

NORTH CAROLINA

IN THIS ISSUE



REGISTER

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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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3	Auditor	Athletic Trainer Examiners	3
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5	Correction	Barber Examiners	6
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9	Governor	General Contractors	12
10	Health and Human Services	Cosmetic Art Examiners	14
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13	Labor	Electrical Contractors	18
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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
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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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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.

U.S. Department of Justice

Civil Rights Division

JDR:JR:NT:par
DJ 166-012-3
2002-5149

*Voting Section – NWB.
950 Pennsylvania Ave., NW
Washington, D.C. 20530*

December 9, 2002

Albert M. Benshoff, Esq.
City Attorney
P.O. Box 1388
Lumberton, NC 28359-1388

Dear Mr. Benshoff:

This refers to four annexations (Ordinance Nos. 1798 (2000), 1825 and 1826 (2001), and 1849 (2002), and their designation to districts of the City of Lumberton in Robeson County, North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on October 16, 2002; supplemental information was received on November 21, 2002.

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

Sincerely,

Joseph D. Rich
Chief, Voting Section

STATE OF NORTH CAROLINA
ENVIRONMENTAL MANAGEMENT COMMISSION
1617 MAIL SERVICE CENTER
RALEIGH, NORTH CAROLINA 27699-1617

PUBLIC NOTICE OF INTENT TO ISSUE STATE GENERAL NPDES PERMITS

Public notice of intent to reissue expiring State National Pollutant Discharge Elimination System (NPDES) General Permits for Point Source Discharges of Stormwater for the following types of discharges:

NPDES General Permit No. NCG050000 for stormwater point source discharges associated with activities classified as establishments primarily engaged in Apparel and Other Finished Products Made from Fabrics and Similar Materials [standard industrial classification (SIC) 23], Printing Publishing and Allied Industries [SIC 27], Converted Paper and Paperboard Products [SIC 267], Paperboard Containers and Boxes [SIC 265], Miscellaneous Manufacturing Industries [SIC 39], Leather and Leather Products [SIC 31], and Rubber and Miscellaneous Products [SIC 30]. The following activities are specifically excluded from coverage under this General Permit: Leather Tanning and Finishing [SIC 311] and Tires and Inner Tubes [SIC 301].

NPDES General Permit No. NCG070000 for stormwater point source discharges associated with activities classified as establishments primarily engaged in Stone, Clay, Glass, and Concrete Products [standard industrial classification (SIC) 32]. The following activities are specifically excluded from coverage under this General Permit: Ready-mixed concrete [SIC 3273].

NPDES General Permit No. NCG110000 for stormwater point source discharges associated with activities classified as Treatment Works treating domestic sewage or any other sewage sludge or wastewater treatment device or system, used in the storage, treatment, recycling, and reclamation of municipal or domestic sewage, with a design low of 1.0 million gallons per day or more, or facilities which are required to have an approved pretreatment program under Title 40 CFR Part 403, including lands dedicated to the disposal of sewage sludge that is located within the confines of the facility.

NPDES General Permit No. NCG130000 for stormwater point source discharges associated with activities classified as establishments primarily engaged in the wholesale trade of non-metal waste and scrap (hereafter referred to as the non-metal waste recycling industry) [a portion of standard industrial classification (SIC) 5093]. The following activities are specifically excluded from coverage under this General Permit: the wholesale trade of metal waste and scrap, iron and steel scrap, and nonferrous metal scrap; waste oil recycling; and automobile wrecking for scrap.

NPDES General Permit No. NCG210000 for stormwater point source discharges associated with activities classified as establishments primarily engaged in Timber Products [standard industrial classification (SIC) 24]. The following activities are specifically excluded from coverage under this General Permit: Wood Kitchen Cabinets [SIC 2434], Wood Preserving [SIC 2491], Logging [SIC 241], and Wood Chip Mills .

On the basis of preliminary staff review and application of Article 21 of Chapter 143 of the General Statutes of North Carolina, Public Law 92-500 and other lawful standards and regulations, the North Carolina Environmental Management Commission proposes to reissue State NPDES General Permits for the discharges as described above.

INFORMATION: Copies of the draft NPDES General Permits and Fact Sheets concerning the draft Permits are available by writing or calling:

Valery Stephens
Water Quality Section
N.C. Division of Water Quality
1617 Mail Service Center, Raleigh, North Carolina 27699-1617
Telephone (919) 733-5083 ext. 520

Persons wishing to comment upon or object to the proposed determinations are invited to submit their comments in writing to the above address no later than February 14, 2003. All comments received prior to that date will be considered in the final determination regarding permit issuance. A public meeting may be held where the Director of the Division of Water Quality finds a significant degree of public interest in any proposed permit issuance. The draft Permits, Fact Sheets and other information are on file at the Division of Water Quality, 512 N. Salisbury Street, Room 925, Archdale Building, Raleigh, North Carolina. They may be inspected during normal office hours. Copies of the information of file are available upon request and payment of the costs of reproduction. All such comments and requests regarding these matters should make reference to the draft Permit Numbers, NCG050000, NCG070000, NCG110000, NCG130000 or NCG210000.

Date: 12/16/02 (signed Bradley Bennett)
for Alan Klimek, PE, Director
NC Division of Water Quality

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

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

CHAPTER 02 – ENVIRONMENTAL MANAGEMENT

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

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

Authority for the Rule-making: G.S. 150B-4

Statement of the Subject Matter: New rules will be developed to describe the procedure for requesting declaratory rulings for rule of the Divisions of Air Quality, Water Quality and Water Resources within the Department of Environment and Natural Resources. The rules will also describe the procedures that the Environmental Management Commission must follow when considering such requests.

Reason for Proposed Action: The Administrative Procedure Act, G.S. 150B-4, requires the Environmental Management Commission to set forth in its rules the procedures to be followed by persons requesting declaratory rulings, and the procedures to follow for considering such requests.

Comment Procedures: Comments from the public shall be directed to Jeff Manning, DWQ Planning Branch, 1617 Mail Service Center, Raleigh, NC 27699, phone 733-5083, ext. 579, and email jeff.manning@ncmail.net.

CHAPTER 10 - WILDLIFE RESOURCES AND WATER SAFETY

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

Citation to Existing Rule Affected by this Rule-making: 15A NCAC 10F - Other rules may be proposed in the course of the rule-making process.

Authority for the Rule-making: G.S. 75A-3; 75A-15

Statement of the Subject Matter: No wake zones

Reason for Proposed Action: Several county commissions have contacted the Wildlife Resources Commission requesting no wake zones to address safety concerns.

Comment Procedures: Comments from the public shall be directed to Joan B. Troy, 1701 Mail Service Center, Raleigh, NC 27699-1701.

NOTICE OF RULE MAKING PROCEEDINGS AND PUBLIC HEARING

NORTH CAROLINA BUILDING CODE COUNCIL

Notice of Rule-making Proceedings is hereby given by the N.C. Building Code Council in accordance with G.S. 150B-21.5(d).

Citation to Existing Rule Affected by this Rule-Making: North Carolina Building Code and North Carolina Fire Prevention Code.

Authority for the Rule-making: G.S. 143-136; 143-138.

Reason for Proposed Action: To incorporate changes in the NC Building Code as a result of rulemaking petitions filed with the N.C. Building Code Council and incorporate changes proposed by the Council.

Public Hearing: March 10, 2002, 1:00 p.m., Wake County Commons, 4011 Cary Drive, Raleigh, N.C.

Comment Procedures: Written comments may be sent to Wanda Edwards, Secretary, N.C. Building Code Council, c/o N.C. Department of Insurance, 410 N. Boylan Avenue, Raleigh, NC 27603. Comment period expires on March 9, 2002.

Statement of Subject Matter:

1. Revise Section 907.2.3, Exception 1, of the North Carolina Fire Code and the North Carolina Building Code as follows:

907.2.3 Group E. A manual fire alarm system shall be installed in Group E occupancies. When automatic sprinkler systems or smoke detectors are installed, such systems or detectors shall be connected to the building fire alarm system.

Exceptions:

1. Group E occupancies with an occupant load of less than 50.
2. Manual fire alarm boxes are not required in Group E occupancies where all the following apply:
 - 2.1 Interior corridors are protected by smoke detectors with alarm verification.
 - 2.2 Auditoriums, cafeterias, gymnasiums and the like are protected by heat detectors or other approved detection devices.
 - 2.3 Shops and laboratories involving dusts or vapors are protected by heat detectors or other approved detection devices.
 - 2.4 Off-premises monitoring is provided.
 - 2.5 The capability to activate the evacuation signal from a central point is provided.
 - 2.6 In buildings where normally occupied spaces are provided with a two-way communication system between such spaces and a constantly attended receiving station from where a general evacuation alarm can be sounded, except in locations specifically designated by the building official.

2. Revise Section 2206.2.3, #2 of the North Carolina Fire Prevention Code as follows:

2206.2.3 Above-ground tanks located outside, above grade. Above-ground tanks shall not be used for the storage of Class I, II, or IIIA liquid motor fuels except as provided by this section.

1. Above-ground tanks used for outside, above-grade storage of Class I liquids shall be listed and labeled as protected above-ground tanks and be in accordance with Chapter 34. Such tanks shall be located in accordance with Table 2206.2.3.
2. ~~Above ground tanks used for above ground storage of Class II or IIIA liquids are allowed~~

~~to be protected above ground tanks or, when approved by the code official, other above-ground tanks that comply with Chapter 34. Tank locations shall be in accordance with Table 2206.2.3.~~

Fleet Vehicle Service Stations:

When approved by the code official, above-ground storage tanks, 1,100 gallons or less in capacity, may be used to store Class I liquids at fleet vehicle service stations in accordance with NFPA 30A.

3. ~~Tanks containing motor fuels shall not exceed 12,000 gallons (45,420 L) in individual capacity or 48,000 gallons (181,680 L) in aggregate capacity. Installations with the maximum allowable aggregate capacity shall be separated from other such installations by not less than 100 feet (30,480 mm).~~
3. Above-ground tanks used for above-ground storage of Class II or IIIA liquids are allowed to be protected above-ground tanks or, when approved by the code official, other above-ground tanks that comply with Chapter 34. Tank locations shall be in accordance with Table 2206.2.3.
4. ~~Tanks located at farms, construction projects, or rural areas shall comply with Section 3406.2.~~
4. Tanks containing motor fuels shall not exceed 12,000 gallons (45,420 L) in individual capacity or 48,000 gallons (181,680 L) in aggregate capacity. Installations with the maximum allowable aggregate capacity shall be separated from other such installations by not less than 100 feet (30,480 mm).
5. Tanks located at farms, construction projects, or rural areas shall comply with 3406.2.

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 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Environmental Management Commission intends to amend the rule cited as 15A NCAC 02D .0506. Notice of Rule-making Proceedings was published in the Register on August 16, 1999.

Proposed Effective Date: August 1, 2004

Reason for Proposed Action: As a result of public comments received at the public hearing, a new paragraph is proposed to be added that restricts fugitive emissions not elsewhere covered under the rule.

Comment Procedures: Comments from the public shall be directed to Thomas Allen Division of Air Quality, 1641 Mail Service Center, Raleigh, NC 27699-1641, fax (919) 715-7476, and email thom.allen@ncmail.net. Comments shall be accepted through February 15, 2003.

Fiscal Impact

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

CHAPTER 02 – ENVIRONMENTAL MANAGEMENT

SUBCHAPTER 02D - AIR POLLUTION CONTROL REQUIREMENTS

SECTION .0500 - EMISSION CONTROL STANDARDS

15A NCAC 02D .0506 PARTICULATES FROM HOT MIX ASPHALT PLANTS

- (a) The allowable emission rate for particulate matter resulting from the operation of a hot mix asphalt plant that are discharged from any stack or chimney into the atmosphere shall not exceed the level calculated with the equation E = 4.9445(P)^0.4376 calculated to three significant figures, where "E" equals the maximum allowable emission rate for particulate matter in pounds per hour and "P" equals the process rate in tons per hour. The allowable emission rate shall be 60.0 pounds per hour for process rates equal to or greater than 300 tons per hour.
(b) Visible emissions from stacks or vents at a hot mix asphalt plant shall be less than 20 percent opacity when averaged over a six-minute period.
(c) All hot mix asphalt batch plants shall be equipped with a scavenger process dust control system for the drying, conveying, classifying, and mixing equipment. The scavenger process dust control system shall exhaust through a stack or vent and shall be operated and maintained in such a manner as to comply with Paragraphs (a) and (b) of this Rule.

- (d) Fugitive non-process dust emissions shall be controlled by Rule .0540 of this Section.
(e) Fugitive emissions for sources at a hot mix asphalt plant not covered elsewhere under this Rule shall not exceed 10 percent opacity averaged over one minute.
(f) Any asphalt batch plant that was subject to the 40-percent opacity standard in Rule .0521 of this Section before April 1, 2003 shall be in compliance with the 20-percent opacity standard by January 1, 2004.

Authority G.S. 143-215.3(a)(1); 143-215.107(a)(5).

Notice is hereby given in accordance with G.S. 150B-21.2 that the Well Contractors Certification Commission intends to amend the rule cited as 15A NCAC 27 .0301. Notice of Rule-making Proceedings was published in the Register on June 3, 2002 as a Notice of Intent to adopt a temporary rule per Section 1.5 of Senate Bill 312 or Session Law 2002-440. Notice of the permanent rule published on September 16, 2002.

Proposed Effective Date: August 1, 2004

Public Hearing:

Date: February 5, 2003

Time: 7:00 p.m.

Location: Archdale Building, Ground Floor Hearing Room, 512 N. Salisbury St., Raleigh, NC

Reason for Proposed Action: Pursuant to a mandate by the North Carolina General Assembly, the Well Contractors Certification Commission (WCCC) approved a temporary rule in response to the passage of Session Law 2001-440 (Senate Bill 312). The temporary rule was enacted on September 12, 2002 and affects 15A NCAC 27 .0301 concerning application requirements and continuing education requirements. The rule specifies information that the Well Contractors Certification Commission will accept in applications for certification or renewal of certification. The rule also shows the qualifications that a well contractor must demonstrate to the Commission to apply for certification or renewal of certification. As a follow-up to temporary rulemaking, a Subject Matter Notice of Permanent Rulemaking for 15A NCAC 27 .0301 was issued through the North Carolina Register on September 12, 2002. This action was taken to obtain stakeholder involvement in the rulemaking process and meet the Office of Administrative Hearings notice requirements. Comments received under the notice of the temporary rule were from the Well Contractor Certification Commission and propose minor changes and clarifications. These proposed changes by the Well Contractors Certification Commission are included in these notice materials. The proposed rule reduces the work experience requirement for well contractors in 15A NCAC 27(f)(1-3) from 24 months to 18

months of actual labor in well contractor activities. The Commission believes that requiring well contractors to have two years or 24 months of experience prior to applying for certification in this Rule is burdensome. Under Paragraph (f) of this Rule, letters from businesses, suppliers, and government agencies attesting to well contractor performance will no longer be considered necessary as proof that a well contractor meets the experience requirement. Acceptable proof may include an affidavit showing that the well contractor has been working in the trade for six months as shown in Subparagraph (f)(4) of this Rule. This new Subparagraph specifies that the applicant may furnish information showing that he has completed either a Commission approved course of study through the N.C. Community College system, an apprenticeship program approved by the Department of Labor, or a similar course or apprenticeship approved by the Well Contractor Certification Commission. Based on comments received from notices of the temporary rule and permanent rule, the permanent rule that is going to public hearing is the same as the temporary rule that went into effect on September 12, 2002.

Proposed additional changes from the Well Contractors Certification Commission to this Rule will be discussed at the public hearing and include:

1. Removal of outdated language from Paragraphs (a) and (d)) with respect to "recertification", "certification without exam" and "temporary certification";
2. Specifying that the experience in Paragraph .0301(f) be "full time" experience;
3. The deletion of 15A NCAC 27 .0301(f)(1);
4. Changing the word "letter" to "affidavit" in Rule .0301(f)(2);
5. Changing appropriate Subparagraphs of 15A NCAC .0301(f) to show that the person offering proof that an applicant for certification meets the requirements of Chapter 27 is a person who:
 - A. Has not committed any violation of the Well Construction Rules in 15A NCAC 02C in the past two years;
 - B. Has not committed any violation of the Well Contractor Certification Rules in 15A NCAC 27 in the past two years; and
 - C. Submits payroll records showing that the applicant has worked as a well contractor.

Comment Procedures: Interested persons may contact David Hance at (919) 715-6189 for more information. Oral comments may be made during the hearings. All written comments must be submitted by February 14, 2003. Written copies of oral statements exceeding three minutes are requested. Oral statements may be limited at the discretion of the hearing officers. Mail comments to: David Hance, DENR-DWQ-Groundwater Section, 1636 Mail Service Center, Raleigh, North Carolina, 27699-1636, Phone: (919) 715-6189; Fax: (919) 715-0588; E-Mail Address; David.Hance@ncmail.net.

Fiscal Impact
 State

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

CHAPTER 27 - WELL CONTRACTOR CERTIFICATION RULES

SECTION .0300 - CERTIFICATION OF WELL CONTRACTORS

15A NCAC 27.0301 APPLICATION REQUIREMENTS FOR CERTIFICATION

(a) The Commission shall accept applications and renewal requests for certification as a well contractor from any person who is at least 18 years of age and whose application meets all the following conditions:

- (1) Each application shall be submitted on forms provided by the Commission, which are designed for requesting certification as a well contractor by way of reexamination, certification without examination, or temporary certification and just be properly and accurately completed and submitted with an appropriate fee to the office of the chairman of the Commission.
- (2) Each application has been determined as complete. Incomplete applications and applications not accompanied by an appropriate fee and attachments cannot be processed and shall be returned to the applicant.
- (3) Each application shall contain proof of experience as provided in Paragraph (f) of this Rule.
- (4) Each application shall include a request for the well contractor examination or include documentation that the applicant meets the requirement for certification without examination as provided in Section .0500 of this Chapter.

(b) Applicants who have intentionally supplied false information must wait 12 months before resubmitting an application for certification.

(c) The Commission shall not schedule an applicant to take the required examination until his application has been reviewed and the applicant has met all other conditions for certification. The applicant must pass the examination within three attempts or within a one year period of time after application submittal or a new application shall be required. An applicant who has failed the examination after three consecutive attempts shall be required to obtain eight PDH units prior to resubmittal of an application for certification.

(d) A certification shall not be issued until the applicant successfully passes the required examination or meets the requirements for certification without examination.

(e) A certification issued by the Commission shall be valid in every county in the state.

(f) Proof of 18 months experience in well contractor activities shall be demonstrated by providing one of the following:

- (1) A list of at least 25 wells, together with their locations, major use and approximate depth

PROPOSED RULES

and diameter, for which the applicant has supervised or assisted in the construction, repair or abandonment process. This list shall provide the name and address of the owner or owners of each well, and the approximate date the construction of each well was completed. A copy of the completion report for each well shall accompany the list. Completion dates of the 25 wells shall be distributed over a consecutive 18 month period.

- (2) A letter from at least one currently certified well contractor attesting that the applicant has been working in a well contractor activity for a minimum of 18 months.
- (3) Any other proof of working in well contractor activities for a minimum of 18 months may be presented to the Commission and may be accepted on an individual basis.
- (4) An affidavit from at least one currently certified well contractor attesting that the applicant has been working for the certified well contractor in well construction for a minimum of six months may be accepted, if the applicant also furnishes proof of completion of one of the following:
 - (A) Completion of a course of study in well construction techniques approved by the Well Contractor's Certification Commission and offered by a community college within the N.C. Department of Community Colleges with a passing grade; or
 - (B) Completion of an apprenticeship program approved by the Well Contractor's Certification Commission and approved by the N.C. Department of Labor in well construction; or
 - (C) Completion of a similar course of study or apprenticeship program as approved by the Well Contractor's Certification Commission.

Authority G.S. 87-98.6; 87-98.9; 143B-301.11; S.L. 2001-440.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS

Notice is hereby given in accordance with G.S. 150B-21.2 that the State Board of Refrigeration Examiners intends to adopt the rules cited as 21 NCAC 60 .0212-.1213; amend the rules cited as 21 NCAC 60 .0102, .0206-.0208, .0311, .1102; and repeal the rules cited as 21 NCAC 60 .0201, .0204, .0210. Notice of Rule-making Proceedings was published in the Register on November 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): A demand for a*

hearing must be made in writing addressed to Barbara Hines, Suite 208, 875 Highway 70 West, Garner, NC 27529. The demand must be received within 15 days of this notice.

Reason for Proposed Action: *Establish and set out procedure for computer based testing, clarify use of license and permit requirements and delete unnecessary information.*

Comment Procedures: *Comments from the public shall be directed to Barbara Hines, Suite 208, Highway 70 West, Garner, NC 27529, (919) 779-4711, fax (919) 779-4733, and email sbbre1@bellsouth.net. Comments shall be received through February 17, 2003.*

Fiscal Impact

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

CHAPTER 60 - BOARD OF REFRIGERATION EXAMINERS

SECTION .0100 - ORGANIZATION AND DEFINITIONS

21 NCAC 60 .0102 OFFICE OF BOARD

The Board's office is located at, 875 Highway 70, West, Suite 208, Garner, North Carolina. The Board's mailing address is Suite 208, 875 Highway 70, West, Garner, North Carolina, NC 27529. The Board's rules are available for inspection at this office during regular office hours. The materials used in rule-making decisions will be available for inspection at said office.

Authority G.S. 87-54; 150B-11(2).

SECTION .0200 - EXAMINATIONS

21 NCAC 60 .0201 DATES OF BOARD MEETINGS

Authority G.S. 87-54; 87-58.

21 NCAC 60 .0204 SCORING EXAMINATIONS

Authority G.S. 87-54; 87-58.

21 NCAC 60 .0206 EXAMINATION APPLICATION DULY FILED

An examination application shall be considered as duly filed when the applicant has filed an application with the Board, together with information satisfactorily verifying that he meets all of the minimum requirements to sit for an examination. By filing his application with the Board, an applicant authorizes the Board or the Board's staff to verify, in any manner the Board or staff deems necessary and appropriate, the information submitted on or in support of his application.

Authority G.S. 87-54; 87-58.

21 NCAC 60 .0207 REQUIREMENTS FOR EXAMINATION APPLICANTS

(a) An applicant for the commercial refrigeration examination shall be eligible to take that examination upon:

- (1) Filing with the Board an application, on a form provided by the Board, together with the non-refundable combined examination-license fee.
- (2) Furnishing with his application information verifying that he has acquired at least 4000 hours of commercial refrigeration experience gained while engaged actively and directly in the installation, maintenance, servicing or repairing of commercial, industrial or institutional refrigeration equipment.

