NORTH CAROLINA

REGISTER

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Office of Administrative Hearings
Rules Division
424 North Blount Street (27601)
6714 Mail Service Center
Raleigh, NC 27699-6714
(919) 733-2678
FAX (919) 733-3462

IN THIS ISSUE

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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

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2	Agriculture	Architecture	2
3	Auditor	Athletic Trainer Examiners	3
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Note: Title 21 contains the chapters of the various occupational licensing boards.

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Publication Schedule for January 2002 – December 2002

Filing Deadlines			Notice of Rule-Making Proceedings	Notice of Text							Temporary Rule
					non-substantial economic impact			substantial economic impact			
volume & issue number	issue date	last day for filing	earliest register issue for publication of text	earliest date for public hearing	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	270th day from issue date
16:13	01/02/02	12/06/01	03/15/02	01/17/02	02/01/02	02/20/02	05/28/02	03/04/02	03/20/02	05/28/02	09/29/02
16:14	01/15/02	12/19/01	04/01/02	01/30/02	02/14/02	02/20/02	05/28/02	03/18/02	03/20/02	05/28/02	10/12/02
16:15	02/01/02	01/10/02	04/15/02	02/16/02	03/04/02	03/20/02	05/28/02	04/02/02	04/22/02	01/29/03	10/29/02
16:16	02/15/02	01/25/02	05/01/02	03/02/02	03/18/02	03/20/02	05/28/02	04/16/02	04/22/02	01/29/03	11/12/02
16:17	03/01/02	02/08/02	05/01/02	03/16/02	04/01/02	04/22/02	01/29/03	04/30/02	05/20/02	01/29/03	11/26/02
16:18	03/15/02	02/22/02	05/15/02	03/30/02	04/15/02	04/22/02	01/29/03	05/14/02	05/20/02	01/29/03	12/10/02
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17:12	12/16/02	11/21/02	02/17/03	12/31/02	01/15/03	01/21/03	05/00/04	02/14/03	02/20/03	05/00/04	09/12/03

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.

STATE OF NORTH CAROLINA

COUNTY OF WAKE

BEFORE THE
TAX REVIEW BOARD

IN THE MATTER OF:

The Proposed Assessment of Unauthorized Substance Tax dated February 2, 2001 by the Secretary of Revenue of North Carolina

vs.

Timmie Joe Tucker
Taxpayer

ADMINISTRATIVE DECISION
Number: 380

This matter was heard before the Tax Review Board (hereinafter "Board") in the City of Raleigh, North Carolina on Thursday, February 14, 2002, upon Timmie Joe Tucker's (hereinafter "Taxpayer") petition for administrative review of the Final Decision of the Assistant Secretary of Revenue entered on September 13, 2001, sustaining the assessment of unauthorized substance tax for the period of February 2, 2001.

Chairman Richard H. Moore, State Treasurer, presided over the hearing with Jo Anne Sanford, Chair, Utilities Commission and duly appointed member, Noel L. Allen, Attorney at Law participating.

The Taxpayer did not appear at the hearing. David J. Adinolfi, II, Associate Attorney General, represented the Secretary of Revenue at the hearing.

Pursuant to G.S. 105-113.111(a) and G.S. 105-241.1, a Notice of Unauthorized Substance Tax Assessment was issued to the Taxpayer on February 2, 2001. The notice related to a proposed assessment of tax, penalty and interest in the amount of $1,748.53 based upon the possession of 23.8 grams of cocaine. At the request of Taxpayer's counsel, the administrative hearing was conducted via written communication in lieu of meeting in person. The written record upon which the Assistant Secretary based his decision was closed on July 12, 2001. On September 13, 2001, the Assistant Secretary entered his decision that sustained the proposed assessment. Thereafter, the Taxpayer, through counsel, timely filed a notice and petition for administrative review of the Assistant Secretary's final decision with the Tax Review Board.

ISSUES

The issues considered by the Board upon administrative review of this matter are stated as follows:

1. Did the Taxpayer have actual and/or constructive possession of cocaine without the proper stamps affixed?
2. Is the Taxpayer subject to the assessment of unauthorized substance tax?

EVIDENCE

The evidence submitted to the Assistant Secretary and included in the record for the Board's review is stated as follows:

1. US-1 Form BD-10, Notice of Unauthorized Substance Tax Assessment, dated February 2, 2001.
2. US-2 Letter from the Taxpayer's attorney, dated February 26, 2001, requesting a hearing.
3. US-3 Letter to the Taxpayer's attorney, dated March 29, 2001, advising him that his client's Administrative Tax Hearing was scheduled for June 29, 2001.
4. US-4 Form BD-4, Report of Arrest and/or Seizure Involving Nontaxpaid (Unstamped) Controlled Substances, which names the Taxpayer as the possessor of the controlled substances.
5. US-5 Investigation report by the Guilford County Sheriff's Office, including the SBI lab report.

6. US-6 Memorandum from E. Norris Tolson, Secretary of Revenue, dated May 16, 2001, delegating to Eugene J. Cella, Assistant Secretary of Administrative Hearings, the authority to hold any hearing required or allowed under Chapter 105 of the North Carolina General Statutes.

The Taxpayer, through counsel, submitted a letter and three documents to present the Taxpayer's objection to the unauthorized substance tax assessment.

FINDINGS OF FACT

The Board reviewed the following findings of fact in the Assistant Secretary's decision in this matter:

1. Assessment of Unauthorized Substance Tax was made against the Taxpayer on February 2, 2001, in the sum of $1,200.00 tax, $480.00 penalty and $68.53 interest, for a total proposed liability of $1,748.53, based on possession of 23.8 grams of cocaine.
2. The Taxpayer made a timely objection and application for a hearing.
3. On May 19, 2000, the Taxpayer possessed 23.8 grams of cocaine.
4. No tax stamps were purchased for or affixed to the cocaine as required by law.

CONCLUSIONS OF LAW

The Board reviewed the following conclusions of law made by the Assistant Secretary in his decision regarding this matter:

1. An assessment of tax is presumed to be correct.
2. The burden is upon the Taxpayer who objects to an assessment to overcome that presumption and that burden was not met.
3. Liability for the Unauthorized Substance Excise Tax is created by possession, not ownership, of a controlled substance.
4. The Taxpayer possessed 23.8 grams of cocaine on May 19, 2000 and was therefore a dealer as that term is defined in G.S. 105-113.106(3).
5. The Taxpayer is liable for $1,200.00 tax, $480.00 penalty and interest until date of full payment.

DECISION

The scope of administrative review for petitions filed with the Tax Review Board is governed by G.S. 105-241.2(b2). After the Board conducts a hearing this statute provides in pertinent part:

> (b2). "The Board shall confirm, modify, reverse, reduce or increase the assessment or decision of the Secretary."

Pursuant to G.S. 105-241.1(a), a proposed tax assessment is presumed to be correct and the burden is on to the Taxpayer to rebut that presumption. Since the Taxpayer failed to provide any evidence to overcome the presumption, the assessment is correct.

The Board having conducted a hearing in this matter and having considered the petition, the brief, the final decision and the documents of record, concludes that the Assistant Secretary properly sustained the proposed assessment against the Taxpayer in this matter.

WHEREFORE, THE BOARD ORDERS that the Assistant Secretary's final decision be confirmed in every respect.

Made and entered into the ___17__ day of _____April_____ 2002.

TAX REVIEW BOARD

Signature_____
Richard H. Moore, Chairman
State Treasurer

Signature_____
Jo Anne Sanford, Member
Chair, Utilities Commission

Signature_____
Noel L. Allen, Appointed Member

STATE OF NORTH CAROLINA **BEFORE THE**
TAX REVIEW BOARD

COUNTY OF WAKE

IN THE MATTER OF:
The Proposed Corporate)
Franchise and Income Tax)
Assessments for the Fiscal)
Years of January 31, 1992)
through January 31, 1994)
by the Secretary of Revenue)
of North Carolina)
) **ADMINISTRATIVE DECISION**
vs.) **Number:** 381
)
A&F Trademark, Inc.,)
Caciqueco, Inc.,)
Expressco, Inc.,)
Lanco, Inc.,)
Lernco, Inc.,)
Limco Investments, Inc.,)
Limtoo, Inc.,)
Structureco, Inc.)
V. Secret Stores, Inc.)

This matter was heard before the Tax Review Board (hereinafter "Board") in the City of Raleigh, Wake County, North Carolina, in the office of the State Treasurer on Thursday, February 14, 2002, upon the Petition of A&F Trademark, Inc., Caciqueco, Inc., Expressco, Inc., Lanco, Inc., Lernco, Inc., Limco Investments, Inc., Limtoo, Inc., Structureco, Inc., and V. Secret Stores, Inc. ("hereinafter Taxpayers") for administrative review of the Final Decision of Michael A. Hannah, Assistant Secretary of the North Carolina Department of Revenue, entered on September 19, 2000, sustaining the Department's proposed assessment of corporate franchise and income taxes for fiscal year ended January 31, 1994.

Chairman Richard H. Moore, State Treasurer, presided over the hearing with Jo Anne Sanford, Chair, Utilities Commission and duly appointed member, Noel L. Allen, Attorney at Law participating.

Paul H. Frankel, Hollis L. Hyans, and Craig B. Fields of Morrison & Foerster, LLP, and Jasper L. Cummings, Jr., of Alston & Bird, LLP represented the Taxpayers at the hearing. Kay Miller Hobart, Assistant Attorney General, represented the Secretary of Revenue at the hearing.

STATEMENT OF FACTS

The Taxpayers are nine wholly-owned subsidiaries of the Limited Stores, Inc. (the "Limited") an Ohio corporation. The Limited also owns 100% of eight retail companies. Those companies are: Lane Bryant, Inc.; Lerner, Inc.; Victoria's Secret, Inc., Cacique, Inc.; Abercrombie & Fitch, Inc.; Limited Too, Inc.; Express, Inc.; and Structure, Inc.

The Limited and the wholly-owned eight retail subsidiaries are doing business in North Carolina and pay corporate income and franchise taxes here. During the year at issue, the Limited and the eight retail subsidiaries operated over 130 retail locations in North Carolina.

Taxpayers were incorporated in Delaware to hold the trademarks owned by the Limited and the related retail companies. The marks owned by the Taxpayers include "The Limited," "Limited Too," "Victoria's Secrets," "Express," "Structure," "Cacique," "Abercrombie and Fitch," "Lane Bryant," and "Lerner." The marks are a form of intangible personal property. The Taxpayers do not own or lease any real property or tangible personal property in any state except Delaware. The Taxpayers have no employees in any state. The Taxpayers received the marks they own in separate I.R.C. Section 351 tax-free exchanges with the related retail companies. In these exchanges, the related retail companies transferred the marks to the Taxpayers for little or no consideration. The Taxpayers then entered into a licensing agreement with the corresponding related retail companies. The licensing agreements authorized the related retail companies to continue to use the marks they had previously owned in exchange for royalty payments to the Taxpayers. These agreements required the retail stores to pay Taxpayers a royalty fee based on the percentage of the retail companies' gross sales. The Limited and the related retail companies deducted these royalty payments from their income for North Carolina tax purposes.

Taxpayers then loaned these royalty payments back to the related companies for use in their retail operations. Taxpayers charged the retail companies a market rate of interest, which generated further deductions for the related retail companies.

Taxpayers did not pay any income tax to any state on any of the income received from the related retail companies. For the year at issue (1994), Taxpayers recorded $301,067,619 in royalty income and $122,031,344 in interest income from the related retail companies. This accounted for 100% of Taxpayers' income.

STATEMENT OF CASE

The Department of Revenue issued proposed notices of tax assessments, which the Taxpayers protested. On June 9, 10, and June 11, 1998, a three-day administrative hearing was held before Michael A. Hannah, the Assistant Secretary of Revenue. On September 19, 2000, the Assistant Secretary issued the Final Decision. In the Final Decision, the Assistant Secretary cancelled the assessments for the Taxpayers' fiscal years ended January 31, 1992 and January 31, 1993, which were fiscal years that began prior to the November 2, 1992 effective date of the Administrative Rule. The Assistant Secretary also waived all penalties asserted by the Department of Revenue against the Taxpayers. However, the Assistant Secretary sustained the Department of Revenue's assessment of corporate franchise and income tax against the Taxpayers for the fiscal year ended January 31, 1994. In this Final Decision, the Assistant Secretary concluded that the Taxpayers were doing business in North Carolina. He also concluded that the contractual relationship between the Taxpayers and their Licensees created an agency relationship and that all of the activities that the Licensees were required to perform under the license agreements were attributable to Taxpayers. Additionally, the Assistant Secretary concluded that Taxpayers were "excluded corporations" under G.S. 105-130.4(a)(4), and are therefore required to use a single sales factor as their apportionment formula under G.S. 105-130.4(r) & (l). The Assistant Secretary also determined that the Taxpayers could be required to be included in combined reports with their related Licensees. On December 15, 2000, Taxpayers filed with the Board a Petition for Administrative Review of the Final Decision pursuant to G.S. 105-241.2.

ISSUES

The issues considered by the Board upon administrative review of this matter are stated as follows:

1. Whether the Taxpayers were "doing business" in this State within the meaning of G.S. 105-130.3 and G.S. 105-114 so as to be subject to the corporate income and franchise tax.
2. Whether the Taxpayers were "excluded corporations" within the meaning of G.S. 105-130.4(a)(4).

EVIDENCE

The evidence presented at the hearing before the Assistant Secretary of Revenue and included in the record for the Board's review is attached as Exhibit A and is incorporated by reference herein.

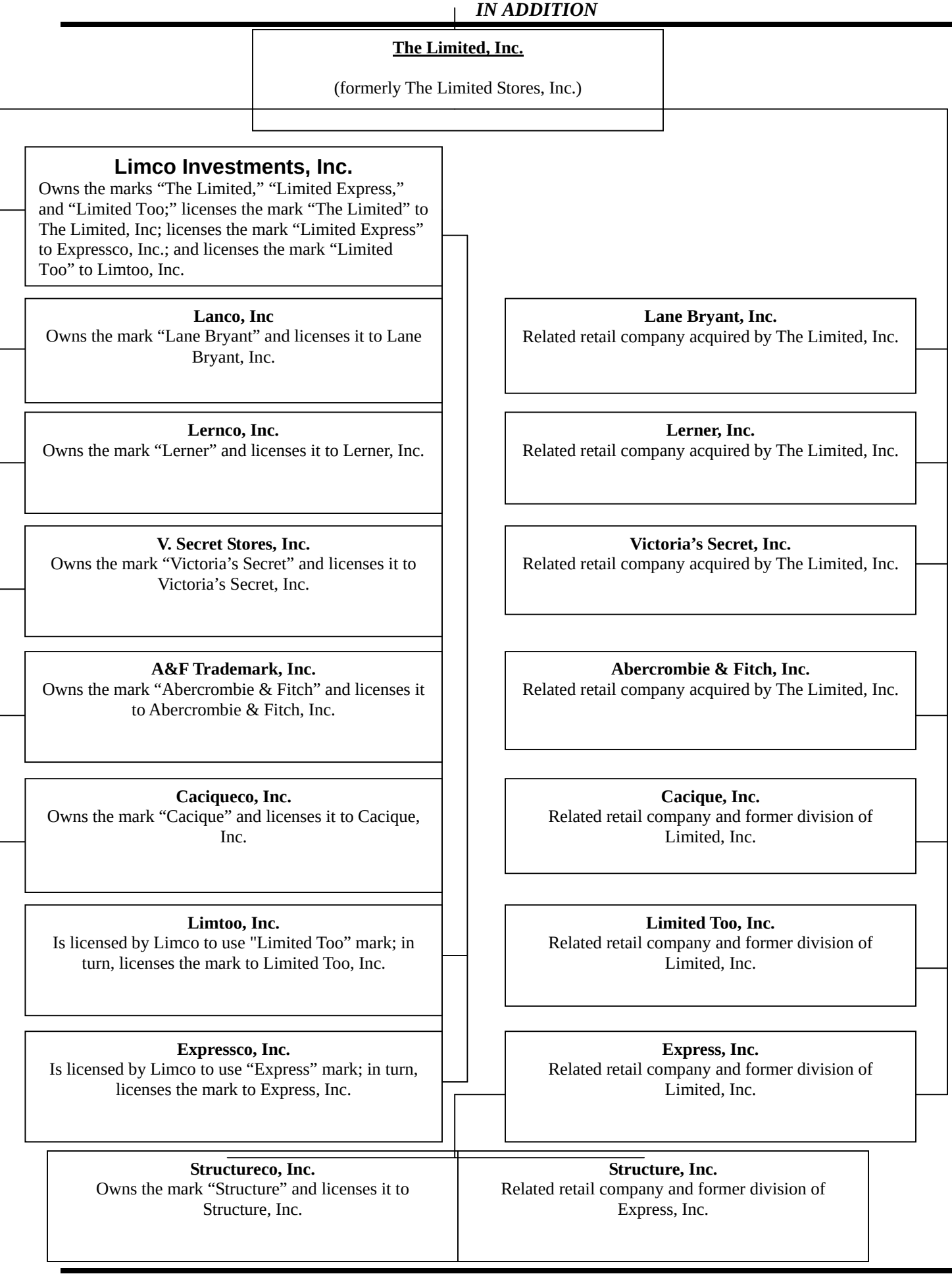
FINDINGS OF FACT

The Board reviewed the following findings of facts made by the Assistant Secretary in his final decision:

1. The Taxpayers are nine non-domiciliary corporations headquartered in Delaware.
2. The Taxpayers are wholly-owned subsidiaries of the Limited, Inc. ("Limited").
3. The Limited is primarily engaged in the nationwide retail sale of men's, women's, and children's clothing and accessories.
4. The Limited's principal place of business and commercial domicile is located in Columbus, Ohio.
5. The Limited started in business in 1963 and has expanded to over 5,000 stores nationwide and 12 separate retail operating subsidiaries.
6. The Limited and its retail operating subsidiaries ("related retail companies") own and operate all of their stores; none are franchised.
7. The Taxpayers own and license trademarks, tradenames, and service marks ("marks") and the goodwill associated with these marks to the Limited and its related retail companies, nine of which are located in North Carolina.
8. The nine related retail companies operating in North Carolina are: (1) The Limited Stores, Inc.; (2) Cacique, Inc.; (3) Express, Inc.; (4) Lane Bryant, Inc.; (5) Lerner, Inc.; (6) Limited Too, Inc.; (7) Structure, Inc.; (8) Victoria's Secret, Inc.; and (9) Abercrombie & Fitch.
9. The nine related retail companies operating in North Carolina have over 130 retail locations in North Carolina; these companies extensively use the Taxpayers' marks at these locations.
10. The marks owned by the Taxpayers were all previously owned by either the Limited or one of the Limited's related retail companies.
11. The Taxpayers license their marks to the nine related retail companies operating in North Carolina as follows:

Taxpayer	**Related Retail Company**
Limco Investments, Inc.	The Limited, Inc.
Caciqueco, Inc.	Cacique, Inc.
Expressco, Inc.	Express, Inc.
Lanco, Inc.	Lane Bryant, Inc.
Lernco, Inc.	Lerner, Inc.
Limtoo, Inc.	Limited Too, Inc.
Structureco, Inc.	Structure, Inc.
V. Secret Stores, Inc.	Victoria's Secret, Inc.
A&F Trademark, Inc.	Abercrombie & Finch, Inc.

12. The structure of the Limited, the Taxpayers, and the related retail companies is illustrated on the following chart:


The Limited, Inc.
(formerly The Limited Stores, Inc.)
Limco Investments, Inc.
Owns the marks "The Limited," "Limited Express," and "Limited Too;" licenses the mark "The Limited" to The Limited, Inc; licenses the mark "Limited Express" to Expressco, Inc.; and licenses the mark "Limited Too" to Limtoo, Inc.
Lanco, Inc
Owns the mark "Lane Bryant" and licenses it to Lane Bryant, Inc.
Lane Bryant, Inc.
Related retail company acquired by The Limited, Inc.
Lernco, Inc.
Owns the mark "Lerner" and licenses it to Lerner, Inc.
Lerner, Inc.
Related retail company acquired by The Limited, Inc.
V. Secret Stores, Inc.
Owns the mark "Victoria's Secret" and licenses it to Victoria's Secret, Inc.
Victoria's Secret, Inc.
Related retail company acquired by The Limited, Inc.
A&F Trademark, Inc.
Owns the mark "Abercrombie & Fitch" and licenses it to Abercrombie & Fitch, Inc.
Abercrombie & Fitch, Inc.
Related retail company acquired by The Limited, Inc.
Caciqueco, Inc.
Owns the mark "Cacique" and licenses it to Cacique, Inc.
Cacique, Inc.
Related retail company and former division of Limited, Inc.
Limtoo, Inc.
Is licensed by Limco to use "Limited Too" mark; in turn, licenses the mark to Limited Too, Inc.
Limited Too, Inc.
Related retail company and former division of Limited, Inc.
Expressco, Inc.
Is licensed by Limco to use "Express" mark; in turn, licenses the mark to Express, Inc.
Express, Inc.
Related retail company and former division of Limited, Inc.
Structureco, Inc.
Owns the mark "Structure" and licenses it to Structure, Inc.
Structure, Inc.
Related retail company and former division of Express, Inc.

13. The Taxpayers purposefully utilize at least 130 retail locations in North Carolina to prominently display their marks, advertise apparel bearing their marks, and avail themselves of the North Carolina marketplace.
14. The Taxpayers' marks are permanently affixed to the 130 retail locations throughout North Carolina.
15. The related retail companies filed North Carolina franchise and income tax returns for the tax years January 1992 through January 1994 pursuant to G.S. 105-130 *et seq.*
16. The related retail companies reduced their North Carolina tax liability by deducting accrued royalty and interest expenses "paid" by journal entries to Taxpayers, thus producing substantial tax savings.
17. The Taxpayers accrued royalty and interest income on their books for tax years 1992 through 1994.
18. The Taxpayers did not file North Carolina franchise or income tax returns for tax years 1992 through 1994.
19. The Taxpayers did not pay any corporate income tax in Delaware or in any other state on their substantial royalty income and interest income deducted by the related retail companies.

Creation of Taxpayers

20. In its early years of operation, the Limited developed and cultivated intangible intellectual property including trademarks, tradenames, service marks, and associated goodwill.
21. Mr. Frank Colucci, Taxpayers' trademark counsel, testified that a trademark as defined under trademark law is "any name, word, symbol or device which one manufacturer or provider of services uses to distinguish his goods or services from like goods or services of another." (T. 6/9/98, p. 232).
22. The Limited incurred substantial expenses in the development of its marks. The expenses were deducted from the Limited's gross income in the determination of its federal taxable income.
23. The Limited's North Carolina taxable income was also reduced by the expenses associated with the development of its marks because the Limited's North Carolina net income was based on its federal taxable income.
24. The value and significance of the trademark "The Limited" increased as the number of the Limited's stores increased.
25. All of the Limited's marks were registered, monitored, policed, and defended against infringement by the Limited's own in-house legal counsel prior to the formation of Taxpayers.
26. Officers of the Limited, including Mr. Kenneth Gilman, the Executive Vice-President and Chief Financial Officer of the Limited, concluded that the creation of a separate trademark holding company was the best way to protect the trademark from being "knocked off." (T. 6/9/98, p. 45).
27. The Limited's Board of Directors authorized the establishment of a separate trademark company to hold the trademark "The Limited."
28. On December 19, 1980, Articles of Incorporation were filed with the Delaware Secretary of State incorporating Limco Investments, Inc. ("Limco").
29. Limco held its first Board of Directors' meeting on January 29, 1981.
30. At this meeting, the Board authorized a tax-free exchange of assets for stock between the Limited and Limco in accordance with I.R.C. § 351, which is a common method of capitalizing subsidiaries.
31. Also on January 29, 1981, Limco issued 100 shares of its common stock, par value $1.00 per share, to the Limited for $100. In addition, the Limited made a $10,000 capital contribution to Limco.
32. The Limited became the sole shareholder of Limco.
33. By written Assignment dated January 28, 1981 The Limited assigned its marks and associated goodwill to Limco.
34. The Limited received little or no consideration for the transfer of its marks and goodwill to Limco.
35. The Limited did not have its trademark valued by a third party for a determination of the trademark's actual worth before assigning the trademark to Limco.
36. Both Limco and the Limited filed registration statements with the United States Patent and Trademark Office reporting the change in ownership of the trademark "The Limited" together with the goodwill established by the trademark from the Limited to Limco.
37. Limco did not register the trademark "The Limited" with the North Carolina Secretary of State's Office.
38. On January 29, 1981, the same day that the Limited assigned its marks and related goodwill to Limco, Limco and the Limited entered into a licensing agreement whereby Limco granted the Limited the right to use its marks in the Limited's retail operations.
39. Limco received, under the terms of the licensing agreement, royalties in the amount of 5% of the Limited's retail sales.
40. On January 29, 1981, the same day that the Limited assigned its marks and related goodwill to Limco, Limco and the Limited entered into a loan agreement whereby Limco agreed to loan the Limited money on a secured or unsecured basis, in an amount not to exceed $2,000,000. The loan agreement required the Limited to repay Limco any outstanding loan balance in 90 days and required the Limited to accrue and pay interest at the current prime rate.
41. The Limited acquired several retail establishments specializing in varying areas of apparel and began to operate these companies as wholly-owned subsidiaries. The acquired retail companies were: (1) Lane Bryant, Inc. ("Lane Bryant"), specializing in apparel for large size women; (2) Victoria's Secret, Inc. ("Victoria's Secret"), specializing in ladies' lingerie; (3) Lerner, Inc. ("Lerner"), specializing in women's apparel at a budget price; and (4) Abercrombie & Fitch, Inc. ("Abercrombie & Fitch"), specializing in upscale, casual clothing.
42. The marks owned by each of the acquired retail companies had name recognition and associated goodwill prior to acquisition of the retail companies by the Limited.

43. The Limited created separate trademark companies in a manner consistent with the tax-free creation of Limco.
44. The trademark holding company, Lanco, Inc. ("Lanco"), was incorporated in Delaware on December 15, 1982.
45. The retail company, Lane Bryant, assigned its trademark "Lane Bryant," together with the goodwill of the business symbolized by the trademark, to Lanco by a written Assignment recorded with United States Patent and Trademark Office.
46. Lane Bryant received little or no consideration from Lanco for its trademarks.
47. Lane Bryant did not have its trademark valued by a third party for a determination of the trademark's actual worth before assigning the trademark to Lanco.
48. The trademark holding company, Lernco, Inc. ("Lernco"), was incorporated in Delaware on May 2, 1985.
49. The retail company, Lerner, assigned its trademark "Lerner," together with the goodwill of the business symbolized by the trademark, to Lernco by written Assignment recorded with the United States Patent and Trademark Office.
50. Lerner did not have its trademark valued by a third party for a determination of the trademark's actual worth before assigning the trademark to Lernco.
51. Lerner received little or no consideration from Lernco for its trademarks.
52. The trademark holding company, A&F Trademark, Inc. ("A&F Trademark"), was incorporated in Delaware on February 2, 1988.
53. The retail company, Abercrombie & Fitch, assigned its trademark "Abercrombie & Fitch," together with the goodwill of the business symbolized by the trademark, to A&F Trademark by written Assignment recorded with the United States Patent and Trademark Office.
54. Abercrombie & Fitch received little or no consideration from A&F Trademark for its trademarks.
55. Abercrombie & Fitch did not have its trademark valued by a third party for a determination of the trademark's actual worth before assigning the trademark to A&F Trademark.
56. The trademark holding company, V. Secret Stores, Inc. ("V. Secret"), was incorporated in Delaware on December 1, 1988.
57. The retail company, Victoria's Secret, assigned its trademark "Victoria's Secret," together with the goodwill of the business symbolized by the trademark, to V. Secret by written Assignment recorded with the United States Patent and Trademark Office.
58. Victoria's Secret received little or no consideration from V. Secret for its trademarks.
59. Victoria's Secret did not have its trademark valued by a third party for a determination of the trademark's actual worth before assigning the trademark to V. Secret.
60. In addition to acquiring retail companies, the Limited developed its own retail companies by incorporating various business segments or divisions operated by the Limited. The retail divisions incorporated as wholly-owned subsidiaries of the Limited were: (1) Express, Inc. ("Express"), specializing in younger women's apparel; (2) Cacique, Inc. ("Cacique"), specializing in an older, more sophisticated type of lingerie; and (3) Limited Too, Inc. ("Limited Too"), specializing in clothing for young girls.
61. The trademark holding company, Expressco, Inc. ("Expressco"), was incorporated in Delaware on September 9, 1987.
62. On September 10, 1987, Expressco issued 100 shares of its common stock, par value $1.00 per share, to the trademark holding company, Limco, in exchange for $100. In addition, Limco made a $20,000 capital contribution to Expressco.
63. Also on September 10, 1987, Limco granted Expressco a non-exclusive license to use the tradename "Limited Express" or "Express" and the right to sub-license these tradenames to other companies.
64. Limco did not charge Expressco any royalty fee for the use of its mark "Express."
65. Limco did not have its trademark valued by a third party for a determination of the trademark's actual worth before licensing the trademark to Expressco.
66. The trademark holding company, Limtoo, Inc. ("Limtoo"), was incorporated in Delaware on August 1, 1991.
67. On December 31, 1991, Limtoo issued 100 shares of its common stock, par value $1.00 per share, to the trademark holding company, Limco, in exchange for $100. In addition, Limco made a $10,000 capital contribution to Limtoo.
68. Limco became the sole shareholder of Limtoo.
69. On September 9, 1991, Limco granted to Limtoo a non-exclusive license to use the trademark "Limited Too".
70. Limtoo licensed the tradename "Limited Too" from Limco, the Limited's wholly-owned subsidiary that owned the trademark.
71. Limco did not charge Limtoo any royalty fee for the use of its mark "Limited Too".
72. Limco did not have its trademark valued by a third party for a determination of the trademark's actual worth before licensing the trademark to Limtoo.
73. The trademark holding company, Structureco, Inc. ("Structureco"), was incorporated in Delaware on August 1, 1991.
74. On December 11, 1991, Structureco issued 100 shares of its common stock, par value $1.00 per share, to Express for $100. In addition, Express made a $20,000 capital contribution to Structureco.
75. Express is the sole shareholder of both Structure and Structureco.
76. On December 11, 1991, Express assigned the trademark "Structure" together with its associated goodwill to Structureco.
77. Also on December 11, 1991, Structureco licensed the tradename "Structure" to Express under the terms of a Related Company Agreement.
78. Structureco did not charge Express any royalty fee for the use of its mark "Structure".
79. Structureco did not have its trademark valued by a third party for a determination of the trademark's actual worth before licensing the trademark to Express or Structure.
80. The trademark holding company Caciqueco, Inc. ("Caciqueco") was incorporated in Delaware on August 1, 1991.

81. On September 9, 1991, Caciqueco issued 100 shares of its common stock, par value $1.00 per share, to the Limited for $100. In addition, the Limited made a $10,000 capital contribution to Caciqueco.
82. Also on September 9, 1991, the Limited assigned to Caciqueco the trademark "Cacique" together with its associated goodwill.
83. On January 1, 1991, Caciqueco licensed the trade name "Cacique" to Cacique under the terms of a Related Company Agreement.
84. The Limited did not have its trademark valued by a third party for a determination of the trademark's actual worth before assigning the trademark to Caciqueco.
85. All corporate formalities required by Delaware laws were observed in the creation of each Taxpayer.
86. Taxpayer and its corresponding related retail companies properly filed registration statements with the United States Patent and Trademark Office indicating the transfer to the Assignee of the right, title, and interest in the trademarks together with the goodwill of the business connected with the use of the marks.
87. The Taxpayers did not register their trademarks or tradenames with the North Carolina Secretary of State, relying instead on the registrations with the United States Patent and Trademark Office.
88. Upon the creation or acquisition of each Taxpayer and the tax-free assignment or grant of a license to use or sublicense the marks, each Taxpayer would license or sublicense the use of the marks back to the respective related retail company pursuant to a related company licensing agreement.
89. Each related company licensing agreement followed the format established by the original Limco licensing agreement.
90. Each related company licensing agreement entered into between a Taxpayer and the related retail company gave the related retail company a non-exclusive license to use the Taxpayer's trademarks, tradenames, service marks, and associated goodwill in its retail operations throughout the United States.
91. Each related company licensing agreement required the related retail company to pay the Taxpayer a set royalty fee based upon the related retail company's retail sales.
92. The related retail companies used Taxpayers' trademarks, tradenames, and service marks and their associated goodwill in North Carolina to promote and enhance their business in North Carolina.
93. Mr. Kenneth Gilman, President of all the Taxpayers, testified that Taxpayers' trademarks were sewn in the label of the clothes sold at the retail locations in North Carolina. (T. 6/9/98, p. 75).
94. The Taxpayers' marks were used by the related retail companies located in North Carolina in their store layout, their merchandising, and their advertising.
95. The Taxpayers' ownership of the marks did not affect the use of the marks in North Carolina in the eyes of the public consumer who continued to purchase apparel from the retail locations and who were unaware that the marks had been assigned to Taxpayers.
96. Mr. Kenneth Gilman testified that there were no changes in the relationship of the customer and the related retail companies as a result of the assignment of the marks to Taxpayers. (T. 6/9/98, pp. 149-150).
97. Mr. Kenneth Gilman testified that as long as a related retail company operated in accordance with the licensing agreements, the day-to-day operations of the related retail company did not change with the creation of Taxpayers and the assignment of the marks. (T. 6/9/98, pp. 148-149).
98. Neither the Taxpayers nor any of the related retail companies made any public announcements notifying the public of either the formation of Taxpayers or the assignment of the marks to Taxpayers.
99. The shareholders of the Limited were not notified that the marks and the goodwill associated with the marks had been assigned to Taxpayers.
100. Employees of the related retail companies were not notified that the marks and goodwill associated with the marks had been assigned to Taxpayers.
101. After the assignment of the marks, Taxpayers depended upon the same consumer recognition and customer loyalty for the production of their income that had existed prior to the transfer of the marks.
102. At no time during the audit period did the Limited's annual reports or its Form 10-Ks disclose the formation of Taxpayers or the transfer to Taxpayers of marks valued at approximately $1.2 billion dollars.
103. The Limited's January 30, 1993, Form 10-K included a footnote "A," which reads: "[T]he names of certain subsidiaries are omitted since such unnamed subsidiaries considered in the aggregate as a single subsidiary would not constitute a significant subsidiary as of January 30, 1993."
104. The Taxpayers were not listed as subsidiaries of the Limited on the January 30, 1993 Form 10-K.
105. Mr. Kenneth Gilman testified that the intercompany transactions occurring during the audit period between Taxpayers (producing over $1 billion in income) and the related retail companies (producing over $203 million in losses) were not significant enough to be disclosed in the footnotes of the Limited's annual report financial statements. (T. 6/9/98, pp. 117-123).

Organization of Taxpayers

106. Each of the Taxpayers elected a Board of Directors, the composition of which changed from time to time during the audit period
107. The Board of Directors was generally the same for each Taxpayer.
108. The Taxpayers' Board of Directors consisted of Mr. Kenneth Gilman, President, Mr. Louis Black, an attorney, Mr. Roger Thompson, a banking executive, and Mr. Edward Jones, an accountant from Delaware Corporate Management.

109. Mr. Kenneth Gillman testified that he did not believe that he had attended a board meeting of the Taxpayers in over 10 years. (T. 6/9/98, p. 160).
110. Mr. Kenneth Gillman testified that he delegated his responsibilities as board member of the Taxpayers to Mr. Tim Lyons, Vice-President of Taxes for the Limited. (T. 6/9/98, pp. 56-57).
111. The Taxpayers compensated Board members not associated with the Limited for board meetings attended but did not compensate the Board members directly employed by the Limited.
112. Mr. Kenneth Gilman testified that neither he nor Mr. Tim Lyons as executives of the Limited were permitted to receive compensation for services performed for any subsidiary of the Limited. (T. 6/9/98, p. 125).
113. Mr. Louis Black testified that each of Taxpayers' boards on which he served compensated him fifty dollars ($50) for each board meeting attended. (T. 6/9/98, pp. 208-209).
114. The Taxpayers' expenses associated with the compensation of board members averaged $600 per year per Taxpayer.
115. The Taxpayers' Board of Directors met quarterly and they discussed such things as royalty rates, interest rates, and the authorized lending limits between the Taxpayers and the related retail companies.
116. The Taxpayers' board members authorized increased lending limits for the related retail companies as needed when the balance of the related retail companies' outstanding notes receivable reached authorized lending limits.
117. The Taxpayers' Board of Directors meetings were held at Mr. Louis Black's office, not at the Taxpayers' leased office space.
118. The Taxpayers' corporate records, such as minutes, charters, and by-laws, were kept in Mr. Louis Black's office, not at the Taxpayers' leased office space.
119. The Taxpayers held annual stockholders' meetings as required by Delaware law and adopted appropriate resolutions, including the election of officers and directors.
120. The Taxpayers' officers or board members did not prepare yearly business plans for the operations of Taxpayers.
121. The Taxpayers did not own or lease any real property or any tangible personal property in any state except Delaware.
122. The Taxpayers subleased shared office space from Delaware Corporate Management in a building located in Delaware.
123. The Taxpayers shared office equipment and office supplies.
124. The Taxpayers' primary office address was 1105 Market Street, Delaware; approximately 670 companies not related to the Limited or its wholly-owned subsidiaries list this same address as their primary office address.
125. Mr. Louis Black testified that an employee of Delaware Corporate Management doing work for or on behalf of Taxpayers used Taxpayers' subleased office space, "if they [were] used by anyone at all." (T. 6/9/98; p. 227).
126. The Taxpayers' rental expense associated with the subleased office space in Delaware approximated $240 per year for each Taxpayer.
127. The subleased office space was not permanently assigned to Taxpayers, but instead was rotated much like a time share-arrangement.
128. The Taxpayers hired no employees in any state.
129. The Taxpayers outsourced all of their accounting, legal, banking and administrative services.
130. The law of firm of Morris, Nichols, Arsht & Tunnel, of which Mr. Louis Black was a partner, was hired as legal counsel for Taxpayers.
131. Delaware Corporate Management, of which Mr. Ed Jones was an employee, was hired as Taxpayers' accounting firm.
132. As board member and principal executive in charge of Taxpayers' accounting services, Mr. Ed Jones was limited to signing checks not to exceed $500.
133. The Taxpayers contracted with Mr. Frank Colucci of the firm Colucci & Umans as their trademark counsel.
134. The Taxpayers maintained checking accounts in their own names.
135. The Taxpayers used their checking accounts to pay operating expenses such as legal and accounting bills.
136. The Taxpayers did not incur substantial ordinary and necessary business expenses such as postage, telephone, or utilities for their business operations in Delaware.
137. The Taxpayers contracted with Delaware Corporate Management, a "nexus service provider" to perform services on their behalf in Delaware.
138. Services performed by Delaware Corporate Management for the Taxpayers included: (1) providing officers and directors located in the State of Delaware; (2) providing office space; (3) mail forwarding; (4) filing annual Delaware Franchise Tax Returns; (5) maintaining the operating checkbook; and (6) scheduling use of a shared conference room.

Operations of the Taxpayers

139. The Taxpayers' Board of Directors agreed to license their marks to the related retail companies pursuant to licensing agreements.
140. The Taxpayers' trademark counsel, Mr. Frank Colucci, assisted in drafting licensing agreements between the Taxpayers, as licensor, and the related retail companies, as licensees.
141. Mr. Frank Colucci testified that all of the Taxpayers' licensing agreements were basically the same in terms of the legal requirements imposed on both the licensee and licensor. (T. 6/9/98, p. 243).
142. Each licensing agreement granted the related retail company a non-exclusive license to use all of the Taxpayer's marks in its retail operations.
143. The terms of each licensing agreement required the related retail company to pay a royalty fee of between 5% and 6% of its retail operating gross sales to Taxpayers in return for continued use of the marks.

144. Each licensing agreement allowed the related retail company to continue using the Taxpayer's name in conducting its business in the same manner as before the creation of the Taxpayer.
145. Initially, the royalty rates charged by the Taxpayers to the related retail companies were estimated by Taxpayers' trademark counsel based upon his knowledge of licensing agreements between unrelated third parties and what he believed to be a reasonable royalty based on a fair, arms-length transaction.
146. Dr. Irving Plotkin, the Taxpayers' expert witness, testified that: "When you deal with a transaction between a related party, the transaction itself is not arm's length. It cannot be - it could not have come about by an arm's length negotiation." (T. 6/11/98, pp. 68-69).
147. Dr. Plotkin testified that: "The [intercompany] agreement should have never been described as an arm's length agreement, because [it] couldn't have been." (T. 6/11/98, p. 70).
148. The Taxpayers eventually solicited trademark valuation studies from third parties, which they used to establish the royalty rate, charged.
149. The Taxpayers were required on occasion to amend the royalty rates charged to the related retail companies to correspond with the royalty rates determined by the third party valuation studies.
150. The values of the marks as determined by the trademark valuation reports were dependent upon the "on-going" retail operations of the related retail companies.
151. The royalty rate charged to the related retail companies as determined by the trademark valuation reports was between 5% and 6%.
152. The Taxpayers were completely dependent upon the operations of the related retail companies, including the ones located in North Carolina, for the production of their income because the royalty rates charged by the Taxpayers were based on a percentage of the related retail companies' operating sales.
153. A royalty fee was not charged for the use of the marks when a license or sublicense agreement was entered into between two Taxpayers.
154. Neither the Limited nor any of its subsidiaries licensed or sublicensed marks to foreign subsidiaries.
155. The Taxpayers' Profit and Loss Statements for the years at issue did not include any foreign source royalty income.
156. Royalty income received from foreign subsidiaries is considered gross income and fully taxable for federal corporate income tax purposes pursuant to I.R.C. § 951.
157. The only time the Taxpayers, as licensors, charged a royalty fee for the use of their marks to an affiliated company, as a licensee, was when a state tax benefit could be obtained by the licensee.
158. Each licensing agreement entered into between a related retail company, as licensee, and a Taxpayer, as licensor, required the related retail company to make quarterly royalty payments for the use of the trademarks.
159. The related retail companies did not pay the royalty fees to Taxpayers or tender any cash remittances to Taxpayers in settlement of the royalties charged.
160. Each related retail company accrued a royalty expense deduction based on a percentage of sales.
161. Mr. Kenneth Gilman testified that the royalty payments due under the licensing agreements were made by accounting journal entry. No checks were written nor were there any physical transfers of funds between the parties. The related retail companies therefore "paid" their royalty fees to Taxpayers via accounting journal entries. (T. 6/9/98, p. 93).
162. The North Carolina taxable income of each of the related retail companies was significantly reduced by the deduction of accrued royalty expenses.
163. The Taxpayers accrued but never received payment for royalties from the respective related retail companies.
164. The accrued royalty receivables for each of the Taxpayers increased on a yearly basis corresponding closely to the amount of accrued royalty payables recorded on the books of the related retail companies.
165. The related retail companies' accrued royalty receivables were never collected.
166. The Taxpayers paid no state income tax to Delaware or any state on the accrued royalty receivables.
167. The Taxpayers' expenses were miniscule in relation to their accrued income. For example, Limco's total expenses for the three years at issue were $729,175, which is 0.2% of its total accrued income of $311,952,574 during the same period. Of Limco's total expenses, legal expenses alone equaled $687,754 or 94.32% of total expenses.
168. Limco's remaining expenses of $41,421 for the three years at issue were immaterial and are summarized as follows: (1) Delaware franchise fees - $150; (2) accounting services - $31,052; (3) telephone expenses - $1,102; (4) rental expenses - $ 720; (5) Director's fees - $2,300; (6) custodial expenses to Delaware Trust Management - $3,520; (6) depreciation expenses - $1,862; (7) other miscellaneous expenses - $714.
169. The Taxpayers neither declared nor paid a dividend to the Limited or to any of the related retail companies during the audit period.
170. The Taxpayers entered into loan agreements whereby Taxpayers loaned their excess operating funds to the related retail companies in the form of notes receivable.
171. Mr. Kenneth Gilman testified that the primary source of lending to the related retail companies was the earnings of Taxpayers. (T. 6/9/98, pp. 105-106).
172. Mr. Louis Black testified that Taxpayers earned their money by charging the related retail companies royalties for the use of Taxpayers' marks and by receiving interest through loaning the related retail companies money. (T. 6/9/98, p. 179).
173. The Taxpayers' Board of Directors, including Mr. Louis Black, authorized loans to the related retail companies in amounts comparable to the cumulative amount of royalties the related retail companies accrued during the tax year.

