

NORTH CAROLINA



REGISTER

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This issue contains documents officially filed through June 11, 2001.

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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
*21	Occupational Licensing Boards	Marital and Family Therapy	31
22	Administrative Procedures (Repealed)	Medical Examiners	32
23	Community Colleges	Midwifery Joint Committee	33
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28	Juvenile Justice and Delinquency	Opticians	40
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		Plumbing, Heating & Fire Sprinkler Contractors	50
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		Refrigeration Examiners	60
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Note: Title 21 contains the chapters of the various occupational licensing boards.

NORTH CAROLINA REGISTER
 Publication Schedule for July 2000 – June 2001

Filing Deadlines			Notice of Rule-Making Proceedings	Notice of Text							Temporary Rule
volume & 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	
15:13	01/02/01	12/07/00	03/15/01	01/17/01	02/01/01	02/20/01	05/00/02	03/05/01	03/20/01	05/00/02	09/29/01
15:14	01/16/01	12/20/00	04/02/01	01/31/01	02/15/01	02/20/01	05/00/02	03/19/01	03/20/01	05/00/02	10/13/01
15:15	02/01/01	01/10/01	04/02/01	02/16/01	03/05/01	03/20/01	05/00/02	04/02/01	04/20/01	05/00/02	10/29/01
15:16	02/15/01	01/25/01	05/01/01	03/02/01	03/19/01	03/20/01	05/00/02	04/16/01	04/20/01	05/00/02	11/12/01
15:17	03/01/01	02/08/01	05/01/01	03/16/01	04/02/01	04/20/01	05/00/02	04/30/01	05/21/01	05/00/02	11/26/01
15:18	03/15/01	02/22/01	05/15/01	03/30/01	04/16/01	04/20/01	05/00/02	05/14/01	05/21/01	05/00/02	12/10/01
15:19	04/02/01	03/12/01	06/01/01	04/17/01	05/02/01	05/21/01	05/00/02	06/01/01	06/20/01	05/00/02	12/28/01
15:20	04/16/01	03/26/01	06/15/01	05/01/01	05/16/01	05/21/01	05/00/02	06/15/01	06/20/01	05/00/02	01/11/02
15:21	05/01/01	04/10/01	07/02/01	05/16/01	05/31/01	06/20/01	05/00/02	07/02/01	07/20/01	05/00/02	01/26/02
15:22	05/15/01	04/24/01	07/16/01	05/30/01	06/14/01	06/20/01	05/00/02	07/16/01	07/20/01	05/00/02	02/09/02
15:23	06/01/01	05/11/01	08/01/01	06/18/01	07/02/01	07/20/01	05/00/02	07/31/01	08/20/01	05/00/02	02/26/02
15:24	06/15/01	05/25/01	08/15/01	07/02/01	07/16/01	07/20/01	05/00/02	08/14/01	08/20/01	05/00/02	03/12/02
16:01	07/02/01	06/11/01	09/04/01	07/17/01	08/01/01	08/20/01	05/00/02	08/31/01	09/20/01	05/00/02	03/29/02
16:02	07/16/01	06/22/01	09/17/01	07/31/01	08/15/01	08/20/01	05/00/02	09/14/01	09/20/01	05/00/02	04/12/02
16:03	08/01/01	07/11/01	10/01/01	08/16/01	08/31/01	09/20/01	05/00/02	10/01/01	10/22/01	05/00/02	04/28/02
16:04	08/15/01	07/25/01	10/15/01	08/30/01	09/14/01	09/20/01	05/00/02	10/15/01	10/22/01	05/00/02	05/12/02
16:05	09/04/01	08/13/01	11/15/01	09/19/01	10/04/01	10/22/01	05/00/02	11/05/01	11/20/01	05/00/02	06/01/02
16:06	09/17/01	08/24/01	12/03/01	10/02/01	10/17/01	10/22/01	05/00/02	11/16/01	11/20/01	05/00/02	06/14/02
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16:09	11/01/01	10/11/01	01/02/02	11/16/01	12/03/01	12/20/01	05/00/02	12/31/01	01/21/02	05/00/02	07/29/02
16:10	11/15/01	10/24/01	01/15/02	11/30/01	12/17/01	12/20/01	05/00/02	01/14/02	01/21/02	05/00/02	08/12/02
16:11	12/03/01	11/07/01	02/01/02	12/18/01	01/02/02	01/22/02	05/00/02	02/01/02	02/20/02	05/00/02	08/30/02
16:12	12/17/01	11/26/01	02/15/02	01/02/02	01/16/02	01/22/02	05/00/02	02/15/02	02/20/02	05/00/02	09/13/02

EXPLANATION OF THE PUBLICATION SCHEDULE

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

GENERAL

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

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

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

FILING DEADLINES

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

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

NOTICE OF 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.

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:MSR:DCM:nj
DJ 166-012-3
2001-1288

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

May 17, 2001

David A. Holec, Esq.
City Attorney
P.O. Box 7207
Greenville, NC 27835-7207

Dear Mr. Holec:

This refers to 12 annexations (adopted between January 11 and April 12, 2001) and their designation to districts of the City of Greenville in Pitt 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 April 30, 2001.

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. In addition, as authorized by Section 5, we reserve the right to reexamine this submission if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41 and 51.43).

Finally, we wish to take this opportunity to inform you that beginning January 29, 2001, Section 5 submissions sent to the Attorney General, other than through the United States Postal Service, should be addressed, or may be delivered to: Chief, Voting Section, Civil Rights Division, Department of Justice, 1800 G Street, N.W., Room 7254, Washington, D.C. 20006. Our postal box address (PO Box 66128, Washington, D.C. 29935-6128) remains unchanged.

Sincerely,

Joseph D. Rich
Acting Chief
Voting Section

U.S. Department of Justice

Civil Rights Division

JDR:RPL:NT:jdh
DJ 166-012-3
2001-1110

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

May 29, 2001

Richard J. Rose, Esq.
Poyner & Spruill
P.O. Box 353
Rocky Mount, NC 27802-0353

Dear Mr. Rose:

This refers to seven annexations (Ordinance Nos. O-2000-24 through O-2000-27, O-2000-79, O-2000-80, and O-2000-86) and their designation to districts of the City of Rocky Mount 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 April 12, 2001.

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. In addition, as authorized by Section 5, we reserve the right to reexamine this submission if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41 and 51.43).

Finally, we wish to take this opportunity to inform you that beginning January 29, 2001, Section 5 submissions sent to the Attorney General, other than through the United States Postal Service, should be addressed, or may be delivered to: Chief, Voting Section, Civil Rights Division, Department of Justice, 1800 G Street, N.W., Room 7254, Washington, D.C. 20006. Our postal box address (PO Box 66128, Washington, D.C. 20035-6128) remains unchanged.

Sincerely,

Joseph D. Rich
Acting Chief
Voting Section

**SUMMARY OF NOTICE OF INTENT TO REDEVELOP
A BROWNFIELDS PROPERTY**

CAMDEN SQUARE ASSOCIATES, LLC

Pursuant to N.C.G.S. 130A-310.34, Camden Square Associates, LLC ("Camden Square") has filed a Notice of Intent to Redevelop a Brownfields Property ("Notice of Intent") with the North Carolina Department of Environment and Natural Resources ("DENR"). The Property which is the subject of the Notice of Intent is located in Charlotte, Mecklenburg County, North Carolina, and consists of the following parcels identified by street address or, where no street addresses exist, by property tax parcel identification numbers: 307 W. Worthington, 311 W. Worthington, 317 W. Worthington, 1909 S. Tryon Street, 1917 S. Tryon Street, 332 Doggett Street, Doggett Street Parcel 121-012-07, and Doggett Street Parcel 121-012-08. Camden Square intends to redevelop the Property for mixed use, including office, studio and retail. Environmental contamination exists on the Property in soil and groundwater. In light of previous investigation activities conducted on the Property, land use restrictions embodied in the proposed Notice of Brownfields Property referenced below are sufficient to protect public health and the environment. The Notice of Intent includes: (1) a proposed Brownfields Amendment between DENR and Camden Square, which in turn includes (a) a copy of the Brownfields Agreement for properties located at 1930 Camden Road, 127 W. Worthington, and 413 Doggett Street in Charlotte, Mecklenburg County, North Carolina, made and entered into by Camden Square and DENR on April 6, 1998, (b) a legal description of the Property, (c) a map showing the location of the Property, (d) a description of the contaminants involved and their concentrations in the media of the Property, and (e) the above-stated description of the intended future use of the Property; and (2) a proposed Notice of Brownfields Property prepared in accordance with G.S. 130A-310.35. The full Notice of Intent to Redevelop a Brownfields Property may be reviewed in the Carolina Room at the Main Branch of the Public Library of Charlotte and Mecklenburg County, 310 N. Tryon St., Charlotte, NC 28202, (704) 336-2980; or at 401 Oberlin Rd., Raleigh, NC 27605 by contacting Scott Ross at that address, at scott.ross@ncmail.net, or at (919)733-2801, ext. 328. Written public comments and written requests for a public meeting may be submitted to DENR within 30 days of the date of this Notice. All such comments and requests, and/or requests to view the full Notice of Intent, should be addressed as follows:

Mr. Bruce Nicholson
Head, Special Remediation Branch
Superfund Section
Division of Waste Management
NC Department of Environment and Natural Resources
401 Oberlin Road, Suite 150
Raleigh, North Carolina 27605

**SUMMARY OF NOTICE OF
INTENT TO REDEVELOP A BROWNFIELDS PROPERTY**

Glen Wilde, LLC

Pursuant to N.C.G.S. § 130A-310.34, Glen Wilde, LLC has filed with the North Carolina Department of Environment and Natural Resources ("DENR") a Notice of Intent to Redevelop a Brownfields Property ("Property") in Boone, Watauga County, North Carolina. The Property consists of 5.014 acres and is located at 660 State Farm Road, Boone, Watauga County. Environmental contamination exists on the Property in soil and groundwater. Glen Wilde, LLC has committed itself to redevelopment of the Property for office space. In light of previous investigation activities conducted on the Property by DENR, the land use restrictions contained in the proposed Notice of Brownfields Property referenced below, and the spring closure and pond sampling requirements included in the Brownfields Agreement referenced below, are sufficient to protect public health and the environment. The Notice of Intent to Redevelop a Brownfields Property includes: (1) a proposed Brownfields Agreement between DENR and Glen Wilde, LLC, which in turn includes (a) a legal description of the Property, (b) a map showing the location of the Property, (c) a description of the contaminants involved and their concentrations in the media of the Property, (d) the above-stated description of the intended future use of the Property, and (e) required spring closure and pond sampling; and (2) a proposed Notice of Brownfields Property prepared in accordance with G.S. 130A-310.35. The full Notice of Intent to Redevelop a Brownfields Property may be reviewed at the offices of the Town of Boone by contacting Gregory Young, Town Manager, or Kevin Rothrock, Planning Supervisor, at Boone Town Hall, P. O. Drawer 192, Boone, NC 28607 or at 401 Oberlin Rd., Raleigh, NC 27605 by contacting Scott Ross at that address, at scott.ross@ncmail.net, or at (919)733-2801, ext. 328. Written public comments may be submitted to DENR within 60 days of the date of this Notice. Written requests for a public meeting may be submitted to DENR within 30 days of the date of this Notice. All such comments and requests, and/or requests to view the full Notice of Intent, should be addressed as follows:

Mr. Bruce Nicholson
Head, Special Remediation Branch
Superfund Section
Division of Waste Management
NC Department of Environment and Natural Resources
401 Oberlin Road, Suite 150
Raleigh, North Carolina 27605

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 19A – DEPARTMENT OF TRANSPORTATION

Notice of Rule-making Proceedings is hereby given by NC Department of Transportation – Division of Highways in accordance with G.S. 150B-21.2. The agency shall subsequently publish in the Register the text of the rule(s) 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: 19A NCAC 02B .0165. Other rules may be proposed in the course of the rule-making process.

Authority for the Rule-making: G.S. 130A-444; 136-28.1(f)

Statement of the Subject Matter: This Rule sets out requirements for private firms to perform asbestos abatement for the Department of Transportation.

Reason for Proposed Action: This Rule is proposed for amendment to increase the dollar amount of a yearly asbestos abatement contract from \$250,000 to \$1,000,000 due to increased cost for the work.

Comment Procedures: Any interested person may submit written comments on the proposed rule by mailing the comments to Emily Lee, NC DOT, 1501 Mail Service Center, Raleigh, NC 27699-1501 by November 20, 2001.

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: None - Other rules may be proposed in the course of the rule-making process.

Authority for the Rule-making: G.S. 143B-30.1(f)

Statement of the Subject Matter: Although the NC RRC is exempt from the required notice and hearing requirements of the NC APA, it is required to publish its rules, otherwise known as its policies and procedures. At this time many of them are published and available at the office of the RRC. However they are not in the NCAC nor in the NCAC format. The purpose of this rulemaking is to codify these policies and procedures and enact any new ones as may be necessary or desirable.

Reason for Proposed Action: Most, if not all, the substantive provisions of the NC RRC's rules review process are set out by statute in the NC Administrative Procedure Act. Over the years of its existence the RRC has come to use certain procedures and customs for its implementation and interpretation of the APA. This action will formally codify those and attempt to determine whether they need to be modified or abandoned. We would also hope to determine whether any new rules are necessary or desirable.

Comment Procedures: Persons interested in the rulemaking process are invited and encouraged to provide written comment concerning any aspect of the RRC rules review portion of the APA process. This includes both mandatory and discretionary aspects of the process as well as whether there should be any waivers possible of the mandatory portion. Send written comments to Joe Deluca, Jr., Rules Review Commission, 1307 Glenwood Ave., #159, Raleigh, NC 27605, or email to: jdeluca@dca.commerce.state.nc.us.

TITLE 24 – INDEPENDENT AGENCIES

CHAPTER 06 – RULES REVIEW COMMISSION

Notice of Rule-making Proceedings is hereby given by NC Rules Review Commission. The agency shall subsequently publish in the Register the text of the rule(s) it proposes to adopt

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.

SECTION .3000 – REFUND POLICIES

TITLE 10 – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Medical Care Commission intends to adopt the rules cited as 10 NCAC 42D .2401-.2403 and amend the rules cited as 10 NCAC 42C .3003, .3702. Notice of Rule-making Proceedings was published in the Register on January 16, 2001.

Proposed Effective Date: July 1, 2002

Public Hearing:

Date: September 14, 2001

Time: 9:00 am – 10:00 am

Location: Division of Facility Services, Council Building (Dorothea Dix Campus), Room 201, 201 Barbour Dr., Raleigh, NC

Reason for Proposed Action: *The adult care home industry provides various levels of care to frail and vulnerable members of our population. Two critical moments in the delivery of that care occur during admission and at discharge/transfer. 10 NCAC 42C .3003 outlines some of the requirements pertaining to discharge or transfer of a resident. 10 NCAC 42C .3702 outlines some of the requirements pertaining to the admission of a resident. Failure to adopt these rules could jeopardize the development of an appropriate plan of care and, thus, jeopardize the ability to identify the necessary resources to provide quality care. House Bill 512 (SL 99-0443) established certification requirements for adult care home administrators and Senate Bill 10 (SL 99-0334) mandated temporary rule-making to address specific qualifications of staff who shall be on duty in adult care homes to assure safe and quality care for residents. 10 NCAC 42D .2401-.2403 are necessary to implement those minimum standards.*

Comment Procedures: *Questions of comments concerning the rules should be directed to Mark Benton, Rule-Making Coordinator, or Doug Barrick, Policy Coordinator, Division of Facility Services, 701 Barbour Dr., 2701 Mail Service Center, Raleigh, NC 27699-2701. Comments will be accepted through September 14, 2001.*

Fiscal Impact

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

CHAPTER 42 – INDIVIDUAL AND FAMILY SUPPORT

SUBCHAPTER 42C – LICENSING OF FAMILY CARE HOMES

10 NCAC 42C .3003 SETTLEMENT OF COST OF CARE

(a) If the resident, after being notified by the home of its intent to discharge him in accordance with Rule ~~.2505 (a)~~ .2506 of this Subchapter, moves out of the home before the ~~two weeks (14 days)-30 days~~ has elapsed, he shall receive a refund equal to the cost of care for the remainder of the month minus any nights spent in the home during the ~~two week-30-day~~ period. The refund ~~is to shall~~ be made within ~~14-30~~ days from the date of notice. ~~for a resident who is returning to an independent living arrangement in the community and within 30 days from the date of notice for all other circumstances where a resident is leaving the home.~~

(b) If the resident, after giving written notice to the home of his intent to leave in accordance with Rule ~~.2505 (b)~~ .2506 of this Subchapter, moves out of the home before the two weeks (14 days) has elapsed, the resident owes the administrator an amount equal to the cost of care for the 14 days. If the two weeks' period for a resident receiving State-County Special Assistance extends into another month and the resident moves early, the former home is entitled to the required payment. The resident shall be refunded the remainder of any advance payment following settlement of the cost of care. The refund ~~is to shall~~ be made within 14 days from the date of notice for a resident who is returning to an independent living arrangement in the community and within 30 days from the date of notice for all other circumstances where a resident is leaving the home.

(c) When there is an exception to the notice as provided in Rule ~~.2505 (e)~~ .2506 of this Subchapter to protect the health or safety of the resident or others in the home, the resident is only required to pay for any nights spent in the home. A refund ~~is to shall~~ be made within 14 days from the date of notice for a resident who is returning to an independent living arrangement in the community and within 30 days from the date of notice for all other circumstances where a resident is leaving the home.

(d) When a resident leaves the home with the intent of returning to it, the following apply:

- (1) The home may reserve the resident's bed for a set number of days with the written agreement of administrator and the resident or his responsible person and thereby expect payment for the days the bed is held;
- (2) If, after leaving the home, the resident decides not to return to it, the resident or someone acting on his behalf may be required by the home to provide a two weeks' (14 day) written notice that he is not returning;
- (3) Requirement of the two weeks' notice, if it is to be applied by the home, ~~must shall~~ be a part of the written agreement and explained by the administrator to the resident and his family or responsible person before signing;

- (4) On notice by the resident or someone acting on his behalf that he will not be returning to the facility, the administrator ~~must shall~~ refund the remainder of any advance payment to the resident or his responsible person, minus an amount equal to the cost of care for the two weeks (14 days) covered by the agreement. The refund ~~is to shall~~ be made within 14 days from the date of notice for a resident who is returning to an independent living arrangement in the community and within 30 days from the date of notice for all other circumstances where a resident is leaving the home;
- (5) In no situation involving a recipient of State-County Special Assistance may a home expect payment for more than 30 days since State-County Special Assistance is not authorized unless the resident is actually residing in the facility or it is anticipated that he will return to the facility within 30 days; and
- (6) Exceptions to the two weeks' notice, if required by the home, are cases where returning to the home would jeopardize the health or safety of the resident or others in the home as certified by the resident's physician or approved by the county department of social services, and in the case of the resident's death. In these cases, the administrator ~~must shall~~ refund the rest of any advance payment calculated beginning with the day the home is notified.

(e) If a resident dies, the administrator of his estate or the Clerk of Superior Court, when no administrator for his estate has been appointed, ~~must shall~~ be given a refund equal to the cost of care for the month minus any nights spent in the home during the month. This is to be done within 30 days after the resident's death.