(b) An applicant for the transport refrigeration examination shall be eligible to take that examination upon:

- (1) Filing with the Board an application, on a form provided by the Board, together with the non-refundable combined examination license fee.
- (2) Furnishing with his application information verifying that he has acquired at least 4000 hours of transport or commercial refrigeration experience or a combination of both gained while engaged actively and directly in the installation, maintenance, servicing or repairing of transport or commercial refrigeration equipment or a combination of both.

(c) Prior to filing the application, qualifying experience shall be acquired while working under the supervision of a person who holds a valid refrigeration contractor's license, who is a registered professional engineer or who has equivalent industry experience. Up to one-half of the experience may be in academic or technical training directly related to the field of endeavor for which the examination is requested. Applicants who obtain a license shall receive a certificate issued by the Board, bearing that license number. The license shall not be assigned or transferred to another individual.

(d) An individual holding a valid transport contractor refrigeration license shall be eligible to sit for the commercial refrigeration examination upon filing with the Board an application, on a form provided by the Board, together with the combined examination-license fee.

~~(e)~~(e) The Board may deny an examination applicant permission to take an examination when it finds the applicant is not eligible, regardless of whether it has previously notified the applicant that he may take the examination. The Board may refuse to issue a license to a licensee when it finds the applicant is not qualified, regardless of whether the applicant has passed the appropriate examination. An applicant may contest the Board's decision by requesting an administrative hearing.

Authority G.S. 87-54; 87-58.

21 NCAC 60 .0208 EXAMINATION REVIEW

An examination review shall be held immediately following the taking of each examination.

Authority G.S. 87-54; 87-58(d); 93B-8(c).

21 NCAC 60 .0210 SPECIAL EXAMINATION

Authority G.S. 87-54; 87-58(d); 93B-8(c).

21 NCAC 60 .0212 QUALIFYING EXAMINATIONS

(a) Commercial Refrigeration contractor examinations are divided into four parts, "A," "B," "C" and "D." Transport refrigeration contractor examinations are divided into three parts, "A", "B" and "C".

(b) Each applicant must successfully complete 70 percent of each part to pass an examination. Each candidate who passes an examination is issued a refrigeration contractor's license.

(c) All qualifying examinations administered by the Board for each license classification shall be written or computer-based examinations and must be taken by the approved applicant.

(d) The approved applicant will be scheduled for the examination and will be notified of the date, time and place.

(e) The executive director is authorized to arrange for examinations to be administered by the Board.

Authority G.S. 87-54; 87-58.

21 NCAC 60 .0213 EXAMINATIONS

(a) In order to pass the qualifying examination, an applicant is required to pass all four parts of the examinations within the same one year period and within no more than three consecutive attempts. Each time an applicant takes the examination, he shall take all parts for which he does not have currently valid passing grades. If the applicant fails to pass all four parts within one year or within three consecutive attempts (whichever period is shorter), any passing grades for individual parts shall no longer be valid and the applicant must start over by re-taking all four parts of the examination.

(b) A person who fails an examination must wait a period of five business days from the date he last failed an examination before he will be eligible to take another examination.

(c) Each person who fails an examination shall be notified of his scores and the parts of the examination he failed.

(d) If a person files an application for examination which is accepted, and takes and fails the examination, his verification of refrigeration experience shall be kept and shall be sufficient for taking any future examination, provided he files another application accompanied by the required fee.

Authority G.S. 87-54; 87-58.

SECTION .0300 - LICENSES AND FEES

21 NCAC 60 .0311 PERMITS

(a) The refrigeration license number of the licensee shall appear on all permits as issued by a municipality.

(b) A licensee shall assure that a permit is obtained from the local Building Code enforcement official before commencing any installation work for which a license is required by the Board. The licensee shall also assure that a request for final inspection is made within 10 days of subsequent completion of the work for which a license is required, absent agreement with the owner and the local Building Code enforcement official.

(c) A licensee shall obtain permits and allow his number to appear on permits only for work over which he will provide general supervision until the completion of the work, for which he holds the contract and for which he receives all contractual payments.

- (1) General supervision is that degree of supervision which is necessary and sufficient to ensure that the work is performed in a competent manner and with the requisite skill and that the work is done timely, safely and in accordance with applicable codes and rules. General supervision requires that the review of the work be performed in person by the licensee while the work is in progress.
- (2) Each business office for which a licensee is responsible shall be actively and locally supervised by that licensee who shall have primary responsibility and a corresponding amount of time personally involved in the work contracted for or performed by that office.
- against such contractor by setting forth the charges in writing with particularity including, but not limited to, the date and place of the alleged violation. Such charges shall be signed and sworn to by the party preferring such charges and filed with the Executive Director of the State Board of Refrigeration Examiners at the office of the Board, Suite 208, 875 Highway 70 West, Garner, North Carolina 27629.
- (b) A licensee who prefers charges against a refrigeration contractor shall cooperate with the Board in its investigation of the complaint including the execution of an affidavit covering their knowledge of the facts and circumstances concerning the complaint, if required, and participate in any legal action authorized by the Board if requested by the Board or its representative.
- (c) A licensee shall fully cooperate with the Board in connection with any inquiry it shall make. Full cooperation includes responding in a timely manner to all inquiries of the Board or representative of the Board and claiming Board correspondence from the U.S. Postal Service.

Authority G.S. 87-54; 87-58(g).

SECTION .1100 - DISCIPLINARY ACTION

21 NCAC 60 .1102 PREFERRING CHARGES

(a) Any person who believes that any refrigeration contractor is in violation of the provisions of G.S. 87-59 may prefer charges

Authority G.S. 87-59.

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 10 – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Rule-making Agency: *NC Medical Care Commission*

Rule Citation: *10 NCAC 03D .2911*

Effective Date: *January 1, 2003*

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

Authority for the rulemaking: *G.S. 143-508(d)(11); S.L. 2002, c. 179*

Reason for Proposed Action: *This temporary rule-making action was prompted by a recent change in state law. Specifically, HB 1508 (S.L. 2002-179) was amended in G.S. 143-508(d)(11) to provide more flexibility in determining who can qualify to receive emergency, on-site treatment for anaphylaxis. Prior to HB 1508, treatment was limited to anaphylaxis triggered by insect stings. Now, the authority has been extended to allow credentialed personnel to administer life-saving treatment to persons having allergic reaction to any agent that causes anaphylaxis. Such agents include, but are not limited to, peanuts, shellfish, honey, etc. Adhering to the notice and hearing requirements would be contrary to the public interest as it would delay the ability for credentialed personnel to begin responding to all agents that cause anaphylaxis. Any delay in implementing this temporary rule change will result in the loss of numerous lives.*

Comment Procedures: *Comments from the public shall be directed to Mark Benton, NCDFS 2701 Mail Service Center, Raleigh, NC 27699-2701, phone (919) 855-3750, and email mark.benton@ncmail.net.*

CHAPTER 03 - FACILITY SERVICES

SUBCHAPTER 03D - RULES AND REGULATIONS GOVERNING AMBULANCE SERVICE

SECTION .2900 – EMS PERSONNEL

10 NCAC 03D .2911 CREDENTIALING OF INDIVIDUALS TO ADMINISTER LIFESAVING TREATMENT TO PERSONS SUFFERING AN ADVERSE REACTION TO AGENTS THAT MIGHT CAUSE ANAPHYLAXIS

(a) To become credentialed by the North Carolina Medical Care Commission to administer epinephrine to persons who suffer adverse reactions to agents that might cause anaphylaxis, a person shall meet the following:

- (1) Be 18 years of age or older; and
- (2) Successfully complete an educational program taught by a physician licensed to practice

medicine in North Carolina or designee of the physician. The educational program shall instruct individuals in the appropriate use of procedures for the administration of epinephrine to pediatric and adult victims who suffer adverse reactions to agents that might cause anaphylaxis and shall include at a minimum the following:

- (A) definition of anaphylaxis;
- (B) agents which might cause anaphylaxis and the distinction between them, including drugs, insects, foods, and inhalants;
- (C) recognition of symptoms of anaphylaxis for both pediatric and adult victims;
- (D) ~~Appropriate~~ appropriate emergency treatment of anaphylaxis as a result of agents that might cause anaphylaxis;
- (E) availability and design of packages containing equipment for administering epinephrine to victims suffering from anaphylaxis as a result of agents that might cause anaphylaxis;
- (F) pharmacology of epinephrine including indications, contraindications, and side effects;
- (G) discussion of legal implications of rendering aid; and
- (H) instruction that treatment is to be utilized only in the absence of the availability of physicians or other practitioners who are authorized to administer the treatment.

(b) A credential to administer epinephrine to persons who suffer adverse reactions to agents that might cause anaphylaxis may be issued by the North Carolina Medical Care Commission upon receipt of a completed application signed by the applicant and the physician who taught or was responsible for the educational program. All credentials shall be valid for the period stated on the credential issued to the applicant and this period shall not exceed four years.

History Note: Authority G.S. 143-508(d)(11); Temporary Adoption Eff. January 1, 2002; Temporary Adoption Eff. January 1, 2003.

Rule-making Agency: *DHHS, Division of Facility Services*

Rule Citation: *10 NCAC 03R .1125, .2213, .2217, .2411, .2713-.2715, .3603, .3701, .3703, .4201-.4203, .6401-.6433, .6436-.6444*

Effective Date: *January 1, 2003*

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

Authority for the rulemaking: *G.S. 131E-175; 131E-176; 131E-177; 131E-183; S.L. 2001, c. 234*

Reason for Proposed Action: *Temporary rule-making is necessary because the annual planning process does not leave the Department the time necessary to use permanent rule-making. The Medical Facilities Planning Section began updating its inventories of medical facilities, services, and equipment at the end of December 2001.*

Comment Procedures: *Comments from the public shall be directed to Mark Benton, Chief of Budget & Planning/Rule-making Coordinator, NC DHHS – DFS, 2701 Mail Service Center, Raleigh, NC 27699-2701, phone (919) 855-3750, and email mark.benton@ncmail.net.*

CHAPTER 03 - FACILITY SERVICES

SUBCHAPTER 03R - CERTIFICATE OF NEED REGULATIONS

SECTION .1100 - CRITERIA AND STANDARDS FOR NURSING FACILITY OR ADULT CARE HOME SERVICES

10 NCAC 03R .1125 INFORMATION REQUIRED OF APPLICANT

- (a) An applicant proposing to establish new nursing facility or adult care home beds shall project an occupancy level for the entire facility for each of the first eight calendar quarters following the completion of the proposed project. All assumptions, including the specific methodologies by which occupancies are projected, shall be stated.
- (b) An applicant proposing to establish new nursing facility or adult care home beds shall project patient origin by percentage by county of residence. All assumptions, including the specific methodology by which patient origin is projected, shall be stated.
- (c) An applicant proposing to establish new nursing facility or adult care home beds shall show that at least 85 percent of the anticipated patient population in the entire facility lives within a 45 mile radius of the facility, with the exception that this standard shall be waived for applicants proposing to transfer existing certified nursing facility beds from a State Psychiatric Hospital to a community facility, facilities that are fraternal or religious facilities, or facilities that are part of licensed continuing care facilities which make services available to large or geographically diverse populations.
- (d) An applicant proposing to establish a new nursing facility or adult care home shall specify the site on which the facility will be located. If the proposed site is not owned by or under the control of the applicant, the applicant shall specify at least one alternate site on which the services could be operated should acquisition efforts relative to the proposed site ultimately fail, and shall demonstrate that the proposed and alternate sites are available for acquisition.

- (e) An applicant proposing to establish a new nursing facility or adult care home shall document that the proposed site and alternate sites are suitable for development of the facility with regard to water, sewage disposal, site development and zoning including the required procedures for obtaining zoning changes and a special use permit after a certificate of need is obtained.
- (f) An applicant proposing to establish new nursing facility or adult care home beds shall provide documentation to demonstrate that the physical plant will conform with all requirements as stated in 10 NCAC 03H or 10 NCAC 42D, whichever is applicable.

History Note: Authority G.S. 131E-175; 131E-176; 131E-177(1); 131E-183(b); S.L. 2001, c. 234; Eff. November 1, 1996; Temporary Amendment Eff. January 1, 2002; Temporary Amendment Eff. January 1, 2003.

SECTION .2200 - CRITERIA AND STANDARDS FOR END-STAGE RENAL DISEASE SERVICES

10 NCAC 03R .2213 INFORMATION REQUIRED OF APPLICANTS

- (a) An applicant that proposes to increase stations in an existing certified facility or relocated stations must provide the following information:
 - (1) Utilization rates;
 - (2) Mortality rates;
 - (3) The number of patients that are home trained and the number of patients on home dialysis;
 - (4) The number of transplants performed or referred;
 - (5) The number of patients currently on the transplant waiting list;
 - (6) Hospital admission rates, by admission diagnosis, i.e., dialysis related versus non-dialysis related;
 - (7) The number of patients with infectious disease, i.e., hepatitis and AIDS, and the number converted to infectious status during last calendar year.
- (b) An applicant that proposed to increase the number of stations in an existing facility, or establish a new dialysis station, or the relocation of existing dialysis stations must provide the information requested on the End Stage Renal Disease (ESRD) Treatment application form to include the following:
 - (1) A signed written agreement with an acute care hospital that specifies the relationship with the dialysis facility and describes the services that the hospital will provide to patients of the dialysis facility. The agreement must comply with 42 C.F.R., Section 405.2100.
 - (2) A written agreement with a transplantation center describing the relationship with the dialysis facility and the specific services that the transplantation center will provide to patients of the dialysis facility. The agreements must include at least the following:
 - (A) timeframe for initial assessment and evaluation of patients for transplantation,

- (B) composition of the assessment/evaluation team at the transplant center,
 - (C) method for periodic re-evaluation,
 - (D) criteria by which a patient will be evaluated and periodically re-evaluated for transplantation, and
 - (E) signatures of the duly authorized persons representing the facilities and the agency providing the services.
- (3) Documentation that the water supply will comply with 42 C.F.R., Section 405.2100.
 - (4) Documentation of standing service from a power company and back-up capabilities.
 - (5) The location of the site on which the services are to be operated. If such site is neither owned by nor under option to the applicant, the applicant must provide a written commitment to diligently pursue acquiring the site if and when the approval is granted, must specify a secondary site on which the services could be operated should acquisition efforts relative to the primary site ultimately fail, and must demonstrate that the primary and secondary sites are available for acquisition.
 - (6) Documentation that the services will be provided in conformity with applicable laws and regulations pertaining to staffing, fire safety equipment, physical environment, and other relevant health and safety requirements.
 - (7) The projected patient origin for the services. All assumptions, including the specific methodology by which patient origin is projected, must be clearly stated.
 - (8) For new facilities, documentation that at least 80 percent of the anticipated patient population resides within 30 miles of the proposed facility.

SECTION .2400 - CRITERIA AND STANDARDS FOR INTERMEDIATE CARE FACILITY/MENTALLY RETARDED (ICF/MR)

10 NCAC 03R .2411 PERFORMANCE STANDARDS

- (a) An applicant proposing to add ICF/MR beds to an existing facility shall not be approved unless the overall average occupancy, over the six months immediately preceding the submittal of the application, of the total number of ICF/MR beds within the facility in which the new beds are to be operated was at least 90 percent.
- (b) An applicant proposing to establish new ICF/MR beds shall not be approved unless occupancy is projected to be at least 90 percent for the total number of ICF/MR beds proposed to be operated in the entire facility, no later than one year following the completion of the proposed project.
- (c) An applicant proposing to establish new ICF/MR beds shall comply with one of the following models:
 - (1) a residential community based freestanding facility with six beds or less, i.e., group home model;
 - (2) a community-based facility with 7 to 15 beds if documentation is provided that a facility of this size is necessary because adequate residential community based freestanding facilities are not available in the catchment area to meet the needs of the population to be served; or
 - (3) a facility with greater than 15 beds if the proposed new beds are to be established in response to an adjusted need determination contained in the 2003 State Medical Facilities Plan.
- (d) No more than three intermediate care facilities for the mentally retarded housing a combined total of 18 persons shall be developed on contiguous pieces of property, with the exception that this standard may be waived for beds proposed to be established in response to an adjusted need determination contained in the 2003 State Medical Facilities Plan.

History Note: Authority G.S. 131E-177(1); 131E-183(b); Eff. March 1, 1989; Temporary Amendment Eff. January 1, 2003.

History Note: Authority G.S. 131E-177(1), (5); 131E-183; Eff. November 1, 1996; Temporary Amendment Eff. January 1, 2003.

10 NCAC 03R .2217 PERFORMANCE STANDARDS

- (a) An applicant proposing to establish a new End Stage Renal Disease facility shall document the need for at least 10 stations based on utilization of 3.2 patients per station per week as of the end of the first operating year of the facility.
- (b) An applicant proposing to increase the number of dialysis stations in an existing End Stage Renal Disease facility shall document the need for the additional stations based on utilization of 3.2 patients per station per week as of the end of the first operating year of the additional stations.
- (c) An applicant shall provide all assumptions, including the specific methodology by which patient utilization is projected.

History Note: Authority G.S. 131E-177(1); 131E-183(b); Temporary Adoption Eff. January 1, 2002; Temporary Adoption Eff. January 1, 2003.

SECTION .2700 - CRITERIA AND STANDARDS FOR MAGNETIC RESONANCE IMAGING SCANNER

10 NCAC 03R .2713 DEFINITIONS

- The following definitions shall apply to all rules in this Section:
- (1) "Approved MRI scanner" means an MRI scanner which was not operational prior to the beginning of the review period but which had been issued a certificate of need.
 - (2) "Existing MRI scanner" means an MRI scanner in operation prior to the beginning of the review period.
 - (3) "Magnetic Resonance Imaging" (MRI) means a non-invasive diagnostic modality in which electronic equipment is used to create tomographic images of body structure. The MRI scanner exposes the target area to

- nonionizing magnetic energy and radio frequency fields, focusing on the nuclei of atoms such as hydrogen in the body tissue. Response of selected nuclei to this stimulus is translated into images for evaluation by the physician.
- (4) "Magnetic resonance imaging scanner" (MRI Scanner) is defined in G.S. 131E-176(14e), and includes dedicated fixed breast MRI scanners.
 - (5) "Mobile MRI scanner" means an MRI scanner and transporting equipment which is moved at least weekly to provide services at two or more host facilities.
 - (6) "MRI procedure" means a single discrete MRI study of one patient.
 - (7) "MRI service area" means the Magnetic Resonance Imaging Planning Areas, as defined in the applicable State Medical Facilities Plan, except for proposed new mobile MRI scanners.
 - (8) "MRI study" means one or more scans relative to a single diagnosis or symptom.

- (2) projections of the annual number of procedures to be performed ~~—the average charge for each proposed procedure for each of the first three years of operation after completion of the project. This information shall be provided separately for each proposed host facility if the application proposes the acquisition of a mobile MRI scanner;~~ for each of the first three years of operation after completion of the project;
- (3) the average charge to the patient, regardless of who bills the patient, for each of the 20 most frequent MRI procedures to be performed for each of the first three years of operation after completion of the project and a description of items included in the charge; if the professional fees is included in the charge, provide the dollar amount for the professional fee;
- (4) if the proposed MRI service will be provided pursuant to a service agreement, the dollar amount of the service contract fee billed by the applicant to the contracting party for each of the first three years of operation;
- (5) documentation of the need for an additional MRI scanner in the proposed MRI service area and description of the methodology used to project need, including all assumptions regarding the population to be served; and
- (6) letters from physicians indicating their intent to refer patients to the proposed magnetic resonance imaging scanner. ~~scanner; and~~

History Note: Authority G.S. 131E-177(1); 131E-183(b); Temporary Adoption Eff. September 1, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner; Eff. February 1, 1994; Temporary Amendment Eff. January 1, 1999; Temporary Eff. January 1, 1999 Expired on October 12, 1999; Temporary Amendment Eff. January 1, 2000; Temporary Amendment effective January 1, 2000 amends and replaces a permanent rulemaking originally proposed to be effective August 2000; Temporary Amendment Eff. January 1, 2001; Temporary Amendment effective January 1, 2001 amends and replaces a permanent rulemaking originally proposed to be effective April 1, 2001; Temporary Amendment Eff. January 1, 2002; Amended Eff. August 1, 2002; Temporary Amendment effective January 1, 2002 amends and replaces the permanent rule effective August 1, 2002; Temporary Amendment Eff. January 1, 2003.

10 NCAC 03R .2714 INFORMATION REQUIRED OF APPLICANT

- (a) An applicant proposing to acquire an MRI scanner, including a mobile MRI scanner, shall use the Acute Care Facility/Medical Equipment application form.
- (b) Except for proposals to acquire mobile MRI scanners that serve two or more host facilities, both the applicant and the person billing the patients for the MRI service shall be named as co-applicants in the application form.
- (c) An applicant proposing to acquire a magnetic resonance imaging scanner, including a mobile MRI scanner, shall provide the following information:
 - (1) documentation that the MRI scanner shall be available and staffed for use at least 66 hours per week, with the exception of a mobile MRI scanner;

- (d) An applicant proposing to acquire a mobile MRI scanner shall provide copies of letters of intent from, and proposed contracts with, all of the proposed host facilities of the new MRI scanner.
- (e) An applicant proposing to acquire a dedicated fixed breast MRI scanner shall:

- (1) provide a copy of a contract or working agreement with a radiologist or practice group that has experience interpreting images and is trained to interpret images produced by an MRI scanner configured exclusively for mammographic studies;
- (2) document that the applicant performed mammograms continuously for the last year; and
- (3) document that the applicant's existing mammography equipment is in compliance with the U.S. Food and Drug Administration Mammography Quality Standards Act.

History Note: Authority G.S. 131E-177(1); 131E-183(b); Temporary Adoption Eff. September 1, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner; Eff. February 1, 1994;

Temporary Amendment Eff. January 1, 2002;
Temporary Amendment Eff. January 1, 2003.

10 NCAC 03R .2715 REQUIRED PERFORMANCE STANDARDS

(a) An applicant proposing to acquire a mobile magnetic resonance imaging (MRI) scanner shall:

- (1) demonstrate that at least 2900 MRI procedures were performed in the last year on each of its existing mobile MRI scanners operating in the Health Service Area(s), (e.g., HSA I), in which the proposed mobile MRI scanner will be located [Note: This is not the average number of procedures performed on all of the applicant's mobile MRI scanners.];
- (2) demonstrate annual utilization in the third year of operation is reasonably projected to be at least 2900 MRI procedures on each of its existing, approved and proposed mobile MRI scanners to be operated in the Health Service Area(s), (e.g., HSA I), in which the proposed equipment will be located [Note: This is not the average number of procedures performed on all of the applicant's mobile MRI scanners.];
- (3) document the assumptions and provide data supporting the methodology used for each projection required in this Rule.