174. Despite authorizing loans to the related retail companies in excess of $100 billion, Taxpayers' Board Member, Mr. Louis Black, testified that he had not reviewed the Limited's 10-K or its annual reports. (T. 6/9/98, p. 201).
175. The notes, which were generally 180-day promissory notes, contained standard provisions such as loan amount, interest rate, due date, and names of the parties.
176. All notes bore a market rate of interest.
177. The Taxpayers earned interest income on the notes to the related retail companies.
178. The related retail companies did not pay any outstanding principal or interest on the notes to the Taxpayers during the audit period.
179. The related retail companies accrued an interest expense deduction on their outstanding notes receivable.
180. The interest charges were settled by accounting journal entries.
181. As notes matured, the Taxpayers made the required journal entries and issued new notes to the related retail companies.
182. The Taxpayers' Board of Directors increased the authorized lending limits of the related retail companies once the related retail companies' outstanding notes receivable balances reached authorized limits.
183. The notes receivable contained no mechanism by which the Taxpayers could collect the loan debt from the related retail companies.
184. The Taxpayers made no attempt at collecting the outstanding notes receivable during the audit period.
185. The Taxpayers instructed their custodian, Wilmington Trust, to make no attempt to collect the outstanding notes.
186. The Taxpayers' Yearly Statements of Account reflecting the asset value of Taxpayers' outstanding notes were marked "Notes - Do Not Collect."
187. The Taxpayers did not loan money to or borrow money from any unrelated third party.
188. The North Carolina taxable income of the related retail companies was reduced by the deduction of the accrued royalty and interest expenses that were never paid.
189. The Taxpayers paid no state income tax to Delaware or any state on the royalty or interest income.
190. The Taxpayers earned 100% of their ordinary gross income from two sources: (1) the royalties charged to the related retail companies for the use of Taxpayers' marks and (2) interest earned from outstanding loans issued to the related retail companies.
191. The Taxpayers recorded royalty income totaling $957,442,830 and interest income totaling $236,728,978 from the related retail companies for the tax years at issue, broken down as follows:

YEAR	ROYALTY INCOME	INTEREST INCOME
1/92	$298,494,228	$ 58,610,029
1/93	349,880,983	56,087,605
1/94	301,067,619	122,031,344
Total	**$949,442,830**	**$236,728,978**

192. Pursuant to I.R.C. § 1501, the Taxpayers filed a consolidated federal income tax return with their parent, the Limited, for tax years ended January 1992, January 1993, and January 1994.
193. The intercompany royalty and interest transactions that occurred between Taxpayers and the related retail companies had no tax effect on the federal taxable income of the Limited because of required intercompany eliminations.
194. The intercompany royalty and interest transactions that occurred between Taxpayers and the related retail companies significantly decreased the North Carolina taxable income of the related retail companies.

The Licensing Agreements

195. The Taxpayers had incurred none of the costs and had performed none of the activities that, in any manner, had created, enhanced, or protected the value of the marks prior to the assignment of the marks to Taxpayers.
196. "Naked assignment" is a term used in trademark law that describes the assignment of a trademark without its associated goodwill.
197. Mr. Frank Colucci, Taxpayers' trademark counsel, testified that it is illegal in the United States to assign trademarks without assigning the goodwill associated with the trademarks. (T. 6/9/98, p. 279).
198. Mr. Frank Colucci testified that goodwill is an accumulation of everything that the public perceives about a trademark - good, bad, or indifferent (T. 6/9/98, p. 280).
199. Mr. Frank Colucci testified that the goodwill the Taxpayers' assigned to the related retail companies had been created by the related retail companies. (T. 6/9/98, p. 280).
200. Mr. Frank Colucci testified that, after the assignment of the marks to the Taxpayers, the only way to maintain the goodwill associated with the marks was to use the marks. Mr. Frank Colucci stated that, "You use the trademark and, through the use of the trademark, you either maintain the goodwill or you don't maintain the goodwill." (T. 6/9/98, p. 280).
201. Mr. Frank Colucci testified that the trademarks were used by the related retail companies wherever they had stores and businesses. (T. 6/9/98, p. 280).
202. If Taxpayers did not take appropriate measures to monitor the related retail companies' use of their marks, Taxpayers risked abandonment of their marks, thereby enabling third parties to use the marks in whatever manner they desired.
203. The trademark law concept of "naked licensing" requires the owner of a trademark that permits another company to use its trademark to ensure that the public is not deceived with respect to the nature and quality of the goods sold under the mark.

204. Mr. Frank Colucci testified that a licensing agreement is the contractual basis by which the licensor of a trademark or tradename controls the nature and quality of the goods and services sold by a licensee using the trademark or tradename. (T. 6/9/98, p. 241).
205. Mr. Frank Colucci testified that a court could invalidate a mark and refuse to enforce a mark if the owner of the mark does nothing to protect the public trust with respect to the nature and quality of the goods sold under the mark. (T. 6/9/98, p. 237).
206. Mr. Frank Colucci testified that "the whole idea of having a related company [licensing agreement is] that there be controls over an *agent* quality of the goods . . . so that the public being accustomed with a mark being used on one line of goods or services, now that it was given to another company, would not be confused or deceived." (emphasis added) (T. 6/9/98, pp. 236-237).
207. The Taxpayers relied upon the related retail companies to ensure that the public was not deceived with respect to the nature and quality of goods sold under Taxpayers' marks.
208. The Taxpayers, owners of the marks, controlled the use of the marks in North Carolina and the nature and quality of goods sold under the marks by the related retail companies in North Carolina.
209. The related retail companies performed activities in North Carolina on behalf of the Taxpayers, including the following: (1) the preparation of quarterly inspection reports regarding the activities of the retail location; (2) establishment of store layout and design; (3) selecting the merchandise that would bear Taxpayers' marks; (4) regularly advertising apparel and merchandise in this State bearing Taxpayers' marks; (5) inspecting merchandise bearing Taxpayers' marks; (6) reporting trademark violations; and (7) establishing and maintaining Taxpayers' economic market in North Carolina.
210. The activities performed in North Carolina on behalf of the Taxpayers were significantly associated with Taxpayers' ability to establish and maintain a market in North Carolina.
211. Mr. Kenneth Gilman testified that: "[I]t's important to protect the trademark because it's the identity of the company. It's one of the ways that you differentiate what you are as a company and what you represent; what you're selling; what you're trying to accomplish in a commercial marketplace from other people." (T. 6/9/98, p. 71).
212. The Taxpayers' commercial marketplace was in part located in North Carolina.
213. The Taxpayers' marks were displayed on the North Carolina retail locations of the related retail companies.
214. The related retail companies' activities, including marketing products bearing Taxpayer's trademarks and tradenames, maintaining the quality of the apparel sold under Taxpayers' marks, and otherwise providing retail customers with a quality shopping experience, inures to and enhances the value of Taxpayers' trademarks and tradenames in North Carolina.
215. Mr. Frank Colucci testified that he monitored "how the trademarks [were] used by the retailers" in his capacity as trademark counsel for both Taxpayers and the related retail companies. (T. 6/9/98, pp. 254-255).
216. Mr. Frank Colucci testified that representatives of the retailers as well as representatives of Taxpayers sent Mr. Frank Colucci or Mr. Frank Colucci's staff into the retail stores to monitor the use of Taxpayers' trademarks by the related retail companies. (T. 6/9/98, p. 260).
217. The Taxpayers, as owners of the marks, had the power to determine which retail companies used their marks and where they could be used.
218. The Taxpayers, as owners of the marks, had the power to control to whom the marks were licensed, what license fees were charged, and when the licensing agreements expired.
219. The Taxpayers, as owners of marks, had the right to dictate the manner in which the trademarks and tradenames were displayed at the retail locations throughout North Carolina.
220. The Taxpayers knowingly and purposefully granted the retail companies a license to use their marks in connection with retail operations worldwide, including in North Carolina.
221. The licensing agreements provided that all products sold by the related retail companies bearing Taxpayers' trademarks and tradenames had to be consistent with the high standards of quality and excellence established over the years by the related retail companies with respect to their trademarks and tradenames.
222. Sections 2.1 through 2.3 of the licensing agreements provided that Taxpayers' trademarks or tradenames had to be used by the related retail companies in accordance with the following terms and conditions: (1) the retailer would use its best efforts, skill, and diligence in the operation of its Stores, and would regulate its employees so that they will be courteous and helpful to the public; (2) the retailer would use its best efforts, skill, and diligence to ensure that the quality of all apparel sold under or in connection with the trademark or tradenames would not be less than the standard of quality previously established by the retail companies; and (3) the retailer would operate its stores in accordance with reasonable business standards and would provide a standard of service not less than the standard of quality previously established by the retail companies.
223. Section 3.1 of the licensing agreements provided that each retail store operated by a related retail company had to inspect the store at least once each year and had to notify Taxpayers of the inspections in a written statement verifying that the inspections took place.
224. The Taxpayers did not physically inspect any stores in North Carolina and rarely, if ever, visited any store outside of Delaware.
225. Store employees at the North Carolina retail locations of the related retail companies acted as quality assurance inspectors and performed all inspections of apparel bearing Taxpayers' marks to ensure the quality of the goods sold under Taxpayers' marks in North Carolina.
226. The North Carolina retail operating store employees, in their capacity as quality assurance inspectors, prepared inspection reports based on the operations of the related retail companies in this State.

227. Mr. Kenneth Gilman testified that the employees of the related retail companies performed inspections of the stores located in North Carolina in order to adhere to quality standards mandated by the licensing agreements and to demonstrate compliance with the licensors' requirements. (T. 6/9/98, pp. 86-88).
228. Section 3.1.2 of the licensing agreements provided that the related retail companies were responsible for, at their own cost and expense, correcting any deficiencies found in the quality of the products sold bearing Taxpayers' trademarks.
229. Section 4 of the licensing agreements provided that the related retail companies had to make available to Taxpayers samples of all advertising or other literature, packages, and labels bearing Taxpayers' tradename or trademarks.
230. Mr. Frank Colucci testified that he monitored all advertising associated with Taxpayers' trademarks and tradenames in his capacity as trademark counsel for both the related retail companies and Taxpayers. (T. 6/9/98, pp. 254-255).
231. In reviewing the advertising samples submitted by the related retail companies, Mr. Frank Colucci looked to ensure that Taxpayers' marks were used in a consistent manner and to ensure that the use did not infringe on other marks.
232. Section 11.1 of the licensing agreements required the related retail company to defend Taxpayers' marks against infringement by third parties at its own cost and expense.
233. Section 11.2 of the licensing agreements provided that if the related retail company was made party to a legal proceeding based upon a claim that one of Taxpayers' marks infringed upon a third party's mark, the related retail company had to, at its own cost and expense, defend its use of the licensed mark.
234. Prior to the formation of Taxpayers, the marks associated with the related retail companies were registered, monitored, and defended against infringement by the related retail companies themselves.
235. The Taxpayers continually updated the trademark filings and registrations with the United States Patent and Trademark Office in order to ensure that Taxpayers' rights in the marks were preserved.
236. Mr. Frank Colucci testified that his office filed with the United States Patent and Trademark Office every six years an affidavit "saying that [the] trademarks [were] still in use. Otherwise, [the trademarks would] be automatically cancelled." (T. 6/9/98, pp. 262-263).
237. Mr. Kenneth Gilman, President of the Limited, testified that the related retail companies located in North Carolina used Taxpayers' marks on a daily basis. (T. 6/9/98, pp. 74-75).

The Assessments

238. The Limited was contacted in March, 1995 by Mr. Al Milak, Revenue Field Auditor in the Interstate Audit Division, regarding the activities of the Limited and its affiliates in this State.
239. An on-site audit for corporate franchise and income tax was conducted in August 1995.
240. The auditors determined that Taxpayers, subsidiaries of the Limited, were doing business in this State and subject to corporate income and franchise taxation in this State pursuant to G.S. 105-114, 105-122, 105-130.1, and 105-130.3.
241. The Taxpayers were not filing corporate franchise and income tax returns.
242. The auditor requested on October 23, 1995 that Taxpayers file and pay North Carolina franchise and income tax, apportioning their income liability to this State as an excluded corporation pursuant to G.S. 105-130.4(a)(4) and 105-130.4(r).
243. The Taxpayers did not voluntarily file North Carolina franchise and income tax returns and refused to provide the auditors with sufficient information necessary to compute Taxpayers' North Carolina corporate liability.
244. Jeopardy assessments of corporate income and franchise taxes were issued for tax years January 1992, January 1993, and January 1994 under the authority of G.S. 105-241.1(g) on March 26, 1996 and on April 2, 1996.
245. The Taxpayers were assessed income and franchise taxes calculated on royalty and interest income derived from sources within North Carolina.
246. For each Taxpayer during the audit period, the franchise assessments of tax, penalties, and interest are as follows:

Franchise Tax Assessments		
A&F Trademark, Inc.	$	3,963
Caciqueco, Inc.	$	1,025
Expressco, Inc.	$	37,264
Lanco, Inc	$	37,296
Lernco, Inc.	$	31,949
Limco Investments, Inc.	$	124,966
Limtoo, Inc.	$	44,142
Structureco, Inc.	$	1,071
V. Secret Stores, Inc.	$	27,176
Total	**$**	**308,852**

247. For each Taxpayer during the audit period, the corporate income tax assessments of tax, penalties, and interest are as follows:

Income Tax Assessments		
A&F Trademark, Inc.	$	116,401
Caciqueco, Inc.	$	58,452
Expressco, Inc.	$	953,765
Lanco, Inc	$	580,231

Lernco, Inc.	$	766,775
Limco Investments, Inc.	$	1,331,052
Limtoo, Inc.	$	128,766
Structureco, Inc.	$	82,479
V. Secret Stores, Inc.	$	666,909
Total	**$**	**4,684,830**

248. The jeopardy income tax assessments were based on the best information available to the auditor. That information was Taxpayers' separate entity, "pro-forma" federal taxable income, Federal Line 28, as reflected on the Limited's consolidated 1120 tax return.

249. The proposed assessments were based on the State's assertion that Taxpayers were doing business in North Carolina by virtue of their activities of licensing intangibles for use in North Carolina and using in-state representatives in furtherance of their business activities.

250. On April 22, 1996, Taxpayers timely protested the proposed corporate income and franchise tax assessments and reserved the right to a hearing before the Secretary of Revenue.

251. An application for hearing was timely filed on August 18, 1997.

252. An Administrative Tax Hearing before the Secretary of Revenue was conducted by the hearings' officer on Monday, June 9 through Wednesday, June 11, 1998 in the Revenue Building on 501 North Wilmington Street.

253. On June 11, 1998, the hearings' officer granted Taxpayers' motion to waive all penalties associated with all three-tax years at issue.

CONCLUSIONS OF LAW

The Board reviewed the following conclusions of law made by the Assistant Secretary in his final decision:

1. The Taxpayers are subject to corporate income taxation in this State pursuant to G.S. 105-130 *et seq*.
2. The Taxpayers are subject to franchise taxation in this State pursuant to G.S. 105-114 *et seq*.
3. G.S. 105-130.3 imposes a tax upon the State net income of every C corporation doing business in this State.
4. The Taxpayers are C corporations.
5. G.S. 105-122 imposes a franchise tax upon every corporation domesticated under the laws of this State or doing business in this State.
6. The Taxpayers are not domesticated under the laws of this State.
7. For franchise tax purposes, "doing business" is defined as "[e]ach and every act, power or privilege exercised or enjoyed in this State, as an incident to, or by virtue of the powers and privileges granted by the laws of this State."
8. North Carolina Administrative Rule 17 NCAC 05C .0102 was promulgated by the Secretary of Revenue under authority of G.S. 105-262 and 105-264 to interpret G.S. 105-130.3.
9. Administrative Rule 17 NCAC 05C .0102 is *prima facie* correct.
10. Administrative Rule 17 NCAC 05C .0102 defines "doing business," in pertinent part, as "the operation of any business enterprise or activity in North Carolina for economic gain, including, but not limited to . . . the owning, renting, or operating of business or income-producing property in North Carolina including, but not limited to . . . [t]rademarks [and] tradenames."
11. The Taxpayers own intangible property in the form of trademarks, tradenames, and service marks and the goodwill associated with these marks.
12. There is no such thing as property in a trademark except as a right appurtenant to an established business or trade in connection with which the mark is employed.
13. A trademark has no independent significance apart from the goodwill it symbolizes; if there is no established business and no goodwill, a trademark symbolizes nothing.
14. A trademark cannot exist apart from the going business in which it is used.
15. Trademark rights are wholly dependent upon actual use.
16. The actual use of a symbol as a trademark in the sale of goods creates and builds up rights in a mark.
17. Lack of actual use can result in loss of legal rights in the mark, known as "abandonment."
18. The Taxpayers licensed their intangible property, in the form of trademarks, tradenames, service marks and associated goodwill, to the related retail companies for use in this State.
19. If a trademark owner licenses the mark, the owner must control the nature and quality of the goods sold under the mark and must at all costs avoid deceiving the public.
20. The concept of quality control has been incorporated into the Lanham Act by the "related company" doctrine.
21. Under the Lanham Act, a "related company" is "any person whose use of the mark is controlled by the owner of the mark with respect to the nature and quality of the goods or services on or in connection with which the mark is used."
22. If the owner controls the use of the mark by the licensee, the owner obtains the benefits of Section 5 of the Lanham Act, and the licensee's use of the mark is attributed to and inures to the benefit of licensor, the owner of the mark.
23. If the owner of a trademark does not exercise sufficient actual control over the use of the mark by the licensee, the owner loses its rights in the mark through abandonment.

24. The trademark owner must exercise *actual* control over the licensee's use of the mark. Mere paper control, such as a quality control provision in a licensing agreement, without actual control is insufficient. The mere legal right to control is insufficient, as is the voluntary exchange of information.
25. Under the related company doctrine, if the Taxpayers exercised sufficient actual control over the operations of the related retail companies in North Carolina with regard to their use of the marks and the nature and quality of the goods sold under the marks, the use by the related retail companies in North Carolina is attributed to and inures to the benefit of the Taxpayers.
26. Absent sufficient actual control by the Taxpayers over the related retail companies' use of the marks in North Carolina and the nature and quality of the goods sold under the marks in this State, the use of the marks by the related retail companies is not attributed to the Taxpayers.
27. If use by the related retail companies of Taxpayers' marks is not attributed to Taxpayers, the marks would be abandoned.
28. The licensing agreements between Taxpayers and the related retail companies created a contractual agency relationship between Taxpayers and the related retail companies.
29. The Taxpayers exercised actual control over the licensees' use of the marks at the 130 North Carolina retail locations and over the nature and quality of the goods sold under the marks by the licensees at these locations.
30. The related retail companies are "related retail companies" under the related company doctrine of trademark law.
31. The related retail companies regularly and systematically used the Taxpayers' marks at the 130 retail locations in North Carolina.
32. The intangibles owned by the Taxpayers and used at the 130 retail locations in this State have acquired a business situs in North Carolina.
33. The Taxpayers own income-producing property in North Carolina.
34. The regular and systematic use of the Taxpayers' marks by the related retail companies at the 130 retail locations in North Carolina is attributed to and inures to the benefit of Taxpayers, thereby protecting and preserving the value and existence of the marks and associated goodwill, Taxpayers' only assets.
35. The use of Taxpayers' marks by the related retail companies in North Carolina is essential to the continued existence of the marks.
36. The quality control and trademark protection activities performed by employees of the related retail companies in North Carolina to protect Taxpayers' marks are attributed to and inure to the benefit of Taxpayers.
37. The activities performed by employees of the related retail companies in North Carolina to assist in maintaining the goodwill associated with Taxpayers' marks are attributed to and inure to the benefit of Taxpayers.
38. The related retail companies, in performing the activities of quality control and protection and preservation of Taxpayers' marks and associated goodwill, act as Taxpayers' agents or representatives in North Carolina.
39. The activities of the related retail companies, acting as Taxpayers' agents or representatives, enable Taxpayers to maintain and enhance a market in this State for merchandise bearing Taxpayers' marks.
40. The Taxpayers' primary source of income, the royalty fees, is dependent upon business activity conducted by employees of the related retail companies in North Carolina, which activity Taxpayers control.
41. Taxpayers purposefully availed themselves of the benefits of an economic market in North Carolina.
42. The Taxpayers regularly and systematically exploited the North Carolina marketplace for economic gain.
43. The Taxpayers' business activities were purposefully directed towards residents of North Carolina.
44. The Taxpayers operate income-producing business property in North Carolina.
45. The Taxpayers are operating a business activity or enterprise in this State for economic gain.
46. The Taxpayers are "doing business" in this State for corporate income tax purposes.
47. The Taxpayers are "doing business" in this State for corporate franchise tax purposes.
48. The Taxpayers received more than 50% of their income from investments in or dealing in intangible property.
49. The Taxpayers are "excluded corporations" under G.S. 105-130.4(a)(4).
50. The Taxpayers must apportion their business income using the sales factor as determined under G.S. 105-130.4(a)(l).
51. The proposed assessments of corporate income and franchise tax were proper under G.S. 105-241.1.

DECISION

Taxpayers have petitioned this Board for administrative review of the final decision issued by the Assistant Secretary on September 19, 2000 sustaining the assessment of corporate franchise and income tax for Taxpayers' fiscal year ended January 31, 1994. The scope of administrative review for petitions filed with the Tax Review Board is governed by G.S. 105-241.2(b2). After the Board conducts an administrative hearing, this statute provides in pertinent part: "the Board shall confirm, modify, reverse, reduce or increase the assessment or decision of the Secretary."

When reviewing the Assistant Secretary's Final Decision, the Board must determine, based upon the record, whether the Assistant Secretary properly concluded: (1) that the Taxpayers were "doing business" in this State within the meaning of G.S. 105-130.3 and G.S. 105-114 so as to be subject to the corporate income and franchise tax; and (2) that the Taxpayers were "excluded corporations" within the meaning of G.S. 105-130.4(a)(4).

The Taxpayers' principle arguments for reverse of the Assistant Secretary's Final Decision were: (1) until the recent enactment of legislation, the statute did not authorize taxation of the Taxpayers, (2) physical presence in a state is a constitutional prerequisite for taxation; and (3) since the Taxpayers are not physically present in North Carolina they cannot be taxed by North

Carolina. Taxpayers' subsidiary arguments include: (1) no agency relationships exist between the Taxpayers and the related retail entities to which they have licensed their tangible property; and (2) Taxpayers are not "excluded corporations" under G.S. 105-130.4(a).

Upon review of the record, the facts show that Taxpayers are nine wholly-owned subsidiaries of the Limited Stores, Inc. (the "Limited") an Ohio corporation. The Limited also owns 100% of eight retail companies. Those companies are: Lane Bryant, Inc.; Lerner, Inc.; Victoria's Secret, Inc., Cacique, Inc.; Abercrombie & Fitch, Inc.; Limited Too, Inc.; Express, Inc.; and Structure, Inc. The Limited and the wholly-owned eight retail subsidiaries are doing business in North Carolina and pay corporate income and franchise taxes here. During the year at issue, the Limited and the eight retail subsidiaries operated over 130 retail locations in North Carolina.

Taxpayers were incorporated in Delaware to hold the trademarks owned by the Limited and the related retail companies. The marks owned by the Taxpayers include "The Limited," "Limited Too," "Victoria's Secrets," "Express," "Structure," "Cacique," "Abercrombie and Fitch," "Lane Bryant," and "Lerner." The marks are a form of intangible personal property. The Taxpayers do not own or lease any real property or tangible personal property in any state except Delaware. The Taxpayers have no employees in any state. The Taxpayers received the marks they own in separate I.R.C. Section 351 tax-free exchanges with the related retail companies. In these exchanges, the related retail companies transferred the marks to the Taxpayers for little or no consideration. The Taxpayers then entered into a licensing agreement with the corresponding related retail companies. The licensing agreements authorized the related retail companies to continue to use the marks they had previously owned in exchange for royalty payments to the Taxpayers. These agreements required the retail stores to pay Taxpayers a royalty fee based on the percentage of the retail companies' gross sales. The Limited and the related retail companies deducted these royalty payments from their income for North Carolina tax purposes. Taxpayers then loaned these royalty payments back to the related companies for use in their retail operations. Taxpayers charged the retail companies a market rate of interest, which generated further deductions for the related retail companies. Taxpayers did not pay any income tax to any state on any of the income received from the related retail companies. For the year at issue (1994), Taxpayers recorded $301,067,619 in royalty income and $122,031,344 in interest income from the related retail companies. This accounted for 100% of Taxpayers' income. The net effect of both of these separate transactions upon each related retail company was to significantly reduce the company's taxable income in the states in which it did business by both the royalty payment and the interest expense charged by the Taxpayers.

This Board notes that G.S. 105-122 imposes a franchise tax on every corporation incorporated, domesticated or doing business in this State. For franchise tax purposes, "doing business" is defined as [e]ach and every act, power, or privileges granted by the laws of this State." (See G.S. 105-114(b)(3).) G.S. 105-130.3 imposes a tax upon the State net income of every C corporation doing business in the State. Although the term "doing business" is not defined by statute for corporate income tax purposes, the Secretary has promulgated an administrative rule defining this term. G.S. 105-262 and G.S. 105-264 authorize the Secretary to adopt administrative rules interpreting all laws he administers. Administrative Rule 17 NCAC 5C .0102 provides, in pertinent part, that "the term 'doing business' means the operation of any business enterprise or activity in North Carolina for economic gain, including, but not limited to ….. the owning, renting or operating of business or income-producing property in North Carolina including but not limited to ….. [t]rademarks [and] tradenames." Thus, Administrative Rule 17 NCAC 5C .0102 is deemed *prima facie* correct.

Upon administrative review of the Final Decision, the Board determines that the Assistant Secretary properly concluded the Taxpayers were "doing business" in this State and were therefore subject to this State's corporate income tax and corporate franchise tax. Applying the applicable statutes and administrative rule, the Assistant Secretary concluded that the Taxpayers were doing business in this State because they operate a business activity or enterprise in North Carolina for economic gain. In determining that the Taxpayers were doing business in North Carolina, the Assistant Secretary found that the Taxpayers own valuable intangible property in the form of trademarks, tradenames, and service marks and the goodwill associated with the marks. This property is business or income-producing property. The property is intangible property and, under applicable principles of law, has acquired a business situs where it is used. *See Wheeling Steel Corp. v. Fox*, 298 U.S. 193 (1936). The Taxpayers' property is used in North Carolina. Consequently, Taxpayers own business or income-producing property in North Carolina.

Applying the principles of trademark law, the Assistant Secretary ruled that Taxpayers' property cannot exist apart from an established business in which it is used; if the property is not used, the property is considered abandoned and ceases to exist. The Taxpayers' property therefore exists only where it is used. The Taxpayers' property is used extensively in North Carolina in connection with established businesses. These established businesses are the 130 plus North Carolina retail locations of Taxpayers' related retail companies.

The record in this matter reflects that the Taxpayers' marks are permanently affixed to the retail locations and appear on the labels of merchandise sold at the locations. As a result, Taxpayers' marks are used at the retail locations each time employees at the locations sell merchandise. This use, which occurs in North Carolina, preserves the existence of Taxpayers' property.

The record also reflects that the Taxpayers rent their intangible property in North Carolina by licensing the use of the property to their related retail companies, which operate over 130 retail locations in North Carolina. The licensing agreements require the related companies to make royalty payments to Taxpayers for the use of Taxpayers' property. The Taxpayers purposefully license their property for use in this State. The Taxpayers in fact earn significant royalty income from the licensing agreements. The Taxpayers therefore license business or income-producing property in North Carolina.

Based upon the facts, the Assistant Secretary concluded that the Taxpayers were doing business in North Carolina because they are operating a business enterprise or activity in North Carolina for economic gain. Thus, Taxpayers' activities fall within all three of the possible methods set out in Administrative Rule 17 NCAC 5C .0102(a)(5) by which an entity could be doing business in this State. The Taxpayers own business or income-producing property in North Carolina, the Taxpayers license business or income-

producing property in North Carolina, and the Taxpayers operate business or income-producing property in North Carolina. Thus, the Board determines that the record supports the Assistant Secretary's determination that the Taxpayers were "doing business" under the applicable North Carolina statutes and administrative rules and finds no merit in Taxpayers' argument that until the enactment of recent legislation, the statute did not authorize taxation of the Taxpayers.

The Board also determines that the Assistant Secretary properly concluded that the Taxpayers were "excluded corporations" within the meaning of G.S. 105-130.4(a)(4). G.S. 105-130.4(a)(4) defines an "excluded corporation" in pertinent part as "a corporation which receives more than fifty percent (50%) of its ordinary gross income from investments in and/or dealing in intangible property." The Assistant Secretary properly determined that the Taxpayers both "invest" and "deal" in the trademarks, which are intangible property. The Taxpayers received more than 50% of their ordinary gross income from their investments in or dealing in the trademarks. They therefore meet the statutory definition of "excluded corporation" set forth in G.S. 105-130.4(a)(4). Since the Taxpayers are "excluded corporations," G.S. 105-130.4(r) requires the Taxpayers to apportion their business income using the sales factor as determined under G.S. 105-130.4 (l).

Regarding Taxpayers' arguments that the Assistant Secretary's Final Decision should be reversed because physical presence in a state is a constitutional prerequisite for taxation; and since the Taxpayers are not physically present in North Carolina they cannot be taxed by North Carolina; the Tax Review Board, which is an administrative body, does not have the authority or jurisdiction to rule upon the constitutionality of a statute. *Great American Insurance Company v. Gold, 254 N.C. 168 (1961).* Since these contentions involve constitutional issues, the Tax Review Board lacks authority or jurisdiction to address them. Thus, Taxpayers' constitutional claims are not issues that the Tax Review Board is empowered to determine.

The Board having conducted an administrative hearing in this matter, and having considered the petition, briefs, the whole record, the Assistant Secretary's final decision, the parties' arguments and the authorities cited, concludes that the findings of fact made by the Assistant Secretary in the final decision were fully supported by competent evidence in the record; that based upon the findings of fact, the Assistant Secretary's conclusions of law were fully supported by the findings of fact; therefore the final decision of the Secretary of Revenue should be confirmed.

In confirming the final decision in this matter, the Board takes administrative notice that the Assistant Secretary modified the proposed corporate franchise and income tax assessments for tax year 1994 by granting the Taxpayers' motion to waive the penalties imposed against them for tax year 1994. Although there is ample evidence in the record supporting the Department of Revenue's original imposition of penalties for tax year 1994, since the decision to waive penalties imposed by the Department of Revenue falls within the discretion of the Secretary of Revenue, this Board defers to the Secretary's determination.

WHEREFORE, THE TAX REVIEW BOARD ORDERS, ADJUDGES AND DECREES that the Final Decision entered by the Assistant Secretary in this matter on September 19, 2000 be and is hereby **Confirmed** in its entirety.

Made and entered into the 7th day of May, 2002.

TAX REVIEW BOARD

Signature_____
Richard H. Moore, Chairman
State Treasurer

Signature_____
Jo Anne Sanford, Member
Chair, Utilities Commission

Signature_____
Noel L. Allen, Appointed Member

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 02 – DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

CHAPTER 52 – VETERINARY DIVISION

Notice of Rule-making Proceedings *is hereby given by the North Carolina Board of Agriculture 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: *02 NCAC 52J .0101-.0103, .0201-.0210, .0301-.0304 - Other rules may be proposed in the course of the rule-making process.*

Authority for the Rule-making: *G.S. 19A-24*

Statement of the Subject Matter: *These Rules establish standards for the care of dogs and cats by animal shelters, boarding kennels, pet shops, dealers and public auctions. The rules also provide for recordkeeping by licensees.*

Reason for Proposed Action: *Proposed changes would clarify existing rules by making requirements more specific, add requirements for drainage of facilities, acceptable impervious surfaces for sanitation, fencing of outdoor areas, and other changes to improve quality of facilities and care provided by licensees.*

Comment Procedures: *Written comments may be submitted to David S. McLeod, Secretary, North Carolina Board of Agriculture, PO Box 27647, Raleigh, NC 27611.*

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

CHAPTER 19 - HEALTH: EPIDEMIOLOGY

Notice of Rule-making Proceedings *is hereby given by Commission for Health Services 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: *15A NCAC 19A .0401. Other rules may be proposed in the course of the rule-making process.*

Authority for the Rule-making: *G.S. 130A-134; 130A-135; 130A-139; 130A-141*

Statement of the Subject Matter: *The permanent rule change will amend the rubella, hepatitis B, Hib requirements, add varicella vaccine to the requirements, and give the State Health Director authority to suspend temporarily any portion of the requirements due to emergency conditions such as the unavailability of vaccine.*

Reason for Proposed Action: *The CDC recommends the changes to the vaccine requirements. This action will add varicella vaccine to the requirements for immunization. Senate Bill 736 has appropriated funds for a childhood varicella vaccine program. The United State has experienced an intermittent supply shortage for many vaccines. Vaccine shortages impact immunization requirements. This action will give the State Health Director the authority to delay any portion of the requirements of the immunization rules due to emergency conditions, such as the unavailability of vaccines.*

Comment Procedures: *Written comments concerning these rule-making actions may be submitted to Chris Hoke, Rule-making Coordinator, Division of Public Health, 2001 Mail Service Center, Raleigh, NC 27699-2001.*

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

TITLE 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 amend the rules cited as 10 NCAC 03C .3102, .4305. Notice of Rule-making Proceedings was published in the Register on October 15, 2001 and April 15, 2002.*

Proposed Effective Date: *April 1, 2003*

Public Hearing:
Date: *July 31, 2002*
Time: *10:00 a.m.*
Location: *Room 201, Council Building, NC Division of Facility Services, Dorothea Dix Campus, 701 Barbour Dr., Raleigh, NC*

Reason for Proposed Action: *The NC General Assembly recently ratified House Bill 1147 (Session Law 2001-410). This legislation amends G.S. 132E-83 and directs the NC Medical Care Commission to adopt temporary rules "setting forth conditions for licensing neonatal care beds." The Commission adopted temporary amendments to these Rules to meet this legislative mandate. 10 NCAC 03R .1413-.1417 are Certificate of Need (CON) rules that were also temporarily amended to conform to – and ensure consistency with – the changes to these Rules. The Division is now moving forward with the permanent adoption of the amendments. This notice identifies a time for a public hearing and a deadline for receiving comments on this rule-making action.*

Comment Procedures: *Written comments concerning this rule-making action must be submitted by July 31, 2002, to Mark Benton, Chief of Budget & Planning/Rule-making Coordinator, NC Division of Facility Services, 2701 Mail Service Center, Raleigh, NC 27699-2701.*

Fiscal Impact
☐ **State**
☐ **Local**
☐ **Substantive (**>$5,000,000**)**
☒ **None**

CHAPTER 03 – FACILITY SERVICES

SUBCHAPTER 03C - LICENSING OF HOSPITALS

SECTION .3100 – PROCEDURE

10 NCAC 03C .3102 PLAN APPROVAL

(a) The facility design and construction shall be in accordance with the construction standards of the Division, the North Carolina Building Code, and local municipal codes.

(b) Submission of Plans:

(1) Before construction is begun, color marked plans, and specifications covering construction of the new buildings, alterations or additions to existing buildings, or any change in facilities shall be submitted to the Division for approval.

(2) The Division will review the plans and notify the licensee that said buildings, alterations, additions, or changes are approved or disapproved. If plans are disapproved the Division shall give the applicant notice of deficiencies identified by the Division.

(3) In order to avoid unnecessary expense in changing final plans, a preliminary step, proposed plans in schematic form shall be reviewed by the Division.

(4) The plans shall include a plot plan showing the size and shape of the entire site and the location of all existing and proposed facilities.

(5) Plans shall be submitted in triplicate in order that the Division may distribute a copy to the Department of Insurance for review of State Building Code requirements and to the Department of Environment, Health, and Natural Resources for review under state sanitation requirements.

(c) Location:

(1) The site for new construction or expansion shall be approved by the Division.

(2) Hospitals shall be so located that they are free from undue noise from railroads, freight yards, main traffic arteries, schools and children's playgrounds.

(3) The site shall not be exposed to smoke, foul odors, or dust from nearby industrial plants.

(4) The area of the site shall be sufficient to permit future expansion and to provide adequate parking facilities.

(5) Available paved roads, adequate water, sewage and power lines shall be taken into consideration in selecting the site.

(d) The bed capacity and services provided in a facility shall be in compliance with G.S. 131E, Article 9 regarding Certificate of Need. A facility shall be licensed for no more beds than the number for which required physical space and other required facilities are available. Neonatal Level 1, Level II and III beds are considered part of the licensed bed capacity. Newborn nursery bassinets are not considered part of the licensed bed capacity however, no more bassinets shall be placed in service than the number for which required physical space and other required facilities are available.

Authority G.S. 131E-79.

SECTION .4300 - MATERNAL - NEONATAL SERVICES

10 NCAC 03C .4305 ORGANIZATION OF NEONATAL SERVICES

(a) The governing body shall approve the scope of all neonatal services and the facility shall classify its capability in providing a range of neonatal services using the following criteria:

(1) Newborn Nursery: Full-term and pre-term neonates that are stable without complications; may include small for gestational age or large for gestational age neonates;

(2) LEVEL I: Neonates or infants that are stable without complications but require special care and frequent feedings; infants of any weight who no longer require Level II or Level III neonatal services, but who still require more nursing hours than normal infants; and infants who require close observation in a licensed acute care bed;

(3) LEVEL II: Neonates or infants that are high-risk, small (or approximately 32 and less than 36 completed weeks of gestational age) but otherwise healthy, or sick with a moderate degree of illness that are admitted from within the hospital or transferred from another facility requiring intermediate care services for sick infants, but not requiring intensive care; may serve as a "step-down" unit from Level III. Level II neonates or infants require less constant nursing care, but care does not exclude respiratory support.

(4) LEVEL III (Neonatal Intensive Care Services): High-risk, medically unstable or critically ill neonates approximately under 32 weeks of gestational age, or infants, requiring constant nursing care or supervision not limited to continuous cardiopulmonary or respiratory support, complicated surgical procedures, or other intensive supportive interventions.

(b) The facility shall provide for the availability of equipment, supplies, and clinical support services.

(c) The medical and nursing staff shall develop and approve policies and procedures for the provision of all neonatal services.

Authority G.S. 131E-79.

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***Notice** is hereby given in accordance with G.S. 150B-21.2 that the NC Division of Facility Services intends to amend the rules cited as 10 NCAC 03R .1413-.1417. Notice of Rule-making Proceedings was published in the Register on October 15, 2001 and April 15, 2002.*

Proposed Effective Date: *April 1, 2003*

Public Hearing:
Date: *July 31, 2002*
Time: *10:00 a.m.*
Location: *Room 201, Council Building, NC Division of Facility Services, Dorothea Dix Campus, 701 Barbour Dr., Raleigh, NC*

Reason for Proposed Action: *The NC General Assembly recently ratified House Bill 1147 (Session Law 2001-410). This legislation amends G.S. 132E-83 and directs the NC Medical Care Commission to adopt temporary rules "setting forth conditions for licensing neonatal care beds." The Commission adopted temporary amendments to these Rules to meet this legislative mandate. These Rules are Certificate of Need (CON) rules that were also temporarily amended to conform to – and ensure consistency with – the changes to 10 NCAC 03C .3102 and .4305. The Division is now moving forward with the permanent adoption of the amendments. This notice identifies a time for a public hearing and a deadline for receiving comments on this rule-making action.*

Comment Procedures: *Written comments concerning this rule-making action must be submitted by July 31, 2002, to Mark Benton, Chief of Budget & Planning/Rule-making Coordinator, NC Division of Facility Services, 2701 Mail Service Center, Raleigh, NC 27699-2701.*

Fiscal Impact
☐ **State**
☐ **Local**
☐ **Substantive (**>$5,000,000**)**
☒ **None**

CHAPTER 03 – FACILITY SERVICES

SUBCHAPTER 03R - CERTIFICATE OF NEED REGULATIONS

SECTION .1400 - CRITERIA AND STANDARDS FOR NEONATAL SERVICES

10 NCAC 03R .1413 DEFINITIONS

The definitions in this Rule shall apply to all rules in this Section:

(1) "Approved neonatal service" means a neonatal service that was not operational prior to the beginning of the review period. (2) "Existing neonatal service" means a neonatal service in operation prior to the beginning of the review period.

(3) "High-risk obstetric patients" means those patients requiring specialized services provided by an acute care hospital to the mother and fetus during pregnancy, labor, delivery and to the mother after delivery. The services are characterized by specialized facilities and staff for the intensive care and management of high-risk maternal and fetal patients before, during, and after delivery.

(4) "Level I neonatal service" means services provided by an acute care hospital in a licensed acute care bed to neonates and infants that are stable without complications but require special care and frequent feedings; infants of any weight who no longer require Level II or Level III neonatal services, but still require more nursing hours than normal

infants; and infants who require close observation in a licensed acute care bed.

(5) "Level II neonatal service" means services provided by an acute care hospital in a licensed acute care bed to neonates or infants that are high-risk, small (approximately 32 and less than 36 completed weeks of gestational age) but otherwise healthy, or sick with a moderate degree of illness that are admitted from within the hospital or transferred from another facility requiring intermediate care services for sick infants, but not intensive care. Level II neonates or infants require less constant nursing care than Level III services, but care does not exclude respiratory support.

(6) "Level III neonatal service" means neonatal intensive care services provided by an acute care hospital in a licensed acute care bed to high-risk medically unstable or critically ill neonates (approximately under 32 weeks of gestational age) or infants requiring constant nursing care or supervision not limited to continuous cardiopulmonary or respiratory support, complicated surgical procedures, or other intensive supportive interventions.

(7) "Neonatal bed" means a licensed acute care bed used to provide Level I, II, or III neonatal services.

