for the 12-month period ending September 30, ~~1998~~ 1999 by calculating the "Medicaid Deficit" for each hospital. The Medicaid Deficit shall be calculated by ascertaining the reasonable costs of inpatient and outpatient hospital Medicaid services; plus the reasonable direct and indirect costs attributable to inpatient and outpatient Medicaid services of operating Medicare approved graduate medical education programs; less Medicaid payments received or to be received for these services. For purposes of this Subparagraph:

(A) A qualified public hospital is a hospital that meets the other requirements of this Paragraph; and:

- (i) was owned or operated by a State (or by an instrumentality or a unit of government within a State) from September ~~16~~ 18 through and including September 30, ~~1999~~ 2000;
- (ii) verified its status as a public hospital by certifying State, local, hospital district or authority government control on the most recent version of Form HCFA-1514 filed with the Health Care Financing Administration, U.S. Department of Health and Human Services on or before September ~~16, 1999~~; 18, 2000; and
- (iii) files with the Division on or before September ~~16, 1999~~ 18, 2000 by use of a form prescribed by the Division a certificate of public expenditures to support a portion of the non-federal share of the payment it shall receive pursuant to this Subparagraph. This provision shall not apply to qualified public hospitals that are also designated by North Carolina as Critical Access Hospitals pursuant to 42 USC 1395i-4.

(B) Reasonable costs shall be ascertained in accordance with the provisions of the Medicare Provider Reimbursement Manual as defined in Paragraph (b) of this Rule.

(C) The phrase "Medicaid payments received or to be received for these services" shall exclude all Medicaid disproportionate share hospital payments received or to be received.

(2) Qualified public hospitals shall receive a payment under this Paragraph in an amount (including the public expenditures certified to the Division by each hospital for the non-federal share) not to exceed each hospital's Medicaid Deficit.

(3) Hospitals licensed by the State of North Carolina and reimbursed under the DRG methodology for more than 50 percent of their Medicaid inpatient discharges for the 12-months ending September 30, ~~1999~~ 2000 that are not qualified public hospitals as defined in this Paragraph shall be entitled to an additional payment under this Subparagraph for the Medicaid Deficit calculated in accordance with Subparagraph (1) of this Paragraph in an amount not to exceed the Medicaid Deficit.

(4) Payments authorized by this Paragraph shall be made solely on the basis of an estimate of costs incurred and payments received for inpatient and outpatient Medicaid services during the payment fiscal year ~~1999-2000~~. Subject to availability of funds the Director of the Division of Medical Assistance shall determine the amount of the estimated payments to be made by analysis of costs incurred and payments received for Medicaid services as reported on cost reports for fiscal year ending in ~~1998~~ 1999 filed before September ~~16, 1999~~ 18, 2000 and supplemented by additional financial information available to the Director when the estimated payments are calculated if and to the extent that the Director concludes that the additional financial information is reliable and relevant.

~~(5) To ensure that estimated payments pursuant to this Paragraph do not exceed the State aggregate upper limits to such payments established by applicable federal law and regulation (42 CFR 447.272), such payments shall be cost settled within 12 months of receipt of the completed cost report covering the 12-month period ending September 30, 1999, 2000. There shall be a separate cost settlement procedure for inpatient and outpatient hospital services. In addition, for both inpatient and outpatient hospital services, there shall be a separate cost settlement procedure for state-operated hospitals and for non-state operated hospitals.~~

(5) To ensure that estimated payments pursuant to Subparagraph (4) of this Paragraph do not exceed the state aggregate upper limits to such payments established by applicable federal law and regulation (42 C.F.R. 447.272 and 42 C.F.R. 447.321), such payments shall be cost settled within twelve months of receipt of the completed cost reports covering the 12-month period ending September 30, 2000 or December 31, 2001, whichever date is earliest. There shall be

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separate a cost settlement procedure for inpatient and outpatient hospital services. In addition for both inpatient and outpatient hospital services, there shall be a separate aggregate cost settlement pool for qualified public hospitals that are owned or operated by the State, for qualified public hospitals that are owned or operated by an instrumentality or unit of government within a State and for hospitals qualified for payment under this Paragraph that are not qualified public hospitals. As to each of these separate cost settlement procedures, if it should be determined that aggregate payments under this Paragraph exceed aggregate upper limits for such payments, any hospital that received payments under this Paragraph in excess of unreimbursed reasonable costs as defined in this Paragraph shall promptly refund its proportionate share of aggregate payments in excess of aggregate upper limits. The proportionate share of each such hospital shall be ascertained by calculating for each such hospital its percentage share of all payments to all members of the cost settlement group that are in excess of unreimbursed reasonable costs, and multiplying that percentage times the amount by which aggregate payments being cost settled exceed aggregate upper limits applicable to such payments. No additional payments shall be made in connection with these cost settlements.

(6) The payments authorized by this Paragraph shall be effective in accordance with G.S. 108A-55(c).

(f) Subject to the availability of funds, hospitals licensed by the State of North Carolina and reimbursed under the DRG methodology for more than 50 percent of their Medicaid inpatient discharges for any fiscal year ending September 30, commencing with September 30, 2000 that are not qualified public hospitals as defined in Part (e)(1)(A) of this Paragraph; that operate Medicare approved graduate medical education programs and reported Medicaid costs attributable to such programs to the Division on cost reports for fiscal years ending in 1995 through 1999; and that incur for the 12-month period ending September 30, 1999 unreimbursed costs for providing inpatient and outpatient services to uninsured patients in an amount in excess of two million five hundred thousand dollars (\$2,500,000) shall be eligible for a lump sum payment subject to the following provisions:

- (1) Qualification for any 12-month period ending September 30 shall be based on cost report data and uninsured patient data certified to the Division by hospitals on or before September 1 of each year, for the fiscal year ending in the preceding calendar year.
- (2) To ensure that the payments authorized by this Paragraph for any fiscal year do not exceed the upper limits established by 42 C.F.R. 447.272 and 42 C.F.R. 447.321:
 - (i) Subject to the limitations in Subparagraph (5) of this Paragraph, the lump sum payment shall be the reasonable cost of inpatient and outpatient hospital Medicaid services; plus
 - (ii) The reasonable direct and indirect costs attributable to inpatient and outpatient Medicaid services of

operating Medicare approved graduate medical education programs, less Medicaid payments received or to be received for these services.

- (3) Reasonable costs shall be ascertained in accordance with the provisions of the Medicare Provider Reimbursement Manual as defined in Paragraph (b) of this Rule.
- (4) The phrase "Medicaid payments received or to be received for these services" shall exclude all Medicaid disproportionate share hospital payments received or to be received, but shall include all Medicaid payments received other than disproportionate share hospital payments, calculated after any payments made pursuant to Paragraph (e) of this Rule.
- (5) Under no circumstances shall the payment authorized by this Paragraph exceed a percentage of the Hospital's unreimbursed cost for providing services to uninsured patients determined by the Division under Paragraph (e) of Rule .0213.
- (6) Payments authorized by this Paragraph shall be made solely on the basis of an estimate of costs incurred and payments received for Medicaid inpatient and outpatient services during the fiscal year to which the payment relates. The Director of the Division of Medical Assistance shall determine the amount of the estimated payments to be made by analysis of costs incurred and payments received for Medicaid inpatient and outpatient services as reported on cost reports for fiscal years ending during the calendar year preceding the year to which the payment relates filed before September 1 of the year to which the payment relates, and supplemented by additional financial information available to the Director when the estimated payments are calculated if and to the extent that the Director concludes that the additional financial information is reliable and relevant.
- (7) To ensure that estimated payments pursuant to Subparagraph (6) of this Paragraph do not exceed the state aggregate upper limit to such payments established by applicable federal law and regulation (42 C.F.R. 447.272 and 447.321), such payments shall be cost settled within 12 months of receipt of the completed cost report for the year for which such payments were made. The cost settlement shall be as described in Subparagraph (e)(5) of this Rule.
- (8) The payments authorized by this Paragraph shall be effective in accordance with G.S. 108A-55(c).

History Note: Authority G.S. 108A-25(b); 108A-54; 108A-55(c); 42 C.F.R. 447, Subpart C; 42 C.F.R. 447.321; Eff. February 1, 1995; Filed as a Temporary Amendment Eff. September 15, 1995, for a period of 180 days or until the permanent rule becomes effective, whichever is sooner; Amended Eff. January 1, 1996; Temporary Amendment Eff. September 25, 1996; Temporary Amendment Eff. September 30, 1997; Temporary Amendment Expired July 31, 1998;

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Temporary Amendment Eff. September 16, 1998;
Temporary Amendment Expired on June 13, 1999;
Temporary Amendment Eff. September 22, 1999;
Temporary Amendment Expired on July 11, 2000;
Temporary Amendment Eff. September 18, 2000.

10 NCAC 26H .0213 DISPROPORTIONATE SHARE HOSPITALS

(a) Hospitals that serve a disproportionate share of low-income patients and have a Medicaid inpatient utilization rate of not less than one percent are eligible to receive rate adjustments. The cost report data and financial information that is required in order to qualify as a disproportionate share hospital effective April 1, 1991 is based on the fiscal year ending in 1989 for each hospital, as submitted to the Division of Medical Assistance on or before April 1, 1991. The cost report data and financial information to qualify as a disproportionate share hospital effective July 1, 1991 is based on the fiscal year ending in 1990 for each hospital, as submitted to the Division of Medical Assistance on or before September 1, 1991. In subsequent years, qualifications effective July 1 of any particular year are based on each hospital's fiscal year ending in the preceding calendar year. The patient days, costs, revenues, or charges related to nursing facility services, swing-bed services, home health services, outpatient services, or any other service that is not a hospital inpatient service cannot be used to qualify for disproportionate share status. A hospital is deemed to be a disproportionate share hospital if:

- (1) The hospital has at least two obstetricians with staff privileges at the hospital who have agreed to provide obstetric services to individuals eligible for Medicaid. In the case of a hospital located in a rural area, the term obstetrician includes any physician with staff privileges at the hospital to perform non-emergency obstetric services as of December 21, 1987 or to a hospital that predominantly serves individuals under 18 years of age; and
- (2) The hospital's Medicaid inpatient utilization rate, defined as the percentage resulting from dividing Medicaid patient days by total patient days, is at least one standard deviation above the mean Medicaid inpatient utilization rate for all hospitals that receive Medicaid payments in the state; or
- (3) The hospital's low income utilization rate exceeds 25 percent. The low-income utilization rate is the sum of:
 - (A) The ratio of the sum of Medicaid inpatient revenues plus cash subsidies received from the State and local governments, divided by the hospital's total patient revenues; and
 - (B) The ratio of the hospital's gross inpatient charges for charity care less the cash subsidies for inpatient care received from the State and local governments divided by the hospital's total inpatient charges; or
- (4) The sum of the hospital's Medicaid revenues, bad debts allowance net of recoveries, and charity care exceeds 20 percent of gross patient revenues; or
- (5) The hospital, in ranking of hospitals in the State, from most to least in number of Medicaid patient days provided, is among the top group that accounts for 50

percent of the total Medicaid patient days provided by all hospitals in the State; or

- (6) It is a Psychiatric hospital operated by the North Carolina Department of Health and Human Services, Division of Mental Health, Developmental Disabilities, Substance Abuse Services (DMH/DD/SAS) or UNC Hospitals operated by the University of North Carolina.
- (b) The rate adjustment for a disproportionate share hospital is 2.5 percent plus one fourth of one percent for each percentage point that a hospital's Medicaid inpatient utilization rate exceeds one standard deviation of the mean Medicaid inpatient utilization rate in the State. The rate adjustment is applied to a hospital's payment rate exclusive of any previous disproportionate share adjustments.
- (c) An additional one time payment for the 12-month period ending September 30, 1995, in an amount determined by the Director of the Division of Medical Assistance, may be paid to the Public hospitals that are the primary affiliated teaching hospitals for the University of North Carolina Medical Schools less payments made under authority of Paragraph (d) of this Rule. The payment limits of the Social Security Act, Title XIX, Section 1923(g)(1) applied to this payment require that when this payment is added to other Disproportionate Share Hospital payments, the additional disproportionate share payment will not exceed 100 percent of the total cost of providing inpatient and outpatient services to Medicaid and uninsured patients less all payments received for services provided to Medicaid and uninsured patients. The total of all payments may not exceed the limits on DSH funding as set for the State by HCFA.
- (d) Effective July 1, 1994, hospitals eligible under Subparagraph (a)(6) of this Rule shall be eligible for disproportionate share payments, in addition to other payments made under the North Carolina Medicaid Hospital reimbursement methodology, from a disproportionate share pool under the circumstances specified in Subparagraphs (1), (2) and (3) of this Paragraph.
 - (1) An eligible hospital will receive a monthly disproportionate share payment based on the monthly bed days of services to low income persons of each hospital divided by the total monthly bed days of services to low income persons of all hospitals items allocated funds.
 - (2) This payment shall be in addition to the disproportionate share payments made in accordance with Subparagraphs (a)(1) through (a)(5) of this Rule. However, DMH/DD/SAS operated hospitals are not required to qualify under the requirements of Subparagraphs (a)(1) through (5) of this Rule.
 - (3) The amount of allocated funds shall be determined by the Director of the Division of Medical Assistance, but not to exceed the quarterly grant award of funds (plus appropriate non-federal match) earmarked for disproportionate share hospital payments less payments made under Subparagraphs (a)(1) through (a)(5) of this Rule divided by three. In Subparagraph (d)(1) of this Rule, bed days of services to low income persons is defined as the number of bed days provided to individuals that have been determined by the hospital as patients that do not possess the financial resources to

pay portions or all charges associated with care provided. Low income persons include those persons that have been determined eligible for medical assistance. The count of bed days used to determine payment is based upon the month immediately prior to the month that payments are made. Disproportionate share payments to hospitals are limited in accordance with The Social Security Act as amended, Title XIX section 1923(g), limit on amount of payment to hospitals.

(e) Subject to the availability of funds, hospitals that: qualify as disproportionate share hospitals under Subparagraphs (a)(1) through (5) of this Rule for the fiscal years ended September 30, ~~1995, 1996 and 1997;~~ 1995, through 2000; operate Medicare approved graduate medical education programs and reported Medicaid costs attributable to such programs to the Division on cost reports for fiscal years ending in ~~1995, 1996 and 1997;~~ 1995, through 2000; and incur for the 12-month period ending September 30, ~~1997~~ 2000 unreimbursed costs (calculated without regard to payments under either this Paragraph or Paragraph (f) of this Rule) for providing inpatient and outpatient services to uninsured patients in an amount in excess of two million five hundred thousand dollars (\$2,500,000); and meet the definition of qualified public hospital set forth in Subparagraph (f)(6) of this Rule shall be eligible for disproportionate share payments for such services from a disproportionate share pool under the circumstances specified in Subparagraphs (1) through ~~(7)~~ (8) of this Paragraph.

- (1) Qualification for the 12 month period ending September 30, 1996 shall be based on cost report data and uninsured patient data certified to the Division by hospitals on or before September 23, 1996 for fiscal years ending in 1995, in connection with the disproportionate share hospital application process. Qualification for subsequent 12 month periods ending September 30 of each year shall be based on cost report data and uninsured patient data certified to the Division by hospitals on or before September 1 of each subsequent year, for the fiscal year ending in the preceding calendar year.
- (2) Any payments made pursuant to this Paragraph shall be calculated and paid no less frequently than annually, and prior to the calculation and payment of any disproportionate share payments pursuant to Paragraph (f) of this Rule.
- (3) For the 12 month period ending September 30, 1996 a payment shall be made to each qualified hospital in an amount determined by the Director of the Division of Medical Assistance based on a percentage (not to exceed a maximum of 23 percent) of the unreimbursed costs incurred by each qualified hospital for inpatient and outpatient services provided to uninsured patients.
- (4) In subsequent 12 month periods ending September 30th of each year, the percentage payment shall be ascertained and established by the Division by ascertaining funds available for payments pursuant to this Paragraph divided by the total unreimbursed costs of all hospitals that qualify for payments under this

Paragraph for providing inpatient and outpatient services to uninsured patients.

- (5) The payment limits of the Social Security Act, Title XIX, section 1923(g)(1) applied to the payments authorized by this Paragraph require on a hospital specific basis that when this payment is added to other disproportionate share hospital payments, the total disproportionate share payments shall not exceed 100 percent of the total costs of providing inpatient and outpatient services to Medicaid and uninsured patients for the fiscal year in which such payments are made, less all payments received for services to Medicaid and uninsured patients. The total of all disproportionate share hospital payments shall not exceed the limits on disproportionate share hospital funding as established for this State by HCFA. HCFA in accordance with the provisions of the Social Security Act, Title XIX, Section 1923(f).
- (6) For purposes of this Paragraph, a qualified public hospital is a hospital that: qualifies for disproportionate share hospital status under Subparagraphs (a)(1) through (a)(5) of this Plan; does not qualify for disproportionate share hospital status under Subparagraph (a)(6) of this plan; was owned or operated by a State (or by an instrumentality or a unit of government within a State) as of September 1 through and including September 30, of the year for which payments under this paragraph are being ascertained; verified its status as a public hospital by certifying state, local, hospital district or authority government control on the most recent version of Form HCFA-1514 filed with the Health Care Financing Administration, U.S. Department of Health and Human Services on or before September 1 of the year for which payments under this Paragraph are being ascertained; files with the Division on or before September 1 of the year for which payments under this paragraph are being ascertained by use of a form prescribed by the Division a certification of its unreimbursed charges for inpatient and outpatient services provided to uninsured patients during the fiscal year ending in the calendar year preceding the fiscal year for which payments under this paragraph are being ascertained; and submits to the Division on or before September 1 of the year for which payments under this paragraph are being ascertained by use of a form prescribed by the Division a certificate of public expenditures.
- ~~(6)~~(7) To ensure that the estimated payments pursuant to Paragraph (e) do not exceed the State aggregate upper limits to such payments established by applicable federal law and regulation (~~42 C.F.R. 447.272~~), described in Subparagraph (5) of this Rule such payments shall be cost settled within 12 months of receipt of the completed cost report covering the period for which such payments are made. If any hospital receives payments, pursuant to this Subparagraph in excess of the percentage established by the Director under Subparagraph ~~(d)~~ (e)(3) or (e)(4) of this Rule,

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ascertained without regard to other disproportionate share hospital payments that may have been received for services during the 12-month period ~~ending September 30, 1996, for which such payments were made~~, such excess payments shall promptly be refunded to the Division. No additional payment shall be made to qualified hospitals in connection with the cost settlement.

~~(7)(8)~~ The payments authorized by Subparagraph (6) shall be effective in accordance with G.S. 108A-55(c).

(f) An additional one-time disproportionate share hospital payment during the 12-month period ending September 30, ~~1999~~ 2000 (subject to the availability of funds and to the payment limits specified in this Paragraph) shall be paid to qualified public hospitals. For purposes of this Paragraph, a qualified public hospital is a hospital that qualifies for disproportionate share hospital status under Subparagraphs (a)(1) through (5) of this Rule; does not qualify for disproportionate share hospital status under Subparagraph (a)(6) of this Rule; was owned or operated by a State (or by an instrumentality or a unit of government within a State) from September ~~16, 1999~~ 18, 2000 through and including September 30, ~~1999~~ 2000 verified its status as a public hospital by certifying state, local, hospital district or authority government control on the most recent version of Form HCFA-1514 filed with the Health Care Financing Administration, U.S. Department of Health and Human Services on or before September ~~16, 1999~~; 18, 2000; files with the Division on or before September ~~16, 1999~~; 18, 2000, by use of a form prescribed by the Division a certification of its unreimbursed charges for inpatient and outpatient services provided to uninsured patients during the fiscal year ending in ~~1998~~ 1999 and submits to the Division on or before September ~~16, 1999~~ 18, 2000 by use of a form prescribed by the Division a certificate of public expenditures.

- (1) The payment to qualified public hospitals pursuant to this Paragraph for the 12-month period ending September 30, ~~1999~~ 2000 shall be based on and shall not exceed the unreimbursed charges certified to the Division by each such hospital by use of a form prescribed by the Division for inpatient and outpatient services provided to uninsured patients for the fiscal year ending in ~~1998, 1999~~, to be converted by the Division to unreimbursed cost by multiplying unreimbursed charges times the cost-to-charge ratio established by the Division for each hospital for the fiscal year ending in ~~1998, 1999~~. Payments authorized by this Paragraph shall be made no less frequently than annually.
- (2) Any payments pursuant to this Paragraph shall be ~~ascertained~~ ascertained, and paid and cost settled after any disproportionate share hospital payments that may have been or may be paid by the Division pursuant to Paragraphs (d) and (e) of this Rule.
- (3) The payment limits of the Social Security Act, Title XIX, Section 1923(g)(1) applied to this payment require on a hospital-specific basis that when this payment is added to other disproportionate share hospital payments, the total disproportionate share hospital payments will not exceed 100 percent of the

total costs of providing inpatient and outpatient services to Medicaid and uninsured patients for the fiscal year in which such payments are made, less all payments received for services to Medicaid and uninsured patients for that year. The total of all DSH payments by the Division may not exceed the limits on disproportionate share hospital funding as established for this State by HCFA in accordance with the Social Security, Title XIX, Section 1923(f) for the fiscal year in which such payments are made.