(b) An applicant proposing to acquire a magnetic resonance imaging (MRI) scanner for which the need determination in the State Medical Facilities Plan was based on the utilization of fixed MRI scanners, shall:

- (1) demonstrate that its existing MRI scanners, except mobile MRI scanners, operating in the proposed MRI service area in which the proposed MRI scanner will be located performed an average of at least 2900 MRI procedures per scanner in the last year;
- (2) demonstrate annual utilization in the third year of operation is reasonably projected to be an average of 2900 procedures per scanner for all existing, approved and proposed MRI scanners or mobile MRI scanners to be operated by the applicant in the MRI service area(s) in which the proposed equipment will be located; and
- (3) document the assumptions and provide data supporting the methodology used for each projection required in this Rule.

(c) An applicant proposing to acquire a magnetic resonance imaging (MRI) scanner for which the need determination in the State Medical Facilities Plan was based on utilization of mobile MRI scanners, shall:

- (1) if the applicant does not own or lease an MRI scanner or have an approved MRI scanner, demonstrate annual utilization in the third year of operation is reasonably projected to be at least 2080 MRI procedures per year for the proposed MRI scanner;

- (2) if the applicant already owns or leases an MRI scanner or has an approved MRI scanner, demonstrate annual utilization is reasonably projected to be an average of 2900 MRI procedures per scanner for all existing, approved and proposed MRI scanners or mobile MRI scanners to be operated by the applicant in the MRI service area(s) in which the proposed equipment will be located; and
- (3) document the assumptions and provide data supporting the methodology used for each projection required in this Rule.

(d) An applicant proposing to acquire a magnetic resonance imaging (MRI) scanner for which the need determination in the State Medical Facilities Plan was based on the absence of an existing or approved fixed MRI scanner in the MRI service area shall:

- (1) demonstrate annual utilization of the proposed MRI scanner in the third year of operation is reasonably projected to be at least 2080 MRI procedures per year; and,
- (2) document the assumptions and provide data supporting the methodology used for each projection required in this Rule.

History Note: Authority G.S. 131E-177(1); 131E-183(b); Temporary Adoption Eff. September 1, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner; Eff. February 1, 1994; Temporary Amendment Eff. January 1, 1999; Temporary Eff. January 1, 1999 Expired on October 12, 1999; Temporary Amendment Eff. January 1, 2000; Temporary Amendment effective January 1, 2000 amends and replaces a permanent rulemaking originally proposed to be effective August 2000; Temporary Amendment Eff. January 1, 2001; Temporary Amendment effective January 1, 2001 amends and replaces a permanent rulemaking originally proposed to be effective April 1, 2001; Temporary Amendment Eff. January 1, 2002; Amended Eff. August 1, 2002; Temporary Amendment effective January 1, 2002 amends and replaces the permanent rule effective, August 1, 2002; Temporary Amendment effective January 1, 2003.

SECTION .3600 - CRITERIA AND STANDARDS FOR GAMMA KNIFE

10 NCAC 03R .3603 REQUIRED PERFORMANCE STANDARDS

An applicant proposing to acquire a gamma knife shall:

- (1) demonstrate that all existing gamma knives in the applicant's gamma knife service area performed at least 408 procedures during the 12 month period immediately preceding submittal of the application;
- (2) demonstrate that the gamma knife shall be utilized at an annual rate of at least 250 procedures (i.e., 80% of 312 procedures) per machine, measured during the fourth quarter

- (3) of the third year of operation following completion of the project, and shall provide all assumptions and data supporting the methodology used for the projections;
- (3) for the projections provided in response to Item (2) of this Rule, calculate the number of procedures projected to be performed for clinical purposes and the number of procedures projected to be performed for research purposes; and
- (4) demonstrate that all of the existing and approved gamma knives in the applicant's gamma knife service area shall be performing at least 326 gamma knife procedures per year in the third year of operation of the new gamma knife, and provide all assumptions and data supporting the methodology used for the projections.

History Note: Authority G.S. 131E-177(1); 131E-183(b); Temporary Adoption Eff. September 1, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner; Eff. January 4, 1994; Temporary Amendment Eff. January 1, 2003.

SECTION .3700 - CRITERIA AND STANDARDS FOR POSITRON EMISSION TOMOGRAPHY SCANNER

10 NCAC 03R .3701 DEFINITIONS

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

- (1) "Approved positron emission tomography (PET) scanner" means a PET scanner which was not operational prior to the beginning of the review period but which had been issued a certificate of need.
- (2) "Cyclotron" means an apparatus for accelerating protons or neutrons to high energies by means of a constant magnet and an oscillating electric field.
- (3) "Dedicated PET Scanner" means PET Scanners as defined in the applicable State Medical Facilities Plan.
- (4) "Existing PET scanner" means a PET scanner in operation prior to the beginning of the review period.
- (5) "Mobile PET Scanner" means a PET scanner and transporting equipment that is moved, at least weekly, to provide services at two or more host facilities.
- (6) "PET procedure" means a single discrete study of one patient involving one or more PET scans.
- (7) "PET scan" means an image-scanning sequence derived from a single administration of a PET radiopharmaceutical, equated with a single injection of the tracer. One or more PET scans comprise a PET procedure.
- (8) "PET scanner service area" means the PET Scanner Service Area as defined in the applicable State Medical Facilities Plan.

- (9) "Positron emission tomographic scanner" (PET) is defined in G.S. 131E-176(19a).
- (10) "Radioisotope" means a radiochemical which directly traces biological processes when introduced into the body.

History Note: Authority G.S. 131E-177(1); 131E-183(b); Temporary Adoption Eff. September 1, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner; Eff. January 4, 1994; Temporary Amendment Eff. January 1, 2001; Temporary Amendment Eff. January 1, 2002; Amended Eff. August 1, 2002; Temporary Amendment effective January 1, 2002 amends and replaces the permanent rule effective August 1, 2002; Temporary Amendment Eff. January 1, 2003.

10 NCAC 03R .3703 REQUIRED PERFORMANCE STANDARDS

(a) An applicant proposing to acquire a dedicated PET scanner, including a mobile dedicated PET scanner, shall demonstrate that:

- (1) the proposed dedicated PET scanner, including mobile dedicated PET scanners, shall be utilized at an annual rate of at least 1,220 PET procedures by the end of the third year following completion of the project;
- (2) its existing dedicated PET scanners, excluding those used exclusively for research, performed an average of 1,220 PET procedures per PET scanner in the last year; and
- (3) its existing and approved dedicated PET scanners shall perform an average of at least 1,220 PET procedures per PET scanner during the third year following completion of the project.

(b) The applicant shall describe the assumptions and provide data to support and document the assumptions and methodology used for each projection required in this Rule.

History Note: Authority G.S. 131E-177(1); 131E-183(b); Temporary Adoption Eff. September 1, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner; Eff. January 4, 1994; Temporary Amendment Eff. January 1, 2002; January 1, 2001; Amended Eff. August 1, 2002; Temporary Amendment effective January 1, 2002 amends and replaces the permanent rule effective August 1, 2002; Temporary Amendment Eff. January 1, 2003.

SECTION .4200 - CRITERIA AND STANDARDS FOR HOSPICES, HOSPICE INPATIENT FACILITIES, AND HOSPICE RESIDENTIAL CARE FACILITIES

10 NCAC 03R .4201 DEFINITIONS

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

- (1) "Bereavement counseling" means counseling provided to a hospice patient's family or

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| <p>significant others to assist them in dealing with issues of grief and loss.</p> <p>(2) "Caregiver" means the person whom the patient designates to provide the patient with emotional support, physical care, or both.</p> <p>(3) "Care plan" means a plan as defined in 10 NCAC 03T .0102 of the Hospice Licensing Rules.</p> <p>(4) "Continuous care" means care as defined in 42 CFR 418.204, the Hospice Medicare Regulations.</p> <p>(5) "Home-like" means furnishings of a hospice inpatient facility or a hospice residential care facility as defined in 10 NCAC 03T .1110 or .1201 of the Hospice Licensing Rules.</p> <p>(6) "Homemaker services" means services provided to assist the patient with personal care, maintenance of a safe and healthy environment and implementation of the patient's care plan.</p> <p>(7) "Hospice" means any coordinated program of home care as defined in G.S. 131E-176(13a).</p> <p>(8) "Hospice inpatient facility" means a facility as defined in G.S. 131E-176(13b).</p> <p>(9) "Hospice residential care facility" means a facility as defined in G.S. 131E-176(13c).</p> <p>(10) "Hospice service area" means, for residential care facilities,</p> <p style="padding-left: 40px;">the county in which the hospice residential care facility will be located and the contiguous counties for which the hospice residential care facility will provide services.</p> <p>(11) "Hospice services" means services as defined in G.S. 131E-201.</p> <p>(12) "Hospice staff" means personnel as defined in 10 NCAC 03T .0102 of the Hospice Licensing Rules.</p> <p>(13) "Interdisciplinary team" means personnel as defined in G.S. 131E-201.</p> <p>(14) "Palliative care" means treatment as defined in G.S. 131E-201.</p> <p>(15) "Respite care" means care provided as defined in 42 CFR 418.98.</p> | <p>(1) the annual unduplicated number of hospice patients projected to be served in each of the first two years following completion of the project and the methodology and assumptions used to make the projections;</p> <p>(2) the projected number of hospice patients to be served by quarter for the first 24 months following completion of the project and the methodology and assumptions used to make the projections;</p> <p>(3) the projected number of patient care days, by level of care (i.e., routine home care, respite care, and inpatient care), by quarter, to be provided in each of the first two years of operation following completion of the project and the methodology and assumptions used to make the projections shall be clearly stated;</p> <p>(4) the projected number of hours of continuous care to be provided in each of the first two years of operation following completion of the project and the methodology and assumptions used to make these projections;</p> <p>(5) the projected average annual cost per hour of continuous care for each of the first two operating years following completion of the project and the methodology and assumptions used to make the projections;</p> <p>(6) the projected average annual cost per patient care day, by level of care (i.e., routine home care, respite care, and inpatient care), for each of the first two operating years following completion of the project and the methodology and assumptions used to project the average annual cost;</p> <p>(7) documentation of attempts made to establish working relationships with sources of referrals to the hospice services and copies of proposed agreements for the provision of inpatient care.</p> <p>(c) An applicant proposing to develop a hospice shall also provide documentation that the hospice shall be licensed and shall be certified for participation in the Medicare program within one year after issuance of the certificate of need.</p> <p>(d) An applicant proposing to develop hospice inpatient or hospice residential care facility beds shall also provide the following information:</p> <p>(1) a description of the means by which hospice services shall be provided in the patient's own home;</p> <p>(2) copies of the proposed contractual agreements, with a licensed hospice or a licensed home care agency with a hospice designation on its license, for the provision of hospice services in the patient's own home;</p> <p>(3) a copy of the admission policies, including the criteria that shall be used to select persons for admission and to assure that terminally ill patients are served in their own homes as long as possible; and</p> <p>(4) documentation that a home-like setting shall be provided in the facility.</p> |
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History Note: Authority G.S. 131E-177(1); Eff. July 1, 1994; Temporary Amendment Eff. January 1, 2003.

10 NCAC 03R .4202 INFORMATION REQUIRED OF APPLICANT

- (a) An applicant proposing to develop a hospice shall complete the application form for Hospice Services. An applicant proposing to develop hospice inpatient facility beds or hospice residential care facility beds shall complete the application form for Hospice Inpatient and Hospice Residential Care Services.
- (b) An applicant proposing to develop a hospice, hospice inpatient facility beds, or hospice residential care facility beds shall provide the following information:

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History Note: Authority G.S. 131E-177(1); 131E-183; Eff. July 1, 1994; Amended Eff. November 1, 1996; Temporary Amendment Eff. January 1, 2003.

10 NCAC 03R .4203 REQUIRED PERFORMANCE STANDARDS

(a) An applicant proposing to develop hospice inpatient facility beds or hospice residential care facility beds shall demonstrate that:

- (1) the average occupancy rate of the licensed beds in the facility is projected to be at least 50% for the last six months of the first operating year following completion of the project;
- (2) the average occupancy rate for the licensed beds in the facility is projected to be at least 65% for the second operating year following completion of the project; and
- (3) if the application is submitted to address the need for a hospice residential care facility, each existing facility which is located in the hospice service area and which has licensed beds of the type proposed by the applicant attained an occupancy rate of at least 65% for the 12 month period reported on that facility's most recent Licensure Renewal Application Form.

(b) An applicant proposing to add beds to an existing hospice inpatient facility or hospice residential care facility shall document that the average occupancy of the licensed hospice inpatient and hospice residential care facility beds in its existing facility was at least 65% for the nine months immediately preceding the submittal of the proposal.

10 NCAC 03R .6402 CERTIFICATE OF NEED REVIEW SCHEDULE

The Department of Health and Human Services (DHHS) has established the following review schedules for certificate of need applications.

- (1) Acute Care Beds (in accordance with the need determination in 10 NCAC 03R .6406)

Hospital Service System	CON Beginning Review Date
Cannon Memorial Hospital	October 1, 2003

- (2) Operating Rooms (in accordance with the need determination in 10 NCAC 03R .6408)

Ambulatory Surgery Service Area (Constituent Counties)	Certificate of Need Beginning Review Date
27 (Hoke, Lee, Montgomery, Moore, Richmond, Scotland)	September 1, 2003

- (3) Fixed Cardiac Catheterization/Angioplasty Equipment (in accordance with the need determination in 10 NCAC 03R .6411)

County	CON Beginning Review Date
Forsyth	February 1, 2003
Guilford	October 1, 2003
New Hanover	July 1, 2003
Wake	March 1, 2003

(c) An applicant proposing to develop a hospice shall demonstrate that no less than 80% of the total number of days of hospice care furnished to Medicaid and Medicare patients will be provided in the patient's residence in accordance with 42 CFR 418.302(f)(2).

History Note: Authority G.S. 131E-177(1); Eff. July 1, 1994; Temporary Amendment Eff. January 1, 1999; Temporary Eff. January 1, 1999 Expired on October 12, 1999; Temporary Amendment Eff. January 1, 2000; Temporary Amendment effective January 1, 2000 amends and replaces a permanent rulemaking originally proposed to be effective August 2000; Amended Eff. April 1, 2001; Temporary Amendment Eff. January 1, 2003.

SECTION .6400 – PLANNING POLICIES AND NEED DETERMINATIONS FOR 2003

10 NCAC 03R .6401 APPLICABILITY OF RULES RELATED TO THE 2003 STATE MEDICAL FACILITIES PLAN

Rules .6401 through .6404 and .6406 through .6433 and .6436 through .6444 of this Section apply to certificate of need applications for which the scheduled review period begins during calendar year 2003. In addition, Rule .6405 of this Section shall be used to implement procedures described within it during calendar year 2003.

History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b); Temporary Adoption Eff. January 1, 2003.

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- (4) Shared Fixed Cardiac Catheterization/Angioplasty Equipment (in accordance with the need determination in 10 NCAC 03R .6412)

Hospital Service System	CON Beginning Review Date
Randolph Hospital	October 1, 2003

- (5) Gamma Knife (in accordance with the need determination in 10 NCAC 03R .6417)

Gamma Knife Planning Region	CON Beginning Review Date
2 (HSAs IV, V, VI)	November 1, 2003

- (6) Radiation Oncology Treatment Center/Linear Accelerator (in accordance with the need determination in 10 NCAC 03R .6418)

Radiation Oncology Treatment Center Service Area	CON Beginning Review Date
15 (Cumberland, Bladen, Robeson, Sampson)	May 1, 2003

- (7) Fixed Dedicated Positron Emission Tomography (PET) Scanners (in accordance with the need determination in 10 NCAC 03R .6419)

Positron Emission Tomography (PET) Scanners Planning Region	CON Beginning Review Date
HSA I	April 1, 2003
HSA II	August 1, 2003
HSA III	June 1, 2003
HSA V	March 1, 2003
HSA VI	July 1, 2003

- (8) Fixed Magnetic Resonance Imaging Scanners (in accordance with the need determinations in 10 NCAC 03R .6421)

Magnetic Resonance Imaging Scanners Service Areas (Constituent Counties)	CON Beginning Review Date
1 (Cherokee, Clay)	April 1, 2003
1A (Macon)	June 1, 2003
2 (Graham, Jackson, Swain)	April 1, 2003
4 (Buncombe, Madison, Yancey)	August 1, 2003
5 (McDowell, Mitchell)	August 1, 2003
7 (Alexander, Burke, Caldwell, Catawba, Lincoln)	December 1, 2003
8 (Rutherford, Cleveland)	October 1, 2003
11 (Cabarrus, Rowan, Stanly)	October 1, 2003
13 (Alleghany, Davie, Forsyth, Stokes, Surry, Wilkes, Yadkin)	October 1, 2003
15 (Davidson, Guilford, Randolph, Rockingham)	December 1, 2003
16 (Hoke, Montgomery, Moore, Richmond, Scotland)	July 1, 2003
17 (Anson, Mecklenburg, Union)	December 1, 2003
19 (Franklin, Wake)	November 1, 2003
19A (Harnett, Johnston)	May 1, 2003
21 (Durham, Granville, Person, Vance, Warren)	March 1, 2003
23 (Carteret, Craven, Jones, Onslow, Pamlico)	March 1, 2003
24 (Wayne, Wilson)	September 1, 2003
25 (Beaufort, Bertie, Greene, Hyde, Lenoir, Martin, Pitt, Washington)	July 1, 2003

- (9) Fixed Magnetic Resonance Imaging (MRI) Scanner Need Determination (in accordance with 10 NCAC 03R .6422)

Magnetic Resonance Imaging Scanners Service Area	CON Beginning Review Date
12 (Iredell)	December 1, 2003
13 (Alleghany, Davie, Forsyth, Stokes, Surry, Wilkes, Yadkin)	April 1, 2003
15 (Davidson, Guilford, Randolph, Rockingham)	June 1, 2003
17 (Anson, Mecklenburg, Union)	June 1, 2003

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- (10) Mobile Magnetic Resonance Imaging Scanners (in accordance with the need determination in 10 NCAC 03R .6423)

Mobile Magnetic Resonance Imaging Scanners Planning Region	CON Beginning Review Date
1 (HSAs I, II, III)	August 1, 2003
2 (HSAs IV, V, VI)	September 1, 2003

- (11) Nursing Care Beds (in accordance with the need determination in 10 NCAC 03R .6424)

County	CON Beginning Review Date
Clay	April 1, 2003
Dare	November 1, 2003
Perquimans	May 1, 2003
Union	June 1, 2003

- (12) Adult Care Home Beds (in accordance with the need determination in 10 NCAC 03R .6425)

County	CON Beginning Review Date
Beaufort	July 1, 2003
Camden	May 1, 2003
Cherokee	April 1, 2003
Currituck	May 1, 2003
Dare	November 1, 2003
Gates	May 1, 2003
Graham	April 1, 2003
Greene	September 1, 2003
Hyde	July 1, 2003
Jackson	April 1, 2003
Jones	September 1, 2003
Macon	June 1, 2003
Madison	August 1, 2003
Mitchell	August 1, 2003
Pender	September 1, 2003
Polk	August 1, 2003
Transylvania	August 1, 2003
Tyrrell	May 1, 2003
Washington	May 1, 2003

- (13) Medicare-Certified Home Health Agencies or Offices (in accordance with the need determination in 10 NCAC 03R .6426)

County	CON Beginning Review Date
Pamlico	November 1, 2003

- (14) Hospice Home Care Program (in accordance with the need determination in 10 NCAC 03R .6427)

County	CON Beginning Review Date
Vance	November 1, 2003

- (15) Hospice Inpatient Beds (in accordance with the need determination in 10 NCAC 03R .6428)

County	CON Beginning Review Date
Catawba	December 1, 2003
Forsyth	December 1, 2003
Gaston	June 1, 2003
Iredell	February 1, 2003
Mecklenburg	December 1, 2003
Richmond	May 1, 2003

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Union	December 1, 2003
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- (16) Intermediate Care Facility Beds for the Mentally Retarded (in accordance with the need determination in 10 NCAC 03R .6433)

Mental Health Planning Region	CON Beginning Review Date
7 (Gaston-Lincoln-Cleveland)	August 1, 2003

- (17) There are 10 categories of projects for certificate of need review. The DHHS shall determine the appropriate review category or categories for all applications submitted pursuant to 10 NCAC 03R .0304. The review of an application for a certificate of need shall commence in the next applicable review schedule after the application has been determined to be complete. The 10 categories are:
- (a) Category A. Proposals submitted by acute care hospitals, except those proposals included in Categories B through H and Category J, including but not limited to the following types of projects: renovation, construction, equipment, and acute care services.
 - (b) Category B. Proposals for nursing care beds; adult care home beds; new continuing care retirement communities applying for exemption under 10 NCAC 03R .6438(b) or .6439; and relocations of nursing care beds under 10 NCAC 03R .6438(d) or 10 NCAC 03R .6438(f).
 - (c) Category C. Proposals for new psychiatric facilities; psychiatric beds in existing health care facilities; new intermediate care facilities for the mentally retarded (ICF/MR) and ICF/MR beds in existing health care facilities; new substance abuse and chemical dependency treatment facilities; substance abuse and chemical dependency treatment beds in existing health care facilities; transfers of nursing care beds from State Psychiatric Hospitals to local communities pursuant to 10 NCAC 03R .6438(e); transfers of psychiatric beds from State Psychiatric Hospitals to community facilities pursuant to 10 NCAC 03R .6442; transfers of ICF/MR beds from State Mental Retardation Centers to community facilities pursuant to Chapter 858 of the 1983 Sessions Laws.
 - (d) Category D. Proposals for new dialysis stations in response to the "county need" or "facility need" methodologies; and relocations of existing dialysis stations to another county.
 - (e) Category E. Proposals for inpatient rehabilitation facilities; inpatient rehabilitation beds; licensed ambulatory surgical facilities; new operating rooms and relocations of existing operating rooms as defined in 10 NCAC 03R .6408(b).
 - (f) Category F. Proposals for new Medicare-certified home health agencies or offices; new hospices; new hospice inpatient facility beds; and new hospice residential care facility beds.
 - (g) Category G. Proposals for conversion of hospital beds to nursing care under 10 NCAC 03R .6438(a); and conversion of acute care hospitals to long-term acute care hospitals.
 - (h) Category H. Proposals for bone marrow transplantation services, burn intensive care services, neonatal intensive care services, open heart surgery services, solid organ transplantation services, air ambulance equipment, cardiac angioplasty equipment, cardiac catheterization equipment, heart-lung bypass machines, gamma knives, lithotriptors, magnetic resonance imaging scanners, positron emission tomography scanners, major medical equipment as defined in G.S. 131E-176 (14f), diagnostic centers as defined in G.S. 131E-176 (7a), and oncology treatment centers as defined in G.S. 131E-176 (18a).
 - (i) Category I. Proposals involving cost overruns; expansions of existing continuing care retirement communities which are licensed by the Department of Insurance at the date the application is filed and are applying under 10 NCAC 03R .6438(b) for exemption from need determinations in 10 NCAC 03R .6424 or 10 NCAC 03R .6439 for exemption from need determinations in 10 NCAC 03R .6425; relocations within the same county of existing health service facilities, beds or dialysis stations (excluding relocation of operating rooms as defined in 10 NCAC 03R .6408(b)) which do not

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involve an increase in the number of health service facility beds or stations; reallocation of beds or services; Category A proposals submitted by Academic Medical Center Teaching Hospitals designated prior to January 1, 1990; proposals submitted pursuant to 10 NCAC 03R .6436 by Academic Medical Center Teaching Hospitals designated prior to January 1, 1990; acquisition of replacement equipment that does not result in an increase in the inventory; and any other proposal not included in Categories A through H and Category J.