(8) "Neonatal intensive care services" shall have the same meaning as defined in G.S. 131E-176(15b).

(9) "Neonatal service area" means a geographic area defined by the applicant from which the patients to be admitted to the service will originate.

(10) "Neonatal services" means any of the Level I, Level II or Level III services defined in this Rule.

(11) "Newborn nursery services" means services provided by an acute care hospital to full term and pre-term neonates that are stable, without complications, and may include neonates that are small for gestational age or large for gestational age.

(12) "Obstetric services" means any normal or high-risk services provided by an acute care hospital to the mother and fetus during pregnancy, labor, delivery and to the mother after delivery.

(13) "Perinatal services" means services provided during the period shortly before and after birth.

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Authority G.S. 131E-177(1); 131E-183.

10 NCAC 03R .1414 INFORMATION REQUIRED OF APPLICANT

(a) An applicant proposing to develop a new newborn nursery service or increase the number of Level I, II, or III neonatal beds shall use the Acute Care Facility/Medical Equipment application form.

(b) An applicant proposing to develop a new newborn nursery service or increase the number of Level I, II, or III neonatal beds shall provide the following additional information:

(1) the current number of newborn nursery bassinets, Level I beds, Level II beds and Level III beds operated by the applicant;

(2) the proposed number of newborn nursery bassinets, Level I beds, Level II beds and Level III beds to be operated following completion of the proposed project;

(3) evidence of the applicant's experience in treating the following patients at the facility during the past twelve months, including:

(A) the number of obstetrical patients treated at the acute care facility;

(B) the number of neonatal patients treated in newborn nursery bassinets, Level I beds, Level II beds and Level III beds, respectively;

(C) the number of inpatient days at the facility provided to obstetrical patients;

(D) the number of inpatient days provided in Level I beds, Level II beds and Level III beds, respectively;

(E) the number of high-risk obstetrical patients treated at the applicant's facility and the number of high-risk obstetrical patients referred from the applicant's facility to other facilities or programs; and

(F) the number of neonatal patients referred to other facilities for services, identified by required level of neonatal service (i.e. Level I, Level II or Level III);

(4) the projected number of neonatal patients to be served identified by newborn nursery, Level I, Level II and Level III neonatal services for each of the first three years of operation following the completion of the project, including the methodology and assumptions used for the projections;

(5) the projected number of patient days of care to be provided in the newborn nursery bassinets, Level I beds, Level II beds and Level III beds, respectively, for each of the first three years of operation following completion of the project, including the methodology and assumptions used for the projections;

(6) if proposing to provide new newborn nursery or Level I neonatal services, documentation that at least 90 percent of the anticipated patient population is within 30 minutes driving time one-way from the facility;

(7) if proposing to provide new newborn nursery or Level I neonatal services, documentation of a written plan to transport infants to Level II or Level III neonatal services as the infant's care requires;

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(8) evidence that the applicant shall have access to a transport service with at least the following components:
(A) trained personnel;
(B) transport incubator;
(C) emergency resuscitation equipment;
(D) oxygen supply, monitoring equipment and the means of administration;
(E) portable cardiac and temperature monitors; and
(F) a mechanical ventilator;

(9) documentation that the proposed service shall be operated in an area organized as a physically and functionally distinct entity with controlled access;

(10) documentation to show that the new or additional Level I, Level II or Level III neonatal services shall be offered in a physical environment that conforms to the requirements of federal, state, and local regulatory bodies;

(11) a detailed floor plan of the proposed area drawn to scale;

(12) documentation of direct or indirect visual observation by unit staff of all patients from one or more vantage points; and

(13) documentation that the floor space allocated to each bed and bassinet shall accommodate equipment and personnel to meet anticipated contingencies.

(c) If proposing to provide new Level II or Level III neonatal services the applicant shall also provide the following information:

(1) documentation that at least 90 percent of the anticipated patient population is within 90 minutes driving time one-way from the facility, with the exception that there shall be a variance from the 90 percent standard for facilities which demonstrate that they provide very specialized levels of neonatal care to a large and geographically diverse population, or facilities which demonstrate the availability of air ambulance services for neonatal patients;

(2) evidence that existing and approved neonatal services in the applicant's defined neonatal service area are unable to accommodate the applicant's projected need for additional Level II and Level III services;

(3) an analysis of the proposal's impact on existing Level II and Level III neonatal services which currently serve patients from the applicant's primary service area;

(4) the availability of high risk OB services at the site of the applicant's planned neonatal service;

(5) copies of written policies which provide for parental participation in the care of their infant, as the infant's condition permits, in order to facilitate family adjustment and continuity of care following discharge; and

(6) copies of written policies and procedures regarding the scope and provision of care within the neonatal service, including but not limited to the following:
(A) the admission and discharge of patients;
(B) infection control;
(C) pertinent safety practices;
(D) the triaging of patients requiring consultations, including the transfer of patients to another facility; and
(E) the protocols for obtaining emergency physician care for a sick infant.

Authority G.S. 131E-177(1); 131E-183.

10 NCAC 03R .1415 REQUIRED PERFORMANCE STANDARDS

(a) An applicant shall demonstrate that the proposed project is capable of meeting the following standards:

(1) an applicant proposing a new newborn nursery, new Level I services, or additional Level I beds shall demonstrate that the occupancy of the applicant's total number of neonatal beds is projected to be at least 50% during the first year of operation and at least 65% during the third year of operation following completion of the proposed project;

(2) if an applicant proposes an increase in the number of the facility's existing Level II or Level III beds, the overall average annual occupancy of the total number of existing Level II and Level III beds in the facility is at least 75%, over the 12 months immediately preceding the submittal of the proposal; and

(3) if an applicant is proposing to develop new or additional Level II or Level III beds, the projected occupancy of the total number of Level II and Level III beds proposed to be operated during the third year of operation of the proposed project shall be at least 75%.

(4) The applicant shall document the assumptions and provide data supporting the methodology used for each projection in this Rule.

(b) If an applicant proposes to develop a new Level II or Level III service, the applicant shall document that an unmet need exists in the applicant's defined neonatal service area. The need for Level II and Level III beds shall be computed for the applicant's neonatal service area by:

(1) identifying the annual number of live births occurring at all hospitals within the proposed neonatal service area, using the latest available data compiled by the State Center for Health Statistics;

(2) identifying the low birth weight rate (percent of live births below 2,500 grams) for the births identified in (1) of this Paragraph, using the

latest available data compiled by the State Center for Health Statistics;

(3) dividing the low birth weight rate identified in Subparagraph (2) of this Paragraph by .08 and subsequently multiplying the resulting quotient by four; and

(4) determining the need for Level II and Level III beds in the proposed neonatal service area as the product of:

(A) the product derived in Subparagraph (3) of this Paragraph, and

(B) the quotient resulting from the division of the number of live births in the initial year of the determination identified in Subparagraph (1) of this Paragraph by the number 1000.

Authority G.S. 131E-177(1); 131E-183(b).

10 NCAC 03R .1416 REQUIRED SUPPORT SERVICES

(a) An applicant proposing to provide new Level I, Level II or Level III services shall document that the following items shall be available, unless an item shall not be available, then documentation shall be provided obviating the need for that item:

(1) competence to manage uncomplicated labor and delivery of normal term newborn;

(2) capability for continuous fetal monitoring;

(3) a continuing education program on resuscitation to enhance competence among all delivery room personnel in the immediate evaluation and resuscitation of the newborn and of the mother;

(4) obstetric services;

(5) anesthesia services;

(6) capability of cesarean section within 30 minutes at any hour of the day; and

(7) twenty-four hour on-call blood bank, radiology, and clinical laboratory services.

(b) An applicant proposing to provide new Level II or Level III services shall document that the following items shall be available, unless any item shall not be available, then documentation shall be provided obviating the need for that item:

(1) competence to manage labor and delivery of premature newborns and newborns with complications;

(2) twenty-four hour availability of microchemistry hematology and blood gases;

(3) twenty-four hour coverage by respiratory therapy;

(4) twenty-four hour radiology coverage with portable radiographic capability;

(5) oxygen and air and suction capability;

(6) electronic cardiovascular and respiration monitoring capability;

(7) vital sign monitoring equipment which has an alarm system that is operative at all times;

(8) capabilities for endotracheal intubation and mechanical ventilatory assistance;

(9) cardio-respiratory arrest management plan;

(10) isolation capabilities;

(11) social services staff;

(12) occupational or physical therapies with neonatal expertise; and

(13) a registered dietician or nutritionist with training to meet the special needs of neonates.

(c) An applicant proposing to provide new Level III services shall document that the following items shall be available, unless any item shall not be available, then documentation shall be provided obviating the need for that item:

(1) pediatric surgery services;

(2) ophthalmology services;

(3) pediatric neurology services;

(4) pediatric cardiology services;

(5) on-site laboratory facilities;

(6) computed tomography and pediatric cardiac catheterization services;

(7) emergency diagnostic studies available 24 hours per day;

(8) designated social services staff; and

(9) serve as a resource center for the statewide perinatal network.

Authority G.S. 131E-177(1); 131E-183(b).

10 NCAC 03R .1417 REQUIRED STAFFING AND STAFF TRAINING

An applicant shall demonstrate that the following staffing requirements for hospital care of newborn infants shall be met:

(1) If proposing to provide new Level I services the applicant shall provide documentation to demonstrate that:

(a) the nursing care shall be supervised by a registered nurse in charge of perinatal facilities;

(b) a physician is designated to be responsible for neonatal care; and

(c) the medical staff will provide physician coverage to meet the specific needs of patients on a 24 hour basis.

(2) If proposing to provide new Level II services the applicant shall provide documentation to demonstrate that:

(a) the nursing care shall be supervised by a registered nurse;

(b) the service shall be staffed by a board certified pediatrician; and

(c) the medical staff will provide physician coverage to meet the specific needs of patients on a 24 hour basis.

(3) If proposing to provide new Level III services the applicant shall provide documentation to demonstrate that:

(a) the nursing care shall be supervised by a registered nurse with educational preparation and advanced skills for maternal-fetal and neonatal services;

(b) the service shall be staffed by a full-time board certified pediatrician with certification in neonatal medicine; and

(c) the medical staff will provide physician coverage to meet the specific needs of patients on a 24 hour basis.

(4) All applicants shall submit documentation which demonstrates the availability of appropriate inservice training or continuing education programs for neonatal staff.

(5) All applicants shall submit documentation which demonstrates the proficiency and ability of the nursing staff in teaching parents how to care for neonatal patients following discharge to home.

(6) All applicants shall submit documentation to show that the proposed neonatal services will be provided in conformance with the requirements of federal, state and local regulatory bodies.

Authority G.S. 131E-177(1); 131E-183(b).

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***Notice** is hereby given in accordance with G.S. 150B-21.2 that the DHHS – Division of Medical Assistance intends to amend the rules cited as 10 NCAC 26H .0212-.0213. Notice of Rule-making Proceedings was published in the Register on July 2, 2001 and July 16, 2001.*

Proposed Effective Date: *April 1, 2003*

Public Hearing:
Date: *July 31, 2002*
Time: *11:30 - 12:30 p.m.*
Location: *1985 Umstead Drive, Room 132, Kirby Building, Raleigh, NC*

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 by August 30, 2002 to Portia W. Rochelle, Rule-making Coordinator, Division of Medical Assistance, 1985 Umstead Drive, 2504 Mail Service Center, Raleigh, NC 27699-2504.*

Fiscal Impact
☐ **State**
☐ **Local**
☒ **Substantive (**>$5,000,000**)**
☐ **None**

CHAPTER 26 – MEDICAL ASSISTANCE

SUBCHAPTER 26H – REIMBURSEMENT PLANS

SECTION .0200 - HOSPITAL INPATIENT REIMBURSEMENT PLAN

10 NCAC 26H .0212 EXCEPTIONS TO DRG REIMBURSEMENT

(a) Covered psychiatric and rehabilitation inpatient services provided in either specialty hospitals, Medicare recognized distinct part units (DPU), or other beds in general acute care hospitals shall be reimbursed on a per diem methodology.

(1) For the purposes of this Section, psychiatric inpatient services are defined as admissions where the primary reason for admission would result in the assignment of DRGs in the range 424 through 432 and 436 through 437. For the purposes of this Section, rehabilitation inpatient services are defined as admissions where the primary reason for admissions would result in the assignment of DRG 462. All services provided by specialty rehabilitation hospitals are presumed to come under this definition.

(2) When a patient has a medically appropriate transfer from a medical or surgical bed to a psychiatric or rehabilitative distinct part unit within the same hospital, or to a specialty hospital the admission to the distinct part unit or the specialty hospital shall be recognized as a separate service which is eligible for reimbursement under the per diem methodology. Transfers occurring within general hospitals from acute care services to non-DPU psychiatric or rehabilitation services are not eligible for reimbursement under this Section. The entire hospital stay in these instances shall be reimbursed under the DRG methodology.

(3) The per diem rate for psychiatric services is established at the lesser of the actual cost trended to the rate year or the calculated median rate of all hospitals providing psychiatric services as derived from the most recent as filed cost reports.

(4) Hospitals that do not routinely provide psychiatric services shall have their rate set at the median rate.

(5) The per diem rate for rehabilitation services is established at the lesser of the actual cost trended to the rate year or the calculated median rate of all hospitals providing rehabilitation services as derived from the most recent filed cost reports.

(6) Rates established under this Paragraph are adjusted for inflation consistent with the methodology under Rule .0211 Subparagraph (d)(5) of this Section.

(b) To assure compliance with the separate upper payment limit for State-operated facilities, the hospitals operated by the Department of Health and Human Services and all the primary affiliated teaching hospitals for the University of North Carolina Medical Schools shall be reimbursed their reasonable costs in accordance with the provisions of the Medicare Provider

Reimbursement Manual. This Manual referred to as, (HCFA Publication #15-1) is hereby incorporated by reference including any subsequent amendments and editions. A copy is available for inspection at the Division of Medical Assistance, 1985 Umstead Drive, Raleigh, NC. Copies may be obtained from the U.S. Department of Commerce, National Technical Information Service, Subscription Department, 5285 Port Royal Road, Springfield, VA 22161 at a cost of one hundred seventy seven dollars (177.00). Purchasing instructions may be received by calling 1-800-363-2068. Updates are available for an additional fee. The Division shall utilize the DRG methodology to make interim payments to providers covered under this Paragraph, setting the hospital unit value at a level which can best be expected to approximate reasonable cost. Interim payments made under the DRG methodology to these providers shall be retrospectively settled to reasonable cost.

(c) When the Norplant contraceptive is inserted during an inpatient stay the current Medicaid fee schedule amount for the Norplant kit shall be paid in addition to DRG reimbursement. The additional payment for Norplant shall not be paid when a cost outlier or day outlier increment is applied to the base DRG payment.

(d) Hospitals operating Medicare approved graduate medical education programs shall receive a per diem rate adjustment which reflects the reasonable direct and indirect costs of operating these programs. The per diem rate adjustment shall be calculated in accordance with the provisions of Rule .0211 Paragraph (f) of this Section.

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(e) Hospitals licensed by the State of North Carolina and reimbursed under the DRG methodology for more than 50 percent of their Medicaid inpatient discharges for the fiscal years ending September 30, 2000 and thereafter shall be entitled to a lump sum payment for the period from September 18, 2000 through September 30, 2000, and lump sum payments for subsequent fiscal years calculated and paid no less frequently than annually and no more frequently than quarterly for inpatient and outpatient hospital services in amounts or percentages determined by the Director of the Division of Medical Assistance, for periods preceding or following the payment date subject to the provisions of Subparagraphs (1) through (7) of this Paragraph.

(1) To ensure that the payments authorized by this Paragraph do not exceed the applicable upper limits, such payments (when added to Medicaid payments received or to be received for these services) shall not exceed for the 12-month period ending September 30th of the year for which payments are made the applicable percentage of:

(A) The reasonable cost of inpatient and outpatient hospital Medicaid services; plus

(B) The reasonable direct and indirect costs attributable to inpatient and outpatient Medicaid services of operating Medicare approved graduate medical education programs.

(2) For purposes of this Paragraph the phrase "applicable percentage" refers to the upper payment limit as a percentage of reasonable costs established by 42 C.F.R. 447.272 and 42 C.F.R. 447.321 for different categories of hospitals.

(A) Reasonable costs shall be ascertained in accordance with the provisions of the Medicare Provider Reimbursement Manual as defined in Paragraph (b) of this Rule.

(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.

(3) Qualified public hospitals shall receive payments under this Paragraph in amounts (including the expenditures described in Part (A)(iii) of this Subparagraph not to exceed the applicable percentage of each hospital's Medicaid costs for the 12-month period ending September 30th of the fiscal year for which such payments are made, less any Medicaid payments received or to be received for these services.

(A) A qualified public hospital is a hospital that meets the other requirements of this Paragraph:

(i) 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 are made;

(ii) Verified its status as a public hospital by certifying State, local, hospital district or authority government control on the most recent version of Form HCFA-1514 filed with the Health Care Financing Administration, U. S. Department of Health and Human Services at least 30 days prior to the date of any such payment that remains valid as of the date of any such payment; and

(iii) Files with the Division on or before 10 working days prior to the date of any such payment by use of a form prescribed by the Division certification of expenditures eligible for FFP as described in 42 C.F.R. 433.51(b). This provision shall not apply to qualified public hospitals that are also designated by North Carolina as Critical Access Hospitals pursuant to 42 USC 1395i-4.

(4) Hospitals licensed by the State of North Carolina and reimbursed under the DRG methodology for more than 50 percent of their Medicaid inpatient discharges for the fiscal years ending September 30, 2000 and thereafter that are not qualified public hospitals as defined in this Paragraph shall be entitled to lump sum payments in amounts that do not exceed the applicable percentage of each hospital's Medicaid costs (calculated in accordance with Subparagraph (1) of this Paragraph) for the 12- month period ending September 30th of the fiscal year for which such payments are made less any Medicaid payments received or to be received for these services.

(5) Payments authorized by this Paragraph shall be made solely on the basis of an estimate of costs incurred and payments received for inpatient and outpatient Medicaid services 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 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.

(6) To ensure that estimated payments pursuant to Subparagraph (5) of this Paragraph do not exceed the aggregate upper limits to such payments established by applicable federal law and regulation (42 C.F.R. 447.272 and 42 C.F.R. 447.321), such payments shall be cost settled within 12 months of receipt of the completed and audited Medicare/Medicaid cost reports for the period for which payments are made. There shall be a separate cost settlement procedure for inpatient and outpatient hospital services. In addition for both inpatient and outpatient hospital services, there shall be a separate aggregate cost settlement pool for qualified public hospitals that are owned or operated by the State, for qualified public hospitals that are owned or operated by an instrumentally or unit of government within a State and for hospitals qualified for payment under this Paragraph that are not qualified public hospitals. As to each of these separate cost settlement procedures, if it is determined that aggregate payments under this Paragraph exceed aggregate upper limits for such payments, any hospital that received payments under this Paragraph in excess of unreimbursed reasonable costs as defined in this Paragraph shall promptly refund its proportionate share of aggregate payments in excess of aggregate upper limits. The proportionate share of each such hospital shall be ascertained by calculating for each such hospital its percentage share of all payments to all members of the cost settlement group that are in excess of unreimbursed reasonable costs, and multiplying that percentage times the amount by which aggregate payments being cost settled exceed aggregate upper limits applicable to such payments. No additional payment shall be made in connection with the cost settlement.

(7) The payments authorized under this Paragraph shall be effective in accordance with G.S. 108A-55(c).

(f) Subject to availability of funds, hospitals licensed by the State of North Carolina and reimbursed under the DRG methodology for more than 50 percent of their Medicaid inpatient discharges for the fiscal years ending September 30th and thereafter, that are not qualified public hospitals as defined in Paragraph (e)(3)(A) of this Rule; that 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; and that incur unreimbursed costs for providing inpatient and outpatient services to uninsured patients in an amount in excess of two million five hundred thousand dollars ($2,500,000.00) shall be eligible for a lump sum payment for the period from September 18, 2000 through September 30, 2000, and lump sum payments for subsequent fiscal years calculated and paid no less frequently than annually and no more frequently than quarterly in amounts or percentages determined by the Director of the Division of Medical Assistance, for periods preceding or following the payment date subject to the provisions of Subparagraphs (1) through (7) of this Paragraph.

(1) 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 by hospitals at least 60 days prior to the date of any payment under this Paragraph.

(2) To ensure that the payments authorized by this Paragraph do not exceed the applicable upper limits, such payments (when added to Medicaid payments received or to be received for these services) shall not exceed for the 12-month period ending September 30th of the year for which payments are made the applicable percentage of:

(A) The reasonable cost of inpatient and outpatient hospital Medicaid Services; plus

(B) The reasonable direct and indirect costs attributable to inpatient and outpatient Medicaid services of operating Medicare approved graduate medical education programs.

(3) For purposes of this Paragraph the phrase "applicable percentage" refers to the upper

payment limit as a percentage of reasonable costs established by 42 C.F.R. 447.272 and 42 C.F.R. 447.321 for different categories of hospitals.

(A) Reasonable costs shall be ascertained in accordance with the provisions of the Medicare Provider Reimbursement Manual as defined in Paragraph (b) of this Rule.

(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, but shall include all Medicaid payments received other than disproportionate share hospital payments, calculated after any payments made pursuant to Paragraph (e) of this Rule.

(4) Under no circumstances shall the payment authorized by this Paragraph exceed a percentage of the hospital's unreimbursed cost for providing services to uninsured patients determined by the Division under Paragraph (e) of Rule .0213 of this Section.

(5) Payments authorized by this Paragraph shall be made solely on the basis of an estimate of costs incurred and payments received for Medicaid services during 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 analysis of costs incurred and payments received for Medicaid inpatient and outpatient 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.

(6) To ensure that estimated payments pursuant to Subparagraph (5) of this Paragraph do not exceed the aggregate upper limit to such payments established by applicable federal law and regulation (42 C.F.R. 447.272 and 42 C.F.R. 447.321), such payments shall be cost settled within 12 months of receipt of the completed and audited Medicare/Medicaid cost reports for the period for which such payments were made. The cost settlement shall be as described in Paragraph (e)(6) of this Rule.

(7) The payments authorized by this Paragraph shall be effective in accordance with G.S. 108A-55(c).

Authority G.S. 108A-25(b); 108A-54; 108A-55(c); 42 C.F.R. 447, Subpart C; 42 C.F.R. 447.321.

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

(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 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 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 (5) of this Rule. However, DMH/DD/SAS operated hospitals are not required to qualify under the requirements of Subparagraphs (a)(1) through (5) of this Rule.

(3) The amount of allocated funds shall be determined by the Director of the Division of Medical Assistance, but not to exceed the quarterly grant award of funds (plus appropriate non-federal match) earmarked for disproportionate share hospital payments less payments made under Subparagraphs (a)(1) through (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 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 30thth 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 (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 C.F.R. 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 Subparagraph (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) 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 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 shall be paid monthly in an amount to be reviewed and approved by the Division of Medical Assistance. The total of all payments shall not exceed the limits on Disproportionate Share Hospital funding as set forth for the state by HCFA.

(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 Subparagraphs (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 Rule .0212 of this Section. 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 Part (B) 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. 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).

the payment fiscal year 2000. (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 Rule .0212 of this Section.

(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) 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 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 of this Section.

(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 report 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).

Authority G.S. 108A-25(b); 108A-54; 108A-55; 42 C.F.R. 447, Subpart C.

TITLE 11 – DEPARTMENT OF INSURANCE

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the NC Department of Insurance/Home Inspector Licensure Board intends to amend the rules cited as 11 NCAC 08 .1101, .1103, .1105, .1110, .1112-.1114. Notice of Rule-making Proceedings was published in the Register on May 1, 2002.*

Proposed Effective Date: *May 1, 2003*

Public Hearing:
Date: *July 19, 2002*
Time: *8:30 a.m.*
Location: *410 N. Boylan Avenue, Raleigh, NC*

Reason for Proposed Action: *The amendments made technical corrections to the Home Inspector Licensure Board standards of practice.*

Comment Procedures: *Written comments may be sent to Grover Sawyer, NC Department of Insurance, PO Box 26387, Raleigh, NC 27611. Comments will be accepted through July 31, 2002.*

Fiscal Impact
☐ **State**
☐ **Local**
☐ **Substantive (**>$5,000,000**)**
☒ **None**

CHAPTER 08 - ENGINEERING AND BUILDING CODES

SECITON .1100 - NC HOME INSPECTOR STANDARDS OF PRACTICE AND CODE OF ETHICS

11 NCAC 08 .1101 DEFINITIONS

The following definitions apply to this Section:

(1) "Automatic safety controls" means devices designed and installed to protect systems and components from excessively high or low pressures and temperatures, excessive electrical current, loss of water, loss of ignition, fuel leaks, fire, freezing, or other unsafe conditions.

(2) "Central air conditioning" means a system that uses ducts to distribute cooled and/or dehumidified air to more than one room or uses pipes to distribute chilled water to heat exchangers in more than one room, and that is not plugged into an electrical convenience outlet.

(3) "Component" means a readily accessible and observable aspect of a system, such as a floor, or wall, but not individual pieces such as boards or nails where many similar pieces make up the component.

(4) "Cosmetic" means superficial; decorative, rather than functional.

(5) "Cross connection" means any physical connection or arrangement between potable water and any source of contamination.

(6) "Dangerous or adverse situations" means situations that pose a threat of injury to the inspector, or those situations that require the use of special protective clothing or safety equipment.

(7) "Describe" means report in writing a system or component by its type, or other observed characteristics, to distinguish it from other components used for the same purpose.

(8) "Dismantle" means to take apart or remove any component, device or piece of equipment that is bolted, screwed, or fastened by other means and that would not be dismantled by a homeowner in the course of normal household maintenance

(9) "Enter" means to go into an area to observe all visible components.

(10) "Functional drainage" means a drain is functional when it empties in a reasonable amount of time and does not overflow when another fixture is drained simultaneously.

(11) "Functional flow" means a reasonable flow at the highest fixture in a dwelling when another fixture is operated simultaneously.

(12) "Installed" means attached or connected such that the installed item requires tools for removal.

(13) "Normal operating controls" means homeowner operated devices such as a thermostat, wall switch, or safety switch.

(14) "Observe" means the act of making a visual examination.

(15) "On-site water supply quality" means water quality is based on the bacterial, chemical, mineral, and solids content of the water.

(16) "On-site water supply quantity" means water quantity is the rate of flow of water.

(17) "Operate" means to cause systems or equipment to function.

(18) "Readily accessible" means easily approached or entered for visual inspection without the use of special equipment or tools.

(19) "Readily openable access panel" means a panel provided for homeowner inspection and maintenance that has removable or operable fasteners or latch devices in order to be lifted off, swung open, or otherwise removed by one person; and its edges and fasteners are not painted in place. This definition is limited to those panels within normal reach or from a four-foot stepladder, and that are not blocked by stored items, furniture, or building components.

(20) "Readily visible" means easily seen by using sufficient natural or artificial light without the use of special equipment or tools.

(21) "Representative number" means for multiple identical components such as windows and electrical outlets - one such component per room. For multiple identical exterior components - one such component on each side of the building.

(22) "Roof drainage systems" means gutters, downspouts, leaders, splashblocks, and similar components used to carry water off a roof and away from a building.

(23) "Shut down" means a piece of equipment or a system is shut down when it cannot be operated by the device or control that a home owner should normally use to operate it. If its safety switch or circuit breaker is in the "off" position, or its fuse is missing or blown, the inspector is not required to reestablish the circuit for the purpose of operating the equipment or system.

(24) "Solid fuel heating device" means any wood, coal, or other similar organic fuel burning device, including but not limited to fireplaces whether masonry or factory built, fireplace inserts and stoves, woodstoves (room heaters), central furnaces, and combinations of these devices.

(25) "Structural component" means a component that supports non-variable forces or weights (dead loads) and variable forces or weights (live loads).

(26) "System" means a combination of interacting or interdependent components, assembled to carry out one or more functions.

(27) "Technically exhaustive" means an inspection involving the extensive use of measurements, instruments, testing, calculations, and other means to develop scientific or engineering findings, conclusions, and recommendations.

(28) "Underfloor crawl space" means the area within the confines of the foundation and between the ground and the underside of the lowest floor structural component.

Authority G.S. 143-151.49.

11 NCAC 08 .1103 PURPOSE AND SCOPE

(a) Home inspections performed according to this Section shall provide the client with a better understanding of the property conditions, as observed at the time of the home inspection.

(b) Home inspectors shall:

(1) Provide a written contract, signed by the client, before the home inspection is performed that shall:

(A) State that the home inspection is in accordance with the Standards of Practice of the North Carolina Home Inspector Licensure Board;

(B) Describe what services shall be provided and their cost; and

(C) State, when an inspection is for only one or a limited number of systems or components, that the inspection is limited to only those systems or components;

(2) Observe readily visible and accessible installed systems and components listed in this Section; and

(3) Submit a written report to the client that shall:

(A) Describe those systems and components specified to be described in Rules .1106 through .1115 of this Section;

(B) State which systems and components designated for inspection in this Section have been inspected, and state any systems or components designated for inspection that were not inspected, and the reason for not inspecting;

(C) State any systems or components so inspected that do not function as intended, allowing for normal wear and tear, or adversely affect the habitability of the dwelling;

(D) State whether the condition reported requires correction, repair, monitoring, or further evaluation of the reported deficiency; and

(E) State the name, license number, and signature of the person supervising the inspection and the name, license number, and signature of the person conducting the inspection.

(c) This Section does not limit home inspectors from:

(1) Reporting observations and conditions or rendering opinions of items in addition to those required in Paragraph (b) of this Rule; or

(2) Excluding systems and components from the inspection if requested by the client, and so stated in the written contract.

(d) Written reports required by this Rule for pre-purchase home inspections of three or more systems shall include a separate section labeled "Summary" that includes any system or component that:

(1) does not function as intended or adversely affects the habitability of the dwelling; or

(2) appears to warrant further investigation by a specialist or requires subsequent observation.

This summary shall not contain recommendations for routine upkeep of a system or component to keep it in proper functioning condition or recommendations to upgrade or enhance the function, efficiency, or safety of the home. This summary shall contain the following statements: "This summary is not the entire report. The complete report may include additional information of concern to the client. It is recommended that the client read the complete report."

Authority G.S. 143-151.49.

11 NCAC 08 .1105 GENERAL EXCLUSIONS

(a) Home inspectors are not required to report on:

(1) Life expectancy of any component or system;

(2) The causes of the need for a repair;

(3) The methods, materials, and costs of corrections;

(4) The suitability of the property for any specialized use;

(5) Compliance or non-compliance with codes, ordinances, statutes, regulatory requirements or restrictions;

(6) The market value of the property or its marketability;

(7) The advisability or inadvisability of purchase of the property;

(8) Any component or system that was not observed;

(9) The presence or absence of pests such as wood damaging organisms, rodents, or insects; or

(10) Cosmetic items, underground items, or items not permanently installed.

(b) Home inspectors are not required to:

(1) Offer warranties or guarantees of any kind;

(2) Calculate the strength, adequacy, or efficiency of any system or component;

(3) Enter any area or perform any procedure that may damage the property or its components or be dangerous to or adversely effect the health of the home inspector or other persons;

(4) Operate any system or component that is shut down or otherwise inoperable;

(5) Operate any system or component that does not respond to normal operating controls;

(6) Move personal items, panels, furniture, equipment, plant life, soil, snow, ice, or debris that obstructs access or visibility;

(7) Determine the presence or absence of any suspected adverse environmental condition or hazardous substance, including but not limited to toxins, carcinogens, noise, contaminants in the building or in soil, water, and air;

(8) Determine the effectiveness of any system installed to control or remove suspected hazardous substances;

(9) Predict future condition, including but not limited to failure of components;

(10) Project operating costs of components;

(11) Evaluate acoustical characteristics of any system or component;

(12) Observe special equipment or accessories that are not listed as components to be observed in this Section; or

(13) Disturb insulation, except as required in Rule .1114 of this Section.

(c) Home inspectors shall not:

(1) Offer or perform any act or service contrary to law; or

(2) Offer or perform engineering, architectural, plumbing, electrical or any other job function requiring an occupational license in the jurisdiction where the inspection is taking place, unless the home inspector holds a valid occupational license, in which case the home inspector shall inform the client that the home inspector is so licensed, and therefore qualified to go beyond this Section and perform additional inspections beyond those within the scope of the basic inspection.

Authority G.S. 143-151.49.

11 NCAC 08 .1110 ELECTRICAL

(a) The home inspector shall observe:

(1) Service entrance conductors;

(2) Service equipment, grounding equipment, main overcurrent device, and main and distribution panels;

(3) Amperage and voltage ratings of the service;

(4) Branch circuit conductors, their overcurrent devices, and the compatibility of their ampacities and voltages;

(5) The operation of a representative number of installed ceiling fans, lighting fixtures, switches and receptacles located inside the house, garage, and on the dwelling's exterior walls;
(6) The polarity and grounding of all receptacles within six feet of interior plumbing fixtures, and all receptacles in the garage or carport, and on the exterior of inspected structures;
(7) The operation of ground fault circuit interrupters; and
(8) Smoke detectors.

(b) The home inspector shall describe:
(1) Service amperage and voltage;
(2) Service entry conductor materials;
(3) Service type as being overhead or underground;
(4) Location of main and distribution panels; and
(5) Wiring methods.

(c) The home inspector shall report any observed aluminum branch circuit wiring.

(d) The home inspector shall report on presence or absence of smoke detectors, and operate their test function, if accessible, except when detectors are part of a central system.

(e) The home inspector is not required to:
(1) Insert any tool, probe, or testing device inside the panels;
(2) Test or operate any overcurrent device except ground fault circuit interrupters;
(3) Dismantle any electrical device or control other than to remove the covers of the main and auxiliary distribution panels; or
(4) Observe:
(A) Low voltage systems;
(B) Security system devices, heat detectors, or carbon monoxide detectors;
(C) Telephone, security, cable TV, intercoms, or other ancillary wiring that is not a part of the primary electrical distribution system; or
(D) Built-in vacuum equipment.

Authority G.S. 143-151.49.

11 NCAC 08 .1112 AIR CONDITIONING

(a) The home inspector shall observe:
(1) Central air conditioning and permanently installed cooling systems including:
(A) Cooling and air handling equipment; and
(B) Normal operating controls.
(2) Distribution systems including:
(A) Fans, pumps, ducts and piping, with associated supports, dampers, insulation, air filters, registers, fan-coil units; and
(B) The presence of an installed cooling source in each room.

(b) The home inspector shall describe:
(1) Energy sources; and
(2) Cooling equipment type.

(c) The home inspector shall operate the systems using normal operating controls.

(d) The home inspector shall open readily openable access panels provided by the manufacturer or installer for routine homeowner maintenance

(e) The home inspector is not required to:
(1) Operate cooling systems when weather conditions or other circumstances may cause equipment damage;
(2) Observe window air conditioners; or
(3) Observe the uniformity or adequacy of cool-air supply to the various rooms.

Authority G.S. 143-151.49.

11 NCAC 08 .1113 INTERIORS

(a) The home inspector shall observe:
(1) Walls, ceiling, and floors;
(2) Steps, stairways, balconies, and railings;
(3) Counters and a representative number of installed cabinets; and
(4) A representative number of doors and windows.

(b) The home inspector shall:
(1) Operate a representative number of windows and interior doors; and
(2) Report signs of abnormal or harmful water penetration into the building or signs of abnormal or harmful condensation on building components.

(c) The home inspector is not required to observe:
(1) Paint, wallpaper, and other finish treatments on the interior walls, ceilings, and floors;
(2) Carpeting; or
(3) Draperies, blinds, or other window treatments.

Authority G.S. 143-151.49.

11 NCAC 08 .1114 INSULATION AND VENTILATION

(a) The home inspector shall observe:
(1) Insulation and vapor retarders in unfinished spaces;
(2) Ventilation of attics and foundation areas;
(3) Kitchen, bathroom, and laundry venting systems; and
(4) The operation of any readily accessible attic ventilation fan, and, when temperature permits, the operation of any readily accessible thermostatic control.

(b) The home inspector shall describe:
(1) Insulation in unfinished spaces; and
(2) Absence of insulation in unfinished space at conditioned surfaces.

(c) The home inspector is not required to report on:
(1) Concealed insulation and vapor retarders; or
(2) Venting equipment that is integral with household appliances.

(d) Home inspectors shall:

(1) Move insulation where readily visible evidence indicates the need to do so; and

(2) Move insulation where chimneys penetrate roofs, where plumbing drain/waste pipes penetrate floors, adjacent to earth filled stoops or porches, and at exterior doors.

Authority G.S. 143-151.49.

TITLE 13 – DEPARTMENT OF LABOR

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the NC Department of Labor – Elevator and Amusement Device Bureau intends to adopt the rules cited as 13 NCAC 15 .0701-.0704. Notice of Rule-making Proceedings was published in the Register on November 15, 2001.*

Proposed Effective Date: *July 1, 2003*

Public Hearing:
Date: *July 23, 2002*
Time: *2:00 p.m.*
Location: *NCDOL, Old Revenue Building – 3rd Floor Conference Room, 111 Hillsborough St., Raleigh, NC*

Reason for Proposed Action: *Pursuant to Session Law 2001-427, Section 11, effective September 28, 2001, the North Carolina General Assembly granted to the Commissioner of Labor the authority to set fees for inspections of Elevator and Amusement Devices. The Department of Labor proposes to make permanent the temporary rules for effective October 17, 2001, which were enacted pursuant to that authority.*

Comment Procedures: *Written comments directed to the attention of Barbara A. Jackson, North Carolina Department of Labor, 4 West Edenton St., Raleigh, NC 27601, will be accepted until July 31, 2002. Those wishing to speak at the public hearing on Tuesday, July 23, 2002, should contact Lynette D. Johnson at (919) 733-7885 to pre-register.*

Fiscal Impact
☒ **State** *13 NCAC 15 .0701-.0702*
☒ **Local** *13 NCAC 15 .0701-.0704*
☐ **Substantive (**>$5,000,000**)**
☐ **None**

CHAPTER 15 - ELEVATOR AND AMUSEMENT DEVICE DIVISION

SECTION .0700 – FEES

13 NCAC 15 .0701 ELEVATOR, ESCALATOR, DUMBWAITER, AND SPECIAL EQUIPMENT INSTALLATION AND ALTERATION FEES SCHEDULE

Inspection fees for installation or alteration of elevators, escalators, dumbwaiters, and special equipment shall be two hundred dollars ($200.00) per unit. In the event that the installation or alteration inspection cannot be completed on the initial visit, all follow up visits shall be charged at two hundred dollars ($200.00) per visit per unit.

Authority G.S. 95-107; 95-95-110.5(20).

13 NCAC 15 .0702 ELEVATOR, ESCALATOR, DUMBWAITER, AND SPECIAL EQUIPMENT ANNUAL INSPECTION FEES SCHEDULE

Annual inspection fees for elevator, escalator, dumbwaiter, and special equipment shall be as follows:

	Equipment	Unit Fee
(a)	All dumbwaiters and handicapped lifts	$35.00
(b)	All hydraulic elevators, belt man lifts, escalators, plus all elevators not identified as either hydraulic or traction and special lifting devices	$118.00
(c)	Traction Elevators	
	(1) 1-10 Floors	$155.00
	(2) Over 10 Floors	$200.00

Authority G.S. 95-107; 95-95-110.5(20).

13 NCAC 15 .0703 AMUSEMENT DEVICE INSPECTION FEE SCHEDULE

Inspection fees for amusement devices shall be as follows:

	Equipment	Unit Fee	Inspection Required
(a)	Inflatables	$100.00	Annually
(b)	Kiddie Rides (48" maximum height restriction) or Go Karts	$ 30.00	Every setup, except in permanent parks, which shall be inspected annually
(c)	Major Rides (including water slides)	$ 60.00	Every setup, except permanent parks, which shall be inspected annually
(d)	Roller Coasters, other than mobile or portable roller coasters	$250.00	Annually

Authority G.S. 95-107; 95-111.4(19).

13 NCAC 15 .0704 AMUSEMENT DEVICE INSPECTION FEE SCHEDULE

(a) In the event that an inspection is scheduled and the amusement device operator or owner fails to have all amusement devices scheduled for inspection ready for inspection, any follow up inspection visits requested by the operator or owner shall be charged at two hundred fifty dollars ($250.00) per amusement device, notwithstanding the provisions of 13 NCAC 15.0703.

(b) All inspections conducted outside normal business hours for the North Carolina Department of Labor (7:00 a.m. to 7:00 p.m. Monday through Friday, exclusive of State government holidays) shall be charged at the rate of two hundred fifty dollars ($250.00) per amusement device, notwithstanding the provisions of 13 NCAC 15 .0703.

Authority G.S. 95-107; 95-111.4(19).

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the DENR – Environmental Management Commission intends to amend the rules cited as 15 NCAC 02B .0208, .0211-.0212, .0214-.0216, .0218. Notice of Rule-making Proceedings was published in the Register on November 1, 2001.*

Proposed Effective Date: *April 1, 2003*

Public Hearing:
Date: *July 30, 2002*
Time: *7:00 p.m.*
Location: *Ground Floor Hearing Room, Archdale Building, 512 N. Salisbury St., Raleigh, NC*
Date: *August 1, 2002*
Time: *6:00 p.m.*
Location: *Morton Hall, UNC Wilmington, 601 S. College Rd., Wilmington, NC*

Reason for Proposed Action: *The Environmental Management Commission (EMC) has provided the Division of Water Quality with permission to conduct two public hearings to consider proposed permanent amendments to various rules that establish the surface water quality standards for North Carolina. These proposed amendments comprise the State's 2000-2003 Triennial Review of Surface Water Quality Standards, which is mandated by the Clean Water Act. If adopted, the proposals would implement the following changes to the surface water quality standards for North Carolina. A human health standard for arsenic of 10 ug/l would be established for all freshwaters of the State. In addition, an instream standard for arsenic of 10 ug/l would be established for all water supply (WS) classified waters of the State. The current freshwater action level standard of 17 ug/l for total residual chlorine (TRC) would be removed and replaced with an instream surface water quality standard of 17 ug/l for TRC for all freshwaters of the State. The existing freshwater cyanide standard of 5 ug/l would be modified to allow dischargers the option of developing a site-specific standard based upon the aquatic life at the site in accordance with EPA procedures. A new surface water quality standard for methyl tert-butyl ether (MTBE) would be established. This standard is proposed to be 12 ug/l for all water supply (WS) classified waters of the State. In addition, a human health standard for MTBE of 1,158 ug/l would be established for all other waters of the State (both salt and fresh). The existing methylene blue active substances (MBAS) surface water quality aquatic life standard of 500 ug/l would be removed and replaced with an aesthetic MBAS standard of 500 ug/l for water supply (WS) classified waters. Under this proposal the toxic constituents of MBAS would be covered under existing whole effluent toxicity (WET) testing. In addition, as part of this Triennial Review, the EMC is also interested in receiving public comment regarding the amendment of the following two surface water quality standards that will be the subject of separate rulemaking actions in the near future: (1) Bacteriological Criteria: The Environmental Protection Agency is requiring North Carolina to shift its bacteriological surface water quality criteria from a measurement of fecal coliforms, to a measurement of either Escherichia coli (E. coli) and/or enterococci. Accordingly, the Division of Water Quality (DWQ) anticipates initiating rulemaking to modify its surface water quality bacteriological criteria in late 2003. In light of this, the EMC would like to expand the current Triennial Review to solicit any public input that could be used to assist in the development and implementation of appropriate new E. coli and/or enterococci bacteriological surface water quality criteria for North Carolina; and (2) Nutrient Criteria: In response to EPA requirements, DWQ is currently engaged in the development of a Nutrient Criteria Implementation Plan. This plan, which will be submitted to the EPA this year for their review and approval, will detail North Carolina's current efforts to control nutrient pollution in the State's surface waters and will present DWQ's future plans to enhance and upgrade the Division's surface water nutrient control strategy and program. Once completed, this Nutrient Criteria Implementation Plan will be made available for public review and comment. However, as part of this Triennial Review, the EMC would like to solicit any public input that might assist in the development and formulation of the North Carolina Nutrient Criteria Implementation Plan. Furthermore, the public will have the opportunity to comment on three variances from surface water quality standards and the current thermal (temperature) variances. The three surface water quality standards variances consist of two variances from the chloride standard for Mt. Olive and Dean Pickle Companies (NC0001074 & NC0001970) and a variance from the color standard for Blue Ridge Paper Products (NC0000272). Detailed information concerning these water quality standards variances and the thermal variances may be viewed at http://h2o.enr.state.nc.us/csu/ or can be obtained by contacting the individual named in the comment procedures.*

Comment Procedures: *The purpose of this announcement is to encourage those interested in this proposal to provide comments. The EMC is very interested in all comments pertaining to these proposed rule changes. It is very important that all interested and potentially affected persons or parties make their views known to the EMC whether in favor of or opposed to any and all of the proposed amendments. You may*

attend the public hearing and make relevant verbal comments. You may also submit written comments, data or other relevant information by August 1, 2002. Written comments may be submitted to Thomas Reeder, DENR/Division of Water Quality, Planning Branch, 1617 Mail Service Center, Raleigh, NC 27699-1617, e-mail Tom.Reeder@ncmail.net, or by calling Tom Reeder at (919) 733-5083 extension 557.