- (4) To ensure that estimated payments pursuant to Paragraph (f) do not exceed the ~~State aggregate~~ upper limits to such payments established by applicable federal law and regulation described in the preceding Subparagraph (42 C.F.R. 447.272), such payments shall be cost settled within 12 months of receipt of the completed cost report covering the 12 month period for which such payments are made. ~~No additional payments shall be made in connection with the cost settlement. The federal portion of any payments in excess of either of the upper limits described in Subparagraph (f)(3) of this Rule will be promptly repaid. Subject to the availability of funds, and to the upper limits described in Subparagraph (f)(3) of this Rule, additional payments shall be made as part of the cost settlement process to hospitals qualified for payment under this Paragraph in an amount not to exceed the hospital-specific upper limit for each such hospital.~~
- (5) The payments authorized by Paragraph (f) of this Rule shall be effective in accordance with G.S. 108A-55(c).
- (g) Effective with dates of payment beginning October 31, 1996, hospitals that provide services to clients of State Agencies are considered to be a Disproportionate Share Hospital (DSH) when the following conditions are met:
 - (1) The hospital has a Medicaid inpatient utilization rate not less than one percent and has met the requirements of Subparagraph (a)(1) of this Rule; and
 - (2) The State Agency has entered into a Memorandum of Understanding (MOU) with the Division of Medical Assistance (Division); and
 - (3) The inpatient and outpatient services are authorized by the State Agency for which the uninsured client meets the program requirements.
 - (A) For purposes of this Paragraph, uninsured patients are those clients of the State Agency that have no third parties responsible for any hospital services authorized by the State Agency.
 - (B) DSH payments are paid for services to qualified uninsured clients on the following basis:
 - (i) For inpatient services the amount of the DSH payment is determined by the State Agency in accordance with the applicable Medicaid inpatient payment methodology as stated in Rule .0211 of this Section.
 - (ii) For outpatient services the amount of the DSH payment is determined by the State Agency in accordance with the applicable Medicaid outpatient payment

methodology as stated in Section 24 of Chapter 18 of the 1996 General Assembly of North Carolina.

- (iii) No federal funds are utilized as the non-federal share of authorized payments unless the federal funding is specifically authorized by the federal funding agency as eligible for use as the non-federal share of payments.

(C) Based upon this subsection DSH payments as submitted by the State Agency are to be paid monthly in an amount to be reviewed and approved by the Division of Medical Assistance. The total of all payments may not exceed the limits on Disproportionate Share Hospital funding as set forth for the state by HCFA.

(h) An additional disproportionate share hospital payment during the 12-month period ending September 30, ~~1999~~ 2000 (subject to the availability of funds and to the payment limits specified in this Paragraph) shall be paid to Hospitals that qualify for disproportionate share hospital status under Subparagraph (a)(1) through (5) of this Rule and provide inpatient or outpatient hospital services to Medicaid Health Maintenance Organizations ("HMO") enrollees during the year ending September 30, ~~1999~~ 2000. For purposes of this Paragraph, a Medicaid HMO enrollee is a Medicaid beneficiary who receives Medicaid services through a Medicaid HMO; a Medicaid HMO is a Medicaid managed care organization, as defined in Section 1903 (m)(1)(A), that is licensed as a HMO and provides or arranges for services for enrollees under a contract pursuant to Section 1903 (m)(2)(A)(i) through (xi). To qualify for a DSH payment under this Paragraph, a hospital must also file with the Division on or before September ~~16, 1999~~ 18, 2000 by use of a form prescribed by the Division a certification of its charges for inpatient and outpatient services provided to Medicaid HMO enrollees during the fiscal year ending in ~~1998~~ 1999. The payment to qualified hospitals pursuant to this Paragraph for the 12-month period ending September 30, ~~1999~~ 2000 shall be based on charges certified to the Division by each hospital by use of a form prescribed by the Division for inpatient and outpatient Medicaid HMO services for the fiscal year ending in ~~1998, 1999~~, converted by the Division to cost by multiplying charges times the cost-to-charge ratio established by the Division for each hospital for the fiscal year ending in ~~1998, 1999~~.

- (1) The payment shall then be determined by multiplying the cost times a percentage determined annually by the Division. The payment percentage established by the Division will be calculated to ensure that the Medicaid HMO DSH payment authorized by this Paragraph is equivalent (as a percentage of reasonable cost) to the Medicaid supplemental payment (calculated without regard to the certified public expenditures portion of such payment) authorized by Paragraph (e) of ~~this~~ Rule 10 NCAC 26H .0212.
- (2) The payment limits of the Social Security Act, Title XIX, Section 1923 (g)(1) applied to this payment require on a hospital-specific basis that when this

payment is added to other disproportionate share hospital payments, the total disproportionate share hospital payments will not exceed 100 percent of the total costs of providing inpatient and outpatient services to Medicaid and uninsured patients for the fiscal year in which such payments are made, less all payments received for services to Medicaid and uninsured patients for that year. The total of all DSH payments by the Division may not exceed the limits on Disproportionate Share hospital funding as established for this State by HCFA in accordance with the provisions of the Social Security Act, Title XIX, Section 1923 (f) for the fiscal year ~~in~~ for which such payments are made.

- (3) To ensure that estimated payments pursuant to this Paragraph do not exceed the ~~State aggregate~~ upper limits to such payments described in the preceding Subparagraph and established by applicable federal law and regulation (~~42 CFR 447.272~~), such payments shall be cost settled within 12 months of receipt of the completed cost report covering the 12 month period for which such payments are made. No additional payments shall be made in connection with the cost settlement.

(4) The payments authorized by this Paragraph shall be effective in accordance with G.S. 108A-55 (c).

(i) An additional disproportionate share hospital payment during the twelve-month period ending September 30, ~~1999~~ 2000 (subject to the availability of funds and to the payment limits specified in this Paragraph) shall be paid to large free-standing inpatient rehabilitation hospitals that are qualified public hospitals. For purposes of this ~~Subparagraph, Paragraph~~, a large free-standing inpatient rehabilitation hospital is a hospital licensed for more than 100 rehabilitation beds. For purposes of this ~~Subparagraph, Paragraph~~, a qualified public hospital is a hospital that: either qualifies for disproportionate share hospital status under Subparagraph (a)(1) of this Rule or did not offer nonemergency obstetric services to the general population as of December 21, 1987; qualifies for disproportionate share hospital status under Subparagraphs (a)(2) through (a)(5) of this Rule; does not qualify for disproportionate share hospital status under Subparagraph (a)(6) of this Rule; was owned or operated by a State (or by an instrumentality or a unit of government within a State) from September ~~16, 1999~~ 18, 2000 through and including September 30, ~~1999~~ 2000, and verifies its status as a public hospital by certifying state, local, hospital district or authority government control on the most recent version of Form HCFA-1514 filed with the Health Care Financing Administration, U.S. Department of Health and Human Services on or before September ~~16, 1999~~ 18, 2000.

- (1) The payment to qualified public hospitals pursuant to this Paragraph for the twelve month period ending September 30, ~~1999~~ 2000 shall be based on and shall not exceed the "Medicaid Deficit" for each hospital. The Medicaid Deficit shall be calculated by ascertaining the reasonable costs of inpatient and outpatient hospital Medicaid services less Medicaid

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payments received or to be received for these services. For purposes of this Subparagraph:

- (A) Reasonable costs shall be ascertained in accordance with the provisions of the Medicare Provider Reimbursement Manual as defined in Paragraph (b) of ~~this~~ Rule 10 NCAC 26H .0212;
 - (B) The phrase "Medicaid payments received or to be received for these services" shall exclude all Medicaid disproportionate share hospital payments received or to be received.
- (2) The disproportionate share hospital payments to qualified public hospitals shall be made on the basis of an estimate of costs incurred and payments received for inpatient and outpatient Medicaid services during the payment fiscal year ~~1999, 2000~~. The Director of the Division of Medical Assistance shall determine the amount of the estimated payments to be made by analysis of costs incurred and payments received for Medicaid services as reported on cost reports for the fiscal year ending in ~~1998 1999~~ and filed before ~~September 16, 1999 18, 2000~~ and supplemented by additional financial information available to the Director when the estimated payments are calculated if and to the extent that the Director concludes that the additional financial information is reliable and relevant.
 - (3) The payment limits of the Social Security Act, Title XIX, Section 1923(g)(1) applied to this payment require on a hospital-specific basis that when this payment is added to other disproportionate share hospital payments, the total disproportionate share hospital payments will not exceed 100 percent of the total costs of providing inpatient and outpatient services to Medicaid and uninsured patients for the fiscal year ~~in~~ for which such payments are made, less all payments received for services to Medicaid and uninsured patients for that year. The total of all DSH payments by the Division may not exceed the limits on Disproportionate Share hospital funding as established for this State by HCFA in accordance with the provisions of the Social Security Act, Title XIX, Section 1923(f) for the fiscal year ~~in~~ for which such payments are made.
 - (4) To ensure that estimated payments pursuant to this paragraph do not exceed the ~~State aggregate~~ upper limits to such payments described in the preceding Subparagraph and established by applicable federal law and ~~regulation (42 C.F.R. 447.272) regulation~~, such payments shall be cost settled within 12 months of receipt of the completed cost report covering the 12 month period for which such payments are made. No additional payments shall be made in connection with the cost settlement.
 - (5) The payments authorized by this Paragraph shall be effective in accordance with G.S. 108A-55(c).
- (j) An additional disproportionate share hospital payment for any fiscal year ending September 30, commencing with September 30, 2000 (subject to the availability of funds and to the payment limits specified in this Paragraph) shall be paid to hospitals that are designated as critical access hospitals under

42 U.S.C. 1395i-4 for the fiscal year to which such payment relates; incurred for the 12-month period ending September 30 of the fiscal year to which such payments relate unreimbursed costs for providing inpatient and outpatient services to Medicaid patients; and qualify as a disproportionate share hospital under the minimum requirements specified by 42 U.S.C. 1396r-4(d).

- (1) Qualification for any 12-month period ending September 30 shall be based on cost report data and uninsured patient data certified to the Division by qualified hospitals on or before September 1 of each year, for the fiscal year ending in the preceding calendar year.
- (2) Payments made pursuant to this Paragraph shall be calculated and paid annually after the calculation and payment of all other Medicaid payments of any kind to which a hospital may be entitled for any fiscal year.
- (3) The payment to qualified hospitals under this Paragraph for any fiscal year shall be based on and shall not exceed the "Medicaid Deficit" for each hospital. The Medicaid Deficit shall be calculated by ascertaining the reasonable costs of inpatient and outpatient hospital Medicaid services less Medicaid payments received or to be received for these services. For purposes of this Subparagraph:
 - (A) Reasonable costs shall be ascertained in accordance with the provisions of the Medicare Provider Reimbursement Manual as defined in Paragraph (b) of Rule .0212.
 - (B) The phrase "Medicaid payments received or to be received for these services" shall exclude all Medicaid disproportionate share hospital payments received or to be received.
 - (C) The disproportionate share hospital payments to qualified hospitals pursuant to this Paragraph shall be made on the basis of an estimate of costs incurred and payments received for inpatient and outpatient Medicaid services during the fiscal year to which the payment relates. The Director of the Division of Medical Assistance shall determine the amount of the estimated payments to be made by analysis of costs incurred and payments received for Medicaid services as reported on cost reports for fiscal years ending during the calendar year preceding the year to which the payment relates, and supplemented by additional financial information available to the Director when the estimated payments are calculated if and to the extent that the Director concludes that the additional financial information is reliable and relevant.
 - (D) The payment limits of the Social Security Act, Title XIX, Section 1923(g)(1) applied to the payments authorized by this Paragraph require on a hospital-specific basis that when this payment is added to other disproportionate share hospital payments, the total disproportionate share payments shall not exceed 100% of the total costs of providing inpatient and outpatient services to

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Medicaid and uninsured patients for the fiscal year for which such payments are made, less all payments received for services to Medicaid and uninsured patients. The total of all disproportionate share hospital payments shall not exceed the limits on disproportionate share hospital funding as established for this State by HCFA in accordance with the provisions of the Social Security Act, Title XIX, Section 1923(f) for the fiscal year for which such payments are made.

(E) To ensure that estimated payments pursuant to this Paragraph do not exceed the upper limits to such payments established by applicable federal law and regulation described in the preceding Subparagraph, such payments shall be cost settled within 12 months of receipt of the completed cost report covering the period for which such payments are made. No additional payments shall be made in connection with such cost settlement.

(F) The payments authorized by this Paragraph shall be effective in accordance with G.S. 108A-55(c).

History Note: Authority G.S. 108A-25(b); 108A-54; 108A-55; 42 C.F.R. 447, Subpart C; Eff. February 1, 1995;

Amended Eff. July 1, 1995;

Filed as a Temporary Amendment Eff. September 15, 1995, for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;

Filed as a Temporary Amendment Eff. September 29, 1995, for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;

Amended Eff. January 1, 1996;

Temporary Amendment Eff. September 25, 1996;

Temporary Amendment Eff. April 15, 1997;

Temporary Amendment Eff. September 30, 1997;

Temporary Amendment Eff. September 16, 1998;

Temporary Amendment Expired on June 13, 1999;

Temporary Amendment Eff. September 22, 1999;

Temporary Amendment Expired on July 11, 2000;

Temporary Amendment Eff. September 21, 2000.

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Rule-making Agency: DENR – Soil & Water Conservation

Rule Citation: 15A NCAC 06G .0101-.0106

Effective Date: October 1, 2000

Findings Reviewed and Approved by: Beecher R. Gray

Authority for the rulemaking: G.S. 113A-235; 139-4; 143-215.74(a); 143B-294; S.L. 1998-165

Reason for Proposed Action: *The North Carolina Conservation Reserve Enhancement Program (CREP) is a state/federal/local partnership that combines existing federal Conservation Reserve Program funding and state funding from various sources, including the Agriculture Cost Share Program, to take environmentally sensitive land out of crop production. The objectives of the program are to reduce agricultural non-point pollution; to enroll eligible land in conservation easements; to encourage voluntary sign-ups for the program; and to enhance ecological aspects of areas near to watercourses. The North Carolina Soil and Water Conservation Commission operates the program as the lead agency for the State of North Carolina. These rules are being adopted to establish the criteria by which the Commission will implement CREP.*

Comment Procedures: *Comments, statements, data and other information may be submitted in writing within 60 days after the date of publication of this issue of the North Carolina Register. Copies of the rules and information package may be obtained by contacting the Division of Soil and Water Conservation at (919) 715-6109. Written comments may be submitted to Vernon Cox, Division of Soil and Water Conservation, 1614 Mail Service Center, Raleigh, NC 27699-1614. Comments may also be submitted by electronic mail to Vernon.Cox@ncmail.net.*

CHAPTER 6 – SOIL AND WATER CONSERVATION COMMISSION

SUBCHAPTER 06G - CONSERVATION RESERVE ENHANCEMENT PROGRAM (CREP) -- STATE PORTION OF THE PROGRAM

15A NCAC 06G .0101 OBJECTIVES

(a) The North Carolina Conservation Reserve Enhancement Program (CREP) is a state/federal/local partnership that combines existing federal Conservation Reserve Program (CRP) funding and state funding from various sources, including the Agriculture Cost Share Program (ACSP), to take environmentally sensitive land out of crop production. The state portion of CREP is referred to herein as NC-CREP. Under CREP, landowners may voluntarily enroll eligible land in ten-year, fifteen-year, thirty-year or permanent agreements or contracts. The Commission operates the program as the lead agency for the State of North Carolina (State), and may from time to time delegate activities to the Division. These rules govern NC-CREP.

(b) The program objectives for the Commission, which are the same as those of the multi-agency CREP team, are the following: to reduce agricultural non-point source pollution; to enroll eligible land in 10-year, 15-year, 30-year or permanent contracts; to encourage voluntary sign-ups for the program; and to enhance ecological aspects and wildlife habitat of areas near watercourses.

(c) There will initially be an enrollment period beginning March 1, 1999, which will last five years, unless otherwise extended during which time requests to enroll acreage will be received. The Division, or its agent, will seek eligible applicants for

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enrollment into the program. Landowner payments will be made in accordance with state and federal requirements, and are subject to the availability of funds.

(d) The applicable standards, rules, regulations, and practices of the Natural Resource Conservation Service (NRCS), the Farm Service Agency (FSA), the Division of Forest Resources and the Wetlands Restoration Program, as set forth in the Standard Operating Procedures Manual for CREP (NC-CREP SOP Manual), are incorporated herein by reference, and such incorporation includes subsequent amendments and editions of the referenced material. Likewise, the provisions of the NC-CREP SOP Manual are incorporated herein by reference, and such incorporation includes subsequent amendments and editions of the referenced material. Copies of all of these materials are available at the offices of the Division, and the cost of any copies may not exceed \$.10 per page.

History Note: Authority G.S. 113A-235; 139-4; 143-215.74(a); 143B-294; S.L. 1998-165; Temporary Adoption Eff. October 1, 2000.

15A NCAC 06G .0102 ELIGIBILITY

(a) Persons may offer to enroll acreage in the program at any time within the 5-year enrollment period or any extension thereof. Acreage accepted into the CREP is referred to herein as "CREP Enrollments." Acreage enrolled into NC-CREP is referred to herein as NC-CREP 3 Enrollments. In order to be accepted into the CREP, all of the following must be met:

- (1) Applicant meets the producer eligibility requirements within the NC-CREP SOP Manual;
- (2) Acreage submitted meets the cropland and marginal pasture land requirements within the NC - CREP SOP Manual;
- (3) Acreage offered is eligible under the NC-CREP SOP Manual, and applicable NRCS standards, and is suitable for the intended practice;
- (4) Producer accepts the maximum payment rate based on one of the following:
 - (A) the county average rental for enrollments of less than 10 acres;
 - (B) the 3 predominant soil types for enrollments of 10 acres or greater; or
 - (C) marginal pastureland rental rate.
- (5) Other identified priorities of the CREP, as determined by the Commission.

(b) In addition to meeting the requirements in Paragraph (a) of this Rule, the land must meet all other applicable land eligibility criteria and enrollment expectations as set forth in the NC-CREP SOP Manual. The Commission reserves the right to refuse enrollment where water quality benefits do not justify the payments, or where the acquisition is impractical or nuisance conditions exist on the land.

(c) The following acreage is ineligible to be enrolled in CREP:

- (1) federally-owned land unless the applicant has a prior written lease for the time frame in which the land is under the Conservation Reserve Program (CRP);
- (2) land on which a federal agency restricts the use in a mortgage or an easement;

(3) acreage permanently under water, including acreage currently enrolled in CRP;

(4) land currently enrolled in other federal programs and still under lifespan requirements;

(5) land already enrolled in CRP; or

(6) acreage withdrawn, terminated or otherwise released from the CRP after enrollment and before the contract expiration date.

(d) Eligibility for the CREP shall be determined by the local District, Farm Service Agency (FSA), NRCS and the Division. An eligible applicant may enter into the federal agreements (10-years to 15-years), as well as the State agreements (30-year or permanent). Persons and land qualifying for the federal portion of CREP may also be qualified for enrollment under NC-CREP. Any landowner enrolling 10 acres or greater per tract, regardless of the length of enrollment, must enter into a thirty-year or permanent State agreement. 30-year or permanent State agreements also require granting of a conservation easement to the State.

History Note: Authority G.S. 113A-235; 139-4; 143-215.74(a); 143B-294; S.L. 1998-165; Temporary Adoption Eff. October 1, 2000.

15A NCAC 06G .0103 CONSERVATION PLAN

(a) A conservation plan is required for all CREP Enrollments. The conservation plan is a record of the applicant's decisions and supporting information for the treatment of a unit of land or water as a result of the planning process that meets the NRCS Field Office Technical Guide quality criteria for each natural resource and that addresses economic and social considerations. The plan shall describe the schedule of operations and activities required to solve identified natural resource concerns. Conservation plans shall be prepared according to all applicable federal, state and local environmental laws, executive orders, and rules. The conservation plan shall be consistent with any conservation easement protecting the enrollment area. This applies regardless of eligibility for cost-share funds. Participants shall also agree to establish and maintain approved practices according to the conservation plan of operations and forest management plans. Practices included in the conservation plan must cost-effectively achieve a reduction in soil erosion and nutrient transport. All forestry management practices must be completed according to a forestry management plan approved by a registered forester. The Division and the Commission may review conservation plans at any time while CREP agreements are effective.

(b) All CREP Enrollments must provide interception of water from the crop or pasture land into the enrollment area. All CREP Enrollments must maintain a contiguous buffer with the water course. Enrollments of wetland restoration areas shall only be accepted if lands are hydrologically restored to the greatest extent practicable and, if enrollments shall be in trees, in those areas where trees would be the natural cover. The riparian forested buffer or wetland practice may include an outer buffer layer of native grasses between cropped areas and the trees, as specified in the practice criteria. Hydrologic restoration to the greatest extent practicable shall occur on all NC-CREP Enrollments. Hydrologic restoration to the greatest extent

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practicable means to improve/increase hydrology and/or retain water to the maximum extent as long as there are no adverse impacts to non-enrolled lands. This will be accomplished through the following means: creating sheet flow; reducing concentrated flow areas; blocking or filling artificial drainage; or using water control structures in conjunction with buffers. All shall meet or exceed appropriate NRCS standards. Water infiltration and retention should be maximized on non-hydric soils by creating sheet flow and by reducing concentrated flow areas. Plans should provide for improved wildlife habitat.