- (j) Category J. Proposals for demonstration projects.

- (18) A service, facility, or equipment for which a need determination is identified in Items (1) through (16) of this Rule shall have only one scheduled review date and one corresponding application filing deadline in the calendar year as specified in these items, even though the following review schedule shows multiple review dates for the broad category. Applications for certificates of need for new institutional health services not specified in Items (1) through (16) of this Rule shall be reviewed pursuant to the following review schedule, with the exception that no reviews are scheduled if the need determination is zero. Need determinations for additional dialysis stations pursuant to the "county need" or "facility need" methodologies shall be reviewed in accordance with 10 NCAC 03R .6429 or 10 NCAC 03R .6430.

CON Beginning Review Date	Review Categories for HSA I, II, III	Review Categories for HSA IV, V, VI
January 1, 2003	--	--
February 1, 2003	A, C, E, F, G, H, I, J	--
March 1, 2003	--	A, C, E, G, H, I, J
April 1, 2003	B, C, D, H, I	D
May 1, 2003	--	B, C, F, H, I
June 1, 2003	A, B, C, F, H, I	--
July 1, 2003	--	A, B, C, H, I
August 1, 2003	B, C, E, H, I	--
September 1, 2003	--	B, C, E, H, I
October 1, 2003	A, C, D, H, I	D
November 1, 2003	--	A, B, C, F, H, I
December 1, 2003	C, F, H, I	--

- (19) For purposes of Magnetic Resonance Imaging (MRI) scanners reviews only, Anson County in MRI Area 17 is considered to be in HSA III. In order to give the DHHS sufficient time to provide public notice of review and public notice of public hearings as required by G.S. 131E-185, the deadline for filing certificate of need applications is 5:00 p.m. on the 15th day of the month preceding the "CON Beginning Review Date." In instances when the 15th day

of the month falls on a weekend or holiday, the filing deadline is 5:00 p.m. on the next business day. The filing deadline is absolute and applications received after the deadline shall not be reviewed in that review period.

History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b); Temporary Adoption Eff. January 1, 2003.

10 NCAC 03R .6403 MULTI-COUNTY GROUPINGS

(a) Health Service Areas. The Department of Health and Human Services (DHHS) has assigned the counties of the state to the following health service areas for the purpose of scheduling applications for certificates of need:

HEALTH SERVICE AREAS (HSA)

I County	II County	III County	IV County	V County	VI County
Alexander	Alamance	Cabarrus	Chatham	Anson	Beaufort
Alleghany	Caswell	Gaston	Durham	Bladen	Bertie
Ashe	Davidson	Iredell	Franklin	Brunswick	Camden
Avery	Davie	Lincoln	Granville	Columbus	Carteret

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Buncombe	Forsyth	Mecklenburg	Johnston	Cumberland	Chowan
Burke	Guilford	Rowan	Lee	Harnett	Craven
Caldwell	Randolph	Stanly	Orange	Hoke	Currituck
Catawba	Rockingham	Union	Person	Montgomery	Dare
Cherokee	Stokes		Vance	Moore	Duplin
Clay	Surry		Wake	New Hanover	Edgecombe
Cleveland	Yadkin		Warren	Pender	Gates
Graham				Richmond	Greene
Haywood				Robeson	Halifax
Henderson				Sampson	Hertford
Jackson				Scotland	Hyde
McDowell					Jones
Macon					Lenoir
Madison					Martin
Mitchell					Nash
Polk					Northampton
Rutherford					Onslow
Swain					Pamlico
Transylvania					Pasquotank
Watauga					Perquimans
Wilkes					Pitt
Yancey					Tyrrell
					Washington
					Wayne
					Wilson

(b) Mental Health Planning Areas. The DHHS has assigned the counties of the state to the following Mental Health Planning Areas for purposes of the State Medical Facilities Plan:

MENTAL HEALTH PLANNING AREAS

Area Number	Constituent Counties
1	Cherokee, Clay, Graham, Haywood, Jackson, Macon, Swain
2	Buncombe, Madison, Mitchell, Yancey
3	Alleghany, Ashe, Avery, Watauga, Wilkes
4	Henderson, Transylvania
5	Alexander, Burke, Caldwell, McDowell
6	Rutherford, Polk
7	Cleveland, Gaston, Lincoln
8	Catawba
9	Mecklenburg
10	Cabarrus, Rowan, Stanly, Union
11	Surry, Yadkin, Iredell
12	Forsyth, Stokes, Davie
13	Rockingham
14	Guilford
15	Alamance, Caswell
16	Orange, Person, Chatham
17	Durham
18	Vance, Granville, Franklin, Warren
19	Davidson
20	Anson, Hoke, Montgomery, Moore, Richmond
21	Bladen, Columbus, Robeson, Scotland
22	Cumberland
23	Lee, Harnett
24	Johnston
25	Wake
26	Randolph
27	Brunswick, New Hanover, Pender
28	Onslow
29	Wayne

TEMPORARY RULES

- | | |
|----|---|
| 30 | Wilson, Greene |
| 31 | Edgecombe, Nash |
| 32 | Halifax |
| 33 | Carteret, Craven, Jones, Pamlico |
| 34 | Lenoir |
| 35 | Pitt |
| 36 | Bertie, Gates, Hertford, Northampton |
| 37 | Beaufort, Hyde, Martin, Tyrrell, Washington |
| 38 | Camden, Chowan, Currituck, Dare, Pasquotank, Perquimans |
| 39 | Duplin, Sampson |

(c) Mental Health Planning Regions. The DHHS has assigned the counties of the state to the following Mental Health Planning Regions for purposes of the State Medical Facilities Plan:

MENTAL HEALTH PLANNING REGIONS (AREA NUMBER AND CONSTITUENT COUNTIES)

Western (W)

- | | |
|----|--|
| 1 | Cherokee, Clay, Graham, Haywood, Jackson, Macon, Swain |
| 2 | Buncombe, Madison, Mitchell, Yancey |
| 3 | Alleghany, Ashe, Avery, Watauga, Wilkes |
| 4 | Henderson, Transylvania |
| 5 | Alexander, Burke, Caldwell, McDowell |
| 6 | Rutherford, Polk |
| 7 | Cleveland, Gaston, Lincoln |
| 8 | Catawba |
| 9 | Mecklenburg |
| 10 | Cabarrus, Rowan, Stanly, Union |

North Central (NC)

- | | |
|----|------------------------------------|
| 11 | Surry, Yadkin, Iredell |
| 12 | Forsyth, Stokes, Davie |
| 13 | Rockingham |
| 14 | Guilford |
| 15 | Alamance, Caswell |
| 16 | Orange, Person, Chatham |
| 17 | Durham |
| 18 | Vance, Granville, Franklin, Warren |

South Central (SC)

- | | |
|----|--|
| 19 | Davidson |
| 20 | Anson, Hoke, Montgomery, Moore, Richmond |
| 21 | Bladen, Columbus, Robeson, Scotland |
| 22 | Cumberland |
| 23 | Lee, Harnett |
| 24 | Johnston |
| 25 | Wake |
| 26 | Randolph |

Eastern (E)

- | | |
|----|---|
| 27 | Brunswick, New Hanover, Pender |
| 28 | Onslow |
| 29 | Wayne |
| 30 | Wilson, Greene |
| 31 | Edgecombe, Nash |
| 32 | Halifax |
| 33 | Carteret, Craven, Jones, Pamlico |
| 34 | Lenoir |
| 35 | Pitt |
| 36 | Bertie, Gates, Hertford, Northampton |
| 37 | Beaufort, Hyde, Martin, Tyrrell, Washington |

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- 38 Camden, Chowan, Currituck, Dare, Pasquotank, Perquimans
- 39 Duplin, Sampson

(d) Radiation Oncology Treatment Center Planning Areas. The DHHS has assigned the counties of the state to the following Radiation Oncology Treatment Center Planning Areas for purposes of the State Medical Facilities Plan:

RADIATION ONCOLOGY TREATMENT CENTER PLANNING AREAS

Area Number	Constituent Counties
1	Cherokee, Clay, Graham, Jackson, Macon, Swain
2	Buncombe, Haywood, Madison, McDowell, Mitchell, Yancey
3	Ashe, Avery, Watauga
4	Henderson, Polk, Transylvania
5	Alexander, Burke, Caldwell, Catawba
6	Rutherford, Cleveland, Gaston, Lincoln
7	Mecklenburg, Anson, Union
8	Iredell, Rowan
9	Cabarrus, Stanly
10	Alleghany, Forsyth, Davidson, Davie, Stokes, Surry, Wilkes, Yadkin
11	Guilford, Randolph, Rockingham
12	Chatham, Orange
12B	Alamance, Caswell
13	Durham, Granville, Person, Vance, Warren
14	Moore, Hoke, Lee, Montgomery, Richmond, Scotland
15	Cumberland, Bladen, Sampson, Robeson
16	New Hanover, Brunswick, Columbus, Pender
17	Wake, Franklin, Harnett, Johnston
18	Lenoir, Duplin, Wayne
19	Craven, Carteret, Onslow, Jones, Pamlico
20	Nash, Halifax, Wilson, Northampton, Edgecombe
21	Pitt, Beaufort, Bertie, Greene, Hertford, Hyde, Martin, Washington
22	Pasquotank, Camden, Chowan, Currituck, Dare, Gates, Perquimans, Tyrrell

(e) Ambulatory Surgical Facility Planning Areas. The DHHS has assigned the counties of the state to the following Ambulatory Surgical Facility Planning Areas for purposes of the State Medical Facilities Plan:

AMBULATORY SURGICAL FACILITY PLANNING AREAS

Area	Constituent Counties
1	Alamance
2	Alexander, Iredell
3	Alleghany, Surry, Wilkes
4	Anson, Gaston, Mecklenburg, Union
5	Ashe, Avery, Watauga
6	Beaufort, Hyde
7	Bertie, Gates, Hertford
8	Bladen, Cumberland, Robeson, Sampson
9	Brunswick, Columbus, Duplin, New Hanover, Pender
10	Buncombe, Haywood, Madison, Mitchell, Yancey
11	Burke, McDowell, Rutherford
12	Cabarrus, Rowan, Stanly
13	Caldwell, Catawba, Lincoln
14	Camden, Currituck, Dare, Pasquotank, Perquimans
15	Carteret, Craven, Jones, Onslow, Pamlico
16	Caswell, Chatham, Orange
17	Cherokee, Clay, Graham, Jackson, Macon, Swain
18	Chowan, Tyrrell, Washington
19	Cleveland
20	Davidson, Davie, Forsyth, Stokes, Yadkin
21	Durham, Granville, Person
22	Edgecombe, Halifax, Nash, Northampton

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23	Franklin, Harnett, Johnston, Wake
24	Greene, Lenoir, Martin, Pitt
25	Guilford, Randolph, Rockingham
26	Henderson, Polk, Transylvania
27	Hoke, Lee, Montgomery, Moore, Richmond, Scotland
28	Vance, Warren
29	Wayne
30	Wilson

(f) Magnetic Resonance Imaging (MRI) Scanners Service Areas for fixed MRI scanners. The DHHS has assigned the counties of the state to the following Magnetic Resonance Imaging Scanners Service Areas for purposes of the State Medical Facilities Plan for fixed MRI scanners.

MAGNETIC RESONANCE IMAGING SCANNERS PLANNING AREAS

Area Number	Constituent Counties
1	Cherokee, Clay
1A	Macon
2	Graham, Swain, Jackson
3	Haywood
4	Buncombe, Madison, Yancey
5	Mitchell, McDowell
6	Ashe, Avery, Watauga
7	Alexander, Burke, Caldwell, Catawba, Lincoln
8	Cleveland, Rutherford
9	Henderson, Polk, Transylvania
10	Gaston
11	Cabarrus, Rowan, Stanly
12	Iredell
13	Alleghany, Davie, Forsyth, Stokes, Surry, Wilkes, Yadkin
14	Alamance, Caswell
15	Davidson, Guilford, Randolph, Rockingham
16	Richmond, Scotland, Montgomery, Moore, Hoke
17	Anson, Mecklenburg, Union
18	Cumberland, Robeson, Sampson
19	Franklin, Wake
19A	Harnett, Johnston
20	Chatham, Orange, Lee
21	Durham, Granville, Person, Vance, Warren
22	Bladen, Brunswick, Columbus, Duplin, New Hanover, Pender
23	Carteret, Craven, Jones, Onslow, Pamlico
24	Wayne, Wilson
25	Beaufort, Bertie, Greene, Hyde, Lenoir, Martin, Pitt, Washington
26	Edgecombe, Halifax, Nash, Northampton
27	Camden, Chowan, Currituck, Dare, Gates, Hertford, Pasquotank, Perquimans, Tyrrell

(g) Mobile Magnetic Resonance Imaging Scanners Planning Regions. The DHHS has assigned the HSAs as outlined in 10 NCAC 03R .6403(a) to the following Mobile Magnetic Resonance Imaging scanners planning regions for purposes of the State Medical Facilities Plan.

MOBILE MAGNETIC RESONANCE IMAGING SCANNERS PLANNING REGIONS

Region Number	Constituent HSAs
<u>1</u>	<u>HSAs I, II, III</u>
<u>2</u>	<u>HSAs IV, V, VI</u>

(h) Positron Emission Tomography (PET) Scanners Planning Regions. The DHHS has assigned the HSAs as outlined in 10 NCAC 03R .6403(a) to the following Positron Emission Tomography (PET) Scanners Planning Regions for purposes of the State Medical Facilities Plan.

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POSITRON EMISSION TOMOGRAPHY (PET) SCANNERS PLANNING REGIONS

<u>Region Number</u>	<u>Constituent HSAs</u>
<u>1</u>	<u>HSA I</u>
<u>2</u>	<u>HSA II</u>
<u>3</u>	<u>HSA III</u>
<u>4</u>	<u>HSA IV</u>
<u>5</u>	<u>HSA V</u>
<u>6</u>	<u>HSA VI</u>

(i) Gamma Knife Planning Regions. The DHHS has assigned the HSAs as outlined in 10 NCAC 03R .6403(a) to the following Gamma Knife Planning Regions for purposes of the State Medical Facilities Plan.

GAMMA KNIFE PLANNING REGIONS

<u>Region Number</u>	<u>Constituent HSAs</u>
<u>1</u>	<u>HSAs I, II, III</u>
<u>2</u>	<u>HSAs IV, V, VI</u>

*History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(1);
Temporary Adoption Eff. January 1, 2003.*

10 NCAC 03R .6404 SERVICE AREAS AND PLANNING AREAS

(a) An acute care bed's service area is the acute care bed planning area in which the bed is located. The acute care bed planning areas are the hospital service systems which are defined as follows:

- (1) hospitals that are in the same city or within 10 miles of one another are in the same hospital service system;
- (2) hospitals that are under common ownership and within the same county are in the same hospital service system; or
- (3) a 10-mile radius around a hospital that is not included in one of the groups of hospitals described in Subparagraphs (1) or (2) of the Rule is a hospital service system.

(b) A rehabilitation bed's service area is the rehabilitation bed planning area in which the bed is located. The rehabilitation bed planning areas are the health service areas which are defined in 10 NCAC 03R .6403(a).

(c) An ambulatory surgical facility's service area is the ambulatory surgical facility planning area in which the facility is located. The ambulatory surgical facility planning areas are the multi-county groupings as defined in 10 NCAC 03R .6403(e).

(d) A radiation oncology treatment center's and linear accelerator's service area is the radiation oncology treatment center and linear accelerator planning area in which the facility is located. The radiation oncology treatment center and linear accelerator planning areas are the multi-county groupings as defined in 10 NCAC 03R .6403(d).

(e) A magnetic resonance imaging scanner's service area is the magnetic resonance imaging planning area in which the scanner is located. The magnetic resonance imaging planning areas are the multi-county groupings as defined in 10 NCAC 03R .6403(f).

(f) A nursing care bed's service area is the nursing care bed planning area in which the bed is located. Each of the 100 counties in the State is a separate nursing care bed planning area.

(g) A Medicare-certified home health agency office's service area is the Medicare-certified home health agency office planning area in which the office is located. Each of the 100 counties in the State is a separate Medicare-certified home health agency office planning area.

(h) A dialysis station's service area is the dialysis station planning area in which the dialysis station is located. Each of the 100 counties in the State is a separate dialysis station planning area.

(i) A hospice's service area is the hospice planning area in which the hospice is located. Each of the 100 counties in the State is a separate hospice planning area.

(j) A hospice inpatient facility bed's service area is the hospice inpatient facility bed planning area in which the bed is located. Each of the 100 counties in the State is a separate hospice inpatient facility bed planning area.

(k) A psychiatric bed's service area is the psychiatric bed planning area in which the bed is located. The psychiatric bed planning areas are the Mental Health Planning Regions which are defined in 10 NCAC 03R .6403(c).

(l) With the exception of chemical dependency (substance abuse) detoxification-only beds, a chemical dependency treatment bed's service area is the chemical dependency treatment bed planning area in which the bed is located. The chemical dependency (substance abuse) treatment bed planning areas are the Mental Health Planning Regions which are defined in 10 NCAC 03R .6403(c).

(m) A chemical dependency detoxification-only bed's service area is the chemical dependency detoxification-only bed planning area in which the bed is located. The chemical dependency (substance abuse) detoxification-only bed planning areas are the Mental Health Planning Areas which are defined in 10 NCAC 03R .6403(b).

(n) An intermediate care bed for the mentally retarded's service area is the intermediate care bed for the mentally retarded planning area in which the bed is located. The intermediate care bed for the mentally retarded planning areas are the Mental Health Planning Areas which are defined in 10 NCAC 03R .6403(b).

- (o) A heart-lung bypass machine's service area is the heart-lung bypass machine planning area in which the heart-lung bypass machine is located. The heart-lung bypass machine planning areas are the hospital service systems, as defined in 10 NCAC 03R .6404(a).
- (p) A unit of fixed cardiac catheterization and cardiac angioplasty equipments service area is the fixed cardiac catheterization and cardiac angioplasty equipment planning area in which the equipment is located. Each of the 100 counties in the State is a separate fixed cardiac catheterization and cardiac angioplasty equipment planning area.
- (q) A unit of shared fixed cardiac catheterization and cardiac angioplasty equipment's service area is the shared fixed cardiac catheterization and cardiac angioplasty planning area in which the equipment is located. The shared fixed cardiac catheterization and cardiac angioplasty planning areas are the hospital service systems, as defined in 10 NCAC 03R .6404(a).
- (r) A positron emission tomography scanner's service area and planning region is the health service area (HSA) in which the scanner is located and the planning region as defined in 10 NCAC 03R .6403(h). The health service areas are the multi-county groupings as defined in 10 NCAC 03R .6403(a).
- (s) An adult care home bed's service area is the adult care home bed planning area in which the bed is located. Each of the 100 counties in the State is a separate adult care home bed planning area.
- (t) An operating room's service area is the ambulatory surgical facility planning area in which the operating room is located. The ambulatory surgical facility planning areas are the multi-county groupings as defined in 10 NCAC 03R .6403(e).
- (u) A mobile magnetic resonance imaging scanner's service area is the planning region as defined in 10 NCAC 03R .6403(g). The health service areas are the multi-county groupings as defined in 10 NCAC 03R .6403(a).
- (v) A gamma knife's service area is the planning region as defined in 10 NCAC 03R .6403(i). The health service areas are the multi-county groupings as defined in 10 NCAC 03R .6403(a).

*History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(1);
Temporary Adoption Eff. January 1, 2003.*

10 NCAC 03R .6405 REALLOCATIONS AND ADJUSTMENTS

(a) REALLOCATIONS

- (1) Reallocations shall be made only to the extent that need determinations in 10 NCAC 03R .6406, through .6433 indicate that need exists after the inventories are revised and the need determinations are recalculated.
- (2) Beds or services which are reallocated once in accordance with this Rule shall not be reallocated again. Rather, the Medical Facilities Planning Section shall make any necessary changes in the next annual State Medical Facilities Plan.
- (3) Dialysis stations that are withdrawn, relinquished, not applied for, decertified, denied, appealed, or pending the expiration of the 30 day appeal period shall not be

reallocated. Instead, any necessary redetermination of need shall be made in the next scheduled publication of the Dialysis Report.

- (4) Appeals of Certificate of Need Decisions on Applications. Need determinations of beds or services for which the CON Section decision to approve or deny the application has been appealed shall not be reallocated until the appeal is resolved.

- (A) Appeals Resolved Prior to August 17: If such an appeal is resolved in the calendar year prior to August 17, the beds or services shall not be reallocated by the CON Section; rather the Medical Facilities Planning Section shall make the necessary changes in the next annual State Medical Facilities Plan, except for dialysis stations which shall be processed pursuant to Subparagraph (a)(3) of this Rule.

- (B) Appeals Resolved on or After August 17: If such an appeal is resolved on or after August 17 in the calendar year, the beds or services, except for dialysis stations, shall be made available for a review period to be determined by the CON Section, but beginning no earlier than 60 days from the date that the appeal is resolved. Notice shall be mailed by the Certificate of Need Section to all persons on the mailing list for the State Medical Facilities Plan, no less than 45 days prior to the due date for receipt of new applications.

- (5) Withdrawals and Relinquishments. Except for dialysis stations, a need determination for which a certificate of need is issued, but is subsequently withdrawn or relinquished, is available for a review period to be determined by the Certificate of Need Section, but beginning no earlier than 60 days from:

- (A) the last date on which an appeal of the notice of intent to withdraw the certificate could be filed if no appeal is filed;

- (B) the date on which an appeal of the withdrawal is finally resolved against the holder; or

- (C) the date that the Certificate of Need Section receives from the holder of the certificate of need notice that the certificate has been voluntarily relinquished.

Notice of the scheduled review period for the reallocated services or beds shall be mailed by the Certificate of Need Section to all persons on the mailing list for the State Medical Facilities

Plan, no less than 45 days prior to the due date for submittal of the new applications.