Fiscal Impact

☐ **State**
☒ **Local** 15A NCAC 02B .0211
☐ **Substantive (**>$5,000,000**)**
☒ **None** 15A NCAC 02B .0208, .0212, .0214 - .0216, .0218

CHAPTER 02 – ENVIRONMENTAL MANAGEMENT

SUBCHAPTER 02B - SURFACE WATER AND WETLAND STANDARDS

SECTION .0200 - CLASSIFICATIONS AND WATER QUALITY STANDARDS APPLICABLE TO SURFACE WATERS AND WETLANDS OF NORTH CAROLINA

15A NCAC 02B .0208 STANDARDS FOR TOXIC SUBSTANCES AND TEMPERATURE

(a) Toxic Substances. The concentration of toxic substances, either alone or in combination with other wastes, in surface waters will not render waters injurious to aquatic life or wildlife, recreational activities, public health, or impair the waters for any designated uses. Specific standards for toxic substances to protect freshwater and tidal saltwater uses are listed in Rules .0211 and .0220 of this Section, respectively. Procedures for interpreting the narrative standard for toxic substances and numerical standards applicable to all waters are as follows:

(1) Aquatic life standards. The concentration of toxic substances will not result in chronic toxicity. Any levels in excess of the chronic value will be considered to result in chronic toxicity. In the absence of direct measurements of chronic toxicity, the concentration of toxic substances will not exceed the concentration specified by the fraction of the lowest LC50 value which predicts a no effect chronic level (as determined by the use of acceptable acute/chronic ratios). If an acceptable acute/chronic ratio is not available, then that toxic substance will not exceed one-one hundredth (0.01) of the lowest LC50 or if it is affirmatively demonstrated that a toxic substance has a half-life of less than 96 hours the maximum concentration will not exceed one-twentieth (0.05) of the lowest LC50.

(2) Human health standards. The concentration of toxic substances will not exceed the level necessary to protect human health through exposure routes of fish (or shellfish) tissue consumption, water consumption, or other route identified as appropriate for the water body.

(A) For non-carcinogens, these concentrations will be determined using a Reference Dose (RfD) as published by the U.S. Environmental Protection Agency pursuant to Section 304(a) of the Federal Water Pollution Control Act as amended or a RfD issued by the U.S. Environmental Protection Agency as listed in the Integrated Risk Information System (IRIS) file or a RfD approved by the Director after consultation with the State Health director. Water quality standards or criteria used to calculate water quality based effluent limitations to protect human health through the different exposure routes are determined as follows:

(i) Fish tissue consumption:
WQS = (RfD-DT) x Body Weight / (FCRxBCF)
where:
WQS = water quality standard or criteria;
RfD = reference dose;
DT = estimated non-fish dietary intake (when available);
FCR = fish consumption rate (assumed to be 6.5 gm/person-day);
BCF = bioconcentration factor, or bioaccumulation factor (BAF), as appropriate.
BCF or BAF values are based on U.S. Environmental Protection Agency publications pursuant to Section 304(a) of the Federal Water Pollution Control Act as amended, literature values, or site specific bioconcentration data approved by the Commission or its designee; FCR values are average consumption rates for a 70 Kg adult for the lifetime of the population; alternative FCR values may be used when it is considered necessary to protect localized populations which may be consuming fish at a higher rate;

(ii) Water consumption (including a correction for fish consumption):
WQS = (RfD-DT) x Body Weight / [WCR+(FCRxBCF)]
where:

WQS = water quality standard or criteria;
RfD = reference dose;
DT = estimated non-fish dietary intake (when available);
FCR = fish consumption rate (assumed to be 6.5 gm/person-day);
BCF = bioconcentration factor, or bioaccumulation factor (BAF), as appropriate;
WCR = water consumption rate (assumed to be 2 liters per day for adults).

To protect sensitive groups, exposure may be based on a 10 Kg child drinking one liter of water per day. Standards may also be based on drinking water standards based on the requirements of the Federal Safe Drinking Water Act [42 U.S.C. 300(f)(g)-1]. For non-carcinogens, specific numerical water quality standards have not been included in this Rule because water quality standards to protect aquatic life for all toxic substances for which standards have been considered are more stringent than numerical standards to protect human health from non-carcinogens through consumption of fish; standards to protect human health from non-carcinogens through water consumption are listed under the water supply classification standards in Rule .0211 of this Section; the equations listed in this Subparagraph will be used to develop water quality based effluent limitations on a case-by-case basis for toxic substances which are not presently included in the water quality standards. Alternative FCR values may be used when it is considered necessary to protect localized populations which may be consuming fish at a higher rate;

(B) For carcinogens, the concentrations of toxic substances will not result in unacceptable health risks and will be based on a Carcinogenic Potency Factor (CPF). An unacceptable health risk for cancer will be considered to be more than one case of cancer per one million people exposed (10-6 risk level). The CPF is a measure of the cancer-causing potency of a substance estimated by the upper 95 percent confidence limit of the slope of a straight line calculated by the Linearized Multistage Model or other appropriate model according to U.S. Environmental Protection Agency Guidelines [FR 51 (185): 33992-34003; and FR 45 (231 Part V): 79318-79379]. Water quality standards or criteria for water quality based effluent limitations are calculated using the procedures given in Subparagraphs (A) and (B) of this Rule. Standards to protect human health from carcinogens through water consumption are listed under the water supply classification standards in Rules .0212, .0214, .0215, .0216, and .0218 of this Section; standards to protect human health from carcinogens through the consumption of fish (and shellfish) only are applicable to all waters as follows:

~~(xi)~~(i) Aldrin: 0.136 ng/1:
(ii) Arsenic: 10 ug/l; (applicable only to freshwaters);
~~(ii)~~(iii) Benzene: 71.4 ug/1;
~~(i)~~(iv) Beryllium: 117 ng/1;
~~iii~~(v) Carbon tetrachloride: 4.42 ug/l;
~~xii~~(vi) Chlordane: 0.588 ng/1;
~~xiii~~(vii) DDT: 0.591 ng/1;
~~(xiv)~~(viii) Dieldrin: 0.144 ng/1;
~~(iv)~~(ix) Dioxin: 0.000014 ng/l;
~~xv~~(x) Heptachlor: 0.208 ng/1;
~~(v)~~(xi) Hexachlorobutadiene: 49.7 ug/l;
(xii) Methyl tert-butyl ether (MTBE): 1158 ug/l;
~~(vi)~~(xiii) Polychlorinated biphenyls: 0.079 ng/1.
~~vii~~(xiv)Polynuclear aromatic hydrocarbons: 31.1 ng/l;
~~viii~~(xv)Tetrachloroethane (1,1,2,2): 10.8 ug/l;
~~ix~~(xvi)Trichloroethylene: 92.4 ug/l;
~~x~~(xvii) Vinyl Chloride: 525 ug/l.

The values listed in (i) through (xv) in Subparagraph (B) of this Rule may be adjusted by the Commission or its designee on a case-by-case basis to account for site-specific or chemical-specific information pertaining to the assumed BCF, FCR or CPF values or other appropriate data.

(b) Temperature. The Commission may establish a water quality standard for temperature for specific water bodies other

than the standards specified in Rules .0211 and .0220 of this Section, upon a case-by-case determination that thermal discharges to these waters, which serve or may serve as a source and/or receptor of industrial cooling water provide for the maintenance of the designated best use throughout a reasonable portion of the water body. Such revisions of the temperature standard must be consistent with the provisions of Section 316(a) of the Federal Water Pollution Control Act as amended and will be noted in Rule .0218 of this Section.

Authority G.S. 143-214.1; 143-215.3(a)(1).

15A NCAC 02B .0211 FRESH SURFACE WATER QUALITY STANDARDS FOR CLASS C WATERS

General. The water quality standards for all fresh surface waters are the basic standards applicable to Class C waters. See Rule .0208 of this Section for standards for toxic substances and temperature. Additional and more stringent standards applicable to other specific freshwater classifications are specified in Rules .0212, .0214, .0215, .0216, .0217, .0218, .0219, .0223, .0224 and .0225 of this Section.

(1) Best Usage of Waters. Aquatic life propagation and maintenance of biological integrity (including fishing, and fish), wildlife, secondary recreation, agriculture and any other usage except for primary recreation or as a source of water supply for drinking, culinary or food processing purposes;

(2) Conditions Related to Best Usage. The waters shall be suitable for aquatic life propagation and maintenance of biological integrity, wildlife, secondary recreation, and agriculture; sources of water pollution which preclude any of these uses on either a short-term or long-term basis shall be considered to be violating a water quality standard;

(3) Quality standards applicable to all fresh surface waters:

(a) Chlorophyll a (corrected): not greater than 40 ug/l for lakes, reservoirs, and other waters subject to growths of macroscopic or microscopic vegetation not designated as trout waters, and not greater than 15 ug/l for lakes, reservoirs, and other waters subject to growths of macroscopic or microscopic vegetation designated as trout waters (not applicable to lakes and reservoirs less than 10 acres in surface area); the Commission or its designee may prohibit or limit any discharge of waste into surface waters if, in the opinion of the Director, the surface waters experience or the discharge would result in growths of microscopic or macroscopic vegetation such that the standards established pursuant to this Rule would be violated or the intended best usage of the waters would be impaired;

(b) Dissolved oxygen: not less than 6.0 mg/l for trout waters; for non-trout waters, not less than a daily average of 5.0 mg/l with a minimum instantaneous value of not less than 4.0 mg/l; swamp waters, lake coves or backwaters, and lake bottom waters may have lower values if caused by natural conditions;

(c) Floating solids; settleable solids; sludge deposits: only such amounts attributable to sewage, industrial wastes or other wastes as shall not make the water unsafe or unsuitable for aquatic life and wildlife or impair the waters for any designated uses;

(d) Gases, total dissolved: not greater than 110 percent of saturation;

(e) Organisms of the coliform group: fecal coliforms shall not exceed a geometric mean of 200/100ml (MF count) based upon at least five consecutive samples examined during any 30 day period, nor exceed 400/100ml in more than 20 percent of the samples examined during such period; violations of the fecal coliform standard are expected during rainfall events and, in some cases, this violation is expected to be caused by uncontrollable nonpoint source pollution; all coliform concentrations are to be analyzed using the membrane filter technique unless high turbidity or other adverse conditions necessitate the tube dilution method; in case of controversy over results, the MPN 5-tube dilution technique shall be used as the reference method;

(f) Oils; deleterious substances; colored or other wastes: only such amounts as shall not render the waters injurious to public health, secondary recreation or to aquatic life and wildlife or adversely affect the palatability of fish, aesthetic quality or impair the waters for any designated uses; for the purpose of implementing this Rule, oils, deleterious substances, colored or other wastes shall include but not be limited to substances that cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines pursuant to 40 CFR 110.4(a)-(b) which are hereby incorporated by reference including any subsequent amendments and additions. This material is available for inspection at the Department of Environment and

Natural Resources, Division of Water Quality, 512 North Salisbury Street, Raleigh, North Carolina. Copies may be obtained from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402-9325 at a cost of thirteen dollars ($13.00).

(g) pH: shall be normal for the waters in the area, which generally shall range between 6.0 and 9.0 except that swamp waters may have a pH as low as 4.3 if it is the result of natural conditions;

(h) Phenolic compounds: only such levels as shall not result in fish-flesh tainting or impairment of other best usage;

(i) Radioactive substances:

(i) Combined radium-226 and radium-228: the maximum average annual activity level (based on at least four samples collected quarterly) for combined radium-226 and radium-228 shall not exceed five picoCuries per liter;

(ii) Alpha Emitters: the average annual gross alpha particle activity (including radium-226, but excluding radon and uranium) shall not exceed 15 picoCuries per liter;

(iii) Beta Emitters: the maximum average annual activity level (based on at least four samples, collected quarterly) for strontium-90 shall not exceed eight picoCuries per liter; nor shall the average annual gross beta particle activity (excluding potassium-40 and other naturally occurring radio-nuclides) exceed 50 picoCuries per liter; nor shall the maximum average annual activity level for tritium exceed 20,000 picoCuries per liter;

(j) Temperature: not to exceed 2.8 degrees C (5.04 degrees F) above the natural water temperature, and in no case to exceed 29 degrees C (84.2 degrees F) for mountain and upper piedmont waters and 32 degrees C (89.6 degrees F) for lower piedmont and coastal plain waters. The temperature for trout waters shall not be increased by more than 0.5 degrees C (0.9 degrees F) due to the discharge of heated liquids, but in no case to exceed 20 degrees C (68 degrees F);

(k) Turbidity: the turbidity in the receiving water shall not exceed 50 Nephelometric Turbidity Units (NTU) in streams not designated as trout waters and 10 NTU in streams, lakes or reservoirs designated as trout waters; for lakes and reservoirs not designated as trout waters, the turbidity shall not exceed 25 NTU; if turbidity exceeds these levels due to natural background conditions, the existing turbidity level cannot be increased. Compliance with this turbidity standard can be met when land management activities employ Best Management Practices (BMPs) [as defined by Rule .0202 of this Section] recommended by the Designated Nonpoint Source Agency [as defined by Rule .0202 of this Section]. BMPs must be in full compliance with all specifications governing the proper design, installation, operation and maintenance of such BMPs;

(l) Toxic substances: numerical water quality standards (maximum permissible levels) for the protection of human health applicable to all fresh surface waters are in Rule .0208 of this Section; numerical water quality standards (maximum permissible levels) to protect aquatic life applicable to all fresh surface waters:

(i) Arsenic: 50 ug/l;

(ii) Beryllium: 6.5 ug/l;

(iii) Cadmium: 0.4 ug/l for trout waters and 2.0 ug/l for non-trout waters; attainment of these water quality standards in surface waters shall be based on measurement of total recoverable metals concentrations unless appropriate studies have been conducted to translate total recoverable metals to a toxic form. Studies used to determine the toxic form or translators must be designed according to the "Water Quality Standards Handbook Second Edition" published by the Environmental Protection Agency (EPA

823-B-94-005a) or "The Metals Translator: Guidance For Calculating a Total Recoverable Permit Limit From a Dissolved Criterion" published by the Environmental Protection Agency (EPA 823-B-96-007) which are hereby incorporated by reference including any subsequent amendments. The Director shall consider conformance to EPA guidance as well as the presence of environmental conditions that limit the applicability of translators in approving the use of metal translators.

(iv) Chlorine, total residual: 17 ug/l;

(v) Chromium, total recoverable: 50 ug/l;

(vi) Cyanide: 5.0 ug/l; unless site-specific criteria are developed based upon the aquatic life at the site utilizing The Recalculation Procedure in Appendix B of Appendix L in the Environmental Protection Agency's Water Quality Standards Handbook hereby incorporated by reference including any subsequent amendments;

(vii) Fluorides: 1.8 mg/l;

(viii) Lead, total recoverable: 25 ug/l; collection of data on sources, transport and fate of lead shall be required as part of the toxicity reduction evaluation for dischargers that are out of compliance with whole effluent toxicity testing requirements and the concentration of lead in the effluent is concomitantly determined to exceed an instream level of 3.1 ug/l from the discharge;

(ix) Mercury: 0.012 ug/l;

(x) Nickel: 88 ug/l; attainment of these water quality standards in surface waters shall be based on measurement of total recoverable metals concentrations unless appropriate studies have been conducted to translate total recoverable metals to a toxic form. Studies used to determine the toxic form or translators must be designed according to the "Water Quality Standards Handbook Second Edition" published by the Environmental Protection Agency (EPA 823-B-94-005a) or "The Metals Translator: Guidance For Calculating a Total Recoverable Permit Limit From a Dissolved Criterion" published by the Environmental Protection Agency (EPA 823-B-96-007) which are hereby incorporated by reference including any subsequent amendments. The Director shall consider conformance to EPA guidance as well as the presence of environmental conditions that limit the applicability of translators in approving the use of metal translators.

(xi) Pesticides:

(A) Aldrin: 0.002 ug/l;

(B) Chlordane: 0.004 ug/l;

(C) DDT: 0.001 ug/l;

(D) Demeton: 0.1 ug/l;

(E) Dieldrin: 0.002 ug/l;

(F) Endosulfan: 0.05 ug/l;

(G) Endrin: 0.002 ug/l;

(H) Guthion: 0.01 ug/l;

(I) Heptachlor: 0.004 ug/l;

(J) Lindane: 0.01 ug/l;

(K) Methoxychlor: 0.03 ug/l;

(L) Mirex: 0.001 ug/l;

(M) Parathion: 0.013 ug/l;

(N) Toxaphene: 0.0002 ug/l;

(xii) Polychlorinated biphenyls: 0.001 ug/l;

(xiii) Selenium: 5 ug/l;

(xiv) Toluene: 11 ug/l or 0.36 ug/l in trout waters;

(xv) Trialkyltin compounds: 0.008 ug/l expressed as tributyltin;

(4) Action Levels for Toxic Substances: if the Action Levels for any of the substances listed in this Subparagraph (which are generally not bioaccumulative and have variable toxicity to

aquatic life because of chemical form, solubility, stream characteristics or associated waste characteristics) are determined by the waste load allocation to be exceeded in a receiving water by a discharge under the specified low flow criterion for toxic substances (Rule .0206 in this Section), the discharger shall monitor the chemical or biological effects of the discharge; efforts shall be made by all dischargers to reduce or eliminate these substances from their effluents. Those substances for which Action Levels are listed in this Subparagraph shall be limited as appropriate in the NPDES permit based on the Action Levels listed in this Subparagraph if sufficient information (to be determined for metals by measurements of that portion of the dissolved instream concentration of the Action Level parameter attributable to a specific NPDES permitted discharge) exists to indicate that any of those substances may be a causative factor resulting in toxicity of the effluent. NPDES permit limits may be based on translation of the toxic form to total recoverable metals. Studies used to determine the toxic form or translators must be designed according to "Water Quality Standards Handbook Second Edition" published by the Environmental Protection Agency (EPA 823-B-94-005a) or "The Metals Translator: Guidance For Calculating a Total Recoverable Permit Limit From a Dissolved Criterion" published by the Environmental Protection Agency (EPA 823-B-96-007) which are hereby incorporated by reference including any subsequent amendments. The Director shall consider conformance to EPA guidance as well as the presence of environmental conditions that limit the applicability of translators in approving the use of metal translators.

(a) Copper: 7 ug/l;
(b) Iron: 1.0 mg/l;
(c) Silver: 0.06 ug/l;
(d) Zinc: 50 ug/l;
(e) Chloride: 230 mg/l;

For purposes other than consideration of NPDES permitting of point source discharges as described in this Subparagraph, the Action Levels in this Rule, as measured by an appropriate analytical technique, per 15A NCAC 02B .0103(a), shall be considered as numerical ambient water quality standards.

Authority G.S. 143-214.1; 143-215.3(a)(1).

15A NCAC 02B .0212 FRESH SURFACE WATER QUALITY STANDARDS FOR CLASS WS-I WATERS

The following water quality standards apply to surface waters within water supply watersheds that are classified WS-I. Water quality standards applicable to Class C waters as described in Rule .0211 of this Section also apply to Class WS-I waters.

(1) Best Usage of Waters. Source of water supply for drinking, culinary, or food-processing purposes for those users desiring maximum protection of their water supplies, waters located on land in public ownership, and any best usage specified for Class C waters.

(2) Conditions Related to the Best Usage. Waters of this class are protected water supplies within essentially natural and undeveloped watersheds in public ownership with no permitted point source dischargers except those specified in Rule .0104 of this Subchapter; waters within this class must be relatively unimpacted by nonpoint sources of pollution; land use management programs are required to protect waters from nonpoint source pollution; the waters, following treatment required by the Division of Environmental Health, shall meet the Maximum Contaminant Level concentrations considered safe for drinking, culinary, and food-processing purposes which are specified in the national drinking water regulations and in the North Carolina Rules Governing Public Water Supplies, 15A NCAC 18C .1500; sources of water pollution which preclude any of these uses on either a short-term or long-term basis shall be considered to be violating a water quality standard. The Class WS-I classification may be used to protect portions of Class WS-II, WS-III and WS-IV water supplies. For reclassifications occurring after the July 1, 1992 statewide reclassification, the more protective classification requested by local governments shall be considered by the Commission when all local governments having jurisdiction in the affected area(s) have adopted a resolution and the appropriate ordinances to protect the watershed or the Commission acts to protect a watershed when one or more local governments has failed to adopt necessary protection measures.

(3) Quality Standards Applicable to Class WS-I Waters:

(a) MBAS (Methylene-Blue Active Substances): not greater than 0.5 mg/l to protect the aesthetic qualities of water supplies and to prevent foaming;
(b) Nonpoint Source Pollution: none that would adversely impact the waters for use as a water supply or any other designated use;
(c) Organisms of coliform group: total coliforms not to exceed 50/100 ml (MF count) as a monthly geometric mean value in watersheds serving as unfiltered water supplies;
(d) Phenolic compounds: not greater than 1.0 ug/l (phenols) to protect

water supplies from taste and odor problems from chlorinated phenols;

(e) Sewage, industrial wastes: none except those specified in Subparagraph (2) of this Paragraph or Rule .0104 of this Subchapter;

(f) Solids, total dissolved: not greater than 500 mg/l;

(g) Total hardness: not greater than 100 mg/l as calcium carbonate;

(h) Toxic and other deleterious substances:

(i) Water quality standards (maximum permissible concentrations) to protect human health through water consumption and fish tissue consumption for non-carcinogens in Class WS-I waters:

(A) Barium: 1.0 mg/l;

(B) Chloride: 250 mg/l;

(C) Manganese: 200 ug/l;

(D) Nickel: 25 ug/l;

(E) Nitrate nitrogen: 10.0 mg/l;

(F) 2,4-D: 100 ug/l;

(G) 2,4,5-TP (Silvex): 10 ug/l;

(H) Sulfates: 250 mg/l;

(ii) Water quality standards (maximum permissible concentrations) to protect human health through water consumption and fish tissue consumption for carcinogens in Class WS-I waters:

(A) Aldrin: 0.127 ng/l;

(B) Arsenic: 10 ug/l;

(C) Benzene: 1.19 ug/l;

(D) Beryllium: 6.8 ng/l;

(E) Carbon tetrachloride: 0.254 ug/l;

(F) Chlordane: 0.575 ng/l;

(G) Chlorinated benzenes: 488 ug/l;

(H) DDT: 0.588 ng/l;

(I) Dieldrin: 0.135 ng/l;

(J) Dioxin: 0.000013 ng/l;

(K) Heptachlor: 0.208 ng/l;

(L) Hexachlorobutadiene: 0.445 ug/l;

(M) Methyl tert-butyl ether (MTBE): 12 ug/l;

(N) Polynuclear aromatic hydrocarbons: 2.8 ng/l;

(O) Tetrachloroethane (1,1,2,2): 0.172 ug/l;

(P) Tetrachloroethylene: 0.8 ug/l;

(Q) Trichloroethylene: 3.08 ug/l;

(R) Vinyl Chloride: 2 ug/l;

Authority G.S. 143-214.1; 143-215.3(a)(1).

15A NCAC 02B .0214 FRESH SURFACE WATER QUALITY STANDARDS FOR CLASS WS-II WATERS

The following water quality standards apply to surface waters within water supply watersheds that are classified WS-II. Water quality standards applicable to Class C waters as described in Rule .0211 of this Section also apply to Class WS-II waters.

(1) Best Usage of Waters. Source of water supply for drinking, culinary, or food-processing purposes for those users desiring maximum protection for their water supplies where a WS-I classification is not feasible and any best usage specified for Class C waters.

(2) Conditions Related to Best Usage. Waters of this class are protected as water supplies which are in predominantly undeveloped watersheds and meet average watershed development density levels as specified in Sub-Items (3)(b)(i)(A), (3)(b)(i)(B), (3)(b)(ii)(A) and (3)(b)(ii)(B) of this Rule; discharges which qualify for a General Permit pursuant to 15A NCAC 2H .0127, trout farm discharges, recycle (closed loop) systems that only discharge in response to 10-year storm events and other stormwater discharges are allowed in the entire watershed; new domestic and industrial discharges of treated wastewater are not allowed in the entire watershed; the waters, following treatment required by the Division of Environmental Health, shall meet the Maximum Contaminant Level concentrations considered safe for drinking, culinary, and food-processing purposes which are specified in the national drinking water regulations and in the North Carolina Rules Governing Public Water Supplies, 15A NCAC 18C .1500; sources of water pollution which preclude any of these uses on either a short-term or long-term basis shall be considered to be violating a water quality standard. The Class WS-II classification may be used to protect portions of Class WS-III and WS-IV water supplies. For reclassifications of these

portions of Class WS-III and WS-IV water supplies occurring after the July 1, 1992 statewide reclassification, the more protective classification requested by local governments shall be considered by the Commission when all local governments having jurisdiction in the affected area(s) have adopted a resolution and the appropriate ordinances to protect the watershed or the Commission acts to protect a watershed when one or more local governments has failed to adopt necessary protection measures.

(3) Quality Standards Applicable to Class WS-II Waters:

(a) Sewage, industrial wastes, non-process industrial wastes, or other wastes: none except for those specified in either Item (2) of this Rule and Rule .0104 of this Subchapter; and none which shall have an adverse effect on human health or which are not effectively treated to the satisfaction of the Commission and in accordance with the requirements of the Division of Environmental Health, North Carolina Department of Environment and Natural Resources; any discharger may be required upon request by the Commission to disclose all chemical constituents present or potentially present in their wastes and chemicals which could be spilled or be present in runoff from their facility which may have an adverse impact on downstream water quality; these facilities may be required to have spill and treatment failure control plans as well as perform special monitoring for toxic substances;

(b) Nonpoint Source and Stormwater Pollution: none that would adversely impact the waters for use as a water supply or any other designated use;

(i) Nonpoint Source and Stormwater Pollution Control Criteria For Entire Watershed:

(A) Low Density Option: Development density must be limited to either no more than one dwelling unit per acre of single family detached residential development (or 40,000 square foot lot excluding roadway right-of-way) or 12 percent built-upon area for all other residential and non-residential development in the watershed outside of the critical area; Stormwater runoff from the development shall be transported by vegetated conveyances to the maximum extent practicable;

(B) High Density Option: If new development exceeds the low density option requirements as stated in Sub-Item (3)(b)(i)(A) of this Rule, then engineered stormwater controls must be used to control runoff from the first inch of rainfall; new residential and non-residential development shall not exceed 30 percent built-upon area;

(C) Land within the watershed shall be deemed compliant with the density requirements if the following condition is met: The density of all existing development at the time of reclassification does not exceed the density requirement when densities are averaged throughout the entire watershed area at the time of classification;

(D) Cluster development is allowed on a

project-by-project basis as follows:

(I) overall density of the project meets associated density or stormwater control requirements of this Section;

(II) buffers meet the minimum statewide water supply watershed protection requirements;

(III) built-upon areas are designed and located to minimize stormwater runoff impact to the receiving waters, minimize concentrated stormwater flow, maximize the use of sheet flow through vegetated areas; and maximize the flow length through vegetated areas;

(IV) areas of concentrated development are located in upland areas and away, to the maximum extent practicabl, from surface waters and drainageways;

(V) remainder of tract to remain in vegetated or natural state;

(VI) area in the vegetated or natural state may be conveyed to a property owners association; a local government for preservation as a park or greenway; a conservation organization; or placed in a permanent conservation or farmland preservation easement;

(VII) a maintenance agreement for the vegetated or natural area shall be filed with the Register of Deeds; and

(VIII) cluster development that meets the applicable low density option requirements shall transport stormwater runoff from the development by vegetated conveyances to the maximum extent practicable;

(E) A maximum of 10 percent of each jurisdiction's portion of the watershed outside of the critical area as delineated on July 1, 1993 may be developed with new development projects and expansions of existing development of up to 70 percent built-upon surface area in addition to the new development approved in compliance with the appropriate

requirements of Sub-Item (3)(b)(i)(A) or Sub-Item (3)(b)(i)(B) of this Rule. For expansions to existing development, the existing built-upon surface area is not counted toward the allowed 70 percent built-upon surface area. A local government having jurisdiction within the watershed may transfer, in whole or in part, its right to the 10 percent/70 percent land area to another local government within the watershed upon submittal of a joint resolution and review by the Commission. When the water supply watershed is composed of public lands, such as National Forest land, local governments may count the public land acreage within the watershed outside of the critical area in calculating the acreage allowed under this provision. For local governments that do not choose to use the high density option in that WS-II watershed, each project must, to the maximum extent practicable, minimize built-upon surface area, direct stormwater runoff away from surface waters and incorporate best management practices to minimize water quality impacts; if the local government selects the high density development option within that WS-II watershed, then engineered stormwater controls must be employed for the new development;

(F) If local governments choose the high density development option which requires stormwater controls, then they shall assume ultimate responsibility for operation and maintenance of the required controls as outlined in Rule .0104 of this Subchapter;

(G) Minimum 100 foot vegetative buffer is required for all new development activities that exceed the low density option requirements as specified in Sub-Items (3)(b)(i)(A) and Sub-Item (3)(b)(ii)(A) of this Rule; otherwise a minimum 30 foot vegetative buffer for development activities is required along all perennial waters indicated on the most recent versions of U.S.G.S. 1:24,000 (7.5 minute) scale topographic maps or as determined by local government studies; nothing in

this Section shall stand as a bar to desirable artificial streambank or shoreline stabilization;

(H) No new development is allowed in the buffer; water dependent structures, or other structures such as flag poles, signs and security lights, which result in only diminimus increases in impervious area and public projects such as road crossings and greenways may be allowed where no practicable alternative exists; these activities shall minimize built-upon surface area, direct runoff away from the surface waters and maximize the utilization of BMPs;

(I) No NPDES permits shall be issued for landfills that discharge treated leachate;

(ii) Critical Area Nonpoint Source and Stormwater Pollution Control Criteria:

(A) Low Density Option: New development is limited to either no more than one dwelling unit of single family detached residential development per two acres (or 80,000 square foot lot excluding roadway right-of-way) or six percent built-upon area for all other residential and non-residential development; Stormwater runoff from the development shall be transported by vegetated conveyances to the maximum extent practicable;

(B) High Density Option: If new development density exceeds the low density requirements specified in Sub-Item (3)(b)(ii)(A) of this Rule, then engineered stormwater controls must be used to control runoff from the first inch of rainfall; new residential and non-residential development density not to exceed 24 percent built-upon area;

(C) No new permitted sites for land application of residuals or petroleum contaminated soils are allowed;

(D) No new landfills are allowed; (c) MBAS (Methylene-Blue Active Substances): not greater than 0.5 mg/l to protect the aesthetic qualities of water supplies and to prevent foaming;

(d) Odor producing substances contained in sewage or other wastes: only such amounts, whether alone or in combination with other substances or wastes, as will not cause: taste and odor difficulties in water supplies which cannot be corrected by treatment, impair the palatability of fish, or have a deleterious effect upon any best usage established for waters of this class;

(e) Phenolic compounds: not greater than 1.0 ug/l (phenols) to protect water supplies from taste and odor problems from chlorinated phenols;

(f) Total hardness: not greater than 100 mg/l as calcium carbonate;
(g) Total dissolved solids: not greater than 500 mg/l;
(h) Toxic and other deleterious substances:
  (i) Water quality standards (maximum permissible concentrations) to protect human health through water consumption and fish tissue consumption for non-carcinogens in Class WS-II waters:
    (A) Barium: 1.0 mg/l;
    (B) Chloride: 250 mg/l;
    (C) Manganese: 200 ug/l;
    (D) Nickel: 25 ug/l;
    (E) Nitrate nitrogen: 10 mg/l;
    (F) 2,4-D: 100 ug/l;
    (G) 2,4,5-TP: 10 ug/l;
    (H) Sulfates: 250 mg/l;
  (ii) Water quality standards (maximum permissible concentrations) to protect human health through water consumption and fish tissue consumption for carcinogens in Class WS-II waters:
    (A) Aldrin: 0.127 ng/l;
    (B) Arsenic: 10 ug/l;
    (C) Benzene: 1.19 ug/l;
    (D) Beryllium: 6.8 ng/l;
    (E) Carbon tetrachloride: 0.254 ug/l;
    (F) Chlordane: 0.575 ng/l;
    (G) Chlorinated benzenes: 488 ug/l;
    (H) DDT: 0.588 ng/l;
    (I) Dieldrin: 0.135 ng/l;
    (J) Dioxin: 0.000013 ng/l;
    (K) Heptachlor: 0.208 ng/l;
    (L) Hexachlorobutadiene: 0.445 ug/l;
    (M) Methyl tert-butyl ether (MTBE): 12 ug/l;
    (N) Polynuclear aromatic hydrocarbons: 2.8 ng/l;
    (O) Tetrachloroethane (1,1,2,2): 0.172 ug/l;
    (P) Tetrachloroethylene: 0.8 ug/l;
    (Q) Trichloroethylene: 3.08 ug/l;
    (R) Vinyl Chloride: 2 ug/l.

Authority G.S. 143-214.1; 143-215.3(a)(1).

15A NCAC 02B .0215 FRESH SURFACE WATER QUALITY STANDARDS FOR CLASS WS-III WATERS

The following water quality standards apply to surface water supply waters that are classified WS-III. Water quality standards applicable to Class C waters as described in Rule .0211 of this Section also apply to Class WS-III waters.

(1) Best Usage of Waters. Source of water supply for drinking, culinary, or food-processing purposes for those users where a more protective WS-I or WS-II classification is not feasible and any other best usage specified for Class C waters;
(2) Conditions Related to Best Usage. Waters of this class are protected as water supplies which are generally in low to moderately developed watersheds and meet average watershed development density levels as specified in Sub-Items (3)(b)(i)(A), (3)(b)(i)(B), (3)(b)(ii)(A) and (3)(b)(ii)(B) of this Rule; discharges that qualify for a General Permit pursuant to 15A NCAC 2H .0127, trout farm discharges, recycle (closed loop) systems that only discharge in response to 10-year storm events, and other stormwater discharges are allowed in the entire watershed; treated domestic wastewater discharges are allowed in the entire watershed but no new domestic wastewater discharges are allowed in the critical area; no new industrial wastewater discharges except non-process industrial discharges are allowed in the entire watershed; the waters, following treatment required by the Division of Environmental Health, shall meet the Maximum Contaminant Level concentrations considered safe for drinking, culinary, or food-processing purposes which are specified in the national drinking water regulations and in the North Carolina Rules Governing Public Water Supplies, 15A NCAC 18C .1500; sources of water pollution which preclude any of these uses on either a short-term or long-term basis shall be considered to be violating a water quality standard; the Class WS-III classification may be used to protect portions of Class WS-IV water supplies. For reclassifications of these portions of WS-IV water supplies occurring after the July 1, 1992 statewide reclassification, the more protective

classification requested by local governments shall be considered by the Commission when all local governments having jurisdiction in the affected area(s) have adopted a resolution and the appropriate ordinances to protect the watershed or the Commission acts to protect a watershed when one or more local governments has failed to adopt necessary protection measures.

(3) Quality Standards Applicable to Class WS-III Waters:

(a) Sewage, industrial wastes, non-process industrial wastes, or other wastes: none except for those specified in Item (2) of this Rule and Rule .0104 of this Subchapter; and none which shall have an adverse effect on human health or which are not effectively treated to the satisfaction of the Commission and in accordance with the requirements of the Division of Environmental Health, North Carolina Department of Environment and Natural Resources; any discharger may be required by the Commission to disclose all chemical constituents present or potentially present in their wastes and chemicals which could be spilled or be present in runoff from their facility which may have an adverse impact on downstream water quality; these facilities may be required to have spill and treatment failure control plans as well as perform special monitoring for toxic substances;

(b) Nonpoint Source and Stormwater Pollution: none that would adversely impact the waters for use as water supply or any other designated use;

(i) Nonpoint Source and Stormwater Pollution Control Criteria For Entire Watershed:

(A) Low Density Option: Development density must be limited to either no more than two dwelling units of single family detached residential development per acre (or 20,000 square foot lot excluding roadway right-of-way) or 24 percent built-upon area for all other residential and non-residential development in watershed outside of the critical area; Stormwater runoff from the development shall be transported by vegetated conveyances to the maximum extent practicable;

(B) High Density Option: If new development density exceeds the low density option requirements specified in Sub-Item (3)(b)(i)(A) of this Rule then development must control runoff from the first inch of rainfall; new residential and non-residential development shall not exceed 50 percent built-upon area;

(C) Land within the watershed shall be deemed compliant with the density requirements if the following condition is met: The density of all existing development at the time of reclassification does not exceed the density requirement when densities are averaged throughout the entire watershed area;

(D) Cluster development is allowed on a project-by-project basis as follows:

(I) overall density of the project meets associated density or stormwater

control requirements of this Section;

(II) buffers meet the minimum statewide water supply watershed protection requirements;

(III) built-upon areas are designed and located to minimize stormwater runoff impact to the receiving waters, minimize concentrated stormwater flow, maximize the use of sheet flow through vegetated areas; and maximize the flow length through vegetated areas;

(IV) areas of concentrated development are located in upland areas and away, to the maximum extent practicable, from surface waters and drainageways;

(V) remainder of tract to remain in vegetated or natural state;

(VI) area in the vegetated or natural state may be conveyed to a property owners association; a local government for preservation as a park or greenway; a conservation organization; or placed in a permanent conservation or farmland preservation easement;

(VII) a maintenance agreement for the vegetated or natural area shall be filed with the Register of Deeds; and

(VIII) cluster development that meets the applicable low density option requirements shall transport stormwater runoff from the development by vegetated conveyances to the maximum extent practicable;

(E) A maximum of 10 percent of each jurisdiction's portion of the watershed outside of the critical area as delineated on July 1, 1993 may be developed with new development projects and expansions of existing development of up to 70 percent built-upon surface area in addition to the new development approved in compliance with the appropriate requirements of Sub-Item (3)(b)(i)(A) or Sub-Item (3)(b)(i)(B) of this Rule. For expansions to existing

development, the existing built-upon surface area is not counted toward the allowed 70 percent built-upon surface area. A local government having jurisdiction within the watershed may transfer, in whole or in part, its right to the 10 percent/70 percent land area to another local government within the watershed upon submittal of a joint resolution and review by the Commission. When the water supply watershed is composed of public lands, such as National Forest land, local governments may count the public land acreage within the watershed outside of the critical area in figuring the acreage allowed under this provision. For local governments that do not choose to use the high density option in that WS-III watershed, each project must, to the maximum extent practicable, minimize built-upon surface area, direct stormwater runoff away from surface waters, and incorporate best management practices to minimize water quality impacts; if the local government selects the high density development option within that WS-III watershed, then engineered stormwater controls must be employed for the new development;

(F) If local governments choose the high density development option which requires engineered stormwater controls, then they shall assume ultimate responsibility for operation and maintenance of the required controls as outlined in Rule .0104 of this Subchapter;

(G) Minimum 100 foot vegetative buffer is required for all new development activities that exceed the low density requirements as specified in Sub-Item (3)(b)(i)(A) and Sub-Item (3)(b)(ii)(A) of this Rule, otherwise a minimum 30 foot vegetative buffer for development is required along all perennial waters indicated on the most recent versions of U.S.G.S. 1:24,000 (7.5 minute) scale topographic maps or as determined by local government studies; nothing in this Section shall stand as a bar to artificial streambank or shoreline stabilization;

(H) No new development is allowed in the buffer; water

dependent structures, or other structures such as flag poles, signs and security lights, which result in only diminimus increases in impervious area and public projects such as road crossings and greenways may be allowed where no practicable alternative exists; these activities shall minimize built-upon surface area, direct runoff away from surface waters and maximize the utilization of BMPs;

(I) No NPDES permits shall be issued for landfills that discharge treated leachate;

(ii) Critical Area Nonpoint Source and Stormwater Pollution Control Criteria:

(A) Low Density Option: New development limited to either no more than one dwelling unit of single family detached residential development per acre (or 40,000 square foot lot excluding roadway right-of-way) or 12 percent built-upon area for all other residential and non-residential development; Stormwater runoff from the development shall be transported by vegetated conveyances to the maximum extent practicable;

(B) High Density Option: If new development exceeds the low density requirements specified in Sub-Item (3)(b)(ii)(A) of this Rule, then engineered stormwater controls must be used to control runoff from the first inch of rainfall; development shall not exceed 30 percent built-upon area;

(C) No new permitted sites for land application of residuals or petroleum contaminated soils are allowed;

(D) No new landfills are allowed;

(c) MBAS (Methylene-Blue Active Substances): not greater than 0.5 mg/l to protect the aesthetic qualities of water supplies and to prevent foaming;

(d) Odor producing substances contained in sewage, industrial wastes, or other wastes: only such amounts, whether alone or in combination with other substances or wastes, as shall not cause taste and odor difficulties in water supplies which cannot be corrected by treatment, impair the palatability of fish, or have a deleterious effect upon any best usage established for waters of this class;

(e) Phenolic compounds: not greater than 1.0 ug/l (phenols) to protect water supplies from taste and odor problems from chlorinated phenols;

(f) Total hardness: not greater than 100 mg/l as calcium carbonate;

(g) Total dissolved solids: not greater than 500 mg/l;

(h) Toxic and other deleterious substances:

(i) Water quality standards (maximum permissible concentrations) to protect human health through water consumption and fish tissue consumption for non-carcinogens in Class WS-III waters:

(A) Barium: 1.0 mg/l;
(B) Chloride: 250 mg/l;
(C) Manganese: 200 ug/l;
(D) Nickel: 25 ug/l;
(E) Nitrate nitrogen: 10 mg/l;
(F) 2,4-D: 100 ug/l;
(G) 2,4,5-TP (Silvex): 10 ug/l;
(H) Sulfates: 250 mg/l;

(ii) Water quality standards (maximum permissible concentrations) to protect human health through water consumption and fish tissue consumption for carcinogens in Class WS-III waters:
(A) Aldrin: 0.127 ng/l;
(B) Arsenic: 10 ug/l;
(C) Benzene: 1.19 ug/l;
(D) Beryllium: 6.8 ng/l;
(E) Carbon tetrachloride: 0.254 ug/l;
(F) Chlordane: 0.575 ng/l;
(G) Chlorinated benzenes: 488 ug/l;
(H) DDT: 0.588 ng/l;
(I) Dieldrin: 0.135 ng/l;
(J) Dioxin: 0.000013 ng/l;
(K) Heptachlor: 0.208 ng/l;
(L) Hexachlorobutadiene: 0.445 ug/l;
(M) Methyl tert-butyl ether (MTBE): 12 ug/l;
(N) Polynuclear aromatic hydrocarbons: 2.8 ng/l;
(O) Tetrachloroethane (1,1,2,2): 0.172 ug/l;
(P) Tetrachloroethylene: 0.8 ug/l;
(Q) Trichloroethylene: 3.08 ug/l;
(R) Vinyl Chloride: 2 ug/l;

Authority G.S. 143-214.1; 143-215.3(a)(1).