The establishment of CREP practices shall be:

- (1) consistent with conservation compliance provisions;
- (2) at the participant's own expense;
- (3) included in the approved conservation plan;
- (4) approved by the local District; and
- (5) subject to FSA and Division approval where applicable.

(c) A modification to an approved conservation plan must be in the best interest of CREP, and consistent with any conservation easement protecting the enrollment area. Such plans should be revised on an as-needed basis. Acceptable modifications include but are not limited to:

- (1) adding or improving a CREP practice;
- (2) changing CREP practices;
- (3) scheduling reapplication of a CREP practice;
- (4) reflecting change in ownership; or
- (5) implementing other non-cost shared conservation measures, if producer agrees to install according to the approved conservation plan on CREP land already seeded to an acceptable cover.

History Note: Authority G.S. 113A-235; 139-4; 143-215.74(a); 143B-294; S.L. 1998-165; Temporary Adoption Eff. October 1, 2000.

15A NCAC 06G .0104 APPROVING STATE AGREEMENTS

(a) Final approval for all NC-CREP agreements shall be the responsibility of the Division. The thirty-year and permanent agreements require recording of a conservation easement in the appropriate county registry. The intent is to provide that the NC-CREP Enrollment Area will be protected for the life of the signed agreement. The Division will provide a mechanism to acquire and record easements for NC-CREP. The Division shall provide a survey for all permanent easements. Conservation easements entered into will be consistent with the requirements of the Department of Administration and with 1 NCAC 6B.0210.

(b) For approval under NC-CREP, the Division must receive:

- (1) the State CREP form signed by the local District and the applicant;
- (2) a copy of landowner's deed(s) to the land to be enrolled;
- (3) a completed conservation easement(s);
- (4) latitude and longitude coordinates locating the easement site; and
- (5) descriptions (maps, surveys, directions to site, etc.) identifying the easement site.

(c) Under a CREP 30-year or permanent conservation easement, the title of the land still resides with the landowner. The landowner may use the land under the conservation easement in

a manner that does not violate the conditions and terms of the easement. The conservation easement does not restrict the owner from selling or devising the land, however the easement will run with the land and remain an encumbrance thereon. The State must be allowed access to monitor the NC-CREP conservation easement area.

History Note: Authority G.S. 113A-235; 139-4; 143-215.74(a); 143B-294; S.L. 1998-165; Temporary Adoption Eff. October 1, 2000.

15A NCAC 06G .0105 PAYMENT

(a) The NC-CREP combines federal and state funding to achieve the goals of the program. For that reason, the eligible person may receive two separate payments (i.e. federal and state) to meet expectations set by the applicable contracts.

(b) The State payment shall be dependent on the length of the contract signed. The State payment will consist of a one-time bonus payment for executed contracts for 30-year and permanent enrollments, which require a conservation easement. The State shall also pay a portion of cost-shareable practices implemented within the guidelines of the ACSP subject to availability of funds to the District. Any agricultural cost share payments will be consistent with all Commission requirements, including but not limited to those in 15A NCAC 6E .0101-.0108.

(c) For enrollments involving the ACSP, all cost-share practices are subject to terms and policies as set forth in the ACSP rules and best management practices manual. State cost-share percentages, listed below, shall be dependent on the length of enrollment. All payments involving ACSP funds require approval of the local District Board of Supervisors, and are subject to the availability of funds to the District.

<u>10 year</u>	<u>25%</u>
<u>15 year</u>	<u>30%</u>
<u>30 year</u>	<u>40%</u>
<u>permanent agreement</u>	<u>50%</u>

(d) The maximum one-time bonus payment under NC-CREP that an eligible person can receive will be limited by the maximum payment allowed under the federal payment. The payment for enrollment of land in 30-year or permanent conservation easements will be made once the conservation easement has been recorded by the State and it has been determined that the participant is actively engaged in the applicable practices.

(e) The formula for payment of the one-time State bonus will be as follows on a per acre basis:

$$\begin{aligned} \text{permanent agreement bonus payment} &= (15 \times \text{federal payment}) \times 0.30 \\ \text{30-year agreement bonus payment} &= (15 \times \text{federal payment}) \times 0.125 \end{aligned}$$

(f) An additional payment of one-hundred dollars (\$100.00) per contract will be made to a participant for applying tree-planting practices on land enrolled in a 15-year, 30-year or permanent agreement, if consistent with the provisions of the NC-CREP SOP Manual.

History Note: Authority G.S. 113A-235; 139-4; 143-215.74(a); 143B-294; S.L. 1998-165;

Temporary Adoption Eff. October 1, 2000.

15A NCAC 06G .0106 DISPUTE RESOLUTION

(a) If noncompliance with any CREP agreement is determined, the landowner must return the enrolled area to the condition that meets the guidelines of the CREP upon receiving written notification to do so. The notice, from the appropriate CREP agency, will contain:

- (1) a detailed description of the enrolled area;
- (2) a description of the area in noncompliance;
- (3) recommended measures for repair of the practice; and
- (4) a time frame for repair.

Any expense incurred due to the noncompliance of a practice will be the responsibility of the landowner. Landowners are not responsible for repayment of cost-share due to a failure of a practice through no fault of their own.

(b) From the date of the notice of noncompliance, the landowner will be given 30 days to reply in writing to the Division with a plan for repairing the easement area. The Division will work with the landowner to ensure that the plan of repair meets the CREP objectives. Once a plan is approved in writing by the Division, the landowner has 90 days from the date of said approval to complete restoration of the easement area. For vegetative practices, applicants are given one calendar year to re-establish the vegetation. An extension may be granted by the Division if it is determined that compliance cannot be met due to circumstances beyond the landowner's control.

(c) In the event that an easement has been found to be noncompliant and the landowner does not agree to repair or re-implement the cost shared practice, the landowner and the Division may jointly request the Commission to mediate the case as set forth in the NC-CREP contract between the parties. To invoke this method, both parties must stipulate that said mediation is binding.

History Note: Authority G.S. 113A-235; 139-4; 143-215.74(a); 143B-294; S.L. 1998-165; Temporary Adoption Eff. October 1, 2000.

APPROVED RULES

*This Section includes the Register Notice citation to Rules approved by the Rules Review Commission (RRC) at its meeting of August 17, 2000 pursuant to G.S. 150B-21.17(a)(1) and reported to the Joint Legislative Administrative Procedure Oversight Committee pursuant to G.S. 150B-21.16. The full text of rules is published below when the rules have been approved by RRC in a form different from that originally noticed in the Register or when no notice was required to be published in the Register. The rules published in full text are identified by an * in the listing of approved rules. Statutory Reference: G.S. 150B-21.17.*

These rules, unless otherwise noted, will become effective on the 31st legislative day of the 2001 Session of the General Assembly or a later date if specified by the agency unless a bill is introduced before the 31st legislative day that specifically disapproves the rule. If a bill to disapprove a rule is not ratified, the rule will become effective either on the day the bill receives an unfavorable final action or the day the General Assembly adjourns. Statutory reference: G.S. 150B-21.3.

APPROVED RULE CITATION				REGISTER CITATION TO THE NOTICE OF TEXT
10	NCAC	50B	.0305*	14:18 NCR
15A	NCAC	02B	.0230*	14:10 NCR
15A	NCAC	02B	.0306*	13:20 NCR
15A	NCAC	10B	.0119	14:12 NCR
15A	NCAC	10I	.0102	14:15 NCR
15A	NCAC	10I	.0103-.0105*	14:15 NCR
15A	NCAC	18A	.2806*	14:19 NCR
15A	NCAC	18A	.2812*	14:19 NCR
18	NCAC	06	.1402	14:22 NCR
18	NCAC	06	.1413	14:22 NCR
18	NCAC	06	.1709	14:22 NCR
18	NCAC	07	.0102*	not required G.S. 150B-21.3, 150B-21.5; Eff. August 22, 2000
21	NCAC	14A	.0101*	14:22 NCR
21	NCAC	14I	.0106	14:22 NCR
21	NCAC	14I	.0401	14:22 NCR
21	NCAC	14O	.0105	14:22 NCR
21	NCAC	14P	.0103	14:22 NCR
21	NCAC	14P	.0107-.0108	14:22 NCR
21	NCAC	14P	.0115	14:22 NCR

TITLE 10 - DEPARTMENT OF HEALTH AND HUMAN SERVICES

10 NCAC 50B .0305 DEPRIVATION

Deprivation shall be due to:

- (1) Death of either parent.
- (2) Physical or mental incapacity of either parent based on a physical or mental defect, illness, or impairment of such a debilitating nature as to reduce or eliminate the parent's ability to support or care for the otherwise eligible child; provided, that the defect, illness, or impairment shall be expected to last for at least 30 days.
- (3) Continued absence of parent for reason other than death or hospitalization, of not more than 12 months, and this absence interferes with the child's receipt of maintenance, physical care, or guidance from his parent and precludes the parent's being counted on for support or care for the child. Such continued absence may be due to any of the following:
 - (a) Divorce;
 - (b) Separation;

- (c) Desertion or abandonment;
- (d) Absence from the home for treatment or medical care and the expected duration of the absence will exceed 12 months; and
- (e) Incarceration in an institution.
Temporary absence of the payee relative or of the child from the home shall not affect eligibility, if the absent member of the household has not established another abode of a permanent nature, and the reasons for absence indicate that the absence will be temporary. A child may be temporarily absent from the home for various reasons, but the responsible relative shall have a plan documented in the record for bringing the child back into the home when the need for his absence has passed. The exercise of parental control and guidance by the relative, rather than the physical presence of the relative or the child in the home, shall be the important factor to be considered.
- (4) Parents living together and not married to each other where the putative father's duty to support the child has not been established.

- (5) Unemployed Status for Two-Parent Families. The child shall be deprived if both parents are in the home and:
- (a) The parents are eligible for Medicaid because countable income is equal to or less than the appropriate categorically needy income limit as defined in Paragraph (e) of Rule .0313 of this Section; or
 - (b) The parents are eligible for Medicaid under medically needy eligible criteria by virtue of meeting a deductible based upon income which exceeds the appropriate income limit as defined in Paragraph (e) of Rule .0313 of this Section.

History Note: Authority G.S. 108A-28; 108A-54; 42 C.F.R. 435.510; 89 CVS 922; Eff. September 1, 1984; Amended Eff. October 1, 1991; August 1, 1990; Temporary Amendment Eff. August 5, 1999; Amended Eff. April 1, 2001.

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

15A NCAC 02B .0230 ACTIVITIES DEEMED TO COMPLY WITH WETLANDS STANDARDS

(a) The following activities for which Section 404 permits are not required pursuant to Section 404(f)(1) of the Clean Water Act and which are not recaptured into the permitting process pursuant to Section 404(f)(2) are deemed to be in compliance with wetland standards in 15A NCAC 2B .0231 provided that they comply with the most current versions of the federal regulations to implement Section 404 (f) (US Environmental Protection Agency and US Army Corps of Engineers including 40 C.F.R. 232.3) and the Sedimentation Pollution Control Act, G.S. 113A, Article 4:

- (1) normal, on-going silviculture, farming and ranching activities such as plowing, seeding, cultivating, minor drainage and harvesting for the production of food, fiber and forest products, or upland soil and water conservation practices, provided that relevant silvicultural activities must comply with U.S. Environmental Protection Agency and U.S. Army Corps of Engineers Memorandum to the Field entitled "Application of Best Management Practices to Mechanical Silvicultural Site Preparation Activities for the Establishment of Pine Plantations in the Southeast", November 28, 1995 which is hereby incorporated by reference including any subsequent amendments and editions;
- (2) maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures, and other maintenance, repairs or modification to existing structures as required by the NC Dam Safety Program;
- (3) construction and maintenance of farm or stock ponds or irrigation ditches. In addition, new pond construction in designated river basins with riparian buffer protection regulations also must comply with relevant portions of those regulations;

- (4) maintenance of drainage ditches, provided that spoil is removed to high ground, placed on top of previous spoil, or placed parallel to one side or the other of the ditch within a distance of 20 feet and spoils are placed in a manner that minimizes damages to existing wetlands; and ditch maintenance is no greater than the original depth, length and width of the ditch;
- (5) construction of temporary sediment control measures or best management practices as required by the NC Sediment and Erosion Control Program on a construction site, provided that the temporary sediment control measures or best management practices are restored to natural grade and stabilized within two months of completion of the project and native woody vegetation is reestablished during the next appropriate planting season and maintained;
- (6) construction or maintenance of farm roads, forest roads, and temporary roads for moving mining equipment where such roads are constructed and maintained in accordance with best management practices, as defined in 40 C.F.R. 232.3 (c)(6)(i-xv), to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of navigable waters is not reduced, and that any adverse effects on the aquatic environment will be otherwise minimized.

(b) Where the Director determines, in consultation with the US Army Corps of Engineers or the US Environmental Protection Agency, and considering existing or projected environmental impact, that an activity is not exempt from permitting under Section 404(f), or where the appropriate Best Management Practices are not implemented and maintained in accordance with Paragraph (a) of this Rule, the Director may require restoration of the wetlands as well as imposition of enforcement measures as authorized by G.S. 143-215.6A (civil penalties), G.S. 143-215.6B (criminal penalties) and G.S. 143-215.6C (injunctive relief).

History Note: Authority G.S. 143-214.1; 143-214.7; 143-215; 143-215.3; 143-215.6A; 143-215.6B; 143-215.6C; Temporary Adoption Eff. November 24, 1999; Eff. April 1, 2001.

15A NCAC 02B .0306 BROAD RIVER BASIN

- (a) The schedule may be inspected at the following places:
- (1) Clerk of Court:
 - Buncombe County
 - Cleveland County
 - Gaston County
 - Henderson County
 - Lincoln County
 - McDowell County
 - Polk County
 - Rutherford County
 - (2) North Carolina Department of Environment and Natural Resources:
 - (A) Mooresville Regional Office
919 North Main Street
Mooresville, North Carolina
 - (B) Asheville Regional Office
Interchange Building
59 Woodfin Place

Asheville, North Carolina.

(b) Unnamed Streams. Such streams entering South Carolina are classified "C."

(c) The Broad River Basin Schedule of Classifications and Water Quality Standards was amended effective:

- (1) March 1, 1977;
- (2) February 12, 1979;
- (3) August 12, 1979;
- (4) April 1, 1983;
- (5) February 1, 1986;
- (6) August 3, 1992;
- (7) September 1, 1994;
- (8) August 1, 1998;
- (9) August 1, 2000;
- (10) April 1, 2001.

(d) The Schedule of Classifications and Water Quality Standards for the Broad River Basin was amended effective August 3, 1992 with the reclassification of all water supply waters (waters with a primary classification of WS-I, WS-II or WS-III). These waters were reclassified to WS-I, WS-II, WS-III, WS-IV or WS-V as defined in the revised water supply protection rules, (15A NCAC 2B .0100, .0200 and .0300) which became effective on August 3, 1992. In some cases, streams with primary classifications other than WS were reclassified to a WS classification due to their proximity and linkage to water supply waters. In other cases, waters were reclassified from a WS classification to an alternate appropriate primary classification after being identified as downstream of a water supply intake or identified as not being used for water supply purposes.

(e) The Schedule of Classifications and Water Quality Standards for the Broad River Basin was amended effective September 1, 1994 with the reclassification of the Second Broad River [Index No. 9-41-(0.5)] from its source to Roberson Creek including associated tributaries was reclassified from Class WS-V to Classes WS-V, WS-IV and WS-IV CA.

(f) The Schedule of Classifications and Water Quality Standards for the Broad River Basin was amended effective August 1, 1998 with the revision to the primary classification for portions of the Broad River [Index No. 9-(23.5)] from Class WS-IV to Class C and Second Broad River [Index Nos. 9-41-(10.5) and 9-41-(14.5)] and First Broad River [Index No. 950-(11)] from Class WS-IV to Class WS-V.

(g) The Schedule of Classifications and Water Quality Standards for the Broad River Basin was amended August 1, 2000 with the reclassification of the Green River [Index No. 9-29-(1)], including all tributaries, from its source to its mouth in Lake Summit at elevation 2011 from Class C Tr to Class B Tr.

(h) The Schedule of Classifications and Water Quality Standards for the Broad River Basin was amended effective August 1, 2000 with the reclassification of Lake Montonia [Index No. 9-54-1-(1)], and all tributaries, from Class B to Class B HQW.

(i) The Schedule of Classifications and Water Quality Standards for the Broad River Basin was amended effective April 1, 2001 with the reclassification of the Green River [Index No. 9-29-(1)], including all tributaries, from its source to the downstream side of the mouth of Rock Creek from Class B Tr to Class B Tr HQW.

History Note: Authority G.S. 143-214.1; 143-215.1; 143-215.3(a)(1);

Eff. February 1, 1976;

Amended Eff. April 1, 2001; August 1, 2000; August 1, 1998; September 1, 1994; August 3, 1992; February 1, 1986; January 1, 1985.

15A NCAC 101.0103 ENDANGERED SPECIES LISTED

(a) The following species of resident wildlife are designated as federally-listed endangered species:

- (1) Amphibians:
None Listed At This Time.
- (2) Birds:
 - (A) Bachman's warbler (*Vermivora bachmanii*);
 - (B) Ivory-billed woodpecker (*Campephilus principalis*);
 - (C) Kirtland's warbler (*Dendroica kirtlandii*);
 - (D) Piping plover (*Charadrius melodus circumcinctus*);
 - (E) Red-cockaded woodpecker (*Picoides borealis*);
 - (F) Roseate tern (*Sterna d. dougallii*);
 - (G) Wood stork (*Mycteria americana*).
- (3) Crustacea: None Listed At This Time.
- (4) Fish:
 - (A) Cape Fear shiner (*Notropis mekistocholas*);
 - (B) Shortnose sturgeon (*Acipenser brevirostrum*), when found in inland fishing waters.
- (5) Mammals:
 - (A) Carolina northern flying squirrel (*Glaucomys sabrinus coloratus*);
 - (B) Eastern cougar (*Puma concolor*);
 - (C) Gray bat (*Myotis grisescens*);
 - (D) Indiana bat (*Myotis sodalis*);
 - (E) Manatee (*Trichechus manatus*), when found in inland fishing waters;
 - (F) Virginia big-eared bat (*Corynorhinus townsendii virginianus*).
- (6) Mollusks:
 - (A) Appalachian elktoe (*Alasmidonta raveniliana*);
 - (B) Carolina heelsplitter (*Lasmigona decorata*);
 - (C) Dwarf wedge mussel (*Alasmidonta heterodon*);
 - (D) Little-wing pearl mussel (*Pegias fabula*);
 - (E) Tar river spiny mussel (*Elliptio [canthyrus] steinstansana*).
- (7) Reptiles:
 - (A) Atlantic ridley turtle (*Lepidochelys kempii*);
 - (B) Hawksbill turtle (*Eretmochelys imbricata*);
 - (C) Leatherback turtle (*Dermochelys coriacea*).

(b) The following species of resident wildlife are designated as state-listed endangered species:

- (1) Amphibians: Green salamander (*Aneides aeneus*).
- (2) Birds:
 - (A) American peregrine falcon (*Falco peregrinus anatum*);
 - (B) Bewick's wren (*Thryomanes bewickii*).
- (3) Crustacea: None Listed At This Time.
- (4) Fish:
 - (A) Blotchside logperch (*Percina burtoni*);
 - (B) Cutlips minnow (*Exoglossum maxillingua*);
 - (C) Dusky darter (*Percina sciera*);
 - (D) Orangefin madtom (*Noturus gilberti*);

- (E) Paddlefish (*Polyodon spathula*);
- (F) Rustyside sucker (*Thoburnia hamiltoni*);
- (G) Stonecat (*Noturus flavus*).
- (5) Mammals: None Listed At This Time.
- (6) Mollusks:
 - (A) Atlantic pigtoe (*Fusconaia masoni*);
 - (B) Barrel floater (*Anodonta couperiana*);
 - (C) Brook floater (*Alasmidonta varicose*);
 - (D) Carolina creekshell (*Villosa vauguaniana*);
 - (E) Fragile glyph (*Glyphyalinia clingmani*);
 - (F) Green floater (*Lasmigona subviridis*);
 - (G) Greenfield rams-horn (*Helisoma eucosmium*);
 - (H) Knotty elimia (*Goniobasis interrupta*);
 - (I) Magnificent rams-horn (*Planorbella magnifica*);
 - (J) Neuse spike (*Elliptio judithae*);
 - (K) Purple wartyback (*Cyclonaias tuberculata*);
 - (L) Savannah lilliput (*Toxolasma pullus*);
 - (M) Slippershell mussel (*Alasmidonta viridis*);
 - (N) Tennessee clubshell (*Pleurobema ovicorne*);
 - (O) Tennessee heelsplitter (*Lasmigona holstonia*);
 - (P) Tennessee pigtoe (*Fusconaia barnesiana*);
 - (Q) Yellow lampmussel (*Lampsilis cariosa*); and
 - (R) Yellow lance (*Elliptio lanceolata*).
- (7) Reptiles:
 - (A) Eastern coral snake (*Micrurus f. fulvius*);
 - (B) Eastern diamondback rattlesnake (*Crotalus adamanteus*).