Authority G.S. 131D-2; 131D-4.5; 143B-165; S.L. 99-0334.

SECTION .3700 – RESIDENT ASSESSMENT AND CARE

10 NCAC 42C .3702 RESIDENT CARE PLAN

- (a) ~~Effective January 1, 2002, The~~ the facility shall assure a care plan is developed in conjunction with the ~~initial resident assessment evaluation to be completed within 30 calendar days of admission according to Rule .3701 of this Section~~ and revised as needed based on annual assessments and any reassessments of the resident. ~~Prior to January 1, 2002, the administrator shall assure a care plan is developed in conjunction with the admission assessment to be completed within 72 hours of admission according to Rule .3701 of this Section and revised as needed based on annual assessments and any reassessments of the resident.~~ For the purposes of this Subchapter, the care plan is an individualized, written program of personal care for each resident.
- (b) The care plan shall include the following:
 - (1) a statement of the care or service to be provided based on the assessment or reassessment; and
 - (2) frequency of the service provision.

- (c) The assessor shall sign the care plan upon its completion.
- (d) The facility shall assure that the resident's physician authorizes personal care services and certifies the following by signing the care plan within 15 calendar days of completion of the assessment:
 - (1) the resident is under the physician's care; and
 - (2) the resident has a medical diagnosis with associated physical or mental limitations that justify the personal care services specified in the care plan.

Authority G.S. 131D-2; 131D-4.3; 131D-4.5; 143B-153; S.L. 99-0334.

SUBCHAPTER 42D – LICENSING OF HOMES FOR THE AGED AND INFIRM

SECTION .2400 - CERTIFICATION REQUIREMENTS FOR ADULT CARE HOME ADMINISTRATORS

10 NCAC 42D .2401 ADMINISTRATOR CERTIFICATION AND RENEWAL

- (a) The administrator of an adult care home shall be certified by the Department under the provisions of G.S. 90, Article 20A. An applicant administrator shall submit documentation, according to Guidelines for Applicant Administrators, that the qualifications specified in G.S. 90-288.14 have been met. Copies of these guidelines may be obtained at no charge by contacting the Adult Care Licensure Section, Division of Facility Services, 2708 Mail Service Center, Raleigh, NC 27699-2708.
- (b) The certification shall be renewed by the Department every two years upon the submission of a renewal application according to G.S. 90-288.15(b) and Certification Renewal Guidelines, including documentation that the administrator has completed at least 30 hours of continuing education related to the management of adult care homes and care of aged and disabled persons. Copies of these guidelines may be obtained at no charge by contacting the Adult Care Licensure Section at the address specified in Paragraph (a) of this Rule.

Authority G.S. 90-288; 131D-2; 143B-165; S.L. 99-0334; S.L. 99-0443.

10 NCAC 42D .2402 QUALIFYING EDUCATION AND EXPERIENCE

- (a) The equivalent of two years of coursework at an accredited college, community college or university, as provided for in G.S. 90-288.14(3), shall be 60 semester hours or 96 quarter hours which shall be completed prior to applying for certification. All education credits shall be documented by an official college transcript.
- (b) A combination of education and experience in lieu of the two-year education equivalent as specified in G.S. 90-288.14(3) shall comply with the following:
 - (1) successful completion of the equivalent of one year of college level study (30 semester hours or 48 quarter hours) from an accredited college, community college or university; and
 - (2) two years of supervisory experience in a licensed adult care home, nursing home or other health or residential care setting within

five years preceding the date of the application for certification. For the purposes of this Section, supervisory experience means having direct responsibility for the supervision of a least one full-time employee.

Authority G.S. 90-288; 131D-2; 143B-165; S.L. 99-0334; S.L. 99-0443.

10 NCAC 42D .2403 ADMINISTRATOR-IN-TRAINING PROGRAM

(a) The 120-hour administrator-in-training program as required in G.S. 90-288.14(4) shall meet the following requirements:

(1) A minimum of 75 hours of coursework with at least 14 classroom hours conducted by an on-site instructor. The curriculum for the 75 hours of coursework shall consist of at least the following:

(A) 14 hours of instruction in assisted living in North Carolina and laws, rules, policies and procedures that impact the operations of adult care homes in North Carolina;

(B) 34 hours of instruction in organizational, human resources and physical environment management; and

(C) 27 hours of instruction in business and financial management and resident care management.

(2) A minimum of 140 hours of combined internship/AIT coursework under a qualified preceptor, according to guidelines established by the Department, with a credit of .32 hours for each of the 140 hours for a total of 45 credit hours.

(b) The person or entity seeking approval of the 75 hours coursework required in Part (a)(1) of this Rule and the 140 hours of combined internship/AIT coursework as required in Subparagraph (a)(2) of this Rule shall submit a written request to the Department containing information on courses, instructors and policies as specified in the Administrator-in-Training Curriculum Approval Guidelines. Copies of these guidelines are may be obtained at no cost by contacting the Adult Care Licensure Section, Division of Facility Services, 2708 Mail Service Center, Raleigh, NC 27699-2708.

(b) Preceptors for the 140 hours of combined internship/AIT coursework required in Subparagraph (a)(2) of this Rule shall be approved according to the Administrator-in-Training Preceptor Approval Guidelines which may be obtained at no cost by contacting the Adult Care Licensure Section at the address specified in Paragraph (b) of this Rule.

(c) Licensed nursing home administrators shall be deemed to have met the administrator-in-training program requirements specified in this Rule.

Authority G.S. 90-288; 131D-2; 143B-165; S.L. 99-0334; S.L.-0443.

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Coastal Resources Commission intends to amend the rule cited as 15A NCAC 07H .0209. Notice of Rule-making Proceedings was published in the Register on April 16, 2001.

Proposed Effective Date: August 1, 2002

Public Hearing:

Date: July 25, 2001

Time: 3:30 pm

Location: Ground Floor Hearing Room, Archdale Building, 512 North Salisbury Street, Raleigh, NC 27604-1148

Reason for Proposed Action: *The proposed amendment would establish criteria for exceptions to the regulatory requirement, effective as of August 1, 2000, of a 30-foot development setback along public trust and estuarine waters. The proposed amendment would allow for a limited variety of common uses and the construction of residences on previously platted undeveloped lots that are located in intensively developed areas that would otherwise be prohibited under rules adopted by the CRC pursuant to Article 7 of Chapter 113A of the North Carolina General Statutes.*

Comment Procedures: *Comments may be submitted to Mike Lopazanski, Division of Coastal Management, 1638 Mail Service Center, Raleigh, NC 27699-1638, 919-733-2293. Comments will be accepted through August 1, 2001.*

Fiscal Impact

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

CHAPTER 07 – COASTAL MANAGEMENT

SUBCHAPTER 07H – STATE GUIDELINES FOR AREAS OF ENVIRONMENTAL CONCERN

SECTION .0200 – THE ESTUARINE AND OCEAN SYSTEM

15A NCAC 07H .0209 COASTAL SHORELINES

(a) Description. The Coastal Shorelines category includes estuarine shorelines and public trust shorelines. Estuarine shorelines AEC are those non-ocean shorelines extending from the normal high water level or normal water level along the estuarine waters, estuaries, sounds, bays, fresh and brackish waters, and public trust areas as set forth in an agreement adopted by the Wildlife Resources Commission and the Department of Environment and Natural Resources [described in Rule .0206(a) of this Section] for a distance of 75 feet landward. For those estuarine shorelines immediately contiguous to waters classified as Outstanding Resource Waters by the Environmental Management Commission, the estuarine shoreline AEC shall extend to 575 feet landward from the normal high water level or normal water level, unless the Coastal Resources Commission

establishes the boundary at a greater or lesser extent following required public hearing(s) within the affected county or counties. Public trust shorelines AEC are those non-ocean shorelines immediately contiguous to public trust areas, as defined in Rule 7H .0207(a) of this Section, located inland of the dividing line between coastal fishing waters and inland fishing waters as set forth in that agreement and extending 30 feet landward of the normal high water level or normal water level.

(b) Significance. Development within coastal shorelines influences the quality of estuarine and ocean life and is subject to the damaging processes of shore front erosion and flooding. The coastal shorelines and wetlands contained within them serve as barriers against flood damage and control erosion between the estuary and the uplands. Coastal shorelines are the intersection of the upland and aquatic elements of the estuarine and ocean system, often integrating influences from both the land and the sea in wetland areas. Some of these wetlands are among the most productive natural environments of North Carolina and they support the functions of and habitat for many valuable commercial and sport fisheries of the coastal area. Many land-based activities influence the quality and productivity of estuarine waters. Some important features of the coastal shoreline include wetlands, flood plains, bluff shorelines, mud and sand flats, forested shorelines and other important habitat areas for fish and wildlife.

(c) Management Objective. The management objective is to ensure that shoreline development is compatible with both the dynamic nature of coastal shorelines as well as the values and the management objectives of the estuarine and ocean system. Other objectives are to conserve and manage the important natural features of the estuarine and ocean system so as to safeguard and perpetuate their biological, social, aesthetic, and economic values; to coordinate and establish a management system capable of conserving and utilizing these shorelines so as to maximize their benefits to the estuarine and ocean system and the people of North Carolina.

(d) Use Standards. Acceptable uses shall be those consistent with the management objectives in Paragraph (c) of this Rule. These uses shall be limited to those types of development activities that will not be detrimental to the public trust rights and the biological and physical functions of the estuarine and ocean system. Every effort shall be made by the permit applicant to avoid, mitigate or reduce adverse impacts of development, to estuarine and coastal systems through the planning and design of the development project. In every instance, the particular location, use, and design characteristics shall comply with the general use and specific use standards for coastal shorelines, and where applicable, the general use and specific use standards for coastal wetlands, estuarine waters, and public trust areas described in Rule .0208 of this Section.

- (1) All development projects, proposals, and designs shall preserve and not weaken or eliminate natural barriers to erosion, including, but not limited to, peat marshland, resistant clay shorelines, and cypress-gum protective fringe areas adjacent to vulnerable shorelines.
- (2) All development projects, proposals, and designs shall limit the construction of impervious surfaces and areas not allowing natural drainage to only so much as is necessary to adequately service the major

purpose or use for which the lot is to be developed. Impervious surfaces shall not exceed 30 percent of the AEC area of the lot, unless the applicant can effectively demonstrate, through innovative design, that the protection provided by the design would be equal to or exceed the protection by the 30 percent limitation. Redevelopment of areas exceeding the 30 percent impervious surface limitation may be permitted if impervious areas are not increased and the applicant designs the project to comply with the intent of the rule to the maximum extent feasible.

~~(3) Within the Coastal Shorelines category (estuarine and public trust shorelines AEC's), new development, with the exception of water dependent uses, shall be located a distance of 30 feet landward of the normal water level or the normal high water level.~~

~~(4)~~(3) All development projects, proposals, and designs shall comply with the following mandatory standards of the North Carolina Sedimentation Pollution Control Act of 1973:

(A) All development projects, proposals, and designs shall provide for a buffer zone along the margin of the estuarine water which is sufficient to confine visible siltation within 25 percent of the buffer zone nearest the land disturbing development.

(B) No development project proposal or design shall permit an angle for graded slopes or fill which is greater than an angle which can be retained by vegetative cover or other erosion-control devices or structures.

(C) All development projects, proposals, and designs ~~that~~ ~~which~~ involve uncovering more than one acre of land shall plant a ground cover sufficient to restrain erosion within 30 working days of completion of the grading; provided that this shall not apply to clearing land for the purpose of forming a reservoir later to be inundated.

~~(5)~~(4) Development shall not have a significant adverse impact on estuarine and ocean resources. Significant adverse impacts shall include but not be limited to development that would directly or indirectly impair water quality standards, increase shoreline erosion, alter coastal wetlands or Submerged Aquatic Vegetation (SAV), deposit spoils waterward of normal water level or normal high water, or cause degradation of shellfish beds.

~~(6)~~(5) Development shall not interfere with existing public rights of access to, or use of, navigable waters or public resources.

~~(7)~~(6) No public facility shall be permitted if such a facility is likely to require public expenditures

for maintenance and continued use, unless it can be shown that the public purpose served by the facility outweighs the required public expenditures for construction, maintenance, and continued use. For the purpose of this standard, "public facility" shall mean a project ~~that which~~ is paid for in any part by public funds.

- ~~(8)~~(7) Development shall not cause irreversible damage to valuable, historic architectural or archaeological resources as documented by the local historic commission or the North Carolina Department of Cultural Resources.
- ~~(9)~~(8) Established common-law and statutory public rights of access to the public trust lands and waters in estuarine areas shall not be eliminated or restricted. Development shall not encroach upon public accessways nor shall it limit the intended use of the accessways.
- ~~(10)~~(9) Within the AECs for shorelines contiguous to waters classified as Outstanding Resource Waters by the EMC, no CAMA permit shall be approved for any project which would be inconsistent with applicable use standards adopted by the CRC, EMC or MFC for estuarine waters, public trust areas, or coastal wetlands. For development activities not covered by specific use standards, no permit shall be issued if the activity would, based on site-specific information, degrade the water quality or outstanding resource values.
- (10) Within the Coastal Shorelines category (estuarine and public trust shoreline AEC's), new development shall be located a distance of 30 feet landward of the normal water level or normal high water level, with the exception of the following:
 - (A) Water dependent uses as described in Rule .0208(a)(1) of this Section;
 - (B) Pile supported signs (in accordance with local regulations);
 - (C) Post or pile supported fences;
 - (D) Elevated, slatted, wooden boardwalks exclusively for pedestrian use and six feet in width or less. The boardwalk may be greater than six feet in width if it is to serve a public use or need;
 - (E) Crab Shedders if uncovered with elevated trays and no associated impervious surfaces except those necessary to protect the pump;
 - (F) Decks/Observation Decks limited to slatted, wooden, elevated and unroofed decks that shall not singularly or collectively exceed 200 square feet;
 - (G) Grading, excavation and landscaping with no wetland fill except when required by a permitted shoreline stabilization project. Projects shall not increase stormwater runoff to

adjacent estuarine and public trust waters and shall be certified by a NC licensed design professional who meets any North Carolina occupational licensing requirements for such designs, as proposed and approved during the permit application process; and

- ~~(H)~~ Existing structures may be expanded vertically provided that the original footprint of the structure is not increased.
- (e) Exceptions to the 30-foot buffer ~~requirement. requirement set forth in Subparagraph (d)(10) of this Rule.~~ Development shall be exempted from the buffer requirement set out in Paragraph (d) of this Rule under the following circumstances:
 - (1) ~~Where strict application of the buffer requirement would preclude placement of a residential structure on lots, parcels and tracts platted prior to June 1, 1999, development shall comply with the buffer area requirement to the maximum extent feasible. Feasible means an alternative is available and capable of being done after taking into consideration cost, existing technology, proposed use, and overall project purposes. The footprint of the residential structure shall not exceed 1000 square feet. Land disturbance is limited to only so much as is necessary to construct and provide access to the residence and to allow installation or connection of utilities such as water and sewer. At a minimum, non-water dependent development shall be located a distance landward of the normal high water or normal water level equal to 20 percent of the greatest depth of the lot. Existing structures that encroach into the applicable buffer area may be replaced or repaired consistent with the criteria set out in 07J .0201 and 07J .0211. Where application of the buffer requirement would preclude placement of a residential structure with a footprint of 1,200 square feet or less on lots, parcels and tracts platted prior to June 1, 1999, development may be permitted within the buffer as required in Subparagraph (d)(10) of this Rule, providing the following criteria are met:~~
 - (A) Development shall minimize the impacts to the buffer and reduce runoff by limiting land disturbance to only so much as is necessary to construct and provide access to the residence and to allow installation or connection of utilities such as water and sewer; and
 - (B) The residential structure development shall be located a distance landward of the normal high water or normal water level equal to 20 percent of the greatest depth of the lot. Existing structures that encroach into the

applicable buffer area may be replaced or repaired consistent with the criteria set out in Rules .0201 and .0211 in Subchapter 07J of this Chapter.

- (2) Where strict application of the buffer requirement would preclude placement of a residential structure on undeveloped lots platted prior to June 1, 1999, that are 5,000 square feet or less and located in an intensely developed area and where existing waterfront residential structures are present on lots on both sides immediately adjacent to the proposed structure, development may be permitted within the buffer as required in section 07H .0209 d(3), providing the following criteria are met; — Where application of the buffer requirement would preclude placement of a residential structure on a undeveloped lots platted prior to June 1, 1999, that are 5,000 square feet or less that do not require onsite septic systems, or lots that are 7,500 square feet or less that require onsite septic systems may be permitted within the buffer as required in Subparagraph (d)(10) of this Rule, providing the following criteria are met;

- (A) Development shall minimize the impacts to the buffer and reduce runoff by limiting land disturbance to only so much as is necessary to construct and provide access to the residence and to allow installation or connection of utilities such as water and sewer; The lot is located in an intensely developed area and where existing waterfront residential structures are present on lots on both sides immediately adjacent to the proposed residential structure;
- (B) Placement of the residential structure and associated pervious decking (e.g. slatted wood) may be aligned no further into the buffer than the existing residential structures and existing pervious decking on adjoining lots; Development shall minimize the impacts to the buffer and reduce runoff by limiting land disturbance to only so much as is necessary to construct and provide access to the residence and to allow installation or connection of utilities such as water and sewer;
- (C) The first one and one-half inch of rainfall from all impervious surfaces on the lot shall be collected and contained on site in accordance with the design standards for stormwater management for coastal counties as specified in NCACT15A: 02H .0005.

~~The stormwater management system shall be designed by an individual who meets any North Carolina occupational licensing requirements for the type of system proposed and approved during the permit application process. If the residential structure encroaches into the buffer, then no other impervious surfaces will be allowed within the buffer; Placement of the residential structure and associated pervious decking (e.g. slatted wood) may be aligned no further into the buffer than the existing residential structures and existing pervious decking on adjoining lots;~~

- (D) The lot must not be adjacent to waters designated by the Division of Marine Fisheries as approved or conditionally approved shellfish waters. The first one and one-half inch of rainfall from all impervious surfaces on the lot shall be collected and contained on site in accordance with the design standards for stormwater management for coastal counties as specified in NCAC 15A .02H .0005. The stormwater management system shall be designed by an individual who meets any North Carolina occupational licensing requirements for the type of system proposed and approved during the permit application process. If the residential structure encroaches into the buffer, then no other impervious surfaces will be allowed within the buffer; and
- (E) The lot must not be adjacent to waters designated by the Division of Environmental Health, Shellfish Sanitation as approved or conditionally approved shellfish waters.

(f) The buffer requirements in Paragraph (d) of this Rule will not apply to Coastal Shorelines where the Environmental Management Commission (EMC) has adopted rules that contain buffer standards, or to Coastal Shorelines where the EMC adopts such rules, upon the effective date of those rules.

- (g) Specific Use Standards for ORW Coastal Shorelines.
 - (1) Within the AEC for estuarine and public trust shorelines contiguous to waters classified as ORW by the EMC, all development projects, proposals, and designs shall limit the built upon area in the AEC to no more than 25 percent or any lower site specific percentage as adopted by the EMC as necessary to protect the exceptional water quality and outstanding resource values of the ORW, and shall:
 - (A) have no stormwater collection system;

PROPOSED RULES

- (B) provide a buffer zone of at least 30 feet from the normal high water line or normal water line;
- (C) otherwise be consistent with the use standards set out in Paragraph (d) of this Rule.

