

NORTH CAROLINA



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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

Julian Mann III, Director
Camille Winston, Deputy Director
Molly Masich, Director of APA Services
Ruby Creech, Publications Coordinator
Linda Dupree, Editorial Assistant
Dana Sholes, Editorial Assistant
Rhonda Wright, Editorial Assistant

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NORTH CAROLINA ADMINISTRATIVE CODE CLASSIFICATION SYSTEM

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

TITLE/MAJOR DIVISIONS OF THE NORTH CAROLINA ADMINISTRATIVE CODE

TITLE	DEPARTMENT	LICENSING BOARDS	CHAPTER
1	Administration	Acupuncture	1
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4	Commerce	Auctioneers	4
5	Correction	Barber Examiners	6
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7	Cultural Resources	Chiropractic Examiners	10
8	Elections	Employee Assistance Professionals	11
9	Governor	General Contractors	12
10	Health and Human Services	Cosmetic Art Examiners	14
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16	Public Education	Geologists	21
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NORTH CAROLINA REGISTER
 Publication Schedule for January 2003 – December 2003

Filing Deadlines			Notice of Rule-Making Proceedings	Notice of Text							Temporary Rule
volume & issue number	issue date	last day for filing	earliest register issue for publication of text	earliest date for public hearing	non-substantial economic impact			substantial economic impact			270 th day from issue date
					end of required comment period	deadline to submit to RRC for review at next meeting	first legislative day of the next regular session	end of required comment period	deadline to submit to RRC for review at next meeting	first legislative day of the next regular session	
17:13	01/02/03	12/06/02	03/03/03	01/17/03	02/03/03	02/20/03	05/00/04	03/03/03	03/20/03	05/00/04	09/29/03
17:14	01/15/03	12/19/02	03/17/03	01/30/03	02/14/03	02/20/03	05/00/04	03/17/03	03/20/03	05/00/04	10/12/03
17:15	02/03/03	01/10/03	04/15/03	02/18/03	03/05/03	03/20/03	05/00/04	04/04/03	04/21/03	05/00/04	10/31/03
17:16	02/17/03	01/27/03	05/01/03	03/04/03	03/19/03	03/20/03	05/00/04	04/21/03	04/21/03	05/00/04	11/14/03
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17:22	05/15/03	04/24/03	07/15/03	05/30/03	06/16/03	06/20/03	05/00/04	07/14/03	07/21/03	05/00/04	02/09/04
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18:01	07/01/03	06/10/03	09/02/03	07/16/03	07/31/03	08/20/03	05/00/04	09/02/03	09/22/03	05/00/04	03/27/04
18:02	07/15/03	06/23/03	09/15/03	07/30/03	08/14/03	08/20/03	05/00/04	09/15/03	09/22/03	05/00/04	04/10/04
18:03	08/01/03	07/11/03	10/01/03	08/16/03	09/02/03	09/22/03	05/00/04	09/30/03	10/20/03	05/00/04	04/27/04
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18:11	12/01/03	11/05/03	02/02/04	12/16/03	12/31/03	01/20/04	05/00/04	01/30/04	02/20/04	05/00/04	08/27/04
18:12	12/15/03	11/20/03	02/16/04	12/30/03	01/14/04	01/20/04	05/00/04	02/13/04	02/20/04	05/00/04	09/10/04

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.

**NARROW THERAPEUTIC INDEX DRUGS DESIGNATED BY THE NORTH
CAROLINA SECRETARY OF HUMAN RESOURCES**

Pursuant to N.C.G.S. 90-85.27(4a), this is a revised publication from the North Carolina Board of Pharmacy of narrow therapeutic index drugs designated by the North Carolina Secretary of Human Resources upon the advice of the State Health Director, North Carolina Board of Pharmacy, and North Carolina Medical Board:

Carbamazepine:	all oral dosage forms
Cyclosporine:	all oral dosage forms
Digoxin:	all oral dosage forms
Ethosuximide	
Levothyroxine sodium tablets	
Lithium (including all salts):	all oral dosage forms
Phenytoin (including all salts):	all oral dosage forms
Procainamide	
Theophylline (including all salts):	all oral dosage forms
Warfarin sodium tablets	

North Carolina Department of Labor
Division of Occupational Safety and Health
4 West Edenton Street
Raleigh, NC 27601

(919) 807-2875

NOTICE OF VERBATIM ADOPTION OF FEDERAL STANDARDS

In consideration of G.S. 150-B-21.5(c) the Occupational Safety and Health Division of the Department of Labor hereby gives notice that:

- rule changes have been submitted to update the *North Carolina Administrative Code* at 13 NCAC 07F .0201 to incorporate by reference the occupational safety and health related provisions of Title 29 of the *Code of Federal Regulations* Part 1926 promulgated as of September 12, 2002, except as specifically described, and
- the *North Carolina Administrative Code* at 13 NCAC 07A .0301 automatically includes amendments to certain parts of the *Code of Federal Regulations*, including Title 29, Part 1904—Recording and Reporting Occupational Injuries and Illnesses.

This update encompasses recent verbatim adoptions concerning:

- Safety Standards for Signs, Signals and Barricades
(67 FR 57722, September 12, 2002)

The *Federal Register* (FR), as cited above, contains both technical and economic discussions that explain the basis for each change.

For additional information, please contact:

Bureau of Education, Training and Technical Assistance
Occupational Safety and Health Division
North Carolina Department of Labor
4 West Edenton Street
Raleigh, North Carolina 27601

For additional information regarding North Carolina's process of adopting federal OSHA Standards verbatim, please contact:

Barbara A. Jackson, General Counsel
North Carolina Department of Labor
Legal Affairs Division
4 West Edenton Street
Raleigh, NC 27601

FROM THE CODIFIER

Pursuant to G.S. 12-3.1, notwithstanding any other law, an agency's establishment or increase of a fee or charge shall not go into effect unless the General Assembly has enacted express authorization of the amount of the fee or charge or the General Assembly has enacted general authorization for the agency to establish or increase the fee or charge, and the agency has consulted with the Joint Legislative Commission on Governmental Operations on the amount and purpose of the fee or charge to be established or increased.

The Commission was consulted on the following rules at their December 4, 2002 meeting and have been entered into the NC Administrative Code effective December 4, 2002:

<u>Agency</u>	<u>Rule Citation</u>
Insurance	11 NCAC 08 .1332
Transportation/DMV	19A NCAC 03J .0202 and .0502
Dental Examiners	21 NCAC 16Q .0204
Dental Examiners	21 NCAC 16Y .0102
Electrical Contractors	21 NCAC 18B .0209 and .0404
Electrolysis Examiners	21 NCAC 19 .0201 and .0622
Plumbing, Heating & Fire Sprinkler Contractors	21 NCAC 50 .1101, .1102, .1104
Professional Engineers and Land Surveyors	21 NCAC 56.0505, .0606, and .0804
Real Estate Commission	21 NCAC 58A .0503

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 02 – DEPARTMENT OF AGRICULTURE

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Board of Agriculture intends to amend the rule cited as 02 NCAC 52B .0204. Notice of Rule-making Proceedings was published in the Register on October 15, 2002.

Proposed Effective Date: August 1, 2004

Instructions on How to Demand a Public Hearing: *(must be requested in writing within 15 days of notice): Any person may request a public hearing on the proposed rule by submitting a request in writing no later than January 17, 2003, to David S. McLeod, Secretary, NC Board of Agriculture, P.O. Box 27647, Raleigh, NC 27611.*

Reason for Proposed Action: *Over the past decade, there has been a significant decrease in brucellosis cases throughout the country. Proposed changes would delete the requirement for herd certification numbers on the health certificate because most herds from brucellosis-free states are no longer certified; and delete the requirement for negative brucellosis test within 30 days prior to entry for cattle from brucellosis-free states.*

Comment Procedures: *Written comments should be submitted to David S. McLeod, Sec., NC Board of Agriculture, P.O. Box 27647, Raleigh, NC 27611, Phone: (919) 733-7125, Fax: (919) 716-0105, email: david.mcleod@ncmail.net. Comments should be submitted by February 3, 2003.*

Fiscal Impact

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

CHAPTER 52 – VETERINARY DIVISION

SUBCHAPTER 52B – ANIMAL DISEASE

SECTION .0200 - ADMISSION OF LIVESTOCK TO NORTH CAROLINA

02 NCAC 52B .0204 IMPORTATION REQUIREMENTS: BRUCELLOSIS

(a) All cattle imported into North ~~Carolina, regardless of the class of state,~~ Carolina are subject to the provisions of this Rule, as follows: following requirements:

- (1) all cattle shall be identified by ear tag, tattoo, or other permanent means approved by the State Veterinarian;
- (2) cattle originating from any certified ~~Brucellosis-free~~ brucellosis-free State ~~or herd~~

may enter North Carolina provided the following is recorded on the official health certificate:

- (A) individual identification of each animal, and
- (B) ~~herd certification number,~~ and brucellosis status of the State;
- ~~(C) date of last herd test;~~
- (3) no test is required on steers and spayed females;
- (4) no cattle will be accepted (other than those consigned to immediate slaughter) which have been adult vaccinated against brucellosis or originate from infected, exposed or quarantined herds;
- (5) required retests will be performed by representatives of State Veterinarian at no expense to the owner, or the owner may have the tests conducted by ~~an~~ a licensed, accredited veterinarian [as defined in 02 NCAC 52B .0401(5)] at his expense; and
- (6) all cattle shall be negative in all dilutions if tube or plate agglutination test is used, or negative to official card test.

(b) In addition to the requirements of Paragraph (a) of this Rule, cattle imported from ~~brucellosis free and class A~~ brucellosis class A states shall comply with the following:

- (1) all females and bulls eight months of age and older shall be tested negative within ~~thirty~~ 30 days prior to entry into North Carolina, except:
 - (A) dairy heifers under ~~twenty~~ 20 months of age, and heifers of the beef breeds under ~~twenty-four~~ 24 months of age that are officially vaccinated against brucellosis; or
 - (B) cattle originating from any certified, brucellosis-free herd, provided the following is recorded on the official health certificate:
 - (i) individual identification of each animal;
 - (ii) herd certification number;
 - (iii) date of last herd test; and
- (2) cattle from class A states which originate from the farm of origin and move directly to an approved stockyard or farm in North Carolina in compliance with this ~~part~~ Rule are not required to be tested within 45 to 120 days after entry. However, ~~the State Veterinarian strongly recommends a retest and~~ retests may be performed by a representative of the State Veterinarian at no expense to the owner. Eligible cattle which have been commingled in

PROPOSED RULES

a stockyard prior to importation ~~must~~ **must**, in addition to the requirements of this ~~part~~ **Rule**, pass a negative retest within 45 to 120 days after arrival in this state.

(c) In addition to the requirements of **Paragraph** (a) of this Rule, cattle imported from class B states shall comply with the following:

- (1) a permit issued to a North Carolina resident by the State Veterinarian of North Carolina prior to entry is required;
- (2) all females and bulls eight months of age or older must be tested negative within 30 days prior to entry into North Carolina except:
 - (A) dairy heifers under ~~twenty~~ **20** months of age and heifers of the beef breeds under ~~twenty-four~~ **24** months of age officially vaccinated against brucellosis;
 - (B) cattle originating from any certified brucellosis-free herd provided that the following is recorded on the official health certificate:
 - (i) individual identification of each animal;
 - (ii) herd certification number; and
 - (iii) date of last herd test;
- (3) all test eligible cattle shall be quarantined upon arrival and must pass a negative retest within 45 to 120 days after arrival.

(d) In addition to the requirements of **Paragraph** (a) of this Rule, cattle imported from class C states shall comply with the following:

- (1) a permit issued to the North Carolina resident by the State Veterinarian in North Carolina prior to entry is required;
- (2) all females and bulls eight months of age and older must have two negative tests at least 60 days apart, with the second test being conducted within 30 days of entry into North Carolina, except:
 - (A) dairy heifers under ~~twenty~~ **20** months of age officially vaccinated against brucellosis;
 - (B) heifers of the beef breeds less than ~~twenty-four~~ **24** months of age and officially vaccinated against brucellosis;
 - (C) cattle originating from any certified brucellosis-free herd provided the following is recorded on the official health certificate:
 - (i) individual identification of each animal;
 - (ii) herd certification number; and
 - (iii) date of last herd test;
- (D) test eligible cattle may enter North Carolina on a 30 day negative test provided that the herd of origin has

- (E) had a complete negative test within the previous 12 months;
- test eligible cattle may enter North Carolina with one negative test for consignment to a specifically state, federally approved stockyard. A permit from the State Veterinarian or his authorized representative is required prior to removal of cattle from the stockyard under this provision; and
- (3) all test eligible cattle shall be quarantined upon arrival and shall pass a negative retest within 45 to 120 days after arrival and all female cattle which are from a "~~C~~" **class C** state shall remain under quarantine until tested negative 20 to 45 days post calving or until slaughtered.
- (4) feeder heifers must also be spayed and "spayed branded" or be "F" branded. Feeder heifers are subject to ~~item~~ **Subparagraph** (3) of this Paragraph. Branding must be with a hot brand, the letter F on the right or left tail head area. This F brand size shall be 3" x 3". A properly applied and placed F brand will meet the individual identification requirement as specified in **Subparagraph** (a)(1) of this Rule.

Authority G.S. 106-307.5.

TITLE 10 – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice is hereby given in accordance with G.S. 150B-21.2 that the DHHS – Division of Medical Assistance intends to amend the rule cited as 10 NCAC 26H .0404. Notice of Rule-making Proceedings was published in the Register on April 1, 2002.

Proposed Effective Date: August 1, 2004

Public Hearing:

Date: January 22, 2003

Time: 10:30 – 11:30 a.m.

Location: RM 132, Kirby Bldg., 1985 Umstead Dr., Raleigh, NC

Reason for Proposed Action: *This change is for calendar year 2002 only. The Division of Medical Assistance shall increase dental fees based on access to care in lieu of the inflationary increases. Specific procedure codes will be increased based on administrative review. The codes selected by medical policy for increases are based on high utilization and provider complaints of not meeting costs. Some of the codes selected were chosen because they were not in accordance proportionately with the service description. Recommendations from the UNC School of Dentistry (Pediatric Department) were taken under advisement and the codes on that list have been incorporated in the recommended Medical Policy selected fee list and are considered to be fee increases that will help children the most. This amendment is made due to review by administrative personnel and recommendations based on access to care issues*

PROPOSED RULES

by providers and Medicaid recipients. This amendment will have no overall fiscal impact due to selective fee increases in lieu of inflationary increases.

Comment Procedures: Comments from the public shall be directed to Portia W. Rochelle, 1985 Umstead Dr., 2504 Mail Service Center, Raleigh, NC 27699-2504, phone (919) 857-4094, fax (919) 733-6608, and email prochell@bellsouth.net. Comments shall be received through February 3, 2003.

Fiscal Impact

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

CHAPTER 26 – MEDICAL ASSISTANCE

SUBCHAPTER 26H - REIMBURSEMENT PLANS

SECTION .0400 - PROVIDER FEE SCHEDULES

10 NCAC 26H .0404 OTHER SERVICES PERFORMED BY PHYSICIANS AND OTHER PRACTITIONERS

A maximum fee is established for other services performed by physicians and other practitioners and is applicable to all specialties and settings in which the service is rendered. Payment is equal to the lower of the maximum fee or the provider's customary charge to the general public for the particular service rendered.

- (1) Fees for office services, hospital services, nursing home services, consultations, and obstetric services are derived from the standard fees that were established for all specialties effective January 1, 1988.
- (2) Fees for all services are established by applying the following method to the fees in effect on May 1, 1989:
 - (a) The higher of the inpatient or outpatient fee is selected for each service within each specialty and the weighted average of this amount is computed among all specialties. The average is weighted by the number of services billed by each specialty in 1988.
 - (b) The weighted average fee is then increased by 10 percent.
- (3) Annual fee increases are applied each January 1 based on the forecast of the gross national product (GNP) implicit price deflator, but not to exceed the percentage increase approved by the North Carolina General Assembly. For calendar year 2002 only, the Division of Medical Assistance shall increase dental fees based on access to care in lieu of inflationary increases.
- (4) Fees for new services are established based on the fees for similar existing services. If there

are no similar services the fee is established at 75 percent of estimated average charge.

- (5) Fees for particular services may be increased based on administrative review if it is determined that the service is essential to the health needs of Medicaid recipients, that no alternative treatment is available, and that a fee adjustment is necessary to maintain physician participation at a level adequate to meet the needs of Medicaid recipients. A fee may also be decreased based on administrative review if it is determined that the fee may exceed the Medicare allowable amount for the same or similar services, or if the fee is higher than Medicaid fees for similar services, or if the fee is too high in relation to the skills, time, and other resources required to provide the particular service.

Authority G.S. 108A-25(b); S.L. 1985, c. 479, s. 86.

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Commission for Health Services intends to amend the rules cited as 15A NCAC 13A .0101, .0109, and .0113. Notice of Rule-making Proceedings was published in the Register on September 16, 2002.

Proposed Effective Date: August 1, 2004

Public Hearing:

Date: January 17, 2003

Time: 1:00 p.m.

Location: Parker Lincoln Building, 2728 Capital Blvd., Air Quality Training Room, Raleigh, NC 27604

Reason for Proposed Action:

15A NCAC 13A .0101 – Changes will update the cost of the rule book to \$32.00 to cover mailing and printing.

15A NCAC 13A .0109 – Paragraph(s) is expanded to include 40 CFR 264.551 and 264.555. The title for Part 264 Subpart S, "Corrective Action for Solid Waste Management Units," is revised to read "Special Provisions for Cleanup."

15A NCAC 13A .0113 – 40 CFR 270.235, Subpart I, "Integration with Maximum Achievable Control Technology (MACT) Standards" is being added to provide options for incinerators and cement and lightweight aggregate kilns to minimize emissions from startup.