- (B) Northern saw-whet owl (*Aegolius acadicus* ssp.).
- (3) Crustacea: None Listed At This Time
- (4) Fish:
 - (A) American brook lamprey (*Lampetra* appendix);
 - (B) Banded sculpin (*Cottus carolinae*);
 - (C) Bigeye jumprock (*Scartomyzon ariommus*);
 - (D) Carolina pygmy sunfish (*Elassoma boehlkei*);
 - (E) Freshwater drum (*Aplodinotus grunniens*);
 - (F) Least brook lamprey (*Lampetra aepyptera*);
 - (G) Logperch (*Percina caprodes*);
 - (H) Rosyface chub (*Hybopsis rubrifrons*);
 - (I) Sharphead darter (*Etheostoma acuticeps*);
 - (J) Striped shiner (*Luxilus chrysocephalus*); and
 - (K) Waccamaw darter (*Etheostoma perlongum*).
- (5) Mammals:
 - (A) Eastern woodrat (*Neotoma f. floridana*);
 - (B) Rafinesque's big-eared bat (*Corynorhinus rafinesquii*).
- (6) Mollusks:
 - (A) Alewife floater (*Anodonta implicata*);
 - (B) Big-tooth covert (*Mesodon jonesianus*);
 - (C) Cape Fear threetooth (*Triodopsis soelneri*);
 - (D) Carolina fatmucket (*Lampsilis radiata conspicua*);
 - (E) Clingman covert (*Mesodon clingmanicus*);
 - (F) Eastern lampmussel (*Lampsilis radiata radiata*);
 - (G) Eastern pondmussel (*Ligumia nasuta*);
 - (H) Engraved covert (*Mesodon orestes*);
 - (I) Mountain creekshell (*Villosa vanuxemensis*);
 - (J) Roan supercoil (*Paravitrea varidens*);
 - (K) Roanoke slabshell (*Elliptio roanokensis*);
 - (L) Sculpted supercoil (*Paravitrea ternaria*);
 - (M) Seep mudalia (*Leptoxis dilatata*);
 - (N) Smoky Mountain covert (*Mesodon ferrissi*);
 - (O) Squawfoot (*Strophitus undulatus*);
 - (P) Tidewater mucket (*Leptodea ochracea*);
 - (Q) Triangle floater (*Alasmidonta undulata*);
 - (R) Waccamaw ambersnail (*Catinella waccamawensis*);
 - (S) Waccamaw fatmucket (*Lampsilis fullerkeri*); and
 - (T) Waccamaw spike (*Elliptio waccamawensis*).
- (7) Reptiles: None Listed At This Time.

History Note: Authority G.S. 113-134; 113-291.2; 113-292; 113-333; Eff. June 11, 1977; Amended Eff. April 1, 2001; February 1, 1994; November 1, 1991; April 1, 1991; June 1, 1990.

15A NCAC 10I .0104 THREATENED SPECIES LISTED

- (a) The following species of resident wildlife are designated as federally-listed threatened species:
 - (1) Amphibians: None Listed At This Time.
 - (2) Birds:
 - (A) Bald eagle (*Haliaeetus leucocephalus*); and
 - (B) Piping plover (*Charadrius melodus melodus*).
 - (3) Crustacea: None Listed At This Time.
 - (4) Fish:
 - (A) Spotfin chub (*Cyprinella monacha*); and
 - (B) Waccamaw silverside (*Menidia extensa*).
 - (5) Mammals: None Listed At This Time.
 - (6) Mollusks: Noonday globe (*Mesodon clarki nantahala*).
 - (7) Reptiles:
 - (A) Bog turtle (*Clemmys muhlenbergii*);
 - (B) American alligator (*Alligator mississippiensis*);
 - (C) Green turtle (*Chelonia mydas*); and
 - (D) Loggerhead turtle (*Caretta caretta*).
- (b) The following species of resident wildlife are designated as state-listed threatened species:
 - (1) Amphibians:
 - (A) Carolina gopher frog (*Rana capito capito*);
 - (B) Eastern tiger salamander (*Ambystoma t. tigrinum*);
 - (C) Junaluska salamander (*Eurycea junaluska*); and
 - (D) Wehrle's salamander (*Plethodon wehrlei*).
 - (2) Birds:
 - (A) Gull-billed tern (*Sterna nilotica aranea*); and

History Note: Authority G.S. 113-134; 113-291.2; 113-292; 113-333; Eff. March 17, 1978; Amended Eff. April 1, 2001; November 1, 1991; April 1, 1991; June 1, 1990; September 1, 1989.

15A NCAC 10I .0105 SPECIAL CONCERN SPECIES LISTED

- The following species of resident wildlife are designated as state-listed special concern species:
- (1) Amphibians:
 - (a) Crevice salamander (*Plethodon longicrus*);
 - (b) Dwarf salamander [silver morph] (*Eurycea quadridigitata*);
 - (c) Eastern hellbender (*Cryptobranchus a. alleganiensis*);
 - (d) Four-toed salamander (*Hemidactylum scutatum*);
 - (e) Longtail salamander (*Eurycea l. longicauda*);
 - (f) Mole salamander (*Ambystoma talpoideum*);
 - (g) Mountain chorus frog (*Pseudacris brachyphona*);

- (h) Mudpuppy (*Necturus maculosus*);
 - (i) Neuse River waterdog (*Necturus lewisi*);
 - (j) River frog (*Rana heckscheri*);
 - (k) Weller's salamander (*Plethodon welleri*);
 - (l) Zigzag salamander (*Plethodon Ventralis*).
- (2) Birds:
- (a) Bachman's sparrow (*Aimophila aestivalis*);
 - (b) Black-capped chickadee (*Poecila atricapillus*);
 - (c) Black skimmer (*Rynchops niger*);
 - (d) Black vulture (*Coragyps atratus*);
 - (e) Brown creeper (*Certhia americana nigrescens*);
 - (f) Common tern (*Sterna hirundo*);
 - (g) Cooper's hawk (*Accipiter cooperii*);
 - (h) Glossy ibis (*Plegadis falcinellus*);
 - (i) Least tern (*Sterna antillarum*);
 - (j) Little blue heron (*Egretta caerulea*);
 - (k) Loggerhead shrike (*Lanius ludovicianus*);
 - (l) Olive-sided flycatcher (*Contopus coopen*);
 - (m) Red crossbill (*Loxia curvirostra*);
 - (n) Snowy egret (*Egretta thula*);
 - (o) Tricolored heron (*Egretta tricolor*);
 - (p) Yellow-bellied sapsucker (*Sphyrapicus varius appalachiensis*).
- (3) Crustacea:
- (a) Broad River spiny crayfish (*Cambarus spicatus*);
 - (b) Chowanoke crayfish (*Orconectes virginienis*);
 - (c) Greensboro burrowing crayfish (*Cambarus catagius*);
 - (d) Hiwassee headwaters crayfish (*Cambarus parrishi*);
 - (e) Little Tennessee River crayfish (*Cambarus georgiae*);
 - (f) North Carolina spiny crayfish (*Orconectes carlionensis*);
 - (g) Oconee stream crayfish (*Cambarus chaugaensis*);
 - (h) Waccamaw crayfish (*Procambarus braswelli*).
- (4) Fish:
- (a) Atlantic sturgeon (*Acipenser oxyrhynchus*);
 - (b) Bluefin killifish (*Lucania goodei*);
 - (c) Blueside darter (*Etheostoma jessiae*);
 - (d) Bridle shiner (*Notropis bifrenatus*);
 - (e) Broadtail madtom (*Noturus n. sp.*) (Lumber River and its tributaries and Cape Fear-River and its tributaries);
 - (f) Carolina darter (*Etheostoma collis*);
 - (g) Carolina madtom (*Noturus furiosus*) (Neuse River and its tributaries);
 - (h) Highfin carpsucker (*Carpionodes velifer*);
 - (i) Kanawha minnow (*Phenacobius teretulus*);
 - (j) Lake sturgeon (*Acipenser fulvescens*);
 - (k) Least killifish (*Heterandria formosa*);
 - (l) Longhead darter (*Percina macrocephala*);
 - (m) Mooneye (*Hiodon tergisus*);
 - (n) Mountain madtom (*Noturus eleutherus*);
 - (o) Olive darter (*Percina squamata*);
 - (p) Pinewoods darter (*Etheostoma mariae*);
 - (q) River carpsucker (*Carpionodes carpio*);
 - (r) Riverweed darter (*Etheostoma podostemone*);
 - (s) Rosyside dace (*Clinostomus funduloides ssp.*) (Little Tennessee River and its tributaries);
 - (t) Sandhills chub (*Semotilus lumbee*);
 - (u) Sharpnose darter (*Percina oxyrhynchus*);
 - (v) Tennessee snubnose darter (*Etheostoma simoterum*);
 - (w) Thinlip chub (*Cyprinella zanema*) (Lumber River and its tributaries and Cape Fear River and its tributaries);
 - (x) Turquoise darter (*Etheostoma inscriptum*);
 - (y) Waccamaw killifish (*Fundulus waccamensis*);
 - (z) Wounded darter (*Etheostoma vulneratum*);
 - (aa) Yellowfin shiner (*Notropis lutipinnis*) (Savannah River and its tributaries and Little Tennessee River and its tributaries).
- (5) Mammals:
- (a) Allegheny woodrat (*Neotoma magister*);
 - (b) Keen's bat (*Myotis septentrionalis*);
 - (c) Long-tailed shrew (*Sorex dispar blitchi*);
 - (d) Pungo white-footed mouse (*Peromyscus leucopus easti*);
 - (e) Rock vole (*Microtus chrotorrhinus carolinensis*);
 - (f) Small-footed bat (*Myotis l. leibii*);
 - (g) Southeastern bat (*Myotis austroriparius*);
 - (h) Southern Appalachian woodrat (*Neotoma floridana haematorea*);
 - (i) Star-nosed mole (*Condylura cristata parva*);
 - (j) Water shrew (*Sorex palustris punctulatus*).
- (6) Mollusks:
- (a) Appalachian gloss (*Zonitoides patuloides*);
 - (b) Bidentate dome (*Ventridens coelaxis*);
 - (c) Black mantleslug (*Pallifera hemphilli*);
 - (d) Blackwater ancyliid (*Ferrissia hendersoni*);
 - (e) Blue-foot lancetooth (*Haplotrema kendeighi*);
 - (f) Cape Fear spike (*Elliptio marsupiobesa*);
 - (g) Dark glyph (*Glyphyalinia junaluskana*);
 - (h) Dwarf proud globe (*Mesodon clarki*);
 - (i) Dwarf threetooth (*Triodopsis fulciden*);
 - (j) Fringed coil (*Helicodiscus fimbriatus*);
 - (k) Glossy supercoil (*Paravitrea placentula*);
 - (l) Great Smoky slitmouth (*Stenotrema depilatum*);
 - (m) High mountain supercoil (*Paravitrea andrewsae*);
 - (n) Honey glyph (*Glyphyalinia vanattai*);
 - (o) Lamellate supercoil (*Paravitrea lamellidens*);
 - (p) Mirey Ridge supercoil (*Paravitrea clappi*);
 - (q) Notched rainbow (*Villosa constricta*);
 - (r) Open supercoil (*Paravitrea umbilicaris*);
 - (s) Pink glyph (*Glyphyalinia pentadelphia*);
 - (t) Pod lance (*Elliptio folliculata*);
 - (u) Queen crater (*Mesodon chilhoweensis*);
 - (v) Rainbow (*Villosa nebulosa*);
 - (w) Ramp Cove supercoil (*Paravitrea lacteodens*);
 - (x) Saw-tooth disc (*Discus bryanti*);
 - (y) Spike (*Elliptio dilatata*);
 - (z) Spiral coil (*Helicodiscus bonamicus*);
 - (aa) Velvet covert (*Mesodon subpalliatum*);
 - (bb) Waccamaw amnicola (*Amnicola sp.*);
 - (cc) Waccamaw lampmussel (*Lampsilis crocata*);
 - (dd) Waccamaw siltsnail (*Cincinnati sp.*);
 - (ee) Wavy-rayed lampmussel (*Lampsilis fasciola*).
- (7) Reptiles:
- (a) Carolina pigmy rattlesnake (*Sistrurus m miliarius*);
 - (b) Carolina salt marsh snake (*Nerodia sipedon williamengelsi*);
 - (c) Diamondback terrapin (*Malaclemys terrapin*);

- (d) Eastern smooth green snake (*Opheodrys v. vernalis*);
- (e) Eastern spiny softshell (*Apalone s. spinifera*);
- (f) Mimic glass lizard (*Ophisaurus mimicus*);
- (g) Northern pine snake (*Pituophis m. melanoleucus*);
- (h) Outer banks kingsnake (*Lampropeltis getula sticticeps*);
- (i) Southern hognose snake (*Heterodon simus*);
- (j) Stripeneck musk turtle (*Sternotherus minor peltifer*);
- (k) Timber rattlesnake (*Crotalus horridus*).

History Note: Authority G.S. 113-134; 113-291.2; 113-292; 113-333;

Eff. September 1, 1989;

Amended Eff. April 1, 2001; November 1, 1991; April 1, 1991; June 1, 1990.

15A NCAC 18A .2806 FOOD STORAGE

- (a) Food products shall be stored in approved, clean, tightly covered, storage containers once the original package is opened. Container covers shall be impervious and nonabsorbent.
- (b) Foods not stored in the product container or package, in which it was obtained, shall be stored in a tightly covered, approved food storage container identifying the food by common name.
- (c) Food shall be stored above the floor in a manner that protects the food from splash and other contamination and that permits easy cleaning of the storage area.
- (d) Food and containers of food shall not be stored under exposed or unprotected sewer lines or water lines, except for automatic fire protection sprinkler heads that may be required by law. Food shall not be stored in toilet or laundry rooms, or other areas where there is a potential for contamination. Child care centers licensed for fewer than 13 children and located in a residence may store food in laundry rooms if protected as required in Paragraph (e) of this Rule.
- (e) All food shall be stored in a manner to protect it from dust, insects, drip, splash and other contamination.
- (f) Packaged food such as milk or other fluid containers may be stored in undrained ice as long as any individual units are not submerged in water. Wrapped sandwiches shall not be stored in direct contact with ice.
- (g) Refrigerated storage:

- (1) Refrigeration equipment shall be provided in such number and of such capacity to assure the maintenance of potentially hazardous food at required temperatures during storage. Each refrigerator shall be provided with a numerically scaled indicating thermometer, accurate to $\pm 3^{\circ}\text{F}$, ($\pm 1.5^{\circ}\text{C}$) located to measure the air temperature in the warmest part of the refrigerator and located to be easily readable. Recording thermometers, accurate to $\pm 3^{\circ}\text{F}$ ($\pm 1.5^{\circ}\text{C}$), may be used in lieu of indicating thermometers;
- (2) Potentially hazardous food requiring refrigeration after preparation shall be cooled to an internal temperature of 45°F (7°C), or below. Cooling of potentially hazardous foods shall be initiated upon completion of preparation or a period of hot storage. Methods such as shallow pans, agitation, quick chilling or water circulation external to the food containers shall be used to cool large quantities of potentially hazardous food.

Potentially hazardous food to be transported cold shall be prechilled and held at a temperature of 45°F (7°C) or below;

- (3) Ice used for cooling stored food and food containers shall not be used for human consumption.
- (h) Hot storage:
 - (1) Hot food storage equipment shall be provided in such number and of such capacity to assure the maintenance of food at the required temperature during storage. Each hot food unit shall be provided with a numerically scaled indicating thermometer, accurate to $\pm 3^{\circ}\text{F}$ ($\pm 1.5^{\circ}\text{C}$), located to measure the air temperature in the coolest part of the unit and located to be easily readable. Recording thermometers, accurate to $\pm 3^{\circ}\text{F}$ ($\pm 1.5^{\circ}\text{C}$), may be used in lieu of indicating thermometers. Where it is impractical to install thermometers on equipment such as steam tables, steam kettles, heat lamps, cal-rod units, or insulated food transport carriers, a metal stem-type numerically scaled indicating product thermometer shall be available and used to check internal food temperature;
 - (2) The internal temperature of potentially hazardous foods requiring hot storage shall be 140°F (60°C) or above except during necessary periods of preparation and service. Potentially hazardous food to be transported hot shall be held at a temperature of 140°F (60°C) or above.

History Note: Authority G.S. 110-91;

Eff. July 1, 1991;

Amended Eff. February 1, 1995;

Temporary Amendment Eff. December 1, 1999;

Amended Eff. April 1, 2001.

15A NCAC 18A .2812 MANUAL CLEANING AND SANITIZING

- (a) Child care centers licensed for or serving food to 30 or more children, shall provide and use a three-compartment sink with drainboards or counter top space of adequate size on each end if utensils and equipment are manually cleaned and sanitized.
- (b) Child care centers licensed for or serving food to fewer than 30 children that use a domestic dishwasher and two compartment sink for sanitizing multi-service articles shall sanitize as required in Subparagraph (e)(4) of this Rule. Sink compartments shall be large enough to submerge the largest items to be washed and each compartment shall be supplied with hot and cold running water.
- (c) If required under Rule 18A .2810 of this Section, drainboards or countertop space of adequate size shall be provided for handling of soiled utensils prior to washing and cleaned utensils following sanitizing. For child care centers originally licensed on or after April 15, 1998, drainboards or countertop space shall be no less than 24" long. For child care centers licensed for fewer than 13 children and located in a residence, a domestic dishwasher may be used to provide the equivalent of 24" of drainboard space, and other designated areas not contiguous with the sink may be utilized to meet drainboard or countertop space requirements. Replacement equipment and new equipment acquired on or after April 15, 1998 shall meet the requirements of this Paragraph. Upon change of ownership, or the closing of the operation and the

issuance of a new license, a child care center shall also comply with this Paragraph.

(d) Equipment and utensils shall be preflushed or prescraped and, when necessary, presoaked to remove gross food particles and soil.

(e) Except for fixed equipment and utensils too large to be cleaned in sink compartments, manual washing, rinsing, and sanitizing shall be conducted in the following sequence:

- (1) Sinks shall be cleaned and sanitized prior to use.
- (2) Equipment and utensils shall be thoroughly washed in the first compartment with a hot detergent solution that is changed once visibly soiled.
- (3) Equipment and utensils shall be rinsed free of detergent and abrasives with clean water in the second compartment.
- (4) The food-contact surfaces of equipment and utensils shall be sanitized in the third compartment by:
 - (A) Immersion for at least one minute in clean, hot water at a temperature of at least 170°F (77°C);
 - (B) Immersion for at least two minutes in a clean solution containing at least 50 parts per million (ppm) of available chlorine at a temperature of at least 75°F (24°C);
 - (C) Immersion for at least two minutes in a clean solution containing at least 12.5 ppm of available iodine and having a pH not higher than 5.0 and at a temperature of at least 75°F (24°C); or
 - (D) Immersion for at least two minutes in a clean solution containing at least 200 ppm of quaternary ammonium products and having a temperature of at least 75°F (24°C), provided that the product is labeled to show that it is effective in water having a hardness value at least equal to that of the water being used.

(f) For utensils and equipment which are either too large or impractical to sanitize in a dishwashing machine or dishwashing sink, a spray-on or wipe-on sanitizer shall be used. When spray-on or wipe-on sanitizers are used, the chemical strengths shall be those required for sanitizing multi-use eating and drinking utensils. Spray-on or wipe-on sanitizers shall be prepared daily and kept on hand for bactericidal treatment.

(g) When hot water is used for sanitizing, the following facilities shall be provided and used:

- (1) An integral heating device or fixture installed in, on, or under the sanitizing compartment of the sink capable of maintaining the water at a temperature of at least 170°F (77°C); and
- (2) A numerically scaled indicating thermometer, accurate to ±3°F (±1.5°C), convenient to the sink for frequent checks of water temperature; and
- (3) Dish baskets of such size and design to permit complete immersion of the tableware, kitchenware, and equipment in the hot water.

(h) An approved testing method or equipment, used in accordance with the product manufacturer's instructions, shall be available, convenient, and regularly used to test chemical sanitizers to insure minimum prescribed strengths.

(i) After sanitization, all equipment and utensils shall be air dried.

History Note: Authority G.S. 110-91;

Eff. July 1, 1991;

Amended Eff. April 15, 1998; February 1, 1995; July 1, 1993;

Temporary Amendment Eff. December 1, 1999;

Amended Eff. April 1, 2001.