(2) Development (other than single-family residential lots) more than 75 feet from the normal high water line or normal water line but within the AEC as of June 1, 1989 shall be permitted in accordance with rules and standards in effect as of June 1, 1989 if:

- (A) the development has a CAMA permit application in process, or
- (B) the development has received preliminary subdivision plat approval or preliminary site plan approval under applicable local ordinances, and in which financial resources have been invested in design or improvement;

(3) Single-family residential lots that would not be buildable under the low-density standards defined in Paragraph (g)(1) of this Rule may be developed for single-family residential purposes so long as the development complies with those standards to the maximum extent possible.

(4) For ORW's nominated subsequent to June 1, 1989, the effective date in Paragraph (g)(2) of this Rule shall be the dates of nomination by the EMC.

(h) Urban Waterfronts.

(1) Description. Urban Waterfronts are waterfront areas, not adjacent to Outstanding Resource Waters, in the Coastal Shorelines category that lie within the corporate limits of any municipality duly chartered within the 20 coastal counties of the state. In determining whether an area is an urban waterfront, the following criteria shall be met as of the effective date of this Rule:

- (A) The area lies wholly within the corporate limits of a municipality; and
- (B) the area is in a central business district where there is minimal undeveloped land, mixed land uses, and urban level services such as water, sewer, streets, solid waste management, roads, police and fire protection or an industrial zoned area adjacent to a central business district.

(2) Significance. Urban waterfronts are recognized as having cultural, historical and economic significance for many coastal municipalities. Maritime traditions and longstanding development patterns make these areas suitable for maintaining or promoting dense development along the shore. With proper planning and stormwater management,

these areas may continue to preserve local historical and aesthetic values while enhancing the economy.

(3) Management Objectives. To provide for the continued cultural, historical, aesthetic and economic benefits of urban waterfronts. Activities such as in-fill development, reuse and redevelopment facilitate efficient use of already urbanized areas and reduce development pressure on surrounding areas, in an effort to minimize the adverse cumulative environmental effects on estuarine and ocean systems. While recognizing that opportunities to preserve buffers are limited in highly developed urban areas, they are encouraged where practical.

(4) Use Standards:

(A) The buffer requirement pursuant to ~~this Rule [07H .0209 (d)(3)]~~ Subparagraph (d)(10) of this Rule is not required for development within designated Urban Waterfronts that meets the following standards:

(i) The development must be consistent with the locally adopted land use plan.

(ii) Impervious surfaces shall not exceed 30 percent of the AEC area of the lot. Impervious surfaces may exceed 30 percent if the applicant can effectively demonstrate, through a stormwater management system design, that the protection provided by the design would be equal to or exceed the protection by the 30 percent limitation. The stormwater management system shall be designed by an individual who meets any North Carolina occupational licensing requirements for the type of system proposed and approved during the permit application process. Redevelopment of areas exceeding the 30 percent impervious surface limitation may be permitted if impervious areas are not increased and the applicant designs the project to comply with the intent of the rule to the maximum extent feasible.

(iii) The development shall meet all state stormwater management requirements as required by the NC

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- Environmental Management Commission.
- (B) Non-water dependent uses over estuarine waters, public trust waters and coastal wetlands may be allowed only within designated Urban Waterfronts as set out below:
- (i) Existing structures over coastal wetlands, estuarine waters or public trust areas may be used for non-water dependent purposes.
 - (ii) Existing enclosed structures may be expanded vertically provided that vertical expansion does not exceed the original footprint of the structure.
 - (iii) New structures built for non-water dependent purposes are limited to pile supported, single story, unenclosed decks and boardwalks, and must meet the following criteria:
 - (I) The proposed development must be consistent with a locally adopted waterfront access plan that provides for enhanced public access to the shoreline;
 - (II) Structures may be roofed but shall not be enclosed by partitions, plastic sheeting, screening, netting, lattice or solid walls of any kind and shall be limited to a single story;
 - (III) Structures must be pile supported and require no filling of coastal wetlands, estuarine waters or public trust areas;
 - (IV) Structures shall not extend more than 20 feet waterward of the normal high water level or normal water level;
 - (V) Structures must be elevated at least three feet over the wetland substrate as measured from the
- (VI) Structures shall have no more than six feet of any dimension extending over coastal wetlands;
- (VII) Structures shall not interfere with access to any riparian property and shall have a minimum setback of 15 feet between any part of the structure and the adjacent property owners areas of riparian access. The line of division of areas of riparian access shall be established by drawing a line along the channel or deep water in front of the properties, then drawing a line perpendicular to the line of the channel so that it intersects with the shore at the point the upland property line meets the water's edge. The minimum setback provided in the rule may be waived by the written agreement of the adjacent riparian owner(s) or when two adjoining riparian owners are co-applicants. Should the adjacent property be sold before construction of the structure commences, the applicant shall obtain a written agreement with the new owner waiving the minimum setback and submit it to the permitting agency prior to

PROPOSED RULES

(VIII) initiating any development; Structures must be consistent with the US Army Corps of Engineers setbacks along federally authorized waterways;

(XII) Structures shall not pose a threat to navigation.

Authority G.S. 113A-107(b); 113A-108; 113A-113(b); 113A-124.

(IX) Structures shall have no significant adverse impacts on fishery resources, water quality or adjacent wetlands and there must be no reasonable alternative that would avoid wetlands. Significant adverse impacts shall include but not be limited to the development that would directly or indirectly impair water quality standards, increase shoreline erosion, alter coastal wetlands or Submerged Aquatic Vegetation (SAV), deposit spoils waterward of normal water level or normal high water level, or cause degradation of shellfish beds;

Notice is hereby given in accordance with G.S. 150B-21.2 that the Coastal Resources Commission intends to amend the rule cited as 15A NCAC 07H .0309. Notice of Rule-making Proceedings was published in the Register on April 16, 2001.

Proposed Effective Date: August 1, 2002

Public Hearing:

Date: July 25, 2001

Time: 3:30 p.m.

Location: Ground Floor Hearing Room, Archdale Building, 512 North Salisbury Street, Raleigh, NC 27604-1148

Reason for Proposed Action: The purpose of this proposed rule amendment is to prohibit the siting of substantial and potentially debris-generating accessory structures such as swimming pools, tennis courts and hard-surfaced parking areas within the mandatory (small structure) oceanfront setback, as defined in 15A NCAC 07H .0306(a).

Comment Procedures: Comments may be submitted to James Rosich, NC Division of Coastal Management, 1638 Mail Service Center, Raleigh, NC 27699-1638, 919-733-2293. Comments will be accepted through August 1, 2001.

Fiscal Impact

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

(X) Structures shall not degrade waters classified as SA or High Quality Waters Outstanding Resource Waters as defined by the NC Environmental Management Commission;

SUBCHAPTER 07H – STATE GUIDELINES FOR AREAS OF ENVIRONMENTAL CONCERN

SECTION .0300 – OCEAN HAZARD AREAS

15A NCAC 07H .0309 USE STANDARDS FOR OCEAN HAZARD AREAS: EXCEPTIONS

(a) The following types of development may be permitted seaward of the oceanfront setback requirements of Rule .0306(a) of the Subchapter if all other provisions of this Subchapter and other state and local regulations are met:

(XI) Structures shall not degrade Critical Habitat Areas or Primary Nursery Areas as defined by the NC Marine Fisheries Commission; and

- (1) campgrounds that do not involve substantial permanent structures;
(2) parking areas with clay, packed sand, or gravel; similar surfaces;
(3) outdoor tennis courts;
(4)(3) elevated decks not exceeding a footprint of 500 square feet;
(5)(4) beach accessways consistent with Rule .0308(c) of this Subchapter;

- ~~(6)~~(5) unenclosed, uninhabitable gazebos with a footprint of 200 square feet or less;
- ~~(7)~~(6) uninhabitable, single-story storage sheds with a foundation or floor consisting of clay, packed sand or gravel, and a footprint of 200 square feet or less;
- ~~(8)~~(7) temporary amusement stands; and
- ~~(9)~~ swimming pools;
- ~~(8)~~ sand fences.

In all cases, this development shall only be permitted if it is landward of the vegetation line; involves no significant alteration or removal of primary or frontal dunes or the dune vegetation; has overwalks to protect any existing dunes; is not essential to the continued existence or use of an associated principal development; is not required to satisfy minimum requirements of local zoning, subdivision or health regulations; and meets all other non-setback requirements of this Subchapter.

(b) Where strict application of the oceanfront setback requirements of Rule .0306(a) of this Subchapter would preclude placement of permanent substantial structures on lots existing as of June 1, 1979, single family residential structures may be permitted seaward of the applicable setback line in ocean erodible areas, but not inlet hazard areas, if each of the following conditions are met:

- (1) The development is set back from the ocean the maximum feasible distance possible on the existing lot and the development is designed to minimize encroachment into the setback area;
- (2) The development is at least 60 feet landward of the vegetation line;
- (3) The development is not located on or in front of a frontal dune, but is entirely behind the landward toe of the frontal dune;
- (4) The development incorporates each of the following design standards, which are in addition to those required by Rule .0308(d) of this Subchapter.
 - (A) All pilings have a tip penetration that extends to at least four feet below mean sea level;
 - (B) The footprint of the structure be no more than 1,000 square feet or 10 percent of the lot size, whichever is ~~greater;~~ greater; and
 - (C) Driveways and parking areas shall be constructed of clay, packed sand or gravel.
- (5) All other provisions of this Subchapter and other state and local regulations are met. If the development is to be serviced by an on-site waste disposal system, a copy of a valid permit for such a system must be submitted as part of the CAMA permit application.

(c) Reconfiguration of lots and projects that have a grandfather status under Paragraph (b) of this Rule shall be allowed provided that the following conditions are met:

- (1) Development is setback from the first line of stable natural vegetation a distance no less than that required by the applicable exception;
- (2) Reconfiguration will not result in an increase in the number of buildable lots within the

- (3) Ocean Hazard AEC or have other adverse environmental consequences; and
- Development on lots qualifying for the exception in Paragraph (b) of this Rule must meet the requirements of Paragraphs (1) through (5) of that Paragraph.

For the purposes of this Rule, an existing lot is a lot or tract of land which, as of June 1, 1979, is specifically described in a recorded plat and which cannot be enlarged by combining the lot or tract of land with a contiguous lot(s) or tract(s) of land under the same ownership. The footprint is defined as the greatest exterior dimensions of the structure, including covered stairways, when extended to ground level.

(d) The following types of water dependent development shall be permitted seaward of the oceanfront setback requirements of Rule .0306(a) of this Section if all other provisions of this Subchapter and other state and local regulations are met:

- (1) piers providing public access (excluding any pier house, office, or other enclosed areas); and
- (2) maintenance and replacement of existing state-owned bridges and causeways and accessways to such bridges.

(e) Where application of the oceanfront setback requirements of Rule .0306(a) of this Section would preclude replacement of a pier house associated with an existing ocean pier, replacement of the pier house shall be permitted if each of the following conditions are met:

- (1) The associated ocean pier provides public access for fishing or other recreational purposes whether on a commercial, public, or nonprofit basis;
- (2) The pier house is set back from the ocean the maximum feasible distance while maintaining existing parking and sewage treatment facilities and is designed to reduce encroachment into the setback area;
- (3) The pier house shall not be enlarged beyond its original dimensions as of January 1, 1996;
- (4) The pier house shall be rebuilt to comply with all other provisions of this Subchapter; and
- (5) If the associated pier has been destroyed or rendered unusable, replacement of the pier house shall be permitted only if the pier is also being replaced and returned to its original function.

(f) In addition to the development authorized under Rule.0309(d) of this Section, small scale, non-essential development that does not induce further growth in the Ocean Hazard Area, such as the construction of single family piers and small scale erosion control measures that do not interfere with natural ocean front processes, may be permitted on those non oceanfront portions of shoreline within a designated Ocean Hazard Area that exhibit features characteristic of Estuarine Shoreline. Such features include the presence of wetland vegetation, lower wave energy and lower erosion rates than in the adjoining Ocean Erodeable Area. Such development shall be permitted under the standards set out in Rule .0208 of this Subchapter. For the purpose of this Rule, small scale is defined as those projects which are eligible for authorization under 15A NCAC 7H .1100, .1200 and 7K .0203.

PROPOSED RULES

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

Notice is hereby given in accordance with G.S. 150B-21.2 that the Coastal Resources Commission intends to adopt the rule cited as 15A NCAC 07K .0209. Notice of Rule-making Proceedings was published in the Register on December 15, 2001.

Proposed Effective Date: August 1, 2002

Public Hearing:

Date: July 25, 2001

Time: 3:30 p.m.

Location: Ground Floor Hearing Room, Archdale Building, 512 North Salisbury Street, Raleigh, NC 27604-1148

Reason for Proposed Action: The proposed rule amendment will clarify the criteria used to define structures considered development projects as opposed to those accessory structures which are excluded from the definition of development as per N.C.G.S. 113A-103(5)(b)(6).

Comment Procedures: Comments may be submitted to Ted Tyndall, Division of Coastal Management, 151-B, Hwy 24, Hestron Plaza II, Morehead City, NC 28557, 252-808-2808. Comments will be accepted through August 1, 2001.

Fiscal Impact

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

SUBCHAPTER 07K- ACTIVITIES IN AREAS OF ENVIRONMENTAL CONCERN WHICH DO NOT REQUIRE A COASTAL AREA MANAGEMENT ACT PERMIT

SECTION .0200 - CLASSES OF MINOR MAINTENANCE AND IMPROVEMENTS WHICH SHALL BE EXEMPTED FROM THE CAMA MAJOR DEVELOPMENT PERMIT REQUIREMENT

15A NCAC 07K .0209 EXEMPTION/ACCESSORY USES/MAINTENANCE REPAIR/REPLACEMENT

(a) Accessory buildings customarily incident to an existing structure are specifically excluded from the definition of development if the work does not involve filling, excavation, or the alteration of any sand dune or beach as set out in G.S. 113A-103(5)b.6. Accessory buildings shall be subordinate in area and purpose to the principal structure and shall not require or consist of the expansion of the existing structure as defined by an increase in footprint or total floor area of the existing structure. The size of an accessory building shall be limited to only that which is necessary to allow for the customary use of the accessory building. Accessory buildings shall not usurp public trust areas or estuarine waters nor shade any coastal wetlands

and shall be consistent with current CRC rules. Examples of accessory buildings include buildings to house compressors, air conditioner and heating units, water and sewer pumps and electrical boxes, storage sheds, carports, cargo containers, temporary construction trailers, and similar structures.

(a)(b) Accessory uses that are directly related to the existing dominant use, but not within the exclusion set out in G.S. 113A-103(5)b.6-113A-103(5)b.6., as defined in Paragraph (a) of this Rule, and that require no plumbing, electrical or other service connections and do not exceed 200 square feet shall be exempt from the CAMA minor development permit requirement if they also meet the criteria set out in Paragraph (e)(d) of this Rule.

(b)(c) Any structure or part thereof may be maintained, repaired or replaced in a similar manner, size and location as the existing structure without requiring a permit, unless such repair or replacement would be in violation of the criteria set out in Paragraph (e)(d) of this Rule. This exemption applies to those projects that are not within the exclusion for maintenance and repairs as set out in G.S. 113A-103(5)b.5. and Rule .0103 of this Subchapter.

(e)(d) In order to be eligible for the exemptions described in Paragraphs (a)(b) and (b)(c) of this Rule, the proposed development activity must meet the following criteria:

- (1) the development must not disturb a land area of greater than 200 square feet on a slope of greater than 10 percent;
(2) the development must not involve removal, damage, or destruction of threatened or endangered animal or plant species;
(3) the development must not alter naturally or artificially created surface drainage channels;
(4) the development must not alter the land form or vegetation of a frontal dune;
(5) the development must not be within 30 feet of normal water level; and
(6) the development must be consistent with all applicable use standards and local land use plans in effect at the time the exemption is granted.

Authority G.S. 113A-103(5)b; 113A-103(5)c; 113A-111; 113A-118(a); 113A-120(8).

Notice is hereby given in accordance with G.S. 150B-21.2 that the Coastal Resources Commission intends to adopt the rule cited as 15A NCAC 07K .0213. Notice of Rule-making Proceedings was published in the Register on December 15, 2000.

Proposed Effective Date: August 1, 2002

Public Hearing:

Date: July 25, 2001

Time: 3:30 pm

Location: Ground Floor Hearing Room, Archdale Building, 512 North Salisbury Street, Raleigh, NC 27604-1148

Reason for Proposed Action: The proposed adoption will allow an exemption to be issued in lieu of a CAMA minor permit

PROPOSED RULES

for single family residences located within the High Hazard Flood AEC (excluding the Ocean Erodible and Inlet Hazard AECs).

Comment Procedures: Comments may be submitted to Charles S. Jones, Division of Coastal Management, 151-B, Hwy 24, Hestron Plaza II, Morehead City, NC 28557, 252-808-2808. Comments will be accepted through August 1, 2001.

Fiscal Impact

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

SUBCHAPTER 07K- ACTIVITIES IN AREAS OF ENVIRONMENTAL CONCERN WHICH DO NOT REQUIRE A COASTAL AREA MANGEMENT ACT PERMIT

SECTION .0200 – CLASSES OF MINOR MAINTENANCE AND IMPROVEMENTS WHICH SHALL BE EXEMPTED FROM THE CAMA MAJOR DEVELOPMENT PERMIT REQUIREMENT

15A NCAC 07K.0213 SINGLE FAMILY RESIDENCES EXEMPTED FROM THE CAMA PERMIT REQUIREMENTS WITIN THE HIGH HAZARD FLOOD AREA OF ENVIROMENTAL CONCERN

(a) All single family residences, including associated infrastructure, accessory structures or structural additions to an existing single family structure, constructed within the High Hazard Flood Area of Environmental Concern are exempt from the CAMA permit requirements provided that the development is consistent with all other applicable CAMA permit standards and local land use plans and/or rules in effect at the time the exemption is granted including the following conditions and limitations:

- (1) The development shall not be located within the Ocean Erodible or Inlet Hazard Areas of Environmental Concern.
- (2) Any building shall be on pilings and comply with the North Carolina Building Code and the local flood damage prevention ordinance as required by the National Flood Insurance Program.
- (3) The development does not require any permission, licensing, approval, certification or authorization, licensing or approval from any state or federal agency.

(b) Prior to commencing any work under this exemption, the Department of Environment and Natural Resources (DENR) representative or local CAMA permitting officer must be notified of the proposed activity to allow on-site review. Notification shall be given in person or in writing. Notification must include:

- (1) the name, address and telephone number of the landowner and the location of the work, including the county, nearest community and water body closest to the development;
- (2) the dimensions of the proposed house, driveway, landscaping or other accessory developments proposed on the property; and
- (3) a signed AEC hazard notice indicating the property owner is aware of the special risks and conditions associated with development in this area. The DENR representative or local CAMA permitting officer shall provide the applicable notice form to the landowner.

(c) The applicant for a permit exemption must submit with the request a check or money order payable to the Department of Environment and Natural Resources (DENR) or local permitting authority in the sum of fifty dollars (\$50.00).

Authority G.S. 113A-103(5)(c); 113A-119.1.