15A NCAC 02B .0216 FRESH SURFACE WATER QUALITY STANDARDS FOR WS-IV WATERS

The following water quality standards apply to surface water supply waters that are classified WS-IV. Water quality standards applicable to Class C waters as described in Rule .0211 of this Section also apply to Class WS-IV waters.

(1) Best Usage of Waters. Source of water supply for drinking, culinary, or food-processing purposes for those users where a more protective WS-I, WS-II or WS-III classification is not feasible and any other best usage specified for Class C waters.

(2) Conditions Related to Best Usage. Waters of this class are protected as water supplies which are generally in moderately to highly developed watersheds or protected areas and meet average watershed development density levels as specified in Sub-Items (3)(b)(i)(A), (3)(b)(i)(B), (3)(b)(ii)(A) and (3)(b)(ii)(B) of this Rule. Discharges which qualify for a General Permit pursuant to 15A NCAC 02H .0127, trout farm discharges, recycle (closed loop) systems that only discharge in response to 10-year storm events, other stormwater discharges and domestic wastewater discharges shall be allowed in the protected and critical areas. Treated industrial wastewater discharges are allowed in the protected and critical areas; however, new industrial wastewater discharges in the critical area shall be required to meet the provisions of 15A NCAC 02B .0224(1)(b)(iv), (v) and (vii), and 15A NCAC 02B .0203. New industrial connections and expansions to existing municipal discharges with a pretreatment program pursuant to 15A NCAC 02H .0904 are the allowed. The waters, following treatment required by the Division of Environmental Health, shall meet the Maximum Contaminant Level concentrations considered safe for drinking, culinary, or food-processing purposes which are specified in the national drinking water regulations and in the North Carolina Rules Governing Public Water Supplies, 15A NCAC 18C .1500. Sources of water pollution which preclude any of these uses on either a short-term or long-term basis shall be considered to be violating a water quality standard. The Class WS-II or WS-III classifications may be used to protect portions of Class WS-IV water supplies. For reclassifications of these portions of WS-IV water supplies occurring after the July 1, 1992 statewide reclassification, the more protective classification requested by local governments shall be considered by the Commission when all local governments having jurisdiction in the affected area(s) have adopted a resolution and the appropriate ordinances to protect the watershed or the Commission acts to protect a watershed when one or more local governments has failed to adopt necessary protection measures.

(3) Quality Standards Applicable to Class WS-IV Waters:

(a) Sewage, industrial wastes, non-process industrial wastes, or other wastes: none shall be allowed except for those specified in Item (2) of this Rule and Rule .0104 of this Subchapter and none shall be allowed which shall have an adverse effect on human health or which are not effectively treated to the satisfaction of the Commission and in accordance with the requirements of the Division of Environmental Health, North Carolina Department of Environment and Natural Resources. Any discharges or industrial users subject to pretreatment standards may be required by the Commission to disclose all chemical constituents present or potentially present in their wastes and chemicals which could be spilled or be present in runoff from their facility which may have an adverse impact on downstream water supplies. These facilities may be required to have spill and treatment failure control plans as well as perform special monitoring for toxic substances;

(b) Nonpoint Source and Stormwater Pollution: none shall be allowed that would adversely impact the waters for use as water supply or any other designated use.

(i) Nonpoint Source and Stormwater Pollution Control Criteria For Entire Watershed or Protected Area:

(A) Low Density Option: Development activities which require a Sedimentation/Erosion Control Plan in accordance with 15A NCAC 04 established by the North Carolina Sedimentation Control Commission or approved local government programs as delegated by the Sedimentation Control Commission shall be limited to no more than either: two dwelling units of single family detached development per acre (or 20,000 square foot lot excluding roadway right-of-way) or 24 percent built-upon on area for all other residential and non-residential development; or three dwelling units per acre or 36 percent built-upon area for projects without curb and gutter street systems in the protected area outside of the critical area; Stormwater runoff from the development shall be transported by vegetated conveyances to the maximum extent practicable;

(B) High Density Option: If new development activities which require a Sedimentation/ Erosion Control Plan exceed the low density requirements of Sub-Item (3)(b)(i)(A) of this Rule then development shall control the runoff from the first inch of rainfall; new residential and non-residential development shall not exceed 70 percent built-upon area;

(C) Land within the critical and protected area shall be deemed compliant with the

density requirements if the following condition is met: The density of all existing development at the time of reclassification does not exceed the density requirement when densities are averaged throughout the entire area;

(D) Cluster development shall be allowed on a project-by-project basis as follows:

(I) overall density of the project meets associated density or stormwater control requirements of this Section;

(II) buffers meet the minimum statewide water supply watershed protection requirements;

(III) built-upon areas are designed and located to minimize stormwater runoff impact to the receiving waters, minimize concentrated stormwater flow, maximize the use of sheet flow through vegetated areas, and maximize the flow length through vegetated areas;

(IV) areas of concentrated development are located in upland areas and away, to the maximum extent practicable, from surface waters and drainageways;

(V) remainder of tract to remain in vegetated or natural state;

(VI) area in the vegetated or natural state may be conveyed to a property owners association; a local government for preservation as a park or greenway; a conservation organization; or placed in a permanent conservation or farmland preservation easement;

(VII) a maintenance agreement for the vegetated or natural area shall be filed with the Register of Deeds, and;

(VIII) cluster development that meets the applicable low density option requirements shall transport stormwater runoff from the development by vegetated conveyances to the maximum extent practicable;

(E) If local governments choose the high density development option

which requires engineered stormwater controls, then they shall assume ultimate responsibility for operation and maintenance of the required controls as outlined in Rule .0104 of this Subchapter;

(F) Minimum 100 foot vegetative buffer is required for all new development activities that exceed the low density option requirements as specified in Sub-Item (3)(b)(i)(A) or Sub-Item (3)(b)(ii)(A) of this Rule, otherwise a minimum 30 foot vegetative buffer for development shall be required along all perennial waters indicated on the most recent versions of U.S.G.S. 1:24,000 (7.5 minute) scale topographic maps or as determined by local government studies;

(G) No new development shall be allowed in the buffer; water dependent structures, or other structures, such as flag poles, signs and security lights, which result in only diminimus increases in impervious area and public projects such as road crossings and greenways may be allowed where no practicable alternative exists; these activities shall minimize built-upon surface area, divert runoff away from surface waters and maximize the utilization of BMPs;

(H) For local governments that do not use the high density option, a maximum of 10 percent of each jurisdiction's portion of the watershed outside of the critical area as delineated on July 1, 1995 may be developed with new development projects and expansions to existing development of up to 70 percent built-upon surface area in addition to the new development approved in compliance with the appropriate requirements of Sub-Item (3)(b)(i)(A) of this Rule. For expansions to existing development, the existing built-upon surface area shall not be counted toward the allowed 70 percent built-upon surface area. A local government having jurisdiction within the watershed may transfer, in whole or in part, its right to the 10 percent/70 percent land area to another local government within the watershed upon submittal of a joint resolution for review by the

Commission. When the designated water supply watershed area is composed of public land, such as National Forest land, local governments may count the public land acreage within the designated watershed area outside of the critical area in figuring the acreage allowed under this provision. Each project shall, to the maximum extent practicable, minimize built-upon surface area, direct stormwater runoff away from surface waters and incorporate best management practices to minimize water quality impacts;

(ii) Critical Area Nonpoint Source and Stormwater Pollution Control Criteria:

(A) Low Density Option: New development activities which require a Sedimentation/Erosion Control Plan in accordance with 15A NCAC 04 established by the North Carolina Sedimentation Control Commission or approved local government programs as delegated by the Sedimentation Control Commission shall be limited to no more than two dwelling units of single family detached development per acre (or 20,000 square foot lot excluding roadway right-of-way) or 24 percent built-upon area for all other residential and non-residential development; Stormwater runoff from the development shall be transported by vegetated conveyances to the maximum extent practicable;

(B) High Density Option: If new development density exceeds the low density requirements specified in Sub-Item (3)(b)(ii)(A) of this Rule engineered stormwater controls shall be used to control runoff from the first inch of rainfall; new residential and non-residential development shall not exceed 50 percent built-upon area;

(C) No new permitted sites for land application of residuals or petroleum contaminated soils shall be allowed;

(D) No new landfills shall be allowed;

(c) MBAS (Methylene-Blue Active Substances): not greater than 0.5 mg/l to protect the aesthetic qualities of water supplies and to prevent foaming;

(d) Odor producing substances contained in sewage, industrial wastes, or other wastes: only such amounts, whether alone or in combination with other substances or waste, as will not cause taste and odor difficulties in water supplies which can not be corrected by treatment, impair the palatability

of fish, or have a deleterious effect upon any best usage established for waters of this class;

(e) Phenolic compounds: not greater than 1.0 ug/l (phenols) to protect water supplies from taste and odor problems due to chlorinated phenols shall be allowed. Specific phenolic compounds may be given a different limit if it is demonstrated not to cause taste and odor problems and not to be detrimental to other best usage;

(f) Total hardness shall not exceed 100 mg/l as calcium carbonate;

(g) Total dissolved solids shall not exceed 500 mg/l;

(h) Toxic and other deleterious substances:

(i) Water quality standards (maximum permissible concentrations) to protect human health through water consumption and fish tissue consumption for non-carcinogens in Class WS-IV waters shall be allowed as follows:

(A) Barium: 1.0 mg/l;
(B) Chloride: 250 mg/l;
(C) Manganese: 200 ug/l;
(D) Nickel: 25 ug/l;
(E) Nitrate nitrogen: 10.0 mg/l;
(F) 2,4-D: 100 ug/l;
(G) 2,4,5-TP (Silvex): 10 ug/l;
(H) Sulfates: 250 mg/l;

(ii) Water quality standards (maximum permissible concentrations) to protect human health through water consumption and fish tissue consumption for carcinogens in Class WS-IV waters shall be allowed as follows:

(A) Aldrin: 0.127 ng/l;
(B) Arsenic: 10 ug/l;
(C) Benzene: 1.19 ug/l;
(D) Beryllium: 6.8 ng/l;
(E) Carbon tetrachloride: 0.254 ug/l;
(F) Chlordane: 0.575 ng/l;
(G) Chlorinated benzenes: 488 ug/l;
(H) DDT: 0.588 ng/l;
(I) Dieldrin: 0.135 ng/l;
(J) Dioxin: 0.000013 ng/l;
(K) Heptachlor: 0.208 ng/l;
(L) Hexachlorobutadiene: 0.445 ug/l;
(M) Methyl tert-butyl ether (MTBE): 12 ug/l;
(N) Polynuclear aromatic hydrocarbons: 2.8 ng/l;
(O) Tetrachloroethane (1,1,2,2): 0.172 ug/l;
(P) Tetrachloroethylene: 0.8 ug/l;
(Q) Trichloroethylene: 3.08 ug/l;
(R) Vinyl Chloride: 2 ug/l;

Authority G.S. 143-214.1; 143-215.3(a)(1).

15A NCAC 02B .0218 FRESH SURFACE WATER QUALITY STANDARDS FOR CLASS WS-V WATERS

The following water quality standards apply to surface water supply waters that are classified WS-V. Water quality standards applicable to Class C waters as described in Rule .0211 of this Section also apply to Class WS-V waters.

(1) Best Usage of Waters. Waters protected as water supplies which are generally upstream and draining to Class WS-IV waters or waters previously used for drinking water supply purposes or waters used by industry to supply their employees, but not municipalities or counties, with a raw drinking water supply source, although this type of use is not restricted to WS-V classification. Class WS-V waters are suitable for all Class C uses. The Commission may consider a more protective classification for the water supply if a resolution requesting a more protective classification is submitted from all local governments having land use jurisdiction within the affected watershed; no categorical restrictions on watershed development or wastewater discharges are required, however, the Commission or its designee may apply appropriate management requirements as deemed necessary for the protection of waters downstream of receiving waters (15A NCAC 2B .0203).

(2) Conditions Related to Best Usage. Waters of this class are protected water supplies; the waters, following treatment required by the Division of Environmental Health, shall meet the Maximum Contaminant Level

concentrations considered safe for drinking, culinary, or food-processing purposes which are specified in the national drinking water regulations and in the North Carolina Rules Governing Public Water Supplies, 15A NCAC 18C .1500; sources of water pollution which preclude any of these uses on either a short-term or long-term basis shall be considered to be violating a water quality standard.

(3) Quality Standards Applicable to Class WS-V Waters:

(a) Sewage, industrial wastes, non-process industrial wastes, or other wastes: none which shall have an adverse effect on human health or which are not effectively treated to the satisfaction of the Commission and in accordance with the requirements of the Division of Environmental Health, North Carolina Department of Environment and Natural Resources; any discharges or industrial users subject to pretreatment standards may be required by the Commission to disclose all chemical constituents present or potentially present in their wastes and chemicals which could be spilled or be present in runoff from their facility which may have an adverse impact on downstream water supplies; these facilities may be required to have spill and treatment failure control plans as well as perform special monitoring for toxic substances;

(b) MBAS (Methylene-Blue Active Substances): not greater than 0.5 mg/l to protect the aesthetic qualities of water supplies and to prevent foaming;

(c) Nonpoint Source and Stormwater Pollution: none that would adversely impact the waters for use as water supply or any other designated use;

(d) Odor producing substances contained in sewage, industrial wastes, or other wastes: only such amounts, whether alone or in combination with other substances or waste, as will not cause taste and odor difficulties in water supplies which can not be corrected by treatment, impair the palatability of fish, or have a deleterious effect upon any best usage established for waters of this class;

(e) Phenolic compounds: not greater than 1.0 ug/l (phenols) to protect water supplies from taste and odor problems due to chlorinated phenols; specific phenolic compounds may be given a different limit if it is demonstrated not to cause taste and odor problems and not to be detrimental to other best usage;

(f) Total hardness: not greater than 100 mg/l as calcium carbonate;

(g) Total dissolved solids: not greater than 500 mg/l;

(h) Toxic and other deleterious substances:

(i) Water quality standards (maximum permissible concentrations) to protect human health through water consumption and fish tissue consumption for non-carcinogens in Class WS-V waters:

(A) Barium: 1.0 mg/l;
(B) Chloride: 250 mg/l;
(C) Manganese: 200 ug/l;
(D) Nickel: 25 ug/l;
(E) Nitrate nitrogen: 10.0 mg/l;
(F) 2,4-D: 100 ug/l;
(G) 2,4,5-TP (Silvex): 10 ug/l;
(H) Sulfates: 250 mg/l.

(ii) Water quality standards (maximum permissible concentrations) to protect human health through water consumption and fish tissue consumption for carcinogens in Class WS-V waters:

(A) Aldrin: 0.127 ng/l;
(B) Arsenic: 10 ug/l;
(C) Benzene: 1.19 ug/l;
(D) Beryllium: 6.8 ng/l;
(E) Carbon tetrachloride: 0.254 ug/l;
(F) Chlordane: 0.575 ng/l;
(G) Chlorinated benzenes: 488 ug/l;
(H) DDT: 0.588 ng/l;
(I) Dieldrin: 0.135 ng/l;
(J) Dioxin: 0.000013 ng/l;
(K) Heptachlor: 0.208 ng/l;
(L) Hexachlorobutadiene: 0.445 ug/l;

(M) Methyl tert-butyl ether (MTBE): 12 ug/l;
(N) Polynuclear aromatic hydrocarbons: 2.8 ng/l;
(O) Tetrachloroethane (1,1,2,2): 0.172 ug/l;
(P) Tetrachloroethylene: 0.8 ug/l;
(Q) Trichloroethylene: 3.08 ug/l;
(R) Vinyl Chloride: 2 ug/l;

Authority G.S. 143-214.1; 143-215.3(a)(1).

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***Notice** is hereby given in accordance with G.S. 150B-21.2 that the NC Wildlife Resources Commission intends to adopt the rules cited as 15A NCAC 10F .0369-.0370. Notice of Rule-making Proceedings was published in the Register on May 1, 2002.*

Proposed Effective Date: *October 4, 2002*

Public Hearing:
Date: *August 21, 2002*
Time: *7:00 p.m.*
Location: *The Courthouse. 201 S. Second Street. Albemarle, NC*

Reason for Proposed Action: *Alcoa Power Generating Inc. initiated this rule-making action pursuant to G.S. 150B-20.*

Comment Procedures: *Interested persons may present their views either orally or in writing at the hearing. In addition, the record of hearing will be open for receipt of written comments through September 23, 2002. Such written comments must be mailed to the NC Wildlife Resources Commission, 1701 Mail Service Center, Raleigh, NC 27699-1701.*

Fiscal Impact
☐ **State**
☐ **Local**
☐ **Substantive (**>$5,000,000**)**
☒ **None**

CHAPTER 10 - WILDLIFE RESOURCES AND WATER SAFETY

SUBCHAPTER 10F - MOTORBOATS AND WATER SAFETY

SECTION .0300 - LOCAL WATER SAFETY REGULATIONS

15A NCAC 10F .0369 HIGH ROCK DAM IN YADKIN RIVER IN ROWAN AND DAVIDSON COUNTIES

(a) Regulated Area. This Rule applies only to the area 100 feet upstream or downstream from the dam known as High Rock Dam across the Yadkin River in Rowan and Davidson Counties, and to the structures, abutments and equipment of this dam and its associated powerhouse.
(b) Swimming or boating. No swimming or other entry of a person in or upon a boat, raft or other floating object shall be permitted within 100 feet onto the watercourse downstream or the surface waters upstream of the High Rock Dam.
(c) Fishing. No person shall fish from the High Rock Dam or from any powerhouse, structure, abutment or equipment associated with the dam except for those at designated public access areas.
(d) Paragraphs (a) and (b) shall not apply to persons who, with consent of Alcoa Power Generating Inc. require access for the purpose of maintaining or repairing facilities of Alcoa Power Generating Inc.
(e) Placement and Maintenance of Markers. The Yadkin Division of Alcoa Power Generating, Inc. is designated as a suitable entity for placement and maintenance of buoys and other signs indicating the areas in which boating, swimming and fishing are prohibited by this Rule.

Authority G.S. 75A-3; 75A-15.

15A NCAC 10F .0370 NARROWS DAM IN YADKIN RIVER IN STANLY AND MONTGOMERY COUNTIES

(a) Regulated Area. This Rule applies only to the area 100 feet upstream of the Narrows Dam and 100 feet downstream of the Narrows Dams Bridge across the Yadkin River in Stanly and Montgomery Counties, and to the structures, abutments and equipment of this dam and its associated powerhouses.
(b) Swimming or boating. No swimming or other entry of a person in or upon a boat, raft or other floating object shall be permitted within 100 feet of the upstream of the Narrows Dam and 100 feet downstream of the Narrows Dam Bridge across the Yadkin River in Stanly and Montgomery Counties.
(c) Fishing. No person shall fish from the Narrows Dam or from any powerhouse, structure, abutment or equipment associated with the dam except for those at designated public access areas.
(d) Paragraphs (a) and (b) shall not apply to persons who, with consent of Alcoa Power Generating Inc., require access for the purpose of maintaining or repairing facilities of Alcoa Power Generating Inc.
(e) Placement and Maintenance of Markers. The Yadkin Division of Alcoa Power Generating, Inc. is designated as a suitable entity for placement and maintenance of buoys and other signs indicating the areas in which boating, swimming and fishing are prohibited by this Rule.

Authority G.S. 75A-3; 75A-15.

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 01 – DEPARTMENT OF ADMINISTRATION

Rule-making Agency: *Department of Administration*

Rule Citation: *01 NCAC 30H .0101-.0102, .0201-.0205, .0301-.0305, .0401-.0404, .0501-.0502, .0601, .0701, .0801, .0901, .1001*

Effective Date: *July 1, 2002*

Findings Reviewed and Approved by: *Beecher R. Gray*

Authority for the rulemaking: *G.S. 143-135.2611; S.L. 2001-496, s. 14(b)*

Reason for Proposed Action: *S.L. 2002-496, s. 14(b) provides that the State Building Commission shall adopt temporary rules for conducting mediated settlement conferences by March 1, 2002. The rules were adopted by the State Building Commission on February 26, 2002.*

Comment Procedures: *Any person interested in making written comments to these adopted rules should submit such comments to T. Brooks Skinner, Jr., General Counsel, NC Department of Administration, 116 W. Jones St., Raleigh, NC 27603-8003, phone (919) 807-9571, email brooks.skinner@ncmail.net.*

CHAPTER 30 – STATE CONSTRUCTION

SUBCHAPTER 30H – MEDIATED SETTLEMENT CONFERENCES

SECTION .0100 – INITIATING MEDIATED SETTLEMENT CONFERENCES

01 NCAC 30H .0101 PURPOSE OF MANDATORY SETTLEMENT CONFERENCES

Pursuant to G.S. 143-128(g) 143-135.26(11), these Rules are promulgated to implement a system of settlement events which are designated to focus the parties' attention on settlement rather than on claim preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time prior to or during commencement of the dispute resolution process.

History Note: Authority G.S. 143-135.26(11); S.L. 2001-496, Sec. 14(b);
Temporary Adoption Eff. July 1, 2002.

01 NCAC 30H .0102 INITIATING THE DISPUTE RESOLUTION PROCESS

(a) Any party to a public construction contract governed by G.S. 143, Article 8 and identified in G.S. 143-128(g) and who is a party to a dispute arising out of the construction process in which the amount in controversy is at least fifteen thousand dollars ($15,000) may submit a written request to the public owner for mediation of the dispute.

(b) Prior to submission of a written request for mediation to the public owner, the parties requesting mediation:

(1) If a prime contractor, must have first submitted its claim to the Project Designer for review as set forth in Exhibit A. If the dispute is not resolved through the Project Designer's instructions, then the dispute becomes ripe for mediation in the Formal Dispute Resolution Process, and the party may submit his written request for mediation to the public owner.

(2) If the party requesting mediation is a subcontractor, it must first have submitted its claim for mediation to the prime contractor with whom it has a contract. If the dispute is not resolved through the Prime Contractor's involvement, then the dispute becomes ripe for mediation in the Formal Dispute Resolution Process, and the party may submit its written request for mediation to the public owner.

(3) If the party requesting mediation is the Project Designer, then it must first submit its claim to the public owner to resolve. If the dispute is not resolved with the public owner's involvement, then the Project Designers' dispute is ripe for mediation in the Formal Dispute Resolution Process, and the Project Designer may submit its written request to the public owner for mediation.

History Note: Authority G.S. 143-135.26(11); S.L. 2001-496, Sec. 14(b);
Temporary Adoption Eff. July 1, 2002.

SECTION .0200 – SELECTION OF MEDIATOR

01 NCAC 30H .0201 SELECTION OF CERTIFIED MEDIATOR BY AGREEMENT OF THE PARTIES

The parties may select a mediator certified pursuant to the Rules by agreement within 21 days of requesting mediation. The requesting party shall file with the State Construction Office (hereinafter collectively referred to as the "SCO") or public owner if a non-State project a Notice of Selection of Mediator by Agreement within 10 days of the request; however, any party may file the notice. Such notice shall state the name, address and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation; and state that the mediator is certified pursuant to these Rules.

History Note: Authority G.S. 143-135.26(11); S.L. 2001-496,

Sec. 14(b);
Temporary Adoption Eff. July 1, 2002.

01 NCAC 30H .0202 NOMINATION AND PUBLIC OWNER APPROVAL OF A NON-CERTIFIED MEDIATOR

(a) The parties may select a mediator who does not meet the certification requirements of these rules but who, in the opinion of the parties and the SCO or public owner, is otherwise qualified by training or experience to mediate the action.

(b) If the parties select a non-certified mediator, the requesting party shall file with the SCO a Nomination of Non-Certified Mediator within 10 days of the request. Such nomination shall:

(1) state the name, address and telephone number of the mediator;

(2) state the training, experience or other qualifications of the mediator;

(3) state the rate of compensation of the mediator; and

(4) state that the mediator and opposing counsel have agreed upon the selection and rate of compensation.

The SCO or public owner shall rule on said nomination, shall approve or disapprove of the parties' nomination and shall notify the parties of its decision.

History Note: Authority G.S. 143-135.26(11); S.L. 2001-496, Sec. 14(b);
Temporary Adoption Eff. July 1, 2002.

01 NCAC 30H .0203 APPOINTMENT OF MEDIATOR BY THE SCO

If the parties cannot agree upon the selection of a mediator, the party or party's attorney shall so notify the SCO or public owner and request, on behalf of the parties, that the SCO or public owner appoint a mediator. The request for appointment must be filed within 10 days after request to mediate and shall state that the parties have had a full and frank discussion concerning the selection of a mediator and have been unable to agree. The request shall state whether any party prefers a certified attorney mediator, and if so, the SCO or public owner shall appoint a certified attorney mediator. If no preference is expressed, the SCO or public owner may appoint a certified attorney mediator or a certified non-attorney mediator.

History Note: Authority G.S. 143-135.26(11); S.L. 2001-496, Sec. 14(b);
Temporary Adoption Eff. July 1, 2002.

01 NCAC 30H .0204 MEDIATOR INFORMATION DIRECTORY

To assist the parties in the selection of a mediator by agreement, the parties are free to utilize the list of certified mediators maintained in any county participating in the Superior Court Mediation Settlement Conference Program.

History Note: Authority G.S. 143-135.26(11); S.L. 2001-496, Sec. 14(b);
Temporary Adoption Eff. July 1, 2002.

01 NCAC 30H .0205 DISQUALIFICATION OF MEDIATOR

Any party may request replacement of the mediator by the SCO or public owner for good cause. Nothing in this provision shall preclude mediators from disqualifying themselves.

History Note: Authority G.S. 143-135.26(11); S.L. 2001-496, Sec. 14(b);
Temporary Adoption Eff. July 1, 2002.

SECTION .0300 – THE MEDIATED SETTLEMENT CONFERENCE

01 NCAC 30H .0301 WHERE CONFERENCE IS TO BE HELD

Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in the county where the project is located. The mediator shall be responsible for reserving a place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys, unrepresented parties and other persons and entities required to attend.

History Note: Authority G.S. 143-135.26(11); S.L. 2001-496, Sec. 14(b);
Temporary Adoption Eff. July 1, 2002.

01 NCAC 30H .0302 WHEN CONFERENCE IS TO BE HELD

The deadline for completion of the mediation shall be not less than 30 days nor more than 60 days after the naming of the mediator.

History Note: Authority G.S. 143-135.26(11); S.L. 2001-496, Sec. 14(b);
Temporary Adoption Eff. July 1, 2002.

01 NCAC 30H .0303 REQUEST TO EXTEND DEADLINE FOR COMPLETION

A party, or the mediator, may request the SCO or public owner to extend the deadline for completion of the conference. Such request shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the mediator. If any party does not consent to the request, said party shall promptly communicate its objection to the SCO or public owner.

The SCO or public owner may grant the request by setting a new deadline for completion of the conference.

History Note: Authority G.S. 143-135.26(11); S.L. 2001-496, Sec. 14(b);
Temporary Adoption Eff. July 1, 2002.

01 NCAC 30H .0304 RECESSES

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

History Note: Authority G.S. 143-135.26(11); S.L. 2001-496, Sec. 14(b);
Temporary Adoption Eff. July 1, 2002.

01 NCAC 30H .0305 NO CAUSE FOR DELAY

The mediated settlement conference shall not be cause for the delay of the construction project which is the focus of the dispute.

History Note: Authority G.S. 143-135.26(11); S.L. 2001-496, Sec. 14(b);
Temporary Adoption Eff. July 1, 2002.

SECTION .0400 – DUTIES OF PARTIES AND OTHER PARTICIPANTS IN FORMAL DISPUTE RESOLUTION PROCESS

01 NCAC 30H .0401 ATTENDANCE

(a) All parties to the dispute originally presented to the Designer or Prime Contractor for initial resolution must attend the mediation. Failure of a party to a construction contract to attend the mediation will result in the public owner's withholding of monthly payment to that party until such party attends the mediation.

(b) Attendance shall constitute physical attendance, not by telephone or other electronic means. Any attendee on behalf of a party must have authority from that party to bind it to any agreement reached as a result of the mediation.

(c) Attorneys on behalf of parties may attend the mediation but are not required to do so.

(d) Sureties or insurance company representatives are not required to attend the mediation unless any monies paid or to be paid as a result of any agreement reached as a result of mediation require their presence or acquiescence. If such agreement or presence is required, then authorized representatives of the surety or insurance company must attend the mediation.

History Note: Authority G.S. 143-135.26(11); S.L. 2001-496, Sec. 14(b);
Temporary Adoption Eff. July 1, 2002.

01 NCAC 30H .0402 FINALIZING AGREEMENT

If an agreement is reached in the conference, parties to the agreement shall reduce its terms to writing and sign it along with their counsel.

History Note: Authority G.S. 143-135.26(11); S.L. 2001-496, Sec. 14(b);
Temporary Adoption Eff. July 1, 2002.

01 NCAC 30H .0403 PAYMENT OF FEE

The mediation fee shall be paid in accordance with G.S. 143-128(g).

History Note: Authority G.S. 143-135.26(11); S.L. 2001-496, Sec. 14(b);
Temporary Adoption Eff. July 1, 2002.

01 NCAC 30H .0404 FAILURE TO COMPENSATE MEDIATOR

(a) Any party's failure to compensate the mediators in accordance with G.S. 143-128(g) shall subject that party to a withholding of said amount of money from the party's monthly payment by the public owner.

(b) Should the public owner fail to compensate the mediator, it shall hereby be subject to a civil cause of action from the mediator for the one-third portion of the mediator's total fee as required by G.S. 143-128(g).

History Note: Authority G.S. 143-135.26(11); S.L. 2001-496, Sec. 14(b);
Temporary Adoption Eff. July 1, 2002.

SECTION .0500 – AUTHORITY AND DUTIES OF MEDIATORS

01 NCAC 30H .0501 AUTHORITY OF MEDIATOR

(a) Control of Conference. The mediator shall at all times be in control of the conference and the procedures to be followed.

(b) Private Consultation. The mediator may communicate privately with any participant or counsel prior to and during the conference. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the conference.

(c) Scheduling the Conference. The mediator shall make a good faith effort to schedule the conference at a time that is convenient with the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

History Note: Authority G.S. 143-135.26(11); S.L. 2001-496, Sec. 14(b);
Temporary Adoption Eff. July 1, 2002.

01 NCAC 30H .0502 DUTIES OF MEDIATOR

(a) The mediator shall define and describe the following at the beginning of the conference:

(1) The process of mediation;
(2) The difference between mediation and other forms of conflict resolution;
(3) The costs of the mediated settlement conference;
(4)_ That the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their legal rights if they do not reach settlement;
(5) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;
(6) Whether and under what conditions communications with the mediator will be held in confidence during the conference;
(7) The inadmissibility of conduct and statements as provided by G.S. 7A-38.1(1);
(8) The duties and responsibilities of the mediator and the participants; and
(9) That any agreement reached will be reached by mutual consent.

(b) Disclosure. The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(c) Declaring Impasse. It is the duty of the mediator timely to determine that an impasse exists and that the conference should end.
(d) Reporting Results of Conference. The mediator shall report to the SCO or public owner within 10 days of the conference whether or not an agreement was reached by the parties. If an agreement was reached, the report shall state the nature of said agreement. The mediator's report shall inform the SCO or public owner of the absence of any party known to the mediator to have been absent from the mediated settlement conference without permission. The SCO or public owner may require the mediator to provide statistical data for evaluation of the mediated settlement conference program.
(e) Scheduling and Holding the Conference. It is the duty of the mediator to schedule the conference and conduct it prior to the deadline of completion set by the rules. Deadlines for completion of the conference shall be strictly observed by the mediator unless said time limit is changed by a written order of the SCO or public owner.

History Note: Authority G.S. 143-135.26(11); S.L. 2001-496, Sec. 14(b);
Temporary Adoption Eff. July 1, 2002.

SECTION .0600 – COMPENSATION OF THE MEDIATOR

01 NCAC 30H .0601 COMPENSATION OF THE MEDIATOR
(a) By Agreement. When the mediator is stipulated by the parties, compensation shall be as agreed upon between the parties and the mediator provided that the provision of G.S. 143-128(g) are observed.
(b) By Appointment. When the mediator is appointed by the SCO or public owner, the parties shall compensate the mediator for mediation services at the rate in accordance with the rate charged for Superior Court mediation. The parties shall also pay to the mediator a one-time per case administrative rate in accordance with the rate charged for Superior Court mediation, which is due upon appointment.

History Note: Authority G.S. 143-135.26(11); S.L. 2001-496, Sec. 14(b);
Temporary Adoption Eff. July 1, 2002.

SECTION .0700 – MEDIATOR CERTIFICATION

01 NCAC 30H .0701 MEDIATOR CERTIFICATION
(a) All mediators certified in the Formal Dispute Resolution Program shall be properly certified in accordance with the rules certifying mediators in Superior Court in North Carolina Except when otherwise allowed by the SCO or public owner upon the request of the parties to the mediation. When selecting mediators, the parties may designate a preference for mediators with a background in construction law or public construction contracting. Such requirements, while preferred, are not mandatory under these Rules.
(b) All mediators chosen must either demonstrate they are certified in accordance with the Rules Implementing Scheduled Mediated Settlement Conference in Superior Court or must gain the consent of the SCO or public owner to mediate any dispute in accordance with these Rules.

History Note: Authority G.S. 143-135.26(11); S.L. 2001-496, Sec. 14(b);
Temporary Adoption Eff. July 1, 2002.

SECTION .0800 – RULE MAKING

01 NCAC 30H .0801 RULE MAKING
These Rules are subject to amendment by rule making by the State Building Commission. These Rules are mandated for State projects when the contracting state entity has not otherwise adopted its own dispute resolution provision. These Rules are optional for all other projects subject to G.S. 143, Article 8.

History Note: Authority G.S. 143-135.26(11); S.L. 2001-496, Sec. 14(b);
Temporary Adoption Eff. July 1, 2002.

SECTION .0900 – DEFINITIONS

01 NCAC 30H .0901 DEFINITIONS
When the phrase "SCO or public owner" is used in these Rules, "SCO" shall apply to state projects, "public owner" shall apply to non-state public projects.

History Note: Authority G.S. 143-135.26(11); S.L. 2001-496, Sec. 14(b);
Temporary Adoption Eff. July 1, 2002.

SECTION .1000 – TIME LIMITS

01 NCAC 30H .1001 TIME LIMITS
On state contracts, any time limit provided for by these Rules may be waived or extended by the SCO for good cause shown. On non-state contracts, any time limit provided for by these Rules may be waived or extended by the mediator it appoints for good cause shown. If the mediator has not yet been appointed, the designer of record shall decide all waivers or extensions of time for good cause shown.

History Note: Authority G.S. 143-135.26(11); S.L. 2001-496, Sec. 14(b);
Temporary Adoption Eff. July 1, 2002.

TITLE 04 – DEPARTMENT OF COMMERCE

Rule-making Agency: *Office of the Commissioner of Banks*

Rule Citation: *04 NCAC 03M .0101, .0201-.0203, .0301-.0302*

Effective Date: *July 1, 2002*

Findings Reviewed and Approved by: *Julian Mann, III*

Authority for the rulemaking: *G.S. 53-243.04; 53-243.05, 53-243.07, 53-243.13*

Reason for Proposed Action: *The North Carolina Mortgage Lending Act (S.L. 2001-939) was signed by the Governor on August 23, 2001. Most of its provisions become effective on July 1, 2002. The Act creates a new regulatory structure governing mortgage lenders and brokers and gives the Commissioner of Banks broad general rulemaking authority as well as specific authority to adopt rules regarding initial and continuing education and testing of licensees and minimum recordkeeping standards. Although the Commissioner published a Notice of Rule-making Proceedings February 1, 2002, he has determined that there was insufficient time between the Act's adoption and effective dates to develop permanent rules. As such, the rules promulgated herewith are intended to address only the critical compliance portions of the Act. The Commissioner expects to engage in more comprehensive, permanent rulemaking following the effective date of the Act.*

Comment Procedures: *Any written comments should be submitted to Daniel E. Garner, Agency Legal Specialist, 4309 Mail Service Center, Raleigh, NC 27699-4309.*

CHAPTER 03 – BANKING COMMISSION

SUBCHAPTER 03M – MORTGAGE LENDING

SECTION .0100 – GENERAL MORTGAGE LENDING

04 NCAC 03M .0101 DEFINITIONS

(a) As used in this Subchapter, unless a contrary definition is expressly provided or clearly required by the context:

(1) "Education program" or "program" means a program of instruction that is either a fundamentals program under Rule .0203, Paragraph (c) or a continuing education program under Rule .0203, Paragraph (d).

(2) "Examination" means the mortgage lending fundamentals examination required by G.S. 53-243.05(b)(2).

(3) "Instructor" means an individual who is employed by an education program provider and who is responsible for teaching an education program.

(4) "License year" means July 1 – June 30, or such other 12 month period as the Commissioner may from time to time determine.

(5) "Provider" means any person who provides an education program and, in the case of a fundamentals program, may also include a person who administers the examination.

(6) "Testing service" means an organization selected by the Commissioner to develop and administer the examination.

History Note: Authority G.S. 53-243.05; 53-243.07; 53-243.13;
Temporary Adoption Eff. July 1, 2002.

SECTION .0200 – LICENSING

04 NCAC 03M .0201 LOAN OFFICER EXAMINATION

(a) Examinations shall be administered by the testing service no less frequently than quarterly in a reasonable number of locations distributed throughout North Carolina.

(b) The length and minimum acceptable score for examinations shall be determined from time to time and announced in advance by the Commissioner.

(c) The testing service shall maintain and publish a current schedule of times and locations at which the examination will be administered. The service may charge applicants a fee for its administration of the examination.

History Note: Authority G.S. 53-243.05;
Temporary Adoption Eff. July 1, 2002.

04 NCAC 03M .0202 APPROVAL OF PROVIDERS AND PROGRAMS

(a) A licensee or prospective licensee will receive credit for participation in a program only if it is presented by a provider approved by the Commissioner and the Commissioner has approved the program. The Commissioner shall make readily available to the public a current listing of approved providers list, which shall be updated as needed. The list shall indicate whether a provider is approved to present fundamentals programs, continuing education programs, or both.

(b) Any provider desiring to conduct a fundamentals or continuing education program shall, at least 30 days prior to any advertisement, promotion or solicitation of prospective attendees of the program, request that the Commissioner approve the provider's qualifications and approve one or more specific programs. The application shall be upon a form prescribed by the Commissioner and shall include at least the following information:

(1) the name and address of the provider and date(s) on and locations at which the program is to be offered;

(2) the qualifications and experience of the provider's principal officers, staff, and instructor(s);

(3) the costs of all programs for which approval is sought; and

(4) a reasonably detailed description of each program for which approval is sought.

(c) A provider shall not use any words, symbols or other means to indicate that either the provider or a program has received the Commissioner's approval unless such approval has been issued and remains in effect.

(d) A provider shall publish and provide to all prospective students prior to or simultaneous with their enrollment a writing which contains the information described in Subparagraphs (b)(1)-(b)(4) of this Rule.

(e) The Commissioner's approval of any provider or program shall expire one year from the date of issuance and thereafter on each subsequent anniversary of the renewal date. Application for renewal of provider or program approval must be filed by not later than 60 days prior to each such expiration date.

(f) The Commissioner may deny, revoke, suspend, or terminate approval of any provider or any individual program upon a finding that:

(1) the provider has refused or failed to comply with any applicable provisions of this Subchapter or of any contractual agreement

with the Commissioner or has refused or failed to submit in a timely manner information or properly completed forms prescribed by the Commissioner;

(2) any provider officer or employee has obtained or used, or has attempted to obtain or use, in any manner or form, the examination questions; or

(3) in the case of the fundamentals program, the provider's students have a first-time licensing examination performance record that is significantly below the examination performance record of first-time examination candidates overall; or

(4) the provider has not conducted at least one fundamentals or continuing education program (as applicable) during the preceding 12-month period; or

(5) the provider has knowingly employed to present any program an instructor who would be ineligible under the standards of G.S. 53-243.05(a)(4), or who is otherwise unqualified.

History Note: Authority G.S. 53-243.05; 53-243.07; Temporary Adoption Eff. July 1, 2002.

04 NCAC 03M .0203 REQUIREMENTS FOR PROVIDERS

(a) A provider shall designate one person as its contact person who shall be available to the Commissioner during ordinary business hours and shall be knowledgeable and have authority to act with regard to all administrative matters concerning instructors, scheduling, advertising, recordkeeping, and supervising all programs offered by the provider.

(b) Providers shall retain the following material from each program on file at one location for a minimum of three years: class schedules; advertisements; bulletins, catalogues, and other publications distributed to students; and list of student names, with social security numbers, for each program; and the name of the instructor. All files shall be made available to the Commissioner upon request.

(c) Fundamentals programs must provide prospective loan officer licensees with a basic knowledge of and competency in the following:

(1) basics of home purchase and ownership;

(2) the mortgage industry generally;

(3) loan evaluation and documentation;

(4) the operation of a mortgage firm;

(5) features of various loan products;

(6) state and federally required disclosures; and

(7) ethical considerations.

(d) Continuing education programs must enhance the existing professional competence of the target group of licensees by providing updated information or more detailed or narrowly-focused information than the fundamentals program.

History Note: Authority G.S. 53-243.05; 53-243.07; Temporary Adoption Eff. July 1, 2002.