TITLE 18 – SECRETARY OF STATE

18 NCAC 07 .0102 GENERAL PURPOSE

History Note: Authority G.S. 10A-4; 10A-6; 10A-9(f); 10A-13;

Eff. February 1, 1976;

Amended Eff. January 1, 1995;

Repealed Eff. September 1, 2000.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS

CHAPTER 14 – BOARD OF COSMETIC ARTS

SUBCHAPTER 14A – DEPARTMENTAL RULES

SECTION .0100 – ORGANIZATION RULES

21 NCAC 14A .0101 DEFINITIONS

The following definitions apply in this Chapter:

- (1) "Beauty Establishment" refers to both cosmetic art schools and cosmetic art shops.
- (2) "Cosmetology School" is any cosmetic art school which teaches cosmetic art as defined by G.S. 88B-2(5), but is not a manicurist or an esthetics school.
- (3) "Esthetician Student" is a student in any cosmetic art school whose study is limited to the esthetician curriculum set forth in 21 NCAC 14O .0102.
- (4) "Manicurist School" is a cosmetic art school which teaches only the cosmetic arts of manicuring.
- (5) "Manicurist Student" is a student in any cosmetic art school whose study is limited to the manicurist curriculum set forth in 21 NCAC 14K .0102.
- (6) "Successful Completion" is the completion of an approved cosmetic art curriculum with a minimum grade of "C" or 70%, whichever is deemed as passing by the cosmetic art school.
- (7) "Esthetician School" is any cosmetic art school which teaches only the cosmetic arts of skin care.
- (8) "Esthetics" refers to any of the following practices: giving facials, applying makeup, performing skin care, removing superfluous hair from the body of any person by the use of depilatories, tweezers or waxing, or applying eyelashes to any person (this is to include brow and lash color), beautifying the face, neck, arms or upper part of the human body, by use of cosmetic preparations, antiseptics, tonic, lotions or creams, massaging, cleaning, or stimulating the face, neck, ears, arms, hands, bust, torso, legs or feet, by means of the hands, devices, apparatus, or appliances, with the use of cosmetic preparations, antiseptics, tonics, lotions or creams.

History Note: Authority G.S. 88B-2; 88B-4;

APPROVED RULES

Eff. February 1, 1976;
Amended Eff. June 1, 1993; October 1, 1991;
May 1, 1991; January 1, 1989;
Temporary Amendment Eff. January 1, 1999;
Amended Eff. April 1, 2001; August 1, 2000.

RULES REVIEW COMMISSION

This Section contains the agenda for the next meeting of the Rules Review Commission on Thursday, October 19, 2000, 10:00 a.m., at 1307 Glenwood Ave., Assembly 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 by Friday, October 13, 2000, at 5:00 p.m. Specific instructions and addresses may be obtained from the Rules Review Commission at 919-733-2721. Anyone wishing to address the Commission should notify the RRC staff and the agency at least 24 hours prior to the meeting.

RULES REVIEW COMMISSION MEMBERS

Appointed by Senate

Teresa L. Smallwood, Chairman
John Arrowood
Laura Devan
Jim Funderburke
David Twiddy

Appointed by House

R. Palmer Sugg, 1st Vice Chairman
Jennie J. Hayman, 2nd Vice Chairman
Walter Futch
Paul Powell
George Robinson

RULES REVIEW COMMISSION MEETING DATES

October 19, 2000	December 16, 2000
January 20, 2001	February 17, 2001
March 16, 2001	April 20, 2001
May 18, 2001	June 15, 2001

LOG OF FILINGS

RULES SUBMITTED: August 20, 2000 through September 20, 2000

AGENCY/DIVISION	RULE NAME	RULE CITATION	ACTION
AGRICULTURE, DEPARTMENT OF/STRUCTURAL PEST CONTROL COMMITTEE			
	Subterranean Termite Prevention	2 NCAC 34 .0505	Amend
	Minimum Requirements/Subterranean Termite Prev	2 NCAC 34 .0506	Amend
AGRICULTURE, DEPARTMENT OF/STATE MARKETING AUTHORITY			
	Horse Facility	2 NCAC 43L .0304	Repeal
	Livestock Facility	2 NCAC 43L .0305	Repeal
DEPARTMENT OF COMMERCE/BANKING COMMISSION			
	Customer Bank Communications Terminals Limitations	4 NCAC 3C .1501	Repeal
		4 NCAC 3C .1502	Repeal
DHHS/DIVISION OF FACILITY SERVICES			
	Health Maintenance Organizations	10 NCAC 3R .0213	Amend
	Determination of Review	10 NCAC 3R .0304	Amend
	Filing Applications	10 NCAC 3R .0305	Amend
	Definitions	10 NCAC 3R .1613	Amend
	Required Performance Standards	10 NCAC 3R.1615	Amend
	Information Required of Applicant	10 NCAC 3R .1714	Amend
	Definitions	10 NCAC 3R .1912	Amend
	Information Required of Applicant	10 NCAC 3R .1913	Amend
	Required Performance Standards	10 NCAC 3R .1914	Amend
	Definitions	10 NCAC 3R .2113	Amend
	Definitions	10 NCAC 3R .2713	Amend
	Required Performance Standards	10 NCAC 3R .2715	Amend
	Con Review Categories	10 NCAC 3R .3001	Repeal
	Applicability of Rules	10 NCAC 3R .3002	Repeal
	Multi-County Groupings	10 NCAC 3R .3010	Repeal
	CON Review Schedule	10 NCAC 3R .3020	Repeal
	Facility and Service Need Determinations	10 NCAC 3R .3030	Repeal
	Dialysis Station Need Determination	10 NCAC 3R .3032	Repeal
	Reallocations and Adjustments	10 NCAC 3R .3040	Repeal
	Policies	10 NCAC 3R .3050	Repeal

RULES REVIEW COMMISSION

Applicability of Rules	10 NCAC 3R .3051	Repeal
CON Review Categories	10 NCAC 3R .3052	Repeal
CON Review Schedule	10 NCAC 3R .3053	Repeal
Multi-County Groupings	10 NCAC 3R .3054	Repeal
Reallocations and Adjustments	10 NCAC 3R .3055	Repeal
Dialysis Station Need Determination	10 NCAC 3R .3056	Repeal
Acute Care Bed Need Determination	10 NCAC 3R .3057	Repeal
Rehabilitation Bed Need Determination	10 NCAC 3R .3058	Repeal
Ambulatory Surgical Facilities Need Determination	10 NCAC 3R .3059	Repeal
Open Heart Surgery Services	10 NCAC 3R .3060	Repeal
Heart-Lung Bypass Machines	10 NCAC 3R .3061	Repeal
Heart-Lung Bypass Machines	10 NCAC 3R .3062	Repeal
Cardiac Catheterization Equipment	10 NCAC 3R .3063	Repeal
Cardiac Catheterization Equipment	10 NCAC 3R .3064	Repeal
Cardiac Angioplasty Equipment	10 NCAC 3R .3065	Repeal
Cardiac Angioplasty Equipment	10 NCAC 3R .3066	Repeal
Burn Intensive Care Services	10 NCAC 3R .3067	Repeal
Positron Emission Tomography Scanners	10 NCAC 3R .3068	Repeal
Bone Marrow Transplantation Services	10 NCAC 3R .3069	Repeal
Solid Organ Transplantation Services Need	10 NCAC 3R .3070	Repeal
Gamma Knife Need Determination	10 NCAC 3R .3071	Repeal
Nursing Care Bed Need Determination	10 NCAC 3R .3072	Repeal
Demonstration Project	10 NCAC 3R .3073	Repeal
Home Health Agency Office	10 NCAC 3R .3074	Repeal
Hospice Need Determination	10 NCAC 3R .3075	Repeal
Hospice Inpatient Facility Bed Need	10 NCAC 3R .3076	Repeal
Psychiatric Bed Need Determination	10 NCAC 3R .3077	Repeal
Chemical Dependency Treatment Bed	10 NCAC 3R .3078	Repeal
Intermediate Care Beds	10 NCAC 3R .3079	Repeal
Policies for General Acute Care Hospitals	10 NCAC 3R .3080	Repeal
Policies for Inpatient Rehabilitation Services	10 NCAC 3R .3081	Repeal
Policies for Ambulatory Surgical Facilities	10 NCAC 3R .3082	Repeal
Policies for Nursing Care Facilities	10 NCAC 3R .3083	Repeal
Policies for Home Health Services	10 NCAC 3R .3084	Repeal
Policies for End-Stage Renal Disease	10 NCAC 3R .3085	Repeal
Policies for Psychiatric Inpatient Facilities	10 NCAC 3R .3086	Repeal
Policies for chemical Dependency Treatment	10 NCAC 3R .3087	Repeal
Policies for Intermediate Care Facilities	10 NCAC 3R .3088	Repeal
Required Performance Standards	10 NCAC 3R .4203	Amend
Applicability of Rules	10 NCAC 3R .6101	Repeal
Certificate of Need	10 NCAC 3R .6102	Repeal
Certificate of Need Review Schedule	10 NCAC 3R .6103	Repeal
Multi-County Groupings	10 NCAC 3R .6104	Repeal
Service Areas	10 NCAC 3R .6105	Repeal
Reallocations and Adjustments	10 NCAC 3R .6106	Repeal
Acute Care Bed Need Determination	10 NCAC 3R .6107	Repeal
Rehabilitation Bed Need Determination	10 NCAC 3R .6108	Repeal
Ambulatory Surgical Facilities	10 NCAC 3R .6109	Repeal
Open Heart Surgery Services Need	10 NCAC 3R .6110	Repeal
Heart-Lung Bypass Machines	10 NCAC 3R .6111	Repeal
Fixed Cardiac Catheterization	10 NCAC 3R .6112	Repeal
Mobile Cardiac Catheterization	10 NCAC 3R .6113	Repeal
Burn Intensive Care Services Need	10 NCAC 3R .6114	Repeal
Positron Emission Tomography Scanners	10 NCAC 3R .6115	Repeal
Bone Marrow Transplantation	10 NCAC 3R .6116	Repeal
Solid Organ Transplantation Services	10 NCAC 3R .6117	Repeal
Gamma Knife Need Determination	10 NCAC 3R .6118	Repeal
Lithotripter Need Determination	10 NCAC 3R .6119	Repeal
Radiation Oncology Need Determination	10 NCAC 3R .6120	Repeal
Nursing Care Bed Need	10 NCAC 3R .6121	Repeal
Demonstration Project	10 NCAC 3R .6122	Repeal
Home Health Agency Office	10 NCAC 3R .6123	Repeal

Dialysis Station Need	10 NCAC 3R .6124	Repeal
Hospice Need Determination	10 NCAC 3R .6125	Repeal
Hospice Inpatient Facility Bed Need	10 NCAC 3R .6126	Repeal
Psychiatric Bed Need	10 NCAC 3R .6127	Repeal
Chemical Dependency Treatment	10 NCAC 3R .6128	Repeal
Intermediate Care Beds	10 NCAC 3R .6129	Repeal
Policies for General Acute Care	10 NCAC 3R .6130	Repeal
Policies for Inpatient Rehabilitation	10 NCAC 3R .6131	Repeal
Policy for Ambulatory Surgical Facilities	10 NCAC 3R .6132	Repeal
Policy for Provision of Hospital	10 NCAC 3R .6133	Repeal
Policy for Nursing Care Beds	10 NCAC 3R .6134	Repeal
Policy for Determination of Need	10 NCAC 3R .6135	Repeal
Policy for Relocation	10 NCAC 3R .6136	Repeal
Policy for Home Health Services	10 NCAC 3R .6137	Repeal
Policy for End-Stage Renal Disease	10 NCAC 3R.6138	Repeal
Policies for Psychiatric Inpatients	10 NCAC 3R .6139	Repeal
Policy of Chemical Dependency	10 NCAC 3R .6140	Repeal
Policies for Intermediate Care	10 NCAC 3R .6141	Repeal
Applicability of Rules Related to 2000 Plan	10 NCAC 3R .6250	Adopt
Certificate of Need Review Schedule	10 NCAC 3R .6252	Adopt
Multi-County Groupings	10 NCAC 3R .6253	Adopt
Service Areas	10 NCAC 3R .6254	Adopt
Reallocations and Adjustments	10 NCAC 3R .6255	Adopt
Acute Care Bed Need Determination	10 NCAC 3R .6256	Adopt
Rehabilitation Bed Need Determination	10 NCAC 3R .6257	Adopt
Ambulatory Surgical Facilities Need Determination	10 NCAC 3R .6258	Adopt
Heart-Lung Bypass Machines	10 NCAC 3R .6260	Adopt
Fixed Cardiac Catheterization Equipment	10 NCAC 3R .6261	Adopt
Burn Intensive Care Services Need	10 NCAC 3R .6263	Adopt
Positron Emission Tomography	10 NCAC 3R .6264	Adopt
Bone Marrow Transplantation Services	10 NCAC 3R .6265	Adopt
Solid Organ Transplantation Services	10 NCAC 3R .6266	Adopt
Gamma Knife Need Determination	10 NCAC 3R .6267	Adopt
Lithotripter Need Determination	10 NCAC 3R .6268	Adopt
Radiation Oncology Treatment Centers	10 NCAC 3R .6269	Adopt
Magnetic Resonance Imaging Scanners	10 NCAC 3R .6270	Adopt
Magnetic Resonance Imaging Scanners	10 NCAC 3R .6271	Adopt
Nursing Care Bed Need Determination	10 NCAC 3R .6272	Adopt
Demonstration Project	10 NCAC 3R .6273	Adopt
Home Health Agency Office Need	10 NCAC 3R .6274	Adopt
Dialysis Station Need Determination	10 NCAC 3R .6275	Adopt
Dialysis Station Adjusted Need Determination	10 NCAC 3R .6276	Adopt
Hospice Need Determination	10 NCAC 3R .6277	Adopt
Hospice Inpatient Facility Bed Need	10 NCAC 3R .6278	Adopt
Psychiatric Bed Need Determination	10 NCAC 3R .6279	Adopt
Chemical Dependency	10 NCAC 3R .6280	Adopt
Intermediate Care Beds for the Mentally Retarded	10 NCAC 3R .6281	Adopt
Policies for General Acute Care Hospitals	10 NCAC 3R .6282	Adopt
Policies for Inpatient Rehabilitation Services	10 NCAC 3R .6283	Adopt
Policy for Ambulatory Surgical Facilities	10 NCAC 3R .6284	Adopt
Policy for Provision of Hospital Long Term Care	10 NCAC 3R .6285	Adopt
Policy for Plan Exemption	10 NCAC 3R .6286	Adopt
Policy for Determination of Need	10 NCAC 3R .6287	Adopt
Policy for Relocation of Certain Nursing Facility	10 NCAC 3R .6288	Adopt
Policies for Home Health Services	10 NCAC 3R .6289	Adopt
Policy for Relocation of Dialysis Stations	10 NCAC 3R .6290	Adopt
Policies for Psychiatric Inpatient Facilities	10 NCAC 3R .6291	Adopt
Policy for Chemical Dependency Treatment Facility	10 NCAC 3R .6292	Adopt
Policies for Intermediate Care Facilities	10 NCAC 3R .6293	Adopt
Application for a License for a Child Care Center	10 NCAC 3U .0302	Amend
General Safety Requirements	10 NCAC 3U .0604	Amend

RULES REVIEW COMMISSION

Administering Medication	10 NCAC 3U .0803	Amend
Requirements for Child Care Centers	10 NCAC 3U .1304	Amend
Administrative Policies Required	10 NCAC 3U .1601	Amend
Space Requirements	10 NCAC 3U .1604	Amend
Staff/Child Ratios	10 NCAC 3U .1606	Amend
Application for a License for A Family Child Care	10 NCAC 3U .1702	Amend
Requirements for a Safe Indoor/Outdoor Envir	10 NCAC 3U .1719	Amend
Safety and Sanitation Requirements	10 NCAC 3U .1720	Amend
Requirements for Records	10 NCAC 3U .1721	Amend
Discipline Policy	10 NCAC 3U .1722	Amend
Discipline Policy	10 NCAC 3U .1801	Amend
Notification to County Department of SS	10 NCAC 3U .1901	Amend
Investigation Procedures	10 NCAC 3U .1903	Amend
Administrative Sanctions	10 NCAC 3U .1904	Amend
Administrative Penalties	10 NCAC 3U .2006	Amend
Written Warnings	10 NCAC 3U .2007	Amend
Written Reprimands	10 NCAC 3U .2008	Amend
Probationary Status	10 NCAC 3U .2009	Amend
Suspension	10 NCAC 3U .2010	Amend
Revocation	10 NCAC 3U .2011	Amend
Summary Suspension	10 NCAC 3U .2012	Amend
Centers Operating Under G.S. 110-106	10 NCAC 3U .2101	Amend
Scope and Purpose	10 NCAC 3U .2201	Amend
Schedule of Civil Penalties for Child Care Centers	10 NCAC 3U .2206	Amend
Definitions	10 NCAC 14V .0802	Amend
General Information for Infants	10 NCAC 14V .0803	Amend
Surrogate Parents	10 NCAC 14V .0804	Amend
Procedural Requirements	10 NCAC 14V .0805	Amend
Definitions	10 NCAC 14V .3602	Amend
Purpose and Scope	10 NCAC 14V .3804	Adopt
Definitions	10 NCAC 14V .3805	Adopt
Authorization	10 NCAC 14V .3806	Adopt
DWI Substance Abuse Assessment	10 NCAC 14V .3807	Adopt
Qualifications of Individuals Performing Assess	10 NCAC 14V .3808	Adopt
Responsibilities of Assessing Agency	10 NCAC 14V .3809	Adopt
Responsibilities of Treatment for ADETS Providers	10 NCAC 14V .3810	Adopt
Reporting Requirements	10 NCAC 14V .3811	Adopt
Pre-Trial Assessments	10 NCAC 14V .3812	Adopt
Placement Criteria for Assessed DWI Clients	10 NCAC 14V .3813	Adopt
Documentation Requirements	10 NCAC 14V .3814	Adopt
Authorization to Provide DWI Substance Abuse	10 NCAC 14V .3815	Adopt
Minimal Program Content	10 NCAC 14V .3817	Adopt
Special Controlled Substances Emergency Kit	10 NCAC 45G .0410	Amend
Special Controlled Substances	10 NCAC 45G .0410	Amend
Scope	10 NCAC 46A .0101	Amend
Definitions	10 NCAC 46A .0105	Amend
Applicability	10 NCAC 46C .0102	Amend
Payment Fees	10 NCAC 46C .0106	Amend
Rates for Subsidized Care	10 NCAC 46C .0107	Amend
Definition of Fund	10 NCAC 46D .0101	Amend
Definition of Services	10 NCAC 46D .0102	Amend
Eligibility	10 NCAC 46D .0103	Amend
Fees	10 NCAC 46D .0104	Amend
Program Policies and Standards	10 NCAC 46D .0105	Amend
Allocation	10 NCAC 46D .0106	Amend
Reimbursement	10 NCAC 46D .0107	Amend
Sanctions and Appeals for Fraudulent Misrepresent	10 NCAC 46D .0108	Adopt
Correction of Overpayments	10 NCAC 46D .0109	Adopt
Requirements for Administration of Child Care Prog	10 NCAC 46D .0110	Adopt
Definition of Start-Up Funds	10 NCAC 46D .0201	Amend
Review Criteria for Start-Up Funds	10 NCAC 46D .0202	Amend
Scope	10 NCAC 46D .0301	Amend