(6) Need Determinations for which No Applications are Received

(A) Services or beds with scheduled review in the Calendar Year on or before September 1: The Certificate of Need Section shall not reallocate the services or beds in this category for which no applications were received, because the Medical Facilities Planning Section will have sufficient time to make any necessary changes in the determinations of need for these services or beds in the next annual State Medical Facilities Plan, except for dialysis stations.

(B) Services or beds with scheduled review in the Calendar Year after September 1: Except for dialysis stations, a need determination in this category for which no application has been received by the last due date for submittal of applications shall be available to be applied for in the second Category I review period in the next calendar year for the applicable HSA. Notice of the scheduled review period for the reallocated beds or services shall be mailed by the Certificate of Need Section to all persons on the mailing list for the State Medical Facilities Plan, no less than 45 days prior to the due date for submittal of new applications.

(7) Need Determinations not Awarded because Application Disapproved

(A) Disapproval in the Calendar Year prior to August 17: Need determinations or portions of such need for which applications were submitted but disapproved by the Certificate of Need Section before August 17, shall not be reallocated by the Certificate of Need Section. Instead the Medical Facilities Planning Section shall make the necessary changes in the next annual State Medical Facilities Plan if no appeal is filed, except for dialysis stations.

(B) Disapproval in the Calendar Year on or After August 17: Need determinations or portions of such need for which applications were submitted but disapproved by the Certificate of Need Section on or after August 17, shall be reallocated by the Certificate of Need Section, except for dialysis stations. A need in

this category shall be available for a review period to be determined by the Certificate of Need Section but beginning no earlier than 95 days from the date the application was disapproved, if no appeal is filed. Notice of the scheduled review period for the reallocation shall be mailed by the Certificate of Need Section to all persons on the mailing list for the State Medical Facilities Plan, no less than 80 days prior to the due date for submittal of the new applications.

(8) Reallocation of Decertified ICF/MR Beds. If an ICF/MR facility's Medicaid certification is relinquished or revoked, the ICF/MR beds in the facility may be reallocated by the Department of Health and Human Services, Division of Facility Services, Medical Facilities Planning Section after consideration of recommendations from the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services. The Department of Health and Human Services, Division of Facility Services, Certificate of Need Section shall schedule reviews of applications for any reallocated beds pursuant to Subparagraph (a)(5) of this rule.

(b) CHANGES IN NEED DETERMINATIONS

(1) The need determinations in 10 NCAC 03R .6406 through 10 NCAC 03R .6433 shall be revised continuously by the Medical Facilities Planning Section throughout the calendar year to reflect all changes in the inventories of:

- (A) the health services listed at G.S. 131E-176 (16)f;
- (B) health service facilities;
- (C) health service facility beds;
- (D) dialysis stations;
- (E) the equipment listed at G.S. 131E-176 (16)f1;
- (F) mobile medical equipment; and
- (G) operating rooms as defined in 10 NCAC 03R .6408(b).

as those changes are reported to the Medical Facilities Planning Section. However, need determinations in 10 NCAC 03R .6406 through .6433 shall not be reduced if the relevant inventory is adjusted upward 60 days or less prior to applicable certificate of need application due dates.

(2) Inventories shall be updated to reflect:

- (A) decertification of Medicare-certified home health agencies or offices, intermediate care facilities for the mentally retarded, and dialysis stations;
- (B) delicensure of health service facilities and health service facility beds;
- (C) demolition, destruction, or decommissioning of equipment as

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- (D) elimination or reduction of a health service as listed at G.S. 131E-176(16) (f);
- (E) addition or reduction in operating rooms as defined in 10 NCAC 03R .6408(b);
- (F) psychiatric beds licensed pursuant to G.S. 131E-184(c);
- (G) certificates of need awarded, relinquished, or withdrawn, subsequent to the preparation of the inventories in the State Medical Facilities Plan; and
- (H) corrections of errors in the inventory as reported to the Medical Facilities Planning Section.

- (4) Need determinations resulting from changes in inventory shall be available for a review period to be determined by the Certificate of Need Section, but beginning no earlier than 60 days from the date of the action identified in Subparagraph (b)(2) of this Rule, except for dialysis stations which shall be determined by the Medical Facilities Planning Section and published in the next Dialysis Report. Notice of the scheduled review period for the need determination shall be mailed by the Certificate of Need Section to all persons on the mailing list for the State Medical Facilities Plan, no less than 45 days prior to the due date for submittal of the new applications.

(3) Any person who is interested in applying for a new institutional health service for which a need determination is made in 10 NCAC 03R .6406 through 10 NCAC 03R .6433 may obtain information about updated inventories

*History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b);
Temporary Adoption Eff. January 1, 2003.*

10 NCAC 03R .6406 ACUTE CARE BED NEED DETERMINATION (REVIEW CATEGORY A)

It is determined that there is need for five additional acute care beds in Cannon Memorial Hospital's "Hospital Service System." It is determined that there is no need for additional acute care beds anywhere else in the State.

<u>Hospital Service System</u>	<u>Acute Care Bed Need Determination</u>	<u>Cannon Memorial Hospital</u>
5		

*History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b);
Temporary Adoption Eff. January 1, 2003.*

10 NCAC 03R .6407 INPATIENT REHABILITATION BED NEED DETERMINATION (REVIEW CATEGORY E)

It is determined that there is no need for additional inpatient rehabilitation beds anywhere in the State.

*History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b);
Temporary Adoption Eff. January 1, 2003.*

10 NCAC 03R .6408 OPERATING ROOM NEED DETERMINATIONS (REVIEW CATEGORY E)

(a) It is determined that there is need for three additional operating rooms in one Ambulatory Surgery Service Area as follows. It is determined that there is no need for additional operating rooms anywhere else in the State.

<u>Ambulatory Surgery Service Area</u>	<u>Counties</u>	<u>Operating Room Need Determination</u>
<u>Hoke, Lee, Montgomery, Moore, Richmond, Scotland</u>	3	27

(b) "Operating room" means an inpatient operating room, an outpatient or ambulatory surgical operating room, a shared operating room, or an endoscopy procedure room in a licensed health service facility.

*History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b);
Temporary Adoption Eff. January 1, 2003.*

10 NCAC 03R .6409 OPEN HEART SURGERY SERVICES NEED DETERMINATION (REVIEW CATEGORY H)

It is determined that there is no need for additional open heart surgery services anywhere in the State.

*History Note: Authority G.S. 131E-176(25); 131E-177(1);
131E-183(b);*

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Temporary Adoption Eff. January 1, 2003.

10 NCAC 03R .6410 HEART-LUNG BYPASS MACHINE NEED DETERMINATION (REVIEW CATEGORY H)

It is determined that there is no need for additional heart-lung bypass machines anywhere in the State.

History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b);

Temporary Adoption Eff. January 1, 2003.

10 NCAC 03R .6411 FIXED CARDIAC CATHETERIZATION/ANGIOPLASTY EQUIPMENT NEED DETERMINATIONS (REVIEW CATEGORY H)

(a) It is determined that there is a need for seven additional fixed units of cardiac catheterization/angioplasty equipment in four counties. It is determined that there is no need for additional fixed units of cardiac catheterization/angioplasty equipment anywhere else in the State.

<u>County</u>	<u>Fixed Cardiac Catheterization/Angioplasty Equipment Need Determination</u>	<u>Forsyth</u>
<u>1</u>		
<u>Guilford</u>	<u>1</u>	
<u>New Hanover</u>	<u>2</u>	
<u>Wake</u>	<u>3</u>	

(b) Fixed cardiac catheterization equipment means cardiac catheterization equipment that is not mobile cardiac catheterization equipment, as that term is defined in 10 NCAC 03R .1613(14).

(c) Mobile cardiac catheterization equipment, as defined in 10 NCAC 03R .1613(14), and services shall only be approved for development on hospital sites.

History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b);
Temporary Adoption Eff. January 1, 2003.

10 NCAC 03R .6412 SHARED FIXED CARDIAC CATHETERIZATION/ANGIOPLASTY EQUIPMENT NEED DETERMINATION (REVIEW CATEGORY H)

(a) It is determined that there is a need for one unit of shared fixed cardiac catheterization/angioplasty equipment in Randolph Hospital's "Hospital Service System." It is determined that there is no need for additional units of shared fixed cardiac catheterization/angioplasty equipment anywhere else in the State.

<u>Hospital Service System</u>	<u>Shared Fixed Cardiac Catheterization/Angioplasty Equipment Need Determination</u>	<u>Randolph</u>
<u>Hospital</u>	<u>1</u>	

(b) Shared fixed cardiac catheterization/angioplasty equipment means fixed equipment that is used to perform both cardiac catheterization procedures and angiography procedures.

History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b);

Temporary Adoption Eff. January 1, 2003.

10 NCAC 03R .6413 BURN INTENSIVE CARE SERVICES NEED DETERMINATION (REVIEW CATEGORY H)

It is determined that there is no need for additional burn intensive care services anywhere in the State.

History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b);
Temporary Adoption Eff. January 1, 2003.

10 NCAC 03R .6414 BONE MARROW TRANSPLANTATION SERVICES NEED DETERMINATION (REVIEW CATEGORY H)

(a) It is determined that there is no need for additional allogeneic or autologous bone marrow transplantation services anywhere in the State.

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(b) Allogeneic bone marrow transplants shall be provided only in facilities having the capability of doing human leucocyte antigens (HLA) matching and of management of patients having solid organ transplants. At their present stage of development it is determined that allogeneic bone marrow transplantation services shall be limited to Academic Medical Center Teaching Hospitals.

*History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b);
Temporary Adoption Eff. January 1, 2003.*

10 NCAC 03R .6415 SOLID ORGAN TRANSPLANTATION SERVICES NEED DETERMINATION (REVIEW CATEGORY H)

(a) It is determined that there is no need for new solid organ transplantation services anywhere in the State.

(b) Solid organ transplant services shall be limited to Academic Medical Center Teaching Hospitals at this stage of the development of this service and availability of solid organs.

*History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b);
Temporary Adoption Eff. January 1, 2003.*

10 NCAC 03R .6416 LITHOTRIPTER NEED DETERMINATION (REVIEW CATEGORY H)

It is determined that there is no need for additional lithotripters anywhere in the State.

*History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b);
Temporary Adoption Eff. January 1, 2003.*

10 NCAC 03R .6417 GAMMA KNIFE NEED DETERMINATION (REVIEW CATEGORY H)

It is determined that there is a need for one gamma knife in Gamma Knife Planning Region 2. It is determined that there is no need for additional gamma knives anywhere else in the State.

<u>Gamma Knife Planning Region</u>	<u>Gamma Knife Need Determination</u>
<u>2 (HSAs IV, V, VI)</u>	<u>1</u>

*History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b);
Temporary Adoption Eff. January 1, 2003.*

10 NCAC 03R .6418 RADIATION ONCOLOGY TREATMENT CENTER/LINEAR ACCELERATOR NEED DETERMINATIONS (REVIEW CATEGORY H)

It is determined that there is a need for one additional Radiation Oncology Treatment Center in one Radiation Oncology Treatment Center Service Area as follows. It is determined that there is no need for an additional radiation oncology treatment center anywhere else in the State.

<u>Radiation Oncology Treatment Center Service Area</u>	<u>Radiation Oncology Treatment Center Need Determination</u>
<u>15 (Cumberland, Bladen, Robeson, Sampson)</u>	<u>1</u>

*History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b);
Temporary Adoption Eff. January 1, 2003.*

10 NCAC 03R .6419 FIXED DEDICATED POSITRON EMISSION TOMOGRAPHY (PET) SCANNERS NEED DETERMINATION (REVIEW CATEGORY H)

(a) It is determined that there is a need for nine fixed dedicated PET scanners in five PET Scanner Planning Regions. It is determined that there is no need for additional fixed dedicated PET scanners anywhere else in the State.

(b) Dedicated PET Scanners are scanners used solely for PET imaging.

<u>PET Scanner Planning Region</u>	<u>Fixed Dedicated PET Scanner Need Determination</u>
<u>I</u>	<u>1</u>
<u>II</u>	<u>2</u>
<u>III</u>	<u>3</u>
<u>V</u>	<u>2</u>
<u>VI</u>	<u>1</u>

TEMPORARY RULES

History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b);
Temporary Adoption Eff. January 1, 2003.

10 NCAC 03R .6420 MOBILE DEDICATED POSITRON EMISSION TOMOGRAPHY (PET) SCANNER NEED DETERMINATION (REVIEW CATEGORY H)

- (a) It is determined that there is no need for additional mobile dedicated PET Scanners anywhere in the State.
- (b) Dedicated PET Scanners are scanners used solely for PET imaging.
- (c) Mobile PET Scanner means a PET scanner and transporting equipment which is moved to provide services at two or more host facilities.

History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b);
Temporary Adoption Eff. January 1, 2003.

10 NCAC 03R .6421 FIXED MAGNETIC RESONANCE IMAGING (MRI) SCANNERS NEED DETERMINATION BASED ON FIXED MRI SCANNER UTILIZATION (REVIEW CATEGORY H)

- (a) It is determined that there is a need for 18 additional fixed MRI Scanners based on fixed MRI Scanner utilization in the following Magnetic Resonance Imaging Scanners Service Areas. It is determined that there is no need for an additional fixed MRI Scanner anywhere else in the State, other than the additional scanners provided in 10 NCAC 03R .6422.

<u>Magnetic Resonance Imaging Scanners Service Areas (Constituent Counties)</u>	<u>Fixed MRI Scanners Need Determination</u>
<u>1 (Cherokee, Clay)</u>	<u>1</u>
<u>1A (Macon)</u>	<u>1</u>
<u>2 (Graham, Jackson, Swain)</u>	<u>1</u>
<u>4 (Buncombe, Madison, Yancey)</u>	<u>1</u>
<u>5 (McDowell, Mitchell)</u>	<u>1</u>
<u>7 (Alexander, Burke, Caldwell, Catawba, Lincoln)</u>	<u>1</u>
<u>8 (Rutherford, Cleveland)</u>	<u>1</u>
<u>11 (Cabarrus, Rowan, Stanly)</u>	<u>1</u>
<u>13 (Alleghany, Davie, Forsyth, Stokes, Surry, Wilkes, Yadkin)</u>	<u>1</u>
<u>15 (Davidson, Guilford, Randolph, Rockingham)</u>	<u>1</u>
<u>16 (Hoke, Montgomery, Moore, Richmond, Scotland)</u>	<u>1</u>
<u>17 (Anson, Mecklenburg, Union)</u>	<u>1</u>
<u>19 (Franklin, Wake)</u>	<u>1</u>
<u>19A (Harnett, Johnston)</u>	<u>1</u>
<u>21 (Durham, Granville, Person, Vance, Warren)</u>	<u>1</u>
<u>23 (Carteret, Craven, Jones, Onslow, Pamlico)</u>	<u>1</u>
<u>24 (Wayne, Wilson)</u>	<u>1</u>
<u>25 (Beaufort, Bertie, Greene, Hyde, Lenoir, Martin, Pitt, Washington)</u>	<u>1</u>

- (b) MRI Scanners. "Fixed MRI scanners" means MRI Scanners that are not mobile MRI Scanners, as that term is defined in 10 NCAC 03R .2713(5).

History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b);
Temporary Adoption Eff. January 1, 2003.

10 NCAC 03R .6422 FIXED MAGNETIC RESONANCE IMAGING (MRI) SCANNERS NEED DETERMINATION BASED ON MOBILE MRI SCANNER UTILIZATION (REVIEW CATEGORY H)

- (a) It is determined that there is a need for five additional fixed MRI Scanners based on utilization of mobile MRI Scanners in the following Magnetic Resonance Imaging Scanners Service Areas. It is determined that there is no need for an additional fixed MRI Scanner anywhere else in the State, other than the additional scanners provided in 10 NCAC 03R .6421.

<u>Magnetic Resonance Imaging Scanners Service Areas (Constituent Counties)</u>	<u>Fixed MRI Scanners Need Determination</u>
<u>12 (Iredell)</u>	<u>1</u>
<u>13 (Alleghany, Davie, Forsyth, Stokes, Surry, Wilkes, Yadkin)</u>	<u>1</u>
<u>15 (Davidson, Guilford, Randolph & Rockingham)</u>	<u>2</u>
<u>17 (Anson, Mecklenburg, Union)</u>	<u>1</u>

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(b) MRI Scanners. "Fixed MRI scanners" means MRI Scanners that are not mobile MRI Scanners, as that term is defined in 10 NCAC 03R .2713(5).

History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b);
Temporary Adoption Eff. January 1, 2003.

10 NCAC 03R .6423 MOBILE MAGNETIC RESONANCE IMAGING (MRI) SCANNERS NEED DETERMINATION (REVIEW CATEGORY H)

(a) It is determined that there is a need for two mobile MRI scanners in Mobile MRI Scanners Planning Regions. It is determined that there is no need for additional mobile MRI scanners anywhere else in the state.

<u>Mobile Magnetic Resonance Imaging Scanners Planning Region</u>	<u>Mobile MRI Scanner Need Determination</u>
<u>1 (HSAs I, II, III)</u>	<u>1</u>
<u>2 (HSAs IV, V, VI)</u>	<u>1</u>

(b) Mobile MRI Scanners. "Mobile MRI scanners" are MRI Scanners, as defined in 10 NCAC 03R .2713(5).

History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b);
Temporary Adoption Eff. January 1, 2003.

10 NCAC 03R .6424 NURSING CARE BED NEED DETERMINATIONS (REVIEW CATEGORY B)

It is determined that the counties listed in this Rule need additional Nursing Care beds as specified. It is determined that there is no need for additional Nursing Care beds anywhere else in the State.

<u>County</u>	<u>Number of New Nursing Care Beds Needed</u>
<u>Clay</u>	<u>10</u>
<u>Dare</u>	<u>40</u>
<u>Perquimans</u>	<u>10</u>
<u>Union</u>	<u>60</u>

History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b);
Temporary Adoption Eff. January 1, 2003.

10 NCAC 03R .6425 ADULT CARE HOME BED NEED DETERMINATIONS (REVIEW CATEGORY B)

It is determined that the counties listed in this Rule need additional Adult Care Home beds as specified. It is determined that there is no need for additional Adult Care Home beds anywhere else in the State.

<u>County</u>	<u>Number of Adult Care Home Beds Needed</u>
<u>Beaufort</u>	<u>50</u>
<u>Camden</u>	<u>10</u>
<u>Cherokee</u>	<u>130</u>
<u>Currituck</u>	<u>10</u>
<u>Dare</u>	<u>40</u>
<u>Gates</u>	<u>10</u>
<u>Graham</u>	<u>10</u>
<u>Greene</u>	<u>20</u>
<u>Hyde</u>	<u>30</u>
<u>Jackson</u>	<u>30</u>
<u>Jones</u>	<u>30</u>
<u>Macon</u>	<u>80</u>
<u>Madison</u>	<u>10</u>
<u>Mitchell</u>	<u>80</u>
<u>Pender</u>	<u>80</u>
<u>Polk</u>	<u>30</u>
<u>Transylvania</u>	<u>50</u>

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<u>Tyrrell</u>	<u>20</u>
<u>Washington</u>	<u>20</u>

History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b);
Temporary Adoption Eff. January 1, 2003.

10 NCAC 03R .6426 MEDICARE-CERTIFIED HOME HEALTH AGENCY OFFICE NEED DETERMINATION (REVIEW CATEGORY F)

It is determined that there is a need for one Medicare-certified home health agency or office in Pamlico County. It is determined that there is no need for additional Medicare-certified home health agencies or offices anywhere else in the State.

<u>Counties</u>	<u>Number of New Home Health Agencies/</u>	
	<u>Offices Needed</u>	<u>Pamlico</u>
<u>1</u>		

History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b);
Temporary Adoption Eff. January 1, 2003.

10 NCAC 03R .6427 HOSPICE HOME CARE NEED DETERMINATION (REVIEW CATEGORY F)

It is determined that there is a need for one additional Hospice Home Care Program in Vance County. It is determined that there is no need for additional Hospice Home Care Programs anywhere else in the State.

<u>County</u>	<u>Number of New Hospice Home Care Programs Needed</u>
<u>Vance</u>	<u>1</u>

History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b);
Temporary Adoption Eff. January 1, 2003.

10 NCAC 03R .6428 HOSPICE INPATIENT BED NEED DETERMINATION (REVIEW CATEGORY F)

It is determined that the counties listed in this Rule need additional hospice inpatient beds as specified. It is determined that there is no need for additional hospice inpatient beds anywhere else in the State.

<u>County</u>	<u>Number of Hospice Inpatient Beds Needed</u>	<u>Catawba</u>
<u>5</u>		
<u>Forsyth</u>	<u>6</u>	
<u>Gaston</u>	<u>6</u>	
<u>Iredell</u>	<u>3</u>	
<u>Mecklenburg</u>	<u>11</u>	
<u>Richmond</u>	<u>9</u>	
<u>Union</u>	<u>3</u>	

History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b);
Temporary Adoption Eff. January 1, 2003.

10 NCAC 03R .6429 DIALYSIS STATION NEED DETERMINATION METHODOLOGY FOR REVIEWS BEGINNING APRIL 1, 2003

(a) The Medical Facilities Planning Section (MFPS) shall determine need for new dialysis stations twice during calendar year 2003, and shall make a report of such determinations available to all who request it. The first report shall be called the North Carolina January 2003 Semiannual Dialysis Report (SDR). Data to be used for these determinations, and their sources are as follows:

- (1) Numbers of dialysis patients as of June 30, 2002, by type, county and facility, from the Southeastern Kidney Council, Inc. (SEKC) supplemented by data from the Mid-Atlantic Renal Coalition, Inc.;
- (2) Certificate of need decisions, decisions appealed, appeals settled, and awards, from the Certificate of Need Section, DFS;
- (3) Facilities certified for participation in Medicare, from the Certification Section, DFS; and
- (4) Need determinations for which certificate of need decisions have not been made, from MFPS records.

Need determinations in this report shall be an integral part of the State Medical Facilities Plan.