TEMPORARY RULES

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 02C .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 02 – DEPARTMENT OF AGRICULTURE & CONSUMER SERVICES

Rule-making Agency: NC Department of Agriculture and Consumer Services

Rule Citation: 02 NCAC 56 .0101-.0104; .0201-.0204

Effective Date: June 13, 2001

Findings Reviewed and Approved by: Beecher R. Gray

Authority for the rulemaking: S.L. 1999-463, s. 4

Reason for Proposed Action: The legislative findings in S.L. 1999-463, the Hurricane Floyd Recovery Act of 1999, document the effects of Hurricane Floyd on agriculture and the need for immediate assistance due to the impact on the public health, safety, and welfare, and are incorporated herein by reference. Section 4 of S.L. 1999-463 also provides authority for State agencies to adopt temporary rules to implement Hurricane Floyd assistance programs.

Comment Procedures: Written comments may be submitted to David S. McLeod, APA Coordinator, North Carolina Department of Agriculture and Consumer Services, Legal Affairs Office, PO Box 27647, Raleigh, NC 27611.

CHAPTER 56 - HURRICANE FLOYD AGRICULTURE CRISIS FUND

SECTION .0100 – PURPOSE: AVAILABILITY OF FUNDS: DEFINITIONS: EXPIRATION

02 NCAC 56 .0101 PURPOSE

The purpose of this Chapter is to establish guidelines for the implementation of disaster assistance programs for farmers who continue to suffer financially as a result of Hurricane Floyd. This program is authorized by the Hurricane Floyd Recovery Act, Session Law 1999-463, 1999 Extra Session.

History Note: Authority S.L. 1999-463; Temporary Adoption Eff. June 13, 2001, to Expire on January 1, 2003.

02 NCAC 56 .0102 AVAILABILITY OF FUNDS

The assistance programs described in this Chapter are subject to the availability of funds from the Hurricane Floyd Reserve Fund in the Office of State Budget, Planning and Management, or from other sources. This program shall be administered in accordance with the Hurricane Floyd Recovery Act and the requirements of the Office of State Budget, Planning and Management.

History Note: Authority S.L. 1999-463;

Temporary Adoption Eff. June 13, 2001, to Expire on January 1, 2003.

02 NCAC 56 .0103 DEFINITIONS

As used in this Chapter:

- (1) "Department" means the Department of Agriculture and Consumer Services.
(2) "Disaster area" means the 66 counties in North Carolina that were declared a disaster by the President of the United States as a result of Hurricane Floyd.
(3) "Extension" means the Cooperative Extension Service operated by North Carolina State University and the Cooperative Extension Program operated by North Carolina Agricultural and Technical State University.
(4) "FEMA" means the Federal Emergency Management Agency.
(5) "Foundation" means the North Carolina Agricultural Foundation, Inc.
(6) "FSA" means the Farm Service Agency of the United States Department of Agriculture.
(7) "Local Cooperative Extension Center" means the local office affiliated with the Cooperative Extension Service operated by North Carolina State University and the Cooperative Extension Program operated by North Carolina Agricultural and Technical State University.
(8) "RAFI" means the Rural Advancement Foundation International, Inc.
(9) "Rural Center" means the North Carolina Rural Economic Development Center, Inc.
(10) "USDA" means the United States Department of Agriculture.

History Note: Authority S.L. 1999-463; Temporary Adoption Eff. June 13, 2001, to Expire on January 1, 2003.

02 NCAC 56 .0104 EXPIRATION

This Chapter shall expire on January 1, 2003.

History Note: Authority S.L. 1999-463; Temporary Adoption Eff. June 13, 2001, to Expire on January 1, 2003.

SECTION .0200 - FARM FINANCIAL COUNSELING

02 NCAC 56 .0201 ELIGIBILITY FOR ASSISTANCE

Farm operations in the disaster area that experienced losses as a result of Hurricane Floyd are eligible for assistance.

History Note: Authority S.L. 1999-463; Temporary Adoption Eff. June 13, 2001, to Expire on January 1, 2003.

02 NCAC 56 .0202 ASSISTANCE AVAILABLE

A participating provider will offer eligible farm operations free, confidential financial counseling. Depending upon the needs and interests of the farm operation, the counseling is available at four levels:

- (1) a review of the current financial situation based upon income statements, cash flow analysis and production records;
- (2) assistance developing long range farm plans, marketing strategies and negotiating or presenting plans to lenders;
- (3) advocacy for farm operations threatened with loss of equipment, acceleration or foreclosure; and
- (4) legal consultation and advice, but not representation in litigation, for farm operations involved in foreclosure, bankruptcy actions, or repossession in court.

History Note: Authority S.L. 1999-463; Temporary Adoption Eff. June 13, 2001, to Expire on January 1, 2003.

02 NCAC 56 .0203 COUNSELING PROVIDERS

(a) Financial counseling services will be delivered by provider organizations that employ or contract with qualified financial counselors. Provider organizations will be reimbursed at an hourly rate determined by the Department for providing counseling services to eligible farm operations. Providers are responsible for determining the eligibility of the farm operation before service is rendered.

(b) Participating providers and the level of services offered by each provider are:

- (1) Cooperative Extension and the Department will offer assistance at the first level.
- (2) RAFI and the Coalition for Farm and Rural Families will offer assistance through the third level.
- (3) The Land Loss Prevention Project will offer assistance through the fourth level.

History Note: Authority S.L. 1999-463; Temporary Adoption Eff. June 13, 2001, to Expire on January 1, 2003.

02 NCAC 56 .0204 APPLICATION PROCEDURES

Farm owners and operators may contact the local Cooperative Extension Center or the Department for referral to a participating provider. If the farm operation expresses a preference of provider, the Department will honor that request. If no preference is stated, the Department will make referrals to providers in a manner to expedite service. Farm owners and operators may also contact the provider of their choice directly.

History Note: Authority S.L. 1999-463; Temporary Adoption Eff. June 13, 2001, to Expire on January 1, 2003.

Rule-making Agency: DHHS – Division of Medical Assistance

Rule Citation: 10 NCAC 26H .0213

Effective Date: June 1, 2001

Findings Reviewed and Approved by: Beecher R. Gray

Authority for the rulemaking: G.S. 108A-25(b); 108A-54; 108A-55; 42 CFR 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 Dr., 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 .0213 DISPROPORTIONATE SHARE HOSPITALS (DSH)

(a) Hospitals that serve a disproportionate share of low-income patients and have 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 (Division) 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

TEMPORARY RULES

- (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 30th, 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~~ shall 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~~ shall 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 (a)(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 (a)(5) of this Rule for the fiscal years ended September 30th, 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, through 2000; and incur for the 12-month period ending September 30th, 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 (8) of this Paragraph.~~

- ~~(1) Qualification for the 12-month period ending September 30th, 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 30th 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 30th, 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 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 30th, 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.~~

- ~~(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, described in Subparagraph (f)(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 (e)(3) or (e)(4) of this Rule, ascertained without regard to other disproportionate share hospital payments that may have been received for services during the 12-month period 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.~~

- ~~(8) The payments authorized by Subparagraph (6) shall be effective in accordance with G.S. 108A-55(e).~~

(e) Subject to the availability of funds, hospitals licensed by the State of North Carolina shall be eligible for disproportionate share payments for such services from a disproportionate share pool under the following conditions and circumstances:

- (1) For purposes of this Paragraph eligible hospitals are hospitals that for the fiscal year for which payments are being made and either

for the fiscal year immediately preceding the period for which payments under this Paragraph are being ascertained or for such earlier period as may be determined by the Director:

- (A) qualify as disproportionate share hospitals under Subparagraphs (a)(1) through (a)(5) of this Rule;
 - (B) operate Medicare approved graduate medical education programs and reported on cost reports filed with the Division of Medical Assistance Medicaid costs attributable to such programs;
 - (C) incur 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 (\$2,500,000.00); and
 - (D) meet the definition of qualified public hospitals set forth in Subparagraph (7) of this Paragraph;
- (2) Qualification for 12-month periods ending September 30th of each year shall be based on the most recent cost report data and uninsured patient data filed with and certified to the Division at least 60 days prior to the date of any payment under this Paragraph.
- (3) 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, and may cover periods within the fiscal year preceding or following the payment date.
- (4) 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.
- (5) 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.
- (6) 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 the percentage specified by the Social Security Act, Title XIX, Section 1923(g) 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 in accordance with the provisions of the Social Security Act, Title XIX, Section 1923(f).

- (7) For purposes of this Paragraph, a qualified public hospital is a hospital that:
- (A) Qualifies for disproportionate share hospital status under Subparagraphs (a)(1) through (a)(5) of this Rule;
 - (B) Does not qualify for disproportionate share hospital status under Subparagraph (a)(6) of this Rule;
 - (C) Was owned or operated by a State (or by an instrumentality or a unit of government within a State) during the period for which payments under this Paragraph are being ascertained;
 - (D) 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 at least 30 days prior to the date of any payment under this Subparagraph that is still valid as of the date of any such payments;
 - (E) Files with the Division at least 60 days prior to the date of any payment under this Paragraph by use of a form prescribed by the Division a certification of its unreimbursed charges for inpatient and outpatient services provided to uninsured patients either during the fiscal year

immediately preceding the period for which payments under this Paragraph are being ascertained or such earlier period as shall be determined by the Director; and

(F) Submits to the Division on or before 10 working days prior to the date any such payments under this Paragraph by use of a form prescribed by the Division a certification of expenditures eligible for FFP as described in 42 CFR. 433.51(b).

(8) To ensure that the estimated payments pursuant to this Paragraph do not exceed the upper limits to such payments established by applicable federal law and regulation described in Subparagraph (6) of this Paragraph, such payments shall be cost settled within 12-months of receipt of the completed and audited Medicare/Medicaid cost report for the fiscal year for which such payments are made. If any hospital received payments pursuant to this Paragraph in excess of the percentage established by the Director under Subparagraphs (4) or (5) of this Paragraph, ascertained without regard to other disproportionate share hospital payments that may have been received for services during the 12-month period ending September 30th 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.

(9) The payments authorized by this Paragraph 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 30th, 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 18, 2000 through and including September 30th, 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 18, 2000; files with the Division on or before September 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 1999 and submits to the Division on or before September 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 30th, 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 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 1999. Payments authorized by this Paragraph shall be made no less frequently than annually.~~

~~(2) Any payments pursuant to this Paragraph shall be ascertained, 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 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 12-month period for which such payments are made. 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).~~

(f) Additional disproportionate share hospital payments for the 12-month periods ending September 30th (subject to the availability of funds and to the payment limits specified in this Paragraph) shall be paid to qualified public hospitals licensed by the State of North Carolina. For purposes of this Paragraph, a qualified public hospital is a hospital that:

- (1) Qualifies for disproportionate share hospital status under Subparagraphs (a)(1) through (5) of this Rule;
- (2) Does not qualify for disproportionate share hospital status under Subparagraph (a)(6) of this Rule;
- (3) Was owned or operated by a State (or by an instrumentality or a unit of government within a State) during the period for which payments under this Paragraph are being ascertained;
- (4) 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 at least 30 days prior to the date of any payment under this Subparagraph that is still valid as of the date of any such payment;
- (5) Files with the Division at least 60 days prior to the date of any payment under this Paragraph by use of a form prescribed by the Division a certification of its unreimbursed charges for inpatient and outpatient services provided to uninsured patients either during the fiscal year immediately preceding the period for which payments under this Paragraph are being ascertained or such earlier period as may be determined by the Director; and
- (6) Submits to the Division on or before 10 working days prior to the date of any such payment under this Paragraph by use of a form prescribed by the Division a certification of expenditures eligible for FFP as described in 42 C.F.R. 433.51(b).

(A) The payments to qualified public hospitals pursuant to this Paragraph for any given period 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 either for the fiscal year immediately preceding the period for which payments under this Paragraph are being ascertained or for such earlier period as may be determined by the Director, 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 during which such charges were incurred. Payments authorized by this Paragraph shall be made no more frequently than quarterly or less frequently than annually and may cover periods within the fiscal year preceding or following the payment date.

(B) Any payments pursuant to this Paragraph shall be ascertained, paid and cost settled after any other disproportionate share hospital payments that may have been or may be paid by the Division for the same fiscal year.

(C) 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 such payments are added to other disproportionate share hospital payments, the total disproportionate share hospital payments shall not exceed the percentage specified by the Social Security Act, Title XIX, Section 1923(g) 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 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 in which such payments are made.

(D) To ensure that estimated payments pursuant to this Paragraph do not exceed the upper limits to such payments described in Part C of this Subparagraph and established by applicable federal law and regulation, such payments shall be cost settled within 12 months of receipt of the completed and audited Medicare/Medicaid cost report for the fiscal year for which such payments are made. The federal portion of any payments in excess of either of the upper limits described in Part C of this Subparagraph will be promptly repaid. Subject to the availability of

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funds, and to the upper limits described in Part C of this Subparagraph, 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.

(E) The payments authorized by this Paragraph 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 shall~~ be paid monthly in an amount to be reviewed and approved by the Division of Medical Assistance. The total of all payments ~~may shall~~ 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 30th, 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 30th, 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 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 1999. The payment to qualified hospitals pursuant to this Paragraph for the 12 month period ending September 30th, 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 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 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 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 for which such payments are made.~~

- ~~(3) To ensure that estimated payments pursuant to this Paragraph do not exceed the upper limits to such payments described in the preceding Subparagraph and established by applicable federal law and 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.~~
- ~~(4) The payments authorized by this Paragraph shall be effective in accordance with G.S. 108A-55(e).~~

(h) Additional disproportionate share hospital payments for the 12-month periods ending September 30th (subject to the availability of funds and to the payment limits specified in this Paragraph) shall be paid to hospitals licensed by the State of North Carolina that qualify for disproportionate share hospital status under Subparagraph (a)(1) through (a)(5) of this Rule and provide inpatient or outpatient hospital services to Medicaid Health Maintenance Organization (HMO) enrollees during the period for which payments under this Paragraph are being ascertained.

- (1) 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 the Social Security Act, Title XIX, Section 1903(m)(1)(A), that is licensed as an HMO and provides or arranges for services for enrollees under a contract pursuant to the Social Security Act, Title XIX, Section 1903 (m)(2)(A)(i) through (xi).
- (2) To qualify for a DSH payment under this Paragraph, a hospital shall also file with the Division at least 10 working days prior to the date of any payment under this Paragraph, by use of a form prescribed by the Division, a certification of its charges for inpatient and outpatient services provided to Medicaid HMO enrollees either during the fiscal year immediately preceding the period for which payments under this Paragraph are being ascertained or such earlier period as may be determined by the Director.
 - (A) The payments to qualified hospitals pursuant to this Paragraph for any given period 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 either for the fiscal year immediately preceding the period for which payments under this Paragraph are being ascertained or such earlier period as may be determined by the Director to be 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 during which such charges were incurred. 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 shall 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 10 NCAC 26H .0212. Payments authorized by this Paragraph shall be made no more frequently than quarterly nor less frequently than annually and may cover periods within the fiscal year preceding or following the payment date.

- (B) 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 such payments are added to other disproportionate share hospital payments, the total disproportionate share hospital payments shall not exceed the percentage specified by the Social Security Act, Title XIX, Section 1923(g) 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 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 in which such payments are made.

(C) To ensure that estimated payments pursuant to this Paragraph do not exceed the upper limits to such payments described in Subparagraph 2 of this Paragraph and established by applicable federal law and regulation, such payments shall be cost settled within 12 months of receipt of the completed and audited Medicare/Medicaid cost report for the fiscal year for which such payments are made. No additional payments shall be made in connection with the cost settlement.

(D) 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 30th, 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 Paragraph, a large free-standing inpatient rehabilitation hospital is a hospital licensed for more than 100 rehabilitation beds. For purposes of this 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 18, 2000 through and including September 30th, 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 18, 2000.~~

~~(1) The payment to qualified public hospitals pursuant to this Paragraph for the twelve-month period ending September 30th, 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 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 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 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 1999 and filed before September 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 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 for which such payments are made.~~

~~(4) To ensure that estimated payments pursuant to this paragraph do not exceed the upper limits to such payments described in the preceding Subparagraph and established by applicable federal law and 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).~~

(i) Additional disproportionate share hospital payments for the 12 month periods ending September 30th (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 licensed by the State of North Carolina.

(1) For purposes of this Paragraph a large free-standing inpatient rehabilitation hospital is a

- hospital licensed for more than 100 rehabilitation beds.
- (2) For purposes of this Paragraph a qualified public hospital is a hospital that:
- (A) Qualifies for disproportionate share hospital status under Subparagraph (a)(1) through (5) of this Rule;
- (B) Does not qualify for disproportionate share hospital status under Subparagraph (a)(6) of this Rule;
- (C) Was owned or operated by a State (or by an instrumentality or a unit of government within a State) during the period for which payments under this Paragraph are being ascertained; and
- (D) 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 at least 30 days prior to the date of any payment under this Paragraph that is still valid as of the date of any such payment.

Payments authorized by this Paragraph shall be made no more frequently than quarterly nor less frequently than annually and may cover periods within the fiscal year preceding or following the payment date.

- (3) Payments authorized by this Paragraph for any given period shall be based on and shall not exceed for the 12 month period ending September 30th of the year for which payments are made 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 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
- (4) 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 for the period for which payments are made. The Director of the Division of Medical Assistance shall determine the amount of the estimated

- payments to be made by an analysis of costs incurred and payments received for Medicaid services as reported on the most recent cost reports filed before the Director's determination is made 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) 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 such payments are added to other disproportionate share hospital payments, the total disproportionate share hospital payments shall not exceed the percentage specified by the Social Security Act, Title XIX, Section 1923(g) of the total costs of providing inpatient and outpatient services to 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 for that year. The total of all DSH payments by the Division shall not exceed the limits on DSH 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.
- (6) To ensure that estimated payments pursuant to this Paragraph do not exceed the upper limits to such payments described in Subparagraph 3 of this Paragraph and established by applicable federal law and regulation, such payments shall be cost settled within 12-months of receipt of the completed and audited Medicare/Medicaid cost report for the fiscal year for which such payments are made. No additional payments shall be made in connection with the cost settlement.
- (7) 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 30th, commencing with September 30th, 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 30th 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 30th 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 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.~~
- (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 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(e).~~

(j) Additional disproportionate share hospital payments for the 12-month periods ending September 30th (subject to the availability of funds and to the payment limits specified in this Paragraph) shall be paid to hospitals licensed by the State of North Carolina that: are designated as critical access hospitals under 42 U.S.C. 1395i-4 for the period to which such payment relates; incurred for the 12-month period ending September 30th 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 12-month periods ending September 30th shall be based on the most recent cost report data filed with and certified to the Division at least 60 days prior to the date of any payment under this Paragraph.
- (2) Payments authorized by this Paragraph shall be made no more frequently than quarterly nor less frequently than annually, may cover periods within the fiscal year preceding or following the payment date, and shall be calculated, paid and cost settled after any other Medicaid payments of any kind to which a hospital may be entitled for the same fiscal year.
- (3) Payments to qualified hospitals under this Paragraph for any period shall be based on and shall not exceed the "Medicaid Deficit" for each hospital. The Medicaid Deficit shall be

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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 for the period for 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 the most recent cost reports filed before the Director's determination is made, 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 such payments are added to other disproportionate share hospital payments, the total disproportionate share payments shall not exceed the percentage specified by the Social Security Act, Title XIX, Section 1923(g) 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 shall not exceed the limits on DSH 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 which such payments are made.