Approval	10 NCAC 46D .0302	Amend
Length of Contract	10 NCAC 46D .0303	Amend
Administration of Funds	10 NCAC 46D .0304	Amend
Administration of Program	10 NCAC 46D .0305	Amend
Records	10 NCAC 46D .0306	Amend
Standards for Centers	10 NCAC 46E .0108	Amend
Application	10 NCAC 46E .0109	Repeal
Approval and Continued Participation	10 NCAC 46E .0111	Amend
Appeals	10 NCAC 46E .0112	Amend
Approval for Participation	10 NCAC 46F .0107	Amend
Purchase of Care	10 NCAC 46F .0108	Amend
Continued Participation	10 NCAC 46F .0110	Amend
Appeals	10 NCAC 46F .0111	Amend
Definition	10 NCAC 46G .0109	Amend
Division Responsibility	10 NCAC 46G .0110	Amend
Local Purchasing Agency Responsibility	10 NCAC 46G .0111	Amend
Initial Approval	10 NCAC 46G .0112	Amend
Maintaining Approval	10 NCAC 46G .0113	Amend
Payment Requirements	10 NCAC 46G .0114	Amend
Appeals	10 NCAC 46G .0115	Amend
Applicability of Rules	10 NCAC 46G .0116	Amend
Parent-Provider Checklist	10 NCAC 46G .0213	Amend
Health and Safety Standards	10 NCAC 46G .0214	Amend
Provider Requirements	10 NCAC 46G .0215	Amend
Scope	10 NCAC 46H .0101	Amend
Methods of Service Provision	10 NCAC 46H .0102	Amend
Definition of Service	10 NCAC 46H .0103	Amend
Optional Provision of Services	10 NCAC 46H .0104	Amend
Support to Employment	10 NCAC 46H .0105	Amend
Support for Protective Services	10 NCAC 46H .0106	Amend
Promote Child's Development	10 NCAC 46H .0107	Amend
Limitations	10 NCAC 46H .0108	Amend
Parental Freedom of Choice	10 NCAC 46H .0109	Amend
Definition of Special Needs Child	10 NCAC 46H .0110	Amend
Basic Eligibility Criteria	10 NCAC 46H .0201	Amend
Income Eligible Status	10 NCAC 46H .0203	Amend
Income Eligibility Levels	10 NCAC 46H .0204	Amend
Responsibility for Eligibility Determination	10 NCAC 46H .0207	Amend
Determination of Income Eligibility	10 NCAC 46H .0208	Amend
Requirements for Determination and Redetermination	10 NCAC 46H .0209	Amend
Amount and Collection of Client Fees	10 NCAC 46H .0302	Amend
Adjustments in Fees	10 NCAC 46H .0304	Amend
Minimum Fee Charges	10 NCAC 46H .0305	Repeal
Collection of Fees	10 NCAC 46H .0306	Repeal
DEPARTMENT OF INSURANCE		
Procedure for Procuring Insurance	11 NCAC 10 .0702	Repeal
Form E	11 NCAC 10 .0712	Repeal
Surplus Licensee Report	11 NCAC 10 .0717	Adopt
Form F Affidavit	11 NCAC 10 .0718	Adopt
Definitions and Scope	11 NCAC 16 .0301	Repeal
Restrictions on Premium Rates	11 NCAC 16 .0302	Repeal
Annual Filing	11 NCAC 16 .0303	Repeal
JUSTICE/CRIMINAL JUSTICE EDUCATION & TRAINING STANDARDS COMMISSION		
Definitions	12 NCAC 9A .0103	Amend
DEPARTMENT OF LABOR		
Vacation Pay	13 NCAC 12 .0306	Amend
Bonuses, Commissions and Other Forms of Cal	13 NCAC 12 .0307	Amend
Certification of Youths	13 NCAC 12 .0401	Amend
Application for Youth Employment Certificate	13 NCAC 12 .0402	Amend
Review: Issuance and Maintenance	13 NCAC 12 .0403	Amend
Detrimental Occupations	13 NCAC 12 .0406	Amend

RULES REVIEW COMMISSION

Designation of Youth Employment	13 NCAC 12 .0407	Adopt
Definitions Relative to ABC Restrictions	13 NCAC 12 .0408	Adopt
Parental Exemption	13 NCAC 12 .0409	Adopt
Exemptions	13 NCAC 12 .0501	Amend
Records to be Maintained	13 NCAC 12 .0801	Amend
Definitions	13 NCAC 20 .0101	Adopt
Computing Time Periods	13 NCAC 20 .0201	Adopt
Applicability	13 NCAC 20 .0202	Adopt
Confirmation of Samples	13 NCAC 20 .0203	Adopt
Examiner Options	13 NCAC 20 .0301	Adopt
Current Employees	13 NCAC 20 .0302	Adopt
Prospective Employees	13 NCAC 20 .0303	Adopt
Contractor Procedures	13 NCAC 20 .0304	Adopt
Laboratory Instructions	13 NCAC 20 .0305	Adopt
Retesting Laboratory Instructions	13 NCAC 20 .0306	Adopt
Initial Notice to Examinees	13 NCAC 20 .0401	Adopt
Post-Testing Notice to Examinees	13 NCAC 20 .0402	Adopt
Confidentiality of Information Related to Exam	13 NCAC 20 .0501	Adopt
Examples	13 NCAC 20 .0502	Adopt
Release of Confidential Information	13 NCAC 20 .0503	Adopt
Payment of Expenses	13 NCAC 20 .0601	Adopt
Reasonable Expenses	13 NCAC 20 .0602	Adopt
DENR/ENVIRONMENTAL MANAGEMENT COMMISSION		
Control of Visible Emissions	15 NCAC 2D .0521	Amend
Excess Emissions Reporting and Malfunctions	15 NCAC 2D .0535	Amend
Systemwide Collection System Permitting	15 NCAC 2H .0227	Adopt
TRANSPORTATION, DEPARTMENT OF/DIVISION OF MOTOR VEHICLES		
Stations	19 NCAC 3D .0519	Amend
STATE BOARDS/DENTAL EXAMINERS, BOARD OF		
Approved Courses and Sponsors	21 NCAC 16I .0103	Amend
Reporting Continuing Education	21 NCAC 16I .0104	Amend
Approved Courses and Sponsors	21 NCAC 16R .0102	Amend
Exemption from and Credit for Continuing Education	21 NCAC 16R .0104	Amend
STATE BOARDS/N C BOARD OF NURSING		
Licensure Required	21 NCAC 36 .0221	Amend

RULES REVIEW COMMISSION
September 29, 2000
MINUTES

The Rules Review Commission convened at 10:00 a.m. on Thursday morning, September 21, 2000, in the Assembly Room of the Methodist Building, 1307 Glenwood Avenue, Raleigh, North Carolina. There were only five Commissioners present: Vice Chairman Jennie Hayman, David Twiddy, John Arrowood, Laura Devan, and Walter Futch. Since there was no quorum the only business transacted was to adjourn the meeting until Friday, September 29, 2000 at 10:00 a.m.

At 10:00 a.m. on Friday, September 29, 2000, the Rules Review Commission reconvened. Commissioners in attendance were Vice Chairman Palmer Sugg, Jennie Hayman, Laura Devan, David Twiddy, John Arrowood, Paul Powell, Walter Futch, Robert Saunders, and George Robinson.

Staff members present were: Joseph J. DeLuca, Staff Director; Bobby Bryan, Rules Review Specialist; and Sandy Webster.

The following people attended:

Ann Wall	LABOR
Tom Harris	LABOR
John Bogner	LABOR
Bill Crowell	DENR/DEM
Bob Hamilton	Auctioneers Licensing Board
Bruce Marshburn	Auctioneers Licensing Board
Gary Cyrus	DENR/Aging
Lynne Berry	DENR/Aging

Dale Herman	DHHS
Al Eisele	DHHS
Dee Williams	Cosmetic Art Examiners
Stephanie Montgomery	DHHS/SSC
Denise Stanford	Dental Board

APPROVAL OF MINUTES

The meeting was called to order at 10:02 a.m. with Vice Chairman Sugg presiding. The Vice Chairman asked for any discussion, comments, or corrections concerning the minutes of the August 17, 2000 meeting. The minutes were approved as written.

FOLLOW-UP MATTERS

10 NCAC 42E .0704: Social Services Commission – The rewritten rule submitted by the agency was approved by the Commission.

10 NCAC 42Q .0016: Social Services Commission – The rewritten rule submitted by the agency was approved by the Commission.

10 NCAC 42S .0501: Social Services Commission – The rewritten rule submitted by the agency was approved by the Commission.

15A NCAC 7H .0209: Coastal Resources Commission – The rewritten rule submitted by the agency was approved by the Commission.

15A NCAC 19B .0320, .0321, and .0502: DHHS/Commission for Health Services – The rewritten rules submitted by the agency were approved by the Commission.

15A NCAC 26B .0104: Commission for Health Services – The rewritten rule submitted by the agency was approved by the Commission.

21 NCAC 14I .0104: State Board of Cosmetic Art Examiners - The rewritten rule submitted by the agency was approved by the Commission.

21 NCAC 14P .0105: State Board of Cosmetic Art Examiners - The rewritten rule submitted by the agency was approved by the Commission.

LOG OF FILINGS

Vice Chairman Sugg presided over the review of the log and all rules were a unanimously approved with the following exceptions:

Department of Labor – All rules were withdrawn by the agency with the exception of 13A NCAC 7A .0401 and 13 NCAC 15 .0201 which were approved by the Commission.

15A NCAC 2B .0257: Environmental Management Commission – The Commission objected to this rule due to lack of statutory authority and ambiguity. In (b)(1)(C) it is unclear what are “recreational lands” and “rights-of-way.” In (b)(2) and (4) the meaning and intent of the rule is unclear. It first states that the entire rule applies to “applicators” (2) and “consultants” (4) but then seems to limit the requirements to (c)(2) for both applicators and consultants. (An easily corrected error, but not for purposes of this analysis is that the reference in (b)(4) to (c)(2) should probably be to (c)(4).) In (b)(2) and following, it is unclear who is an “applicator.” Is it the employer or supervisor on a landscaping crew or is it the person who may (or may not) mix the ingredients and apply it to the landscape? In (b)(4) and following, it is also unclear who or what a “consultant” is.

There does not appear to be any authority cited for the provisions in (c) and (d) requiring certification as having successfully completed nutrient management training for applicators and consultants. In (d)(3) it is unclear what constitutes “sound nutrient management recommendations.” In (e)(1)(A) it is unclear whether the N.C. Soil and Water Conservation Commission has adopted standards. If so, then they should be referenced. Likewise in (e)(2)(A) and (B) it is unclear whether the “rules” referred to actually exist.

15 NCAC 2B .0258: Environmental Management Commission – The Commission objected to this rule due to ambiguity. In (a)(1) and (2) it is unclear how “new” developments can achieve a reduction based on decade old levels. Is it a reduction from what 1991 new developments contributed or a reduction from the entire nitrogen/phosphorous loading from all sources in 1991? At any rate it is also unclear why the purpose paragraph needs to be so specific since the remainder of the rule is quite specific about precisely what local governments must do. If the rest of the rule hinges on achieving a specific numerical level, then that level needs to be clear.

RULES REVIEW COMMISSION

Marine Fisheries Commission – The period of review was extended on all rules submitted for the September Log, based on a request by the agency and an opponent of one of the rule filings.

N C Auctioneers Commission - The period of review was extended on all rules submitted for the September Log.

21 NCAC 16I .0103 and .0104: State Board of Dental Examiners – These rules were withdrawn by the Board.

21 NCAC 16I .0102: State Board of Dental Examiners – The Commission objected to this rule due to lack of statutory authority and ambiguity. In (b), it is not clear what is meant by “extenuating circumstance.” This does not appear to be the specific guidelines required by G.S. 150B-19(6) for an agency to waive its rules.

21 NCAC 16R .0102 and .0104: State Board of Dental Examiners – These rules were withdrawn by the Board.

COMMISSION PROCEDURES AND OTHER BUSINESS

Mr. DeLuca reported that no word had been received on the Pharmacy Board lawsuit and that a motion hearing calendar on the Labor lawsuit had been scheduled for the week of November 13. He also reported that Lisa Johnson would be replacing Sandy on October 16. The Commissioners unanimously elected Paul Powell Chairman, John Arrowood first Vice Chairman, and Jennie Hayman second Vice Chairman.

The next meeting will be on Thursday, October 19, 2000.

The meeting adjourned at 11:00 a.m.

Respectfully submitted,
Sandy Webster

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) 733-2698. Also, the Contested Case Decisions are available on the Internet at the following address: <http://www.state.nc.us/OAH/hearings/decision/caseindex.htm>.

OFFICE OF ADMINISTRATIVE HEARINGS

*Chief Administrative Law Judge
JULIAN MANN, III*

*Senior Administrative Law Judge
FRED G. MORRISON JR.*

ADMINISTRATIVE LAW JUDGES

*Sammie Chess Jr.
Beecher R. Gray
Melissa Owens Lassiter*

*James L. Conner, II
Robert Roosevelt Reilly Jr.
Beryl E. Wade*

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
ALCOHOL BEVERAGE CONTROL COMMISSION				
NC ABC Commission v.DCL., Inc. T/A Cheap Shot O'Malleys	99 ABC 1341	Morrison	06/15/00	15:03 NCR 340
Daniel W. Shelton T/A Shelton Broers v.NC ABC Commission	99 ABC 1641	Conner	08/31/00	15:08 NCR 878
NC ABC Commission v. Harris Teeter, Inc. T/A Harris Teeter 142	99 ABC 1746	Lassiter	05/01/00	
Steven Wilson McCrae v. NC ABC Commission	00 ABC 0598	Wade	08/23/00	
Xavier DeShawn Bradley v. NC ABC Commission	00 ABC 0619	Mann	08/08/00	
CRIME CONTROL AND PUBLIC SAFETY				
Mamie Lee French v. N.C. Crime Victims Compensation Commission	99 CPS 1646	Conner	04/27/00	15:01 NCR 38
HEALTH AND HUMAN SERVICES				
William M. Gardin v. Department of Health & Human Services	98 CRA 1054	Lassiter	06/20/00	
Frederica LaShon Smith v. Department of Health & Human Services	00 CRA 0278 ¹	Wade	06/30/00	
Charles Cecil Douglas v. Department of Health & Human Services	00 CRA 0648	Wade	08/23/00	
<i>Child Support Enforcement Section</i>				
Steven M. Helms v. Department of Health & Human Services	98 CSE 1634	Gray	07/13/00	
Richard C. Mack v. Department of Health & Human Services	99 CSE 1244	Mann	08/16/00	
John Ray McCarroll v. Department of Health & Human Services	99 CSE 1272	Lassiter	08/16/00	
Loany Centeno v. Department of Health & Human Services	99 CSE 1325	Chess	06/29/00	
Craig D. McLeod v. Department of Health & Human Services	99 CSE 1369	Lassiter	08/29/00	
Darryl Glenn Cannady v. Department of Health & Human Services	99 CSE 1457	Gray	07/27/00	
Michael A. Whitlow v. Department of Health & Human Services	99 CSE 1482	Gray	07/11/00	
Susan Marie Grier v. Department of Health & Human Services	99 CSE 1484	Mann	06/02/00	
Larry N. McLain v. Department of Health & Human Services	99 CSE 1488	Lassiter	08/16/00	
Randy Gillespie v. Department of Health & Human Services	99 CSE 1491	Gray	08/22/00	
Nina Maier v. Department of Health & Human Services	99 CSE 1541	Gray	07/28/00	
Ronald E. Davis, Jr. v. Department of Health & Human Services	99 CSE 1554	Gray	07/28/00	
Kenneth Jones v. Department of Health & Human Services	99 CSE 1590	Gray	08/22/00	
Anthony C. Lambert v. Department of Health & Human Services	99 CSE 1699	Gray	06/05/00	
Wendy Gosnell v. Department of Health & Human Services	00 CSE 0073	Mann	06/14/00	
Dwight Dion Hallman v. Department of Health & Human Services	00 CSE 0098	Mann	06/14/00	
Davis, Donald George v. Department of Health & Human Services	00 CSE 0107	Wade	06/08/00	
Davis, Donald George v. Department of Health & Human Services	00 CSE 0108	Wade	06/08/00	
Thomas Jackson v. Department of Health & Human Services	00 CSE 0165	Chess	07/27/00	
Albertus Shaw III v. Department of Health & Human Services	00 CSE 0176	Gray	06/05/00	
Linwood Morris v. Department of Health & Human Services	00 CSE 0178	Mann	06/14/00	
John H. Jones v. Department of Health & Human Services	00 CSE 0181	Morrison	08/25/00	
Eddie J. Sykes v. Department of Health & Human Services	00 CSE 0192	Lassiter	06/13/00	
Andrew S. McKenzie v. Department of Health & Human Services	00 CSE 0193	Wade	06/08/00	
Darryal K. Anderson v. Department of Health & Human Services	00 CSE 0200	Gray	06/09/00	
John V. Wiberg, Jr. v. Department of Health & Human Services	00 CSE 0211	Mann	06/23/00	
William Jerry Gibbs v. Department of Health & Human Services	00 CSE 0213	Gray	06/22/00	
Izell Anthony Twiggs v. Department of Health & Human Services	00 CSE 0226	Gray	06/07/00	

CONTESTED CASE DECISIONS

Don Fitzgerald Walker v. Department of Health & Human Services	00 CSE 0230	Mann	08/01/00
Benjamin E. Walker v. Department of Health & Human Services	00 CSE 0232	Morrison	07/31/00
Randy Keith Beddard v. Department of Health & Human Services	00 CSE 0236	Lassiter	06/20/00
Delinda Guthrie Montague v. Department of Health & Human Services	00 CSE 0237	Mann	08/01/00
Lavarr Sharpe v. Department of Health & Human Services	00 CSE 0240	Mann	06/26/00
Timothy Holtzclaw v. Department of Health & Human Services	00 CSE 0245	Gray	09/14/00
Melton Tillery v. Department of Health & Human Services	00 CSE 0246	Lassiter	06/20/00
Darla Judkin v. Department of Health & Human Services	00 CSE 0254	Chess	08/23/00
Ronald L. Long, Jr. v. Department of Health & Human Services	00 CSE 0265	Mann	08/31/00
Walter Witherspoon v. Department of Health & Human Services	00 CSE 0268	Chess	06/19/00
Frederica LaShon Smith v. Department of Health & Human Services	00 CSE 0279	Wade	06/08/00
John Wayne Chambers v. Department of Health & Human Services	00 CSE 0280	Mann	06/30/00
George Fuller v. Department of Health & Human Services	00 CSE 0283	Morrison	06/28/00
Robert G. Wilson v. Department of Health & Human Services	00 CSE 0285	Lassiter	05/25/00
Gary Frank Ramsey v. Department of Health & Human Services	00 CSE 0292	Mann	06/29/00
Shylatron Copeland v. Department of Health & Human Services	00 CSE 0316	Mann	06/26/00
Isaac L. McCoy v. Department of Health & Human Services	00 CSE 0324	Lassiter	06/29/00
Robert Boening v. Department of Health & Human Services	00 CSE 0341	Mann	06/26/00
Joseph Patrick Santana v. Department of Health & Human Services	00 CSE 0344	Morrison	06/07/00
Hilton R. Shaw v. Department of Health & Human Services	00 CSE 0346	Lassiter	07/07/00
Anthony B. Bryant v. Department of Health & Human Services	00 CSE 0351	Wade	07/19/00
Michael Shelton DeBerry v. Department of Health & Human Services	00 CSE 0353	Gray	06/22/00
Leroy L. Alford v. Department of Health & Human Services	00 CSE 0354	Mann	06/26/00
Michael A. Tarach v. Department of Health & Human Services	00 CSE 0357	Morrison	07/26/00
Jeffrey T. Daye v. Department of Health & Human Services	00 CSE 0369	Lassiter	07/07/00
Michael Powell v. Department of Health & Human Services	00 CSE 0389	Conner	07/27/00
Jerry M. Thurmond v. Department of Health & Human Services	00 CSE 0390	Wade	06/30/00
Donald E. Church v. Department of Health & Human Services	00 CSE 0394	Gray	07/11/00
Ricky Barrett v. Department of Health & Human Services	00 CSE 0415	Mann	07/17/00
Kenneth Ray Smith v. Department of Health & Human Services	00 CSE 0416	Morrison	05/31/00
Juan M. Acosta v. Department of Health & Human Services	00 CSE 0417	Lassiter	06/24/00
Stanley Ray Allison v. Department of Health & Human Services	00 CSE 0425	Gray	07/11/00
James T. Graham v. Department of Health & Human Services	00 CSE 0426	Wade	06/08/00
Rufus Mitchell Simmons, Jr. v. Department of Health & Human Services	00 CSE 0431	Gray	06/27/00
James Howard Alexander v. Department of Health & Human Services	00 CSE 0433	Mann	06/26/00
Steve A. Hayward v. Department of Health & Human Services	00 CSE 0435	Morrison	07/14/00
Leonard Gabriel v. Department of Health & Human Services	00 CSE 0450	Mann	06/29/00
Patrick L. Moore v. Department of Health & Human Services	00 CSE 0463	Wade	06/19/00
Gregory Lee Bell v. Department of Health & Human Services	00 CSE 0464	Connor	06/29/00
Tamika B. Jenkins v. Department of Health & Human Services	00 CSE 0466	Chess	06/19/00
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STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
99 ABC 1641

DANIEL W. SHELTON)
T/A SHELTON BROERS)
Petitioner,)
)
v.)
)
N.C.ALCOHOLIC BEVERAGE)
CONTROL COMMISSION)
Respondent.)

RECOMMENDED DECISION

THIS MATTER came on for a hearing on 25 April 2000 on the Petitioner’s timely filed Petition for a Contested Case Hearing. At the hearing, the Petitioner was represented by counsel, John Keating Wiles, and the Respondent was represented by counsel, Timothy W. Morse. Having considered and deliberated upon the parties’ timely filed Prehearing Statements, the Petitioner’s Substitute Hearing Brief, the testimonial and documentary evidence presented at the hearing, the arguments of counsel, and the additional briefing submitted by counsel pursuant to this Office’s request, this matter is ripe for a recommended decision, and this Office makes the following Findings of Fact, Conclusions of Law, and Recommended Decision to the Respondent agency, the North Carolina Alcoholic Beverage Control Commission:

ISSUES

- 1. Whether the regulation under which Respondent disapproved Petitioner’s beer labels on grounds of depiction of the nude human form exceeds the statutory authority of the Respondent.
- 2. Whether the regulation under which Respondent disapproved Petitioner’s beer labels on grounds of depiction of the nude human form is reasonably necessary to enable the agency to fulfill a duty delegated to it by the General Assembly.
- 3. Whether the Respondent should approve Petitioner’s labels under 4 NCAC 25 .1004(c).