Comment Procedures: Written comments should be sent to Bud McCarty, 401 Oberlin Rd., Suite 150, Raleigh, NC 27605-1350. Phone: (919) 733-2178. Comments should be submitted by February 3, 2003.

Fiscal Impact

- State
- Local
- Substantive (≥\$5,000,000)

None

CHAPTER 13 – SOLID WASTE MANAGEMENT

SUBCHAPTER 13A – HAZARDOUS WASTE MANAGEMENT

SECTION .0100 – HAZARDOUS WASTE

15A NCAC 13A .0101 GENERAL

(a) The Hazardous Waste Section of the Division of Waste Management shall administer the hazardous waste management program for the State of North Carolina.

(b) In applying the federal requirements incorporated by reference throughout this Subchapter, the following substitutions or exceptions shall apply:

- (1) "Department of Environment and Natural Resources" shall be substituted for "Environmental Protection Agency" except in 40 CFR 262.51 through 262.54, 262.56, 262.57, and Part 124 where references to the Environmental Protection Agency shall remain without substitution;
- (2) "Secretary of the Department of Environment and Natural Resources" shall be substituted for "Administrator," "Regional Administrator," "Assistant Administrator" and "Director" except for 40 CFR 262.55 through 262.57, 264.12(a), 268.5, 268.6, 268.42(b), 268.44, and Part 124 where the references to the Administrator, Regional Administrator, "Assistant Administrator" and Director shall remain without substitution.

(c) In the event that there are inconsistencies or duplications in the requirements of those Federal rules incorporated by reference throughout this Subchapter and the State rules set out in this Subchapter, the provisions incorporated by reference shall prevail except where the State rules are more stringent.

(d) 40 CFR 260.1 through 260.3 (Subpart A), "General," are incorporated by reference including subsequent amendments and editions.

(e) 40 CFR 260.11, "References", is incorporated by reference including subsequent amendments and editions.

(f) Copies of all materials in this Subchapter may be inspected or obtained as follows:

- (1) Persons interested in receiving rule-making notices concerning the North Carolina Hazardous Waste Management Rules must submit a written request to the Hazardous Waste Section, PO Box 29603, Raleigh, N.C. 27611-9603. A check in the amount of fifteen dollars (\$15.00) made payable to The Hazardous Waste Section must be enclosed with each request. Upon receipt of each request, individuals will be placed on a mailing list to receive notices for one year.
- (2) Material incorporated by reference in the Federal Register may be obtained from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402 at a cost of five hundred and forty-

four dollars (\$544.00) per year. Federal Register materials are codified once a year in the Code of Federal Regulations and may be obtained at the above address for a cost of: 40 CFR 1-51 forty dollars (\$40.00), 40 CFR 260-299 forty dollars (\$40.00) and 40 CFR 87-149, forty one dollars (\$41.00), total one hundred twenty-one dollars (\$121.00).

(3) The North Carolina Hazardous Waste Management Rules, including the incorporated by reference materials, may be obtained from the Hazardous Waste Section at a cost of thirty two dollars (\$32.00) ~~twenty five dollars (\$25.00)~~.

(4) All material is available for inspection at the Department of Environment and Natural Resources, Hazardous Waste Section, 401 Oberlin Road, Raleigh, NC.

Authority G.S. 130A-294(c); 150B-21.6.

15A NCAC 13A .0109 STANDARDS FOR OWNERS/OPERATORS OF HWTSD FACILITIES – PART 264

(a) Any person who treats, stores or disposes of hazardous waste shall comply with the requirements set forth in this Section. The treatment, storage or disposal of hazardous waste is prohibited except as provided in this Section.

(b) 40 CFR 264.1 through 264.4 (Subpart A), "General", are incorporated by reference including subsequent amendments and editions.

(c) 40 CFR 264.10 through 264.19 (Subpart B), "General Facility Standards", are incorporated by reference including subsequent amendments and editions.

(d) 40 CFR 264.30 through 264.37 (Subpart C), "Preparedness and Prevention", are incorporated by reference including subsequent amendments and editions.

(e) 40 CFR 264.50 through 264.56 (Subpart D), "Contingency Plan and Emergency Procedures", are incorporated by reference including subsequent amendments and editions.

(f) 40 CFR 264.70 through 264.77 (Subpart E), "Manifest System, Recordkeeping, and Reporting", are incorporated by reference including subsequent amendments and editions.

(g) 40 CFR 264.90 through 264.101 (Subpart F), "Releases From Solid Waste Management Units", are incorporated by reference including subsequent amendments and editions. For the purpose of this incorporation by reference, "January 26, 1983" shall be substituted for "July 26, 1982" contained in 40 CFR 264.90(a)(2).

(h) 40 CFR 264.110 through 264.120 (Subpart G), "Closure and Post-Closure", are incorporated by reference including subsequent amendments and editions.

(i) 40 CFR 264.140 through 264.151 (Subpart H), "Financial Requirements", are incorporated by reference including subsequent amendments and editions, except that 40 CFR 264.143(a)(3), (a)(4), (a)(5), (a)(6), 40 CFR 264.145(a)(3), (a)(4), (a)(5), and 40 CFR 264.151(a)(1), Section 15 are not incorporated by reference.

(1) The following shall be substituted for the provisions of 40 CFR 264.143(a)(3) which were not incorporated by reference: The owner

or operator shall deposit the full amount of the closure cost estimate at the time the fund is established. Within 1 year of the effective date of these Rules, an owner or operator using a closure trust fund established prior to the effective date of these Rules shall deposit an amount into the fund so that its value after this deposit at least equals the amount of the current closure cost estimate, or shall obtain other financial assurance as specified in this Section.

- (2) The following shall be substituted for the provisions of 40 CFR 264.143(a)(6) which were not incorporated by reference: After the trust fund is established, whenever the current closure cost estimate changes, the owner or operator shall compare the new estimate with the trustee's most recent annual valuation of the trust fund. If the value of the fund is less than the amount of the new estimate, the owner or operator within 60 days after the change in the cost estimate, shall either deposit an amount into the fund so that its value after this deposit at least equals the amount of the current closure cost estimate, or obtain other financial assurance as specified in this section to cover the difference.

- (3) The following shall be substituted for the provisions of 40 CFR 264.145(a)(3) which were not incorporated by reference:

- (A) Except as otherwise provided in Part (i)(3)(B) of this Rule, the owner or operator shall deposit the full amount of the post-closure cost estimate at the time the fund is established.

- (B) If the Department finds that the owner or operator of an inactive hazardous waste disposal unit cannot provide financial assurance for post-closure through any other option (e.g. surety bond, letter of credit, or corporate guarantee), a plan for annual payments to the trust fund over the term of the RCRA post-closure permit may be established by the Department as a permit condition.

- (4) The following additional requirement shall apply:

The trustee shall notify the Department of payment to the trust fund, by certified mail within 10 days following said payment to the trust fund. The notice shall contain the name of the Grantor, the date of payment, the amount of payment, and the current value of the trust fund.

(j) 40 CFR 264.170 through 264.179 (Subpart I), "Use and Management of Containers", are incorporated by reference including subsequent amendments and editions.

(k) 40 CFR 264.190 through 264.200 (Subpart J), "Tank Systems", are incorporated by reference including subsequent amendments and editions.

- (l) The following are requirements for Surface Impoundments:

- (1) 40 CFR 264.220 through 264.232 (Subpart K), "Surface Impoundments", are incorporated by reference including subsequent amendments and editions.

- (2) The following are additional standards for surface impoundments:

- (A) The liner system shall consist of at least two liners;

- (B) Artificial liners shall be equal to or greater than 30 mils in thickness;

- (C) Clayey liners shall be equal to or greater than five feet in thickness and have a maximum permeability of 1.0×10^{-7} cm/sec;

- (D) Clayey liner soils shall have the same characteristics as described in Subparts (r)(4)(B)(ii), (iii), (iv), (vi) and (vii) of this Rule;

- (E) A leachate collection system shall be constructed between the upper liner and the bottom liner;

- (F) A leachate detection system shall be constructed below the bottom liner; and

- (G) Surface impoundments shall be constructed in such a manner to prevent landsliding, slippage or slumping.

(m) 40 CFR 264.250 through 264.259 (Subpart L), "Waste Piles", are incorporated by reference including subsequent amendments and editions.

(n) 40 CFR 264.270 through 264.283 (Subpart M), "Land Treatment", are incorporated by reference including subsequent amendments and editions.

(o) 40 CFR 264.300 through 264.317 (Subpart N), "Landfills", are incorporated by reference including subsequent amendments and editions.

(p) A long-term storage facility shall meet groundwater protection, closure and post-closure, and financial requirements for disposal facilities as specified in Paragraphs (g), (h), and (i) of this Rule.

(q) 40 CFR 264.340 through 264.351 (Subpart O), "Incinerators", are incorporated by reference including subsequent amendments and editions.

- (r) The following are additional location standards for facilities:

- (1) In addition to the location standards set forth in 15A NCAC 13A .0109(c), the Department, in determining whether to issue a permit for a hazardous waste management facility, shall consider the risks posed by the proximity of the facility to water table levels, flood plains, water supplies, public water supply watersheds, mines, natural resources such as wetlands, endangered species habitats, parks, forests, wilderness areas, and historical sites, and population centers and shall consider whether provision has been made for adequate

buffer zones. The Department shall also consider ground water travel time, soil pH, soil cation exchange capacity, soil composition and permeability, slope, climate, local land use, transportation factors such as proximity to waste generators, route, route safety, and method of transportation, aesthetic factors such as the visibility, appearance, and noise level of the facility; potential impact on air quality, existence of seismic activity and cavernous bedrock.

(2) The following minimum separation distances shall be required of all hazardous waste management facilities except that existing facilities shall be required to meet these minimum separation distances to the maximum extent feasible:

(A) All hazardous waste management facilities shall be located at least 0.25 miles from institutions including but not limited to schools, health care facilities and prisons, unless the owner or operator can demonstrate that no unreasonable risks shall be posed by the proximity of the facility.

(B) All hazardous waste treatment and storage facilities shall comply with the following separation distances: all hazardous waste shall be treated and stored a minimum of 50 feet from the property line of the facility; except that all hazardous waste with ignitable, incompatible or reactive characteristics shall be treated and stored a minimum of 200 feet from the property line of the facility if the area adjacent to the facility is zoned for any use other than industrial or is not zoned.

(C) All hazardous waste landfills, long-term storage facilities, land treatment facilities and surface impoundments, shall comply with the following separation distances:

(i) All hazardous waste shall be located a minimum of 200 feet from the property line of the facility;

(ii) Each hazardous waste landfill, long-term storage or surface impoundment facility shall be constructed so that the bottom of the facility is 10 feet or more above the historical high ground water level. The historical high ground water level shall be determined by measuring the seasonal high ground water levels and predicting the long-term

maximum high ground water level from published data on similar North Carolina topographic positions, elevations, geology, and climate; and

(iii) All hazardous waste shall be located a minimum of 1,000 feet from the zone of influence of any existing off-site ground water well used for drinking water, and outside the zone of influence of any existing or planned on-site drinking water well.

(D) Hazardous waste storage and treatment facilities for liquid waste that is classified as TC toxic, toxic, or acutely toxic and is stored or treated in tanks or containers shall not be located:

(i) in the recharge area of an aquifer which is designated as an existing sole drinking water source as defined in the Safe Drinking Water Act, Section .1424(e) [42 U.S.C. 300h-3(e)] unless an adequate secondary containment system is constructed, and after consideration of applicable factors in Subparagraph (r)(3) of this Rule, the owner or operator can demonstrate no unreasonable risk to public health;

(ii) within 200 feet of surface water impoundments or surface water stream with continuous flow as defined by the United States Geological Survey;

(iii) in an area that will allow direct surface or subsurface discharge to WS-I, WS-II or SA waters or a Class III Reservoir as defined in 15A NCAC 2B .0200 and 15A NCAC 18C .0102;

(iv) in an area that will allow direct surface or subsurface discharge to the watershed for a Class I or II Reservoir as defined in 15A NCAC 18C .0102;

(v) within 200 feet horizontally of a 100-year floodplain elevation;

(vi) within 200 feet of a seismically active area as

- defined in Paragraph (c) of this Rule; and
- (vii) within 200 feet of a mine, cave, or cavernous bedrock.
- (3) The Department may require any hazardous waste management facility to comply with greater separation distances or other protective measures necessary to avoid unreasonable risks posed by the proximity of the facility to water table levels, flood plains, water supplies, public water supply watersheds, mines, natural resources such as wetlands, endangered species habitats, parks, forests, wilderness areas, and historical sites, and population centers or to provide an adequate buffer zone. The Department may also require protective measures necessary to avoid unreasonable risks posed by the soil pH, soil cation exchange capacity, soil composition and permeability, climate, transportation factors such as proximity to waste generators, route, route safety, and method of transportation, aesthetic factors such as the visibility, appearance, and noise level of the facility, potential impact on air quality, and the existence of seismic activity and cavernous bedrock. In determining whether to require greater separation distances or other protective measures, the Department shall consider the following factors:
- (A) All proposed hazardous waste activities and procedures to be associated with the transfer, storage, treatment or disposal of hazardous waste at the facility;
 - (B) The type of hazardous waste to be treated, stored, or disposed of at the facility;
 - (C) The volume of waste to be treated, stored, or disposed of at the facility;
 - (D) Land use issues including the number of permanent residents in proximity to the facility and their distance from the facility;
 - (E) The adequacy of facility design and plans for containment and control of sudden and non-sudden accidental events in combination with adequate off-site evacuation of potentially adversely impacted populations;
 - (F) Other land use issues including the number of institutional and commercial structures such as airports and schools in proximity to the facility, their distance from the facility, and the particular nature of the activities that take place in those structures;
 - (G) The lateral distance and slope from the facility to surface water supplies or to watersheds draining directly into surface water supplies;
- (H) The vertical distance, and type of soils and geologic conditions separating the facility from the water table;
 - (I) The direction and rate of flow of ground water from the sites and the extent and reliability of on-site and nearby data concerning seasonal and long-term groundwater level fluctuations;
 - (J) Potential air emissions including rate, direction of movement, dispersion and exposure, whether from planned or accidental, uncontrolled releases; and
 - (K) Any other relevant factors.
- (4) The following are additional location standards for landfills, long-term storage facilities and hazardous waste surface impoundments:
- (A) A hazardous waste landfill, long-term storage, or a surface impoundment facility shall not be located:
 - (i) In the recharge area of an aquifer which is an existing sole drinking water source;
 - (ii) Within 200 feet of a surface water stream with continuous flow as defined by the United States Geological Survey;
 - (iii) In an area that will allow direct surface or subsurface discharge to WS-I, WS-II or SA waters or a Class III Reservoir as defined in 15A NCAC 2B .0200 and 15A NCAC 18C .0102;
 - (iv) In an area that will allow direct surface or subsurface discharge to a watershed for a Class I or II Reservoir as defined in 15A NCAC 18C .0102;
 - (v) Within 200 feet horizontally of a 100-year flood hazard elevation;
 - (vi) Within 200 feet of a seismically active area as defined in Paragraph (c) of this Rule; and
 - (vii) Within 200 feet of a mine, cave or cavernous bedrock.
 - (B) A hazardous waste landfill or long-term storage facility shall be located in highly weathered, relatively impermeable clayey formations with the following soil characteristics:

- (i) The depth of the unconsolidated soil materials shall be equal to or greater than 20 feet;
 - (ii) The percentage of fine-grained soil material shall be equal to or greater than 30 percent passing through a number 200 sieve;
 - (iii) Soil liquid limit shall be equal to or greater than 30;
 - (iv) Soil plasticity index shall be equal to or greater than 15;
 - (v) Soil compacted hydraulic conductivity shall be a maximum of 1.0×10^{-7} cm/sec;
 - (vi) Soil Cation Exchange Capacity shall be equal to or greater than 5 milliequivalents per 100 grams;
 - (vii) Soil Potential Volume Change Index shall be equal to or less than 4; and
 - (viii) Soils shall be underlain by a competent geologic formation having a rock quality designation equal to or greater than 75 percent unless other geological conditions afford adequate protection of public health and the environment.
- (C) A hazardous waste landfill or long-term storage facility shall be located in areas of low to moderate relief to the extent necessary to prevent landsliding or slumping. The site may be graded to comply with this standard.
- (5) All new hazardous waste impoundments that close with hazardous waste residues left in place shall comply with the standards for hazardous waste landfills in Subparagraph (r)(4) of this Rule unless the applicant can demonstrate that equivalent protection of public health and environment is afforded by some other standard.
- (6) The owners and operators of all new hazardous waste management facilities shall construct and maintain a minimum of two observation wells, one upgradient and one downgradient of the proposed facility; and shall establish background groundwater concentrations and monitor annually for all hazardous wastes that the owner or operator proposes to store, treat, or dispose at the facility.
- (7) The owners and operators of all new hazardous waste facilities shall demonstrate that the community has had an opportunity to participate in the siting process by complying with the following:
- (A) The owners and operators shall hold at least one public meeting in the county in which the facility is to be located to inform the community of all hazardous waste management activities including but not limited to: the hazardous properties of the waste to be managed; the type of management proposed for the wastes; the mass and volume of the wastes; and the source of the wastes; and to allow the community to identify specific health, safety and environmental concerns or problems expressed by the community related to the hazardous waste activities associated with the facility. The owners and operators shall provide a public notice of this meeting at least 30 days prior to the meeting. Public notice shall be documented in the facility permit application. The owners and operators shall submit as part of the permit application a complete written transcript of the meeting, all written material submitted that represents community concerns, and all other relevant written material distributed or used at the meeting. The written transcript and other written material submitted or used at the meeting shall be submitted to the local public library closest to and in the county of the proposed site with a request that the information be made available to the public.
 - (B) For the purposes of this Rule, public notice shall include: notification of the boards of county commissioners of the county where the proposed site is to be located and all contiguous counties in North Carolina; a legal advertisement placed in a newspaper or newspapers serving those counties; and provision of a news release to at least one newspaper, one radio station, and one TV station serving these counties. Public notice shall include the time, place, and purpose of the meetings required by this Rule.
 - (C) No less than 30 days after the first public meeting transcript is available at the local public library, the owners and operators shall hold at least one additional public meeting in order to attempt to resolve community concerns. The owners and operators

shall provide public notice of this meeting at least 30 days prior to the meeting. Public notice shall be documented in the facility permit application. The owners and operators shall submit as part of the permit application a complete written transcript of the meeting, all written material submitted that represents community concerns, and all other relevant written material distributed or used at the meeting.