(b) Need for new dialysis stations shall be determined as follows:

- (1) County Need (using the trend line ending with 12/31/01 data)

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- (A) The average annual rate (%) of change in total number of dialysis patients resident in each county from the end of 1997 to the end of 2001 is multiplied by the county's June 30, 2002 total number of patients in the SDR, and the product is added to each county's most recent total number of patients reported in the SDR. The sum is the county's projected total June 30, 2003 patients.
- (B) The percent of each county's total patients who were home dialysis patients on June 30, 2002 is multiplied by the county's projected total June 30, 2003 patients, and the product is subtracted from the county's projected total June 30, 2003 patients. The remainder is the county's projected June 30, 2003 in-center dialysis patients.
- (C) The projected number of each county's June 30, 2003 in-center patients is divided by 3.2. The quotient is the projection of the county's June 30, 2003 in-center dialysis stations.
- (D) From each county's projected number of June 30, 2003 in-center stations is subtracted the county's number of stations certified for Medicare, CON-approved and awaiting certification, awaiting resolution of CON appeals, and the number represented by need determinations in previous State Medical Facilities Plans or Semiannual Dialysis Reports for which CON decisions have not been made. The remainder is the county's June 30, 2003 projected station surplus or deficit.
- (E) If a county's June 30, 2003 projected station deficit is 10 or greater and the January 2003 SDR shows that utilization of each dialysis facility in the county is 80% or greater, the June 30, 2003 county station need determination is the same as the June 30, 2003 projected station deficit. If a county's June 30, 2003 projected station deficit is less than 10 or if the utilization of any dialysis facility in the county is less than 80%, the county's June 30, 2003 station need determination is zero.
- (2) Facility Need. A dialysis facility located in a county for which the result of the County Need methodology is zero in the January 2003 Semiannual Dialysis Report (SDR) is determined to need additional stations to the extent that:
 - (A) Its utilization, reported in the January 2003 SDR, is 3.2 patients per station or greater;
 - (B) Such need, calculated as follows, is reported in an application for a certificate of need:
 - (i) The facility's number of in-center dialysis patients reported in the July 2002 SDR (SDR₁) is subtracted from the number of in-center dialysis patients reported in the January 2003 SDR (SDR₂). The difference is multiplied by two to project the net in-center change for one year. Divide the projected net in-center change for the year by the number of in-center patients from SDR₁ to determine the projected annual growth rate.
 - (ii) The quotient from Subpart (b)(2)(B)(i) of this Rule is divided by 12.
 - (iii) The quotient from Subpart (b)(2)(B)(i) of this Rule is multiplied by 6 (the number of months from June 30, 2002 until December 31, 2002) for the January 2003 SDR.
 - (iv) The product from Subpart (b)(2)(B)(iii) of this Rule is multiplied by the number of the facility's in-center patients reported in the January 2003 SDR and that product is added to such reported number of in-center patients.
 - (v) The sum from Subpart (b)(2)(B)(iv) of this Rule is divided by 3.2, and from the quotient is subtracted the facility's current number of certified stations as recorded in the January 2003 SDR and the number of pending new stations for which a certificate of need has been issued. The remainder is the number of stations needed.
 - (C) The facility may apply to expand to meet the need established in Subpart (b)(2)(B)(v) of this Rule, up to a maximum of 10 stations.
- (c) The schedule for publication of the January 2003 Semiannual Dialysis Report (SDR) and for receipt of certificate of need applications for the April 1, 2003 Review Period shall be as follows:

<u>Data for</u> <u>Period Ending</u>	<u>Due Date for</u> <u>SEKC Report</u>	<u>Publication</u> <u>of SDR</u>	<u>Receipt of CON</u> <u>Applications</u>	<u>Beginning Review</u> <u>Date</u>
<u>June 30, 2002</u>	<u>Nov. 12, 2002</u>	<u>Jan. 2, 2003</u>	<u>March 17, 2003</u>	<u>April 1, 2003</u>

- (d) An application for a certificate of need pursuant to this Rule shall be considered consistent with G.S. 131E-183(a)(1) only if it demonstrates a need by utilizing one of the methods of determining need outlined in this Rule.
- (e) Home patients shall not be included in determination of need for new stations.

History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b);
Temporary Adoption Eff. January 1, 2003.

**10 NCAC 03R .6430 DIALYSIS STATION NEED DETERMINATION METHODOLOGY FOR REVIEWS
BEGINNING OCTOBER 1, 2003**

- (a) The Medical Facilities Planning Section (MFPS) shall determine need for new dialysis stations twice during calendar year 2003, and shall make a report of such determinations available to all who request it. The second report shall be called the North Carolina July 2003 Semiannual Dialysis Report (SDR). Data to be used for these determinations, and their sources, are as follows:

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- (1) Numbers of dialysis patients as of December 31, 2002, by type, county and facility, from the Southeastern Kidney Council, Inc. (SEKC) supplemented by data from the Mid-Atlantic Renal Coalition, Inc.;
- (2) Certificate of need decisions, decisions appealed, appeals settled, and awards, from the Certificate of Need Section, DFS;
- (3) Facilities certified for participation in Medicare, from the Certification Section, DFS; and
- (4) Need determinations for which certificate of need decisions have not been made, from MFPS records.

Need determinations in this report shall be an integral part of the State Medical Facilities Plan.

(b) Need for new dialysis stations shall be determined as follows:

- (1) County Need (using the trend line ending with 12/31/02 data)
 - (A) The average annual rate (%) of change in total number of dialysis patients resident in each county from the end of 1998 to the end of 2002 is multiplied by the county's December 31, 2002 total number of patients in the SDR, and the product is added to each county's most recent total number of patients reported in the SDR. The sum is the county's projected total December 31, 2003 patients.
 - (B) The percent of each county's total patients who were home dialysis patients on December 31, 2002 is multiplied by the county's projected total December 31, 2003 patients, and the product is subtracted from the county's projected total December 31, 2003 patients. The remainder is the county's projected December 31, 2003 in-center dialysis patients.
 - (C) The projected number of each county's December 31, 2003 in-center patients is divided by 3.2. The quotient is the projection of the county's December 31, 2003 in-center dialysis stations.
 - (D) From each county's projected number of December 31, 2003 in-center stations is subtracted the county's number of stations certified for Medicare, CON-approved and awaiting certification, awaiting resolution of CON appeals, and the number represented by need determinations in previous State Medical Facilities Plans or Semiannual Dialysis Reports for which CON decisions have not been made. The remainder is the county's December 31, 2003 projected station surplus or deficit.
 - (E) If a county's December 31, 2003 projected station deficit is ten or greater and the July 2003 SDR shows that utilization of each dialysis facility in the county is 80% or greater, the December 31, 2003 county station need determination is the same as the December 31, 2003 projected station deficit. If a county's December 31, 2003 projected station deficit is less than 10 or if the utilization of any dialysis facility in the county is less than 80%, the county's December 31, 2003 station need determination is zero.
- (2) Facility Need. A dialysis facility located in a county for which the result of the County Need methodology is zero in the July 2003 SDR is determined to need additional stations to the extent that:
 - (A) Its utilization, reported in the July 2003 SDR, is 3.2 patients per station or greater;
 - (B) Such need, calculated as follows, is reported in an application for a certificate of need:
 - (i) The facility's number of in-center dialysis patients reported in the January 2003 SDR (SDR_1) is subtracted from the number of in-center dialysis patients reported in the July 2003 SDR (SDR_2). The difference is multiplied by 2 to project the net in-center change for one year. Divide the projected net in-center change for the year by the number of in-center patients from SDR_1 to determine the projected annual growth rate.
 - (ii) The quotient from Subpart (b)(2)(B)(i) of this Rule is divided by 12.
 - (iii) The quotient from Subpart (b)(2)(B)(ii) of this Rule is multiplied by 12 (the number of months from December 31, 2002 until December 31, 2003) for the July 2003 SDR.
 - (iv) The product from Subpart (b)(2)(B)(iii) of this Rule is multiplied by the number of the facility's in-center patients reported in the July 2003 SDR and that product is added to such reported number of in-center patients.
 - (v) The sum from Subpart (b)(2)(B)(iv) of this Rule is divided by 3.2, and from the quotient is subtracted the facility's current number of certified stations as recorded in the July 2003 SDR and the number of pending new stations for which a certificate of need has been issued. The remainder is the number of stations needed.
 - (C) The facility may apply to expand to meet the need established in Subpart (b)(2)(B)(v) of this Rule, up to a maximum of 10 stations.

(c) The schedule for publication of the July 2003 Semiannual Dialysis Report (SDR) and for receipt of certificate of need applications for the October 1, 2003 Review Period shall be as follows:

<u>Data for</u> <u>Period Ending</u>	<u>Due Date for</u> <u>SEKC Report</u>	<u>Publication</u> <u>of SDR</u>	<u>Receipt of</u> <u>CON Applications</u>	<u>Beginning</u> <u>Review Date</u>
<u>Dec. 31, 2002</u>	<u>May 12, 2003</u>	<u>July 1, 2003</u>	<u>September 15, 2003</u>	<u>October 1, 2003</u>

(d) An application for a certificate of need pursuant to this Rule shall be considered consistent with G.S. 131E-183(a)(1) only if it demonstrates a need by utilizing one of the methods of determining need outlined in this Rule.

(e) Home patients shall not be included in determination of need for new stations.

History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b);
Temporary Adoption Eff. January 1, 2003.

10 NCAC 03R .6431 PSYCHIATRIC BED NEED DETERMINATION (REVIEW CATEGORY C)

It is determined that there is no need for additional psychiatric beds anywhere in the State.

History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b);
Temporary Adoption Eff. January 1, 2003.

10 NCAC 03R .6432 CHEMICAL DEPENDENCY (SUBSTANCE ABUSE) TREATMENT BED NEED DETERMINATION (REVIEW CATEGORY C)

(a) It is determined that there is no need for additional chemical dependency (substance abuse) treatment beds for adolescents anywhere in the State.

(b) It is determined that there is no need for additional chemical dependency (substance abuse) treatment beds for adults anywhere in the State.

History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b);
Temporary Adoption Eff. January 1, 2003.

10 NCAC 03R .6433 INTERMEDIATE CARE FACILITY BEDS FOR THE MENTALLY RETARDED (ICF/MR) NEED DETERMINATION (REVIEW CATEGORY C)

It is determined that there is a need for 22 ICF/MR beds in the Gaston-Union-Cleveland mental health planning area. The ICF/MR beds shall be used for medically fragile individuals, regardless of age. It is determined that there is no need for additional ICF/MR beds anywhere else in the State.

History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b);
Temporary Adoption Eff. January 1, 2003.

10 NCAC 03R .6436 EXEMPTION FROM PLAN PROVISIONS FOR CERTAIN ACADEMIC MEDICAL CENTER TEACHING HOSPITAL PROJECTS

(a) Exemption from the provisions of 10 NCAC 03R .6406 through .6433 shall be granted to projects submitted by Academic Medical Center Teaching Hospitals designated in the State Medical Facilities Plan prior to January 1, 1990 which projects comply with one of the following conditions:

- (1) necessary to complement a specified and approved expansion of the number or types of students, residents or faculty, as certified by the head of the relevant associated professional school; or
- (2) necessary to accommodate patients, staff or equipment for a specified and approved expansion of research activities, as certified by the head of the entity sponsoring the research; or
- (3) necessary to accommodate changes in requirements of specialty education accrediting bodies, as evidenced by copies of documents issued by such bodies.

(b) A project submitted by an Academic Medical Center Teaching Hospital under this Rule that meets one of the above conditions shall also demonstrate that the Academic Medical Center Teaching Hospital's teaching or research need for the proposed project cannot be achieved effectively at any non-Academic Medical Center Teaching Hospital provider which currently offers the service for which the exemption is requested and which is within 20 miles of the Academic Medical Center Teaching Hospital.

(c) Any health service facility or health service facility bed that results from a project submitted under this Rule after January 1, 1999 shall be excluded from the inventory of that health service facility or health service facility bed in the State Medical Facilities Plan.

(d) The Academic Medical Center Teaching Hospitals designated in the State Medical Facilities Plan prior to January 1, 1990 and their dates of designation are as follows:

- | | |
|---|--------------------------|
| <u>(1) The North Carolina Baptist Hospitals</u> | <u>February 16, 1983</u> |
| <u>(2) Duke University Hospital</u> | <u>July 21, 1983</u> |
| <u>(3) University of North Carolina Hospitals</u> | <u>August 8, 1983</u> |
| <u>(4) Pitt County Memorial Hospital</u> | <u>August 8, 1983.</u> |

History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b);
Temporary Adoption Eff. January 1, 2003.

10 NCAC 03R .6437 POLICIES FOR GENERAL ACUTE CARE HOSPITALS

(a) Use of Licensed Bed Capacity Data for Planning Purposes. For planning purposes the number of licensed beds shall be determined by the Division of Facility Services in accordance with standards found in 10 NCAC 03C .3102(d) and Section .6200.

- (b) Reconversion to Acute Care. Facilities that have redistributed beds from acute care bed capacity to psychiatric, rehabilitation, or nursing care use, shall obtain a certificate of need to convert this capacity back to acute care. Applicants

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proposing to reconvert psychiatric, rehabilitation, or nursing care beds back to acute care beds shall demonstrate that the hospital's average annual utilization of licensed acute care beds as reported in the most recent licensure renewal application form is equal to or greater than the target occupancies shown below, but shall not be evaluated against the acute care bed need determinations shown in 10 NCAC 03R .6406.

<u>Licensed Acute Care Bed Capacity</u>	<u>Percent Occupancy</u>
<u>1 - 49</u>	<u>65%</u>
<u>50 - 99</u>	<u>70%</u>
<u>100 - 199</u>	<u>75%</u>
<u>200 - 699</u>	<u>80%</u>
<u>700 +</u>	<u>81.5%</u>

(c) Replacement of Acute Care Bed Capacity. The evaluation of proposals for either partial or total replacement of acute care beds (i.e., construction of new space for existing acute care beds) shall be evaluated against the utilization of the total number of acute care beds in the applicant's hospital in relation to utilization targets which follow. Any hospital proposing replacement of acute care beds must demonstrate the need for maintaining the acute care bed capacity proposed within the application.

<u>Total Licensed Acute Care Beds</u>	<u>Target Occupancy (Percent)</u>
<u>1 - 49</u>	<u>65%</u>
<u>50 - 99</u>	<u>70%</u>
<u>100 - 199</u>	<u>75%</u>
<u>200 - 699</u>	<u>80%</u>
<u>700 +</u>	<u>81.5%</u>

(d) Heart-Lung Bypass Machines for Emergency Coverage. To protect cardiac surgery patients who may require emergency procedures while scheduled procedures are underway, a need is determined for one additional heart-lung bypass machine whenever a hospital is operating an open heart surgery program with only one heart-lung bypass machine. The additional machine is to be used to assure appropriate coverage for emergencies and in no instance shall this machine be scheduled for use at the same time as the machine used to support scheduled open heart surgery procedures. A certificate of need application for a machine acquired in accordance with this provision shall be exempt from compliance with the performance standards set forth in 10 NCAC 03R .1715(2).

*History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b);
Temporary Adoption Eff. January 1, 2003.*

10 NCAC 03R .6438 POLICIES FOR NURSING CARE FACILITIES

(a) Provision Of Hospital-Based Nursing Care.

(1) A certificate of need may be issued to a hospital which is licensed under G.S. 131E, Article 5, and which meets the conditions set forth below and in 10 NCAC 03R .1100, to convert up to ten beds from its licensed acute care bed capacity for use as hospital-based nursing care beds without regard to determinations of need in 10 NCAC 03R .6424 if the hospital:

(A) is located in a county which was designated as non-metropolitan by the U. S. Office of Management and Budget on January 1, 2003; and

(B) on January 1, 2003, had a licensed acute care bed capacity of 150 beds or less.

The certificate of need shall remain in force as long as the Department of Health and Human Services determines that the hospital is meeting the conditions outlined in 10 NCAC 03R .6438(a).

(2) "Hospital-based nursing care" is defined as nursing care provided to a patient who has been directly discharged from an acute care bed and cannot be immediately placed in a licensed nursing facility because of the unavailability of a bed appropriate for the

individual's needs. Nursing care beds developed under 10 NCAC 03R .6438(a) are intended to provide placement for residents only when placement in other nursing care beds is unavailable in the geographic area. Hospitals which develop nursing care beds under 10 NCAC 03R .6438(a) shall discharge patients to other nursing facilities with available beds in the geographic area as soon as possible where appropriate and permissible under applicable law. Necessary documentation including copies of physician referral forms (FL 2) on all patients in hospital-based nursing units, shall be made available for review upon request by duly authorized representatives of licensed nursing facilities.

(3) For purposes of 10 NCAC 03R .6438(a), beds in hospital-based nursing care shall be certified as a "distinct part" as defined by the Centers for Medicare and Medicaid Services. Nursing Care beds in a "distinct part" shall be converted from the existing licensed acute care bed capacity of the hospital and shall not be reconverted to any other category or type of bed without a certificate of need. An application for a certificate of need for reconverting beds to acute care shall be evaluated against the hospital's service needs utilizing target occupancies shown in 10

NCAC 03R .6437(b), without regard to the acute care bed need shown in 10 NCAC 03R .6406.

(4) A certificate of need issued for a hospital-based nursing care unit shall remain in force as long as the following conditions are met:

(A) the nursing care beds shall be certified for participation in the Title XVIII (Medicare) and Title XIX (Medicaid) Programs;

(B) the hospital discharges residents to other nursing facilities in the geographic area with available beds when such discharge is appropriate and permissible under applicable law;

(C) patients admitted shall have been acutely ill inpatients of an acute hospital or its satellites immediately preceding placement in the nursing care unit.

(5) The granting of beds for hospital-based nursing care shall not allow a hospital to convert additional beds without first obtaining a certificate of need.

(6) Where any hospital, or the parent corporation or entity of such hospital, any subsidiary corporation or entity of such hospital, or any corporation or entity related to or affiliated with such hospital by common ownership, control or management:

(A) applies for and receives a certificate of need for nursing care bed need determinations in 10 NCAC 03R .6424; or

(B) currently has nursing home beds licensed as a part of the hospital under G.S. 131E, Article 5; or

(C) currently operates nursing care beds under the Federal Swing Bed Program (P.L. 96-499);

such hospital shall not be eligible to apply for a certificate of need for hospital-based nursing care beds under 10 NCAC 03R .6438(a). Hospitals designated by the State of North Carolina as Critical Access Hospitals pursuant to Section 1820(f) of the Social Security Act, as amended, which have not been allocated nursing care beds under provisions of G.S. 131E-175 through G.S. 131E-190, may apply to develop beds under 10 NCAC 03R .6438(a). However, such hospitals shall not develop nursing care beds both to meet needs determined in 10 NCAC 03R .6424 and 10 NCAC 03R .6438(a).

(7) Beds certified as a "distinct part" under 10 NCAC 03R .6438(a) shall be counted in the inventory of existing nursing care beds and used in the calculation of unmet nursing care bed need for the general population of a planning area. Applications for certificates of need pursuant to 10 NCAC 03R .6438(a) shall be accepted only for the February 1 review cycle for Health Service Areas I, II and III and

for the March 1 review cycle for Health Service Areas IV, V, VI as defined in 10 NCAC 03R .6404(a). Nursing care beds awarded under 10 NCAC 03R .6438(a) shall be deducted from need determinations for the county as shown in 10 NCAC 03R .6424. The Department of Health and Human Services shall monitor this program and ensure that patients affected by 10 NCAC 03R .6438(a) are receiving services as indicated by their care plan, and that conditions under which the certificate of need was granted are being met.

(b) Plan Exemption For Continuing Care Retirement Communities.

(1) Qualified continuing care retirement communities may include from the outset, or add or convert bed capacity for nursing care without regard to the nursing care bed need shown in 10 NCAC 03R .6424. To qualify for such exemption, applications for certificates of need shall show that the proposed nursing care bed capacity:

(A) will only be developed concurrently with, or subsequent to, construction on the same site of facilities for both of the following levels of care:

(i) independent living accommodations (apartments and homes) for persons who are able to carry out normal activities of daily living without assistance; such accommodations may be in the form of apartments, flats, houses, cottages, and rooms; and

(ii) licensed adult care home beds for use by persons who, because of age or disability require some personal services, incidental medical services, and room and board to assure their safety and comfort;

(B) will be used exclusively to meet the needs of persons with whom the facility has continuing care contracts (in compliance with the Department of Insurance statutes and rules) who have lived in a non-nursing unit of the continuing care retirement community for a period of at least 30 days. Exceptions shall be allowed when one spouse or sibling is admitted to the nursing unit at the time the other spouse or sibling moves into a non-nursing unit, or when the medical condition requiring nursing care was not known to exist or be imminent when the individual

became a party to the continuing care contract.;

(C) reflects the number of nursing care beds required to meet the current or projected needs of residents with whom the facility has an agreement to provide continuing care, after making use of all feasible alternatives to institutional nursing care; and

(D) will not be certified for participation in the Medicaid program.

(2) One half of the nursing care beds developed under this exemption shall be excluded from the inventory used to project nursing care bed need for the general population. All nursing care beds developed pursuant to the provisions of S.L. 1983, c. 920, or S.L. 1985, c. 445 shall be excluded from the inventory.

(c) Determination Of Need For Additional Nursing Care Beds In Single Provider Counties. When a nursing care facility with fewer than 80 nursing care beds is the only nursing care facility within a county, it may apply for a certificate of need for additional nursing care beds in order to bring the minimum number of nursing care beds available within the county to no more than 80 nursing care beds without regard to the nursing care bed need determination for that county as listed in 10 NCAC 03R .6424.

(d) Relocation Of Certain Nursing Facility Beds. A certificate of need to relocate existing licensed nursing facility beds to another county(ies) may be issued to a facility licensed as a nursing facility under G.S. 131E, Article 6, Part 1, provided that the conditions set forth in 10 NCAC 03R .6438(d) and in 10 NCAC 03R .1100 and the review criteria in G.S. 131E-183(a) are met.

(1) A facility applying for a certificate of need to relocate nursing facility beds shall demonstrate that:

(A) it is a non-profit nursing facility supported by and directly affiliated with a particular religion and that it is the only nursing facility in North Carolina supported by and affiliated with that religion;

(B) the primary purpose for the nursing facility's existence is to provide long-term care to followers of the specified religion in an environment which emphasizes religious customs, ceremonies, and practices;

(C) relocation of the nursing facility beds to one or more sites is necessary to more effectively provide nursing care to followers of the specified religion in an environment which emphasizes religious customs, ceremonies, and practices;

(D) the nursing facility is expected to serve followers of the specified religion from a multi-county area; and

(E) the needs of the population presently served shall be met adequately pursuant to G.S. 131E-183.

(2) Exemption from the provisions of 10 NCAC 03R .6424 shall be granted to a nursing facility for purposes of relocating existing licensed nursing care beds to another county provided that it complies with all of the criteria listed in 10 NCAC 03R .6438(d)(1)(A) through (E).

(3) Any certificate of need issued under 10 NCAC 03R .6438(d) shall be subject to the following conditions:

(A) the nursing facility shall relocate beds in at least two stages over a period of at least six months or such shorter period of time as is necessary to transfer residents desiring to transfer to the new facility and otherwise make discharge arrangements acceptable to residents not desiring to transfer to the new facility;

(B) the nursing facility shall provide a letter to the Licensure and Certification Section, on or before the date that the first group of beds are relocated, irrevocably committing the facility to relocate all of the nursing facility beds for which it has a certificate of need to relocate; and

(C) subsequent to providing the letter to the Licensure and Certification Section described in 10 NCAC 03R .6438(d)(3)(B), the nursing facility shall accept no new patients in the beds which are being relocated, except new patients who, prior to admission, indicate their desire to transfer to the facility's new location(s).