SECTION 0300 - RECORD AND BOOKKEEPING REQUIREMENTS

04 NCAC 03M .0301 RECORDS TO BE MAINTAINED BY LICENSEES

(a) A licensee shall maintain or cause to be maintained a record of all cash, checks or other monetary instruments received in connection with each mortgage loan application showing the identity of the payor, date received, amount, and purpose.

(b) A licensee shall maintain a record showing a sequential listing of checks written for each bank account relating to the licensee's business as a mortgage broker or mortgage lender, showing at least the payee, amount, date, and purpose of payment, including identification of the loan to which it relates, if any. The licensee shall reconcile the bank accounts monthly.

(c) The licensee shall create and retain a file for each mortgage loan application which shall contain, as applicable, applicant's name, date, name of person taking the application, HUD-1 Settlement Statement, copies of all agreements or contracts with the applicant, including any commitment and lock-in agreements, and all disclosures required by State and Federal law.

(d) A licensee shall maintain a record of samples of each piece of advertising relating to the licensee's business of mortgage brokerage or mortgage banking in North Carolina for a period of 12 months.

(e) A licensee shall maintain a record of copies of all contracts, agreements and escrow instructions to or with any depository.

History Note: Authority G.S. 53-243.13; Temporary Adoption Eff. July 1, 2002.

04 NCAC 03M .0302 FORM AND LOCATION

(a) All records required by this Rule shall be kept for a period of at least three years, and shall be available for inspection and copying upon request by the Commissioner.

(b) Such records may be maintained in the form of magnetic tape, magnetic disk or other form of computer, electronic or microfilm media available for examination on the basis of computer printed reproduction, video display or other medium acceptable to the Commissioner. However, books and records kept in this manner shall be convertible into clearly legible, tangible documents.

(c) All records required by this Rule shall be prepared in accordance with generally accepted accounting principles, where applicable.

(d) Unless otherwise agreed to in writing by the Commissioner, all records required to be maintained shall be maintained in a secure and readily accessible location within the State of North Carolina.

(e) A licensee shall promptly notify the Commissioner of any change in the location of its books and records.

History Note: Authority G.S. 53-243.13; Temporary Adoption Eff. July 1, 2002.

TITLE 10 – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Rule-making Agency: *NC Division of Facility Services*

Rule Citation: *10 NCAC 03R .0214*

Effective Date: *June 3, 2002*

Findings Reviewed and Approved by: *Beecher R. Gray*

Authority for the rulemaking: *G.S. 131E-177(1)*

Reason for Proposed Action: *The 2002 SMFP identifies a need for a limited number of dedicated PET scanners. However, the plan also permits persons to apply for certificates of need (CON) to acquire coincidence circuitry that enables ordinary gamma cameras to perform PET scans. This Rule change prohibits an applicant from obtaining a certificate of need (CON) to acquire coincidence circuitry and then replacing the upgraded gamma camera with a dedicated PET scanner without a CON. This closes an unintended loop-hole in the 2002 SMFP, and prevents the proliferation of unauthorized and unneeded PET scanners.*

Comment Procedures: *Written comments concerning this rule-making action must be submitted to Mark Benton, Rule-making Coordinator, NC Division of Facility Services, 2701 Mail Service Center, Raleigh, NC 27699-2701.*

CHAPTER 03 – FACILITY SERVICES

SUBCHAPTER 03R - CERTIFICATE OF NEED REGULATIONS

SECTION .0200 – EXEMPTIONS

10 NCAC 03R .0214 REPLACEMENT EQUIPMENT

(a) The purpose of this Rule is to define the terms used in the definition of "replacement equipment" set forth in G.S. 131E-176(22a).

(b) "Activities essential to acquiring and making operational the replacement equipment" means those activities which are indispensable and requisite, absent which the replacement equipment could not be acquired or made operational.

(c) "Comparable medical equipment" means equipment which is functionally similar and which is used for the same diagnostic or treatment purposes.

(d) Replacement equipment is comparable to the equipment being replaced if:

(1) it has the same technology as the equipment currently in use, although it may possess expanded capabilities due to technological improvements; and

(2) it is functionally similar and is used for the same diagnostic or treatment purposes as the equipment currently in use and is not used to provide a new health service; and

(3) the acquisition of the equipment does not result in more than a 10% increase in patient charges or per procedure operating expenses within the first twelve months after the replacement equipment is acquired.

(e) Replacement equipment is not comparable to the equipment being replaced if:

(1) the replacement equipment is new or reconditioned, the existing equipment was purchased second-hand, and the replacement equipment is purchased less than three years after the acquisition of the existing equipment; or

(2) the replacement equipment is new, the existing equipment was reconditioned when purchased, and the replacement equipment is purchased less than three years after the acquisition of the existing equipment; or

(3) the replacement equipment is capable of performing procedures that could result in the provision of a new health service or type of procedure that has not been provided with the existing equipment; or

(4) the replacement equipment is purchased and the existing equipment is leased, unless the lease is a capital lease; or

(5) the replacement equipment is a dedicated PET scanner and the existing equipment is:

(A) a gamma camera with coincidence capability; or

(B) nuclear medicine equipment that was designed, built, or modified to detect only the single photon emitted from nuclear events other than positron annihilation.

History Note: Authority G.S. 131E-177(1);
Temporary Adoption Eff. September 1, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;
Eff. January 4, 1994;
Amended Eff. April 1, 1999; November 1, 1996;
Temporary Amendment Eff. June 3, 2002.

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Rule-making Agency: *Environmental Management Commission*

Rule Citation: *15A NCAC 02P .0408*

Effective Date: *July 1, 2002*

Findings Reviewed and Approved by: *Julian Mann, III*

Authority for the rulemaking: *G.S. 143-215.94B(f); 143-215D(f); S.L. 2001 c. 442, s. 1, s. 2, s. 6b*

Reason for Proposed Action: *In House Bill 1063 (S.L. 2001, c. 442, s. 1 and s. 2), the General Assembly mandated that the Environmental Management Commission shall adopt rules governing the competitive bidding process for performance-based cleanups of leaking petroleum underground storage tank sites that are eligible for reimbursement from the Commercial and Noncommercial Trust Funds. The General Assembly further stipulated that these Rules shall establish the qualifications for environmental services firms and for individuals and firms that provide engineering services as part of a contract to*

satisfactorily complete work associated with the cleanup. In Section 6(b) of House Bill 1063, the General Assembly authorized that the Commission may adopt temporary rules to implement this act until July 1, 2002. The commission adopted the temporary rule on May 14, 2002 and the Division needs to publish the adopted temporary rule in the NC Register.

Comment Procedures: *Questions and written comments may be submitted to George C. Matthis, Jr., DENR, Division of Waste Management, UST Section, 1637 Mail Service Center, Raleigh, NC 27699-1637.*

CHAPTER 02 - ENVIRONMENTAL MANAGEMENT

SUBCHAPTER 02P - LEAKING PETROLEUM UNDERGROUND STORAGE TANK CLEANUP FUNDS

SECTION .0400 - REIMBURSEMENT PROCEDURE

15A NCAC 02P .0408 PERFORMANCE-BASED CLEANUPS

(a) The Division shall solicit competitive bids and award contracts for performance-based cleanups in accordance with G.S. 143, Article 3 and 01 NCAC 05B.

(b) To be considered by the Division for performance-based cleanups, an environmental services firm shall provide documentation of proof that the firm and any subcontracted individuals and firms it utilizes can perform the necessary services described in the solicitation documents. Any professional engineering firm selected by an environmental services firm to perform engineering services for a performance-based cleanup must comply with G.S. 89C.

History Note: Authority G.S. 143-215.94B(f); 143-215.94D(f); S.L. 2001, c. 442, s. 6b;
Temporary Adoption Eff. July 1, 2002.

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Editor's Note: *This publication will serve as Notice of Temporary Rules and as Notice of Text for permanent rulemaking.*

Rule-making Agency: *NC Wildlife Resources Commission*

Rule Citation: *15A NCAC 10F .0327, .0368*

Effective Date for Temporary Rule: *July 1, 2002*

Findings Reviewed and Approved by: *Julian Mann*

Authority for the rulemaking: *G.S. 75A-3; 75A-15*

Reason for Proposed Action for Temporary Rule:
15A NCAC 10F .0327 – *The Montgomery County Board of Commissioners initiated the no-wake zone pursuant to G.S. 75A-15, to protect public safety in the areas by restricting vessel speed.*
15 NCAC 10F .0368 – *The Town of Nags Head initiated the no-wake zone pursuant to G.S. 75a-15, to protect public safety in the areas by restricting vessel speed.*

Public Hearing:
Date: *August 7, 2002*
Time: *10:00 a.m.*
Location: *Room 332, Archdale Building, 512 N. Salisbury Street, Raleigh, NC*

Proposed Effective Date for Permanent Rule: *July 1, 2002*

Reason for Proposed Action:
15A NCAC 10F .0327 - *The Montgomery County Board of Commissioners initiated the no-wake zone pursuant to G.S. 75A-15, to protect public safety in the area by restricting vessel speed. The Wildlife Resources Commission may adopt this as a temporary rule pursuant to G.S. 150B-21.1(a1) following the abbreviated notice as indicated in the notice of rule-making.*
15A NCAC 10F .0368 – *The Town of Nag's Head initiated the no-wake zone pursuant to G.S. 75A-15, to protect public safety in the area by restricting vessel speed. The Wildlife Resources Commission may adopt this as a temporary rule pursuant to G.S. 150B-21.1(a1) following the abbreviated notice as indicated in the notice of rule-making.*

Comment Procedures: *Interested persons may present their views either orally or in writing at the hearing. In addition, the record of hearing will be open for receipt of written comments through September 19, 2002. Such written comments must be mailed to the NC Wildlife Resources Commission, 1701 Mail Service Center, Raleigh, NC 27699-1701.*

Fiscal Impact
☐ **State**
☒ **Local**
☐ **Substantive (**>$5,000,000**)**
☐ **None**

CHAPTER 10 - WILDLIFE RESOURCES AND WATER SAFETY

SUBCHAPTER 10F - MOTORBOATS AND WATER SAFETY

SECTION .0300 - LOCAL WATER SAFETY REGULATIONS

15A NCAC 10F .0327 MONTGOMERY COUNTY

(a) Regulated Areas. This Rule applies to the waters and portions of waters described as follows:

(1) Badin .Lake:
  (A) Lakeshore Drive Cove as delineated by appropriate markers; and
  (B) Entrance to fueling site and marina west of the main channel of Lakeshore Drive Cove.
(2) Lake Tillery:
  (A) Woodrun Cove as delineated by appropriate markers.
  (B) Carolina Forest Cove as delineated by appropriate markers.
(3) Tuckertown Reservoir.

(b) Speed Limit Near Shore Facilities. No person shall operate a vessel at greater than no-wake speed within 50 yards of any marked boat launching area, dock, pier, bridge, marina, boat storage structure, or boat service area on the waters of the regulated areas described in Paragraph (a) of this Rule.
(c) Speed Limit. No person shall operate a vessel at greater than no-wake speed within any regulated area described in Paragraph (a) of this Rule.
(d) Restricted Swimming Areas. No person operating or responsible for the operation of a vessel shall permit it to enter any marked public swimming area established with the approval of the Wildlife Resources Commission on the waters of the regulated areas described in Paragraph (a) of this Rule.
(e) Placement and Maintenance of Markers. The Board of Commissioners of Montgomery County is hereby designated a suitable agency for placement and maintenance of the markers implementing this Rule in accordance with the Uniform System.

History Note: Authority G.S. 75A-3; 75A-15;
Eff. November 1, 1977;
Amended Eff. December 1, 1990; May 1, 1989; March 25, 1978;
Temporary Amendment Eff. June 1, 1998;
Amended Eff. April 1, 1999; July 1, 1998;
Temporary Amendment Eff. July 1, 2002.

15A NCAC 10F .0368 TOWN OF NAGS HEAD
(a) Regulated Area. This Rule applies to the waters of the Roanoke Sound extending 600 feet from the shoreline adjacent to and from the northern boundary to the southern boundary of the Old Nags Head Cove Subdivision and marked by buoys.
(b) Speed Limit. No person shall operate any motorboat or vessel at greater than no-wake speed within any of the regulated area described in Paragraph (a) of this Rule.
(c) Placement and Maintenance of Markers. The Town of Nags Head is designated a suitable agency for placement and maintenance of the markers implementing this Rule.

History Note: Authority G.S. 72A-3; 71A-15;
Temporary Adoption Eff. July 1, 2002.

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Rule-making Agency: *NC Department of Environment and Natural Resources*

Rule Citation: *15A NCAC 11 .1102*

Effective Date: *June 30, 2002*

Findings Reviewed and Approved by: *Beecher R. Gray*

Authority for the rulemaking: *G.S. 104E-9(8); 104E-19(a)*

Reason for Proposed Action: *Due to budgetary implications, it is necessary to delay the invoicing of inspection fees for x-ray registrants and radioactive material licensees for two months such that the new fees can be collected in fiscal year 2002-2003. This action will increase receipts funds so that appropriated funds can be decreased.*

Comment Procedures: *Comments may be submitted to Beverly Hall, Division of Radiation Protection, 1645 Mail Service Center, Raleigh, NC 27699-1645.*

CHAPTER 11 – RADIATION PROTECTION

SECTION .1100 - FEES

15A NCAC 11 .1102 PAYMENT DUE
(a) For fiscal year 2002-2003, all fees established in this Section shall be due on September 1, 2002, and on the first day of July of each subsequent year.
(b) Notwithstanding Paragraph (a) of this Rule, when a new license or registration is issued on or after July 1, 2002 and before September 1, 2002, the initial fee shall be due September 1, 2002. After the first day of July of any year subsequent to 2002, the initial fee shall be due on the date of issuance of the license or registration.
(c) The initial fee in Paragraph (b) of this Rule shall be computed as follows:
(1) When any new license or registration is issued before the first day of January of any year, the initial fee shall be the full amount specified in Rule .1105 of this Section; and
(2) When any new license or registration is issued on or after the first day of January of any year, the initial fee shall be one-half of the amount specified in Rule .1105 of this Section.
(d) All fees received by the agency pursuant to provisions of this Section shall be nonrefundable.
(e) Each licensee or registrant shall pay all fees by check or money order made payable to "Division of Radiation Protection" and mail such payment to: Division of Radiation Protection, North Carolina Department of Environment and Natural Resources, 1645 Mail Service Center, Raleigh, North Carolina 27699-1645. Such payment may be delivered to the agency at its office located at 3825 Barrett Drive, Raleigh, North Carolina 27609-7221.

History Note: Authority G.S. 104E-9(a)(8); 104E-19(a);
Eff. July 1, 1982;
Amended Eff. May 1, 199; May 1, 1992; July 1, 1989;
Temporary Amendment Eff. June 30, 2002.

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Rule-making Agency: *Commission for Health Services*

Rule Citation: *15A NCAC 21D .0706*

Effective Date: *July 1, 2002*

Findings Reviewed and Approved by: *Beecher R. Gray*

Authority for the rulemaking: *G.S. 130A-361*

Reason for Proposed Action: *This proposed temporary rule is a revision to a temporary rule that was adopted by the Commission for Health Services on February 13, 2002 with an effective date of July 1, 2002. The primary reason for this change is to request authority to use a new mechanism to price*

certain pediatric formulas using the highest published manufacturer's wholesale price plus an inflationary factor adopted by USDA. This pricing mechanism is considered more equitable for this class of formula than the Medicaid Durable Medical Equipment Fee Schedule used to establish maximum prices for exempt infant formula and WIC eligible medical foods. The other changes to this Rule involve clarification of words and/or phrases to better match the intent of the federal regulations.

Comment Procedures: *Comments, statements, data and other information may be submitted in writing within 30 days of publication of this issue of the NC Register. Copies of the proposed rule and information packets may be obtained by contacting the Nutrition Services Branch at 919-715-0647. Written comments may be sent to Cory Menees, Nutrition Services Branch, 1914 Mail Service Center, Raleigh, NC 27699-1914.*

CHAPTER 21 - HEALTH: PERSONAL HEALTH

SUBCHAPTER 21D - WIC/NUTRITION

SECTION .0700 - WIC PROGRAM FOOD DISTRIBUTION SYSTEM

15A NCAC 21D .0706 AUTHORIZED WIC VENDORS

(a) Vendor applicants and authorized vendors will be placed into peer groups as follows:

(1) When annual WIC supplemental food sales are not yet available, vendor applicants and authorized vendors, excluding chain stores, stores under a WIC corporate agreement, military commissaries, and free-standing pharmacies, will be placed into peer groups based on the number of cash registers in the store until annual WIC supplemental food sales become available. The following are the peer groups based on the number of cash registers in the store:

Peer Group I - - zero to two cash registers;

Peer Group II - - three to five cash registers; and

Peer Group III - - six or more cash registers;

(2) Authorized vendors for which annual WIC supplemental food sales is available, and chain stores, stores under a WIC corporate agreement, military commissaries, and free-standing pharmacies, will be placed into peer groups as follows, except as provided in Subparagraph (a)(6) of this Rule.

Peer Group I - - two thousand dollars ($2,000) to one hundred thousand dollars ($100,000) annually in WIC supplemental food sales at the store;

Peer Group II - - greater than one hundred thousand dollars ($100,000) but not exceeding three hundred thousand dollars ($300,000) annually in WIC supplemental food sales at the store;

Peer Group III - - greater than three hundred thousand dollars ($300,000) but not exceeding five hundred thousand dollars ($500,000) annually in WIC supplemental food sales at the store;

Peer Group IV - - chain stores, stores under a WIC corporate agreement (20 or more authorized vendors under one agreement) and stores exceeding five hundred thousand dollars ($500,000) annually in WIC supplemental food sales;

Peer Group V - - military commissaries; and

Peer Group VI - - free-standing pharmacies, including free-standing pharmacy chain stores and free-standing pharmacies participating under a WIC corporate agreement;

(3) Annual WIC supplemental food sales is the dollar amount in sales of WIC supplemental foods at the store within a 12-month period.

(4) In determining a vendor's peer group designation based on annual WIC supplemental food sales, the state agency will look at the most recent 12-month period for which sales data is available. If the most recent available 12-month period of WIC sales data ends more than one year prior to the time of designation, the peer group designation will be based on the number of cash registers in the store.

(5) The state agency may reassess an authorized vendor's peer group designation at any time during the vendor's agreement period and place the vendor in a different peer group if upon reassessment the state agency determines that the vendor is no longer in the appropriate peer group.

(6) A vendor applicant that is being reauthorized following the nonrenewal or termination of its Agreement or disqualification from the WIC Program will be placed into the peer group the store was in at the time of the nonrenewal, termination or disqualification, provided that no more than one year has passed since the nonrenewal, termination or disqualification. All other vendor applicants will be placed into peer groups in accordance with Subparagraphs (a)(1) and (a)(2) of this Rule.

(b) To become authorized as a WIC vendor, a vendor applicant shall comply with the following vendor selection criteria:

(1) Accurately complete a WIC Vendor Application, a WIC Price List, and a WIC Vendor Agreement. A vendor applicant must submit its current highest shelf price for each WIC supplemental food listed on the WIC Price List;

(2) At the time of application and throughout the term of authorization, submit all completed forms to the local WIC program, except that a corporate entity operating under a WIC corporate agreement shall submit one completed WIC corporate agreement and the WIC Price Lists to the state agency and a separate WIC Vendor Application for each store to the local WIC agency. A corporate entity operating under a WIC corporate agreement may submit a single WIC Price List for those stores that have the same prices for WIC supplemental foods in each store, rather than submitting a separate WIC Price List for each store;

(3) A vendor applicant's current highest shelf price for each WIC supplemental food listed on the WIC Price List must not exceed the maximum price set by the State agency for each supplemental food within that vendor applicant's peer group, except as provided in Part (b)(3)(B) of this Rule;

(A) The most recent WIC Price Lists submitted by authorized vendors within the same peer group will be used to determine the maximum price for each supplemental food. The maximum price will be based on the average of the current highest shelf price for each supplemental food within a vendor peer group, plus a factor to reflect fluctuations in wholesale prices. The state agency will reassess the maximum price set for each supplemental food at least four times a year. For two of its price assessments, the state agency will use the WIC Price Lists which must be submitted by all vendors by January 1 and July 1 each year in accordance with Subparagraph (c)(31) of this Rule. The other two price assessments will be based on WIC Price Lists requested from a sample of vendors within each peer group in March and September of each year;

(B) If any of the vendor applicant's price(s) on its WIC Price List exceed the maximum price(s) set by the state agency for that applicant's peer group, the applicant will be notified in writing. Within 30 days of the date of the written notice, the vendor applicant may resubmit price(s) that it will charge the state WIC Program for those foods that exceeded the maximum price(s). If none of the vendor applicant's resubmitted prices exceed the maximum prices set by the state agency, the vendor applicant will be deemed to have met the requirements of Subparagraph (b)(3) of this Rule. If any of the vendor applicant's resubmitted prices still exceed the maximum prices set by the state agency, or the vendor applicant does not resubmit prices within 30 days of the date of written notice, the application will be denied in writing. The vendor applicant must wait 90 days from the date of receipt of the written denial to reapply for authorization;

(4) Pass a monitoring review by the local WIC program to determine whether the store has minimum inventory of supplemental foods as specified in Subparagraph (c)(24) of this Rule. A vendor applicant who fails this review shall be allowed a second opportunity for an unannounced monitoring review within 14 days. If the applicant fails both reviews, the applicant shall wait 90 days from the date of the second monitoring review before submitting a new application;

(5) Attend, or cause a manager or other authorized store representative to attend, WIC Vendor Training provided by the local WIC Program prior to authorization and ensure that the applicant's employees receive instruction in WIC program procedures and requirements;

(6) Mark the current shelf prices of all WIC supplemental foods clearly on the foods or have the prices posted on the shelf or display case at all times;

(7) The store shall be located at a permanent and fixed location within the State of North Carolina. The store shall be located at the address indicated on the WIC vendor application and shall be the site at which WIC supplemental foods are selected by the WIC customer;

(8) The store shall be open throughout the year for business with the public at least six days a week for a minimum of 40 hours per week between 8:00 a.m. and 11:00 p.m.;

(9) A vendor applicant shall not submit false, erroneous, or misleading information in an application to become an authorized WIC vendor or in subsequent documents submitted to the state or local agency;

(10) The owner(s), officer(s) or manager(s) of a vendor applicant shall not be employed, or have a spouse, child, or parent who is employed by the state WIC program or the local WIC program serving the county in which the vendor applicant conducts business. A vendor applicant shall not have an employee who handles, transacts, deposits, or stores WIC food instruments who is employed, or has a spouse, child, or parent who is employed by the state WIC program or the local WIC

program serving the county in which the vendor applicant conducts business;

(11) WIC vendor authorization shall be denied if in the last six years any of the vendor applicant's current owners, officers, or managers have been convicted of or had a civil judgment entered against them for any activity indicating a lack of business integrity, including, but not limited to, fraud, antitrust violations, embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, and obstruction of justice;

(12) A vendor applicant shall not be authorized if it is currently disqualified from the Food Stamp Program or it has been assessed a Food Stamp Program civil money penalty for hardship and the disqualification period that otherwise would have been imposed has not expired;

(13) A vendor applicant, excluding chain stores and stores under a WIC corporate agreement that have a separate manager on site for each store, shall not have an owner who holds a financial interest in any of the following:

(A) a Food Stamp vendor which is disqualified from participation in the Food Stamp Program or has been assessed a civil money penalty for hardship in lieu of disqualification and the time period during which the disqualification would have run, had a penalty not been paid, is continuing; or

(B) another WIC vendor which is disqualified from participation in the WIC Program or which has been assessed an administrative penalty pursuant to G.S. 130A-22(c1), Paragraph (k), or Paragraph (l) of this Rule as the result of violation of Paragraphs (g), (h)(1)(A), (h)(1)(B), (h)(1)(C), (h)(1)(D) or (h)(2)(D) of this Rule, and if assessed a penalty, the time during which the disqualification would have run, had a penalty not been assessed, is continuing.

The requirements of Subparagraph (b)(13) shall not be met by the transfer or conveyance of financial interest during the period of disqualification. Additionally, the requirements of Subparagraph (b)(13) shall not be met even if such transfer or conveyance of financial interest in a Food Stamp vendor under Subparagraph (b)(13)(A) prematurely ends the disqualification period applicable to that Food Stamp vendor. The requirements of this Subparagraph will apply until the time the Food Stamp vendor disqualification otherwise would have expired;

(14) A vendor applicant, excluding free-standing pharmacies, must have Food Stamp Program authorization for the store as a prerequisite for WIC vendor authorization and must provide its Food Stamp Program authorization number to the state agency; and

(15) A vendor applicant shall not become authorized as a WIC vendor if the store has been disqualified from participation in the WIC Program and the disqualification period has not expired.

(c) By signing the WIC Vendor Agreement, the vendor agrees to:

(1) Process WIC program food instruments in accordance with the terms of this agreement, state and federal WIC program rules, and applicable law;

(2) Accept WIC program food instruments in exchange for WIC supplemental foods; Supplemental foods are those foods which satisfy the requirements of 15A NCAC 21D .0501. The foods, specifications and product identification are described in the WIC Vendor Manual;

(3) Provide only the authorized supplemental foods listed on the food instrument, accurately determine the charges to the WIC program, and clearly complete the "Pay Exactly" box on the food instrument prior to obtaining the countersignature of the WIC customer; The WIC customer is not required to get all of the supplemental foods listed on the food instrument;

(4) Enter in the "Pay Exactly" box on the food instrument only the total amount of the current shelf prices, or less than the current shelf prices, for the supplemental food actually provided and shall not charge or collect sales taxes for the supplemental food provided;

(5) Charge no more for supplemental food provided to a WIC customer than to a non-WIC customer or no more than the current shelf price, whichever is less;

(6) Accept payment from the state WIC Program only up to the maximum price set by the state agency for each food instrument within that vendor's peer group. The maximum price for each food instrument will be based on the maximum prices set by the state agency for each supplemental food, as described in Part (b)(3)(A) of this Rule, listed on the food instrument. A food instrument deposited by a vendor for payment which exceeds the maximum price will be invalid and returned to the vendor. The vendor may receive a replacement food instrument through the local agency for up to the maximum price set by the state agency for that food instrument;

(7) Not charge the state WIC Program more than the maximum price set by the state agency under Part (b)(3)(A) of this Rule for each

supplemental food within the vendor's peer group;

(8) For exempt infant formulas and WIC-eligible medical foods, excluding the exempt pediatric formulas referenced in this Subparagraph (c)(8), accept payment from the state WIC Program only up to the maximum price established by the state agency using the Medicaid Durable Medical Equipment Fee Schedule published by the North Carolina Division of Medical Assistance. For exempt pediatric formulas for high risk infants and children with medical conditions associated with prematurity and low birth weight, accept payment from the state WIC Program only up to the maximum price established by the state agency. The maximum price for each formula will be the most recently published manufacturer's highest wholesale price plus the food cost inflation rate adopted by USDA which is incorporated by reference with all subsequent amendments and editions. A copy of the food cost inflation rate is available at no cost from the Department of Health and Human Services, Division of Public Health, Women's and Children's Health Section, Nutrition Services Branch, 1914 Mail Service Center, Raleigh, North Carolina;

(9) For non-contract brand milk-based and soy-based infant formulas, excluding exempt infant formulas, accept payment from the state WIC Program only up to the maximum price established for contract brand infant formulas under Part (b)(3)(A) of this Rule for the vendor's peer group;

(10) For free-standing pharmacies, provide only infant formula and WIC-eligible medical foods;

(11) Excluding free-standing pharmacies, redeem at least two thousand dollars ($2,000) annually in WIC supplemental food sales. Failure to redeem at least two thousand dollars ($2,000) annually in WIC supplemental food sales shall result in termination of the WIC Vendor Agreement. The store must wait 180 days to reapply for authorization;

(12) Accept WIC program food instruments only on or between the "Date of Issue" and the "Participant Must Use By" dates;

(13) Prior to obtaining the countersignature, enter in the "Date Transacted" box the month, day and year the WIC food instrument is exchanged for supplemental food;

(14) Ensure that the food instrument is countersigned in the presence of the cashier;

(15) Refuse acceptance of any food instrument on which quantities, signatures or dates have been altered;

(16) Not transact food instruments in whole or in part for cash, credit, unauthorized foods, or non-food items;

(17) Not provide refunds or permit exchanges for authorized supplemental foods obtained with food instruments, except for exchanges of an identical authorized supplemental food when the original authorized supplemental food is defective, spoiled, or has exceeded its "sell by," "best if used by," or other date limiting the sale or use of the food. An identical authorized supplemental food means the exact brand, type and size as the original authorized supplemental food obtained and returned by the WIC customer;

(18) Clearly imprint the authorized WIC vendor stamp in the "Pay the Authorized WIC Vendor Stamped Here" box on the face of the food instrument;

(19) Clearly imprint the vendor's bank deposit stamp or the vendor's name, address and bank account number in the "Authorized WIC Vendor Stamp" box in the endorsement;

(20) Promptly deposit WIC program food instruments in the vendor's bank. All North Carolina WIC program food instruments must be deposited in the vendor's bank within 60 days of the "Date of Issue" on the food instrument;

(21) Ensure that the authorized WIC vendor stamp is used only for the purpose and in the manner authorized by this agreement and assume full responsibility for the unauthorized use of the authorized WIC vendor stamp;

(22) Maintain secure storage for the authorized WIC vendor stamp and immediately report loss of this stamp to the local agency;

(23) Notify the local agency of misuse (attempted or actual) of the WIC program food instrument(s);

(24) Maintain a minimum inventory of supplemental foods in the store for purchase. Supplemental foods that are outside of the manufacturer's expiration date do not count towards meeting the minimum inventory requirement. The following items and sizes constitute the minimum inventory of supplemental foods for vendors in Peer Groups I through III of Subparagraph (a)(1) and vendors in Peer Groups I through V of Subparagraph (a)(2) of this Rule:

Food Item	**Type of Inventory**	**Quantities Required**
Milk	Whole fluid: gallon -and- Skim/lowfat fluid: gallon	Total of 6 gallons fluid milk

	Nonfat dry: quart package -or- Evaporated: 12 oz. can	Total of 5 quarts when reconstituted 5 cans
Cheese	2 varieties in 8 or 16 oz. package	Total of 6 pounds
Cereals	4 types (minimum package size 12 oz.)	Total of 12 packages
Eggs	Grade A, large or extra-large: white or brown: one dozen size carton	6 dozen
Juices		
	Frozen: 11.5-12 oz. container	10 containers
	Single strength: 46oz container Orange juice must be available in frozen and single strength. A second flavor must be available in frozen or single strength.	10 containers
Dried Peas and Beans	2 varieties: one pound package	3 packages
or		
Peanut Butter	Plain (smooth, crunchy, or whipped; No reduced fat): 18 oz. container	3 containers
Infant Cereal	Plain-no fruit added: 2 cereal grains (one must be rice); 8-oz. box; brand specified in Vendor Agreement	6 boxes
Infant Formula	milk and soy-based as specified in Vendor Agreement; 13 oz. concentrate	62 can combination
Tuna	Chunk light in water: 6-6.5 oz. can	4 cans
Carrots	Raw, canned or frozen 14.5-16 oz. size	2 packages/cans

All vendors in Peer Groups I through III of Subparagraph (a)(1) and in Peer Groups I through VI of Subparagraph (a)(2) of this Rule shall supply milk, soy based, or lactose-free infant formula in 32 oz. ready-to-feed or powder within 48 hours of request by the state or local agency;

(25) Ensure that all supplemental foods in the store for purchase are within the manufacturer's expiration date;

(26) Permit the purchase of supplemental food without requiring other purchases;

(27) Attend, or cause a manager or other authorized store representative to attend, annual vendor training class upon notification of class by the local agency;

(28) Inform and train vendor's cashiers and other staff on WIC Program requirements;

(29) Be accountable for the actions of its owners, officers, managers, agents, and employees who commit vendor violations;

(30) Allow reasonable monitoring and inspection of the store premises and procedures to ensure compliance with this agreement and state and federal WIC Program rules, regulations and law. This includes, but shall not be limited to, allowance of access to all WIC food instruments at the store and vendor records pertinent to the purchase of WIC supplemental foods, vendor records of all deductions and exemptions allowed by law or claimed in filing sales and use tax returns, and vendor records of all WIC supplemental foods

purchased by the vendor, including invoices, copies of purchase orders, and any other proofs of purchase. These records must be retained by the vendor for a period of three years or until any audit pertaining to these records is resolved, whichever is later. Failure or inability to provide these records, or providing false records for an inventory audit shall be deemed a violation of 7 C.F.R. 246.12(l)(1)(iii)(B) and Part (g)(2)(A) of this Rule;

(31) Submit a current accurately completed WIC Price List when signing this agreement, and by January 1 and July 1 of each year. The vendor also agrees to submit a WIC Price List within one week of any written request by the state or local agency. Failure to submit a WIC Price List as required by this Subparagraph within 30 days of the required submission date shall result in disqualification of the vendor from the WIC Program in accordance with Part (h)(1)(D) of this Rule;

(32) Reimburse the state agency within 30 days of written notification of a claim assessed due to a vendor violation that affects payment to the vendor or a claim assessed due to the unauthorized use of the authorized WIC vendor stamp. The state agency has the authority to deny payment or assess a claim in the amount of the full purchase price of each food instrument affected by the vendor violation. Denial of payment by the state agency or payment of a claim by the vendor for a vendor violation(s) shall not absolve the vendor of the violation(s). The vendor will also be subject to any vendor sanctions authorized under this Rule for the vendor violation(s);

(33) Not seek restitution from the WIC customer for reimbursement paid by the vendor to the state agency or for WIC food instruments not paid or partially paid by the state agency. Additionally, the vendor may not charge the WIC customer for authorized supplemental foods obtained with food instruments;

(34) Not contact a WIC customer outside the store regarding the transaction or redemption of WIC food instruments;

(35) Notify the local agency in writing at least 30 days prior to a change of ownership, change in location, cessation of operations, or withdrawal from the WIC Program. Change of ownership, change in location of more than three miles from the vendor's previous location, cessation of operations, withdrawal from the WIC Program or disqualification from the WIC Program shall result in termination of the WIC Vendor Agreement by the state agency. Change of ownership, change in location, ceasing operations, withdrawal from the WIC Program or nonrenewal of the WIC Vendor Agreement shall not stop a disqualification period applicable to the store;

(36) Return the authorized WIC vendor stamp to the local agency upon termination of this agreement or disqualification from the WIC Program;

(37) Offer WIC customers the same courtesies as offered to other customers;

(38) The WIC Vendor Agreement does not constitute a license or a property interest. A vendor must reapply to continue to be authorized beyond the period of its current WIC Vendor Agreement. Additionally, a store must reapply to become authorized following the expiration of a disqualification period or termination of the Agreement. In all cases, the vendor applicant will be subject to the vendor selection criteria of Paragraph (b) of this Rule; and

(39) Comply with all the requirements for vendor applicants of Subparagraphs (b)(3) and (b)(6) through (b)(14) of this Rule throughout the term of authorization. The state agency may reassess a vendor at any time during the vendor's period of authorization to determine compliance with these requirements. The state agency shall terminate the WIC Vendor Agreement of any vendor that fails to comply with Subparagraphs (b)(3), (b)(7), (b)(8), (b)(10), (b)(11) or (b)(13) during the vendor's period of authorization, and sanction and/or terminate the Agreement of any vendor that fails to comply with Subparagraphs (b)(6), (b)(9), (b)(12) or (b)(14) during the vendor's period of authorization.

(d) By signing the WIC Vendor Agreement, the local agency agrees to the following:

(1) Provide at a minimum annual vendor training classes on WIC procedures and regulations;

(2) Monitor the vendor's performance under this agreement in a reasonable manner to ensure compliance with the agreement, state and federal WIC program rules, regulations and policies, and applicable law. A minimum of one-third of all authorized vendors shall be monitored within a state fiscal year (July 1 through June 30) and all vendors shall be monitored at least once within three consecutive state fiscal years. Any vendor shall be monitored within one week of written request by the state agency;

(3) Provide vendors with the North Carolina WIC Vendor Manual, all Vendor Manual amendments, blank WIC Price Lists, and the authorized WIC vendor stamp indicated on the signature page of the WIC Vendor Agreement;

(4) Assist the vendor with questions which may arise under this agreement or the vendor's participation in the WIC Program; and

(5) Keep records of the transactions between the parties under this agreement pursuant to 15A NCAC 21D .0206.

(e) In order for a food retailer or free-standing pharmacy to participate in the WIC Program a current WIC Vendor Agreement must have been signed by the vendor, the local WIC agency, and the state agency.

(f) If an application for status as an authorized WIC vendor is denied, the applicant is entitled to an administrative appeal as described in Section .0800 of this Subchapter.

(g) Title 7 C.F.R. 246.12(l)(1)(i) through (vi) and (xii) are incorporated by reference with all subsequent amendments and editions.

(1) In accordance with 7 CFR 246.12(l)(1)(i), the State agency shall not allow imposition of a civil money penalty in lieu of disqualification for a vendor permanently disqualified.

(2) A pattern, as referenced in 7 C.F.R. 246.12(l)(1)(iii)(B) through (F) and 246.12(1)(2)(iv), shall be established as follows:

(A) claiming reimbursement for the sale of an amount of a specific supplemental food item over a 60-day period which exceeds the store's documented inventory of that supplemental food item by 10 percent or more. Failure or inability to provide records or providing false records required under Subparagraph (c)(30) of this Rule for an inventory audit shall be deemed a violation of 7 C.F.R. 246.12(l)(1)(iii)(B) and Part (g)(2)(A) of this Rule;

(B) two occurrences of vendor overcharging within a 12-month period;

(C) two occurrences of receiving, transacting and/or redeeming food instruments outside of authorized channels, including the use of an unauthorized vendor and/or an unauthorized person within a 12-month period;

(D) two occurrences of charging for supplemental food not received by the WIC customer within a 12-month period;

(E) two occurrences of providing credit or non-food items, other than alcohol, alcoholic beverages, tobacco products, cash, firearms, ammunition, explosives, or controlled substances as defined in 21 U.S.C. 802, in exchange for food instruments within a 12-month period; or

(F) three occurrences of providing unauthorized food items in exchange for food instruments, including charging for supplemental food provided in excess of those listed on the food instrument within a 12-month period.

(h) Title 7 C.F.R. Section 246.12(l)(2)(i) is incorporated by reference with all subsequent amendments and editions. Except as provided in 7 C.F.R. 246.12 (l)(1)(xii), a vendor shall be disqualified from the WIC Program for the following state-established violations in accordance with the sanction system below. The total period of disqualification shall not exceed one year for state-established violations investigated as part of a single investigation, as defined in Paragraph (i) of this Rule.

(1) When a vendor commits any of the following violations, the state-established disqualification period shall be:

(A) 90 days for each occurrence of failure to properly transact a WIC food instrument by not completing the date and purchase price on the WIC food instrument before obtaining the countersignature, by not obtaining the countersignature in the presence of the cashier, or by accepting a WIC food instrument prior to the "Date of Issue" or after the "Participant Must Use By" dates on the food instrument;

(B) 60 days for each occurrence of requiring a cash purchase to transact a WIC food instrument;

(C) 30 days for each occurrence of requiring the purchase of a specific brand when more than one WIC supplemental food brand is available; and

(D) 30 days for each occurrence of failure to submit a WIC Price List as required by Subparagraph (c)(31) of this Rule.

(2) When a vendor commits any of the following violations, the vendor shall be assessed sanction points as follows for each occurrence:

(A) 2.5 points for stocking WIC supplemental foods outside of the manufacturer's expiration date.

(B) 5 points for:

(i) failure to attend annual vendor training;

(ii) failure to stock minimum inventory; or

(iii) failure to mark the current shelf prices of all WIC supplemental foods clearly on the foods or have the prices posted on the shelf or display case.

(C) 7.5 points for:

(i) discrimination on the basis of WIC participation (separate WIC lines, denying trading stamps, etc.); or

(ii) contacting a WIC customer in an attempt to recoup funds for food instrument(s) or

contacting a WIC customer outside the store regarding the transaction or redemption of WIC food instruments.

(D) 15 points for:

(i) failure to allow monitoring of a store by WIC staff when required;

(ii) failure to provide WIC food instrument(s) for review when requested;

(iii) failure to provide store inventory records when requested by WIC staff, except as provided in Subparagraph (c)(30) and Part (g)(2)(A) of this Rule for failure or inability to provide records for an inventory audit;

(iv) nonpayment of a claim made by the State agency; or

(v) providing false information on vendor records (application, vendor agreement, price list, WIC food instrument(s), monitoring forms), except as provided in Subparagraph (c)(30) and Part (g)(2)(A) of this Rule for providing false records for an inventory audit.

(3) For the violations listed in Subparagraph (h)(2) of this Rule, all sanction points assessed against a vendor remain on the vendor's record for 12 months or until the vendor is disqualified as a result of those points. If a vendor accumulates 15 or more points, the vendor shall be disqualified. The nature of the violation(s) and the number of violations, as represented by the points assigned in Subparagraph (h)(2), are used to calculate the period of disqualification. The formula used to calculate the disqualification period is: the number of points of the worst offense multiplied by 18 days. 18 days shall be added to the disqualification period for each point over 15 points.

(i) For investigations pursuant to this Section, a single investigation is:

(1) Compliance buy(s) conducted by undercover investigators within a 12-month period to detect the following violations:

(A) buying or selling food instruments for cash (trafficking);

(B) selling firearms, ammunition, explosives, or controlled substances as defined in 21 U.S.C. 802, in exchange for food instruments;

(C) selling alcohol or alcoholic beverages or tobacco products in exchange for food instruments;

(D) vendor overcharging;

(E) receiving, transacting, and/or redeeming food instruments outside of authorized channels, including the use of an unauthorized vendor and/or an unauthorized person;

(F) charging for supplemental food not received by the WIC customer;

(G) providing credit or non-food items, other than alcohol, alcoholic beverages, tobacco products, cash, firearms, ammunition, explosives, or controlled substances as defined in 21 U.S.C. 802, in exchange for food instruments;

(H) providing unauthorized food items in exchange for food instruments, including charging for supplemental food provided in excess of those listed on the food instrument;

(I) failure to properly transact a WIC food instrument;

(J) requiring a cash purchase to transact a WIC food instrument; or

(K) requiring the purchase of a specific brand when more than one WIC supplemental food brand is available;

(2) Monitoring reviews of a vendor conducted by WIC staff within a 12-month period which detect the following violations:

(A) failure to stock minimum inventory;

(B) stocking WIC supplemental food outside of the manufacturer's expiration date;

(C) failure to allow monitoring of a store by WIC staff when required;

(D) failure to provide WIC food instrument(s) for review when requested;

(E) failure to provide store inventory records when requested by WIC staff; or

(F) failure to mark the current shelf prices of all WIC supplemental foods clearly on the foods or have the prices posted on the shelf or display case;

(3) Any other method used by the State or local agency to detect the following violations by a vendor within a 12-month period:

(A) failure to attend annual vendor training;

(B) failure to submit a WIC Price List as required by Subparagraph (c)(31) of this Rule;

(C) discrimination on the basis of WIC participation (separate WIC lines, denying trading stamps, etc.);

(D) contacting a WIC customer in an attempt to recoup funds or food instrument(s) or contacting a WIC customer outside the store regarding the transaction or redemption of WIC food instruments;

(E) nonpayment of a claim made by the State agency;

(F) providing false information on vendor records (application, vendor agreement, price list, WIC food instrument(s), monitoring forms); or

(G) claiming reimbursement for the sale of an amount of a specific supplemental food item which exceeds the store's documented inventory of that supplemental food item for a specific period of time, or failure or inability to provide records or providing false records required under Subparagraph (c)(30) of this Rule for an inventory audit.