- (D) The application, written transcripts of all public meetings and any additional material submitted or used at the meetings, and any additions or corrections to the application, including any responses to notices of deficiencies shall be submitted to the local library closest to and in the county of the proposed site, with a request that the information be made available to the public until the permit decision is made.
- (E) The Department shall consider unresolved community concerns in the permit review process and impose final permit conditions based on sound scientific, health, safety, and environmental principles as authorized by applicable laws or rules.

(s) 40 CFR ~~264.550~~ ~~264.552~~ through ~~264.555~~ ~~264.554~~ (Subpart S), "~~Special Provisions for Cleanup~~", "~~Corrective Action for Solid Waste Management Units~~", are incorporated by reference including subsequent amendments and editions.

(t) 40 CFR 264.570 through 264.575 (Subpart W), "Drip Pads", are incorporated by reference including subsequent amendments and editions.

(u) 40 CFR 264.600 through 264.603 (Subpart X), "Miscellaneous Units", are incorporated by reference including subsequent amendments and editions.

(v) 40 CFR 264.1030 through 264.1049 (Subpart AA), "Air Emission Standards for Process Vents", are incorporated by reference including subsequent amendments and editions.

(w) 40 CFR 264.1050 through 264.1079 (Subpart BB), "Air Emission Standards for Equipment Leaks", are incorporated by reference including subsequent amendments and editions.

(x) 40 CFR 264.1080 through 264.1091 (Subpart CC), "Air Emission Standards for Tanks, Surface Impoundments, and Containers", are incorporated by reference including subsequent amendments and editions.

(y) 40 CFR 264.1100 through 264.1102 (Subpart DD), "Containment Buildings", are incorporated by reference including subsequent amendments and editions.

(z) 40 CFR 264.1200 through 264.1202 (Subpart EE), "Hazardous Waste Munitions and Explosives Storage", are incorporated by reference including subsequent amendments and editions.

(aa) Appendices to 40 CFR Part 264 are incorporated by reference including subsequent amendments and editions.

Authority G.S. 130A-294(c); 150B-21.6.

15A NCAC 13A .0113 THE HAZARDOUS WASTE PERMIT PROGRAM - PART 270

(a) 40 CFR 270.1 through 270.6 (Subpart A), "General Information", are incorporated by reference including subsequent amendments and editions. For the purpose of this incorporation by reference, "January 26, 1983" shall be substituted for "July 26, 1982" contained in 40 CFR 270.1(c).

(b) 40 CFR 270.10 through 270.29 (Subpart B), "Permit Application", are incorporated by reference including subsequent amendments and editions.

(c) The following are additional Part B information requirements for all hazardous waste facilities:

- (1) Description and documentation of the public meetings as required in 15A NCAC 13A .0109(r)(7);
- (2) A description of the hydrological and geological properties of the site including, at a minimum, flood plains, depth to water table, ground water travel time, seasonal and long-term groundwater level fluctuations, proximity to public water supply watersheds, consolidated rock, soil pH, soil cation exchange capacity, soil characteristics and composition and permeability, existence of cavernous bedrock and seismic activity, slope, mines, climate, location and withdrawal rates of surface water users within the immediate drainage basin and well water users within a one mile radius of the facility; water quality information of both surface and groundwater within 1000 ft. of the facility, and a description of the local air quality;
- (3) A description of the facility's proximity to and potential impact on wetlands, endangered species habitats, parks, forests, wilderness areas, historical sites, mines, and air quality;
- (4) A description of local land use including residential, industrial, commercial, recreational, agricultural and the proximity to schools and airports;
- (5) A description of the proximity of the facility to waste generators and population centers; a description of the method of waste transportation; the comments of the local community and state transportation authority on the proposed route, and route safety. Comments shall include proposed alternative routes and restrictions necessary to protect the public health;
- (6) A description of facility aesthetic factors including visibility, appearance, and noise level; and
- (7) A description of any other objective factors that the Department determines are reasonably related and relevant to the proper siting and operation of the facility.

(d) In addition to the specific Part B information requirements for hazardous waste disposal facilities, owners and operators of

hazardous waste landfills or longterm storage facilities shall provide the following information:

- (1) Design drawings and specifications of the leachate collection and removal system;
- (2) Design drawings and specifications of the artificial impervious liner;
- (3) Design drawings and specifications of the clay or clay-like liner below the artificial liner, and a description of the permeability of the clay or clay-like liner; and
- (4) A description of how hazardous wastes will be treated prior to placement in the facility.

(e) In addition to the specific Part B information requirements for surface impoundments, owners and operators of surface impoundments shall provide the following information:

- (1) Design drawings and specifications of the leachate collection and removal system;
- (2) Design drawings and specifications of all artificial impervious liners;
- (3) Design drawings and specifications of all clay or clay-like liners and a description of the clay or clay-like liner; and
- (4) Design drawings and specifications that show that the facility has been constructed in a manner that will prevent landsliding, slippage, or slumping.

(f) 40 CFR 270.30 through 270.33 (Subpart C), "Permit Conditions", are incorporated by reference including subsequent amendments and editions.

(g) 40 CFR 270.40 through 270.43 (Subpart D), "Changes to Permit", are incorporated by reference including subsequent amendments and editions.

(h) 40 CFR 270.50 through 270.51 (Subpart E), "Expiration and Continuation of Permits", are incorporated by reference including subsequent amendments and editions.

(i) 40 CFR 270.60 through 270.68 (Subpart F), "Special Forms of Permits", are incorporated by reference including subsequent amendments and editions, except that 40 CFR 270.68 is not incorporated by reference.

(j) 40 CFR 270.70 through 270.73 (Subpart G), "Interim Status", are incorporated by reference including subsequent amendments and editions. For the purpose of this incorporation by reference, "January 1, 1986" shall be substituted for "November 8, 1985" contained in 40 CFR 270.73(c).

(k) 40 CFR 270.235, (Subpart I), "Integration with Maximum Achievable Control Technology (MACT) Standards", is incorporated by reference including subsequent amendments and editions.

~~(l)~~ The following are additional permitting requirements concerning operating record of other facilities.

- (1) An applicant applying for a permit for a hazardous waste facility shall submit a disclosure statement to the Department as a part of the application for a permit or any time thereafter specified by the Department. The disclosure statement shall be supported by an affidavit attesting to the truth and completeness of the facts asserted in the statement and shall include:
 - (A) A brief description of the form of the business (e.g. partnership, sole

proprietorship, corporation, association, or other);

- (B) The name and address of any hazardous waste facility constructed or operated after October 21, 1976 by the applicant or any parent or subsidiary corporation if the applicant is a corporation; and

- (C) A list identifying any legal action taken against any facility identified in Part (k)(1)(B) of this Rule involving:
 - (i) any administrative ruling or order issued by any state, federal or local authority relating to revocation of any environmental or waste management permit or license, or to a violation of any state or federal statute or local ordinance relating to waste management or environmental protection;
 - (ii) any judicial determination of liability or conviction under any state or federal law or local ordinance relating to waste management or environmental protection; and
 - (iii) any pending administrative or judicial proceeding of the type described in this Part.

- (D) The identification of each action described in Part (k)(1)(C) of this Rule shall include the name and location of the facility that the action concerns, the agency or court that heard or is hearing the matter, the title, docket or case number, and the status of the proceeding.

(2) In addition to the information set forth in Subparagraph (k)(1) of this Rule, the Department may require from any applicant such additional information as it deems necessary to satisfy the requirements of G.S. 130A-295. Such information may include, but shall not be limited to:

- (A) The names, addresses, and titles of all officers, directors, or partners of the applicant and of any parent or subsidiary corporation if the applicant is a corporation;
- (B) The name and address of any company in the field of hazardous waste management in which the applicant business or any of its officers, directors, or partners, hold an equity interest and the name of the officer, director, or partner holding such interest; and

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(C) A copy of any administrative ruling or order and of any judicial determination of liability or conviction described in Part (k)(1)(C) of this Rule, and a description of any pending administrative or judicial proceeding in that item.

(3) If the Department finds that any part or parts of the disclosure statement is not necessary to satisfy the requirements of G.S. 130A-295, such information shall not be required.

(m)(4) An applicant for a new, or modification to an existing, commercial facility permit, shall provide a description and justification of the need for the facility.

(n)(m) Requirements for Off-site Recycling Facilities.

(1) The permit requirements of this Rule apply to owners and operators of off-site recycling facilities.

(2) The following provisions of 40 CFR Part 264, as incorporated by reference, shall apply to owners and operators of off-site recycling facilities:

- (A) Subpart B - General Facility Standards;
(B) Subpart C - Preparedness and Prevention;
(C) Subpart D - Contingency Plan and Emergency Procedures;
(D) Subpart E - Manifest System, Recordkeeping and Reporting;
(E) Subpart G - Closure and Post-closure;
(F) Subpart H - Financial Requirements;
(G) Subpart I - Use and Management of Containers;
(H) Subpart J - Tank Systems;
(I) 264.101 - Corrective Action for Solid Waste Management Units;
(J) Subpart X - Miscellaneous Units; and
(K) Subpart DD - Containment Buildings.

(3) The requirements listed in Subparagraph (m)(2) of this Rule apply to the entire off-site recycling facility, including all recycling units, staging and process areas, and permanent and temporary storage areas for wastes.

(4) The following provisions of 15A NCAC 13A .0109 shall apply to owners and operators of off-site recycling facilities:

- (A) The substitute financial requirements of Rule .0109(i)(1), (2) and (4); and
(B) The additional standards of Rule .0109(r)(1), (2), (3), (6) and (7).

(5) The owner or operator of an off-site recycling facility shall keep a written operating record at his facility.

(6) The following information must be recorded, as it becomes available, and maintained in the operating record until closure of the facility:

- (A) A description and the quantity of each hazardous waste received, and the method(s) and date(s) of its treatment, storage, or recycling at the facility;

(B) The location of all hazardous waste within the facility and the quantity at each location. This information must include cross-references to specific manifest document numbers if the waste was accompanied by a manifest; and

(C) Documentation of the fate of all hazardous wastes received from off-site or generated on-site. This shall include records of the sale, reuse, off-site transfer, or disposal of all waste materials.

(o)(n) Permit Fees for Commercial Hazardous Waste Facilities.

(1) An applicant for a permit modification for a commercial hazardous waste facility shall pay an application fee as follows:

- (A) Class 1 permit modification \$100;
(B) Class 2 permit modification \$1,000; or
(C) Class 3 permit modification \$5,000.

Note: Class 1 permit modifications which do not require prior approval of the Division Director are excluded from the fee requirement.

(2) The application fee for a new permit, permit renewal, or permit modification must accompany the application, and is non-refundable. The application shall be considered incomplete until the fee is paid. Checks shall be made payable to: Division of Waste Management.

Authority G.S. 130A-294(c); 130A-294.1; 130A-295(a)(1),(2), (c); 150B-21.6.

Notice is hereby given in accordance with G.S. 150B-21.2 that the Commission for Health Services intends to amend the rule cited as 15A NCAC 18A .2606. Notice of Rule-making Proceedings was published in the Register on May 1, 2000.

Proposed Effective Date: August 1, 2004

Public Hearing:

Date: January 17, 2003

Time: 1:00 p.m.

Location: Parker Lincoln Building, 2728 Capital Blvd., Air Quality Training Room, Raleigh, NC

Reason for Proposed Action: To address changes to the current grading system in North Carolina pertaining to restaurants and other foodhandling establishments.

Comment Procedures: Comments from the public shall be directed to Michael Rhodes, 1632 Mail Service Center, Raleigh, NC 27699-1632, phone (919) 715-0930. Comments shall be received through February 3, 2003.

Fiscal Impact

State

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

CHAPTER 18 - ENVIRONMENTAL HEALTH

SUBCHAPTER 18A – SANITATION

SECTION .2600 - SANITATION OF RESTAURANTS AND OTHER FOODHANDLING ESTABLISHMENTS

15A NCAC 18A .2606 GRADING

(a) The sanitation grading of all restaurants, food stands, and drink stands, shall be based on a system of scoring wherein all establishments receiving a score of at least 90 percent shall be awarded Grade A; all establishments receiving a score of at least 80 percent and less than 90 percent shall be awarded Grade B; all establishments receiving a score of at least 70 percent and less than 80 percent shall be awarded a Grade C. Permits shall be revoked for establishments receiving a score of less than 70 percent.

(b) The grading of restaurants, food stands, and drink stands, shall be based on the standards of operation and construction as set forth in Rules .2607 through .2644 of this Section. An establishment shall receive a credit of two points on its score for each inspection if a manager or other employee responsible for operation of that establishment and who is employed full time in that particular establishment has successfully completed in the past three years a food service sanitation program approved by the Department. Evidence that a person has completed such a

program shall be maintained at the establishment and provided to the Environmental Health Specialist upon request. An establishment shall score at least 70 percent on an inspection in order to be eligible for this credit.

(c) The posted numerical grade shall not be changed as a result of a food sampling inspection.

~~(d) The Department shall institute a pilot program in no more than seven counties. The pilot counties will be determined by mutual agreement of the local board of health and the Department. In the pilot counties, the grading will be conducted in accordance with this Section however, the numerical score rather than the letter grade awarded will be posted. Rule .2603 of this Section shall apply to the posting of the placards showing the numerical score. The Department shall evaluate the pilot program and report the evaluation to the Commission for Health Services at the August 1999 Commission of Health Services meeting. The posted numerical grade will be of black and white color only. All graphics, letters, and numbers for the grade card shall be approved by the State. The alphabetical and numerical sanitation level shall be 1.5 inches in height. No other public displays representing sanitation level to the public will be allowed in food and lodging establishments.~~

(e) Nothing herein shall effect the right of a permit holder to a reinspection pursuant to Rule .2604 of this Section.

(f) Nothing herein shall prohibit the Department from immediately suspending or revoking a permit pursuant to G.S. 130A-23(d).

Authority G.S. 130A-248.

This Section includes temporary rules reviewed by the Codifier of Rules and entered in the North Carolina Administrative Code and includes, from time to time, a listing of temporary rules that have expired. See G.S. 150B-21.1 and 26 NCAC 02C .0500 for adoption and filing requirements. Pursuant to G.S. 150B-21.1(e), publication of a temporary rule in the North Carolina Register serves as a notice of rule-making proceedings unless this notice has been previously published by the agency.

TITLE 02 – DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

Rule-making Agency: NC Board of Agriculture

Rule Citation: 02 NCAC 38 .0705

Effective Date: January 1, 2003

Findings Reviewed and Approved by: Julian Mann

Authority for the rulemaking: G.S. 119-55

Reason for Proposed Action: The North Carolina Department of Agriculture and Consumer Services is responsible for enforcing the Liquefied Petroleum Gas law, G.S. 119-54 et seq. This law requires registration of LP Gas dealers and authorizes the Board of Agriculture to adopt rules for the safe use of LP Gas and related equipment and facilities. The Department's LP-Gas Section has received increasing numbers of complaints from liquefied petroleum gas suppliers that they were not receiving notice prior to the disconnection of service when a consumer selects a new supplier. Generally, when there is a disconnection of service, the new supplier disconnects the former supplier's tank from the service system and connects the new supplier's tank. G.S. 119-58 requires a new supplier to provide the former supplier with notice, but does not specify when and how such notice must be given, and these standards are contained in the proposed rule. Without standards for the notification procedures, administration and enforcement of the statutory notice requirement is difficult, if not impossible. The proposed rule creates a verifiable means of notification and places the responsibility on the new supplier to notify the former supplier in a timely fashion consistent with the chosen means of communication. The LP Gas industry is experiencing growth in the number of customers and number of retail dealers. This has created a situation in which the competition for customers is much greater and the probability that a disconnect will occur at any customer's location is much greater than it used to be. The majority of the disconnects in a given year will occur in the late fall and early winter. Without prior notice, the former supplier cannot take measures to ensure that its equipment is safely disconnected, sealed, and properly stored or promptly removed from the premises, all of which is essential to protect the public from harm. With prior notice, the former supplier can arrange to disconnect its own equipment, and is therefore knowledgeable of any damage to the equipment that could impair the safety of its later use. Prior notice allows for coordination between the involved parties to lessen the possibility for an emergency situation where the consumer may be without fuel during the transition. Many times the consumer does not know whether or not the supplier owns the equipment at the time of disconnection of service, and prior notice to the former supplier enables the new supplier to provide whatever equipment is necessary to ensure continuous service to the consumer.

Comment Procedures: Written comments should be submitted to David S. McLeod, Sec., NC Board of Agriculture, P.O. Box 27647, Raleigh, NC 27611. Phone (919) 733-7125, Fax (919) 716-0105, email david.mcleod@ncmail.net.

CHAPTER 38 – STANDARDS DIVISION

SECTION .0700 - STANDARDS FOR STORAGE, HANDLING AND INSTALLATION OF LP GAS

02 NCAC 38 .0705 NOTIFICATION FOR DISCONNECTION OF SERVICE

(a) This Rule contains additional standards relating to the requirements for disconnection of service contained in G.S. 119-58(b).