(E) To ensure that estimated payments pursuant to this Paragraph do not exceed the upper limits to such payments described in Part D of this Paragraph and established by applicable federal law and regulation, such payments shall be cost settled within 12-months of receipt of the completed and audited Medicare/Medicaid cost for the fiscal year 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 30th, 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; Temporary Amendment Eff. June 2, 2001.

Rule-making Agency: Social Services Commission

Rule Citation: 10 NCAC 30 .0218

Effective Date: July 1, 2001

Findings Reviewed and Approved by: Beecher R. Gray

Authority for the rulemaking: G.S. 108A-25; 143B-153

Reason for Proposed Action: Food and nutrition Service of the United States Department of Agriculture amended 7 CFR part 273.8 as a result of Public Law 106-387. This regulation includes a provision that allows states to add their Temporary Assistance to Needy Families (TANF) policy to existing Food Stamp rules in determining vehicles that must be considered in

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the household's resources. Currently, federal Food Stamp regulations require evaluation of each vehicle to determine its use and licensure status, followed by a determination of each vehicle's value using a complicated set of instructions to assess equity value or fair market value and count as a resource the greater of the two. The TANF State Plan excludes from resources one vehicle per family unit adult. Equity value of any other vehicles is counted in resources. The Food Stamp regulations (as governed by 5(g)(2)(C) of the Food Stamp Act) regarding excluded vehicles will continue to be utilized in addition to the TANF exclusion.

Comment Procedures: Anyone wishing to comment should contact Sharnese Ransome, APA Coordinator, Social Services Commission, NC Division of Social Services, 325 North Salisbury Street, Suite 819, Raleigh, North Carolina 27603, phone 919/733-3055.

CHAPTER 30 – FOOD ASSISTANCE

SECTION .0200 - MANUAL

10 NCAC 30 .0218 VEHICLE DETERMINATIONS

The county department of social services shall adhere to the policy that provides greater benefit to the recipient when determining vehicle value to be considered in a household's resources:

- (1) the Food Stamp Act, Section 5(g)(2)(C); or
- (2) the Temporary Assistance to Needy Families (TANF) State Plan.

A copy of these documents may be obtained by contacting the State Division of Social Services, Economic Independence Section, 2420 Mail Service Center, Raleigh, North Carolina 27699-2420.

History Note: Authority G.S. 108A-51; 143B-153; H.R.4461 CFR 273.8; Temporary Adoption Eff. July 1, 2001.

TITLE 16 – DEPARTMENT OF PUBLIC EDUCATION

Rule-making Agency: State Board of Education

Rule Citation: 16 NCAC 06C .0311

Effective Date: June 20, 2001

Findings Reviewed and Approved by: Beecher R. Gray

Authority for the rulemaking: G.S. 115C-296(a)

Reason for Proposed Action: SL 2001-129 has extended by one year the time within which applicants for teaching license must pass the standard examination required for the license. The amendment to the Rule brings the State Board's Rule concerning temporary permits (for person who have met all licensing requirements other than the standard examinations) into conformity with the law as amended.

Comment Procedures: Comments may be submitted to Harry E. Wilson, State Board of Education, 301 N. Wilmington St., Raleigh, NC 27601-2825, (919) 807-3406, fax (919) 807-3407.

CHAPTER 06 – ELEMENTARY AND SECONDARY EDUCATION

SUBCHAPTER 06C – PERSONNEL

SECTION .0300 – CERTIFICATION

16 NCAC 06C .0311 TEMPORARY PERMIT

(a) A candidate for a license who has not met the standard examinations requirement shall receive a temporary permit if:

- (1) the candidate did not know that a minimum standard examination score was required for a license; and
- (2) the candidate has not had the opportunity to satisfy this requirement after becoming aware of it.

(b) A temporary permit shall be valid for the remainder of the fiscal year during which the permit is established. The department shall extend a temporary permit for the following fiscal year provided that the candidate took the required examinations during the candidate's first year of teaching. Graduates of in-state programs approved under Rule .0202 of this Subchapter shall not be eligible for a temporary permit.

History Note: Authority G.S. 115C-12(9)a.; N.C. Constitution, Article IX, Sec. 5; Eff. July 1, 1986; Amended Eff. August 1, 2000; March 1, 1990; Temporary Amendment Eff. June 20, 2001.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS

CHAPTER 20 – BOARD OF REGISTRATION FOR FORESTERS

Rule-making Agency: NC Board of Registration for Foresters

Rule Citation: 21 NCAC 20 .0115

Effective Date: June 1, 2001

Findings Reviewed and Approved by: Beecher R. Gray

Authority for the rulemaking: 89 B-1

Reason for Proposed Action: The Board of Registration for Foresters in 1976 adopted by reference the Code of Ethics of the Society of American Foresters (SAF) as its official ethical code to establish registration standards and for the Board to use in adjudicating flagrant misconduct in the practice of forestry by Registered Foresters. The SAF has drastically changed their Code of Ethics recently, thereby changing the standards applied to Registered Foresters in NC. This rule change will maintain the same Code of Ethics used by the Board since 1976 rather than the Board being unexpectedly forced to utilize the new, less acceptable SAF code.

Without consistency in applying ethical standards, the Board would not be able to effectively address charges of unethical actions filed against Registered Foresters. This would increase the possibility the citizens of NC may be inappropriately impacted by one or more Registered Foresters without the Board having a consistent standard to use in taking appropriate follow up action.

Comment Procedures: Comments are to be made to the NC Board of Registration for Foresters, P.O. Box 27393, Raleigh, NC 27611.

CHAPTER 20 – BOARD OF REGISTRATION FOR FORESTERS

SECTION .0100 - PURPOSE

21 NCAC 20 .0115 CODE OF ETHICS

The Board ~~has selected~~ hereby incorporates by reference the code of ethics ~~of adopted by~~ the Society of American Foresters on June 23, 1976 and amended November 2, 1992 as guidance for the professional code to be followed by registered foresters ~~to follow~~ in their ~~forestry~~ forestry practice and their conduct with clients and professional colleagues. This incorporation does not include subsequent amendments and editions. Copies may be obtained from the Board of Registration at no charge. This code of ethics is adopted by reference under G.S. 150B-14(e). In each individual canon the title Registered Forester (RF) shall be substituted for the word "member". The canons in the code of ethics are part of the registration application, and all applicants ~~will~~ shall indicate their agreement to conform with them in their signed affidavits. They ~~will~~ shall be used by the Board to help govern its decisions in adjudicating ~~unethical conduct and other conduct charges~~ flagrant misconduct in the practice of forestry under G.S. 89B-13.

History Note: Authority G.S. 89B-6; 89B-9; 89B-13; Eff. February 1, 1976; Amended Eff. May 1, 1989; February 1, 1985; Codifier determined that findings did not meet criteria for temporary rule on May 30, 2001; Temporary Amendment Eff. June 1, 2001.

CHAPTER 36 – BOARD OF NURSING

Rule-making Agency: North Carolina Board of Nursing

Rule Citation: 21 NCAC 36 .0109

Effective Date: July 2, 2001

Findings Reviewed and Approved by: Julian Mann, III

Authority for the rulemaking: G.S. 90-171.21; 90-171.23(b)

Reason for Proposed Action: As a cost savings measure, the Board proposes to publish and disseminate the Bulletin newsletter three times per year instead of four.

Comment Procedures: Written comments should be submitted to Jean H. Stanley, APA Coordinator, North Carolina Board of Nursing, PO Box 2129, Raleigh, NC 27602-2129.

SECTION .0100 – GENERAL PROVISIONS

21 NCAC 36 .0109 SELECTION AND QUALIFICATIONS OF NURSE MEMBERS

(a) Vacancies in nurse member positions on the Board that are scheduled to occur during the next year shall be announced in the ~~December last~~ issue of the North Carolina Board of Nursing ~~"Bulletin", "Bulletin" for the calendar year,~~ which shall be mailed to the address on record for each North Carolina ~~currently licensed nurse on December 1, nurse.~~ The "Bulletin" shall include a petition form for nominating a nurse to the Board and information on filing the petition with the Board.

(b) Each petition shall be checked with the records of the Board to validate that the nominee and each petitioner hold a current North Carolina license to practice nursing. If the nominee is found to be not currently licensed, the petition shall be declared invalid. If any petitioners are found to be not currently licensed and this finding decreases the number of petitioners to less than ten, the petition shall be declared invalid.

(c) On a form provided by the Board, each nominee shall indicate the category for which nominee is seeking election, shall attest to meeting the qualifications specified in G.S. 90-171.21(d) and shall provide written permission to be listed on the ballot. The form must be postmarked on or before April 15.

(d) The majority of employment income of registered nurse members of the Board, must be earned by holding positions with primary responsibilities in nursing education or in nursing practice which includes administration, supervision, planning, delivery or evaluation of nursing care as specified in G.S. 90-171.21(d). The following apply in determining qualifications for registered nurse categories of membership:

- (1) Nurse Educator includes any nurse who teaches in or directs a basic or graduate nursing program; or who teaches in or directs a continuing education or staff development program for nurses.
- (2) Hospital is defined as any facility which has an organized medical staff and which is designed, used, and primarily operated to provide health care, diagnostic and therapeutic services, and continuous nursing to inpatients.
- (3) Hospital Nursing Service Director is any nurse who is the chief executive officer for nursing service.
- (4) Employed by a hospital includes any nurse employed by a hospital.
- (5) Employed by a physician includes any nurse employed by a physician or group of physicians licensed to practice medicine in North Carolina and engaged in private practice.

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- (6) Employed by skilled or intermediate care facility includes any nurse employed by a long term nursing facility.
- (7) Registered nurse approved to perform medical acts includes any nurse approved for practice in North Carolina as a Nurse Practitioner or Certified Nurse Midwife.
- (8) Community health nurse includes any nurse who functions as a generalist or specialist in areas including, but not limited to, public health, student health, occupational health or community mental health.
- (e) The term "nursing practice" when used in determining qualifications for registered or practical nurse categories of membership, means any position for which the holder of the position is required to hold a current license to practice nursing.
- (f) A nominee shall be listed in only one category on the ballot.
- (g) If there is no nomination in one of the registered nurse categories, all registered nurses who have been duly nominated and qualified shall be eligible for an at-large registered nurse position. A plurality of votes for the registered nurse not elected to one of the specified categories shall elect that registered nurse to the at-large position.
- (h) Separate slates shall be prepared for election of registered nurse nominees and for election of licensed practical nurse nominees. Nominees shall be listed in random order on the slate for licensed practical nurse nominees and within the categories for registered nurse nominees. Slates shall be published in the "Bulletin" following the Spring Board meeting and shall be accompanied by biographical data on nominees and a passport-type photograph.
- (i) Any nominee may withdraw her/his name at any time by written notice prior to the date and hour fixed by the Board as the latest time for voting. Such nominee shall be eliminated from the contest and any votes cast for that nominee shall be disregarded.
- (j) The procedure for voting shall be identified in the "Bulletin" following the Spring Board meeting, together with a notice designating the latest day and hour for voting.
- (k) The Board of Nursing may contract with a computer or other service to receive the votes and tabulate the results.
- (l) The tabulation and verification of the tabulation of votes shall include the following:
- (1) The certificate number shall be provided for each individual voting.
 - (2) The certificate number shall be matched with the database from the Board.
- (m) A plurality vote shall elect. If more than one person is to be elected in a category, the plurality vote shall be in descending order until the required number has been elected. In any election, if there is a tie vote between nominees, the tie shall be resolved by a draw from the names of nominees who have tied.
- (n) The results of an election shall be recorded in the minutes of the next regular meeting of the Board of Nursing following the election and shall include at least the following:
- (1) the number of nurses eligible to vote,
 - (2) the number of votes cast; and
 - (3) the number of votes cast for each person on the slate.
- (o) The results of the election shall be forwarded to the Governor and the Governor shall commission those elected to the Board of Nursing.
- (p) All petitions to nominate a nurse, signed consents to appear on the slate, verifications of qualifications, and copies of the computerized validation and tabulation shall be retained for a period of three months following the close of an election.

History Note: Authority G.S. 90-171.21; 90-171.23(b); Eff. May 1, 1982;

Amended Eff. August 1, 1998; January 1, 1996; June 1, 1992; March 1, 1990; April 1, 1989;

Temporary Amendment Eff. July 2, 2001.

RULES REVIEW COMMISSION

This Section contains the agenda for the next meeting of the Rules Review Commission on Thursday, July 19, 2001, 10:00 a.m. at 1307 Glenwood Avenue, 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, July 13, 2001 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

Paul Powell - Chairman
Robert Saunders
Laura Devan
Jim Funderburke
David Twiddy

Appointed by House

John Arrowood - 1st Vice Chairman
Jennie J. Hayman 2nd Vice Chairman
Walter Futch
Jeffrey P. Gray
George Robinson

RULES REVIEW COMMISSION MEETING DATES

July 19, 2001	September 20, 2001
August 16, 2001	October 18, 2001

RULES REVIEW COMMISSION

Log of Filings May 22, 2001 through June 20, 2001

DHHS/SOCIAL SERVICES COMMISSION

Adoption Assistance Defined	10 NCAC 41H .0405	Amend
Eligibility Requirements for Monthly Cash	10 NCAC 41H .0406	Repeal
Eligibility Requirements for Regular Monthly Cash	10 NCAC 41H .0407	Amend
Procedures/Reimbursement of Adoption Assistance	10 NCAC 41H .0408	Amend

JUSTICE/CRIMINAL JUSTICE EDUCATION & TRAINING STANDARDS COMMISSION

Suspension Revocation or Denial of Certification	12 NCAC 09A .0204	Amend
Period of Suspension Revocation or Denial	12 NCAC 09A .0205	Amend
Standards for Criminal Justice Officers	12 NCAC 09B .0101	Amend
Minimum Standards for State Youth Services Officer	12 NCAC 09B .0108	Amend
Basic Training Juvenile Detention Homes Personnel	12 NCAC 09B .0234	Amend
Report of Separation	12 NCAC 09C .0208	Amend
Reports of Training Course Presentation and General Provisions	12 NCAC 09C .0403 12 NCAC 09D .0202	Amend Amend

EDUCATION, STATE BOARD OF

End of Course Tests	16 NCAC 06D .0305	Amend
Student Accountability Standards	16 NCAC 06D .0502	Amend
Annual Performance Standards, Grades K-12	16 NCAC 06G .0305	Amend
Qualified Zone Academy Bonds	16 NCAC 06H .0111	Adopt

STATE BOARDS/N C BOARD OF PHYSICAL THERAPY EXAMINERS

Membership of Board	21 NCAC 48A .0103	Amend
Definitions	21 NCAC 48A .0105	Amend
General Requirements	21 NCAC 48B .0101	Amend
Licenses by Examination	21 NCAC 48B .0103	Amend
Exemptions	21 NCAC 48B .0104	Amend
Permitted Practice	21 NCAC 48C .0101	Amend
Responsibilities	21 NCAC 48C .0102	Amend
Supervision by Physical Therapist	21 NCAC 48C .0201	Amend
Function	21 NCAC 48C .0402	Amend
Responsibilities	21 NCAC 48C .0601	Amend
Persons Refused Examination Permission	21 NCAC 48D .0107	Amend
Retaking Examination	21 NCAC 48D .0109	Amend
Foreign-Trained Physical Therapists	21 NCAC 48E .0110	Amend
Fees	21 NCAC 48F .0102	Amend

RULES REVIEW COMMISSION

Change of Name and Address	21 NCAC 48F .0105	Adopt
Notification	21 NCAC 48G .0202	Amend
Restricted License	21 NCAC 48G .0204	Adopt
Grounds for Warning	21 NCAC 48G .0402	Amend
Conditions for Probation or Warning	21 NCAC 48G .0403	Amend
Grounds for Reprimand	21 NCAC 48G .0405	Amend
Complaints and Investigations	21 NCAC 48G .0504	Amend
Subpoenas	21 NCAC 48G .0512	Amend
Modification of Decision	21 NCAC 48G .0517	Adopt
Prohibited Actions	21 NCAC 48G .0601	Amend
Sanctions; Reapplication	21 NCAC 48G .0602	Adopt

RULES REVIEW COMMISSION

June 21, 2001

MINUTES

The Rules Review Commission met on Thursday morning, June 21, 2001, in the Assembly Room of the Methodist Building, 1307 Glenwood Avenue, Raleigh, North Carolina. Commissioners present: Vice-Chair Jennie Hayman, Jeffrey Gray, David Twiddy, George Robinson, Jim Funderburk, Robert Saunders and Walter Futch.

Staff members present were: Joseph J. DeLuca, Staff Director; Bobby Bryan, Rules Review Specialist; and Lisa Johnson.

The following people attended:

Carl DiFalco	NC Dept. of Agriculture/Structural Pest Control
Kim Dove	NC Board of Dietetics/Nutrition
Henry Jones	NC Board of Dietetics/Nutrition Attorney
Jean Stanley	NC Board of Nursing
Emily Lee	NC Dept. of Transportation
Jackie Sheppard	DHHS/Division of Facility Services
Howard Kramer	NC Board of Nursing Attorney
Elsie Roane	DHHS/Department of Social Services
Doug Barrick	DHHS/Division of Facility Services
Sharnese Ransome	DHHS/Department of Social Services
Joan Troy	NC Wildlife Commission

APPROVAL OF MINUTES

The meeting was called to order at 10:05 a.m. with Ms. Hayman presiding. Chairman Hayman asked for any discussion, comments, or corrections concerning the minutes of the May 17, 2001, meeting. The minutes were approved as written.

FOLLOW-UP MATTERS

02 NCAC 34 .0502: Department of Agriculture Structural Pest Control Committee – The rewritten rule submitted by the agency was approved by the Commission.

10 NCAC 41S All Rules: DHHS/Social Services Commission – The rewritten rules for .0612 and .0704 submitted by the agency were approved by the Commission. The remaining 41S rules were approved with technical changes.

10 NCAC 41T All Rules: DHHS/Social Services Commission – The rules submitted by the agency were approved by the Commission.

15A NCAC 06G .0.0101, .0102: DENR/Soil and Water Conservation Commission – No action was taken.

15A NCAC 06G .0103, .0104, .0105, .0106: DENR/Soil and Water Conservation Commission – No action was taken.

15A NCAC 10B .0203: NC Wildlife Resources Commission - The rewritten rule submitted by the agency was approved by the Commission.

15A NCAC 10C .0211: NC Wildlife Resources Commission - The rewritten rule submitted by the agency was approved by the Commission.

15A NCAC 10H .0301: NC Wildlife Resources Commission - The rewritten rule submitted by the agency was approved by the Commission.

15A NCAC 18A .3307; .3313; .3319; .3323; .3324; .3327; .3330; .3331; .3334: Commission for Health Services - No action was taken.

LOG OF FILINGS

Chairman Hayman presided over the review of the log and all rules were approved with the following exceptions:

10 NCAC 45G .0306: DHHS/Commission for MH/DD/SAS – The Commission objected to this rule due to ambiguity. It is unclear in (b) whether the medical director must also be registered to dispense methadone (or the applicable schedule for methadone.)