FINDINGS OF FACT

- 1. On 24 September 1999, the Petitioner, Daniel W. Shelton, d/b/a Shelton Broers, submitted two Label/Product Applications to the Respondent, North Carolina Alcoholic Beverage Control Commission (ABC Commission). See Attachments to the Petitioner’s Petition for a Contested Case Hearing, filed 30 November 1999.
- 2. One Application was for the label on the Petitioner’s product, Cantillon Rosé de Gambrinus, and the other application was for the label on the Petitioner’s product Cantillon Gueuze Lambic. See Exhibits A and B, attached to the Respondent’s Prehearing Statement, filed 5 January 2000.
- 3. The Cantillon Rosé de Gambrinus label was admitted into evidence at the hearing and identified as Petitioner’s Exhibit 1-A. T. pp. 7, 27.
- 4. The Cantillon Gueuze Lambic label was admitted into evidence at the hearing and identified as Petitioner’s Exhibit 1-B. T. pp. 7, 27.
- 5. The Cantillon Rosé de Gambrinus label includes drawings of a male figure, clothed in armor and seated with a nude female figure seated on his lap. The female figure has a light raspberry color and holds what appears to be a drinking vessel. The male figure, wearing heavy gloves, is clasping the female figure around her rib cage and lower right arm. The drawing also includes leafy figures surrounding the male and female figures, and the following writing appears on the label, beneath the name of the product (Rosé de Gambrinus): “BLENDED LAMBIC BEER BREWED WITH RASPBERRIES.” T. pp. 13 (Testimony of R. Bailey), 15 (Testimony of D. Alley); Petitioner’s Exhibit 1-A.
- 6. The Cantillon Gueuze label includes a drawing of a young boy, standing on a pedestal or platform, holding his penis with his left hand and urinating. With his right hand, the figure is holding what appears to be a full drinking vessel, and the figure is without clothing. The label also includes writing which, among other things, indicates that the product, a “PRODUCT OF BELGIUM,” is “BREWED AND BOTTLED BY BRASSERIE CANTILLON 1070 BRUXELLES.” T. p. 16 (Testimony of D. Alley); Petitioner’s Exhibit 1-B.

7. This Office takes official notice of the fact that Bruxelles is the French name of the Belgian city known in English as Brussels. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, 287 (1986).
8. On 8 October 1999, the ABC Commission disapproved both applications, citing NCAC 02S.1005(a)(3) in both instances. *See* Exhibits A and B, attached to the Respondent's Prehearing Statement, filed 5 January 2000.
9. On labels which the ABC Commission is authorized to regulate by the General Assembly, the Commission's regulations at 4 NCAC 02S.1005(a)(3) prohibit "any statement, design, device or representation which depicts nudity or is obscene or indecent."
10. One of the well-known features of the city of Brussels, Belgium, is the Mannekin-Pis Fountain (1619), noted for a small bronze statue of a boy urinating and known to the people of Brussels as their "oldest citizen." T. pp. 5-6; Joint Stipulation, ¶ 1.
11. Gambrinus is reputed to have been a medieval Belgian duke who invented beer. T. p. 6; Joint Stipulation, ¶ 2.
12. Expert opinion testimony was received at the hearing from Dr. Rebecca Bailey, Head of the Art Department at Meredith College, who testified as an expert witness in the field of art and community attitudes towards artistic expression. T. pp. 10-11.
13. Dr. Bailey's testimony is helpful to this Office acting as a finder of fact.
14. Dr. Rebecca Bailey testified as to Exhibit 1A that "there are numerous examples of women like this in art history and they are usually personifications, and they personify usually love, beauty, grace, or often nature. And I think that since this is a beer made with raspberries and if you look at her raspberry color, I think she's actually a personification of the harvest in this case rather than a real person; a goddess in other words, a goddess of the harvest." Although it is an original work, the nude female figure depicted on the Cantillon Rosé de Gambrinus label is derivative. Tr. 13.
15. Since the Cantillon Rosé de Gambrinus product is a beer made with raspberries and the nude female figure depicted on that product's label has a raspberry color, she can be construed as a personification of the harvest rather than a real person, or in other words, a goddess of the harvest. T. p. 13 (Testimony of R. Bailey).
16. Since Gambrinus is reputed to have been a medieval Belgian duke credited with inventing beer, and the male figure depicted on the Cantillon Rosé de Gambrinus label is clothed in armor, this Office finds that the Cantillon Rosé de Gambrinus label, taken as a whole, portrays a goddess of the harvest in the lap of the medieval figure credited with inventing beer, and the label thereby invokes the product's heritage and lineage.
17. Other than holding the drinking vessel containing beer, the Cantillon Gueuze Lambic label, which depicts the little boy urinating, is a recognizably close copy of the Manneken-Pis statute located in Brussels, Belgium. T. p. 12 (Testimony of R. Bailey).
18. Since the Manneken-Pis Fountain, with its statue of the little boy urinating, is a well-known feature of the city of Brussels, Belgium, where the Cantillon Gueuze Lambic product is brewed and bottled, and the depiction on the Cantillon Gueuze Lambic label is a recognizably close copy of the Brussels statue, this Office finds that the Cantillon Gueuze Lambic label, taken as a whole, portrays the Brussels origin of the Cantillon Gueuze Lambic beer, and the label thereby invokes the product's lineage and heritage.
19. The Commission rejected these labels solely and specifically because they depicted nudity under the dictionary definition. There was no finding that the labels were obscene. Tr. 16,17.
20. Both the Petitioner's expert in art and community attitudes toward artistic expression and the Respondent's Assistant Administrator (and only witness) testified that the illustrations on these labels do not appeal to the average North Carolinian's prurient interest in sex. Tr. 11, 13, 17.
21. Dr. Bailey testified that that sex is not the major issue with respect to the labels; beer is the major issue. T. p. 11 (Testimony of R. Bailey). This Office so finds.
22. This Office finds that, for an average person in North Carolina, neither of the Petitioner's labels appeals to the prurient interest in sex.

23. The labels that have disapproved by the Commission have been approved by the Federal agency in charge of such approvals for the Federal government. Tr. 19.
24. The labels that have been disapproved by the Commission are the labels used on these beers in Belgium, their place of origin. Pet. Exh. 2.
25. The only argument advanced by the Commission that disapproval of these labels is in the public interest is that persons, especially children, may be exposed to these labels against their will or inadvertently while the bottles are on grocery store shelves. Tr. 20-21.
26. No evidence was presented that viewing these labels would be harmful to children. The testimony of Dr. Bailey establishes that such depictions of women as found on Exhibit 1A occur frequently in classical art and the stipulations of the parties establish that the Mannekin Pis statue is on public display to adults and children in the ancient city of Brussels Belgium. The undersigned takes official notice of the fact that children visit art museums with their families and on class trips where they would be exposed to art that depicts nudity. This is considered by our society to be a wholesome and educational experience.
27. Copies of the Mannekin Pis statue are for sale at a garden shop in Wendell, N.C. Tr. 12. The undersigned takes official notice of the fact that copies of the Mannekin Pis statue are commonly available for use as back yard statuary.
28. Even assuming some interest in shielding children from these depictions, no grocery store need carry these beers. Approval of these labels only gives Petitioner the opportunity to try to market its beers. It is not tantamount to any requirement that any store stock the beer or that any person buy the beer.

CONCLUSIONS OF LAW

1. On the basis of the preceding Findings of Fact, this Office concludes that the parties are properly before it and this Office has jurisdiction of the subject matter and person.
2. The Commission has been delegated no specific power to prohibit—or allow—nudity on beer labels. The General Assembly has been completely silent on the subject.
3. For its authority for 04 NCAC 02s.1005, the Commission relies on its authority to “[p]rohibit or regulate any advertising of alcoholic beverages which is contrary to the public interest” and other even more general grants of authority (e.g., the power to make rules under §18B-206). Tr. 18-19.
4. Under the law of this State and this country, nudity does not necessarily equal obscenity. See e.g. *Shinall v. Worrell*, 319 F. Supp. 485 (D.N.C. 1970); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 117 S. Ct. 2329 (1997).
5. It must be remembered that our courts have made clear that there is a public interest in the free and unfettered flow, not only of ideas, but also of commerce. See, e.g. *First National Bank of Boston v. Belotti*, 435 U.S. 765, 766, 98 S. Ct. 1407, 1415 (1978); *American Motors Corporation v. Peters*, 311 N.C. 311, 318, 317 S.E. 2d. 351, 357 (1984). It is not in the public interest to absolutely prohibit these labels and thereby impede the flow of ideas and commerce on no stronger grounds than have been put forward to justify such a prohibition.
6. This Office is not empowered to decide constitutional issues; rather, this power is vested exclusively in the Article III courts. See, e.g. *Meads v. North Carolina Department of Agriculture*, -- N.C. --- (No. 139A98, filed 31 December 1998). Though there may well be a serious Constitutional question as to the validity of this regulation, especially in light of *United States v. Playboy*, ___ U.S. ____, 2000 U.S. Lexis 3427 (May 22, 2000), the Constitutional questions must await appeal to the Superior Court.
7. If the particular rule which the ABC Commission has applied in this case, 4 NCAC 2S.1005(a)(3), exceeds the ABC Commission’s statutory authority, then this Office is empowered to declare such a rule void.
8. If the particular rule which the ABC Commission has applied in this case, 4 NCAC 2S.1005(a)(3), is not reasonably necessary to fulfill a duty delegated to it by the General Assembly, then this Office is empowered to declare it void. N.C. Gen. Stat. §150B-33(b)(9)(1999).
9. Though an agency is entitled to deference in its decisions, that deference is based upon the special expertise of the agency. There is no special expertise of the Commission in determining the public’s interest in being exposed or not exposed to nudity.

10. Though this Office is empowered to declare a rule void, that declaration is still a recommended decision, and the final decision will be made, ironically, by the agency that wrote the rule. *Fearrington v. University of North Carolina*, 126 N.C. App. 774, 487 S.E.2d 169 (1997). That final decision is appealable to Superior Court.
11. Because this Office finds that neither the constitutional nor the statutory claims need be reached if the Petitioner's labels were approved pursuant to 4 NCAC 2S.1004(c), this Office finds that recommending that the ABC Commission approve the Petitioner's labels pursuant to 4 NCAC 2S.1004(c) serves the prudential interest of not deciding questions which may be unnecessary to the resolution of dispute before it.

Based upon the foregoing Findings of Fact and Conclusions of Law the undersigned makes the following:

RECOMMENDED DECISION

1. It is recommended that the Commission reconsider the constitutionality of a regulation creating an absolute blanket prohibition on any nudity of any type on labels on beer bottle labels, without regard to whether that nudity is obscene.
2. It is the recommended decision of this Office that 4 NCAC 2S.1005(a)(3) is void as exceeding the statutory authority of the ABC.
3. It is the recommended decision of this Office that 4 NCAC 2S.1005(a)(3) is void because it is not reasonably necessary to enable the agency to fulfill a duty delegated to it by the General Assembly.
4. It is further the recommended decision of this Office that the Commission use its discretion under 4 NCAC 2S.1004(c), which authorizes the ABC Commission, "upon request and for good cause shown," to "authorize a form of advertising not specifically allowed or authorized by [the Commission's] rules," to approve these two labels and avoid the possibility of invalidation of its regulation.

ORDER

It is hereby ordered that the agency serve a copy of the final agency decision on the Office of Administrative Hearings, P. O. Drawer 27447, Raleigh, NC 27611-7447, in accordance with North Carolina General Statute 150B-36(b).

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this recommended decision and to present written arguments to those in the agency who will make the final decision. G.S. 150B-36(a).

The agency is required by G.S. 150B-36(b) to serve a copy of the final agency decision on all parties and to furnish a copy to the parties' attorney on record and to the Office of Administrative Hearings.

The agency that will make the final decision in this contested case is the N.C. Alcoholic Beverage Control Commission.

This the 31st day of August, 2000.

James L. Conner, II
Administrative Law Judge

through the Winfall Police Department. Under the section that addresses criminal charges on this form the Petitioner wrote: DWI, 6/93, NCHP, Careless/Wreckless.”

5. Petitioner was issued a probationary certification (PRH 239591387) on June 15, 1993.
6. Petitioner was issued a general deputy certification (GNH 239591387) on March 28, 1995.
7. That 12 N.C.A.C. 10B .0204(c)(1) and (2) provides:
 - (c) The Commission may revoke, suspend, or deny the certification of a justice officer when the Commission finds that the applicant for certification or the certified officer:
 - (1) has knowingly made a material misrepresentation of any information required for certification or accreditation from the Commission or the North Carolina Criminal Justice Education and Training Standards Commission; or
 - (2) has knowingly and designedly by any means of false pretense, deception, defraudation, misrepresentation or cheating whatsoever, obtained or attempted to obtain credit, training or certification from the Commission or the North Carolina Criminal Justice Education and Training Standards Commission.
8. In 1988 Ms. Julia Lohman, Director of the Sheriff Standards Division, requested a criminal history check be made on the Petitioner by the Clerk of Superior Court, Pasquotank County. The criminal history check revealed that the Petitioner had been charged on April 16, 1988 and October 8, 1988 in Pasquotank County with the Misdemeanor offenses of Purchase/Possess Beer/Wine Underage. The Petitioner did not list these charges on his Personal History Statement (Form F-3) or his Report of Appointment Form (Form F-5A).

Based upon the foregoing stipulations, and by the greater weight of the admissible evidence, the undersigned makes the following:

FINDINGS OF FACT

1. Petitioner, Ersal Overton, III, is a citizen and resident of Perquimans County, North Carolina. At the time of this hearing Petitioner was employed with the Perquimans County Sheriff’s Department as a Deputy. Petitioner is not married. Petitioner was born in 1971, and at the time of this hearing Petitioner was 28 years old.
2. Petitioner graduated from Perquimans County High School in 1990.
3. With the exception of three to five years in neighboring Pasquotank County, Petitioner has continuously resided in Perquimans County.
4. During and immediately following high school, Petitioner was employed at Larry’s Drive In. Following employment at Larry’s Drive In, in 1992 Petitioner worked for the volunteer rescue squad and as a part-time dispatcher with the Perquimans County Dispatch System. After approximately one year as a part-time dispatcher, Petitioner then worked as a full-time dispatcher with the Perquimans County Dispatch System.
5. While working as a dispatcher, Petitioner’s supervisor was Homeria Jennette. During that time, Ms. Jennette also served as Perquimans County Sheriff Joe Lothian’s secretary. Ms. Jennette has been involved in law enforcement communications for 17 years and worked for Sheriff Lothian for 8 years. Ms. Jennette has known Petitioner since he was 18 years old and as he worked for the Rescue Squad.
6. The Dispatcher’s Office was located near the Sheriff’s Department, and the Sheriff’s personal office was across the hall from the Dispatcher’s Office. The deputies and the Sheriff would frequently come in and out of the Dispatcher’s Office.
7. While Petitioner was employed as a dispatcher, Sheriff Joe Lothian was the Sheriff of Perquimans County.
8. Petitioner knew Sheriff Lothian and deputies before he was employed as a dispatcher because he had lived in rural Perquimans County (population approximately 3,000) most of his life. While Petitioner worked as a dispatcher, he also came to know Sheriff Lothian and the deputies even better because of the proximity of their offices.
9. While working as a dispatcher, Petitioner had aspirations of becoming a law enforcement officer. However, Petitioner had concerns because he had received two underage drinking tickets in Elizabeth City in 1988 when he was 17 years old

CONTESTED CASE DECISIONS

(hereinafter referred to as “1988 underage alcohol citations) and a DWI ticket in 1991 when he was 21 years old. Petitioner voluntarily submitted and paid a \$10 fine and court costs prior to his court dates for each of the 1988 underage alcohol citations. Petitioner’s 1991 DWI was reduced to careless and reckless driving in 1992 as part of a plea bargain.

10. The two underage alcohol possession citations were waivable offenses in that Petitioner could voluntarily tender the amount owed in the Clerk of Court’s office prior to the court date, similar to traffic tickets. Petitioner’s payment of the fine and court costs was the equivalent of a guilty plea.
11. Petitioner discussed his concerns about these prior convictions and citations with numerous people, including then Perquimans County Sheriff Joe Lothian, Perquimans County Deputy Nicholas Viselli, and Magistrate Todd Tilley.
12. Deputy Viselli has known Petitioner since 1988. He was employed by the Perquimans County Sheriff’s Department as a deputy from 1992 until 1994, when he was medically disabled as a result of an injury.
13. Petitioner personally told Sheriff Lothian about the prior convictions and citations even though Sheriff Lothian already knew about them.
14. Magistrate Tilley heard Petitioner speak of the prior DWI and the 1988 underage alcohol possession citations on many occasions prior to Petitioner applying for certification from Respondent. In addition, Magistrate Tilley heard numerous deputies and dispatchers tease Petitioner about those prior offenses prior to Petitioner applying for certification from Respondent.
15. Despite Petitioner’s prior record, both Sheriff Lothian and Deputy Viselli encouraged Petitioner to apply for certification from Respondent. Deputy Viselli also told Petitioner that he had previously received a reckless driving citation which he had also been concerned about prior to applying for certification, but that it had posed no problem for him in receiving his certification.
16. In April, 1993, when Petitioner was 21 years old, he completed a Personal History Statement (Form F-3) (Respondent’s Exhibit 2) (hereinafter “1993 Form F-3”) in connection with his application for certification from Respondent. Petitioner had no law enforcement training when he completed this form. Petitioner did not type the 1993 Form F-3 but instead filled it out with pencil or pen.
17. A Form F-3 is required by Respondent and is used to evaluate whether an applicant meets certain minimum standards, including prior criminal misconduct.
18. The minimum standards for certification as a justice officer include the prohibition that the applicant not have committed a Class B misdemeanor within 5 years of the person’s date of appointment. 12 N.C.A.C. 10B .0301; .0307(a)(3) (Respondent’s Exhibit 16). A Class B misdemeanor includes any crime that provides for possible incarceration between 6 months to 2 years. . 12 N.C.A.C. 10B .0103 (10) (b). If an applicant has a Class B misdemeanor within the previous 5 years of the date of application, Respondent will not issue certification unless approved by Respondent’s Probable Cause Committee.
19. An underage alcohol possession citation for a person less than 19 years of age can result in possible incarceration between 6 months and 2 years.
20. Question 47 of the 1993 Form F-3 asked: “Have you ever been arrested by a law enforcement officer or otherwise charged with a criminal offense?”
21. When filling out the 1993 Form F-3 Petitioner did not personally know whether the two 1988 underage drinking citations were waivable offenses or whether he had to include them in his answer to Question Number 47. Petitioner had not believe he had been arrested in connection with the 1988 citations since he was issued a citation and was not detained, handcuffed or processed on either occasion.
22. Sheriff Lothian was present when Petitioner completed the 1993 Form F-3. Petitioner relied upon Sheriff Lothian’s instructions when filling out the 1993 Form F-3. Petitioner did not include the 1988 underage alcohol possession citations under Question Number 47 on his 1993 Form F-3 because Sheriff Lothian informed him that he did not have to include these citations on the form because they were waivable offenses. There were no witnesses to Sheriff Lothian’s instructions to Petitioner concerning his instruction, but Petitioner’s testimony is found to be credible.
23. Petitioner did include on the 1993 Form F-3 his 1991 careless and reckless driving conviction.