(b) To "notify the former supplier before disconnecting the former service and connecting the new service," as required by G.S. 119-58(b), means that the new supplier shall provide the former supplier with written notice containing the new supplier's name, address and telephone number, the consumer's name and address, and stating the date and time after which service is to be disconnected. The notice may be sent by mail, overnight mail, facsimile, or by hand-delivery, so long as it is received prior to the disconnection of the former service.

History Note: Authority G.S. 119-55; Temporary Adoption Eff. January 1, 2003.

Rule-making Agency: North Carolina Board of Agriculture

Rule Citation: 02 NCAC 52C .0603

Effective Date: December 1, 2002

Findings Reviewed and Approved by: Julian Mann, III

Authority for the rulemaking: G.S. 106-307.2

Reason for Proposed Action: In response to the continuing threat of terrorist attacks on the United States, the General Assembly enacted S.L. 2002-179 to improve management of public health threats resulting from terrorist incidents, including bioterrorism. Included in this was an amendment to G.S. 106-307.2 requiring the Board of Agriculture to establish by rule a list of animal diseases and conditions to be reported by veterinarians and the time and manner of reporting. The diseases listed are those which are transmissible to humans, are foreign animal diseases, or those which could have serious economic effects. Veterinarians would be required to report those diseases to the State Veterinarian within two hours after detection. Adherence to normal notice and hearing requirements would delay implementation of the rule and

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prevent early detection and response to an incident of bioterrorism involving animal disease.

Comment Procedures: Comments from the public shall be directed to David S. Mcleod, Sec., NC Board of Agriculture, PO Box 27647, Raleigh, NC 27611, phone (919) 733-7125, fax (919) 716-0105, email david.mcleod@ncmail.net.

CHAPTER 52 - VETERINARY DIVISION

SUBCHAPTER 52C - CONTROL OF LIVESTOCK DISEASES: MISCELLANEOUS PROVISIONS

SECTION .0600 - DISEASE REPORTS

02 NCAC 52C .0603 REPORTABLE DISEASES

All persons practicing veterinary medicine in North Carolina shall report the following diseases and conditions to the State Veterinarian's office by telephone within two hours after the disease is reasonably suspected to exist:

- (1) Anthrax;
- (2) Avian Chlamydiosis (Psitticosis, Ornithosis);
- (3) Avian Encephalomyelitis;
- (4) Avian Influenza (High Pathogenic);
- (5) Avian Influenza (Low Pathogenic);
- (6) Brucellosis (livestock only);
- (7) Classical Swine Fever (Hog Cholera);
- (8) Contagious Equine Metritis;
- (9) Echinococcus;
- (10) Equine Encephalomyelitis (including Eastern Equine Encephalomyelitis, Venezuelan Equine Encephalomyelitis, Western Equine Encephalomyelitis, and St. Louis Encephalomyelitis);
- (11) Equine Infectious Anemia;
- (12) Exotic Newcastle Disease;
- (13) Foreign Animal Diseases (including, in addition to those listed in this Rule, any disease believed to be absent from the United States and its territories);
- (14) Fowl Typhoid (Salmonella gallinarum);
- (15) Infectious Laryngotracheitis (other than vaccine induced);
- (16) Leishmaniasis;
- (17) Mycoplasma gallisepticum/Mycoplasma synoviae;
- (18) Paramyxovirus (other than Newcastle; includes menangle virus);
- (19) Plague (Yersinia pestis);
- (20) Pseudorabies;
- (21) Pullorum (Salmonella pullorum);
- (22) Q fever (Coxiella burnetii);
- (23) Rabies (equine and livestock only);
- (24) Scabies (cattle and sheep only);
- (25) Screw Worm (Exotic myiasis);
- (26) Transmissible spongiform encephalopathies (including Bovine Spongiform Encephalopathy, Chronic Wasting Disease, and scrapie);
- (27) Tuberculosis;
- (28) Tularemia (Francisella tularensis);

- (29) Vesicular Disease (Foot and Mouth, Vesicular Stomatitis, Vesicular Exanthema, Swine Vesicular Disease); and
- (30) West Nile (domestic animals only).

History Note: Authority G.S. 106-307.2; Temporary Adoption Eff. December 1, 2002.

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Rule-making Agency: Commission for Health Services

Rule Citation: 15A NCAC 20D .0243

Effective Date: January 1, 2003

Findings Reviewed and Approved by: Julian Mann, III

Authority for the rulemaking: G.S. 130A-315

Reason for Proposed Action: Public health would not be compromised by the adoption of the proposed rule. Laboratories analyzing samples for compliance with the Safe Drinking Water Act will still be required to demonstrate proficiency by analyzing one unknown sample per year, plus pass an on-site evaluation. The adoption of the proposed temporary rule will reduce a financial impact on many municipal water treatment plants, county health departments, and commercial laboratories by changing the number of performance evaluation samples required by North Carolina to coincide with the EPA requirement of an annual study. These samples were originally provided to the laboratory community at no charge, and there were only a few contaminants that required testing. Now, there are many more analytes requiring testing and the samples must be purchased. It is both the price and frequency of these samples that has placed a burden on laboratories.

Comment Procedures: Comments from the public shall be directed to Chris G. Hoke, JD, 2001 Mail Service Center, Raleigh, NC 27699-2001, phone (919) 715-4168, and email Chris.Hoke@ncmail.net.

CHAPTER 20 – LABORATORY SERVICES

SUBCHAPTER 20D – CERTIFICATION AND IMPROVEMENT

SECTION .0200 – LABORATORY CERTIFICATION

15A NCAC 20D .0243 CHEMISTRY QUALITY ASSURANCE

(a) The following general requirements for chemistry quality assurance (QA) shall be met:

- (1) All quality control information shall be available for inspection by the certification officer;

- (2) A manual of analytical methods and the laboratory's QA plan shall be available to the analysts;
- (3) Class S weights or higher quality weights shall be available to make periodic checks on the accuracy of the balances. Checks shall be within range of the manufacturer's guidelines. A record of these checks shall be available for inspection. The specific checks and their frequency shall be as prescribed in the laboratory's QA plan or the laboratory's operations manual. These checks shall be performed at least once a month.
- (4) Color standards or their equivalent, such as built-in internal standards, shall be available to verify wavelength settings on spectrophotometers. These checks shall be within the manufacturer's tolerance limits. A record of the checks shall be available for inspection. The specific checks and their frequency shall be as prescribed in the laboratory's QA plan or the laboratory's operations manual. These checks shall be performed at least every six months.
- (b) The laboratory shall analyze performance samples as follows:
- (1) ~~United States Environmental Protection Agency performance samples shall be analyzed semi-annually. Results shall be within control limits established by EPA for each analyte for which the laboratory is or wishes to be certified.~~ U.S. EPA approved performance evaluation samples shall be analyzed annually in the first calendar quarter for each analyte, and by each method, for which the laboratory is or wishes to be certified. Additionally, U.S. EPA approved performance samples for nitrate and nitrite shall be analyzed annually in the first and third calendar quarters by each method for which the laboratory is or wishes to be certified. All result shall be within the control limits established by the sample providers. For any unacceptable result analyzed in the first quarter, a make-up sample shall be analyzed for that analyte in the second quarter. For any unacceptable result analyzed in the third quarter, a make-up sample shall be analyzed for that analyte in the fourth quarter.
- (2) Double blind and blind samples shall be analyzed when submitted to a certified laboratory and results shall be within established control limits; these data shall be of equal weight to the EPA performance sample data and on site quality control sample data in determining the laboratory's certification status.
- (3) On-site quality control samples shall be analyzed when presented to the laboratory by the certification evaluator and results shall be within established control limits. These data shall be of equal weight to the EPA performance evaluation sample data and the double blind sample data in determining the laboratory's certification status.
- (4) A laboratory shall have correctly analyzed two out of the last three performance samples for each analyte for which it is certified. In the event that a laboratory is decertified for failing to correctly analyze two out of the last three performance samples, the laboratory shall correctly analyze two consecutive performance samples to have their certification reinstated. The performance samples shall be analyzed no less than 30 days apart. A laboratory with less than three performance samples shall have successfully analyzed a minimum of two performance samples before their certification status may be determined.
- (5) Unacceptable performance on any of the samples in Paragraph (b) of this Rule shall be corrected and explained in writing within 30 days and submitted to the certification evaluator.
- (c) The minimum daily quality control (QC) for chemistry shall be as follows:
- (1) Inorganic Contaminants:
- (A) At the beginning of each day that samples are to be analyzed, a standard curve composed of at least a reagent blank and three standards covering the sample concentration range shall be prepared. A standard curve is not required on each day of analysis for samples analyzed for Nitrate by manual cadmium reduction or for Cyanide. The standard curve shall be verified each day by analyzing a calibration standard and a reagent blank. The calibration standard must be within ± 10 percent of its true value in order to use the standard curve. If it is not within 10 percent of the true value, a new standard curve shall be prepared.
- (B) The laboratory shall analyze a QC sample (EPA QC sample or equivalent) at the beginning of the sample run, at the end of the sample run, and every 20 samples, with recoveries not to exceed ± 10 percent of the true concentration. The source of this QC sample shall be different from the source used for the calibration standards in Part (c)(1)(A) of this Rule.
- (C) The laboratory shall run an additional standard or QC check at the laboratory's lowest detectable limit for the particular analyte. The laboratory shall not report a value lower than the lowest standard or QC check analyzed.

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- (D) The laboratory shall add a known spike to a minimum of 10 percent of the routine samples (except when the method specifies a different percentage, i.e. furnace methods) to determine if the entire analytical system is in control. The spike concentration shall not be substantially less than the background concentration of the sample selected for spiking. The spike recoveries shall not exceed ± 10 percent of the true value.
 - (E) All compliance samples analyzed by graphite furnace shall be spiked to determine absence of matrix interferences with recoveries ± 10 percent of the true value of the spike concentration.
 - (F) The laboratory shall run a duplicate sample every 10 samples with duplicate values within ± 10 percent of each other.
 - (G) Precision and accuracy data may be computed from the analyses of check samples of known value used routinely in each analytical procedure. This data shall be available for inspection by the laboratory evaluator.
- (2) Organic Contaminants:
- (A) Quality control specified in the approved methods referenced in Rule .0241 of this Section shall be followed.
 - (B) Analysis for regulated volatile organic chemicals under 15A NCAC 18C .1515 shall only be conducted by laboratories that have received conditional approval by EPA or the Department according to 40 C.F.R. 141.24(g)(10) and (11) which is hereby incorporated by reference including any subsequent amendments and editions. A copy is available for inspection at the Department of Environment, Health, and Natural Resources, Division of Laboratory Services, 306 North Wilmington Street, Raleigh, North Carolina.
- (C) Analysis for unregulated volatile organic chemicals under 15A NCAC 18C .1516 shall only be conducted by laboratories approved under Part (c)(2)(B) of this Rule. In addition to the requirements of Part (c)(2)(B) of this Rule, each laboratory analyzing for EDB and DBCP shall achieve a method detection limit for EDB of 0.00001 mg/l and DBCP of 0.00002 mg/l, according to the procedures in Appendix B of 40 C.F.R. Part 136 which is hereby incorporated by reference including any subsequent amendments and editions. A copy may be obtained at no charge by contacting the Department of Environment, Health, and Natural Resources, Division of Laboratory Services, 306 North Wilmington Street, Raleigh, North Carolina.
 - (D) The laboratory shall achieve the method detection limits as listed in 40 CFR 141.24(f)(18) according to the procedures in Appendix B of 40 CFR Part 136 which is hereby incorporated by reference including any subsequent amendments and editions. A copy may be obtained at no charge by contacting the Department of Environment, Health, and Natural Resources, Division of Laboratory Services, 306 North Wilmington Street, Raleigh, North Carolina.

*History Note: Authority G.S. 130A-315;
Eff. December 1, 1991;
Amended Eff. August 1, 1996; January 1, 1996; October 1, 1994; April 1, 1993;
Temporary Amendment Eff. January 1, 2003.*

CONTESTED CASE DECISIONS

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

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
<u>ALCOHOL BEVERAGE CONTROL COMMISSION</u>				
NC ABC Commission v. Issa Fuad Shaikh T/A Variety Pic Up #14	01 ABC 0874	Conner	12/03/02	
NC ABC Commission v. Acme Retail, Inc. T/A Handy Pantry	01 ABC 1325	Chess	05/21/02	
Randall Ralph Casey T/A Maynards Entertainment v. NC ABC Comm.	01 ABC 1396	Wade	06/26/02	
NC ABC Commission v. Headlights, Inc. T/A Headlights	01 ABC 1473	Wade	06/28/02	
NC ABC Commission v. Jerry Lynn Johnson T/A E & J Millenium	02 ABC 0115	Conner	10/23/02	
Roy Hoyt Durham, Lisa Chambers Durham t/a Lincoln House v. NC ABC Commission	02 ABC 0157	Mann	12/03/02	
Edward L. Mumford v. NC Alcoholic Control Commission	02 ABC 0264	Conner	08/29/02	
NC ABC Commission v. WDB, Inc. T/A Twin Peeks	02 ABC 0517	Conner	07/15/02	
Jrs Nigh Hawk, James Theron Lloyd Jr v. NC ABC Commission	02 ABC 0629	Chess	11/19/02	17:13 NCR 1115
NC ABC Commission v. Cevastiano Hernandez T/A Cristy Mexican Store	02 ABC 0667	Gray	10/17/02	
NC ABC Commission v. Easy Street Bistro, Inc. T/A Raleigh Live	02 ABC 0781	Wade	10/23/02	
<u>APPRAISAL BOARD</u>				
NC Appraisal Board v. Thomas G. Hildebrandt, Jr.	02 APB 0130	Chess	08/20/02	17:06 NCR 563
<u>CEMETARY COMMISSION</u>				
Lee Memory Gardens, Inc. v. NC Cemetary Commission	02 COM 0126	Gray	09/19/02	
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<u>CRIME CONTROL AND PUBLIC SAFETY</u>				
Hattie Holt v. NC Crime Victims Compensation Commission	00 CPS 1067	Conner	05/30/02	
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Lial McKoy v. NC Crime Victims Compensation Commission	02 CPS 0394	Chess	07/26/02	
Elbert Reid, Jr. v. NC Crime Victims Compensation Commission	02 CPS 0431	Conner	11/13/02	
Francis Michael McLaurin on behalf of B.W. McLaurin v. NC Crime Victims Compensation Commission	02 CPS 0760	Chess	11/19/02	
Phyllis Ponder Duren v. NC Crime Victims Compensation Commission	02 CPS 1173	Gray	11/06/02	
Brenda S. DuBois on behalf of victim Priscilla Bryant v. NC Dept. of Crime Control & Public Safety, Div. of Victim Comp. Services	02 CPS 1332	Lassiter	09/20/02	
William S. McLean v. NC Crime Victims Compensation Commission	02 CPS 1600	Lassiter	11/18/02	
<u>HEALTH AND HUMAN SERVICES</u>				
A list of Child Support Decisions may be obtained by accessing the OAH Website: www.ncoah.com/decisions .				
Lisa Williams v. NC DHHS, Div. of Soc. Svc., Child Supp. Enf. Sec.	01 DCS 2351	Elkins	10/28/02	17:11 NCR 1024
Thelma Street v. NC DHHS	01 DHR 0303	Reilly	09/17/02	
Emilia E Edgar v. DHHS, Div. of Facility Services	01 DHR 1356	Hunter	09/09/02	
Joyce Jeanette Jones v. DHHS, Div. of Facility Services	02 DHR 1663	Conner	11/15/02	
Evelia Williams v. NC DHHS	01 DHR 1750	Conner	07/15/02	
Jacob Jones v. NC DHHS, Div. of Medical Assistance	01 DHR 2169	Wade	10/04/02	
Kathy Mumford v. DHHS, Div. of Facility Services	01 DHR 2253	Chess	07/26/02	
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Tammy Baldwin v. DHHS, Div. of Facility Services	01 DHR 2329	Morrison	10/16/02	
Pamela S Vuncannon v. DHHS, Div of Child Development	01 DHR 2332	Chess	11/18/02	
James Bell v. NC DHHS, Div. of Facility Services	01 DHR 2340	Elkins	06/27/02	
Adam Syare v. NCDHHS, Div. of MH/DD/SAS, Southeastern Regional Mental Health Center	01 DHR 2352	Conner	06/21/02	
Ramiro Ramos v. NC DHHS and Chris Hoke, State Registrar	01 DHR 2366	Conner	09/11/02	
Effie M. Williams v. NC Department of Health and Human Services	02 DHR 0001	Gray	08/08/02	
Kathy Denise Urban v. NC DHHS, Div. of Facility Services	02 DHR 0055	Hunter	09/10/02	
Betty Carr v. DHHS, Div. of Facility Services	02 DHR 0070	Mann	09/10/02	
Sarah D. Freeman & Tony J. Freeman v. Guilford Co. Mental Health, The Guilford Center	02 DHR 0083	Chess	06/07/02	
Albemarle Home Care & Ginger Parrish, PhD v. NC DHHS, Div. of Medical Assistance	02 DHR 0142	Conner	07/22/02	
Shonta R. Fox v. NC Dept. of Health & Human Services	02 DHR 0218	Conner	11/08/02	
Birgit James v. NC Dept. of Health & Human Services	02 DHR 0255	Connor	07/01/02	
Geraldine Rountree Cooper v. DHHS, Div. of Facility Services	02 DHR 0267	Elkins	07/15/02	
Unieca Richardson v. NC DHHS, Division of Facility Services	02 DHR 0286	Chess	06/17/02	
Greg McKinney & Virgie Elaine McKinney v. DHHS	02 DHR 0301	Mann	08/01/02	
Jerry Dean Webber v. NC DHHS, Broughton Hospital	02 DHR 0306	Conner	08/28/02	
Donna R Anderson v. NC DHHS, Broughton Hospital	02 DHR 0340	Gray	08/01/02	
Notisha Utley v. NC DHHS, Division of Facility Services	02 DHR 0379	Conner	07/26/02	
Isa Spaine v. NC Department of Health & Human Services	02 DHR 0403	Chess	06/24/02	
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Mooreville Hospital Management Associates, Inc. d/b/a Lake Norman Regional Medical Center v. DHHS, Div. of Facility Services, Cert. of Need Section	02 DHR 0541	Chess	08/07/02	
Wayne Douglas Temples v. NC DHHS, NC Off. of Emer. Med. Svcs.	02 DHR 0543	Morrison	10/09/02	
Mark Thomas v. NC DHHS, Div. of Facility Services	02 DHR 0555	Chess	10/17/02	
Eli Maxwell v. NC DHHS, Div. of Facility Services, Health Care Registry	02 DHR 0556	Lassiter	08/08/02	
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Andrea Green, Parent, on behalf of her minor child, Andrew Price v. The Durham Clinic	02 DHR 0682	Gray	11/07/02	
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Vernessa B Pittman v. NC DHHS	02 DHR 0734	Chess	11/21/02	
Mary's Family Care #2, Beulah Spivey v. OAH	02 DHR 0735	Morrison	08/27/02	
Miranda Lynn Stewart v. DHHS, Div. of Facility Services	02 DHR 0791	Mann	11/08/02	17:12 NCR 1086
Hazel Chea v. Department of Health & Human Services	02 DHR 0795	Mann	06/11/02	
Mr. Mohamed Mohamed v. NC DHHS, Women's & Children's Health (WIC Program)	02 DHR 0866	Chess	10/02/02	
Mooreville Hospital Management Assoc, Inc. d/b/a Lake Norman Reg. Med. Ctr v. NC DHHS, Div. of Fac. Svcs, CON Section, Robert J Fitzgerald in his official capacity as Director of the Div of Fac Svcs, and Lee B Hoffman in her official capacity as Chief of the CON Section and The Presbyterian Hospital and the Town of Huntersville	02 DHR 0888	Morrison	11/26/02	17:13 NCR 1120
Martha L Cox v. NC DHHS, Div. of Facility Services	02 DHR 0935	Morrison	10/25/02	
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CONTESTED CASE DECISIONS

STATE OF NORTH CAROLINA
COUNTY OF ROWAN

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
02 ABC 0629

JRS NIGHT HAWK)
JAMES THERON LLOYD, JR.)
Petitioner,)

vs.)