10 NCAC 45H .0203: DHHS/Commission for MH/DD/SAS - The Commission objected to this rule due to ambiguity. This rule tracks, and to a certain extent repeats, N.C.G.S. 90-90 Schedule I Controlled Substances. However it is not consistent in either the identical listing or terminology. And the rule does not indicate that it controls over the statute (which the legislature authorized) in the event of an inconsistency.

10 NCAC 45H .0204: DHHS/Commission for MH/DD/SAS – The Commission objected to this rule due to ambiguity. This rule tracks, and to a certain extent repeats, N.C.G.S. 90-91 Schedule II Controlled Substances. However it is not consistent in either the identical listing or terminology. And the rule does not indicate that it controls over the statute (which the legislature authorized) in the event of an inconsistency. Also it is unclear what “Section 9.32” is in (b)(1) and whether it needs to be incorporated by reference.

19A NCAC 02D .1003: NC Department of Transportation - The Commission objected to this rule due to ambiguity and lack of necessity. In (b) the meaning of the requirement “to be responsible” is unclear. There is no mention of what the applicant is to be “responsible” for, or to whom the applicant is to be “responsible,” if that is the intent. The last sentence in (d) is a legal opinion that may or may not be correct. At any rate it is unnecessary. In (f) it does not require or forbid anything. It is unnecessary and may be misleading to people if people believe that it is a requirement.

21 NCAC 17 .0101: NC Board of Dietetics/Nutrition - The Commission objected to this rule due to ambiguity and lack of necessity. It is not clear that there is a difference in the terms defined in items (11) and (12). Since the term defined in item (12) apparently is not used in the rules, it is not necessary to define the term. This objection applies to existing language in the rule.

21 NCAC 17 .0104: NC Board of Dietetics/Nutrition - The Commission objected to this rule due to ambiguity. Paragraph (f) is unclear because of the two different types of examination eligibility mentioned. The CDR (Commission on Dietetic Registration) exam is the Board’s exam so it is not clear what the distinction is. In (i)(2), it is not clear what documents are needed for evaluation of an equivalent major course of study. In (j)(1), it is not clear if the Board is trying to make a distinction between a “supervised practice program” and a “plan which has been approved/accredited to meet the dietetic practice requirements of ADA.” A “supervised practice program” is defined as one meeting the ADA standards. In (j)(2), it is not clear what is meant by supervised practice “experience” as referenced in 21 NCAC 17 .0101 since that term is not defined. Assuming “experience” really means “program”, it is also not clear what documents are to be submitted for its evaluation. In (k)(1), it is not clear who must approve, or, if it is the Board, which must approve, what the standards for approval for a “credentialing evaluation agency” are. In (k)(2), there is the same problem for a “credentialing evaluation service.” This objection applies to existing language in the rule.

21 NCAC 17 .0105: NC Board of Dietetics/Nutrition - The Commission objected to this rule due to lack of statutory authority. There does not appear to be authority for paragraph (a) for this rule. G.S. 90-357 gives the license requirements. If an applicant meets these requirements, there does not seem to be authority for the Board to require him or her to meet some other eligibility requirements set by an outside agency. This objection applies to existing language in the rule.

21 NCAC 17 .0107: NC Board of Dietetics/Nutrition - The Commission objected to this rule due to ambiguity. In (a)(2), it is not clear what documents are needed for evaluation of an equivalent major course of study. In (b)(1), it is not clear if the Board is trying to make a distinction between a “supervised practice program” and a “plan, which has been approved by CDR to meet the dietetic practice requirements of ADA.” A supervised practice program is defined as one meeting the ADA requirements. In (b)(2), it is not clear what is meant by supervised practice “experience.” Assuming “experience really means “program,” it is not clear what documents are to be completed and submitted for its evaluation. This objection applies to existing language in the rule.

21 NCAC 17 .0109: NC Board of Dietetics/Nutrition - The Commission objected to this rule due to lack of statutory authority. There is no authority for (g)(2) setting standards for continuing education by use of guidelines not in the rules. This objection applies to existing language in the rule.

21 NCAC 17 .0114: NC Board of Dietetics/Nutrition - The Commission objected to this rule due to ambiguity. In (13)(a), it is not clear when the use of LDN by a current licensee would not be authorized. This objection applies to existing language in the rule.

21 NCAC 17 .0115: NC Board of Dietetics/Nutrition - The Commission objected to this rule due to lack of statutory authority and ambiguity. There is no authority cited for requiring a student or trainee to submit information to the Board in order to be exempt from the Act pursuant to G.S. 90-368(2). The Board’s only authority is to determine the period of time. Item (2) is also inconsistent with G.S. 90-368(2) by limiting supervision by a licensed dietitian/nutritionist to 70% of the experience. The statute only exempts them when they are under direct supervision of a licensee. In (3), it is not clear what constitutes “designated.” This objection applies to existing language in the rule.

21 NCAC 17 .0116: NC Board of Dietetics/Nutrition - The Commission objected to this rule due to ambiguity. In (h), it is not clear when an affidavit is timely or what makes it sufficient. In (i)(3)(B), it is not clear who is responsible for filing a petition with the Board. This objection applies to existing language in the rule.

21 NCAC 17 .0302: NC Board of Dietetics/Nutrition - The Commission objected to this rule due to lack of statutory authority, ambiguity and lack of necessity. Most of this rule just repeats the contents of Rule .0115 so one of them is not necessary. There is no authority for the Board to set any requirements beyond those in G.S. 90-368(2) for a student or trainee to be exempt from the Article and therefore regulation by the Board except for the determination of a time period. This problem applies to items (1), (2) and (3). In (1), it is not clear what constitutes “designation”. There is no authority for item (4) for reducing supervision to 70% of experience. The statute requires direct supervision. In (5), it is not clear what standards the Board will use in extending the time period. This is a modification provision without the specific guidelines required by G.S. 150B-19(6). This objection applies to existing language in this rule.

21 NCAC 17 .0303: NC Board of Dietetics/Nutrition - The Commission objected to this rule due to lack of statutory authority and ambiguity. There is no authority cited for the Board to set any type requirements for CAADe-accredited/approved dietetic/nutrition programs. Presumably paragraph (a) is referring to the planned, continuous program in approved clinical practice pursuant to G.S. 90-

RULES REVIEW COMMISSION

357(3)b.2. but that is not abundantly clear. The person designated as the Program Director apparently is the licensed dietitian/nutritionist providing supervision but that is not abundantly clear either. In (a)(3), it is not clear what is meant by sponsoring institution. There does not appear to be any requirement in the statutes or rules that there be any institutional involvement. G.S. 90-357(3)b.2. requires supervision by a licensed dietitian/nutritionist. Paragraphs (c) and (d) of this Rule would allow 30% of the supervision to be by a non-licensed individual. There is no authority for this. This objection applies to existing language in this rule.

21 NCAC 17 .0304: NC Board of Dietetics/Nutrition - The Commission objected to this rule due to ambiguity and lack of necessity. Apparently this rule is about records and reports for the planned continuous program in approved clinical practice referenced in G.S. 90-357(3)b.2. It appears that the only requirements for approval are those in Rule .0303. It is not clear why the Board needs the information in (b) since it does not apply to any existing requirements. Paragraph (c) apparently requires either completion of a supervised practice program as defined in Rule .0101 or some kind of academic requirements. It is not clear what type academic requirements are acceptable. In (d)(1)-(4), it is not clear what type data is requested. This objection applies to existing language in this rule.

21 NCAC 36 .0405: NC Board of Nursing – The Commission objected to this rule due to lack of statutory authority. In (b)(2) the rule refers to the “content hours” and “scope of practice” of the nurse aide II training program (at lines 27-29). It appears that the content and scope of these programs are set outside the rules or statutes. If that is correct there is no authority to set the content or scope outside the rules.

COMMISSION PROCEDURES AND OTHER BUSINESS

Chairman Hayman read letters to the Commission from the North Carolina Board of Ethics concerning Commissioners Laura Devan, and Jim Funderburk. The NC Board of Ethics found that Laura Devan has no actual conflict of interest but does have the potential for conflict interest. Jim Funderburk has no actual conflict of interest or potential for conflict of interest. The Commission discussed the issue further and Chairman Hayman cautioned all Commissions to make sure they do not have a conflict of interest on all the issues that come before the Commission.

The next meeting will be on Thursday, July 19, 2001.

The meeting adjourned at 11.54 a.m.

Respectfully submitted,
Lisa Johnson

AGENDA
RULES REVIEW COMMISSION
July 19, 2001

- I. Call to Order and Opening Remarks
- II. Review of minutes of last meeting
- III. Follow Up Matters
 - A. Department of Cultural Resources – 07 NCAC 04S .0104 Objection on 12/21/00 (DeLuca)
 - B. DHHS/Commission for MH/DD/SAS - 10 NCAC 45G .0306 Objection on 6/21/01 (DeLuca)
 - C. DHHS/Commission for MH/DD/SAS – 10 NCAC 45H .0203 and .0204 Objection on 6/21/01 (DeLuca)
 - D. DENR-Soil and Water Conservation Commission - 15A NCAC 06G .0101 and .0102 Objection on 05/17/01 (DeLuca)
 - E. DENR-Soil and Water Conservation Commission – 15A NCAC 06G .0103 - .0106 Extend period of review on 05/17/01 (DeLuca)
 - F. Commission for Health Services – 15A NCAC 18A .3307; .3313; .3319; .3323; .3324; .3327; .3330; .3331; .3334 Objection on 04/19/01 (Bryan)
 - G. NC Dept. of Transportation – 19A NCAC 02D .1003 Objection on 6/21/01 (DeLuca)
 - H. NC Board of Dietetics/Nutrition – 21 NCAC 17 .0101; .0104; .0105; .0107; .0109; .0114; .0115; .0116; .0302; .0303; .0304 Objection 6/21/01 (Bryan)
 - I. NC Board of Nursing – 21 NCAC 36 .0405 Objection 6/21/01 (DeLuca)
- IV. Review of rules (Log Report #177)
- V. Commission Business
- VI. Next meeting: Thursday; August 16, 2001

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.ncoah.com/hearings>.

OFFICE OF ADMINISTRATIVE HEARINGS

*Chief Administrative Law Judge
JULIAN MANN, III*

*Senior Administrative Law Judge
FRED G. MORRISON JR.*

ADMINISTRATIVE LAW JUDGES

*Sammie Chess Jr.
Beecher R. Gray
Melissa Owens Lassiter*

*James L. Conner, II
Beryl E. Wade
A.B. (Butch) Elkins*

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
<u>ALCOHOL BEVERAGE CONTROL COMMISSION</u>				
C's Mini-Mart, Camille Stephens v. NC ABC Commission and City of Charlotte	00 ABC 1264	Lassiter	06/08/01	
<u>BOARD OF GEOLOGISTS</u>				
O. Phillip Kimbrell, P.G. v. NC Board for the Licensing of Geologists	99 BOG 1254	Conner	05/29/01	
<u>CRIME CONTROL AND PUBLIC SAFETY</u>				
Jerry W. Taylor v. NC Victims Compensation Commission	00 CPS 1052	Gray	05/23/01	
Eddie N McLaughlin v. NC Crime Victims Compensation Commission	01 CPS 0086	Elkins	06/05/01	
<u>HEALTH AND HUMAN SERVICES</u>				
David P. Lemieux v. Department of Health & Human Services	01 CRA 0428	Gray	06/05/01	
<i>Child Support Enforcement Section</i>				
David K. Rose v. Department of Health & Human Services	00 CSE 1681	Gray	06/05/01	
John T McDonald v. Department of Health & Human Services	00 CSE 1687	Wade	06/08/01	
William Baxter v. Department of Health & Human Services	00 CSE 1776	Wade	05/30/01	
Manargo Victor Boykin v. Department of Health & Human Services	00 CSE 1835 ¹	Wade	05/30/01	
Manargo Victor Boykin v. Department of Health & Human Services	00 CSE 1837 ¹	Wade	05/30/01	
Larry W Kiser v. Department of Health & Human Services	00 CSE 1840	Gray	06/08/01	
Robert Steven Preston v. Department of Health & Human Services	00 CSE 1958	Lassiter	06/05/01	
Winston H Powell v. Department of Health & Human Services	00 CSE 2274	Wade	05/30/01	
Kendall L Taylor v. Department of Health & Human Services	00 CSE 0032	Conner	06/08/01	
Samuel E Taylor v. Department of Health & Human Services	01 CSE 0181	Conner	06/08/01	
Randall Blevins v. Department of Health & Human Services	01 CSE 0258	Gray	06/05/01	
Denise Renee Nunn v. Department of Health & Human Services	01 CSE 0368	Morrison	06/05/01	
Dennis E Chardavoyne v. Department of Health & Human Services	01 CSE 0432	Elkins	06/05/01	
Henry L Elliotte v. Department of Health & Human Services	01 CSE 0491	Lassiter	06/05/01	
Gregory Morgan v. Department of Health & Human Services	01 CSE 0498	Elkins	05/24/01	
John Winstead v. Department of Health & Human Services	01 CSE 0562	Conner	06/08/01	
Boyd H Tucker v. NC Child Support Centralized Collection	01 CSE 0618	Wade	05/31/01	
Joseph E Rudd Jr. v. Department of Health & Human Services	01 CSE 0621	Gray	05/29/01	
Kirk M White v. Department of Health & Human Services	01 CSE 0625	Lassiter	06/05/01	
Kevin R Ross v. Department of Health & Human Services	01 CSE 0631	Elkins	06/05/01	
Kelvin R Leonard v. Department of Health & Human Services	01 CSE 0633	Elkins	06/05/01	
Steven Rodger Malysz v. Department of Health & Human Services	01 CSE 0649	Gray	06/05/01	
<u>HEALTH AND HUMAN SERVICES</u>				
Renita Lewis-Walters v. (ADATC), Dept. of Health & Human Services	01 DHR 0286	Morrison	06/08/01	
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<i>Division of Child Development</i>				
Vickie L. Anderson, Camelot Academy v. DHHS, Division of Child Development	00 DHR 1270	Wade	05/22/01	

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Angel McDowell v. Office of Administrative Hearings	01 DHR 0370	Conner	06/05/01
Kristie N Crabtree v. Greene County Social Services	01 DHR 0401	Lassiter	06/05/01

Division of Facility Services

Linda Gail Funke v. DHHS, Division of Facility Services	00 DHR 0625	Wade	06/04/01
Peter Lynn Mosher v. DHHS, Division of Facility Services	01 DHR 0178	Mann	05/30/01
Davina Brook Grant v. DHHS, Division of Facility Services	01 DHR 0363	Conner	06/08/01

JUSTICE

Alarm Systems Licensing Board

Joseph Brian Moses v. Alarm Systems Licensing Board	01 DOJ 0582	Wade	06/01/01
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Private Protective Services Board

Linda Morton Kiziah v. Private Protective Services Board	01 DOJ 0353	Wade	06/01/01
Willie Carl Wilson v. Private Protective Services Board	01 DOJ 0580	Morrison	06/04/01

ENVIRONMENT AND NATURAL RESOURCES

Anson County Citizens Against Chemical Toxins in Underground Storage, Blue Ridge Environmental Defense League, Inc., Mary Gaddy, Bobby Smith and Emma Smith v. DENR	00 EHR 0938	Conner	06/05/01	16:01 NCR	40
Brandon H Clewis, Christy Swails Clewis v. Chatham County Health Dept., Office of Environmental Health	01 EHR 0305	Lassiter	06/04/01		

STATE PERSONNEL

Debbie Whitley v. Wake County Department of Health	96 OSP 1997	Chess	05/22/01
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STATE OF NORTH CAROLINA
COUNTY OF ANSON

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
00 EHR 0938

ANSON COUNTY CITIZENS AGAINST CHEMICAL)
TOXINS IN UNDERGROUND STORAGE, BLUE RIDGE)
ENVIRONMENTAL DEFENSE LEAGUE, INC., MARY)
GADDY, BOBBY SMITH and EMMA SMITH,)
Petitioners,)
v.)
N.C. DEPARTMENT OF ENVIRONMENT)
AND NATURAL RESOURCES, DIVISION OF WASTE)
MANAGEMENT,)
Respondent,)
and)
CHAMBERS DEVELOPMENT OF NORTH)
CAROLINA, INC.)
Respondent-Intervenor.)

RECOMMENDED DECISION

This contested case was heard by the Honorable James L. Conner, II, Administrative Law Judge, on January 29, 30 and 31, 2001, in Wadesboro, North Carolina. The parties filed proposed findings of fact on March 21 and 22, 2001. Several rounds of written arguments were filed by the parties on the franchise issue on dates ranging from April 2 to April 19, 2001.

APPEARANCES

For Petitioners: John D. Runkle, Attorney at Law, P.O. Box 3793, Chapel Hill, N.C. 27515; Melany Earnhardt, Nicole Gooding-Ray, North State Legal Services, P.O. Box 670, Hillsborough, N.C. 27278
For Respondent: Nancy Scott, Assistant Attorney General, Department of Justice, P.O. Box 629, Raleigh, N.C. 27602
For Respondent-Intervenor: Ramona Cunningham O’Bryant, William E Burton III, SMITH HELMS MULLISS & MOORE, LLP, P.O. Box 21927, Greensboro, N.C. 27420; Benne C. Hutson, SMITH HELMS MULLISS & MOORE, LLP, P.O. Box 31247, Charlotte, N.C. 28231

ISSUES

This matter involves the issuance by the N.C. Department of Environment and Natural Resources, Division of Waste Management, of Sanitary Landfill Permit, Number 04-03 (the “Permit”), to Chambers Development of North Carolina, Inc. (the “Applicant”), for a multi-state solid waste landfill in Anson County, North Carolina, on or about June 1, 2000. The permit document filed by the Division incorporates by reference voluminous additional documents that are part of the permit.

The issues to be decided are, as agreed by the parties in the Pre-Trial Order:

1. Whether Petitioners can show that DWM exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, or failed to act as required by law or rule in determining that the Permit to Construct reasonably protected public health and safety?
2. Whether Petitioners can show that DWM exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, or failed to act as required by law or rule in determining that Chambers Development of North Carolina, Inc., its parent company and affiliates had substantially complied with environmental laws?
3. Whether Petitioners can show that DWM exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, or failed to act as required by law or rule in determining that the application for

CONTESTED CASE DECISIONS

the Permit to Construct complied with applicable requirements related to odors, noise, dust, increase in truck traffic, and other nuisance factors?

4. Whether Petitioners can show that DWM exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, or failed to act as required by law or rule in determining that the disposal areas of the Anson County Solid Waste Management Facility would not be located within a 100-year floodplain?
5. Whether Petitioners can show that DWM exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, or failed to act as required by law or rule in determining that the application for the Permit to Construct complied with applicable requirements related to borrow soils?
6. If Petitioners can make such a showing as to any of the issues identified in issues 1 through 5 above, did DWM's issuance of the Permit to Construct substantially prejudice Petitioners' rights?

WITNESSES

For Petitioners: Denise Lee, Bobby Briley, Mary Gaddy, Emma Smith; *and appearing by subpoena*, Sherri Coghill, Philip Prete, James C. Coffey

For Respondent-Intervenor: William Scott Almes, Charles Richard Gillian, Jimmie Jones, Bobby Lutfy, Sherri Coghill

EXHIBITS RECEIVED INTO EVIDENCE

Petitioners:

- PH-1. Permit to Construct dated June 1, 2000
- PH-2. USGS map
- PH-3. Overview map from Site Plan Application
- PH-4. Drawing F-3 from the Permit to Construct Application
- PH-5. Summary of Demographics dated 1992
- PH-6. Anson County Survey dated 2000

Note: This document was admitted over Respondent's and Respondent-Intervenor's objection. (Tr. 248.)