(e) Transfer Of Nursing Facility Beds From State Psychiatric Hospital Nursing Facilities To Community Facilities.

(1) Beds in State Psychiatric Hospitals that are certified as nursing facility beds may be relocated to licensed nursing facilities. However, before nursing facility beds are transferred out of the State Psychiatric Hospitals, services shall be available in the community. State hospital nursing facility beds that are relocated to licensed nursing facilities shall be closed within ninety days following the date the transferred beds become operational in the community. Licensed nursing facilities proposing to operate transferred nursing facility beds shall commit to serve the type of residents who are normally placed in nursing facility beds at the State psychiatric hospitals. To help ensure that relocated nursing facility beds will serve those persons who would have been served by State psychiatric hospitals in nursing facility beds, a certificate of need application to transfer

nursing facility beds from a State hospital shall include a written memorandum of agreement between the Director of the applicable State psychiatric hospital; the Chief of Adult Community Mental Health Services and the Chief of Institutional Services in the Division of MH/DD/SAS; the Secretary of Health and Human Services; and the person submitting the proposal.

- (2) 10 NCAC 03R .6438(e) does not allow the development of new nursing care beds. Nursing care beds transferred from State Psychiatric Hospitals to the community pursuant to 10 NCAC 03R .6438(e)(1) shall be excluded from the inventory.

(f) Relocation Of Nursing Facility Beds. Relocations of existing licensed nursing facility beds are allowed only within the host county and to contiguous counties currently served by the facility, except as provided in 10 NCAC 03R .6438(d). Certificate of need applicants proposing to relocate licensed nursing facility beds to contiguous counties shall:

- (1) demonstrate that the proposal shall not result in a deficit in the number of licensed nursing facility beds in the county that would be losing nursing facility beds as a result of the proposed project, as reflected in the State Medical Facilities Plan in effect at the time the certificate of need review begins; and
- (2) demonstrate that the proposal shall not result in a surplus of licensed nursing facility beds in the county that would gain nursing facility beds as a result of the proposed project, as reflected in the State Medical Facilities Plan in effect at the time the certificate of need review begins.

*History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b);
Temporary Adoption Eff. January 1, 2003.*

10 NCAC 03R .6439 POLICY FOR PLAN EXEMPTION FOR CONTINUING CARE RETIREMENT COMMUNITIES - ADULT CARE HOME BEDS

(a) Qualified continuing care retirement communities may include from the outset, or add or convert bed capacity for adult care without regard to the adult care home bed need shown in 10 NCAC 03R .6425. To qualify for such exemption, applications for certificates of need shall show that the proposed adult care home bed capacity:

- (1) will only be developed concurrently with, or subsequent to, construction on the same site of independent living accommodations (apartments and homes) for persons who are able to carry out normal activities of daily living without assistance; such accommodations may be in the form of apartments, flats, houses, cottages, and rooms;
- (2) will provide for the provision of nursing services, medical services, or other health related services as required for licensure by the Department of Insurance;

- (3) will be used exclusively to meet the needs of persons with whom the facility has continuing care contracts (in compliance with the Department of Insurance statutes and rules) who have lived in a non-nursing or adult care unit of the continuing care retirement community for a period of at least 30 days. Exceptions shall be allowed when one spouse or sibling is admitted to the adult care home unit at the time the other spouse or sibling moves into a non-nursing or adult care unit, or when the medical condition requiring nursing or adult care home care was not known to exist or be imminent when the individual became a party to the continuing care contract;

- (4) reflects the number of adult care home beds required to meet the current or projected needs of residents with whom the facility has an agreement to provide continuing care, after making use of all feasible alternatives to institutional adult care home care; and

- (5) will not participate in the Medicaid program or serve State-County Special Assistance recipients.

(b) One half of the adult care home beds developed under this exemption shall be excluded from the inventory used to project adult care home bed need for the general population.

*History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b);
Temporary Adoption Eff. January 1, 2003.*

10 NCAC 03R .6440 POLICIES FOR MEDICARE-CERTIFIED HOME HEALTH SERVICES

(a) Need Determination Upon Termination of County's Sole Medicare-Certified Home Health Agency. When a home health agency's board of directors, or in the case of a public agency, the responsible public body, votes to discontinue the agency's provision of Medicare-Certified home health services and to decertify the office; and

- (1) the agency is the only Medicare-Certified home health agency with an office physically located in the county; and
- (2) the agency is not being lawfully transferred to another entity;

need for a new Medicare-Certified home health agency office in the county is thereby established through this Paragraph. Following receipt of written notice of such decision from the home health agency's chief administrative officer, the Certificate of Need Section shall give public notice of the need for one Medicare-Certified home health agency office in the county, and the dates of the review of applications to meet the need. Such notice shall be given no less than 45 days prior to the final date for receipt of applications in a newspaper serving the county and to Medicare-Certified home health agencies located outside the county reporting serving county patients in the most recent licensure applications on file.

(b) Need Determination for at Least One Medicare-Certified Home Health Agency per County. When a county has no Medicare-Certified home health agency office physically located within the county's borders, need for a new Medicare-Certified

home health agency office in the county is thereby established through this Paragraph.

History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b); Temporary Adoption Eff. January 1, 2003.

10 NCC 03R .6441 POLICY FOR RELOCATION OF DIALYSIS STATIONS

Relocations of existing dialysis stations are allowed only within the host county and to contiguous counties currently served by the facility. Certificate of need applicants proposing to relocate dialysis stations to contiguous counties shall:

- (1) demonstrate that the proposal shall not result in a deficit in the number of dialysis stations in the county that would be losing stations as a result of the proposed project, as reflected in the most recent Dialysis Report; and
- (2) demonstrate that the proposal shall not result in a surplus of dialysis stations in the county that would gain stations as a result of the proposed project, as reflected in the most recent Dialysis Report.

History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b); Temporary Adoption Eff. January 1, 2003.

10 NCAC 03R .6442 POLICIES FOR PSYCHIATRIC INPATIENT FACILITIES

(a) Transfer of Psychiatric Beds from State Psychiatric Hospitals to Community Facilities. Beds in the State psychiatric hospitals used to serve short-term psychiatric patients may be relocated to community facilities through the Certificate of Need process. However, before psychiatric beds are transferred out of the State psychiatric hospitals, services and programs shall be available in the community. State hospital psychiatric beds which are relocated to community facilities shall be closed within 90 days following the date the transferred psychiatric beds become operational in the community. Facilities proposing to operate transferred psychiatric beds, shall submit an application to the Certificate of Need Section of the Department of Health and Human Services and commit to serve the type of short-term patients normally placed at the State psychiatric hospitals. To help ensure that relocated psychiatric beds will serve those persons who would have been served by the State psychiatric hospitals, a proposal to transfer psychiatric beds from a State hospital shall include a written memorandum of agreement between the area MH/DD/SAS program serving the county where the psychiatric beds are to be located, the Secretary of Health and Human Services, and the person submitting the proposal.

(b) Allocation of Psychiatric Beds. A hospital submitting a Certificate of Need application to add inpatient psychiatric beds shall convert excess licensed acute care beds to psychiatric beds. In determining excess licensed acute care beds, the hospital shall subtract the average occupancy rate for its licensed acute care beds over the previous 12-month period from the appropriate target occupancy rate for acute care beds listed in 10 NCAC 03R .6437(b) and multiply the difference in the percentage figure by

the number of its existing licensed acute care beds to calculate the excess licensed acute care beds.

(c) Linkages Between Treatment Settings. An applicant applying for a certificate of need for psychiatric inpatient facility beds shall document that the affected area mental health, developmental disabilities and substance abuse authorities have been contacted and invited to comment on the proposed services.

History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b); Temporary Adoption Eff. January 1, 2003.

10 NCAC 03R .6443 POLICY FOR CHEMICAL DEPENDENCY TREATMENT FACILITIES

In order to establish linkages between treatment settings, an applicant applying for a certificate of need for chemical dependency treatment beds, as defined in G.S. 131E-176(5b), shall document that the affected area mental health, developmental disabilities and substance abuse authorities have been contacted and invited to comment on the proposed services.

History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b); Temporary Adoption Eff. January 1, 2003.

10 NCAC 03R .6444 POLICY FOR INTERMEDIATE CARE FACILITIES FOR MENTALLY RETARDED

In order to establish linkages between treatment settings, an applicant applying for a certificate of need for intermediate care facility beds for the mentally retarded shall document that the affected area mental health, developmental disabilities and substance abuse authorities have been contacted and invited to comment on the proposed services.

History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b); Temporary Adoption Eff. January 1, 2003.

Rule-making Agency: DHHS – Division of Medical Assistance

Rule Citation: 10 NCAC 26D .0117

Effective Date: December 27, 2002

Findings Reviewed and Approved by: Julian Mann

Authority for the rulemaking: G.S. 108A-25(b); 108A-54; 108A-55; S.L. 2002-126

Reason for Proposed Action: During the 2002 Session of the General Assembly the members approved the reduction of Personal Care Services (PCS) hours as a decreased maximum of 60 hours instead of the previously approved 80 hours. Providers who will need to be reimbursed as well as those who receive PCS will now be limited to the maximum of 60 hours per month. The Personal Care Services (PCS) program covers aide services in the home for clients needing assistance with personal care (ADL/IADLs) due to a medical condition. Reimbursement is only made for the time spent performing specific covered tasks and the services must be physician authorized. Currently in NCAC, there is a 3.5-hour daily limitation on services up to a maximum of 80 hours per month, which needs to be amended to

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reflect the reduction to 60 hours per month. A decrease in the monthly maximum allowable hours to 60 will continue to allow adequate time for the tasks covered by the program while ensuring fiscal viability of the program.

The changes should have a very limited impact on the providers of the service or the recipients needing the care. Historically the majority of the services is limited to weekday hours and has not been provided on weekends. Most of the needs for these recipients, that constitute a covered service, can be completed in less than three hours per day. The 60 hours per month maximum will cover the need.

Comment Procedures: Written comments should be submitted to Kris M. Horton, Division of Medical Assistance, 1895 Umstead Drive, 2405 Mail Service Center, Raleigh, North Carolina 27699-2405. Fax: (919) 733-6608.

CHAPTER 26 - MEDICAL ASSISTANCE

**SUBCHAPTER 26D - LIMITATIONS ON AMOUNT:
DURATION: AND SCOPE**

10 NCAC 26D .0117 PERSONAL CARE SERVICES

(a) Reimbursement is not available for personal care services exceeding 60 hours per recipient per calendar month.

(b) Reimbursement for personal care services is not available to a given recipient on the same day another substantially equivalent service is provided. Substantially equivalent services include home health aide services, and personal care services provided through In-home Aide services at Level II and Level III - Personal Care as defined in 10 NCAC 22J .0103(2) and 10 NCAC 22J .0103(4).

(c) A member of the recipient's immediate family may not be employed by a provider agency to provide personal care services reimbursed by Medicaid. Immediate family members are defined as spouses, children, parents, grandparents, grandchildren, siblings, including corresponding step- and in-law relationships.

History Note: Authority G.S. 108A-25(b); 108A-54; 108A-55; S.L. 2002-126; S.L. 1985, c. 479, s. 86; 42 C.F.R.440.170(f); Eff. January 1, 1986; Amended Eff. December 1, 1991; Temporary Amendment Eff. December 27, 2002.

Rule-making Agency: DHHS – Division of Medical Assistance

Rule Citation: 10 NCAC 50B .0402

Effective Date: January 1, 2003

Findings Reviewed and Approved by: Julian Mann

Authority for the rulemaking: G.S. 108A-54; S.L. 2002-126, Sec. 21.19(n)

Reason for Proposed Action: The proposed rule revises Medicaid eligibility policy for pregnant women under age 21 to

count her parents' income when determining her eligibility for Medicaid. This rule is necessary to implement a cost containment provision of the State Budget: S.L. 2002-126 (S.B. 1115), Section 10.11.(a), amended S.L. 2001 –424, Section 21.19.(n)(1). The amendment changed the state law to require parents' income be counted when determining eligibility of pregnant women under 21 who live with their parents. According to the Conference Report on the Continuation, Capital, and Continuation Budgets, the projected savings for fiscal year 2002-2003 are \$244,793. The policy that the State has followed to not count parents' income when determining eligibility of pregnant women under 21 is an optional policy allowed under Section 1902(r)(2) of the Social Security Act. The State has the option not to apply it.

Comment Procedures: Written comments should be submitted to Kris M. Horton, Division of Medical Assistance, 1895 Umstead Drive, 2405 Mail Service Center, Raleigh, NC 27699-2405. Fax: (919) 733-6608.

CHAPTER 50 - MEDICAL ASSISTANCE

SUBCHAPTER 50B - ELIGIBILITY DETERMINATION

SECTION .0400 - BUDGETING PRINCIPALS

10 NCAC 50B .0402 FINANCIAL RESPONSIBILITY AND DEEMING

The income and resources of financially responsible persons are deemed available to the applicant or recipient in the following situations:

- (1) For aged, blind, and disabled individuals in a private living arrangement, financial responsibility and deeming of income and resources is based on methodologies in Title XVI of the Social Security Act. This applies to:
 - (a) spouses when living together or temporarily absent;
 - (b) parents for disabled or blind children under age 18 who are living in the household with them or temporarily absent.
- (2) For aged, blind, and disabled individuals in a long term care living arrangement, financial responsibility and deeming of income is based on methodologies in Title XVI of the Social Security Act. This applies to:
 - (a) spouse to spouse only for the month of entry into a long term care facility;
 - (b) parents for dependent children under age 18 in skilled nursing facilities, intermediate care facilities, intermediate care facilities for the mentally retarded, or hospitals whose care and treatment is not expected to exceed 12 months as certified by the patient's physician.
- (3) For aged, blind, and disabled individuals in a long term care living arrangement who have a spouse living in the community, treatment of

- income and resources is consistent with Section 1924 of the Social Security Act.
- (4) For AFDC related cases, financial responsibility exists for:
- (a) spouses when living together or one spouse is temporarily absent in long term care;
 - (b) parents for dependent children under age 21 living in the home with them or temporarily absent;
 - (c) parents for dependent children under age 21 in nursing facilities or intermediate care facilities for the mentally retarded except when such care and treatment is expected to exceed 12 months as certified in writing by their attending physician;
 - (d) parents for dependent children under age 21, in institutions for medical, surgical or inpatient psychiatric care, including inpatient treatment for substance abuse except when such care and treatment is expected to exceed 12 months as certified in writing by their attending physician and approved by the Division of Medical Assistance; and
 - (e) For pregnant women, the father of the unborn child if not married to the pregnant woman but living in the home and acknowledging paternity of the unborn child.
- (5) Parental financial responsibility for children in private living arrangements or long term care facilities for whom the county has legal custody or placement responsibility is based on court ordered support and voluntary contributions from the parents.

Authority for the rulemaking: *G.S. 58-2-40; 58-2-205; 150B-21.1(a3)*

Reason for Proposed Action: *An exception to adherence to the prior notice and hearing requirements has been made by the General Assembly in G.S. 58-2-205 and G.S. 150B-21.1(a3). Those statutes authorize the Commissioner of Insurance to amend these rules to keep them current with the model regulation on CPA audits of insurer financial statements, which is promulgated by the National Association of Insurance Commissioners.*

Comment Procedures: *Written comments should be submitted to Ray Martinez, NC Department of Insurance, PO Box 26387, Raleigh, NC 27611. Phone: (919) 733-5633.*

CHAPTER 11 - FINANCIAL EVALUATION DIVISION

SUBCHAPTER 11A - GENERAL PROVISIONS

SECTION .0500 - CPA AUDITS

11 NCAC 11A .0501 PURPOSE AND SCOPE

(a) The purpose of this Section is to improve the Department's surveillance of the financial condition of insurers by requiring an annual examination by CPAs of the financial statements reporting the financial condition and the results of operations of insurers.

(b) This Section applies to all insurers; provided that insurers having direct premiums written in North Carolina of less than two hundred fifty thousand dollars (\$250,000) in any year and having less than 500 policyholders in North Carolina at the end of any year are exempt from this Section for such year unless the Commissioner makes a specific finding that compliance is necessary for the Commissioner to carry out statutory responsibilities. Insurers must notify the Department on or before October 1 of each year of their exempt status.

(c) Foreign insurers filing audited financial reports in another state, pursuant to such other state's requirement of audited financial reports are exempt from this Section if:

- (1) A copy of the Audited Financial Report and Report on Internal Control Structure Related Matters noted in an audit are filed with such other state.
- (2) A copy of any Notification of Adverse Financial Condition Report filed with such other state is filed with the Commissioner within the time specified by such other state.

This Section does not prohibit, preclude, or in any way limit the Commissioner from ordering, conducting, or performing examinations of insurers under the General Statutes or this Title.

Authority G.S. 58-2-40; 58-2-205; 150B-21.1(a3).

11 NCAC 11A .0503 FILING AND EXTENSIONS FOR FILING REPORTS

(a) All insurers shall have an annual audit by a CPA and shall file an audited financial report with the Commissioner on or before May 10 for the previous calendar year. The

History Note: Authority G.S. 108A-54; 143-127.1; S.L. 1983, c. 761, s. 60(6); S.L. 1983, c. 1034; S.L. 1983, c. 1116; 42 C.F.R. 435.602; 42 C.F.R. 435.712; 42 C.F.R. 435.734; 42 C.F.R. 435.821; 42 C.F.R. 435.823; Eff. September 1, 1984; Temporary Amendment Eff. April 1, 1990 for a period of 180 days to expire on September 30, 1990; Amended Eff. January 1, 1995; September 1, 1992; October 1, 1990; August 1, 1990; Temporary Amendment Eff. January 1, 2003.

TITLE 11 – DEPARTMENT OF INSURANCE

This publication will serve as notice of Proposed Temporary Rule-making as required by G.S. 150B-21.1(a3).

Rule-making Agency: *NC Department of Insurance*

Rule Citation: *11 NCAC 11A .0501, .0503-.0506*

Effective Date: *February 15, 2003*

Commissioner may require an insurer to file an audited financial report earlier than May 10 with 90 days advance notice to the insurer. Two copies of this report shall be filed in the office of the Chief Examiner, Examination Section of the Department.

(b) An extension of the May 10 filing date may be granted by the Commissioner for a period of up to 45 days upon a showing by the insurer and its CPA of the reasons for requesting such extension and a determination by the Commissioner of good cause for an extension. The request for extension must be submitted in writing not less than 15 days prior to the due date and must be in sufficient detail to permit the Commissioner to make an informed decision with respect to the requested extension.

Authority G.S. 58-2-40; 58-2-205; 150B-21.1(a3).

11 NCAC 11A .0504 CONTENTS OF ANNUAL AUDITED FINANCIAL REPORT

(a) The annual Audited Financial Report shall report the financial position of the insurer as of the end of the most recent calendar year and the results of its operations, cash flows, and changes in capital and surplus for such year in conformity with statutory accounting practices prescribed, or otherwise permitted, by the Department.

(b) The annual Audited Financial Report shall include the following:

- (1) Report of CPA.
- (2) Balance sheet reporting admitted assets, liabilities, capital and surplus.
- (3) Statement of operations.
- (4) Statement of cash flows.
- (5) Statement of changes in capital and surplus.
- (6) Notes to financial statements. These notes shall be those required by the annual statement and the appropriate notes under generally accepted accounting principles and shall also include:
 - (A) A reconciliation of differences, if any, between the audited statutory financial statements and the Annual Statement filed pursuant to G.S. 58-2-165 with a written description of the nature of these differences; and
 - (B) A narrative explanation of all significant intercompany transactions and balances.
- (7) The financial statements included in the Audited Financial Report shall be prepared in a form and using language and groupings the same as the relevant sections of the Annual Statement of the insurer filed with the Commissioner, and:
 - (A) The financial statement shall be comparative, presenting the amounts as of December 31 of the current year and the amounts as of the immediately preceding December 31; provided, however, in the first year in which an insurer is required to file an audited financial report, the comparative data may be omitted.

(B) Amounts may be rounded to the nearest dollar.

(C) Upon written application of any insurer, the Commissioner may permit the filing of consolidated statutory financial statements provided columnar consolidating worksheets are included in the filing, showing each company separately, and including a listing and description of intercompany eliminations.

Authority G.S. 58-2-40; 58-2-205; 150B-21.1(a3).

11 NCAC 11A .0505 DESIGNATION OF CPA

(a) Each insurer required by this Section to file an annual audited financial report must within 60 days after becoming subject to such requirement, file with the Commissioner a Designation of CPA letter indicating the name and address of the CPA retained to conduct the annual audit set forth in this Section. Insurers not retaining a CPA on the effective date of this Section shall provide the Designation of CPA letter not less than two months before the date when the first certification is to be filed.

(b) The insurer shall obtain an Accountant's Appointment Letter from such CPA, and file a copy with the Commissioner stating that the accountant is aware of the provisions of the North Carolina General Statutes and Administrative Code that relate to accounting and financial matters and affirming that he will express his opinion on the financial statements in the terms of their conformity to the statutory accounting practices prescribed or otherwise permitted by the Department, specifying such exceptions as he may believe appropriate. In addition, the CPA must affirm that he is aware of and will comply with the provisions of 11 NCAC 11A .0511.

(c) If a CPA who was not the CPA for the immediately preceding filed audited financial report is engaged to audit the insurer's financial statements, the insurer shall within 30 days of the date the CPA is engaged notify the Department of this event. The insurer shall also furnish the Commissioner with a separate letter stating whether in the 24 months preceding such engagement there were any disagreements with the former CPA on any matter of accounting principles or practices, financial statement disclosure, or auditing scope or procedure, which disagreements, if not resolved to the satisfaction of the former accountant, would have caused him to make reference to the subject matter of the disagreement in connection with his opinion. The insurer shall also in writing request such former CPA to furnish a letter addressed to the insurer stating whether the CPA agrees with the statements contained in the insurer's letter, and, if not, stating the reasons for which he does not agree; and the insurer shall furnish such responsive letter from the former CPA to the Commissioner together with its own.

Authority G.S. 58-2-40; 58-2-205; 150B-21.1(a3).

11 NCAC 11A .0506 QUALIFICATIONS OF INDEPENDENT CPA

(a) The Commissioner shall not recognize:

TEMPORARY RULES

- (1) Any person or firm as a CPA that is not in good standing with the American Institute of Certified Public Accountants and in all states in which the CPA is licensed to practice; or
- (2) Has either directly or indirectly entered into an agreement of indemnity or release from liability (collectively referred to as indemnification) with respect to the audit of the insurer.