(j) The Food Stamp Program disqualification provisions in 7 C.F.R. 246.12(l)(1)(vii) are incorporated by reference with all subsequent amendments and editions.

(k) The participant access provisions of 7 C.F.R. 246.12(l)(1)(ix) and 246.12(l)(8) are incorporated by reference with all subsequent amendments and editions. The existence of any of the factors listed in Subparagraphs (l)(3)(A), (l)(3)(B) or (l)(3)(C) of this Rule shall conclusively show lack of inadequate participant access provided there is no geographic barrier, such as an impassable mountain or river, to using the other authorized WIC vendors referenced in these Subparagraphs. The agency shall not consider other indicators of inadequate participant access when any of these factors exist.

(l) The following provisions apply to civil money penalties assessed in lieu of disqualification of a vendor:

(1) The civil money penalty formula in 07 C.F.R. 246.12(l)(l)(x) is incorporated by reference with all subsequent amendments and editions, provided that the vendor's average monthly redemptions shall be calculated by using the six-month period ending with the month immediately preceding the month during which the notice of administrative action is dated.

(2) The State agency may also impose civil money penalties in accordance with G.S. 130A-22(c1) in lieu of disqualification of a vendor for the state-established violations listed in Paragraph (h) of this Rule when the State agency determines that disqualification of a vendor would result in undue participant hardship in accordance with Subparagraph (l)(3) of this Rule.

(3) In determining whether to disqualify a WIC vendor for the state-established violations listed in Paragraph (h) of this Rule, the agency shall not consider other indicators of hardship if any of the following factors, which conclusively show lack of undue hardship, are found to exist:

(A) the noncomplying vendor is located outside of the limits of a city, as defined in G.S. 160A-2, and another WIC vendor is located within seven miles of the noncomplying vendor;

(B) the noncomplying vendor is located within the limits of a city, as defined in G.S. 160A-2, and another WIC vendor is located within three miles of the noncomplying vendor; or

(C) a WIC vendor, other than the noncomplying vendor, is located within one mile of the local agency at which WIC participants pick up their food instruments.

(4) The provisions for failure to pay a civil money penalty in 7 C.F.R. 246.12(l)(6) are incorporated by reference with all subsequent amendments and editions.

(m) The provisions of 7 C.F.R. 246.12(l)(1)(viii) prohibiting voluntary withdrawal from the WIC Program or nonrenewal of the WIC Vendor Agreement as an alternative to disqualification are incorporated by reference with all subsequent amendments and editions.

(n) The provision in 7 C.F.R. 246.12(l)(3) regarding prior warning to vendors is incorporated by reference with all subsequent amendments and editions.

(o) The state agency reserves the right to set off payments to an authorized vendor if the vendor fails to reimburse the state agency in accordance with Subparagraph (c)(32) of this Rule.

(p) In accordance with 7 C.F.R. 246.12(l)(7) and 246.12(u)(5), North Carolina's procedures for dealing with abuse of the WIC program by authorized WIC vendors do not exclude or replace any criminal or civil sanctions or other remedies that may be applicable under any federal and state law. (q) Notwithstanding other provisions of this Rule, for the purpose of providing a one-time payment to a non-authorized store for WIC food instruments accepted by the store, an agreement for a one-time payment need only be signed by the store manager and the state agency. The store may request such one-time payment directly from the state agency. The store manager shall sign an agreement indicating that the store has provided foods as prescribed on the food instrument, charged current shelf prices or less than current shelf prices, not charged sales tax, and verified the identity of the WIC customer. Any agreement entered into in this manner shall automatically terminate upon payment of the food instrument in question. After entering into an agreement for a one-time payment, a non-authorized store shall not be allowed to enter into any further one-time payment agreements for WIC food instruments accepted thereafter.

(r) Except as provided in 7 C.F.R. 246.18(a)(2), an authorized WIC vendor shall be given at least 15 days advance written notice of any adverse action which affects the vendor's participation in the WIC Program. The vendor appeal procedures shall be in accordance with 15A NCAC 21D .0800.

History Note: Authority G.S. 130A-361; 42 U.S.C. 1786; 7 C.F.R. 246;
Eff. July 1, 1981;

Amended Eff. August 1, 1995; October 1, 1993; May 1, 1991; December 1, 1990;
Temporary Amendment Eff. May 17, 2000;
Temporary Amendment Eff. June 23, 2000;
Amended Eff. April 1, 2001;
Temporary Amendment Eff. July 1, 2002.

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. Elkins II

AGENCY	CASE NUMBER	ALJ	DATE OF DECISION	PUBLISHED DECISION REGISTER CITATION
ALCOHOL BEVERAGE CONTROL COMMISSION				
NC ABC Commission v. Acme Retail, Inc. T/A Handy Pantry	01 ABC 1325	Chess	05/21/02	
CRIME CONTROL AND PUBLIC SAFETY				
Hattie Holt v. NC Crime Victims Compensation Commission	00 CPS 1067	Conner	05/30/02	
JUSTICE				
Alarm Systems Licensing Board				
Christopher Michael McVicker v. Alarm Systems Licensing Board	02 DOJ 0731	Gray	06/07/02	
Private Protective Services Board				
Anthony Davon Webster v. Private Protective Services Board	01 DOJ 1857	Gray	06/07/02	
Randall G. Bryson v. Private Protective Services Board	02 DOJ 0730	Gray	06/07/02	
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Frances Sherene Hayes v. Criminal Justice & Training Stds. Comm.	02 DOJ 0171	Mann	06/04/02	
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Bipin B Patel Rajan, Inc. v. NC DENR, Div. of Waste Management	02 EHR 0244	Gray	06/05/02	
J.L. Hope & wife, Ruth B. Hope v. NC DENR	02 EHR 0395	Mann	06/10/02	
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NC Bd. of Examiners for Engineers & Surveyors v. C Phil Wagoner	01 ELS 0078	Lewis	06/05/02	
OFFICE OF STATE PERSONNEL				
Andre Foster v. Winston-Salem State University	00 OSP 1216[1]	Mann	06/03/02	17:01 NCR 0000
J Louise Roseborough v. Wm F. Scarlett, Dir. of Cumberland County Department of Social Services	01 OSP 0734	Morgan	06/06/02	
Andre Foster v. Winston-Salem State University	01 OSP 1388	Mann	06/03/02	17:01 NCR 0000
Wayne G. Whisemant v. Foothills Area Authority	01 OSP 1612	Elkins	05/30/02	17:01 NCR 0000
Susan Luke aka Susan Luke Young v. Gaston-Lincoln-Cleveland Area Mental Health "Pathways"	02 OSP 0140	Conner	06/06/02	
Cathy L. White v. NC Department of Corrections	02 OSP 0246	Elkins	05/31/02	
Alber L. Scott v. UNC General Administration	02 OSP 0336	Elkins	06/10/02	
Alber L. Scott v. UNC General Administration	02 OSP 0498	Elkins	06/10/02	
SUBSTANCE ABUSE PROFESSIONAL BOARD				
NC Substance Abuse Professional Certification Board v. Lynn Cameron Gladden	00 SAP 1573	Chess	05/10/02	

[1] Combined Cases

STATE OF NORTH CAROLINA

COUNTY OF FORSYTH

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

ANDRE FOSTER, **Petitioner,** **v.** **WINSTON-SALEM STATE UNIVERSITY** **Respondent.**	)	**00 OSP 1216** **RECOMMENDED DECISION** **(PETITION I)**
ANDRE FOSTER, **Petitioner,** **v.** **WINSTON-SALEM STATE UNIVERSITY** **Respondent.**	)	**01 OSP 1388** **RECOMMENDED DECISION** **(PETITION II)**

These contested cases (consolidated) were heard before Chief Administrative Law Judge Julian Mann, III, in the New County Building, High Point, North Carolina, on 31 January and 1 February 2002.

APPEARANCES

For Petitioner: Herman L. Stephens, Esquire
Attorney at Law
200 W First Street
Winston-Salem, North Carolina 27101

For Respondent: Sylvia Thibaut
Assistant Attorney General
N.C. Department of Justice
PO Box 629
Raleigh, North Carolina 27602-0-629

Jessica Brett
Third Year Certified Law Student

ISSUES

1. Whether Respondent properly separated Petitioner from employment with Respondent after Petitioner exhausted all available leave.

2. Whether there was just cause to dismiss Petitioner for unacceptable personal conduct based upon after-acquired information.

Based upon the stipulations of record and by the greater weight of the evidence, the undersigned makes the following:

FINDING OF FACTS

1. Petitioner was hired as a housekeeper at Winston-Salem State University (hereinafter WSSU or Respondent) in January of 1993. He was recommended for hire by Eddie Flynt, who was and remains Respondent's managerial employee/agent and Housekeeping Supervisor at WSSU. (Tr. pp. 28-29). At all times relevant, Mr. Flynt was Petitioner's supervisor. (Tr. p. 111). Petitioner is a career State employee.

2. Prior to his employment with WSSU, Petitioner was employed as a housekeeper with North Carolina Baptist Hospital. (Tr. pp. 191-192)

3. At the time Petitioner was hired at WSSU, he was already employed as a housekeeper at Preferred Building Maintenance, working part time in the evening, 20-40 hours a week. (Tr. pp. 192-193).

4. Petitioner was also employed as a security guard with Robertson Security while employed at WSSU. (Tr. p. 195). Petitioner worked at Robertson Security on weekends. *Id.*

5. In March 1994, Petitioner received an oral warning concerning excessive absenteeism and tardiness. (Respondent's Ex. A; Tr. p. 32). In November 1994, Petitioner received a second oral warning for a pattern of excessive and unscheduled absences. (Respondent's Ex. B; Tr. pp. 33-34). At the time of the November 1994 warning, Petitioner had taken a total of 173 hours leave during the period from 1 January 1994, through 26 October 1994, of which 42 hours and 40 minutes was leave without pay (hereinafter LWOP) because he had exhausted all of his accumulated leave. (Respondent's Ex. B).

6. Petitioner received another warning for excessive absenteeism in February 1995. (Respondent's Ex. C; Tr. p. 35).

7. Petitioner received a final warning for excessive absenteeism in May 1995. (Respondent's Ex. D; Tr. p. 35). That warning stated that, from 31 October 1994, through 20 April 1995, Petitioner had taken 166 hours and 30 minutes of leave, 43 hours of which was LWOP. because he had exhausted all of his accumulated leave.

8. When Mr. Flynt gave Petitioner this final warning, he informed Petitioner that if he did not improve his work attendance, he would be dismissed. (Tr. p. 36).

9. Petitioner's performance evaluations from 1 June 1994, through 31 May 1995, and from 1 June 1995, through 31 May 1996, indicated poor or unsatisfactory performance. (Respondent's Exs. E and F; Tr. pp. 37-38, 112). A substantial factor in this poor performance was Petitioner's excessive absenteeism. (Respondent's Exs. E and F; Tr. pp. 38, 112).

10. On 3 March 1999, Petitioner was injured in an automobile accident while off duty from WSSU. (Tr. p. 38). Petitioner suffered a cervical sprain, hand, neck and back injury. (Tr. pp. 308-309). He had 13 hours and ten minutes of vacation leave and no sick leave. (Respondent's Ex. QQ; Tr. p. 39).

11. Petitioner used all 13 hours and 10 minutes of leave because he was injured in the accident and could not report to work. (Tr. p. 39). Petitioner applied for leave pursuant to the Family and Medical Leave Act (FMLA). Respondent approved Petitioner's Family Medical Leave application through its Personnel Director, dated 4-5-99, for the period of 3-9-99 through 5-31-99. Petitioner was granted LWOP. Petitioner's physician, Alvin J. Lue, M.D. of PRIMECARE of Winston-Salem, N.C. described Petitioner's medical condition as "low back pain, thumb pain and wrist sprain," his prognosis was "good" and the duration of absence as "1-2 months." (Respondent's Ex. G; Tr. pp. 40, 311-312).

12. Petitioner applied for light duty at this juncture and at subsequent times but was informed by Mr. Chilton that none was available. (Tr. pp. 315-316). Petitioner provided disability statements to WSSU for the time he was absent from work as the result of his accident. A statement, dated 28 May 1999, over the signature of Gregory G. Holthusen, M.D. of Orthopaedic Specialist of the Carolinas, P.A., Winston-Salem, N.C., indicated that Petitioner was totally disabled from 25 May 1999 through 22 June 1999, and indicated any expected date of return as "pending next appt." (Respondent's Ex. H; Tr. p. 42). Petitioner submitted another disability statement 7 days later, dated 4 June 1999, over the signature of Dr. Holthusen indicating that Petitioner was totally disabled from 25 May 1999 to 7 June 1999 but could return to work June 7, 1999 with no restrictions or limitations. (Respondent's Ex. PP; Tr. p. 43).

13. Petitioner returned to work for one day on Tuesday, 8 June 1999, and then remained away from work until the following Monday, 14 June 1999. (Respondent's Ex. QQ; Tr. pp. 40, 44-45). There is no evidence he incurred any injury on 8 June 1999 which could prevent his returning to work the following three days. (Tr. p. 49).

14. Mr. Flynt would not have permitted Petitioner to return to work on 8 June 1999 unless Petitioner had provided a release from his physician to return to work (Tr. p. 44).

15. When Petitioner returned to work on 14 June 1999, he submitted a contradictory disability statement over the signature of Dr. Holthusen indicating that he was totally disabled from 1 April 1999 to 14 June 1999. (Respondent's Ex. I; Tr. p. 46). This statement indicated that Petitioner could return to work with "normal" duties on 14 June 1999.

16. Mr. Flynt would not have permitted Petitioner to return to work on 14 June 1999 unless Petitioner had provided a release from his physician to return to work (Tr. p. 47).

17. By 14 June 1999, Petitioner had exhausted all 12 weeks accorded him under the FMLA and more because his FMLA expired on 31 May 1999. After 31 May 1999 Respondent placed Petitioner on extended LWOP. Because Petitioner was on LWOP, and had no other available leave to take, Petitioner was removed from the WSSU payroll while out on FMLA leave, and reinstated when he returned to work on 8 June 1999. (Respondent's Ex. J; Tr. p. 92).

18. By 25 May 1999, some four days before Petitioner's FMLA leave expired, Mr. Flynt drafted a letter to send to Petitioner to advise him that Petitioner's physician had not indicated when he could return to work. If Petitioner did not return to work by 18 June 1999, WSSU would assume that he had abandoned his position as a housekeeper and that position would be declared vacant. (Respondent's Ex. OO; Tr. pp. 47-49, 72). Because Petitioner returned to work at WSSU on 8 June 1999, Mr. Flynt did not send the letter to Petitioner. (Tr. p. 49).

19. Mr. Flynt was aware that Petitioner had secondary employment while Petitioner was employed at WSSU (Tr. pp. 49-50, 85). At least fifty percent of the Respondent's employees engage in secondary employment. Respondent's secondary employment policy requires the employee's supervisor determine whether the secondary employment would interfere with the primary job. (Tr. pp. 136-137). Mr. Flynt believed that Respondent's secondary employment policy was not enforced. (Tr. p. 50). Mr. Flynt, while he was Petitioner's supervisor, engaged in secondary employment along with the Petitioner for the same secondary employer (Tr. pp. 50, 85). Mr. Flynt, as Petitioner's supervisor, was aware of Petitioner's secondary employment. Neither Petitioner nor Mr. Flynt had requested formal approval. Mr. Flynt did not object to or require Petitioner to obtain approval for secondary employment (Tr. p. 85).

20. Mr. Hodge knew that Mr. Flynt had not applied for secondary employment permission and was not aware if Mr. Flynt was presently engaged in secondary employment. No employee of Respondent has been dismissed for failure to report secondary employment. (Tr. p. 187).

21. Leave without pay is not an entitlement for employees at WSSU. (Tr. p. 96).

22. There are no "light duty" positions for housekeepers at WSSU and neither Mr. Flynt nor his supervisor, Mr. Hodge, has ever created any such position for any employee in Housekeeping. (Tr. pp. 30-31, 86, 114, 318). Petitioner had requested light duty.

23. Petitioner was absent from work from WSSU for medical reasons from 28 September 1999 to 13 October 1999. (Respondent's Exs. K and L; Tr. p. 51). Petitioner submitted physician statements indicating he was totally disabled for periods of limited duration during that period of time. *Id.*

24. Petitioner had no accumulated leave time to cover the period of 28 September 1999, to 13 October 1999, and had previously exhausted all his FMLA leave. (Respondent's Ex. QQ; Tr. pp. 52, 204, 316). Respondent placed Petitioner on LWOP for this time period. *Id.*; *see also* Tr. p. 204. According to Respondent's Personnel Officer, Mr. Otis E. Chilton, LWOP is the status an employee is placed on when all other leave is exhausted and the employee is not present at work. (Tr. p. 95). No material evidence was entered into the record of this contested case as to the Respondent's procedure for application or approval for Petitioner's LWOP status. Respondent granted Petitioner LWOP status automatically without form application or form approval.

25. When Petitioner returned to work on 13 October 1999, he submitted a disability statement indicating he could return to normal duties. (Respondent's Ex. L; Tr. p. 53). This statement was prepared over the signature of Gregory Holthusen, M.D. , Orthopaedic Specialist of the Carolinas. The diagnosis was "SPRAIN/STRAIN LUMBAR SPINE." Mr. Flynt would not have permitted Petitioner to return to work on 13 October 1999 without such a statement. (Tr. p. 53).

26. Petitioner was involved in a second automobile accident on 26 December 1999. (Tr. p. 54). Petitioner presented a physician's statement to Mr. Flynt indicating that he would be out of work from 26 December 1999 through 29 December 1999. (Respondent's Ex. N; Tr. pp. 54-55). This statement was prepared by PRIMECARE of Winston-Salem, N.C.

27. At the time of Petitioner's second accident in December 1999, he had accumulated 15 hours and 20 minutes of sick leave and 8 hours and 40 minutes of annual leave. (Respondent's Exs. QQ and O; Tr. p. 96). Petitioner failed to return to work on 30 December 1999. On 4 January 2000, Petitioner requested that all his accumulated leave be applied to his absences since his second accident. (Respondent's Ex. O). His accumulated leave covered 24 hours, or three days. Thereafter, Petitioner had no leave of any type. (Tr. pp. 58, 142).

28. Inasmuch as Petitioner had no leave as of 4 January 2000, Mr. Flynt could have recommended Petitioner's separation at that time. (Tr. pp. 59, 96-97). Instead, Respondent placed Petitioner on LWOP. (Tr. pp. 59, 96, 115; Respondent's Ex. P). No form application or form approval was placed into evidence to indicate the procedure by which Petitioner obtained LWOP status.

29. From January 2000, through Petitioner's separation from WSSU for exhaustion of all available leave in March 2000, Petitioner periodically submitted disability statements to WSSU. (Respondent's Exs. Q, R, S). The first such statement, dated 12 January 2000, indicated Petitioner was totally disabled from 12 January 2000 through 9 February 2000. (Respondent's Ex. Q). This

statement gave a date of return to normal duties as "10/13/99," which was the date of Petitioner's return from his previous absence. *Id.* The statement indicated, however, that Petitioner was "out of work pending next appt 02/09/00." This statement was prepared over the signature of Gregory Holthusen, M.D. Orthopaedic Specialist of the Carolinas. The stated diagnosis was "SPRAIN HAND/UNSPECIFIED." *Id.*

30. Mr. Flynt had no way to contact Petitioner at that point in time because Petitioner had advised Mr. Flynt that he was moving to a mobile home and did not yet have any forwarding telephone number or address. (Tr. pp. 60-61, 83, 179). Mr. Flynt believed that Petitioner was moving as represented. (Tr. pp. 83-84). Mr. Flynt did speak with some of Petitioner's co-workers to see if they knew how to contact Petitioner, but none of his co-workers had that information. (Tr. p. 61).

31. Mr. Flynt was aware that Petitioner had been living with his mother prior to his purported move to a mobile home. (Tr. pp. 62, 84). However, because Petitioner informed Mr. Flynt that he was moving, Mr. Flynt did not contact Petitioner's mother. *Id.*

32. Petitioner's co-workers had to perform both their own and Petitioner's duties. (Tr. p. 62). They were unhappy about the situation. *Id.* They informed Mr. Flynt "in no uncertain terms" that it was a hardship on them, causing them to get behind in their work, and causing the condition of their buildings to fall below expected standards. *Id.*

33. On 9 February 2000, Petitioner submitted another disability statement to WSSU. (Respondent's Ex. R). This statement indicated Petitioner was totally disabled from 9 February 2000 through 7 March 2000, again giving "10/13/99" as date of return to normal duties. *Id.* The statement indicated Petitioner was "out of work pending next appt 030700." This statement was prepared over the signature of Gregory Holthusen, M.D., Orthopaedic Specialist of the Carolinas. The stated diagnosis was "SPRAIN HAND/UNSPECIFIED." *Id.*; *see also* Tr. p. 63.

34. When Mr. Flynt received the 9 February 2000 disability statement, he contacted Mr. Hodge, his supervisor, to discuss Petitioner's continued absence and his failure to give a date certain for his return. (Tr. pp. 64, 82). Mr. Hodge told Mr. Flynt to attempt to contact Petitioner and ascertain a date for Petitioner's return. (Tr. p. 64). However, Mr. Flynt was not able to contact Petitioner because he did not know Petitioner's new address or telephone number. *Id.*

35. Mr. Chilton, who has been a personnel officer for over thirty years, asserted that many employees cannot be found when the university tries to contact them. (Tr. p. 105). When that happens, the university has to "do the best we can." *Id.*

36. Because Mr. Flynt was unable to contact Petitioner, he decided to forward a letter to Petitioner at the address that Respondent had on file – Petitioner's mother's home. Petitioner actually resided at this address. (Respondent's Ex. T). This letter, dated 29 February 2000, informed Petitioner that he had been absent from work since 3 January 2000, and had failed to indicate a date certain for return to work. *Id.* The letter further informed Petitioner that, because of the work load, WSSU needed all its housekeepers at work and, if Petitioner failed to return to work on or before 6 March 2000, WSSU would assume that he was vacating his position and the position would be declared vacant. *Id.*; *see also* Tr. p. 71.

37. Petitioner contacted Mr. Flynt by telephone a few days before 6 March 2000. (Tr. pp. 65, 68). During this conversation, Mr. Flynt asked Petitioner if he had received the 29 February 2000 letter. (Tr. pp. 65, 69). When Petitioner replied that he had not, Mr. Flynt told him to check his mail. (Tr. p. 65).

38. Petitioner did not return to work on or before 6 March 2000 without restriction from his physician to resume his duties as housekeeper. Mr. Flynt would not have permitted Petitioner to return to work because such a release is mandatory after an extended absence for medical reasons. (Tr. pp. 66-67, 71).

39. The 29 February 2000 letter was sent to Petitioner, in part, because Mr. Hodge received a number of complaints concerning the lack of cleanliness in WSSU's buildings. (Tr. p. 119). Petitioner's continued absence was a primary contributing cause for the condition of the buildings falling below the expected standards of cleanliness. Petitioner's co-workers were responsible for cleaning both Petitioner's building and their buildings as well. *Id.*

40. Mr. Hodge selected the 6 March 2000 date for Petitioner's return. This date was a week after the 29 February 2000 notice and permitted Petitioner time to receive the letter and respond. (Tr. p. 120).

41. At the time the 29 February 2000 letter was sent, Petitioner had given WSSU no date certain for his return. Rather, Petitioner had continued to provide disability statements that said "out of work pending next appt." (Tr. p. 121). The last such statement Mr. Hodge had in his possession prior to sending the 29 February letter was a disability statement dated 9 February 2000, which indicated that Petitioner was still totally disabled and would be "out of work pending next appt 03/07/00." (Tr. p. 121; Respondent's Ex. R).

42. Respondent received a disability statement dated 29 February 2000 from Petitioner on or about 1 March 2000. (Respondent's Ex. S). This disability statement indicated that Petitioner was totally disabled as of 26 December 1999, and would

continue to be totally disabled through 1 March 2000. *Id.*; *see also* Tr. p. 122. This statement failed to give a date certain for return to work. This statement was prepared over the signature of Gregory G. Holthusen, M.D., Orthopaedic Specialist of the Carolinas, P.A. The diagnosis was indicated as: "SPRAIN CERVICAL SPINE" and under Restrictions/Limitations: "Total/Temp" *Id.*

43. Respondent also received another disability statement, dated 1 March 2000, from Petitioner on or about 1 March 2000. (Respondent's Ex. V). This disability statement indicated that Petitioner was totally disabled through 5 April 2000, and gave no date certain for return to work. *Id.*; *see also* Tr. p. 123. Respondent received this disability statement after the 29 February 2000 letter had been sent to Petitioner. (Tr. p. 123). This statement was prepared over the signature of Gregory G. Holthusen, M.D., Orthopaedic Specialist of the Carolinas, P.A. The diagnosis was indicated as: "SPRAIN CERVICAL SPINE" and "PT. OUT OF WORK PENDING NEXT APPT, 040500."

44. Petitioner may have come by WSSU on 6 March 2000, but he did not bring with him a release from his physician indicating he could return to normal work duties, and the most recent disability statement received by Respondent was, 6 March 2000, which indicated Petitioner was totally disabled through 5 April 2000. (Tr. pp. 124-125). If Petitioner returned to work on 6 March 2000, it would have subjected Petitioner to countermand his physician's statement and was a choice Respondent could not permit. (Tr. p. 125).

45. Petitioner was aware he must provide a statement from his physician permitting him to return to normal work duties before he could return from LWOP based upon a disabling injury. (Tr. pp. 197-198, 202, 221) Petitioner testified that it was "customary" to do so. (Tr. p. 221)

46. Petitioner did submit a disability statement to WSSU on 7 March 2000, which indicated that Petitioner could return to normal duties on 9 March 2000. (Tr. pp. 125-126, 150, 153; Respondent's Ex. Y and Petitioner's Ex. 11). The date certain provided by Petitioner's doctor indicated that Petitioner could return to normal work duties, but this date was beyond the 6 March 2000 date given Petitioner in the 29 February 2000 letter, (Tr. p. 126) and contradictory to the previously submitted 5 April 2000 return date.

47. Mr. Hodge did not permit Petitioner to return to work on 9 March 2000. (Tr. p. 129). Based on Petitioner's work history with WSSU, which included complete exhaustion of all leave and multiple periodic absences, Mr. Hodge determined that Petitioner was unreliable; and Respondent needed a reliable housekeeper immediately. *Id.*

48. In a disability statement prepared by Petitioner's physician, Gregory G. Holthusen M.D., dated 4 April 2000, this physician indicated that Petitioner continued to be totally disabled until 18 April 2000. His diagnosis remained: SPRAIN CERVICAL SPINE. (Respondent's Ex. GG). However, this statement indicated that Petitioner continued to have restrictions on his work duties after 18 April 2000, because he was restricted to "limited lifting." *Id.* Petitioner could not have performed his housekeeping duties at WSSU with a limited lifting restriction without potentially further injuring himself. (Tr. p. 217).

49. While Petitioner was out on LWOP from January 2000 through 6 March 2000, he demonstrated other unreliability by frequently canceling scheduled appointments or not showing up at all ("frequent cancellations and one no show") with his physical therapist. (Respondent's Ex. Z; Tr. pp. 218-219).

50. One of Petitioner's medical records originating from Comp Rehab, dated 29 February 2000, indicates: "[Petitioner] is not fit for any duty. out of work until re-evaluation on date 3/31/00." (Respondent's Ex. U).

51. The grounds for Petitioner's separation from WSSU was exhaustion of all available leave. (Tr. pp. 130-131; Respondent's Ex. BB). Petitioner participated in the Respondent's internal grievance process prior to filing his first contested case.

52. Petitioner spoke with Otis Chilton in WSSU's Human Resources Office after he was separated. (Tr. p. 99) Mr. Chilton discussed with Petitioner his appeal rights, including the deadlines for appeal. *Id.* After speaking with Mr. Chilton, Petitioner appealed his separation from WSSU. (Respondent's Ex. FF; Tr. pp. 99, 134). The WSSU grievance committee upheld the separation. (Respondent's Ex. HH). The final agency decision was made by WSSU's Chancellor, who also upheld the decision to separate Petitioner. *Id.*

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

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction of this contested case pursuant to Chapters 126 and 150B of the North Carolina General Statutes.

2. Petitioner was a career state employee at the time he was separated from WSSU based on exhaustion of all available leave.

3. Separation after exhaustion of all available leave is found in 25 N.C.A.C. 1D.0519(a) and provides:

> An employee may be separated on the basis of unavailability when the employee becomes or remains unavailable for work after all applicable leave credits and benefits have been exhausted and agency management does not grant a leave without pay for reasons deemed sufficient by the agency. Such reasons include but are not limited to, lack of suitable temporary assistance, criticality of the position, budgetary constraints.

No State employee is entitled to LWOP as a matter of right. The decision to grant LWOP is entirely discretionary.

4. Respondent placed Petitioner on LWOP status on January 4, 2000. There is no evidence in the record that Petitioner initiated a continuous course of action to remain in communication with his employer, the Respondent, after January 4, 2000 other than forwarding occasional medical form statements to Respondent over his physician's signature.

5. By correspondence (Respondent's Ex. 7) of February 29, 2000 Mr. Hodge explicitly informed Petitioner that if he did not return to work on March 6, 2000, Petitioner would be deemed to have vacated his employment.

6. Petitioner did not return to work on March 6, 2000 prepared to resume his duties as housekeeper. He did not submit a release by his physician without restriction. Anything less was a clear failure to return to work and resume his duties as of March 6, 2000.

7. Mr. Hodge prepared a letter of separation for Petitioner on 7 March 2000, and sent it through the appropriate channels for approval, but the letter was misplaced in the process. (Tr. p. 155). When Mr. Hodge discovered the first letter had been misplaced, he prepared a second letter, which was the letter of separation actually sent to Petitioner.

8. The letter of separation was sent to Petitioner by certified mail and Petitioner signed for it on 17 March 2000. (Tr. pp. 130-131; Respondent's Exs. BB and DD). At the time Petitioner was separated from WSSU, he had been absent from work on LWOP for over two months. (Tr. p. 131).

9. The reasons listed in 25 N.C.A.C. 1D.0519 for not granting an extension of LWOP clearly existed in Petitioner's situation. The following established facts existed beyond March 6, 2000 when Petitioner sought further LWOP :

> (1) Petitioner had been absent from work on LWOP for two months, from January 2000 through March 2000, causing hardship on his co-workers and resulting in complaints about the cleanliness of WSSU's buildings;
>
> (2) Mr. Hodge could not hire temporary assistance because of the budgetary crisis existing in North Carolina in 2000; and
>
> (3) A dependable employee in Petitioner's position was critical.

10. WSSU has a policy regarding separation due to unavailability after exhaustion of all leave. (Respondent's Ex. KK, p. 2). That policy lists several factors which the university should take into consideration before separation: (1) the employee is unavailable for work after all leave has been exhausted, (2) management has a reason for not permitting the employee to take or remain on LWOP, (3) WSSU notifies the employee of the proposed separation and why it is necessary, (4) the employee is given an opportunity to propose alternative methods of accommodation, and (5) WSSU notifies the employee that the proposed accommodation is unacceptable and gives a proposed date of separation.

11. WSSU complied with this policy. All of Petitioner's accumulated leave was exhausted as of 4 January 2000. Mr. Hodge received complaints about the lack of cleanliness of WSSU's buildings because Petitioner's co-workers were having to clean Petitioner's building and their buildings as well and the standards were slipping. WSSU was unable to replace Petitioner with temporary help because of budget and time limitations. There was no light duty for housekeepers. Mr. Flynt attempted to contact Petitioner before sending notice of separation, but was unable to do so because Petitioner informed Mr. Flynt that he was moving, but had not given Mr. Flynt any new address or telephone number, leaving Mr. Flynt with only Petitioner's mother's address and telephone number. The disability statements subsequently given to WSSU by Petitioner indicated total disability through 5 April 2000. A letter was sent to Petitioner indicating that he must return to work on or before 6 March 2000, or he would be assumed to have vacated his position. (Tr. pp. 132-134). Petitioner did not return to work on March 6, 2000 without restriction and thereby vacated his position.

12. 25 N.C.A.C. 1D.0519(b) provides:

> Prior to separation, the employing agency shall meet with or at least notify the employee in writing, of the proposed separation, the efforts undertaken to avoid separation and why the efforts were unsuccessful. The employee shall have the opportunity in this meeting or in writing to propose alternative methods of accommodation. If the proposed accommodations are not possible, the agency must notify the employee of that fact and the proposed date of separation.
>
> WSSU complied with this section of the regulation. That is, Mr. Flynt attempted to contact Petitioner to notify him of his possible separation if he could not return to work; however, Petitioner informed Mr. Flynt that Petitioner was moving to a mobile home but failed to give Mr. Flynt an address or telephone number to reach him. Mr. Flynt even checked with Petitioner's co-workers in order to contact Petitioner. Mr. Flynt advised Petitioner's co-workers to have Petitioner contact him.

13. The only manner by which Mr. Flynt could reach Petitioner was through his last known address, which was Petitioner's mother's home. Mr. Flynt believed that Petitioner no longer resided there, but Petitioner actually resided at this address. Mr. Hodge sent a letter to Petitioner at that address advising Petitioner that the work load was such that WSSU needed every available housekeeper and requesting that Petitioner return to work on or before March 6, 2000, or WSSU would assume Petitioner had vacated his position.

14. Under these circumstances, WSSU made a good faith effort to comply with the regulation. Respondent could not interact with an employee who failed to give his supervisor a telephone number or address where he could be reached. Employees have a duty to keep their supervisor informed of a current address and telephone number. Petitioner should not have indicated to Mr. Flynt that he was moving with a new address and telephone number if that were not true. WSSU is under no obligation to contact Petitioner's mother in order to locate Petitioner. WSSU properly separated Petitioner based on unavailability after exhaustion of all available leave.

15. WSSU's information regarding Petitioner's physical state, even subsequent to sending the 29 February 2000 letter, was that Petitioner's physician continued to describe Petitioner as totally disabled until at least 5 April 2000. Further, Petitioner's physician continued to state that Petitioner was totally disabled *subsequent to the date Petitioner could purportedly return to regular duty* (*see* Respondent's Exhibits U, AA, EE, and GG), which indicates Petitioner could not and did not return to his normal duties by 6 March 2000, as required by WSSU.

16. Petitioner was separated from WSSU because he had exhausted all leave and had been without leave for over two months prior to his separation. WSSU complied with the separation after exhaustion of all available leave in accordance with policy and rule and properly separated Petitioner after exhaustion of all available leave.

17. 25 N.C.A.C. 1D.0519 does not provide for any mandatory relief were it to be construed that an agency improperly separated an employee after exhaustion of all available leave. Specifically, section 1D.0519(d) provides:

> Agencies should make efforts to place an employee so separated pursuant to this Rule when the employee becomes available, if the employee desires, consistent with other employment priorities and rights. *However, there is no mandatory requirement placed on an agency to secure an employee, separated under this Rule, a position in any agency.* (Emphasis added).

18. During the time period from March 1999 through March 2000, Petitioner worked a total of 113 days, 6 hours, 10 minutes. During that same time period, Petitioner was away from work 140 days, 4 hours, 50 minutes, plus 9 holidays. (Respondent's Ex. SS). Petitioner was absent from work more than he was present at work during the year prior to his separation from the Respondent.

19. During that same time period, a period of one full year, Petitioner was credited with *only four, 40-hour weeks.* (Emphasis added)(Respondent's Ex. RR).

20. During the time period from January 1999 through March 2000, WSSU granted Petitioner 996.50 hours of LWOP. (Respondent's Ex TT) While thirteen other employees in Facilities Management also were granted LWOP, Petitioner received six times more LWOP than did the next closest employee, who received 148.25 hours during that same time period. *Id.*

21. Petitioner was given several opportunities to propose to Respondent alternative methods of accommodation. The record is devoid of Petitioner's effort after March 6, 2000 to propose express alternatives and Respondent declined to unilaterally accommodate Petitioner's continued absences or extend LWOP for Petitioner's medical condition. Petitioner was provided opportunity to propose alternatives prior to and in the grievance process, but did not avail himself of this opportunity. Petitioner's failure to return to work on March 6, 2000 without restriction was tantamount to Petitioner's resignation and rendered moot any attempt by Respondent to further accommodate Petitioner.

22. LWOP, although liberally granted by the Respondent to the Petitioner, remains within the Respondent's discretion. The Respondent may unilaterally determine that no further extensions of LWOP will be granted. Respondent expressly terminated Petitioner's LWOP as of March 6, 2000. Based upon the exhaustion of all leave in December of 1999 by the Petitioner and his uncontroverted attendance record during the year of 1999, no reasonable employer would be expected to approve an additional three months of LWOP in the year 2000. This further accommodation went well beyond what Respondent should have been reasonably expected to grant. The Petitioner's failure to report to work on March 6, 2000 without restriction was subject to the Respondent's unilateral election to treat Petitioner's continued absence after that date as an abandonment of his position.

23. Petitioner, aside from his application for Family Medical Leave under the Family Medical Leave Act, provided no documentation to support his request for LWOP or any other leave. Petitioner apparently assumed that LWOP would be granted to him as an entitlement for so long as Respondent received copies of physician statements. Petitioner made infrequent attempts to communicate with or formally request authorization for LWOP to Respondent. The failure of this communication produced great difficulty for his supervisors and management to determine his expected date of return from LWOP and greatly inhibited Respondent's attempt to communicate with Petitioner. However, Respondent also contributed to this failure by not requiring that Petitioner follow any explicit procedures in requesting LWOP or specifying the manner of Petitioner's communication of his medical status while on LWOP.

24. Petitioner's disregard for the application process for LWOP, his failure to continuously communicate with his supervisors during periods of LWOP, and his mere provision of physicians' statements on physicians' forms, which were at times confusing and contradictory, must be construed to estop Petitioner from asserting a defense of a lack of communication from the Respondent, particularly as to Petitioner's failure to receive Respondent's communication after his unavailability on or after March 6, 2000. It is the Petitioner's responsibility, at all times, to provide his employer with his current address and telephone number. It is not the responsibility of the Respondent to attempt to locate employees because they have contradictory information as to a current address or for the employer to elicit this information from Petitioner.

25. Petitioner failed to apply in writing for LWOP; failed to give written notice to return to work at least thirty days prior to the end of leave; failed to return to work at the end of the time granted or to notify Respondent of his intention not to return. Petitioner's physician's statement of March 7, 2000 (Respondent's Ex. Y and Petitioner's Ex. 11) indicating that Petitioner could return to work on March 9, 2000 was late by three days. Respondent could have waived Petitioner's tardiness but elected not to. Petitioner was required to act prior to March 6, 2000 and failed to do so. Petitioner failed to act as required and did so at his peril.

26 Petitioner could be perceived as an employee who was not dependable as evidenced by his history of excessive absenteeism, including his excessive absenteeism during his last year of employment at WSSU. *See* Respondent's Exhibits RR, SS and TT and his failure to communicate with his supervisors during LWOP. Specifically, Petitioner worked *only four, 40-hour weeks* during the period of March 1999 through March 2000 (Emphasis added)(Ex. RR); Petitioner was absent from work 140 days, 4 hours and 50 minutes (plus 9 days holiday) and at work only 113 days, 6 hours and 10 minutes during the period of March 1999 through March 2000 (Ex. SS); and Petitioner was granted 996.50 hours of LWOP during the period of January 1999 through March 2000, six times more LWOP than any other employee in the Physical Plant during this same time period. (Ex. TT).

PETITION II

27. Petitioner filed his initial Petition for a Contested Case (00 OSP 1216) and, during discovery in that case, Petitioner provided responses which indicated that, while he was on FMLA and LWOP from WSSU, from 9 March 1999, through 14 June 1999, and again from 28 September 1999, through 13 October 1999, he continued to work at his secondary housekeeping job. (Respondent's Exs. II, UU). Petitioner had provided disability statements over the signatures of his treating physicians to WSSU during those time periods indicating that he was totally disabled and could not work for periods of limited duration. (Respondent's Exs. H, I, K, L and PP). Presumably, WSSU granted FMLA and LWOP to Petitioner based on these statements. (Tr. pp. 136, 184-185; Respondent's Ex. II).

28. Petitioner's approval for LWOP under the Family Medical Leave Act was, however, specifically based upon his application, Respondent's Exhibit G, with the attached medical statement in support thereof from Dr. Alvin J. Lue. The description of the Petitioner's (patient's) current medical condition is specified therein. Nowhere contained in this application is there any statement as to Petitioner's permanent, partial or total disability from all work. Dr. Lue indicated that Petitioner's prognosis was good. Based upon this application, Respondent approved Petitioner for Family Medical Leave from 3/9/99 to 5/31/99, a period of twelve consecutive weeks of coverage. The subsequent medical forms provided by Petitioner in no way provided the basis for approval of Family Medical Leave during this period of time. The subsequent medical documentation was provided by a different treating physician.

29. Family Medical Leave is granted following a period of incapacity, meaning inability to work due to the serious condition or continuing treatment by a health care provider involving a period of incapacity of more than three consecutive days (emphasis added), and any subsequent treatment or period of incapacity relating to the same condition that also involves treatment two or more times by a health care provider. The period of incapacity is contemplated as being as little as three consecutive days. Family Medical Leave

does not require permanent or total disability before this leave may be granted and it contemplates a period of incapacity of limited duration, as little as three consecutive days. The remainder of time can be used in follow-up treatment of an ongoing or current condition. Other reasons for granting Family Medical Leave are to take care of sick or injured parents and pregnancy leave. Neither of these stated purposes require permanent or partial/permanent disability.

30. Knowledge acquired by an agent in the course and scope of the agent's employment is imputed to the principal, even if not actually communicated to the principal. Mr. Flynt as the agent/employee of Respondent and supervisor of the Petitioner received information as to the Petitioner's dual and secondary employment. This knowledge was acquired by the supervisor during the course and scope of the agent's employment during this supervisor's secondary employment in the very same secondary employment participated in by the Petitioner. This supervisor did not seek approval for his own secondary employment. This would lead a reasonable person, including the Petitioner, to believe that it was not necessary to seek approval and permission for secondary employment under the Respondent's policy. Further, the supervisor's own statement in the record as to his belief that the approval policy for secondary employment was not enforced by the Respondent relates back to the time Petitioner's supervisor first knew of and disregarded Respondent's policy as applied to himself and the Petitioner. Respondent's assertion of its first knowledge of Petitioner's secondary employment cannot be construed to have first been known in the discovery process as after-acquired knowledge, but relates back to the point in time when its supervisor first learned of Petitioner's secondary employment. This cannot be deemed after-acquired knowledge. The record is devoid of any disciplinary action initiated against this supervisor for his failure to report Petitioner or himself for not receiving approval for secondary employment based upon Respondent's after-acquired knowledge as well as statements in the record that indicate that at least fifty percent of the employees of the Respondent were employed in secondary employment. For Respondent not to take disciplinary action of a similar nature against this supervisor for failing to report secondary employment, after acquiring full knowledge of his failure to report, amounts to Respondent's ratification of this supervisor's understanding that this policy was not enforced. Therefore, for Respondent to initiate a just cause termination of Petitioner for failing to report secondary employment cannot support what a reasonable employee might expect as grounds for a just cause discharge under the facts as found without prior warning and, further, if so applied to Petitioner, would be arbitrary and capricious, especially without evidence of a disciplinary action taken against a managerial employee who admittedly had not complied with the same policy or evidence of a similar disciplinary action taken against any other of the 50% of Respondent's employees engaged in secondary employment for a similar failure to report. The same rationale applies to Petitioner's subsequent secondary employment.