- PH-7. Solid Waste Section Permit Applicant Compliance Review form dated October 9, 1998
- PH-8. Memorandum from Philip Prete to Jim Coffey dated May 26, 2000
- PH-9. Compliance information on BFI and Allied Waste

Note: The 2-page summary attached to PH-9 was not admitted into evidence. Petitioners made an offer of proof with respect to the summary. (Tr. 498.)

- PH-10. "Organized Crime's Involvement in the Waste Hauling Industry"

Note: This document was admitted over Respondent's objection.

- PH-11. List of lawsuits involving "Allied Waste"

Note: This document was admitted over Respondent's and Respondent-Intervenor's objection for the limited purpose of showing what Ms. Lee submitted to DWM. (Tr. 499-500.)

- PH-12. Compliance documents

CONTESTED CASE DECISIONS

Note: These documents were admitted over Respondent-Intervenor's objection for the limited purpose of showing what information Ms. Lee was able to obtain regarding various corporations and compliance records. (Tr. 500-502.)

PH-13. Paragraph from EBIC Summary

Note: This paragraph was admitted over Respondent's and Respondent-Intervenor's objection for the limited purpose of showing what information Ms. Lee submitted to DWM. (Tr. 502-505.)

PH-14. FEMA Flood Insurance Rate Map for Anson County dated June 18, 1990

PH-15. Photographs

PH-16. 1908 newspaper article

PH-17. 1945 newspaper article

PH-18. Not identified or admitted.

PH-19. USGS Data

PH-20. FEMA map with handwritten additions and comments

PH-21. Affidavit of Sherri Coghill dated November 28, 2000

PH-22. Letter to Indiana Department of Environmental Management dated January 16, 2001

Note: This letter was admitted over Respondent's objection. (T. pp 555-556.)

Respondent:

R-1. Letter to BFI Charlotte Motor Speedway from the Solid Waste Section dated October 15, 1999.

Respondent-Intervenor:

RI-1. Two-mile area map dated December 30, 1991 from the Site Plan Application

RI-2. Handwritten comments of Robert F. Briley dated July 13, 1999

RI-3. Letter to the Anson Record by Robert F. Briley

RI-4. Affidavit of Robert F. Briley dated December 11, 2000

RI-5. Executive Summary of the Facility Plan, Section 1.0 of the Permit to Construct Application

RI-6. Section 1.2.2.2 and related table from the Permit to Construct Application

RI-7. Floodplain discussion and drawing from the Site Plan Application

RI-8. North Carolina DOT Bridge Survey and Hydraulic Design Report for Cameron Road bridge

Note: This document was admitted for the limited purpose of showing what was submitted to DWM. (Tr. 707.)

RI-9. Affidavit of Steve E. Roberts dated November 16, 1999

RI-10. Not identified or admitted.

RI-11. Letter to Sherri Coghill from Smith Helms Mulliss & Moore, L.L.P. dated November 17, 1999 regarding floodplain delineation

RI-12. Administrative Law Judge Conner's drawing related to Cameron Road bridge

CONTESTED CASE DECISIONS

- RI-13. Letter from Sherri Coghill dated June 4, 1998 requesting compliance information on Allied Waste
- RI-14. Letter to Sherri Coghill from Smith Helms Mulliss & Moore, L.L.P. dated June 17, 1998 responding to request for compliance information
- RI-15. Letter to Sherri Coghill from Smith Helms Mulliss & Moore, L.L.P. dated October 29, 1999 transmitting compliance information for BFI

STATUTES AND RULES IN ISSUE

The substantive statutes involved are N.C. Gen. Stat. §§ 130A-309.06(b) and 130A-294 *et seq.*, the Solid Waste Management Rules at 15A NCAC 13B.0100 *et seq.*, Title VI of the Civil Rights Act of 1964 (as amended) at 42 U.S.C. 2000 *et seq.*, regulations for the U.S. Environmental Protection Agency at 40 C.F.R. Parts 257 and 258, and related statutes and rules.

MOTIONS FOR SUMMARY JUDGMENT

On November 29, 2000, Respondent and Respondent-Intervenor filed a Joint Motion for Summary Disposition requesting summary judgment on all issues. Petitioners responded on December 11, 2000, requesting that summary judgment be granted to them. Oral argument was held on December 12, 2000. At the argument, the undersigned verbally granted summary judgment to Respondent and Respondent-Intervenor on Contention 6(g) concerning leachate from the proposed landfill and Contention 6(h) concerning impacts on fish and wildlife because Petitioners did not present any competent evidence supporting the contentions. The undersigned requested additional briefing on two issues: Contention 6(e) concerning environmental justice, and Contention 6(o) concerning the validity of the franchise agreement. Summary judgment was denied on the other contentions.

On March 19, 2001, the undersigned issued a written Order Granting Partial Summary Judgment, which reflected the above rulings, granted summary judgment to Respondent and Respondent-Intervenor on the environmental justice issue, and granted summary judgment to Petitioners on the franchise agreement issue. Subsequently, Respondent and Respondent-Intervenor moved for reconsideration on Contention 6(o) concerning the franchise agreement. The undersigned denied this motion on April 27, 2001.

Pursuant to N.C. Gen. Stat. §150B-34 and -36, these rulings on the motions for summary judgment are parts of this recommended decision. All such rulings are hereby incorporated herein.

STIPULATIONS

To resolve various contentions raised by Petitioners, the parties agreed to following stipulations:

- a. Contention 6(j) concerning the inability to track the waste stream. Chambers and the State agreed to a condition in the permit to operate that will prohibit the Anson County Solid Waste Management Facility from taking solid waste from transfer stations that accept solid waste generated in states other than North Carolina and South Carolina. (Tr. 557).
- b. Contention 6(m) concerning access to the landfill. The permit to operate contains a condition that "waste collection vehicles shall not use Boylin Road for access to the landfill facility." Chambers and the State agreed to amending this permit condition to prohibit the use of Boylin Road by Chambers for construction equipment and large trucks carrying borrow or other construction materials for the landfill. Chambers can use Boylin Road only for automobile, SUV and pickup traffic. (Tr. 557).
- c. Contention 6(n) concerning the hours of operation. Chambers and the State agreed to amend the permit to operate to include "the landfill will accept truck traffic between 6:30 a.m. and 5:30 p.m. with some activity after 5:30 p.m. to complete required cover activities. The landfill will not operate on Sundays." (Tr. 558).
- d. Contention 6(l) concerning fire protection for the proposed landfill. The Petitioners withdrew this contention after discovery.
- e. Contention 6(i) concerning the hydrogeology of the site. The Petitioners withdrew this contention after discovery.

FINDINGS OF FACT

Parties.

1. Petitioners Mary Gaddy, Emma Smith and Bobby Smith (now deceased) reside on Boylin Road in close proximity to the landfill.

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2. Petitioner Anson County Citizens Against Chemical Toxins in Underground Storage (“CACTUS”) is a community group with approximately 300 members primarily in Anson County. (Tr. 52). CACTUS is a chapter of Petitioner, Blue Ridge Environmental Defense League (“BREDL”), a public interest organization with more than 40 chapters in North Carolina and surrounding states. The individual Petitioners are members of the organizational Petitioners, CACTUS and BREDL.

3. As part of the permitting process a public hearing was held in Wadesboro on July 13, 1999. Members of CACTUS and BREDL, including Ms. Lee and Mr. Briley, provided testimony and written comments. Most of the issues later raised in the Petition for Contested Case Hearing were raised at the public hearing.

4. The Respondent is the N.C. Department of Environment and Natural Resources, Division of Waste Management, (the “Division”), the state agency authorized to issue permits for solid waste landfills.

5. The Respondent-Intervenor is Chambers Development of North Carolina, Inc. (“Chambers Development”), the applicant for the solid waste landfill permit that is the subject of this contested case hearing.

Background.

6. On June 1, 2000, the Division issued Sanitary Landfill Permit Number 04-03 (the “Permit”), to Chambers Development for a multi-state solid waste landfill in Anson County, North Carolina. This landfill is located off U.S. Route 74 west of Wadesboro near Polkton. (Exh. PH-2).

7. Bobby Briley, a member of CACTUS, is the chair of the Anson County Citizens Advisory Committee.

8. Anson County has approximately 25,000 people and generates 60 tons of waste per day. (Tr. 171).

9. The Anson landfill is one of the nine major landfills in North Carolina when measured by tonnage. At full capacity it will take up to 1500 tons of waste per day from North and South Carolina. (Tr. 468).

10. Petitioners timely filed a Petition for Contested Case on June 30, 2000. (Pre-Trial Order, ¶ 3.c.)

Contested Issue #1 - Reasonable Protection of Public Health and Safety

11. Petitioner Emma Smith lives on Boylin Road near the Anson County Solid Waste Management Facility. (Tr. 137-138.) Ms. Smith testified that she was concerned about the landfill because “if there’s any leakage, it might cause a lot of diseases.” and she obtained her drinking water from a well. (Tr. 140, 151.)

12. Ms. Smith’s well is located upgradient from the Anson County Solid Waste Management Facility. (Tr. 226, 679.)

13. Petitioner Mary Gaddy lives on Boylin Road near the Anson County Solid Waste Management Facility. Ms. Gaddy testified that she was concerned about leakage from the landfill because she has well water. Ms. Gaddy also testified that she was concerned about her health because she had cancer five years ago. (Tr. 161)

14. Ms. Gaddy’s well is located upgradient from the Anson County Solid Waste Management Facility. (Tr. 226, 679.)

15. Mr. Robert F. Briley is a member of Petitioner CACTUS and lives approximately 1.5 miles from the Anson County Solid Waste Management Facility. (Tr. 167-169.) Mr. Briley participated in the preparation of a document entitled “Summary of Demographics for Proposed Brown Creek Landfill” in 1992 that contains information on residences, businesses and wells in the area within a two-mile radius of the landfill. (Tr. 173-178; PH-5.) The document was submitted to DWM during the permitting process. (Tr. 178.)

16. Mr. Briley participated in the preparation of a similar survey in June-July 2000. (Tr. 178-179; PH-6.) The survey contains information on the area within a two-mile radius of the landfill footprint. This survey was prepared after DWM issued the Permit to Construct and was not submitted to DWM.

17. Mr. Briley testified regarding the number of employees and prisoners at two existing correctional facilities and one proposed correctional facility in the vicinity of the Anson County Solid Waste Management Facility. (Tr. 188-192.)

18. Mr. James C. Coffey has a Bachelor of Science degree in Geological Engineering from North Carolina State University. Mr. Coffey is a licensed professional geologist and has been the Head of the Permitting Branch of DWM’s Solid Waste Section since 1986. As the Head of the Permitting Branch, Mr. Coffey is familiar with, and has written most of, the North Carolina Municipal Solid Waste Landfill (MSWLF) Rules. (Tr. 467, 474.)

19. The North Carolina MSWLF Rules include the Revised Federal MSWLF Criteria (as defined below in Conclusion of Law # 5). In addition, the North Carolina MSWLF Rules include requirements that are more stringent than the requirements in the Revised Federal MSWLF Criteria, including but not limited to restrictions on the disposal of small quantity generator hazardous waste, additional requirements for the protection of groundwater, a 500-foot location restriction between a disposal area and any well or dwelling, a more restrictive compliance point, and several additional operational requirements. (Tr. 477-479.)

20. Mr. Coffey testified that North Carolina's MSWLF Rules protect the environment and public health, including but not limited to the elderly, people with illnesses, low income people, and prisoners living in close proximity to a MSWLF. (Tr. 474-475.) Mr. Coffey also generally described the sections of the North Carolina MSWLF Rules that protect the environment and public health. (Tr. 479-483.)

21. At the conclusion of the permitting process, DWM determined that Chambers Development of North Carolina, Inc.'s application met all the requirements in the North Carolina Municipal Solid Waste Rules for issuance of the Permit to Construct. (Tr. 489; PH-21, Affidavit of Sherri Coghill, ¶6.)

Contested Issue # 2—Applicant's record of environmental compliance.

22. Ms. Denise Lee, in addition to being the President of CACTUS, is a staff member for BREDL. As part of her duties in this position, she is a researcher who helps answer questions for communities facing environmental issues. Ms. Lee routinely reviews applications and public records, as well as does web searches to find information on corporations. (Tr. 48).

23. Ms. Lee has been involved with the Anson landfill since 1989 or 1990 when she first heard that Chambers Development of N.C. was discussing a landfill site with the County. (Tr. 46).

24. The solid waste industry appears to have been fluid in the last decade. Chambers Development, the original owner of Chambers Development of N.C., sold that company to U.S.A. Waste, who then sold it to Allied Waste, the present owner. (Tr. 80). Allied Waste purchased Chambers Development of N.C. on June 12, 1997. (Tr. 461). Allied Waste purchased Browning-Ferris Industries, Inc. ("BFI") on August 1, 1999. (Tr. 696).

25. There are six to nine BFI facilities in North Carolina. (Tr. 381). The Division has sent official notices of violation to two of those facilities, the Charlotte Motor Speedway landfill in July 1999, and the Container Corporation of the Carolinas in January 1999. (Tr. 69-70). Many violations do not result in the issuance of official notices of violation. (Tr. 383)

26. There are 41 solid waste landfills in North Carolina. (Tr. 468). In the past five years, the Division has issued only three administrative orders for violations at landfills, with penalties ranging from \$20,000 to \$164,000. (Tr. 385).

27. Ms. Lee testified that she had discovered information on violations in the course of performing research on Chambers Development, its parent company and the subsidiaries of its parent company. (Exh. PH-12; PH-13). During her research, she obtained information on lawsuits filed against Allied Waste, the parent company of Chambers Development. (Exh. PH-11; Tr. 59). Ms. Lee testified that she had submitted information on the violations and law suits at the public hearing on the permit. BFI was the subject of a report, "Organized Crime's Involvement in the Waste Hauling Industry," authorized by the State of New York in 1984. (Exh. PH-10; Tr. 102).

28. Ms. Lee testified about various factors that should be used in reviewing violations: the date the incident occurred, whether the violation was resolved, the company involved, the nature and severity of the violation, and the risk to public health and the environment. (Tr. 107-108). Additional factors may be the number of facilities operated by the company and the violations by the people running the landfill in question. (Tr. 123).

29. Philip Prete is the head of the Field Operations Branch for the Solid Waste Section, part of the Division. He is responsible for 24 field staff who inspect landfills and other facilities regulated by the Division. (Tr. 356). Part of his staff's duties is the routine compliance evaluation of all landfills. In a year's time, he conducts 40 - 60 compliance record reviews, three or four of which are for solid waste landfills. (Tr. 364). It is the policy of the Division to review the compliance history of a permit applicant. (Tr. 362). Mr. Prete stated that this review is conducted on a "regular basis." (Tr. 366).

30. The Division relied on the record provided by Allied Waste as part of its application. (Tr. 391). This report contains 123 pages of legal incidents, with up to five incidents per page. Some of these were merely litigation, but most were violations of law that carried with them fines or even prison sentences. (PH-9)

31. The track record of Allied Waste in its facilities across the nation is significantly worse when compared to record of the landfill facilities in North Carolina. Mr. Prete stated that in the approximately 40 landfill facilities in North Carolina, only three

incidents in the past five years have risen to a violation notice containing monetary penalties as compared to the hundreds submitted by the applicant.

32. Mr. Prete did not contact any of the other states in which violations occurred to determine details about any of the violations, or to determine whether the record submitted was incomplete. (Tr. 406-7). Though he had been contacted by the New Jersey State Bureau of Investigation regarding an investigation it was doing into the applicant or its parent, he made no effort to determine the results of that investigation. (Tr. 390) By contrast, the Division receives exactly this sort of request for information from other states from time to time. (Tr. 390)

33. Mr. Prete, though he was required to review the compliance history of “any parent, subsidiary, or other affiliate of the applicant or parent”, N.C. Gen. Stat. § 130A-294(b2), had only partial ideas about the corporate structure of applicant or its affiliates. The Division apparently did not request that the applicant supply a chart of its corporate structure or anything else that would allow him to verify what companies he was supposed to be evaluating. (Tr. 389-413).

34. In his review of an applicant’s compliance history, Mr. Prete stated that his agency’s experience with that applicant in North Carolina carries a lot more weight than their activities in other states. (Tr. 395). Mr. Prete conceded upon cross-examination that the statute did not authorize any such distinction. In fact, Mr. Prete testified that he believed that violations in other states had little or no bearing on his inquiry. (Tr. 395-99)

35. In discussing his review of specific violations in Exh. PH-9, he concluded that for all of them, the “matter was resolved.” (Tr. 425). However, for many of the violations, the matter was resolved by the company paying fines and penalties ranging from \$10,000 to \$4.5 million. In one instance, a matter was resolved by the company pleading guilty to three felony charges. (Tr. 417)

36. He also noted whether violation occurred prior to acquisition by Allied Waste and dismissed most of the violations as not occurring in North Carolina. Mr. Prete also stated that he considered whether the violation, if occurring in North Carolina, would cause the Division to order it to shut down. (Tr. 402-403).

37. Mr. Prete concluded in October 14, 1999, “there is nothing apparent that warrants any negative consideration for this facility permit.” (Exh. PH-8; Tr. 432). He did not review violations in other states after that time, even though the permit was issued in May 26, 2000. (Tr. 439)

38. Ms. Lee further presented an official letter from Allied Waste to the State of Indiana, dated January 16, 2001, listing violations at Allied Waste facilities over the last five years with fines greater than \$10,000. Several significant violations contained in this document were not in Exh. PH-9 (the list of violations submitted by Chambers Development as part of its application for the Anson County landfill), even though they were within the scope of the report. (Tr. 530).

39. Jimmie Jones is the North Carolina District Manager for Allied Waste. (Tr. 688). The Anson County landfill is one of the approximately 12 Allied Waste operations in North Carolina. Mr. Jones is accountable for compliance with environmental laws at those operations and spoke in general terms about Allied Wastes’ policy of compliance. (Tr. 690). Compliance with environmental laws is also reviewed annually during an employee’s performance review. (Tr. 694).

Contested Issue #3 - Odors, Noise, Dust, Truck Traffic, Other Nuisance Factors

40. Petitioner Emma Smith testified regarding noise and the dust on her clothes and car during construction activities when trucks and equipment were using Boylin Road. (Tr. 151-53.) Ms. Smith also testified that there was a dirt road located behind her house that her neighbors used to access their houses. (Tr. 139; see also Tr. 53.)

41. Petitioner Mary Gaddy testified that she smelled an odor on one of her visits to the Richmond Sturdevant Cemetery, which is located along Boylin Road near the Anson County Solid Waste Management Facility. (Tr. 159.)

42. During the hearing, the parties agreed to a condition in the Permit to Operate that would prohibit the use of Boylin Road by Chambers Development of North Carolina, Inc. for construction equipment and large trucks carrying borrow or other construction materials for the landfill. Chambers Development of North Carolina, Inc. can use Boylin Road only for automobile, SUV and pickup truck traffic. (Tr. 557-558.)

Contested Issue #4—Floodplain.

43. In their Petition, Petitioners alleged in Contention 6(f) that “portions of the proposed landfill are situated within a 100-year floodplain and are potentially subject to periodic flooding.”