N.C. ALCOHOLIC BEVERAGE CONTROL)
COMMISSION)
Respondent.)

DECISION

On August 29, 2002, Administrative Law Judge Sammie Chess, Jr. heard this contested case in High Point, North Carolina.

APPEARANCES

Petitioner: James M. Snow
High Point, NC

Respondent: Loretta K. Pinnix, Assistant Counsel
N.C. Alcoholic Beverage Control Commission
Raleigh, NC

STATUTES AT ISSUE

N.C. Gen. Stat. § 18B-901(c)(7)
N.C. Gen. Stat. § 18B-901(c)(8)
N.C. Gen. Stat. § 18B-1005(a)(2)
N.C. Gen. Stat. § 18B-1005(b)

ISSUES

1. Is Petitioner a suitable person to hold an ABC permit?
2. Is the location a suitable place to hold an ABC permit?
3. Did Petitioner or his employees knowingly allow fighting or other disorderly conduct to occur on the licensed premises, which fighting or disorderly conduct could have been prevented without undue danger to Petitioner, his employees, or patrons?
4. Did Petitioner fail to superintend, in person or through a manager, the business for which an ABC permit was issued?

FINDINGS OF FACT

A. PROCEDURAL BACKGROUND

1. Prior to February 15, 2002, Petitioner's family owned improved property located at 409 South Long Street in East Spencer, North Carolina. The property consisted of an ongoing convenience store mart, an automotive parts store, and an unused building on the rear of the property. Petitioner desired to use the unused building for a restaurant with on-premises sale of malt beverages.

2. On or about February 15, 2002, Petitioner applied for an on-premises malt beverage permit from the Rowan County ABC Board. As part of his application process, he also obtained a Local Government Opinion Form 001 for alcohol beverage permits from the City of East Spencer. The mayor of East Spencer completed the form and indicated that the City approved of Petitioner and approved of the location, but the mayor also appended a supplementary letter in which she expressed concern on behalf of the City for the 911 calls that had been previously received at the same location.

3. From on or about February 15, 2002 until March 18, 2002, Petitioner operated at various times his restaurant and sold on-premises malt beverages. In addition to personnel to prepare and deliver food products, Petitioner worked at the restaurant each time it was open, and Petitioner hired at least three security personnel to be present at the premises when it was open and operating.

4. On or about March 16, 2002, an officer of the East Spencer police force was on the premises of Petitioner's business when he observed an apparent fight between two individuals in an area off the parking lot outside of the restaurant. He attempted to stop the fight by spraying pepper spray and by discharging his weapon in the air. Certain other individuals discharged their weapons in the air, and the officer called for back-up support from surrounding law enforcement agencies.

5. Following the above occurrence, Petitioner received a letter dated March 18, 2002, from the ABC Commission informing him that his malt beverage on-premises permit had been disapproved for the reasons cited in said Notice, which was introduced into evidence by Respondent. As a result of such Notice of Rejection, an officer for the Rowan County ABC Board confiscated the permit of Petitioner on March 18, 2002, and Petitioner has not operated an establishment selling on-premises malt beverages since said date.

6. On April 10, 2002, Petitioner completed a petition for a contested case hearing, and served the same on the N.C. ABC Commission as of said date. A Notice of Contested Case and Assignment was issued by the Chief Hearings Clerk for the Office of Administrative Hearings on April 16, 2002. Appropriate notice was given, and this matter was scheduled for hearing before Melissa Owens Lassiter, Administrative Law Judge, and subsequently reassigned to Fred G. Morrison, Jr., Senior Administrative Law Judge, but was reassigned to the undersigned for the hearing of the above matter on the above date.

B. WHETHER APPLICANT IS A SUITABLE PERSON

7. Petitioner testified that he is 37 years old, married, and self-employed in at least three jobs. His family has owned property in East Spencer since 1932, and has owned the present property where his establishment is located since 1991.

8. Petitioner has not received any previous alcohol-related charges or convictions. Petitioner has a conviction for reckless driving in 1999 or 2000; otherwise, Petitioner does not have a criminal record.

9. The mayor of East Spencer indicated on the initial application of Petitioner that he was a suitable person to have an ABC permit. No substantial, credible evidence was offered by Respondent that Petitioner was not a suitable person to hold an ABC permit.

C. WHETHER THE LOCATION IS SUITABLE

10. Petitioner testified that the restaurant is located in the rear of the business property of Petitioner's family. This area is zoned for commercial use. The officer responsible for zoning in East Spencer stated that the use of the property as a restaurant with an on-premises beverage license would be in compliance with the zoning regulations of East Spencer.

11. Petitioner and witnesses for Respondent testified that there are occupied residences approximately one block away from the business of Petitioner. However, in the block of Petitioner, there is only one occupied house, and the only other improved property used for any purpose is an automotive business across from the property where Petitioner operates. The restaurant can seat up to 513 people, but Petitioner has never had more than 140 people to be served. The size of the restaurant is approximately 4,000 square feet.

12. Petitioner stated that he has encountered people loitering at the property, including people apparently conducting drug deals or other suspicious activities. Petitioner has placed a "No Loitering" sign on his property, and has fenced a substantial portion of the property to try to keep loiterers from entering into the area where restaurant patrons might be.

13. A log of 911 calls from January, 2000 through June, 2002, was introduced into the record. The mayor of East Spencer indicated that she had seen a similar compilation at the time she prepared the addendum to the application of Petitioner for a permit. There is a public telephone at the premises which is available for members of the public to make telephone calls, including those to the 911 number. The log of calls indicates that there were no substantial differences in the volume or type of calls received by the Rowan County 911 dispatch during the period of time that Petitioner had his permit.

14. Certain witnesses for Respondent indicated that during the time Petitioner held his permit, it appeared that more individuals loitered on or near the premises where Petitioner had his permit.

15. A neighbor of Petitioner indicated that he had substantial trash on his property during the time that Petitioner was operating under his permit, but he also indicated that he had removed substantial trash from his property from littering just two weeks prior to the hearing.

16. Petitioner indicated that he had called the police to assist with loitering problems at the location of 409 South Long Street prior to and during the time he held a permit, but that the police force of East Spencer was ineffective in assisting with these problems. At the time that Petitioner held his permit, East Spencer was limited to two police officers.

17. A previous permittee, Red Light Health Club, has operated at this same location.

18. Between February 15, 2002 and March 18, 2002, no officer for the Rowan County ABC Board entered the premises of Petitioner.

**D. KNOWINGLY ALLOWING FIGHTING WHICH COULD
HAVE BEEN PREVENTED WITHOUT UNDUE DANGER**

19. Petitioner testified that at approximately 3:00 a.m. on March 16, 2002, patrons began to leave the establishment. Two men in the parking lot were pushing one another, and they were located approximately 150 feet from the entrance to the restaurant. Petitioner stated that he sent three security personnel plus himself to try to take care of the matter, but Officer Vincent Kotarsky of the East Spencer police force sprayed pepper spray upon the crowd that included these two men and the security personnel of Petitioner.

20. After Officer Kotarsky sprayed pepper spray, the officer discharged his weapon. Others discharged weapons, and the crowd disbursed. Officer Kotarsky sent out an emergency signal to surrounding law enforcement agencies, and surrounding law enforcement officers responded to the emergency.

21. An officer responding from the Spencer police force noted an extremely large crowd, fighting and multiple gunshots. He testified that he felt it was a situation that could be best controlled by police officers rather than civilian security.

22. Petitioner operated the premises without any other incident between February 15, 2002 and March 18, 2002. No evidence was presented that any injury of a substantial nature occurred to anyone on the premises of Petitioner on March 16, 2002.

23. Officer Vincent Kotarsky was subsequently fired by East Spencer for problems related to his performance as a law enforcement officer for the town.

E. SUPERINTENDING, IN PERSON OR THROUGH A MANAGER

24. Petitioner testified that he was present at the premises at all times that it was open during the time that he held a permit.

25. Petitioner was on the premises and acting as security on March 16, 2002.

26. No evidence was offered by Respondent that Petitioner was not superintending the business premises on March 16, 2002.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case.

2. The parties received Notice of Hearing more than fifteen (15) days before the hearing.

3. There has been no showing that Petitioner is not a suitable person to hold an ABC permit. Accordingly, it is concluded that Petitioner is a suitable person to hold an ABC permit, based upon the evidence presented and the preponderance of the same.

4. The problems with respect to matters causing the generation of 911 calls have existed in variety and number in the same degree before, during, and after the time period that Petitioner held a permit. The problems that have generated such 911 calls are problems, in general, for East Spencer and the neighborhood where Petitioner's business was located.

5. There has not been a showing that Petitioner's premises is not a suitable place to sell on-premises malt beverages, and the preponderance of evidence warrants a conclusion that Petitioner's place is a suitable place to sell on-premises malt beverages.

6. Neither Petitioner nor his employees knowingly allowed fighting or other disorderly conduct to occur on the licensed premises, which fighting or disorderly conduct could have been prevented without undue danger to Petitioner, his employees, or patrons. The credible evidence warrants a conclusion that the affray which began the difficulties was a sudden, spontaneous event that occurred in the parking lot, and that Officer Vincent Kotarsky overreacted to the situation and provoked a situation that had to be resolved by police authority, rather than civilian security. This warrants a conclusion that Petitioner did not allow conduct to occur on the premises which could have been prevented without undue danger to Petitioner, his employees, or patrons.

CONTESTED CASE DECISIONS

7. Petitioner did not fail to superintend, in person or through a manager, the business premises for which the permit was issued. All of the evidence indicates that he was and is always on the premises while it is being operated, and takes a substantial role in the security for the premises. This warrants a conclusion that he did not fail to superintend in person the business for which the permit was issued.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned finds that the N.C. ABC Commission should not reject Petitioner's ABC permit and RE-ISSUE Petitioner an on-premises malt beverage permit.

ORDER AND NOTICE

The N.C. ABC Commission will make the final decision in this contested case. Pursuant to G.S. 150B-36(a), the Commission is required to give each party an opportunity to file exceptions to this recommended decision and present written arguments to those in the agency who will make the final decision.

Pursuant to G.S. 150B-36(b), the Commission is required to serve a copy of the Final Agency Decision on all parties, the parties' attorneys of record, and on the Office of Administrative Hearings at P.O. Drawer 27447, Raleigh, NC 27611-7447.

This the 19th day of November, 2002.

Sammie Chess, Jr.
Administrative Law Judge

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
02 DHR 0888

MOORESVILLE HOSPITAL MANAGEMENT)
ASSOCIATES, INC. d/b/a LAKE NORMAN REGIONAL)
MEDICAL CENTER)
Petitioner,)
vs.)
NORTH CAROLINA DEPARTMENT OF HEALTH AND)
HUMAN SERVICES, DIVISION OF FACILITY SERVICES,)
CERTIFICATE OF NEED SECTION)
ROBERT J FITZGERALD in his official capacity as Director of)
The Division of Facility Services, and LEE B HOFFMAN in her)
official capacity as Chief of the Certificate of Need Section,)
Respondent)
and)
THE PRESBYTERIAL HOSPITAL and THE TOWN)
OF HUNTERSVILLE,)
Respondent Intervenors.)

RECOMMENDED DECISION
GRANTING PETITIONER'S MOTION
FOR SUMMARY JUDGMENT

Upon consideration of The Presbyterian Hospital's ("Presbyterian") August 16, 2002 Motion for Partial Summary Judgment, Mooresville Hospital Management Associates, Inc. d/b/a Lake Norman Regional Medical Center's ("Lake Norman") September 6, 2002 request for Partial Summary Judgment, Presbyterian's October 14, 2002 Motion for Summary Judgment and Lake Norman's October 14, 2002 Motion for Summary Judgment and after a review of the parties' memoranda, filings, affidavits, supporting documents and pleadings, and hearing oral argument by all parties regarding this case on September 11, 2002, and November 25, 2002, the undersigned determines the following:

APPEARANCES

For Petitioner Mooresville Hospital Management Associates, Inc. d/b/a Lake Norman Regional Medical Center:

Smith Moore LLP
Maureen Demarest Murray
Terrill Johnson Harris
Susan M. Fradenburg

McGuire Woods LLP
John C. Fennebresque
C. Ralph Kinsey, Jr.

For Respondent N.C. Department of Health and Human Services Division of Facility Services, Certificate of Need Section, Robert J. Fitzgerald in his official capacity as Director of the Division of Facility Services, and Lee B. Hoffman in her Official Capacity as Chief of the Certificate of Need Section

N.C. Department of Justice
Office of the Attorney General
James A. Wellons

For Respondent-Intervenors The Presbyterian Hospital and the Town of Huntersville:

Kilpatrick Stockton LLP
Noah Huffstetler
Denise Gunter
Catherine Cummer

PARTIES, PROCEDURE AND CONDUCT OF HEARING

1. Petitioner Mooresville Hospital Management Associates, Inc. d/b/a Lake Norman Regional Medical Center (“Lake Norman”) is a North Carolina corporation with its principal place of business at 171 Fairview Road, Mooresville, North Carolina 28117.
2. Respondent the North Carolina Department of Health and Human Services, Division of Facility Services, Certificate of Need Section (“CON Section”) is the State Agency that administers the Certificate of Need Act (“CON Act”), N.C. Gen. Stat. Chapter 131E, Article 9.
3. Respondent Robert J. Fitzgerald is the Director of the Division of Facility Services and designated final agency decision maker for certificate of need contested cases.
4. Respondent Lee B. Hoffman is the Chief of the Certificate of Need Section.
5. Respondent-Intervenor The Presbyterian Hospital (“Presbyterian”) is a nonprofit corporation organized pursuant to Chapter 55A of the N.C. General Statutes, which according to its licensure renewal applications and the State Medical Facilities Plan (“SMFP”) operates 770 acute care beds and at least 59 operating rooms in Mecklenburg County, North Carolina.
6. Respondent-Intervenor The Town of Huntersville is a political subdivision of the State of North Carolina, located in northern Mecklenburg County.
7. Forsyth Medical Center (“Forsyth”) is a North Carolina not-for-profit corporation organized pursuant to Chapter 55A of the N.C. General Statutes, with its principal place of business in Winston-Salem, Forsyth County, North Carolina. According to the 2002 SMFP, Forsyth has 679 acute care beds and 30 operating rooms.
8. Novant Health, Inc. (“Novant”) is the corporate parent of Forsyth and Presbyterian. Novant owns six hospitals with a total of over 2000 acute care beds in North Carolina. *See* May 24, 2002 Affidavit of P. Paul Smith.
9. The Charlotte Mecklenburg Hospital Authority d/b/a Carolinas Healthcare System (“CMHA”) operates, among other hospitals, Carolinas Medical Center (“CMC”) and University Hospital, two acute care hospitals in Charlotte.
10. CMHA and Presbyterian own and operate all the hospitals in Charlotte and Mecklenburg County.
11. Charlotte Eye Ear Nose and Throat Associates (“CEENTA”) is a private physician practice in Charlotte with a location on Fairview Road.
12. The Agency, Presbyterian, Forsyth and Novant entered into a written global settlement agreement that was dated May 8, 2002 and was set forth in two settlement documents. In the global settlement, the Agency committed to issue Presbyterian a certificate of need for a new hospital in Huntersville, Presbyterian Hospital North (“PHN”), approved the addition and relocation of four operating rooms at a new satellite location for Presbyterian Orthopaedic Hospital (“POH”) at CEENTA on Fairview Road in Charlotte, and prospectively approved Presbyterian’s and Forsyth’s acquisition of PET scanners by 2004.
13. On May 8, 2002, the Agency issued a certificate of need to Presbyterian for a new hospital in Huntersville, purportedly based on its 1999 application.
14. On May 24, 2002, Lake Norman filed a petition for contested case hearing with OAH appealing the Agency’s decision to settle.
15. On May 24, 2002, Lake Norman requested that the Agency’s decision be stayed.
16. On June 6, 2002, Presbyterian was allowed to intervene in the contested case.