24. The 1993 Form F-3 attestation, which Petitioner signed, indicated that “each and every statement made on this form is true and complete” and that “omissions of information” could “subject Petitioner to disqualification for dismissal.” Petitioner signed the form and gave it to Sheriff Lothian.
25. At Sheriff Lothian’s direction, Homeria Jennette typed Petitioner’s 1993 Form F-3.
26. Upon completion, Ms. Jennette returned the 1993 Form F-3 to Sheriff Lothian, who returned it to Petitioner.
27. After Petitioner “probably” reviewed the 1003 Form F-3, he signed it on April 21, 1993. Homeria Jennette then mailed Petitioner’s 1993 Form F-3 to Respondent. Petitioner was aware that the Form F-3 was to be sent to Respondent, and he was also aware that Respondent was a separate entity from the Perquimans County Sheriff’s Department.
28. Petitioner did not believe that his failure to report the two 1988 underage alcohol possession citations on the 1993 Form F-3 would have any effect on his obtaining his certification from Respondent. It was not Petitioner’s intent to cheat, defraud or conceal facts from Respondent by failing to include the two 1988 underage alcohol possession citations. Petitioner did not believe that those two convictions, each with only a \$10 fine, would prevent him from obtaining his certification even if listed on the Form F-3.
29. On May 20, 1993 Ms. Jennette also completed the Summary of Background Investigation (Form F-8) (Respondent’s Exhibit 3). She obtained the information contained on that form from Petitioner’s 1993 Form F-3; through a brief conversation with Petitioner; and from Petitioner’s 1991 D.W.I. citation and judgment which were provided to her by Sheriff Lothian. Through those sources, Ms. Jennette was made aware of Petitioner’s 1991 D.W.I. arrest but not his two 1988 underage alcohol possession citations in Pasquotank County. Ms. Jennette did call the Pasquotank County Clerk’s Office to confirm the 1991 D.W.I. charge that was reduced to reckless driving, and she attached the citation and judgment on that charge to the Form F-8 along with a Perquimans County Criminal Record Check showing no criminal record in Perquimans County. In 1993 Perquimans County did not have a DCI PIN terminal. The procedure at that time for a records check in connection with certification application was to contact individual Clerk’s offices. Ms. Jennette did not inquire of the Pasquotank County Clerk of Court concerning the two underage drinking citations, nor did she conduct a criminal record check in Pasquotank County.
30. On June 23, 1993 Petitioner signed and submitted to Respondent a form entitled Report of Appointment – Deputy Sheriff (Form F-4) (Respondent’s Exhibit 4) (hereinafter referred to as “1993 Form F-4”). This form did not require Petitioner to list his prior criminal convictions, but its attestation, which Petitioner signed, read in pertinent part: “...the information provided above and all other information submitted by me, both oral and written throughout the employment and certification process is thorough, complete and accurate to the best of my knowledge. I further understand and agree that any omission, falsification, or misrepresentation of any factor or portion of such information can be the sole basis for termination of my employment and/or denial or revocation of my certification at any time; now or later.”
31. Petitioner was not concerned when he signed the 1993 Form F-4 because he had filled out all certification application paperwork as instructed by Sheriff Lothian and Petitioner assumed that he had done so correctly and honestly.
32. Thereafter, Petitioner received his probationary certification from Respondent (Respondent’s Exhibit 5) and began work as a Perquimans County Deputy.
33. Petitioner completed Basic Law Enforcement Training (hereinafter referred to as “BLET”) School at Pitt Community College in November, 1994.
34. From 1992 through 1997 Brady Davis was the Academy Director for the Pitt Community College BLET Program when Petitioner successfully completed BLET. Mr. Davis taught the course orientation to Petitioner’s class. Mr. Davis outlined the role of Respondent, the Criminal Justice Commission, the requirements for certification with each, and the role of criminal convictions in the certification process. Mr. Davis informed the class that the two Commissions were separate from the County Sheriffs’ Departments. Mr. Davis talked to the students in each orientation class about honesty and openness concerning disclosing prior criminal offenses. Mr. Davis also instructed the students to come to his office if they had been charged or failed to disclose charges.
35. Jeannie Outland was employed by the Criminal Justice Education and Training Standards Commission for 24 years until December, 1998. Her responsibilities included monitoring compliance with the Commission’s rules. She also routinely gave lectures at BLET schools, including Petitioner’s class in 1994, concerning eligibility for certification and issues related to the completion of Report of Appointment/Application for Certification (Form F-5A). During her presentations, she routinely emphasized the importance of signing the applicant statement and filling out the section relating to criminal offenses. She also explained that the Criminal Justice Commission was a separate Commission from

Respondent and any questions concerning eligibility for certification from Respondent would have to be addressed to a representative of Respondent.

36. In 1994 there was an election for the Perquimans County Sheriff. Sheriff David Lane defeated Sheriff Joe Lothian.
37. At the time of the hearing, the whereabouts of former Sheriff Lothian remained unknown. According to Ms. Jennette, no one in the Perquimans County Sheriff's Department knows how to contact former Sheriff Lothian.
38. Petitioner continued to work as a Deputy Sheriff in Perquimans County from 1993 until 1997. During this time, Petitioner received his general certification from Respondent in 1995 (Respondent's Exhibit 6).
39. In September, 1997 Petitioner resigned from the Perquimans County Sheriff's Department (Respondent's Exhibit 7) because of difficulties between him and Sheriff David Lane.
40. Petitioner next was employed as a law enforcement officer with the Winfall Police Department. Winfall is a small town in Perquimans County that has a one-person police department.
41. As part of his transfer to the Winfall Police Department, Petitioner applied for certification from the North Carolina Criminal Justice Education and Training Standards Commission (hereinafter referred to as "Criminal Justice Commission"). As part of that certification process, November 18, 1997 Petitioner submitted a Report of Appointment/Application for Certification (Form F-5A) (Respondent's Exhibit 10) (hereinafter referred to as "1997 Form F-5A") to the Criminal Justice Commission.
42. Page Two of the 1997 Form F-5A reads in pertinent part "each applicant must list any and all criminal charges regardless of the date of offense and the disposition...Do not include minor traffic offenses..."
43. Magistrate Todd Tilley, who also worked in the Dispatch Office and was a close friend of Petitioner, assisted Petitioner in filling out the 1997 Form F-5A. Magistrate Tilley has known Petitioner for over 12 years. They worked together as dispatchers and members of the volunteer rescue squad. Petitioner asked Magistrate Tilley to assist him in order to make sure that he filled out the form correctly. Prior to completing the form, Petitioner had obtained his Perquimans County and Pasquotank County Criminal Record Checks. The Pasquotank County record showed that Petitioner had paid a \$10 fine for each of the two 1988 underage alcohol possession citations.
44. As they filled out the form in Petitioner's kitchen, Magistrate Tilley asked Petitioner about the necessity of listing the 1988 underage alcohol possession convictions. Petitioner told him that Sheriff Joe Lothian informed him that Petitioner did not need to list these offenses because they were waivable because of the procedure of making payment directly to the Clerk of Court. Therefore, Petitioner had not listed those convictions on the 1993 Form F-3 and did not need to list them on the 1997 Form F-5A.
45. Magistrate Tilley was not concerned that Petitioner did not list the two 1988 citations on the 1997 Form F-5A because he was under the impression that the Commission would perform a criminal records check before issuing certification, and because Petitioner had complied with former Sheriff Lothian's instructions before, received his certification, and had not heard any objections concerning the manner in which he had completed the previous certification forms.
46. Petitioner did, however, indicate on the 1997 Form F-5A that his 1991 DWI was reduced to careless and reckless driving and that a resisting arrest charge had been dismissed.
47. Petitioner did not list the 1988 underage alcohol possession citations on the Form F-5A because Sheriff Joe Lothian had in 1993 told him that he did not have to list those offenses on his 1993 forms, and Petitioner did not believe that the Sheriff was incorrect. Petitioner knew that following his submission of his 1993 paperwork he had served as a Deputy Sheriff for almost 4 years without indication from Respondent or his superiors that he had filled out the 1993 forms incorrectly.
48. In connection with his application for certification from the Criminal Justice Commission, Petitioner filled out and submitted to that Commission a Personal History Statement – Form F-3 (Respondent's Exhibit 15) (hereinafter referred to as "1997 Form F-3"). Question 47 of the 1997 Form F-3 asked "Have you ever been arrested by a law enforcement officer or otherwise charged with a criminal offense?"
49. Petitioner did not include the 1988 underage alcohol possession citations under Question Number 47 on that form because Sheriff Joe Lothian had previously informed him that he did not have to include them on the 1993 Form F-3. Subsequently, no one had contacted Petitioner to inform him that he had filled out the 1993 Form F-3 incorrectly. Petitioner did include on the form his prior DWI that was reduced to careless and reckless driving.

50. Petitioner did not believe that his failure to report the two 1988 underage alcohol possession citations on the 1997 Form F-5A and Form F-3 would have any effect on his obtaining his certification from the Criminal Justice Commission. It was not Petitioner's intent to cheat, defraud or conceal any material information from that Commission by failing to include the two 1988 underage alcohol possession citations. Petitioner did not believe that those two citations, each with a \$10 fine, would prevent him from obtaining his certification if listed on the 1997 paperwork.
51. The Criminal Justice Commission subsequently issued certification to Petitioner.
52. Petitioner did not tell any officials with the Town of Winfall about the 1988 underage alcohol possession citations. However, at the time Petitioner worked for the Town of Winfall, there were no other police officers or a Police Chief. Perquimans County Dispatch was the dispatching agency for the Town of Winfall. The only person with and for whom Petitioner worked in Winfall was the Mayor.
53. In 1998 Sheriff Ralph Robinson defeated Sheriff David Lane in the election. During the election campaigns, Petitioner publicly supported Sheriff Robinson in his race against Sheriff David Lane.
54. After Sheriff Robinson was elected Sheriff, Petitioner transferred back to the Perquimans County Sheriff's Department to resume work as a deputy sheriff, where he has remained employed as a Deputy Sheriff through the date of this hearing. As part of the transfer process, Petitioner signed and submitted to Respondent another Report of Appointment, Form F-4 (Respondent's Exhibit 8) (hereinafter referred to as "1998 Form F-4"), which contained the same attestation as the 1993 Form F-4.
55. On October 12, 1998 Respondent issued Petitioner another General Deputy Certification (Respondent's Exhibit 9).
56. From 1993 until 1999 Petitioner did not notify Respondent or the Criminal Justice Commission of the two 1988 underage alcohol possession citations.
57. Julia Lohman has been the Director for the Sheriff's Standards Division since the Spring of 1999. Previously, she was the Assistant Director for 10 years. Her duties included conducting criminal history violations and possible rule violations.
58. In 1993 Sheriff's offices were not required to conduct background checks upon certification applicants. They were required to submit Clerk of Court records from counties where the applicant has resided within the six-month period preceding this date of the oath of office. They were also required to fingerprint the individual and process the fingerprint with the State and Federal Bureaus of Investigation.
59. Underage alcohol possession citations most likely would not show up on a fingerprint check since those charges stem from a citation without a formal arrest and booking process, so there would normally be no fingerprints associated with those charges.
60. In December 1998 Julia Lohman received a call from Respondent's Chairman indicating that the Chairman had talked with former Perquimans County Sheriff David Lane who indicated that Petitioner had charges on his record that were not revealed to Respondent. The call was Ms. Lohman's first notification of Petitioner's omissions. There was no indication that there was any link between the omitted offenses and Petitioner's ability to perform his duties as a Deputy Sheriff.
61. Ms. Lohman then entered Petitioner's name through the AOC computer which then disclosed the two 1988 underage alcohol possession citations.
62. Ms. Lohman then contacted the Pasquotank County Clerk of Court (Respondent's Exhibit 11) and, in response, received the certified computerized records of the two 1988 citations (Respondent's Exhibit 12). There was no further investigation into the merits of the 1988 charges since they were then over 5 years old.
63. On December 11, 1998 Petitioner received a letter (Petitioner's Exhibit 1) from Julia Lohman. The letter was the first Petitioner received from Respondent. The letter indicated that Respondent had learned of the 1988 underage alcohol possession citations that were not reported on Petitioner's Form F-3 and requested information.
64. Following his receipt of Ms. Lohman's letter, Petitioner informed Ms. Jennette that he had received the letter and informed Ms. Jennette that Sheriff Lothian had instructed him that he should not list the two underage alcohol possession citations. Prior to that time, Petitioner had not mentioned nor discussed these two citations with Ms. Jennette, and she was not aware of them prior to that time.

65. Petitioner, with the help of either Homeria Jennette or Magistrate Tilley, prepared a response letter dated January 4, 1999 (Petitioner's Exhibit 2) in which he explained his omission of the two 1988 citations.
66. Ms. Lohman compiled all of the information and forwarded the information to Respondent's Probable Cause Committee. The Probable Cause Committee determined that it had probable cause to believe Petitioner had falsified his application to both Commissions and recommended a 5 year revocation of Petitioner's certification. Ms. Lohman notified Petitioner of such by letter dated June 3, 1999 (Respondent's Exhibit 13).
67. Had Petitioner reported the two underage alcohol possession citations to Respondent in 1993, since it would have been a few months within 5 years of the date of the offenses, Respondent would have requested the citations and judgments. The application, with the underlying documentation, would have been presented to Respondent's Probable Cause Committee to determine whether the offenses were such that certification should be denied.
68. Had Petitioner reported the two 1988 underage alcohol possession citations to the Criminal Justice Commission in 1997, that Commission still could have issued certification since the 1988 offenses occurred more than 5 years before. However, the omission might have been sent to the Probable Cause Committee since there is no time limitation on either Commission's investigation of possible certification document falsification issues.
69. Ms. Jennette has not known Petitioner to lie to her, and she has never heard anyone say that Petitioner has been dishonest.
70. Deputy Viselli worked with Petitioner in the Perquimans County Sheriff's Department and found him to be a good officer and that he followed direction. Deputy Viselli has not known Petitioner to lie and has never heard anyone speak poorly of Petitioner. Deputy Viselli has not had any reason to question Petitioner's integrity.
71. Magistrate Todd Tilley believes Petitioner is a very honest individual and knows that Petitioner is well thought of in the community. During his numerous years as a law enforcement officer, Petitioner has appeared before Magistrate Tilley on many occasions, and Magistrate Tilley has not doubted Petitioner's veracity or Truthfulness.

Based upon the foregoing Findings of Fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction of this contested case pursuant to Chapter 17E and 150B of the North Carolina General Statutes.
2. 12 N.C.A.C. 10B .0204(c)(1) and (2) provides the Respondent may revoke, suspend, or deny the certification of a justice officer when the Commission finds that the applicant for certification or the certified officer:
 - (1) has knowingly made a material misrepresentation of any information required for certification or accreditation from the Commission or the North Carolina Criminal Justice Education and Training Standards; or
 - (2) has knowingly and designedly by any means of false pretense, deception, defraudation, misrepresentation or cheating whatsoever, obtained or attempted to obtain credit, training or certification from the Commission or the North Carolina Criminal Justice Education and Training Standards Commission.
3. With respect to the 1993 Form F-3 signed by Petitioner on April 21, 1993 and the Report of Appointment – Deputy Sheriff (Form F-4) signed by Petitioner on June 3, 1993, any failure to disclose the facts surrounding the Petitioner's two 1988 underage alcohol possession citations in Pasquotank County, North Carolina occurred through no knowing, intentional or fraudulent misrepresentation by Petitioner. As of April 23, 1993 Petitioner had no training or knowledge as a law enforcement officer or either Commission or their rules. Sheriff Lothian instructed Petitioner that he did not have to list the two 1988 underage alcohol possession citations on the Respondent's forms since they were waivable offenses for which Petitioner paid only a \$10 fine when he was 17 years old. Therefore, Petitioner's failure to disclose the facts surrounding those citations resulted from both Petitioner's ignorance of Respondent's rules and as a result of his

reasonable reliance upon directives given to him by Sheriff Joe Lothian. The undersigned concludes that the Petitioner did not violate 12 N.C.A.C. 10B .0204(c)(1) and (2).

4. With respect to the 1997 Form F-5A that the Petitioner signed on November 18, 1997 and the 1997 Form F-3, any failure to disclose the facts surrounding the Petitioner's two 1988 underage alcohol possession citations in Pasquotank County, North Carolina occurred through no knowing, intentional, or fraudulent misrepresentation by Petitioner. Notwithstanding that Petitioner had by this time attended two classes at BLET that generally advised the importance of listing all criminal convictions, Petitioner had previously reasonably relied upon the advice given to him by Sheriff Joe Lothian of not having to list the citations and during the subsequent four years had never heard from Respondent concerning the manner in which he completed the 1993 certification forms. Therefore, Petitioner could reasonably rely upon the instructions given him by Sheriff Lothian as being accurate and that, over the passage of time without a disclosure to the contrary, Petitioner had correctly completed the certification forms. The undersigned concludes the Petitioner did not violate 12 N.C.A.C. 10B .0204(c)(1) and (2).
5. The undersigned recognizes the importance to the Respondent of accurate information to be recorded in the application process as to criminal history, but under these circumstances, the undersigned cannot find that the Petitioner's failure to disclose these citations in 1993 was a knowing misrepresentation (omission) made with the intent to deceive or defraud or that Petitioner's failure to disclose in 1997 was either a material misrepresentation (omission) or a knowing misrepresentation (omission) made with the intent to deceive or defraud. Not all omissions are per se violations. Only those that rise to the level of fraud. The evidence does not provide several necessary elements of proof of fraud but, on the contrary, seems to justify a simple mistake based on a lack of knowledge and erroneous advice.
6. "Knowingly" means willfully, intentionally and consciously. "Designedly" means on purpose or intentionally. "False pretense" means a designed misrepresentation of existing fact. "Deception" means an intentional misleading by falsehood. "Defraudation" means privation (a taking away or withholding) by fraud. "Misrepresentation" means an intentional false statement. "Cheating" means defrauding. Under any of the foregoing definitions, the Petitioner has not, under the facts of this case, committed any of the violations as contained in 12 NCAC 10B .0204(c)(2).
7. Petitioner did not knowingly make to Respondent any misrepresentation or intentional omission with the intent to deceive or defraud in 1993. Petitioner was not aware of Respondent's rules and also specifically sought assistance from Sheriff Joe Lothian. Sheriff Lothian advised Petitioner that he did not have to report waivable misdemeanors on the certification forms. It was reasonable for Petitioner to rely upon Sheriff Lothian's advice. Petitioner's lack of intent to defraud or misrepresent is evidenced by his reporting on the 1993 Form F-3 and F-4 of the 1992 conviction of careless and reckless driving, which could reasonably be assumed to be an offense more serious than an underage possession of alcohol charge with a mere \$10 fine.
8. Petitioner did not knowingly make to the Criminal Justice Commission any material misrepresentation with the intent to deceive or defraud in 1997. A material misrepresentation is one that is a substantive misrepresentation. That the Criminal Justice Commission in 1997 would not have considered Petitioner's misdemeanor record that was older than five years makes the 1997 omission of listing the 1988 convictions immaterial. Had the Petitioner listed the offenses in 1997, it would have been beyond the five year period and, therefore, this omission is insubstantial. In addition, Petitioner did not knowingly or with intent to defraud, misrepresent his criminal record in 1997 as in 1993 he had

reasonably relied upon the advice of Sheriff Lothian. This belief was reinforced by the concurrence of a judicial officer, Magistrate Tilley, who, after the disclosure of the relevant facts by Petitioner, concurred with Petitioner as to not list these citations. Furthermore, Petitioner reasonably assumed that Respondent had conducted an independent record check in 1993. Since Respondent never contacted Petitioner concerning the manner in which he completed the 1993 paperwork, Petitioner reasonably assumed he had done so correctly. Finally, Petitioner's lack of intent to defraud or misrepresent is evidenced by his reporting on the 1997 Form F-3 and F-5A of the 1991 D.W.I. that was reduced to careless and reckless driving and the related 1991 resisting arrest charge which was dismissed, both which could reasonably be assumed by someone outside of Respondent to be an offense more serious than an underage possession of alcohol charge that carried with it only a \$10 fine.

9. Petitioner completed all forms in question to the best of his knowledge and belief. If an error was made it was an "honest mistake." Not all mistakes rise to the level of lying, deceit and fraud just as all injurious conduct does not rise to the level of negligence, intentional or culpable liability. There are legal standards that must be applied to distinguish legal misconduct from otherwise negligent conduct.
10. The Petitioner did not knowingly make a material misrepresentation of any information required for certification or accreditation from the Commission or the North Carolina Criminal Justice Education and Training Standards Commission.
11. Petitioner has not knowingly violated 12 NCAC 10B .0204(c)(1) per the above definition.
12. To the extent that Petitioner's honesty and credibility were called into question, the undersigned specifically finds that Petitioner testified honestly during his entire testimony in this matter. To the extent that Magistrate Tilley's testimony is called into question, the undersigned specifically finds that he testified honestly.
13. Notwithstanding any sanction that the Respondent may issue in its final decision might issue against this Petitioner (which would likely under the circumstances of this case be minor given the circumstances of this case), the undersigned concludes that the greatest sanction of all would be a finding by Respondent concerning this Petitioner's lack of character for truthfulness in a official application to Respondent. In the event that this Petitioner retains his certification with such a final adjudication on his record and were he to be subsequently involved in a criminal proceeding where his credibility would be placed into issue, then a finding that this Petitioner had knowingly lied by means of false pretense, deception, fraud, misrepresentation or cheating, could be a finding that could be used in a future criminal prosecution under the Rules of Evidence [ostensibly Rule 608(b)] to permit inquiry into specific acts of misconduct sufficient to impeach his credibility as a future witness. Among the types of conduct most widely accepted as falling into this category are uses of false identity, making false statements on affidavits, applications or government forms (including tax returns), giving false testimony, attempting to corrupt or cheat others, and attempting to deceive or defraud others. See *State v. Morgan*, 315 NC 626, 34 SE2d 84 (1986).

Based upon the foregoing Stipulations, Findings of Fact and Conclusions of Law the undersigned makes the following:

PROPOSAL FOR DECISION

That Petitioner shall retain his present law enforcement certification and that the Respondent shall take no action against the Petitioner to revoke said certification or otherwise sanction Petitioner or adjudicate Petitioner as a wrongdoer for violation of Respondent's rules. Further, that Petitioner be awarded his reasonable attorney's fees in this matter.

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions and proposed findings of fact and to present oral and written arguments to the agency. N.C.G.S. § 150B-40(e).

A copy of the final agency decision or order shall be served upon each party personally or by certified mail addresses to the party at the latest address given by the party to the agency and a copy shall be furnished to his attorney of record. N.C.G.S. § 150B-42(a). It is requested that the agency furnish a copy to the Office of Administrative Hearings.

The agency that will make the final decision in this contested case is the North Carolina Sheriff's Education and Training Standards Commission.

This the 23rd day of August, 2000.

Julian Mann, III
Chief Administrative Law Judge