44. Mr. Briley has been involved professionally in real estate development and farming and is familiar with floodplain maps from the Federal Emergency Management Agency, known as FEMA maps. The FEMA map showing the 100-year floodplain at the Anson landfill was created in 1991 and shows the flood plan at the landfill at the 250-foot elevation. (Exh. PH-14).

45. Mr. Briley testified to floods beyond the FEMA 100 year flood line in 1945, some in the 1970s, some in the 1980s and one in the 1990s. (Tr. 201). As a boy he saw the flood of 1945. During that flood, at the bridge on Cameron Road (located 1.5 miles downstream from the Anson landfill), Brown Creek had flooded .3 miles west of Brown Creek and .3 miles east of Brown Creek. At Polkton, it had flooded at least 1200 feet further than the line on the FEMA map.

46. Mr. Briley presented newspaper articles that described the 1945 flood and an earlier flood in 1908. (Exh. PH-17 and PH-18; Tr. 205).

47. Mr. Briley described the location of the U.S. Geological Survey gauging station (#02127000) located one mile downstream from the Cameron Road Bridge. The gauging station records show major flooding events from 1908 - 1971. (Exh. PH-19). These records support Mr. Briley's testimony of several major flood events, and in particular the 1945 and 1908 floods, as well as floods in 1916 and 1928. (Tr. 209).

48. Mr. Briley testified to recent changes in the bridge at Cameron Road that included building up the berms or "dikes" on either side of Brown Creek. This would cause water that would have flooded over Cameron Road to be held back during flood times. (Tr. 211). Mr. Briley also testified to the hundred of acres of trees that had been cut in areas of the watershed since the 1960s and additional acres of trees cut during the construction of the Anson landfill. (Tr. 212). Exh. PH-15 shows photos of the new bridge, flooding and timber removal during construction.

49. Ms. Coghill, who reviewed the permit for the Division, testified that there was no difference in the floodplain delineation between the 1991 FEMA map and the permit application. (Tr. 277). Ms. Coghill testified that she did not know how a FEMA map is created or how accurate it is. She testified that it was primarily an insurance map. (Tr. 283). While she was aware that changes to the site or in the watershed may change the floodplain, she did not evaluate the changes in her review of the application. (Tr. 288).

50. Ms. Coghill relied upon information supplied by the Applicant and did not make any independent evaluation of the floodplain. (Tr. 291). This included the maps that were part of the application, information from the U.S. Geological Survey gauge station (Exh. PH-19), and a report from the N.C. Department of Transportation ("DOT") in designing a new bridge on Cameron Road Bridge (Exh. RI-8). She testified that in the DOT report, there were different numbers for the 100-year flood and that it said on its face that there was "no flood elevation established." (Tr. 330-332).

51. Ms. Coghill testified that Mr. Briley provided "reams" of information at the public hearing and during the public comment period regarding flooding that he believed was outside FEMA's idea of the floodplain. Other members of the public raised similar concerns. (Tr. 282, 287). However, despite her lack of understanding of how FEMA maps are created and whether they are accurate, Ms. Coghill disregarded the public's concerns about flooding and floodplain inaccuracies without any significant investigation, other than asking the applicant to double check its delineation. (Tr. 282-289). That delineation consisted simply of overlaying the FEMA map on the site map and involved no independent investigation. (Tr. 601, 626).

52. William Scott Almes is the president of Almes and Associates, a geoenvironmental consulting firm that prepared the application for the Anson County landfill for Chambers Development. (Tr. 592). He testified how the floodplain delineation was made in the permit application by taking the FEMA map (Exh. PH-14) and electronically overlaying it on the map submitted in the application. (Tr. 601).

53. Mr. Almes did not conduct an independent delineation of the floodplain but relied solely on the 1991 FEMA map. (Tr. 626). He was not aware that changes in site conditions would affect the floodplain. He was not aware generally of the accuracy of FEMA maps. (Tr. 625).

54. Upon Ms. Coghill's request, Mr. Almes had submitted the DOT bridge study (Exh. RI-8) to the Division as part of its review. (Tr. 604).

55. The new bridge, because of the increased height, would hold back river flow in a flood event. The higher embankments created by the new construction are impediments to water flow where none existed before. This could increase flooding upstream of the bridge. The landfill is upstream of the bridge.

56. The FEMA map does not take into consideration changes in the area surrounding the landfill that have had an effect on the floodplain since 1991, including land clearing, timber cutting and a new bridge downstream on Brown Creek.

57. Neither the FEMA map nor the arbitrary floodplain delineation of 250-foot elevation used in the application reflects the actual historical conditions at the site. In the past 100 years, the site has been flooded on several occasions in the area between Brown Creek and Pinch Gut Creek. This is borne out by the USGS gauging station data and historic observations by long term residents.

Contested Issue No. 5—Borrow area

58. In their Petition, Petitioners alleged in Contention 6(k) that “there has not been an adequate investigation of the need for and impacts of taking soil from the borrow area.”

59. Charles R. Gillian is an assistant project manager with Almes & Associates, Inc. Mr. Gillian has a Bachelor of Science degree in Civil Engineering from Virginia Tech University and has worked for Almes since 1990 primarily in the areas of solid waste design, permitting, and construction. On the Anson County Solid Waste Management Facility, Mr. Gillian’s work included determining whether there would be available soil resources on site and the required quantities of soil for landfill construction, operation, and closure. (Tr. 653-654.)

60. Page 1-3 of the Permit to Construct application provides estimates of the amount of soils that will be obtained from construction of sediment basins, entrance roads and facilities, and phases one through four of the landfill. (Tr. 656; RI-6.) Section 1.2.2.2.1 of the Permit to Construct application includes a chart with volumetric estimates of required quantities of soil for landfill construction, operation and closure. (Tr. 269, 656; RI-6.) These estimates were prepared using topographic mapping along with several computer programs, primarily AUTOCAD and SERVECAD. (Tr. 654-655; Tr. 269.)

61. Section 1.2.2.2.1 of the Permit to Construct application provides as follows:

Approximately 2,299,000 cy of on-site soil is expected to be generated from excavation for construction of the landfill, sediment basins and appurtenant facilities. This leaves approximately 2,569,700 cy of material to be derived from on-site borrow areas. Ample space exists on-site for development of borrow areas to produce this quantity of material. Expected borrow areas are indicated on the plans.

(RI-6)

62. Site soils were evaluated during the site suitability application phase and determined to be suitable for use as general/structural fill, clay soil for the base liner, protective cover, daily/intermediate cover, and clayey soil for the cap if appropriately selected and managed. (RI-6.) The geotechnical studies and boring logs in the application also contain information on the character and quality of soil types throughout the landfill property, including the proposed borrow area. (Tr. 341, 343, 352, 660.) Based on this information and except as described below, the types and volumes of soils that are required for construction, operation and closure of the landfill are available on the landfill property. (RI-6; Tr. 661.)

63. If necessary, Chambers Development of North Carolina, Inc. can augment on-site soils with bentonite to obtain the permeabilities specified for the clay soils required to be used in the base liner and the cap. (Tr. 341.)

64. Based on the testimony of Mr. Gillian and Ms. Coghill, Chambers Development of North Carolina, Inc. will not have to obtain soils for construction and operation of Phase One from outside the landfill footprint. (RI-6; T. pp. 266, 271, 657.)

65. Based on the testimony of Mr. Gillian and Ms. Coghill, Chambers Development of North Carolina, Inc. will not have to go outside the landfill property to obtain soils for construction and operation of future Phases of the landfill. This determination was based on the total acreage of property and the types of soils available within the landfill site. (RI-6; T. pp. 657-658.)

66. Although Chambers Development of North Carolina, Inc. does not anticipate the need to obtain soils from the borrow area during Phase One, Condition #13 of the Permit to Construct addresses the possibility of having to do so. The permit condition provides as follows:

Chambers Development of North Carolina, Inc. shall submit a grading plan for the proposed borrow area delineated on Drawing F-3 and obtain prior approval from the Solid Waste Section prior to obtaining borrow soils.

(PH-1; T. pp. 265-266.)

67. During the permitting process, Ms. Coghill discussed the potential hydrogeological impacts of excavating in the proposed borrow area with Mr. Bobby Lutfy and considered the potential effects that excavation in the proposed borrow area could have on drinking water wells near the borrow area. DWM placed Condition #13 in the Permit to Construct so that DWM could review the proposed excavation grades and evaluate the potential hydrogeological impacts of excavation in the proposed borrow area

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in advance of such activities. As stated in the permit condition, Chambers Development of North Carolina, Inc. cannot obtain soils from the proposed borrow area without DWM's prior approval. (Tr. 273, 318.)

68. Mr. Bobby Lutfy is the senior permitting hydrogeologist with the permitting branch of the Solid Waste Section of DWM. Mr. Lutfy was personally involved in the permitting process for the Anson County Solid Waste Management Facility. During this process, Mr. Lutfy reviewed and approved various portions of Chambers Development of North Carolina, Inc.'s Permit to Construct Application, including the Site Hydrogeologic Report, the Design Hydrogeologic Report and the Water Quality Monitoring Plan. Based on these extensive investigations of the site, Mr. Lutfy determined (i) the direction of groundwater flow at the site; (ii) that no private water supply wells are located downgradient from the landfill footprint; and (iii) that no water supply wells are located downgradient from the proposed borrow area. (Tr. 677-79; Affidavit of Bobby Lutfy dated November 28, 2000, ¶¶ 1,5.)

69. Chambers Development of North Carolina, Inc. has proposed a 20 foot cut in the borrow area to obtain the required volumes of soils needed for future Phases of the landfill. If DWM does not approve excavation to that depth in the proposed borrow area, there are other areas on the landfill property where suitable soils can be obtained for construction, operation and closure of the Anson County Solid Waste Management Facility. (Tr. 272, 667.)

70. Section 1.2.2.2.2 of the Permit to Construct application indicates that materials for drainage applications will be needed from off-site locations, provides estimates of the required quantities for these materials, and identifies specific off-site sources of these materials. (RI-6.)

71. Ms. Coghill reviewed these sections of the Permit to Construct application and the soil estimates and calculations contained in these sections during the permitting process. Ms. Coghill also testified that these estimates and calculations were similar to the estimates and calculations in other permit applications she had reviewed and that she had no reason to believe that the estimates and calculations were incorrect or inaccurate in any way. (Tr. 269-270, 314-316.)

72. Based on the information in the Permit to Construct application, DWM determined that Chambers Development of North Carolina, Inc. satisfied the applicable requirements related to borrow. (Tr. 320, 674.)

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the undersigned makes the following Conclusions of Law regarding the Contested Issues:

1. The Office of Administrative Hearings has jurisdiction to hear this case pursuant to G.S. 150A-23 and 15A NCAC 13B.0203(f).
2. All parties are properly before the Office of Administrative Hearings and the Office of Administrative Hearings has jurisdiction over the parties and the Contested Issues.
 - a. Petitioners are aggrieved persons who are directly and adversely affected by the construction and operation of the Anson County landfill and have standing to bring a petition for contested case hearing.
3. All parties have been correctly designated, and there is no question as to misjoinder or nonjoinder of parties.
4. Petitioners bear the burden of proof on the Contested Issues. Britthaven v. N.C. Dept. Of Human Resources, 118 N.C. App. 379, 382, 455 S.E.2d 455, 461, rev. den., 341 N.C. 418, 461 S.E.2d 754 (1995). To meet their burden, Petitioners must show that DWM substantially prejudiced their rights and exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in issuing the Permit to Construct to Chambers Development of North Carolina, Inc.. Id.; N.C. Gen. Stat. § 150B-23(a).

Contested Issue No. 1 – Reasonable Protection of Public Health and Safety

5. Petitioners did not meet their burden of proof to show that DWM exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, or failed to act as required by law or rule in determining that the Permit to Construct reasonably protected public health and safety, except to the extent they may have met their burden on other specific issues, such as the compliance, borrow area and floodplain issues.

6. Upon the motion of Respondent and Respondent-Intervenor at the close of Petitioners' case and after hearing argument from the Petitioners, the undersigned entered an order of involuntary dismissal on this Contested Issue pursuant to Rule 41(b) of the North

Carolina Rules of Civil Procedure to the extent that issue attempts to raise any issue beyond the compliance, borrow area and floodplain issues.

Contested Issue No. 2—Applicant’s record of environmental compliance.

7. N.C. Gen. Stat. §130A-294(b2) and N.C. Gen. Stat. §130A-294(b3) provide as follows, in pertinent part:

(b2) The Department may require an applicant for a permit under this Article to satisfy the Department that the applicant, and any parent, subsidiary, or other affiliate of the applicant or parent:

(2) has substantially complied with the requirements applicable to any solid waste management activity in which the applicant has previously engaged and has been in substantial compliance with federal and state laws, regulations, and rules for the protection of the environment.

(b3) An applicant for a permit under this Article shall satisfy the Department that the applicant has met the requirements of subsection (b2) of this section before the Department is required to otherwise review the application.

8. It should be noted that the Division rule on this subject does not appropriately reflect the statutory authority and mandate quoted above. 15A NCAC 13B.0203(e)(3) provides reasons for denial of a permit, including “the past conduct by the applicant, as defined in GS 130A-309.06(b), which has resulted in repeated violations of solid waste management statutes, these Rules, or orders issued thereunder, or violations of permit conditions of a solid waste management facility located in this State.” This rule was last amended effective February 1, 1991, and has not been amended to reflect the 1997 statutory amendments. N.C. Session Law 1997-27 added new N.C. Gen. Stat. §130A-294(b2) and (b3), including all of the language quoted in the previous paragraph. The overlapping provisions of N.C. Gen. Stat. §130A-309.06(b) remain in effect also. Therefore, the .0203 rule, with its limited inquiry into a company’s track record within the State, is out of date and fails to reflect the statutory mandate and authority granted the Department by the Legislature.

9. The Division routinely investigates the history of environmental compliance for all applicants for solid waste landfill permits. *See* Findings of Fact. The language of the statute is mixed as to whether this is mandatory. Though the “Department may require” the applicant to satisfy it as to the applicant’s past history, N.C. Gen. Stat. §130A-294(b2), the Applicant “shall satisfy the Department” that it has met the requirements of (b2). N.C. Gen. Stat. §130A-294(b3). Whether the investigation is required or not, once it begins an investigation, the Department must perform a sufficient analysis to demonstrate that the applicant has been in substantial compliance with State and Federal laws.

10. The Division’s review of the history of environmental compliance of Chambers Development and its parent company, Allied Waste, including BFI, was flawed. With regard to its review and decision on this matter, the Division acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, and failed to act as required by law or rule for at least the following reasons:

- a. The Division failed to make any effort to look behind the data submitted by the applicant or to gather any of its own data. A citizen using the internet, Ms. Lee, was able to rather easily come up with numerous violations committed by the applicant that were neither submitted by the applicant nor otherwise obtained by the Division.
- b. Incredibly, the Division failed to contact for further information any of the State or Federal authorities that had cited the applicant or that had prosecuted the applicant for criminal violations, relying solely instead on brief, self-serving summaries of the violations compiled by the applicant.
- c. The Division very nearly disregarded violations outside North Carolina, with no rational explanation for having done so, especially with regard to a large, multinational corporate applicant that does most of its business outside North Carolina. The statute does not limit the review to violations in North Carolina; rather it requires that the Division review requirements applicable to *any* solid waste management activity.
- d. The Division gave heavy consideration to whether past violations had been “resolved.” The Division gave a bizarre explanation of the meaning of “resolved” in this context, to include the successful criminal prosecution of the applicant. The Division gave no rational explanation why the payment of large fines for serious violations and being criminally prosecuted for even more serious violation of solid waste management laws would show that the applicant had “substantially complied” with the law.

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Contested Issue #3 - Odors, Noise, Dust, Truck Traffic, Other Nuisance Factors

11. Petitioners did not present any evidence that Chambers Development of North Carolina, Inc.'s application for the Permit to Construct did not comply with applicable requirements related to odors, noise, dust, increase in truck traffic, and other nuisance factors. Therefore, Petitioners did not meet their burden of proof on this Contested Issue.

12. Upon the motion of Respondent and Respondent-Intervenor at the close of Petitioners' case and after hearing argument from the Petitioners, and considering the stipulations entered into between the parties regarding potential nuisance issues, the undersigned entered an order of involuntary dismissal on this Contested Issue pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure.

Contested Issue No. 4—Floodplain.

13. 15A NCAC 13B.1622(2)(b) states that

New MSWLF units, existing MSWLF units, and lateral expansions shall not be located in 100-year floodplains unless the owners or operators demonstrate that the unit will not restrict the flow of the 100-year flood, reduce the temporary water storage capacity of the floodplain, or result in washout of solid waste so as to pose a hazard to human health and the environment.

14. A floodplain is defined in 15A NCAC 13B .1622(b)(i) as "the lowland and relatively flat areas adjoining inland and coastal waters, including flood-prone areas of offshore islands, which are inundated by the 100-year flood." The 100-year flood is defined in 15A NCAC 13B .1622(b)(ii) as "a flood that has a one percent or less chance of recurring in any year or a flood of a magnitude equaled or exceeded once in 100 years on the average over a significantly long period."

15. There is no legal authority for the Division to rely solely upon FEMA delineation to determine the location of the 100 year flood plain. While this might be a reasonable first-cut delineation for the Division, there is no justification for relying absolutely upon it in the face of evidence that it is inaccurate in a specific location, without investigation to determine the true extent of the floodplain.

16. The Division relied on an out-of-date FEMA insurance map to make the determination that the landfill is not situated within a 100-year floodplain. The Division did not perform an independent investigation to determine whether the FEMA map was accurate nor did it require the applicant to conduct additional analysis to determine the floodplain.

Contested Issue No. 5—Borrow area

17. An application for a Permit to Construct a MSWLF must include an analysis of soil resources that provides accurate volumetric estimates of available soil resources from on-site or specific off-site sources and required quantities of soil for landfill construction, operation and closure. The rules recognizes that the applicant may need to make "assumptions" in performing this analysis. 15A NCAC 13B.1619(e)(2). DWM must also review and approve excavation grades for on-site borrow areas.

18. Given Condition Number 13 in the Permit to Construct and the estimates and assumptions in the Permit to Construct application, DWM determined that Chambers Development of North Carolina, Inc. met the applicable requirements related to borrow soils. Petitioners did not present any evidence contradicting the estimates and assumptions regarding soil resources in the Permit to Construct application.

19. Accordingly, Petitioners did not meet their burden of proof to show that DWM exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, or failed to act as required by law or rule in determining that the application for the Permit to Construct complied with applicable requirements related to borrow soils.

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

RECOMMENDED DECISION

IT IS HEREBY RECOMMENDED that the Secretary of the Department of Environment and Natural Resources or his designee find:

1. That in issuing Sanitary Landfill Permit Number 04-03 to Chambers Development for a multi-state solid waste landfill in Anson County, North Carolina, the State agency acted erroneously, failed to follow proper procedure, acted arbitrarily or capriciously, and failed to act as required by law or rule; and
2. That the Sanitary Landfill Permit No. 04-03 is void.

ORDER

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with G.S. 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.

The agency is required by G.S. 150B-36(b) to serve a copy of the final decision on all parties.

This is the 4th day of June, 2001.

James L. Conner, II
Administrative Law Judge