17. On July 1, 2002, the Court denied Lake Norman's motion for stay finding that "Lake Norman has not shown it will be irreparably harmed if no stay is entered in this case because the 270 day deadline for issuing a recommended decision is February 18, 2003, approximately four months before Presbyterian plans to break ground for a new hospital in Huntersville."

18. On July 1, 2002, the Court also found that Lake Norman was an affected person "with regard to the settlement between Presbyterian and the Agency" and "[a]s an affected person Lake Norman is entitled to challenge the May 8, 2002 settlement agreements between the Agency and Presbyterian, the issuance of the CON to Presbyterian to develop a new hospital in Huntersville pursuant to the settlement agreements and the other future effects of the settlement agreements."

19. On July 2, 2002, the Town of Huntersville was allowed to intervene in the contested case.

20. The parties have engaged in discovery in this case through the Court ordered deadline of October 21, 2002, including interrogatories, requests for production of documents and requests for admissions.

21. The parties have also conducted the following depositions:

- a. Lee B. Hoffman, Chief of the Certificate of Need Section;
- b. Robert J. Fitzgerald, Director of the Division of Facility Services;
- c. James Keene, Planner, Medical Facilities Planning Section;
- d. Thomas Elkins, Planner, Medical Facilities Planning Section;
- e. Azalea Y. Conley, Assistant Section Chief for the Acute Care Branch for the Licensure and Certification Section, the Division of Facility Services;
- f. Edward B. Case, Chief Executive Officer, The Presbyterian Hospital;
- g. Paul M. Wiles, President, Chief Executive Officer of Novant Health;
- h. Paul Arrington, Director of Strategic Planning, The Presbyterian Hospital;
- i. P. Paul Smith, Executive Director, Lake Norman Regional Medical Center; and
- j. Daniel J. Sullivan, President, Sullivan Consulting Company.

FINDINGS OF UNDISPUTED FACT

PRESBYTERIAN HOSPITAL NORTH

1. In 1997, 1998, 1999 and 2001, Presbyterian applied to the Agency for a certificate of need to construct a new separately licensed hospital in Huntersville, North Carolina.

2. Each time Presbyterian applied for a certificate of need for a new hospital in Huntersville, Lake Norman submitted written comments and appeared at the public hearing in opposition to the project.

3. Lake Norman's facility is approximately ten miles from the proposed Huntersville Hospital.

4. As of March 2001, Lake Norman's market share is 31.2% in Cornelius, 30.1% in Davidson, and 19.2% in Huntersville. This means, for example, that 31.2% of the people in Cornelius who need hospital services choose Lake Norman. P. Paul Smith's May 24, 2002 affidavit.

5. Each time Presbyterian applied for a certificate of need, the Agency denied the application because it failed to satisfy multiple requirements of the SMFP and certificate of need ("CON") statutory and regulatory criteria.

6. In October of 1999, the Agency denied Presbyterian's 1999 application, finding that it was nonconforming with, among other criteria, statutory criteria 1, 3, 4, 5, 6, 12 and 18a, in N.C. Gen. Stat. § 131E-183(a).

7. When denying Presbyterian's 1999 Huntersville Hospital application, the Agency found that Lake Norman has a sufficient number of existing acute care beds to meet the perceived need for the area and Presbyterian did not "adequately demonstrate a need for 60 additional acute care beds in the Huntersville area." (Agency Findings at 18-19). It also found that Presbyterian failed to show that the new "hospital would not result in unnecessary duplication of existing or approved health service capabilities or facilities in the proposed area." (Agency Findings at 32).

CONTESTED CASE DECISIONS

8. In November of 1999, Presbyterian appealed the Agency's decision to deny its 1999 application, contested case 99 DHR 1593.
9. In December of 1999, Lake Norman and CMHA were each permitted to intervene in 99 DHR 1593 with all the rights of a party.
10. On October 13, 2000, Lynda McDaniel, then Director of the Division of Facility Services, entered a Final Agency Decision denying Presbyterian's 1999 application for a new hospital in Huntersville.
11. On October 23, 2000, Presbyterian appealed Ms. McDaniel's final agency decision to the Court of Appeals.
12. On June 21, 2001, Presbyterian met with the Agency to attempt to settle the 1999 Huntersville Hospital appeal. The Agency would not agree to settle the 1999 Huntersville Hospital application at that time because CMHA was also opposed to the application and was an intervenor in the case pending at the Court of Appeals. Fitzgerald Dep. at 37, 41-42 and 54.
13. In October of 2001, CMHA withdrew from the appeal of the final agency decision regarding the 1999 Huntersville Hospital application.
14. By May of 2002, briefs had been filed in the Court of Appeals and oral argument had been heard regarding the appeal of the decision to deny the 1999 Huntersville Hospital application.
15. In September of 2001, Presbyterian filed another application for a new hospital in Huntersville.
16. Presbyterian projected in its 1999 Huntersville Hospital application that 13.4% of patients for the new facility would come from Iredell County. 2001 Application at 119.
17. In November of 2001, the Presbyterian hospitals attempted to revise their 2001 Licensure Renewal Applications to increase by 16 the number of operating rooms at Presbyterian Hospital, POH and Presbyterian Hospital Matthews. Agency File at 552-578.
18. The Agency has not accepted Presbyterian's revised numbers for its operating rooms. Keene Dep. at 30.
19. On February 27, 2002, the Agency issued a decision denying Presbyterian's 2001 application for a new hospital in Huntersville.
20. On March 6, 2002, the Agency issued findings stating the reasons for its denial of Presbyterian's 2001 Huntersville Hospital application.
21. The Agency found that Presbyterian's 2001 Huntersville Hospital application was nonconforming with, among other criteria, statutory criteria 1, 3, 4, 6 and 18a in N.C. Gen. Stat. § 131E-183(a).
22. The Agency specifically found that Lake Norman and CMHA's University Hospital (located approximately 15 road miles from the proposed new hospital) "offer the same acute care services that are proposed by the applicant, and both hospitals have adequate capacity to meet the applicant's identified need for services." Agency Findings at 24.
23. Six days after the Agency issued its Findings regarding the 2001 Huntersville Hospital application, representatives of Presbyterian met with the Agency to discuss settlement of the disapproval of its 2001 Huntersville Hospital application. Lake Norman was not given notice of nor included in this settlement meeting. Hoffman Dep., Vol. I at 63-65.
24. On March 20, 2002, Presbyterian submitted written materials to the Agency regarding settling its 2001 application. Agency File at 16-236.
25. On March 26, 2002, Presbyterian filed an appeal at OAH concerning the Agency's decision to deny its 2001 application, 02 DHR 0533.
26. On March 26, 2002, Lake Norman filed an appeal at OAH concerning the Agency's findings regarding its denial of Presbyterian's 2001 application, 02 DHR 0541.

CONTESTED CASE DECISIONS

27. On April 5, 2002, just 30 days after i issued its findings denying Presbyterian’s 2001 Huntersville Hospital application, Presbyterian, Novant, Forsyth and the Agency met and entered into a global settlement and signed a memorandum of understanding that in part agreed to award Presbyterian a certificate of need for a new hospital in Huntersville.

28. On April 8, 2002, Lake Norman moved to intervene in 02 DHR 0533, Presbyterian’s contested case challenging the Agency’s decision to disapprove Presbyterian’s 2001 Huntersville Hospital application.

29. On May 8, 2002, Presbyterian submitted additional written materials to the Agency regarding settlement of the Huntersville Hospital project.

30. Presbyterian, Novant, Forsyth and the Agency entered into a written global settlement agreement that was dated May 8, 2002, and included awarding Presbyterian a certificate of need for a new hospital in Huntersville.

31. On May 8, 2002, the Agency issued a certificate of need to Presbyterian for PHN.

32. The settlement agreement stated that the Agency was awarding a certificate of need to Presbyterian for Huntersville Hospital based on the 1999 application, not the 2001 application.

33. The Agency approved a new Huntersville Hospital project that was significantly different from the 1999 application and very similar to the 2001 application as set forth below:

	1999 Application	2001 Application	Settlement
Capital Expenditure	\$37,1900,00 (1999 Application at 102-03)	\$55,719,845 (2001 Application at 159)	\$55,719,845 (Exhibit A to settlement) 18 million or over 50% increase compared to 1999 Application
Financing	debt (1999 Application, at 105, Exhibit 6)	cash reserves (2001 Application at 160)	cash reserves (Agency File at 272, Exhibit 7)
Square Footage	150,729 square feet (1999 Application at 102)	164,858 square feet (2001 Application at 191)	164,858 square feet (Agency File, at 272-73) 14,129 square feet or 9% increase over 1999 Application
Operating Rooms	4 (1999 Application at 14)	8 (2001 Application at 27)	8 (Exhibit A to settlement) 100% increase over 1999 Application
Acute Care Beds	60 (1999 Application at 3)	60 (2001 Application at 26)	50 (with 10 observation beds) (Exhibit A to settlement)
FTEs	258 (1999 Application at 94)	354 (2001 Application at Ex. 24)	354 (Agency File at 276) 96 persons or 37% increase over 1999 Application
Net income 3 ^d year	\$858,818 (1999 Application at 932)	\$2,562,905 (2001 Application at Form B -1)	\$1,671,117 (Agency File at 424)

34. The Agency issued a certificate of need that was identical in scope to what Presbyterian proposed in its 2001 application with the exception of having fifty acute care beds and ten observation beds rather than sixty acute care beds.
35. There is no need in the SMFPs for 1998, 1999, 2000, 2001 and 2002 for new hospitals, additional acute care beds, or operating rooms in Mecklenburg County.
36. The Agency admitted that it purported to settle and issue a certificate of need to Presbyterian for Huntersville Hospital based upon the 1999 application to avoid the statutory stay of the certificate of need created by Lake Norman's appeal of the Agency's 2001 decision. Hoffman Dep., Vol. I at 152. The Agency knew it was prohibited from issuing a CON to Presbyterian for the 2001 application because of Lake Norman's pending appeal. *Id.*
37. The Agency did not find and did not expect to find Presbyterian's 1999 application as updated by settlement materials conforming with all the required statutory and regulatory criteria. Hoffman Dep., Vol. II at 79 ("it was my goal and my attempt to try to get sufficient information to determine that the application was conforming with the majority of all criteria – of the criteria that was the subject of the reviews. I knew from the beginning we were going to disagree on some criteria. And so, no, it wasn't an effort to try to make it conform with every single criteria.")
38. The Agency officials "knew we were going to disagree on the issues related to utilization of inpatient beds" because they had "disagreed with them four times already." Hoffman Dep., Vol. II at 86.
39. The Agency specifically found that "[t]here were criteria which the Agency did not reach a conclusion that it was in agreement with Presbyterian's position. . . . Primarily, that would be Criterion 1, 3, and 6." Hoffman Dep., Vol. II at 81. "In addition Criteria 4 and 18a are related to the other three criteria." *Id.*
40. The Agency officials knew that there was no change in the facts between March 6, 2002, and May 8, 2002, that would lead them to believe that there was no longer a surplus of acute care beds and operating rooms at Lake Norman and University Hospital. Hoffman Dep., Vol. II at 94-96.
41. Even though the Agency officials had not found Presbyterian's projects conforming with all necessary statutory and regulatory criteria and were aware of the lack of any need determination for acute care beds, operating rooms or PET scanners in the SMFP, they still believed that they had discretion to settle. Specifically, they stated that we are "not aware of any limitations" "on our ability to settle a contested case concerning a certificate of need application." Hoffman Dep., Vol. II at 100.
42. The Agency officials do not believe that the provisions in N.C. Gen. Stat. § 131E-183(a)(1) that require an application to conform with the SMFP "impose any limitations on the Agency's ability to settle contested cases concerning certificate of need applications." Hoffman Dep., Vol. II at 105.
43. On May 8, 2002, Robert Fitzgerald sent correspondence by electronic mail to Carmen Hooker Odom, Secretary of the Department of Health and Human Services, and Lanier Cansler, Deputy Secretary of the Department of Health and Human Services, informing them that the Agency had settled with Novant regarding the "Huntersville facility and several other issues related to CON." The e-mail stated:
- You need to know that Novant wanted to settle this for the last 18 months, but until a few months ago CMC [CMHA] was an intervenor in this case and we told Novant that the agreement would need CMC's acquiescence. In a separate agreement which we have never seen CMC and Novant made peace and CMC withdrew from this case. The Lake Norman Hospital is also an intervenor, but carrying this case on and on for their benefit did not seem to be in the public interest. Lake Norman can still contest the settlement if it wishes.
44. On May 8, 2002, Presbyterian moved to dismiss its appeal of the disapproval of its 1999 Huntersville Hospital application, then pending at the Court of Appeals.
45. On May 8, 2002, Presbyterian dismissed 02 DHR 0533, its appeal of the denial of its 2001 Huntersville Hospital application, then pending at OAH.
46. On May 9, 2002, Lake Norman objected to the dismissal of the 1999 appeal in the Court of Appeals.
47. On May 23, 2002, the Court of Appeals dismissed the appeal concerning the 1999 Huntersville Hospital application.

48. On May 20, 2002, the Agency moved to dismiss Lake Norman's appeal of the 2001 decision, 02 DHR 0541.
49. On August 7, 2002, Judge Chess dismissed 02 DHR 0541, finding that:
[T]he issues in this case became moot when The Presbyterian Hospital withdrew its certificate of need application for Project No. F-6495-01 on May 8, 2002, pursuant to settlement agreements between the Respondent Agency and The Presbyterian Hospital . . .

PET SCANNERS

50. In March of 2001, Presbyterian, CMC, and NorthEast Medical Center, each filed an application for the one fixed PET scanner that had been identified as needed by the 2001 SMFP.
51. In August 2001, the Agency denied Presbyterian's application for a PET scanner and approved CMC's application for a PET scanner.
52. In September 2001, Presbyterian appealed the denial of its application for a PET scanner, 01 DHR 1543, but did not appeal the award of a PET scanner to CMC.
53. The Agency issued a CON to CMC for a fixed PET scanner.
54. In October 2001, Presbyterian, Forsyth and Novant requested a declaratory ruling that they could replace two coincidence cameras at Presbyterian and Forsyth with PET scanners.
55. In December 2001, Mr. Fitzgerald issued a declaratory ruling that Presbyterian and Forsyth had illegally acquired their two coincidence cameras without obtaining certificates of need and could not replace their coincidence cameras with PET scanners without each obtaining a certificate of need.
56. Lake Norman received no notice from the Agency of either the request for declaratory ruling or the declaratory ruling issued by the Agency disapproving the replacement of the coincidence cameras with PET scanners.
57. Lake Norman and Presbyterian are in the same health service area, Health Service Area III ("HSA III").
58. Under the SMFP, the need for PET scanners is determined based on health service area.
59. Once the Agency approved CMC's PET scanner application and issued a CON to CMC, there was no remaining need under the 2001 SMFP for a fixed PET scanner.
60. There was no need anywhere in the State for fixed PET scanners in the 2002 SMFP.
61. There was no need for a fixed PET scanner in HSA II where Forsyth was located in 2001 and 2002, and Forsyth did not apply for a fixed PET scanner in 2001 or 2002.
62. On April 5, 2002, the Agency, Presbyterian, Forsyth and Novant prepared a "memorandum of understanding" that allowed Presbyterian and Forsyth to acquire PET scanners by July 2004.
63. The Agency, Presbyterian, Forsyth and Novant entered into a global settlement agreement that is dated May 8, 2002, which in part allowed Presbyterian and Forsyth to each acquire a PET scanner.
64. Pursuant to the terms of the global settlement agreement, the Agency did not require Presbyterian or Forsyth to meet any statutory or regulatory criteria to acquire the PET scanners by July 2004.
65. The global settlement specifically provides:
 - (b) In the event that either Presbyterian or Forsyth or both is not eligible to apply for a CON for a dedicated PET scanner under the 2003 SMFP, such ineligible hospital shall be able to acquire a dedicated PET scanner on or after 1 March 2003.

(c) In the event that either hospital's CON application for a dedicated PET scanner is denied, such hospital shall be able to acquire a dedicated PET scanner on or after 1 July 2004.

66. Pursuant to the terms of the global settlement, there does not need to be an identified need in HSA II or III (the location of Presbyterian and Forsyth) before Presbyterian and Forsyth can acquire a PET scanner.

67. The global settlement does not require either Presbyterian or Forsyth to dispose of a coincidence camera when it acquires a PET scanner.

68. On July 3, 2002, Lake Norman submitted a letter to the Agency stating its support for N.C. Baptist Hospital's application to acquire a mobile PET scanner and its interest in being a host site for the mobile PET scanner.

OPERATING ROOMS

69. On September 26, 2001, POH requested a determination from the Agency that it could add four operating rooms to its satellite location on NorthPoint Road in Huntersville and then relocate all four of those operating rooms to a new satellite location in the private practice of CEENTA on Fairview Road in Charlotte.

70. CEENTA is a private physician practice and is not licensed as an ambulatory surgery facility. It is located at a different location than POH or Presbyterian Specialty Hospital ("PSH") and is separated from each of these campuses by more than a right of way.

71. On February 26, 2002, POH submitted additional documentation stating it was not relocating operating rooms from NorthPoint to CEENTA but simply adding four operating rooms at the CEENTA location.

72. The Agency did not notify Lake Norman of POH's no review request to relocate and add four operating rooms to CEENTA.

73. As part of the September 2001 and February 2002 submissions of information to the Agency, POH submitted a letter dated April 11, 2001, from William England Associates, architects, proposing a fee for architectural/engineering services that would equal 10% of estimated construction costs.