31. Granting LWOP to the Petitioner without requiring of the Petitioner a formal application for LWOP with specific requirements and limitations, coupled with no definitive beginning and ending date, prevents Respondent from knowing specifically what Petitioner's disability was at the time of application for the LWOP as well as any potential conflict that Petitioner's secondary employment may have had with Petitioner's primary employment with Respondent. The decision to grant LWOP and the amount of time granted is an administrative decision for which the agency head must assume full responsibility. Furthermore, Respondent received imputed knowledge of Petitioner's secondary employment from Petitioner's supervisor as well as this supervisor's disregard for the application process for secondary employment to the extent that Respondent had the imputed knowledge of this potential conflict and by taking no action against the Petitioner for this omission as well as the omission of the Petitioner's supervisor prevents Respondent from discharging the Petitioner based upon failure to report secondary employment or the potential conflict of the secondary employment with the primary employment. Respondent's own findings contained in Respondent's Exhibit JJ of the supervisor's knowledge of secondary employment is an admission of this imputed knowledge. The record indicates that Petitioner sought approval for light duty in his primary employment which was not approved and that Petitioner's other secondary employment involved light duty of a nature different from his lifting requirements in his primary employment with Respondent. The record is unclear as to Petitioner's ability to perform the specific tasks of secondary employment (the absence of heavy lifting, etc.) as contrasted with his daily assignments as a housekeeper. Respondent, further failed to carry its burden of proof by the greater of weight of the evidence as to the specific nature of Petitioner's duties in this secondary employment and precisely how this secondary employment may have conflicted with his primary employment.

RECOMMENDED DECISION - PETITION I

Petitioner's dismissal based upon unavailability for failure to return to employment without restriction after exhaustion of LWOP on March 6, 2000 be upheld.

DECISION - PETITION II

Petitioner's dismissal for failure to report or receive approval for secondary employment while on LWOP under the FMLA or subsequent periods of LWOP cannot be deemed after-acquired knowledge and does not otherwise constitute grounds for a just cause disciplinary dismissal as this dismissal would be arbitrary and capricious under the facts found herein and as to whether other disciplinary action of a lesser degree would be justified is moot as petitioner's employment terminated for unavailability as held in Petition I.

ORDER

It is hereby ordered that the agency making the final decision in this case serve a copy of the final decision on the Office of Administrative Hearings, P.O. Drawer 27447, Raleigh, North Carolina 27611-7447, in accordance with N.C. Gen Stat. § 150B-36(b).

NOTICE

The agency making the final decision in this case is required to give each party an opportunity to file exceptions to the recommended decision (Petition I) and decision (Petition II) and to present written arguments to those in the agency who will make the final decision.

The agency making the final decision is required by N.C. Gen Stat. § 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy of the final decision to the parties or their attorneys of record and to the Office of Administrative Hearings.

The agency that will make the final decision in this contested case is the North Carolina State Personnel Commission.

This the 3rd day of June, 2002.

Julian Mann, III
Chief Administrative Law Judge

STATE OF NORTH CAROLINA	**IN THE OFFICE OF ADMINISTRATIVE HEARINGS**
COUNTY OF CALDWELL	**01 OSP 1612**

WAYNE G. WHISENANT,	)	**DECISION** (to the State Personnel Commission)
Petitioner,	)	
v.	)	**RECOMMENDED DECISION** (to the local appointing authority without requirement to comment)
FOOTHILLS AREA AUTHORITY,	)	
Respondent.	)	

THIS MATTER came on for hearing before the undersigned Augustus B. Elkins II, Administrative Law Judge. The matter was heard in Newton, North Carolina, on February 6, 2002; and in Morganton, North Carolina, on February 26, 2002 and February 28, 2002.

APPEARANCES

For the Petitioner: Timothy J. Rohr, Esq.
Attorney at Law
Wilson, Lackey & Rohr, P.C.
606 College Avenue SW, Suite B
Lenoir, North Carolina 28645-5403

For the Respondent: Christopher Z. Campbell, Esq.
Attorney at Law
Roberts & Stevens, P.A.
P.O. Box 7647
Asheville, North Carolina 28802

PRILIMINARY MATTERS

1. On December 27, 2001, Respondent filed its Prehearing Statement, which also contained a Motion to Dismiss. A hearing on the motion was held on February 6, 2002. Respondent advanced their motion to dismiss alleging Petitioner's failure to follow and exhaust administrative remedies and failure to file a complaint with the Office of Administrative Hearings (OAH) in a timely manner.

2. Respondent states in its motion that by letter dated May 1, 2001, Petitioner was personally informed of a Reduction in Force (RIF) and resulting elimination of Petitioner's position and further informed that the RIF would be effective June 1, 2001. Petitioner's last actual day of work was May 1, 2001 and his last paid day of leave was May 31, 2001. Attached to the May 31, 2001 letter were two FAP Policies, one dealing with grievances and the other dealing with RIF actions. The letter briefly instructs the Petitioner to "refer to those policies immediately if you intend to appeal," indicating both are applicable. The grievance policy states an employee should file a written grievance to his/her supervisor within 15 days of the date of the problem. Within the step 1 guidelines and the 15-day period, one is instructed that grievances related to a dismissal should be filed initially with the Area Director (a reader is not directed to Step 2). The RIF policy states the employee should file an appeal at the third step of the appeals procedure within 10 calendar days from the date of the employee's separation (last day of work).

3. By letter dated June 11, 2001 Petitioner submitted a grievance to Respondent. This was 10 days from the effective date of the RIF and within 15 days of the dismissal (elimination of Petitioner's position). It was 11 days from the last paid day of leave for the Petitioner. By e-mail initiated by Petitioner on July 31, 2001 to Frances Bailey at Foothills, he stated that he had not heard anything concerning his grievance and asked if he was to now notify the Area Director within 15 days of a notice of appeal if he appeals to the Office of State Personnel. By e-mail from Frances Bailey on August 15, 2001, she informs Petitioner that the grievance will not be considered because it was not received with the prescribed period of time "as outlined in Foothills Area Program Procedures Manual FAPPM." She further informs him that in accordance with FAPPM he "must notify the Area Director within 15 days of filing an appeal with the Office of State Personnel." By e-mail dated August 15, 2001, Petitioner thanks Frances Bailey for answering his questions and states that he will be filing "a discrimination grievance with the Office of State Personnel prior to 8/30/01," which he states "should fall within 30 days of my receipt of the letter that you referenced in your e-mail."

4. By e-mail dated September 10, 2001, Petitioner informs John Alexander, Foothills Area Director that, "having mailed my grievance to the address specified in the policy, and having notified you via this e-mail, it is my presumption that I have satisfied the requirement(s) of the policy." Petitioner mailed his appeal (grievance) to the OAH on September 11, 2001 using the address furnished by Respondent. That address was incorrect and had not been used by OAH for several years. It arrived at OAH on September 27, 2001.

5. Petitioner filed his Petition for a Contested Case Hearing with OAH alleging that he was discharged without just cause; that he failed to receive priority consideration and lastly, that employment and/or transfer was denied him and/or termination occurred due to discrimination and/or retaliation for opposition to alleged discrimination. A letter of appeal with lengthy attachments was filed with OAH on September 27, 2001 but the Clerk's Office was unable to determine if the letter with attachments constituted a Petition. Petitioner filed a cover Petition with OAH on October 12, 2001.

6. A complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. Pleadings are to be liberally construed. Mere vagueness or lack of detail is not ground for a motion to dismiss. *Sutton v. Duke*, 277 N.C. 94, 102-103, 176 S.E.2d 161, 166-67 (1970); *Caldwell v. Deese*, 26 N.C.App. 435, 216 S.E.2d 452 (1975). *Gallimore v. Sink*, 27 N.C.App. 65, 66-67, 218 S.E.2d 181, 182-83 (1975). When reviewing a motion to dismiss, the court assumes the facts alleged in the complaint (Petition) are true, *see McNair v. Lend Lease Trucks, Inc.*, 95 F.3d 325, 327 (4th Cir. 1996), and construes the allegations liberally, *see Dixon v. Stuart*, 85 N.C. App. 338, 354 S.E.2d 757 (1987), and in the light most favorable to the pleader (in this instance the Petitioner). *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Further, "when the allegations in the complaint give sufficient notice of the wrong complained of, an incorrect choice of legal theory should not result in dismissal of the claim if the allegations are sufficient to state a claim under some legal theory." *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979). Additionally, when reviewing a *pro se* complaint, the court examines carefully the plaintiff's (Petitioner's) factual allegations, no matter how inartfully plead, to determine whether they could provide a basis for relief. *See Haines v. Kerner*, 404 U.S. 519-21 (1972).

7. N.C. GEN. STAT. §126-34 states that any career State employee having a grievance arising out of or due to the employee's employment and who does not allege unlawful harassment or discrimination because of the employee's age, sex, race, color, national origin, religion, creed, handicapping condition or political affiliation shall first discuss the grievance with the employee's supervisor and follow the grievance procedure established by the employee.

8. Though Petitioner does not specify the type of discrimination, at the point in the process of the motion to dismiss, any fact in controversy must be viewed in favor of Petitioner under the standards of review for purposes of this motion. A complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any set of facts which could be proved in support of the claim. Further, pleadings are to be liberally construed and mere vagueness or lack of detail is not ground for a motion to dismiss. Additionally it is noted that at the time of the motion and up until February 1, 2002, the Petitioner was *pro se*. Petitioner had alleged discrimination in his Petition, which is an exception to the requirement of an internal process first being followed. In accord with the standard of review, at the motions juncture of this case, there is not a determination that the theory being advanced by Petitioner is the correct one or not the correct one but the Undersigned is applying the required liberal construction of the standards to view whether there are no set of facts whatsoever in which the Petitioner could be provided any sort of relief in support of his claim. Further, Petitioner fell within the time to appeal according to one policy the Respondent furnished him without explanation. The Respondent refused to hear or review Petitioner's grievance.

9. Respondent alleges the Petition was not timely in that it fell outside the time requirements for filing at OAH.

10. The jurisdiction of the OAH over the grievances of employees derives not from Chapter 150B, but from Chapter 126. The administrative hearing provisions of Article 3, Chapter 150B, do not establish the right of a person "aggrieved" by agency action to OAH review of that action, but describes the procedures for such review. See N.C.G.S. § 150B-23(a). The Fourth Circuit case, *CM, a minor, by and through her parents, JM and EM v. The Board of Education of Henderson County*, 241 F.3rd 374 (4th Circuit 2001), has a lengthy discussion regarding North Carolina's 60-day statute of limitations regarding special education. Though the above is not a special education case, the reasoning in *CM* is equally applicable in this case. The time frame for filing a petition with OAH was not found to be too short, but this was based on specific notice requirements incumbent upon the agency. Citing from that opinion, "Section 150B-23(f) instructs that the 60-day limitations period begins only when aggrieved persons are provided written notice "of the agency decision;" the notice must "set forth the agency action" and inform aggrieved persons of "the right, the procedure, and the time limit to file a contested case petition." N.C. Gen. Stat. § 150B-23(f). The Court went on to say, "The very reason that the North Carolina Supreme Court has refused to extend statutes of limitations by construction is to ensure that parties have notice of the time limits applicable to their cases. Unless parents are informed that an agency decision in their case has triggered the limitations period, simply notifying them of the general right, procedure, and time limitation to request a due process hearing is worthless."

11. Using the *CM* reasoning, Respondent failed to give the detailed notice requirements particular to this Petitioner that would trigger the limitations period. Respondent's brief letter attaches two separate policies without explanation as to their application for this particular Petitioner. Further, after hearing nothing from Respondent for over a month, the Petitioner initiated contact with the agency. The e-mail responses from Respondent were extremely brief or typed onto Petitioner's original questions several weeks later after an already lengthy delay. The handing of general policies to Petitioner as an attachment to a brief letter is directly comparable to simply handing parents a generalized Parents' Rights Handbook as was the case in *CM* where the Fourth Circuit found it to be inadequate to trigger the limitations period. Respondent's attaching two generalized grievance procedures, that were somewhat outdated in at least their directing of filing at OAH with the appropriate address, to a very short RIF letter is not fact specific to this individual Petitioner. There being no fact-specific procedures to follow in the letter itself and no instructions as to which grievance policy to follow and when, leads to no other conclusion under the standards of review for motions to dismiss but that Respondent failed to give adequate notice to the grievant (Petitioner) which would trigger a limitations period.

12. Based on the above, the Undersigned ruled that the Petitioner had stated a claim upon which relief may be granted and had filed a timely petition. The Office of Administrative Hearings has jurisdiction of this contested case and jurisdiction over the Petitioner and Respondent. As announced at hearing, the Motion to Dismiss was denied

ISSUES

1. Was the Petitioner's employment and/or transfer denied him and/or did termination occur due to discrimination and/or retaliation for opposition to alleged discrimination?

2. Was the Reduction in Force (RIF) adopted by the Respondent legitimate in both its process and the ends sought?

3. If the RIF were legitimate in process and ends sought, did the Petitioner receive all the pre-separation and post-separation benefits to which he was entitled?

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making the findings of fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case. From official documents in the file, sworn testimony of the witnesses, and other competent and admissible evidence, it is found as a fact that:

FINDINGS OF FACT

1. Petitioner began working for Respondent, Foothills Area Authority, in 1995. Throughout his employment with Respondent, Petitioner was Information Services ("IS") Director.

2. According to the Petitioner's job description, Petitioner was to "perform supervisory and professional-level technical and administrative work while planning the coordination and operation of a complex wide area network connecting all facilities, local area network(s) connecting individual facilities, various computer system(s), and peripheral devices for" the Respondent.

3. The Respondent is a public agency that provides mental health, mental retardation, and substance abuse services to a four-county area of Burke, Caldwell, Catawba and Alexander Counties. Respondent is an area "mental health, developmental disabilities, and substance abuse services," program organized and operating under N.C. Gen. Stat. § 122C-101 and N.C. Gen. Stat. § 122C-116.

4. Respondent is a "local political subdivision of the State," N.C. Gen. Stat. § 122C-116, which, "[f]or the purpose of personnel administration," N.C. Gen. Stat. § 122C-154 (1996), is governed by the State Personnel System set out in N.C. Gen. Stat. § 126-1 et seq. (1999), unless otherwise provided. N.C. Gen. Stat. § 122C-154.

5. Respondent has received a "substantial equivalency" designation from the State of North Carolina, Office of State Personnel, for its Reduction in Force policy. (R p. 75-76; Res. Ex. A). The designation of substantially equivalent has never been withdrawn by the State of North Carolina. (R p. 77). In addition to the Respondent's policies regarding reduction in force and employee grievances, the Respondent also has its own policy of disciplinary action, including dismissal for just cause for unsatisfactory job performance and unacceptable personal conduct. Although these policies are not the policies set by the State Personnel Commission, 25 N.C. Admin. Code 1D.0500 et seq. and 25 N.C. Admin. Code 1J.0500 et seq., they have also received "substantial equivalency" exemption pursuant to N.C. Gen. Stat. § 126-11.

6. During his time as IS Director, the Petitioner administered the information services department of the Respondent, oversaw the initial networking of the Respondent, installation of software and training of Respondent's employees and oversaw the maintenance, improvement and repairs to the Respondent's computer hardware and software infrastructure. At the time of the Petitioner's hiring, the Respondent's computer system was fragmented and required integration among sites in the four county regions served by the Respondent. (R p. 27 & 84).

7. On May 1, 2001, Petitioner was given written notice from the Area Director, John W. Alexander, that his position would be eliminated pursuant to a Reduction in Force ("RIF") effective June 1, 2001. He was placed on full-time administrative leave effective May 1, 2001 with his last day of employment being May 31, 2001. Attached to the RIF letter was the Reduction in Force plan applied to Petitioner and Respondent's policies regarding reduction in force and employee grievances.

8. At the time of his separation Petitioner was paid his accrued vacation leave and sick leave in amounts in excess of his entitlement. Petitioner was entitled to be paid for 240 hours of vacation pay but was actually paid for 331 hours. Petitioner was entitled to 40 hours of sick leave paid-out at 50% but was given 96 hours at 50% (R p. 249-50; Res. Ex. B & J). The net effect of the administrative leave and the payout was to provide Petitioner with an extra two (2) months of compensation beyond his entitlement. (R p. 104-05).

9. Respondent began discussing re-organization of the Information Services Department after Mr. David Hill joined the Respondent Authority in its Human Resources Department in April of 2001. (R p. 231). Respondent first considered a RIF of Petitioner's position in the middle of April, 2001, less than three weeks before the RIF was implemented. February and March of 2001 the Respondent, by and through its employees Mr. Alexander and Ms. Kincaid, was not considering a re-organization of the Information Services Department. (R p. 244).The Area Director for the Respondent, Mr. John Alexander, approved a RIF plan which abolished the position of Information Systems Manager / Director, held by the Petitioner, Mr. Greg Whisenant. (Pet. Ex. 1, RIF Plan ¶ 5).

10. The Respondent's RIF Policy provides that an employee may be separated whenever necessary due to the abolishment of a position or other material changes in duties or organization. If an employee is to be separated due to consolidation, reorganization or abolishment of a position the Area Director is charged with developing a plan. (Pet. Ex. 2, Policy #4-120, p. 1 of 5).

11. At the time of the Petitioner's separation from employment, the primary technology needs of the Respondent included technical support of existing systems and software. (R p. 84 & 90). Petitioner's job duties were primarily in the areas of "automation and infrastructure." (R p. 241; Res. Ex. G at 5). The Petitioner did not hold any software certifications such as "A Plus" or "Net Plus". (R p. 335). The past billing system used by the Respondent required a significant amount of time and attention from the Petitioner in his position as Information Services Director and as the president of a regional "users group" dedicated to that software. (R p. 87-88). With the conversion to a new software package Respondent believed these functions were no longer needed. (R p. 88).

12. On March 26, 2001 Mr. Alexander instructed Ms. Kincaid and another employee to investigate changing the billing software for the Authority. (R p. 122; Pet. Ex. C). Ms. Kincaid had begun the process of purchasing an alternative software program in March, 2001. This was after the Petitioner's February 2001 evaluation but before Ms. Kincaid first suggested the idea of RIF'ing the Petitioner's position to Mr. Alexander. Ms. Kincaid did not discuss purchasing an alternative software program to CSM with the Petitioner, even though he was IS Director.

13. The change in software was not approved by the full Board of Directors for the Authority until June 17th of 2001 at the same time that the Respondent was implementing multiple RIFs. A letter was sent to the Area Board the prior night from Mr. Alexander in an attempt to let them "know in advance that they needed to come to the meeting prepared to make a decision that evening as to whether to proceed with the purchase." (R p. 122-23; Res. Ex. D). Mr. Alexander believed that "in implementing the new software, we would not have needed an IS Director." (Tr. 123). Petitioner was notified of his position elimination on May 1, 2002.

14. Under the RIF Plan presented to Petitioner on May 1, 2001, the Information Services Department was to be reduced from six (6) positions to three (3) positions by eliminating the Petitioner's position, reclassifying a computer support technician to network administrator, transferring a computer support technician to the Human Resources Department as a Staff Development Trainer, and by transferring a Information Processing Technician to the Finance Department. The RIF Plan also called for a vacant Computer Programmer position to be reclassified to a Computer Support Tech II position and transferred to the IS Department to be responsible for all computer related issues for Alexander and Caldwell Counties. (Pet. Ex. 2).

15. The Respondent's RIF policy provided that "management will consider all feasible alternatives to involuntary separation of employees…" in a RIF. The Respondent did not engage in any memorable meaningful discussion nor did not Respondent adequately explore any alternatives to the Petitioner's involuntary separation through the RIF.

16. The Respondent's RIF policy provided that the Respondent was to consider "possible redistribution of staff and other resources" in formulating the RIF. The RIF plan as applied to the Petitioner did not consider any possible redistribution. Instead, the RIF letter set out only the actual redistribution of staff and other resources.

17. Under the RIF Plan, computer support technician, Russell Ollis, was reclassified as Network Administrator and another employee was hired to fill the vacant Computer Support Tech II position. Following the RIF, the technology needs of the Respondent were met by a single Network Administrator and two Computer Support Techs, each of whom was assigned to facilities located in a two county region. (R p. 100). Mr. Ollis' present position description as Network Administrator is virtually identical to the Petitioner's pre-RIF position description with the exception of direct departmental supervision of employees which function was transferred to Ms. Kincaid. (R p. 271, 151). Petitioner's position description was used to create Mr. Ollis' position description.

18. At the time that Mr. Russell Ollis was hired directly by Petitioner, the Respondent's Information Services Department relied on third-party contracts for server support, maintenance and support on routers and switching equipment. Following Mr. Ollis's hire Respondent conducted these services in-house. (R p. 350).

19. Prior to development of the RIF Plan, Mr. Greg Whisenant, the Petitioner, directly hired Mr. Russell Ollis in October of 1999. Petitioner wanted to place Mr. Ollis in the position of Network Administrator. However, Petitioner was informed that the position of Network Administrator could not be filled because of the nature of position advertised for and approved by the Respondent was not that of a Network Administrator. (R p. 227). Petitioner called Mr. Ollis prior to his first day of work and stated, "There has been an issue with your job description. We have to call you something different. You will be paid the same amount of money, and you will perform the same functions, but you will have a different name." (R p. 355). Petitioner and Mr. Ollis discussed revision of his job description to reflect the duties actually performed by Mr. Ollis. (R p. 352). Between Mr. Ollis's hiring in October of 1999 and the time of the RIF in May of 2001, the Petitioner failed to actually re-write Mr. Ollis's job description. (R p. 325).

20. Petitioner directly hired Mr. Ollis as a Computer Support Tech II but instructed him that he would perform the job functions of the Network Administrator (R p. 227). The essential job functions of the Network Administrator are nearly identical to that of the Information Services Manager / Director. (Pet. Ex. 6 & 9B). The Petitioner instructed Mr. Ollis to perform many of the Petitioner's essential job functions. (R p. 227 & 272, 327-328; 351-52; Pet. Ex. 6 & 9B).

21. Respondent's policy for reductions in force provides that the Respondent will "attempt to place an employee scheduled for RIF in another position that is vacant or becomes available in the area before the effective date of the scheduled separation." To qualify for this **pre-separation priority consideration** an employee must "meet the minimum qualifications for the position and have a demonstrated ability to satisfactorily perform the duties within a reasonable time as determined through normal selection procedures." Pre-separation priority consideration is contingent upon the following condition precedent: "Under such circumstances the employee shall be offered the vacant position if a positive employee evaluation has been received within the past year and no disciplinary action has occurred." (R p. 71-72; Pet. Ex.2; RIF Policy at 2 of 5). At the time of the RIF the position of computer technician was vacant and available. Respondent did not consider Petitioner for pre-separation priority status because of a recent negative performance evaluation. (R p. 72).

22. Petitioner was evaluated by his immediate supervisor Ms. Susan Kincaid on or about February 19, 2001. (Pet. Ex. 3). At that time, Ms. Kincaid had already filled out the written evaluation. Ms. Kincaid did not use the Petitioner's position description form, or any other document, when making her performance evaluation of the Petitioner. Ms. Kincaid believed she was aware of Petitioner's essential job functions and duties. (R p. 234-35). The Petitioner's previous written evaluations by Ms. Janice Orick, had been filled out during the course of the performance evaluation meeting. Petitioner failed to receive a grade of "satisfactory" in nine of the eleven categories; and therefore, Petitioner did not receive a positive evaluation under Kincaid's proposal. (R p. 244; Pet. Ex. 3). Petitioner received a grade of "needs improvement" on six (6) of the eleven (11) categories listed. (R p. 245; Pet Ex. 3). The areas graded as "needs improvement" were the following: management of responsibilities, relationships with consumers or general public, co-worker relationships, flexibility, quality of work, and knowledge of job responsibilities.

23. Prior to the Petitioner's February 2001 evaluation (which was the first Ms. Kincaid had given him), the Petitioner had always received positive evaluations, and in fact had received a score of satisfactory or better in every category every year. Mr. Alexander had given the Petitioner a merit raise based on the Petitioner's positive performance evaluations as recently as eight months before he gave the Petitioner his RIF letter.

24. In the aftermath of the Petitioner's February 2001 evaluation discussions with Ms. Kincaid, the Petitioner asked for a written memorandum from Ms. Kincaid with specific reasons for her concerns with his job performance. Ms. Kincaid met with the Petitioner regarding his performance evaluation for approximately one (1) hour on March 18th. (R p. 216). Ms. Kincaid also provided Petitioner with additional written comments regarding his performance evaluation on March 26, 2001 after 5 p.m.. (Pet. Ex. 12). Ms. Kincaid gave Petitioner until March 29, 2001, to respond. Due to scheduling conflicts, Petitioner did not respond until Monday, April 2, 2001, two business days later. In his April 2, 2001 email to Ms. Kincaid the Petitioner stated, "I have no intentions of signing the evaluation as presented," and he further stated, "[i]t is my desire to have a copy of my comments about my performance evaluation

sent to the HR Department to be placed in my permanent Personnel record along with your performance evaluation of me." (Pet. Ex. 13). Had Petitioner's position not been RIFed, Ms. Kincaid would have re-evaluated Petitioner in June of 2001. (R p. 245).

25. Up until Mr. Alexander actually handed the Petitioner the RIF letter on May 1, 2001, the Petitioner expected to be able to continue to discuss his February 2001 evaluation, and in fact believed that it would not be final until a June 2001 reevaluation. Neither Mr. Alexander nor the Petitioner ever signed the Petitioner's February 2001 evaluation. It was the Respondent's policy that the Area Director is to sign every evaluation. The Area Director for the Respondent does not participate in employee performance evaluations because he is the next level of appeal under Authority policy. A purpose for the signature line for the Area Director is to indicate that the evaluation has been completed. (R p. 101). Mr. Alexander had not seen the Petitioner's February 2001 evaluation at the time of the RIF letter, and did not specifically recall ever seeing it until his testimony in court. In fact, Petitioner's evaluation was not done until Mr. Alexander signed it.

26. Prior to the RIF, Petitioner was not offered the open position of Computer Support Tech II, which position was subordinate to the Petitioner's pre-RIF position.

27. Following separation, an employee is entitled to **post-separation priority re-employment consideration** for a period of twelve (12) months following receipt of notice of scheduled separation if the employee "has positive performance evaluations." (Pet. Ex. 2; RIF Policy at 4 of 5, Para (e)).

28. In the May 1, 2001, RIF letter, Mr. Alexander stated that "[a]lthough reduction in force normally carries with it certain rights to priority placement, this priority placement applies only where an employee has received a satisfactory job performance within the 12 twelve (sic) months prior to the reduction in force. Your most recent performance evaluation does not support priority placement." Again, Respondent's RIF policy provided that "[o]n receipt of formal written notice of scheduled separation, a permanent employee subject to this policy who has positive performance evaluations acquires priority placement and re-employment status… for a period of twelve consecutive months following receipt of the notice of scheduled separation." Nowhere in Respondent's RIF policy does it state that "priority placement applies only where an employee has received a satisfactory job performance within the 12 twelve (sic) months prior to the reduction in force," as stated in the RIF letter. Post separation priority placement is contingent on positive evaluations- meaning more than one evaluation. Despite the fact that Petitioner had at least five positive performance evaluations before Ms. Susan Kincaid's February 19, 2001, evaluation of the Petitioner, Respondent did not give priority placement consideration **post**-RIF to the Petitioner.

29. Respondent has interpreted the RIF post-separation policy to provide that hypothetically if an individual worked for Respondent for 15 years and had outstanding for 14 of those years but the last year was not that could eliminate that individual from post-separation priority considerations. Respondent believes that conversely if an individual had 14 years of bad performances but the last year was good they would be entitled to post-separation priority status. (Tr. 82-83).

30. After the RIF, the Respondent did not give the Petitioner priority placement consideration for the position of Computer Support Tech II. Although post-RIF, the Respondent advertised for, and the Petitioner applied for, the position of Computer Support Tech II, the Respondent did not hire the Petitioner for that position. The position description form for a Computer Support Tech II provides for the kind of job that the Petitioner would be able to perform given his previous responsibilities and performance as IS Director.

31. Respondent's policy on disciplinary action, with dismissal for just cause related to unsatisfactory job performance, provided that among other things prior to dismissal, an employee must have received at least two warnings, a pre-dismissal conference and "a written letter of dismissal containing the specific reasons for dismissal, the effective date of dismissal and the employee's appeal rights…"

BASED UPON the foregoing findings of fact and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction of this contested case pursuant Chapters 126 and 150B of the North Carolina General Statutes.

2. At the time of his dismissal Petitioner was subject to the State Personnel Act in accord with N.C.G.S. § 126-1 et seq. and to Respondent's personnel policies per the "substantial equivalency" designation from the State of North Carolina, Office of State Personnel. The Petitioner is entitled to those protections afforded to local government employees pursuant to N.C. Gen. Stat. § 126-5(a)(2), except where modified by policies of the Respondent deemed "substantially equivalent" by the State of North Carolina. Pursuant to N.C. Gen. Stat. § 126-11, the Respondent's Reduction in Force Policy is "substantially equivalent" to the protections and procedures contained in Chapter 126.

3. Section 126-35 of the North Carolina General Statutes provides that "no career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." Further, N.C.G.S. § 126-35 states that, "for the purposes of contested case hearings under Chapter 150B, an involuntary separation (such as a separation due to a reduction in force) shall be treated in the same fashion as if it were a disciplinary action." Moreover, N.C.G.S. § 126-35 states, "in contested cases conducted pursuant to Chapter 150B of the General Statutes, the burden of showing that a career State employee subject to the State Personnel Act was discharged, suspended, or demoted for just case rests with the department or agency employer."

4. Petitioner has the burden of going forward and the burden of persuasion by a preponderance of the evidence to his claims regarding his employment and/or transfer denied him and/or his termination occurring due to discrimination and/or retaliation for opposition to alleged discrimination.

5. Petitioner presented no direct evidence regarding his claims of discrimination and the evidence he did present regarding his interaction with Susan Kincaid, a female and his supervisor did not rise to the level of setting forth a *prima facie* case for discrimination.

6. On March 26, 2001 Mr. Alexander instructed Ms. Kincaid and another employee to investigate changing the billing software for the Authority. Ms. Kincaid did not discuss purchasing an alternative software program to the software being used by Respondent with the Petitioner, even though he was IS Director. Ms. Kincaid's investigation began after the Petitioner's February 2001 evaluation with Ms. Kincaid but before Ms. Kincaid first suggested the idea of RIF'ing the Petitioner's position to Mr. Alexander. The change in software was not approved by the full Board of Directors for the Authority until June 17th of 2001. A letter was sent to the Area Board the prior night from Mr. Alexander in an attempt to let them "know in advance that they needed to come to the meeting prepared to make a decision that evening as to whether to proceed with the purchase." Mr. Alexander believed that "in implementing the new software, we would not have needed an IS Director."

7. Respondent began discussing re-organization of the Information Services Department after Mr. David Hill joined the Respondent Authority in its Human Resources Department in April of 2001. Respondent first considered a RIF of Petitioner's position in the middle of April, 2001, less than three weeks before the RIF was implemented. In February and March of 2001 the Respondent, by and through its employees Mr. Alexander and Ms. Kincaid, was not considering a re-organization of the Information Services Department. The past billing system used by the Respondent required a significant amount of time and attention from the Petitioner in his position as Information Services Director and as the president of a regional "users group" dedicated to that software. With the conversion to a new software package Respondent believed these functions were no longer needed.

8. Respondent has the right to review its organization and make changes for the good of the agency and abolish positions or make other material changes in duties or organization. In the case at hand, Respondent looked to an organization change of going to new software, which was approved by the full Board of Directors for the Authority on June 17, 2001. With the conversion to a new software package, Respondent believed the agency would not need an IS Director, and the functions being performed by the Petitioner would no longer be needed. Logically, a reduction in force could have seemed proper after June 17, 2001; and certainly, a tentative RIF plan drawn up to account for the possibility (or even probability) the Board would eventually approve the change is logical. However, Petitioner was notified of his position elimination on May 1, 2002. This was some six weeks before approval by the Board which authorized the go ahead to convert to a new software package and thus again logically would trigger the Respondent to go forward with the RIF reorganization.

9. Respondent was evaluated by his immediate supervisor Ms. Susan Kincaid on or about February 19, 2001. Petitioner failed to receive a grade of "satisfactory" in nine of the eleven categories and received a grade of "needs improvement" on six of the eleven categories listed. Prior to the Petitioner's February 2001 evaluation (which was the first Ms. Kincaid had given him), the Petitioner had always received positive evaluations, and in fact had received a score of satisfactory or better in every category every year. Mr. Alexander had given the Petitioner a merit raise based on the Petitioner's positive performance evaluations as recently as eight months before he gave the Petitioner his RIF letter. In the aftermath of the Petitioner's February 2001 evaluation from Ms. Kincaid, the Petitioner asked for a written memorandum from Ms. Kincaid with specific reasons for her concerns with his job performance. Petitioner had concerns that Ms. Kincaid had already filled out the written evaluation when he talked to her. Though Ms. Kincaid believed she was aware of Petitioner's essential job functions and duties, she did not use the Petitioner's position description form, or any other document, when making her performance evaluation of the Petitioner.

10. Respondent has failed to carry its burden of proof by a greater weight of the evidence that the elimination of Petitioner's position and termination of Petitioner was for just cause at the time the notification of the action took place, that is, May 1, 2001. The early termination of Petitioner before approval of the primary organizational change by the Area Board which authorized the need to abolish the Petitioner's position gives strong rise to the notion that it was the Petitioner himself that Respondent sought to terminate as opposed to the position in which he was employed. This is further bolstered by the evaluation encounter between the Petitioner and Ms. Kincaid, the fact she did not discuss purchasing an alternative software program with the Petitioner, even though he was IS Director, the fact she was the primary investigator of the action and made the RIF organizational change suggestions to Mr. Alexander and of course the timing of the actual RIF action itself.

11. Though the Undersigned finds that the Respondent has not carried its burden of proof in showing the termination of Petitioner through a reduction of force was for just cause, it is necessary to proceed further to answer the other relevant issues. Disregarding momentarily the above conclusions, the Undersigned turns next to the issue of, even if the termination had been for good cause did the Respondent correctly follow its own procedures for pre-separation priority consideration. To qualify, an employee must "meet the minimum qualifications for the position and have a demonstrated ability to satisfactorily perform the duties within a reasonable time as determined through normal selection procedures." Pre-separation priority consideration is contingent upon the following condition precedent: "Under such circumstances the employee shall be offered the vacant position if a positive employee evaluation has been received within the past year and no disciplinary action has occurred."

12. The Undersigned finds that Respondent wrongfully failed to give Petitioner the benefit of pre-RIF consideration for the vacant position of Computer Support Tech II. Though he may not have been the most qualified, evidence shows that Petitioner was minimally qualified. The central question then becomes had he received a positive evaluation within the past year.

13. Though Ms. Kincaid had done an evaluation with Petitioner in February, Petitioner's evaluation was not done until Mr. Alexander, the Area Director signed it. The Area Director for the Respondent does not participate in employee performance evaluations because he is the next level of appeal under Authority policy. There is a signature line for the Director's signature and its purpose is to indicate that the evaluation has been completed. Even though Petitioner would not sign Ms. Kincaid's evaluation, Mr. Alexander certainly could have signed the evaluation signaling it was complete and noting Petitioner's failure to sign. The lack of Mr. Alexander's signature by policy of the agency shows that the evaluation was not complete. Therefore the reliance by Respondent on it in denying Petitioner pre-separation priority consideration based on the lack of a positive evaluation was wrongful. Respondent should have gone back to the last complete evaluation. Had it done so, Respondent would have found it positive and Petitioner would have been entitled to the vacant position of Computer Support Tech II.

14. Though the Undersigned finds that the Respondent has not carried its burden of proof in showing the termination of Petitioner through a reduction of force was for just cause, and disregarding momentarily the above conclusions regarding pre-separation, it is necessary to proceed further to answer the last relevant issue, and that being, even if the termination had been for good cause and even if pre-separation policies had been followed, did the Respondent correctly follow its own procedures for post-separation priority consideration.

15. The Undersigned finds that Respondent wrongfully failed to give Petitioner post-RIF priority placement consideration, including failing to hire him for the advertised position of Computer Support Tech II.

16. Following separation, an employee is entitled to post-separation priority placement and re-employment status rights considerations for a period of twelve (12) months following receipt of notice of scheduled separation if the employee "has positive performance evaluations." The use of the term evaluations, refers to more than one. In the May 1, 2001, RIF letter, Mr. Alexander stated that "[a]lthough reduction in force normally carries with it certain rights to priority placement, this priority placement applies only where an employee has received a satisfactory job performance within the 12 twelve (sic) months prior to the reduction in force. Your most recent performance evaluation does not support priority placement." This statement is broadly written and it is unclear if it refers to pre-separation rights or post-separation rights. The use of the language "priority placement" would leave a reasonable reader to believe it refers to post-separation rights since the Respondent's RIF policy uses that language in its heading for post-separation discussions and not in pre-separation language. Furthermore, Respondent appears to interpret post-separation priority as contingent on the last evaluation as opposed to a review of all performance evaluations. A satisfactory job performance evaluation within 12 months of the RIF action is an incorrect requirement for post-separation priority considerations and by its own policy, Respondent is required to review performance evaluations, including the last one.

17. Priority placement and re-employment status includes the right to be interviewed and, where qualified, and having a demonstrated ability to satisfactorily perform the duties, to be offered the position prior to employing anyone who is not a permanent FAP employee. Again, evidence including but not limited to Petitioner's past position and multiple positive evaluations from Janice Orick show Petitioner, though perhaps not being the most qualified, nonetheless could sufficiently have performed the duties of Computer Support Tech II and based on the priority placement and re-employment status should have been placed in the position.

18. 25 N.C.A.C. 1B. provides that the Commission may order reinstatement, back pay, front pay, transfer, promotion or other appropriate remedy and other corrective remedies as well as attorney fees from dismissal upon a finding of lack of substantive just cause.

19. In so far as this matter involves a local government employee subject to Chapter 126 pursuant to North Carolina General Statute § 126-5(a)(2), the decision of the State Personnel Commission shall be advisory to the local appointing authority.

BASED UPON the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following:

DECISION

There is insufficient evidence that Petitioner was discriminated against in Respondent's actions and his employment and/or transfer denied him and/or his termination did not occur as a result of alleged discrimination.

The Respondent, Foothills Area Authority has failed to carry its burden of proof by a greater weight of the evidence that the elimination of Petitioner's position and termination of Petitioner was for just cause at the time the notification of the action took place, that is, May 1, 2001. The evidence gives strong rise to the notion that it was the Petitioner himself that Respondent sought to terminate as opposed to the position in which he was employed. Black's Law Dictionary cites that "preponderance means something more than weight; it denotes a superiority of weight, or outweighing." The finder of fact cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbear, in some degree, the weight upon the other side. Respondent's evidence does not overbear in some degree the weight of the Petitioner and the conclusion cited above.

Further, the Undersigned finds that Respondent wrongfully failed to give Petitioner the benefit of pre-RIF consideration for the vacant position of Computer Support Tech II. Though he may not have been the most qualified, evidence shows that Petitioner was minimally qualified, that a February 2001evaluation was not completed and that his last evaluation was positive.

Also, the Undersigned finds that Respondent wrongfully failed to give Petitioner post-RIF priority placement consideration, including failing to hire him for the advertised position of Computer Support Tech II. Respondent is required to review performance evaluations. Evidence including Petitioner's past position and multiple positive evaluations from Janice Orick show Petitioner, though perhaps not being the most qualified, nonetheless could sufficiently have performed the duties of Computer Support Tech II and based on the priority placement and re-employment status policy of Respondent, the Respondent should have reviewed and weighed all of Petitioner's evaluations and by doing so, the Petitioner should have been placed in the position.

It is the decision of the Undersigned that Respondent reinstate Petitioner to the position that he was in at the time of his dismissal or to a comparable position that is found within Respondent's organizational structure. Further, it is the finding of the Undersigned that Petitioner be awarded back pay and front pay, if necessary and all lost benefits. Further, Petitioner should be awarded reasonable attorney fees pursuant to 25 N.C.A.C. 1B. upon submission by the Petitioner's counsel of a Petition for Attorney Fees with an accompanying itemized statement of the fees and costs incurred in representing the Petitioner.

NOTICE REGARDING DECISION

The North Carolina State Personnel Commission in this contested case is required to give each party an opportunity to file exceptions to this decision issued by the Undersigned, and to present written arguments to the Commission. N. C. Gen. Stat. § 150B-36(a).

In accordance with N.C. Gen. Stat. § 150B-36 the State Personnel Commission shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence. For each finding of fact not adopted by the Commission, the Commission shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the Commission in not adopting the finding of fact. For each new finding of fact made by the Commission that is not contained in the Administrative Law Judge's decision, the Commission shall set forth separately and in detail the evidence in the record relied upon by the Commission in making the finding of fact. The State Personnel Commission shall adopt the decision of the Administrative Law Judge unless the Commission demonstrates that the decision of the Administrative Law Judge is clearly contrary to the preponderance of the admissible evidence in the official record.

In so far as this matter involves a local government employee subject to Chapter 126 pursuant to North Carolina General Statute § 126-5(a)(2), the decision of the State Personnel Commission shall be advisory to the local appointing authority. The State Personnel Commission shall comply with all requirements of North Carolina General Statute § 150B-44 in making an advisory decision. In so far as this Decision by the Undersigned may be reviewed by the local appointing authority, it shall be in the nature of a recommended decision to that authority with no requirements for comment. The local appointing authority is required by North Carolina General Statute § 126-37 to comment upon the advisory decision of the State Personnel Commission. The local appointing authority shall issue a written, final decision either accepting, rejecting, or modifying the decision of the State Personnel Commission. Further requirements of rights, notices and time lines to the Parties shall be forthcoming from the State Personnel Commission and/or the local appointing authority as the circumstances and stage of the process may dictate.

ORDER

It is hereby ordered that the agency making the final decision in this matter serve a copy of the final decision to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, North Carolina 27699-6714, in accordance with N.C. Gen. Stat. § 150B-36.

This the 30th day of May, 2002.

_____
Augustus B. Elkins II
Administrative Law Judge