74. The certified cost estimate dated June 14, 2001, submitted by William England estimated construction costs at \$175,000. The Agency accepted this amount as the proposed construction cost. Hoffman Dep., Vol. I at 115-116.

75. 10% of the construction costs on the certified cost estimate is \$17,500.

76. The letter requested POH to sign the letter if the proposal met with its approval. The letter was signed by Sandra Williams of Presbyterian, but her signature was not dated.

77. The Agency did not know when the letter had been signed by Ms. Williams. Hoffman Dep., Vol. I at 103-04.

78. The Agency File does not contain and the Agency did not have prior to the global settlement any documentation that Presbyterian or POH had spent greater than \$50,000 prior to June 23, 2001, on the CEENTA operating room project.

79. Presbyterian has not produced any evidence that it spent greater than \$50,000 prior to June 23, 2001, on the relocation and addition of operating rooms from PSH to POH's satellite location at CEENTA.

80. The Agency acknowledged that because of new statutory requirements regarding a hospital's relocation and addition of operating rooms, it would not have allowed POH to add four new additional operating rooms to the POH license and relocate the operating rooms to the CEENTA satellite location. Hoffman Dep., Vol. I at 106-110.

81. POH was not involved at any time in any litigation regarding relocating to and adding operating rooms to CEENTA on Fairview Road.

82. As part of the global settlement, the Agency allowed Presbyterian "to relocate four shared operating rooms from PSH to Presbyterian's proposed location of Fairview Road in South Charlotte," and then the operating rooms would then be added to POH's license. Settlement Agreement at 6-7.

83. It is undisputed that PSH closed in 1999. Specifically, it stopped providing any services at its facility between March and June 1999. *See* Memorandum from Mr. Revels dated June 14, 1999; October 18, 1999, Letter from Mr. Noah Huffstetler to Mr. Jeff Horton.

84. As of June 11, 1999, the PSH facility functioned solely as a medical office building. 2000 Revels Dep. at 83.

85. There was no need for additional operating rooms in Mecklenburg County in the 2002 SMFP.

86. There has never been any certificate of need application filed regarding four operating rooms being relocated from PSH and added to CEENTA on Fairview Road, and there has never been a public comment period or public hearing regarding the project.

SETTLEMENT AGREEMENT

87. The Agency officials contend that they settled because of the risk and burden of litigation. Fitzgerald Dep. at 48-49, Hoffman Dep., Vol. II at 87.

88. The global settlement agreement states that “significant amounts of time and resources have been expended by the parties in connection with the foregoing litigation and certificate of need disputes” and lists the multiple claims that are to be settled apparently as justification for settling these claims.

89. There are no findings in the global settlement that Presbyterian and Forsyth satisfied statutory and regulatory criteria to replace coincidence cameras with PET scanners.

90. There are no findings in the global settlement that Presbyterian satisfied necessary statutory and regulatory criteria to relocate and add four operating rooms from PSH to POH’s satellite location at CEENTA or that this project would meet necessary requirements to be grandfathered from obtaining a CON for such project.

91. The only findings in the global settlement related to the settlement of the Huntersville Hospital application were about the reasons for increasing the capital expenditure for the project. These findings stated:

WHEREAS, due to the passage of time since Petitioner filed its certificate of need application for the Project in May 1999 and the significant delays resulting from litigation concerning the Project, some of the information Petitioner submitted with its certificate of need application for the Project is now out of date and needs to be updated to reflect current conditions;

WHEREAS, the architectural design of hospitals and the cost to construct hospitals has also changed since the time Petitioner filed its certificate of need application for the Project in May 1999;

Settlement at 5 and 6.

92. There are no documents in the Agency File or that have been produced by the Agency in this case that reference settlement materials concerning PET scanners.

93. The Agency file for this case contained no information regarding the CEENTA operating room project except Presbyterian’s September 26, 2001, and February 26, 2002, request for no review determination and the letters and certified cost estimates referenced above.

94. When the Agency issued the certificate of need for PHN to Presbyterian, the 1999 appeal of the Agency’s decision to deny Presbyterian’s 1999 application was still pending at the Court of Appeals and Lake Norman’s appeal of the Agency decision regarding the 2001 PHN application was still pending in the Office of Administrative Hearings.

95. Mr. Fitzgerald has acknowledged that, under N.C. Gen. Stat. § 131E-187(a), the Agency may not issue a certificate of need, if a request for a contested case hearing has been filed. Fitzgerald Dep. at 186.

96. Mr. Fitzgerald has admitted that he knew that Lake Norman was a party to contested cases concerning the 1999 and 2001 Huntersville Hospital applications and that he did not give Lake Norman notice or opportunity to participate in the settlement discussions with the Agency and Presbyterian. Fitzgerald Dep., Vol. II at 214.

97. Lake Norman was not invited to and never attended any settlement meetings where the Agency discussed with Presbyterian, Forsyth or Novant the possible global settlement of the applications for a hospital in Huntersville, the relocation and addition of four operating rooms from PSH to POH's satellite location at CEENTA or Presbyterian's and Forsyth's acquisition of PET scanners.

98. Mr. Fitzgerald, who was designated as the final Agency decision maker, has admitted that he participated in settlement discussions with Presbyterian, Forsyth and Novant without Lake Norman's involvement.

99. Lake Norman was a party to two of the cases that were to be dismissed pursuant to the terms of the global settlement, 99 DHR 1593 and 02 DHR 0533, but was excluded from the settlement negotiations.

100. The settlement dated May 8, 2002, was a global settlement and representatives of the Agency and Presbyterian, Forsyth and Novant have testified that they would not have agreed to settle one portion of the agreement without the agreement to settle of all the other issues that were included. Fitzgerald Dep. at. 48, 49, 51, 52, 55-56, 59, 60-63, 64-65, 93; Hoffman Dep., Vol. I at 10, 18, 67; Wiles Dep. at 46, 53, 94.

101. Robert Fitzgerald was designated the final agency decision maker during the settlement negotiations at all times in question and this designation has not changed. *See* Fitzgerald Dep. at 55; DHHS Directive II-24.

CONCLUSIONS OF LAW

I. THE AGENCY DID NOT HAVE PROPER STATUTORY AUTHORITY TO SETTLE THE 1999 OR 2001 HUNTERSVILLE HOSPITAL APPEALS WITHOUT THE CONSENT OF ALL THE PARTIES.

1. Two statutes generally specify the authority of state agencies to settle.
2. N.C. Gen. Stat. § 150B-22 provides:

It is the policy of this State that any dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty, should be settled through informal procedures. In trying to reach a settlement through informal procedures, the agency may not conduct a proceeding at which sworn testimony is taken and witnesses may be cross-examined. If the agency and the other person do not agree to a resolution of the dispute through informal procedures, either the agency or the person may commence an administrative proceeding to determine the person's rights, duties, or privileges, at which time the dispute becomes a "contested case."

3. N.C. Gen. Stat. § 150B-31(b) provides:

Except as otherwise provided by law, disposition may be made of a contested case by stipulation, agreed settlement, consent order, waiver, default, or other method agreed upon by the parties.

4. These statutes do not provide authority for the Agency to enter into the "settlement" reached in this case between the Agency, Presbyterian, Forsyth and Novant.

5. An agency has only that authority granted by the General Assembly. It cannot expand through settlement of a contested case its statutory authority to act. *See, State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 399, 269 S.E.2d 547, 561 (1980) ("The powers and authority of administrative officers and agencies are derived from, defined, and limited by constitution, statute, or other legislative enactment.").

6. The authority of an agency to settle under N.C. Gen. Stat. § 150B-22 is limited to informal proceedings before a "contested case" arises.

7. At the time of the global settlement, contested cases or judicial appeals were pending concerning Presbyterian's 1999 and 2001 applications for a new hospital in Huntersville and PET scanners.

8. Presbyterian characterized its 1999 Huntersville Hospital application as the relocation of PSH, including acute care beds and operating rooms. Presbyterian's 2001 Huntersville Hospital application proposed to delicense operating rooms from PSH as part of the application. *See* 1999 Application and 2001 Application at 27. Therefore, questions regarding relocation and addition of operating rooms from PSH were also pending as part of the appeals of the 1999 and 2001 applications.

9. N.C. Gen. Stat. § 150B-22 could not provide the Agency with any authority to settle the 1999 Huntersville Hospital application, 2001 Huntersville Hospital application, relocation of operating rooms from PSH, or PET scanner appeals.

10. N.C. Gen. Stat. § 150B-31 provides that the settlement must be agreed upon "by the parties."

11. As an intervenor in the 1999 Huntersville Hospital appeal and proposed intervenor in the 2001 Huntersville Hospital appeal, by statute, Lake Norman was a party to these appeals. *See* N.C. Gen. Stat. § 150B-2(5).

12. A contested case cannot be disposed of without the consent of all the parties. *See Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 529 (1986) ("A court's approval of a consent decree between some of the parties . . . cannot dispose of the valid claims of nonconsenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor."); *see also Wheeler v. American Home Products*, 582 F.2d 891 (5th Cir. 1977); *Raylite Electric Corp. v. Noma Electric Corp.*, 170 F.2d 914 (2nd Cir. 1948) *overruled on other grounds by Chappell & Co. v. Frankel*, 367 F.2d 197 (2nd Cir. 1996); *State ex rel. Missouri Cable Telecomms. Ass'n v. Missouri Pub. Serv. Comm'n*, 929 S.W.2d 768, 744 (Mo. Ct. App. 1996) (holding that the Public Service Commission, by making its decision to settle privately, without the intervenors as opposed to openly, with the input of the intervenors, violated "one of the purposes behind vesting exclusive jurisdiction in the circuit court while review is pending, which is to ensure that those interested in the outcome of the case as intervenors have a forum to be heard.")

13. The Agency had no authority to settle the appeals regarding the 1999 and 2001 Huntersville Hospital applications or relocation of operating rooms from PSH without Lake Norman's inclusion.

II. THE AGENCY CANNOT USE SETTLEMENT TO EVADE THE REQUIREMENTS OF THE CERTIFICATE OF NEED ACT OR OTHER STATUTES.

14. N.C. Gen. Stat. § 131E-188(a) establishes the authority of the Agency to settle contested CON matters. N.C. Gen. Stat. § 131E-188(a) states an Agency may issue a CON "pursuant to a settlement agreement to the extent permitted by law."

15. The Agency only has authority to settle within the parameters of its authority under and requirements of CON law. The Agency does not have discretion to settle solely as it believes best, reasonable or in the public interest. *See Carolina-Virginia Ass'n of Bldg. Owner & Managers v. Ingram*, 39 N.C.App. 688, 692, 251 S.E.2d 910, 913 (1979) (holding an Agency "has only such powers as have been lawfully delegated to it by the Legislature.") .

16. "[A]n application must comply with *all* review criteria." N.C. Gen. Stat. § 131E-183(a); *Presbyterian-Orthopaedic Hosp. v. North Carolina Dep't of Human Res.*, 122 N.C. App. 529, 534, 470 S.E.2d 831, 834 (1996).

17. N.C. Gen. Stat. § 131E-183(a)(1) unambiguously requires a project to be consistent with the applicable policies and need determinations in the SMFP.

18. The Huntersville hospital applications, operating room relocation and addition project and PET scanner proposals could not comply with the SMFP because the need determination or lack of a need determination in the SMFP establishes a determinative limitation on health service facilities or health service facility beds that may be approved by the Agency. *See* N.C. Gen. Stat. §§ 131E-175, -177(4) and 183(a)(1); *see also Humana Hosp. Corp. v. North Carolina Dep't of Human Res.*, 81 N.C. App. 628, 345 S.E.2d 235 (1986).

19. It is undisputed that there was no need determination for acute care beds or new hospitals in Mecklenburg County in the 1999, 2000, 2001, or 2002 SMFPs, no need determination in the 2001 or 2002 SMFPs for additional PET scanners in HSAs II and III where Presbyterian and Forsyth are located, and no need for additional ORs in the 2002 SMFP in Mecklenburg County.

20. By issuing a certificate of need to Presbyterian for a new hospital in Huntersville with fifty beds and eight operating rooms, allowing for the acquisition of a PET scanner by Forsyth and by Presbyterian in Forsyth and Mecklenburg Counties, and allowing the relocation and addition of four operating rooms on Fairview Road, the Agency acted in direct contradiction to the lack of

need determinations for acute care beds or facilities in Mecklenburg County in the 1999, 2000, 2001, or 2002 SMFPs, for PET scanners in HSAs II and III in the 2001 or 2002 SMFPs, and for additional ORs in Mecklenburg County in the 2002 SMFP.

21. The CON statutes require a certificate of need to acquire a PET scanner. N.C. Gen. Stat. § 131E-176(16)(f1).

22. The CON statutes require the disposal of equipment that is being replaced without a CON, pursuant to the exemption for replacement equipment. N.C. Gen. Stat. § 131E-176(22a) and 184.

23. In violation of N.C. Gen. Stat. §§131E-176(16)(f1), 176(22)(a) and 184, the settlement agreements do not require Presbyterian or Forsyth to obtain a certificate of need to acquire a PET scanner or to dispose of their coincidence cameras upon acquisition of a PET scanner without a certificate of need.

24. In the settlement, the Agency permitted Presbyterian to relocate one operating room from PSH to Huntersville Hospital and to relocate four operating rooms from PSH to POH's satellite location at CEENTA.

25. As of June 23, 2001, the CON statute requires a certificate of need for the:

construction, development, establishment, increase in the number, or relocation of an operating room or operating rooms, other than the relocation of an operating room or operating rooms within the same building or on the same grounds or to grounds not separated by more than a public right-of-way adjacent to the grounds where the operating room is or operating rooms are currently located.

Session Law 2001-242, N.C. Gen. Stat. § 131E-176(16)(u).

26. Presbyterian must have a certificate of need to relocate from PSH and add to POH's new satellite location at CEENTA on Fairview Road in Charlotte unless the project meets the grandfather requirements of Session Law 2001-242.

27. To be grandfathered, an applicant must show:

- (a) The project would not have required a certificate of need prior to June 23, 2001; *and*
- (b) A person or facility spent more than \$50,000 prior to June 23, 2001 *or* entered into a legally binding obligation prior to June 23, 2001 to spend more than \$50,000; *and*
- (c) The project was reasonably expected to be completed by December 31, 2002.

Session Law 2001-242, Section 5.

28. From July 13, 2000, through June 22, 2001, an applicant required a certificate of need for:

The relocation or expansion of part or all of an ambulatory surgical facility which requires a new license under Part D of Article 6 of this Chapter, or the relocation and addition of part or all of a hospital operating room to a building other than one within which it is currently located.

Session Law 2000-135, N.C. Gen. Stat. § 131E-176(16)t.

29. As part of Session Law 2000-135, that was effective from July 13, 2000, through June 22, 2001, the legislature stated that this act "shall not apply to a party involved in litigation pending on or before the effective date of this act." *Id.*

30. Presbyterian was not involved in litigation related to relocation of operating rooms from PSH to CEENTA in June 2001 and, therefore, the project is not exempted from the provisions of Session Law 2000-135.

31. Presbyterian's September 26, 2001, no review request proposed to relocate and add operating rooms and thus required a certificate of need under Session Law 2000-135, which was in effect prior to June 23, 2001.

32. Presbyterian did not demonstrate to the Agency prior to the settlement that it spent greater than \$50,000 on the CEENTA operating room project prior to June 23, 2001.

33. The documentation submitted by Presbyterian to the Agency prior to the settlement showed at best a commitment to spend \$17,500 and did not establish that Presbyterian had entered into a legally binding obligation to spend \$50,000 prior to June 23, 2001, to relocate operating rooms from PSH and add them to POH's satellite location at CEENTA.

34. The relocation and addition of operating rooms from PSH to POH's satellite location at CEENTA required a certificate of need.

35. PSH was closed as of June 1999 and its license of fifteen acute care beds and five operating rooms no longer existed at the time of the settlement between the Agency, Presbyterian, Forsyth and Novant. 10 N.C.A.C. 3C.3104. The Agency lacked statutory or regulatory authority to approve relocation of these non-existent operating rooms to Presbyterian's Huntersville Hospital and POH's satellite location at CEENTA.

36. Settlements that are not fairly entered into and are in violation of law or public policy will not be upheld. *See Sartin v. Carter*, 76 N.C. App. 278, 28, 332 S.E.2d 521, 524 (1985).

37. In this case, the Agency ignored both the limits on its authority to settle under N.C. Gen. Stat. §§150B-22 and 31 and N.C. Gen. Stat. §131E-188(a) and the limits on its ability to issue certificates and exemptions as set forth in the Certificate of Need Act.

38. The Agency's position that there is no limit to its settlement authority is contrary to the express language of the CON Act and well-established law in North Carolina limiting the authority and jurisdiction of state agencies. *State ex rel. Commiss'r of Ins.*, 300 N.C. at 399, 269 S.E.2d at 561; *see also Bio-Medical Applications of N.C. v. N.C. Dep't of Human Res.*, 136 N.C. App. 103, 109-110, 523 S.E.2d 677, 681-82.

39. The Agency failed to follow the law in issuing a certificate of need to Presbyterian for Huntersville Hospital, certificates of need or exemptions for the two PET scanners for Presbyterian and Forsyth, and an exemption for the relocation and addition of four operating rooms from closed PSH to POH's satellite location at CEENTA and the global settlement must be determined to be null and void.

III. THE "SETTLEMENT" VIOLATES LAKE NORMAN'S RIGHT TO DUE PROCESS.

40. The Agency improperly abrogated Lake Norman's right to due process by negotiating a unilateral settlement with Presbyterian without Lake Norman's participation and agreement. This action substantially prejudiced Lake Norman's rights.

41. The Constitution of North Carolina states as follows:

No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land.

N.C. Constitution, Article I, § 19; *See also* U.S. Const., amend. V.

42. The legislature specifically provided due process procedures related to the denial or grant of a certificate of need or exemption. *See* N.C. Gen. Stat. § 131E-188.

43. The very purpose of the administrative hearing is to protect the due process rights of affected parties while promoting judicial economy. *See Living Centers-Southeast Inc. v. North Carolina Dep't of Health & Human Servs.*, 138 N.C. App. 572, 581, 532 S.E.2d 192, 198 (2000).

44. The North Carolina Supreme Court has recognized the requirement that particular procedures be followed when constitutionally protected property rights are at issue. *See Humble Oil & Refining Co. v. Bd. of Aldermen*, 284 N.C. 458, 467, 202 S.E.2d 129, 135 (1974).

45. The Supreme Court has held that:

[t]he procedural rules of an administrative agency "are binding upon the agency which enacts them as well as upon the public. . . . To be valid the action of the agency must conform to its rules which are in effect at the time the action is taken, particularly those designed to provide procedural safeguards for fundamental rights." 2 Am. Jur. 2d *Administrative Law* § 350 (1962). In no other

way can an applicant be accorded due process and equal protection, or the Aldermen refute a charge that their denial of a permit constituted an arbitrary and unwarranted discrimination against a property owner.

Id. at 467-68, 202 S.E.2d at 135.

46. The Agency and Presbyterian have failed to abide by the procedures set forth in both the CON Act and the APA.

47. The Agency approved the 1999 Huntersville Hospital application with a 50% increase in capital expenditure. The only authority in the CON Act for increasing the capital expenditure amount for a project after it is filed is found in N.C. Gen. Stat. § 131E-181(c).

48. N.C. Gen. Stat. § 13E-181(c) allows the Agency to approve an increased capital expenditure amount when the certificate is issued more than 12 months after the application review began, but the increase is only to reflect inflation, based on the Department of Commerce's Construction Cost Index. *Id.*

49. The increase in capital expenditure approved by the Agency is well above inflation and requires a new application and a new certificate of need.

50. N.C. Gen. Stat. §§ 131E-176(16)(b) and 182 states that any capital expenditure greater than \$2 million to develop or expand a health care facility requires a certificate of need.

51. N.C. Gen. Stat. § 131E-181 states that a certificate of need is only valid for the scope defined in the application. Part of the scope of the project is the capital expenditure.

52. N.C. Gen. Stat. § 131E-176(16d) and 181 provide that any increase of greater than 15% of the approved capital expenditure for a new institutional health service requires a new certificate of need application and new certificate of need.

53. A new application must be considered pursuant to the review process explicitly stated in N.C. Gen. Stat. § 131E-185.

54. That review process provides significant opportunity for public input. *See* N.C. Gen. Stat. § 131E-185.

55. The statute specifically provides that the Agency "shall provide written notice of all the findings and conclusions upon which it based its decision." N.C. Gen. Stat. § 131E-186(b).

56. The settlement of this case denied Lake Norman its right to due process as implemented in the CON Act and the APA. *See* N.C. Gen. Stat. §§ 131E-188 and 150B-23.

57. Courts have recognized a defendant's due process interest in causes of action and have required their signature on dismissals. *See Camacho v. Mancuso*, 53 F.3d 48 (4th Cir. 1995) (holding the that when a voluntary dismissal was filed that was not signed by all the defendants, it was not effective).

58. Lake Norman was substantially prejudiced by the settlement because the settlement resulted in the dismissal of 99 DHR 1593, a case in which Lake Norman had an interest and was an intervenor, and in the dismissal of 02 DHR 0533, a case in which Lake Norman was a pending intervenor and, thus, a party. The settlement was also the basis for the Agency's successful motion to dismiss Lake Norman's appeal of the Agency decision, 02 DHR 0541.

59. Lake Norman was allowed to intervene in the 1999 contested case as a matter of right because it was an affected person who would be substantially prejudiced by a decision in Presbyterian's favor. Lake Norman participated in the case in which it had been an intervenor, filing motions for summary judgment and briefs to the Court of Appeals. Pursuant to G. S. 131E-188(b), as an affected person and party, Lake Norman was entitled to judicial review in that case, but the settlement agreement resulted in no decision from the Court of Appeals. Having relied upon and supported the agency position during the entire process, Lake Norman was substantially prejudiced when agency action rendered its efforts meaningless.

60. By bypassing the application review process, the Agency has deprived Lake Norman of notice and a public hearing and has prevented a record in opposition to the changed 1999 Huntersville Hospital application, PET scanner applications and operating room application that should have been required before approving the projects.

61. The Agency also prospectively rendered the public hearing and written comment period regarding the PET scanners meaningless because Presbyterian and Forsyth are guaranteed PET scanners regardless of the public comments that are received.

62. By exceeding its statutory authority and ignoring statutory mandates, the Agency has also violated Lake Norman's substantive due process rights.

63. "[A]lthough the object of particular legislation may well be within the scope of the police power, the legislation may yet deprive the individuals of due process of law *if the means chosen to implement the legislative objectives are unreasonable.*" *A-S-P Assoc. v. City of Raleigh*, 298 N.C. 207, 217, 258 S.E.2d 444, 450 (1979) (emphasis added).

64. The Agency's settlement with Presbyterian was not consistent with the requirements of the CON Act.

65. By claiming it had unfettered discretion to settle and settling without regard to statutory limits on its authority, the Agency has acted in a way that could render the CON Act, as applied to Lake Norman, unconstitutional. *See Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 514 (9th Cir. 1988) (holding regulations were unconstitutional because "unfettered discretion is patently offensive to the notion of due process"). The Agency's actions in entering into the global settlement have violated Lake Norman's due process rights and the settlement must be declared null and void.

IV. THE AGENCY'S APPLICATION OF THE CON ACT AND REGULATIONS VIOLATES LAKE NORMAN'S RIGHT TO EQUAL PROTECTION UNDER THE LAW.

66. Article I, § 19 of the North Carolina Constitution provides that "[n]o person shall be denied the equal protection of the laws." *See also* U.S. Constitution, XIV Amendment. The Equal Protection Clause, simply put, is a clear constitutional mandate that "all persons similarly situated should be treated alike. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985).

67. "[S]tatutes are void as denying equal protection whenever similarly situated persons are subject to different restrictions or are given different privileges under the same conditions." *Meads v. North Carolina Dep't of Agric.*, 349 N.C. 656, 674, 509 S.E.2d 165, 177 (1998) ; *see also State v. McCleary*, 65 N.C. App. 174, 186, 308 S.E.2d 883, 891-92 (1983), *aff'd per curiam* 311 N.C. 397, 316 S.E.2d 870 (1984).

68. The constitutional protection of the Equal Protection Clause "extends also to the administration and the execution of laws valid on their face." *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 660, 178 S.E.2d 382, 385 (1971).

69. A health service provider subject to the CON Act has a "fundamental right to engage in its otherwise lawful business." *HCA Crossroads Residential Centers, Inc. v. North Carolina Dep't of Human Res.*, 327 N.C. 573, 579, 398 S.E.2d 466, 470 (1990). *See also Roller v. Allen*, 245 N.C. 516, 518-19, 96 S.E.2d 851, 854 (1957) (citations omitted) ("The right to conduct a lawful business or to earn a livelihood is regarded as fundamental.").

70. Governmental acts that "classif[y] persons in terms of their ability to exercise a fundamental right" are subject to review under the "strict scrutiny" standard, which requires "the government to demonstrate that the classification is necessary to promote a compelling governmental interest." *Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980) (citations omitted). The Agency's preferential treatment of Presbyterian fails to satisfy this high burden.

71. The Agency treated Presbyterian and Forsyth preferentially by allowing them to add new health service facilities, beds, operating rooms and equipment without regard to whether the projects met the substantive and procedural conditions of the CON Act that Lake Norman and other similarly situated health service providers must meet to exercise their fundamental right to do business in North Carolina.

72. There is no legitimate interest, compelling or otherwise, to justify the Agency's decision to afford Presbyterian and Forsyth with different privileges (*i.e.*, the ability to engage in business outside the confines of the CON Act) than Lake Norman or any other health care provider subject to the CON Act.

73. Agency officials treated CMC(a fellow intervenor in the 1999 case) differently than Lake Norman during the settlement proceedings by allowing CMC apparent veto power over a settlement. This uneven application of the CON Act and regulations denied Lake Norman equal protection of the law and substantially prejudiced its rights.

V. THE AGENCY ERRED WHEN IT SETTLED BY ENGAGING IN EX PARTE COMMUNICATIONS WITH PRESBYTERIAN.

74. The APA states that:

[u]nless required for disposition of an *ex parte* matter authorized by law, neither the administrative law judge assigned to a contested case *nor a member or employee of the agency making a final decision in the case* may communicate, directly or indirectly, in connection with any issue of fact, or question of law, with *any* person or party or his representative, except on notice and opportunity for all parties to participate.

N.C. Gen. Stat. § 150B-35 (emphasis added).

75. *Ex parte* communications constitute a failure by the Agency to act as required by the law and “undermine the rights of all parties to fundamental fairness.” *Douskey v. Planning & Zoning Comm’n*, No. 416513, 1999 Conn. Super LEXIS 1949 at *32 (Super. Ct. July 19, 1999) (unreported decision).

76. An “*ex parte* communication raises a rebuttable presumption of prejudice. Once the plaintiff shows that an improper *ex parte* communication has occurred, the burden of showing that the communication was harmless shifts to the party seeking to uphold the validity of the commission’s decision.” *Daniel v. Zoning Comm’n of the City of Norwalk*, 645 A.2d 1022, 1023 (Conn. App. Ct. 1994).

77. It is undisputed that the Agency and final agency decision maker communicated directly with Presbyterian, Forsyth and Novant concerning issues of fact and questions of law regarding the 1999 and 2001 Huntersville Hospital applications, PET scanners and relocation and addition of four operating rooms to CEENTA without notice to Lake Norman or opportunity for Lake Norman to participate in settlement discussions.

78. The *ex parte* communications materially prejudiced Lake Norman by resulting in a settlement that awarded to Presbyterian, Forsyth and Novant a new hospital, with fifty acute care beds, twelve operating rooms at two locations and two PET scanners, without Lake Norman’s agreement and despite its objection.

79. The *ex parte* communication renders the global settlement null and void.

VI. THE AGENCY HAD NO JURISDICTION AFTER A FINAL AGENCY DECISION WAS RENDERED TO SETTLE OR ISSUE A CON.

80. The Agency allowed Presbyterian to submit substantial information to “update” the 1999 Huntersville Hospital application while the application was pending at the Court of Appeals.

81. N.C. Gen. Stat. § 150B-31 grants an Agency authority to settle only while cases are pending in the administrative appeal process.

82. Nothing in N.C. Gen. Stat. § 150B-31, which is part of the North Carolina Administrative Procedure Act (“APA”), authorizes the settlement of cases without the consent of all parties, such as the 1999 Huntersville Hospital appeal, that are already in a judicial forum such as the Court of Appeals.

83. The CON Act and APA establish a specific procedure for the Agency’s final decision in a contested case after a recommended decision has been issued by an administrative law judge.

84. First, the Agency must afford each party an opportunity to file exceptions to the decision recommended by the administrative law judge and to present written arguments. N.C. Gen. Stat. § 150B-36(a). Second, the Agency must make its final decision in writing and is limited to the official record. N.C. Gen. Stat. § 150B-36(b). Third, the Agency is prohibited from considering new evidence after receiving the recommended decision. N.C. Gen. Stat. § 150B-51(a).

85. New evidence may only be considered as a result of a determination, order and remand by the Superior Court. N.C. Gen. Stat. § 150B-49. *See Living Centers-Southeast, Inc. v. North Carolina Dep’t of Health & Human Servs.*, 138 N.C. App. 572, 579, 532 S.E.2d 192, 196 (2000). (“If the court determines that the agency heard new evidence, the court shall reverse the decision or remand the case to the agency to enter a decision in accordance with the evidence in the official record.”).

86. There is no provision in the CON Act or APA for the Agency to reconsider or change its final Agency decision or approve a revised application without the consent of all the parties once a final agency decision has been issued.

87. The Agency's approval of the "updated" 1999 Huntersville Hospital application violates the express requirements in the CON Act and rules, including a ban on amendments to applications, public notice, opportunity for public comment and public hearing on new CON applications, and the right to a contested case concerning new CON applications.

VII. THE AGENCY ERRED BY ISSUING A CERTIFICATE TO PRESBYTERIAN WITHIN THIRTY DAYS OF ITS DECISION TO APPROVE PRESBYTERIAN'S AMENDED AND UPDATED APPLICATION.

88. The Agency's rules state that "[a] certificate shall not be issued until 30 days after the date of the final decision under Rule .0313 of this section If a request for a contested case hearing is received within that time, the certificate shall not be issued until the final agency decision from the contested case hearing has been issued." N.C. Admin. Code tit. 10, r. 3R. 0315(a) (July 2002).

89. Under N.C. Gen. Stat. § 131E-187(a), the Agency may not issue a certificate of need if a request for a contested case hearing has been filed until after a request for a contested case hearing has been withdrawn or the final Agency decision has been made following a contested case hearing.

90. If a contested case is filed, issuance of the certificate of need is automatically stayed until after a request for contested case hearing has been withdrawn or the final Agency decision has been made following a contested case hearing. N.C. Gen. Stat. § 131E-187(b).

91. The statutory policy of allowing a contested case hearing prior to issuance of a certificate of need should also apply to certificates of need to be issued pursuant to settlement agreements. If it did not, then the Agency could bypass the statutory requirements simply by denying an application, then "settling" with the applicant and issuing a certificate.

92. Under N.C. Gen. Stat. § 131E-188(a), any affected person is entitled to a contested case hearing concerning the decision of the Department to issue a certificate pursuant to a settlement agreement.

93. Lake Norman, as an affected person, was first entitled to bring a contested case hearing before any certificate of need was issued.

94. The North Carolina Supreme Court has stated:

The procedural rules of an administrative agency "are binding upon the agency which enacts them as well as upon the public To be valid the action of the agency must conform to its rules which are in effect at the time the action is taken, particularly those designed to provide procedural safeguards for fundamental rights."

Humble Oil & Refining Co. v. Bd. of Aldermen, 284 N.C. at 467-68, 202 S.E.2d at 135 (quoting 2 Am. Jur. 2d *Administrative Law* § 350 (1962)).

95. Furthermore, the Agency approved the 2001 application not the 1999 application as it claimed because the capital expenditure and scope authorized by the certificate of need were identical to the capital expenditure and scope stated in the CON 2001 application rather than the 1999 application.

96. At the time the certificate of need for PHN was issued, there was an appeal pending regarding the 2001 Huntersville Hospital application at OAH, 02 DHR 0541. There had been no request to dismiss this matter in which Lake Norman was a petitioner at the time the certificate of need was issued.

97. The Agency issued the certificate of need for PHN on the same day the settlement agreement was signed in violation of its own regulations and statutory authority.

98. The Agency has also already indicated it will issue a certificate of need for a PET scanner to Forsyth and Presbyterian without regard to the 30-day provision. *See* PET scanner settlement agreement.

99. The Agency's violation of its own regulations and statutory authority render the global settlement null and void.

100. The settlement agreements contain no severability clause and portions of the agreements cannot be upheld while other portions are overturned.

101. The Agency, Presbyterian, Forsyth and Novant have acknowledged that this was a global settlement and neither party would have agreed to any portion of the settlement or settlement agreements unless all of the matters in dispute between the parties were resolved.

102. Although the General Assembly has articulated a public policy of encouraging settlements, that policy does not countenance settlements that seek to evade the law:

[I]t is the policy of the law to uphold and enforce compromise and settlement agreements only if they are fairly made and are not in contravention of some law or public policy. . . . If a settlement agreement is based on an antecedent claim or transaction which is undisputedly illegal or contrary to public policy, the agreement is considered invalid on the ground of illegality as well as a lack of consideration. . . Courts generally will not permit the law or any judicial machinery to be used in assisting the enforcement of such an agreement.

Sartin v. Carter, 76 N.C. App. at 282, 332 S.E.2d at 524 (citing 15A Am. Jur. 2d *Compromise and Settlement* §§ 5 and 28 (1976)).

103. Finally, G. S. 131E-190(a) provides: “Only those new institutional health services which are found by the Department to be needed as provided in this article--shall be offered or developed within the State.” The Department has denied four applications submitted by Presbyterian because it did not find that there was a need for a new health service facility in the subject area. On the date of the settlements, agency officials had not been convinced that need criteria had been met or satisfied. Lake Norman and others are meeting the needs and have excess beds. Thus, in the words of G. S. 131E-175(4), when a need has not been shown, --“the proliferation of unnecessary health service facilities results in costly duplication and underuse of facilities, with the availability of excess capacity leading to unnecessary use of expensive resources and overutilization of health care services.” Allowing a new, unnecessary facility would substantially prejudice Lake’s Norman’s rights.

NOW, THEREFORE, IT IS HEREBY RECOMMENDED that Lake Norman’s Motion for Summary Judgment be granted, the settlement agreement be deemed null and void, the certificate of need issued for Huntersville Hospital be withdrawn, and the Agency action in entering into the global settlement agreement and the effects of that action be stayed, including the development of PHN, the addition and relocation of four operating rooms to Fairview Road and the acquisition of two PET scanners.

ORDER

It is hereby ordered that the Agency serve a copy of the Final Decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with N.C. Gen. Stat § 150B-36(b).

NOTICE

Before the Agency makes the Final Decision, it is required by N.C. Gen. Stat. § 150B-36(a) to give each party an opportunity to file exceptions to this Recommended Decision, and to present written arguments to those in the Agency who will make the final decision.

The Agency is required by N.C. Gen. Stat. § 150B-(b) to serve a copy of the Final Decision on all parties and to furnish a copy to the parties’ attorneys of record.

This the 26th day of November, 2002.

Fred G. Morrison Jr.
Senior Administrative Law Judge