(b) Except as otherwise provided in this Section, a CPA shall be recognized as independent as long as he or she conforms to the standards of his or her profession, as contained in the Code of Professional Ethics of the American Institute of Certified Public Accountants and Rules and Regulations and Code of Ethics and Rules of Professional Conduct of the North Carolina State Board of Certified Public Accountant Examiners, or similar code.

(c) The Commissioner shall not recognize as a qualified independent certified public accountant, nor accept an annual audited financial report, prepared in whole or part by, a natural person who:

- (1) Has been convicted of fraud, bribery, a violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U. S. C. Sections 1961 to 1968k, or any dishonest conduct or practices under federal or state law;
- (2) Has been found to have violated the insurance laws of this state with respect to any previous reports submitted under this regulation; or
- (3) Has demonstrated a pattern or practice of failing to detect or disclose material information in previous reports filed under the provisions of this regulation.

(d) The Commissioner may hold a hearing to determine whether a CPA is independent and, considering the evidence presented, may rule that the CPA is not independent for purposes of expressing an opinion on the financial statements in the annual Audited Financial Report made pursuant to this Section and require the insurer to replace the CPA with another whose relationship with the insurer is independent within the meaning of this Section.

Authority G.S. 58-2-40; 58-2-205; 150B-21.1(a3).

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

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

Rule-making Agency: *NC Wildlife Resources Commission*

Rule Citation: *15A NCAC 10F .0326, .0336, .0352*

Effective Date for Temporary Rule: *March 15, 2003*

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

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

Reason for Proposed Action for Temporary Rule: *This notice includes a provision for a public hearing to take place February 10, 2003 and the effective date for this temporary rule to begin March 15, 2003. The reason for the temporary rule is that no permanent rule could become effective until 2004, which creates potential for boating and swimming hazards in the intervening warm weather seasons.*

Public Hearing:

Date: *February 10, 2003*

Time: *10:00 a.m.*

Location: *Wildlife Resources Conference Room, 3rd Floor Archdale Building, 512 North Salisbury St., Raleigh, NC*

Proposed Effective Date for Permanent Rule: *August 1, 2004*

Reason for Proposed Action:

15A NCAC 10F .0326 - Minnesott Beach *has complained that their current marking for no wake zone is not extended far enough and warrants revision. Our investigating officer has agreed that the zone should be extended. This extension will entail moving existing buoys; therefore no further purchase of buoys is anticipated.*

15A NCAC 10F .0336, .0352 - Camden County *has requested this rulemaking to address a water safety concern in Roland Creek*

Comment Procedures: *Comments from the public shall be directed to Joan Troy, WRC, 1701 Mail Services Center, Raleigh, NC 27699-1701. Comments shall be received through February 14, 2003.*

Fiscal Impact

- State**
- Local** *15A NCAC 10F .0336, .0352*
- Substantive** (*>\$5,000,000*)
- None** *15A NCAC 10F .0326*

CHAPTER 10 - WILDLIFE RESOURCES AND WATER SAFETY

SUBCHAPTER 10F - MOTORBOATS AND WATER SAFETY

SECTION .0300 - LOCAL WATER SAFETY REGULATIONS

15A NCAC 10F .0326 PAMLICO COUNTY

(a) Regulated Areas. This Rule applies to the following waters or portions of waters in Pamlico County:

- (1) Silverthorn Bay: the waters of Silverthorn Bay, a tributary of Lower Broad Creek;
- (2) Intracoastal Waterway: that portion of the Intracoastal Waterway beginning at the north side of the State Forestry Dock and extending to the land cut entrance on the south side of Jones Bay;
- (3) Minnesott Beach: the Minnesott Beach Yacht Basin and its access channel inland from the shoreline to 30 yards beyond the outermost points of the rock jetties in Neuse River.

TEMPORARY RULES

(b) Speed Limit. No person shall operate any motorboat or vessel at greater than no-wake speed in the regulated areas described in Paragraph (a) of this Rule.

(c) Placement and Maintenance of Markers. The Board of Commissioners of Pamlico County is designated a suitable agency for placement and maintenance of the markers implementing this Rule, subject to the approval of the United States Coast Guard and the United States Army Corps of Engineers.

History Note: Authority G.S. 75A-3; 75A-15; Eff. May 1, 1977; Amended Eff. December 1, 1985; November 1, 1977; Temporary Amendment Eff. March 15, 2003.

15A NCAC 10F .0336 NORTHAMPTON AND WARREN COUNTIES

(a) Regulated Area. This Rule applies only to that portion of Lake Gaston which lies within the boundaries of Northampton and Warren Counties.

(b) Speed Limit in Mooring Areas. No person shall operate a vessel at greater than no-wake speed while within a marked mooring area established with the approval of the Executive Director, or his representative, on the waters of Gaston Lake in Northampton and Warren Counties.

(c) Speed Limit Near Shore Facilities. No person shall operate a vessel at greater than no-wake speed within 50 yards of any marked boat launching area, dock, pier, bridge, marina, boat storage structure, or boat service area on the waters of the regulated areas described in Paragraph (a) of this Rule.

(d) Speed Limit in specific waters. No person shall operate a vessel at greater than no-wake speed within the following bodies of water:

- (1) the North Point Cove located on the north shore of Gaston Lake within Northampton County at the end of "Vincent Lane," at coordinates N 36° 31' 00" and W 077° 49' 25";
- (2) Big Stonehouse Creek at State Road 1357;
- (3) Songbird Creek at State Road 1360;
- (4) Six Pound Creek at State Road 1334; and
- (5) Lizard Creek at SR 1362.

(e) Restricted Swimming Areas. No person operating or responsible for the operation of a vessel shall permit it to enter any marked public swimming area established with the approval of the Executive Director, or his representative, on the waters of Gaston Lake in Northampton and Warren Counties.

(f) Placement and Maintenance of Markers. The Board of Commissioners of Northampton County and Warren County are designated as suitable agencies for placement and maintenance of the markers implementing this Rule, subject to the approval of the United States Coast Guard and United States Army Corps of Engineers. With regard to marking Gaston Lake, all of the supplementary standards listed in Rule .0301(g) of this Section shall apply.

History Note: Authority G.S. 75A-3; 75A-15; Eff. March 29, 1981; Amended Eff. June 1, 1994; March 1, 1993; September 1, 1989; Temporary Amendment Eff. March 15, 2003.

15A NCAC 10F .0352 CAMDEN COUNTY

(a) Regulated Areas. This Rule applies to the waters described below:

- (1) Edgewater Canal running parallel with and along the south shore of Camden Point in Camden County and the connecting channels to Albemarle Sound;
- (2) That portion of the ICW also known as the South Mills Shores Canal parallel to Bingham Road for a distance of approximately 1,000 feet to be marked at each end by appropriate markers;
- (3) The canals known as Canals No. 1, 2, 3 and 4 in Whitehall Shores; and
- (4) Roland Creek.

(b) Speed Limit. No person shall operate a vessel at greater than no-wake speed within the regulated area described in Paragraph (a) of this Rule.

(c) Placement and Maintenance of Markers. The Board of Commissioners of Camden County is designated a suitable agency for placement and maintenance of the markers implementing this Rule.

History Note: Authority G.S. 75A-3; 75A-15; Eff. June 1, 1987; Amended Eff. January 1, 1989; Temporary Amendment Eff. March 15, 2003.

TITLE 19A – DEPARTMENT OF TRANSPORTATION

Rule-making Agency: *North Carolina Department of Transportation – Division of Highways*

Rule Citation: *19A NCAC 02E .1101-.1108, .1201-.1205*

Effective Date: *January 1, 2003*

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

Authority for the rulemaking: *G.S. 20-4.01(32); 20-219.4; 136-130; 136-140.15; 136-140.16; 136-140.17; 136-140.18-19; 143B-346; 143B-348; 143B-350(f)*

Reason for Proposed Action:

19A NCAC 02E .1101-.1108 – Senate Bill 206, S.L. 2001-383, ratified August 26, 2001, directed the NCDOT to promulgate rules, set fees, and establish sign standards to implement the Tourist-Oriented Directional Sign Program (TODS). The TODS legislation became effective January 1, 2002 and the Board of Transportation approved these rules in May 2002. However, pursuant to the requirements in HB 232, Section 8(a), ratified September 2001, the department could not proceed with temporary rule-making until the Joint Legislative Commission on Governmental Operations approved the TODS fee. The Department proposes to adopt temporary rules which allow our staff to proceed with the legislative intent without further delay.

19A NCAC 02E .1201-.1205 – Senate Bill 438, S.L. 2001-441, ratified October 4, 2001 amended G.S. 20-4.01(32) and directed the Department of Transportation to promulgate rules for public vehicular registration and serve as registry for this vehicular designation. SB 438 directs the department to charge a fee of

not greater than \$500 per registration for public vehicular traffic designation. These rules are promulgated by the Department in response to the requirements of the legislation. The Board of Transportation initially approved these temporary rules in May 2002. The Board of Transportation revised the fee structure and again approved the fees on November 7, 2002. The legislation and the rules allow property owners to identify public vehicular areas and DWI laws will now be applicable on private property. These rules must be in place for the public vehicular laws to be fully enforced. Approval of the temporary rules will allow private property owners to immediately register for the public vehicular area designation and enforce all laws for the safety and well-being of our citizens.

Comment Procedures: Comments from the public shall be directed to Emily B. Lee, NCDOT, 1501 Mail Service Center, Raleigh, NC 27699-1501, phone (919) 733-2520, fax (919) 733-9150, and email elee@dot.state.nc.us.

CHAPTER 02 - DIVISION OF HIGHWAYS

SUBCHAPTER 02E - MISCELLANEOUS OPERATIONS

SECTION .1100 – TOURIST-ORIENTED DIRECTIONAL SIGN PROGRAM

19A NCAC 02E .1101 TOURIST-ORIENTED DIRECTIONAL SIGN (TODS) PROGRAM

(a) The Tourist-Oriented Directional Sign Program, hereinafter "Program," offered by the North Carolina Department of Transportation, hereinafter "Department," provides directional signing for eligible tourist attractions located off the state non-freeway system which is located within the right-of-way at intersections as specified in the Manual on Uniform Traffic Control Devices (MUTCD).

(b) Requests for information may be directed to the State Traffic Engineer, Division of Highways, Department of Transportation, 1592 Mail Service Center, Raleigh, North Carolina 27699-1592.

(c) The Division Engineer in which the attraction is located or his designee shall accept applications for participation in the Program.

History Note: Authority G.S. 136-130; 136-140.15; 136-140.16; 136-140.17; 136-140.18; 136-140.19; 143B-346; 143B-348; 143B-350(f); Temporary Adoption Eff. January 1, 2003.

19A NCAC 02E .1102 DEFINITIONS

For purposes of these Rules, the following definitions shall apply:

- (1) Panel - A TODS for the purpose of displaying the business identification of and directional information for eligible attractions.
- (2) Trailblazer – Additional TODS for the purpose of guiding tourists from the mainline intersection to the attraction.
- (3) Attraction – Classes of businesses or facilities as described in G.S. 136-140.15(b)(2) and (b)(3) which are of significant interest to tourists. When used in this Rule, the term

"attraction" means either a tourist-oriented business or a tourist-oriented facility.

History Note: Authority G.S. 136-89.56; 136-130; 136-140.15; 136-140.16; 136-140.17; 136-140.18; 136-140.19; 143B-346; 143B-348; 143B-350(f); Temporary Adoption Eff. January 1, 2003.

19A NCAC 02E .1103 LOCATION OF TODS

The Department shall control the erection and maintenance of official signs giving specific information of interest to the traveling public in accordance with following criteria:

- (1) The Department shall limit the placement of TODS panels to highways other than fully controlled access highways that are either in rural unincorporated areas or in towns or cities with a population of less than 40,000. TODS panels shall not be placed on highways that are in towns or cities with a population equal to or greater than 40,000.
- (2) The Department may only erect panels at intersections (at-grade). Trailblazers may be installed when further direction is needed to guide the tourist from the intersection to the attraction.
- (3) Panels shall be fabricated and located as detailed on the signing plans for the intersections and shall be located in a manner to take advantage of natural terrain and to have the least impact on the scenic environment.
- (4) A separate sign panel shall be provided on the intersection approach for each qualified attraction. Panels shall be allowed in each direction only when lateral spacing is available. The number of TODS panels shall not exceed a total of six per approach with only one attraction name on each TODS panel.
- (5) The center of the mainline TODS intersection shall not be more than five driving miles from the qualified attraction and shall not be placed where prohibited by local ordinance.
- (6) If an attraction is not directly on a State highway, it is eligible for TODS panels only if both of the following requirements are met:
 - (a) It is located on a street that directly connects with a state maintained road; and
 - (b) It is located so that only one TODS Trailblazer, placed on a state maintained road, will lead the tourist to the attraction.
- (7) Sign panels shall not be placed immediately in advance of the attraction if its on-premise advertising signs are readily visible from the highway.
- (8) TODS panels shall be located at least 200 feet in advance of the main intersection. Signs shall be spaced at least 200 feet apart and at least 200 feet from other traffic control devices. TODS panels shall not be located more than one-half (0.5) mile from the center of the main

intersection and shall not be placed in the signing sequence for any other prior intersections.

- (9) Existing warning, regulatory, guide or other official highway signs shall take precedence over TODS.

History Note: Authority G.S. 136-89.56; 136-130; 136-140.15; 136-140.16; 136-140.17; 136-140.18; 136-140.19; 143B-346; 143B-348; 143B-350(f); Temporary Adoption Eff. January 1, 2003.

19A NCAC 02E .1104 ELIGIBILITY FOR PROGRAM

An attraction is eligible to participate in the Program if it meets all of the following conditions:

- (1) It meets the criteria in G.S. 136-140.16; and
(2) The maximum distance that an attraction shall be located from the intersection containing TODS panels shall not exceed five miles. Said distance shall be measured from the center of the intersection coincident with the centerline of a non-controlled access highway route or its median, along the roadways to the respective attraction. The point to be measured to for each attraction is a point on the roadway that leads to the main entrance to the attraction that is perpendicular to the corner of the nearest wall of the attraction to the intersection. The wall to be measured to shall be that of the main building or office. Walls of sheds (concession stands, storage buildings, separate restrooms,) whether or not attached to the main building shall not be used for the purposes of measuring. If the office (main building) of an attraction is located more than two-tenths (0.2) mile from a public road on a private road or drive, the distance to the office along the said drive or road shall be included in the overall distance measured to determine whether or not the attraction qualifies for TODS signing. The office shall be presumed to be at the place where the services are provided.

History Note: Authority G.S. 136-89.56; 136-130; 136-140.15; 136-140.16; 136-140.17; 136-140.18; 136-140.19; 143B-346; 143B-348; 143B-350(f); Temporary Adoption Eff. January 1, 2003.

19A NCAC 02E .1105 COMPOSITION OF SIGNS

- (a) No TODS panel shall be displayed which would mislead or misinform the traveling public.
(b) Any messages that interfere with, imitate, or resemble any official warning or regulatory traffic sign, signal or similar device are prohibited.
(c) Each specific TODS panel shall include only information that is related to that specific attraction.
(d) TODS panel and trailblazer designs shall be in conformance with the standards as specified in the MUTCD and approved by the Department prior to fabrication and shipment.

History Note: Authority G.S. 136-89.56; 136-130; 136-140.15; 136-140.16; 136-140.17; 136-140.18; 136-140.19; 143B-346; 143B-348; 143B-350(f); Temporary Adoption Eff. January 1, 2003.

19A NCAC 02E .1106 FEES

The Department shall set fees to cover the initial costs of signs, sign maintenance, and administering the program.

- (1) The fees for participation in the program are as follows:
(a) Non-refundable application fee of one hundred seventy-five dollars (\$175.00) per contract shall be prepaid prior to field investigation.
(b) Initial construction fee of three hundred twenty-five dollars (\$325.00) per each sign.
(c) Annual maintenance fee of three hundred dollars (\$300.00) for each contract shall be renewed annually each July 1.
(d) Prorated Fee is a prorated portion of the maintenance fee. This fee shall be charged for that period of time between acceptance and placement of the TODS panel by the Department and the following July 1. This TODS prorated fee shall be charged on the first July 1 of the contract.
(e) Service Charge Fee of one hundred sixty dollars (\$160.00) per each TODS panel, each additional masking and unmasking, shall be charged when an attraction requests replacement of a sign, or when the Department performs replacement due to damages to the TODS panel caused by acts of vandalism, accidents, or natural causes including natural deterioration. The attraction shall provide a new or renovated TODS panel with the service charge fee per each TODS panel to the Department.
(f) All participating attractions shall prepay all associated costs for the installation and maintenance of the TODS panel(s).
(2) Fees may be paid by check or money order and are due in advance of the period of service covered by said fee. Failure to pay a charge when due is grounds for removal of the TODS panel and termination of the contract.

History Note: Authority G.S. 136-89.56; 136-130; 136-140.15; 136-140.16; 136-140.17; 136-140.18; 136-140.19; 143B-348; 143B-350(f); Temporary Adoption Eff. January 1, 2003.

19A NCAC 02E .1107 CONTRACTS WITH THE DEPARTMENT

TEMPORARY RULES

(a) The Department shall perform all required installation, maintenance, removal and replacement of all TODS panel(s).

(b) Applications shall be submitted to the Division Engineer for the Division in which the attraction is located, and must include a layout of the proposed TODS, and the initial application fee.

(c) Upon approval of the application for participation in the TODS program, the applicant must agree to submit the required program fees within 30 days of notification.

(d) No TODS panel shall be displayed which, in the opinion of the Department, is unsightly, badly faded, or in a state of dilapidation. The Department shall remove, replace, or mask any such TODS panel at the expense of the business. Ordinary maintenance services shall be performed by the Department at such necessary times upon payment of the annual renewal fee, and removal shall be performed upon failure to pay any fee or for violation of any provision of the rules in this Section and the TODS panel shall be removed.

(e) When a TODS panel is removed, it shall be taken to the Division Traffic Services Shop of the Division in which the attraction is located. The participant shall be notified in writing of such removal and given 30 days in which to retrieve his sign. After 30 days, the TODS panel shall become the property of the Department and shall be disposed of as the Department shall see fit.

(f) Should the Department determine that trailblazing to an attraction is desirable as described in Item (6) of Rule .1103 of this Section, it shall be done in conformance with the standards for a TODS trailblazer as defined in Item (2) of Rule .1102 of this Section. The participant shall furnish trailblazing signs required and deemed necessary by the Department. In such trailblazer installations, only one TODS trailblazer shall be used per each TODS intersection signed.

(g) Should an attraction qualify for TODS signage at two intersections, the TODS panel shall be erected at the nearest intersection. If the participant desires signing at the second intersection also, it may be so signed provided it does not prevent another attraction from being signed.

(h) An attraction under construction shall not be allowed to apply for participation in the program if its participation would prevent an existing open attraction applicant from participating, unless the open attraction has turned down a previous opportunity offered by the Department to participate in the program as provided in the program. After approval of an application, an attraction under construction shall be allowed priority participation over another qualifying attraction that opens for business prior to the time specified for opening in the application by the attraction under construction.

(i) The closest interested eligible attractions at an intersection up to a total of six TODS panels per approach to submit signed contracts shall be allowed TODS panels at that approach. Should the number of attractions at an approach increase to more than the maximum number of TODS panels allowed at that approach and a closer interested eligible participant requests installation of its TODS panels, the farthest qualifying participant shall be removed at the renewal date. Program participants may renew their respective contracts annually provided the attraction maintains program eligibility. An attraction with more than one sign displayed on any intersection approach leg shall have the additional sign(s) removed at the end of a contract period when other qualifying attractions apply for space on that approach.

(j) An attraction which has been closed for remodeling or repair shall be granted one year to complete the construction, renovation, or restoration, provided all TODS fees are maintained and the same type of qualifying service is provided after reopening, even if under a different business name as set out in G.S. 136-140.18(b). The signs shall then be reinstalled upon payment of a service charge fee per each TODS as described in Rule .1105 of this Section. The attraction shall be granted one year to complete the construction, renovation, or restoration, provided all TODS fees are maintained and the same type of qualifying service is provided after reopening, even if under a different business name. The signs shall then be reinstalled upon payment of a Service Charge fee as described in Subitem (1)(d) in Rule .1106 of this Section per each TODS panel.

(k) Should a participating attraction cease to be in compliance with G.S. 136-140.16 and the rules in this Section, the Division Engineer shall notify the participant that it shall be given 30 days to bring the attraction into compliance or its TODS panel(s) shall be removed. If the attraction is removed and later applies for reinstatement, this request shall be handled in the same manner as a request from a new applicant. When a participating attraction is determined not to be in compliance with G.S. 136-140.16 and the rules in this Section for a second time within two years of the first determination of non-compliance, its TODS panel(s) shall be permanently removed. If an attraction under construction is not open on the specified date in the agreement, the participant shall be given 30 days notification to request the TODS panel installation or forfeit its panel. Future applications shall be treated in the same manner as a new applicant.

(l) The transfer of ownership of an attraction for which an agreement has been lawfully executed shall not affect the validity of the agreement for the TODS agreement provided that the appropriate Division Engineer is given notice in writing of the transfer of ownership within 30 days of the actual transfer and the application is updated.

(m) No new contracts shall be accepted by the Department during the month of June. The renewal date for all contracts shall be on July 1.

(n) The Department shall not maintain waiting lists for the program.

History Note: Authority G.S. 136-89.56; 136-130; 136-140.15; 136-140.16; 136-140.17; 136-140.18; 136-140.19; 143B-346; 143B-348; 143B-350(f); Temporary Adoption Eff. January 1, 2003.

19A NCAC 02E .1108 APPEAL OF DECISION

(a) Any applicant who applies to participate in the program and is refused, or any attraction participating in the program has its contract terminated and signs removed, believes that the program is not being administered in accord with the Rules in this Section may appeal the decision of the Division Engineer to the Secretary of the Department of Transportation. The decision of the Secretary is final.

(b) The applicant or participant shall so notify the appropriate Division Engineer of his decision to appeal by certified mail, return receipt requested, within 10 days of the receipt of the decision.

(c) Within 20 days from the time of submitting his notice of appeal, the applicant or participant shall submit to the Secretary

a written appeal setting forth with particularity the facts upon which its appeal is based.

(d) Within 30 days from the receipt of the said written appeal or within such additional time as may be agreed to between the Secretary and the appealing party, the Secretary shall make an investigation of the said appeal. The Secretary shall then make findings of fact and conclusions pertaining to the appeal on behalf of the Department and the findings and conclusions shall be served upon the appealing party by certified mail, return receipt requested.

History Note: Authority G.S. 136-89.56; 136-130; 136-140.15; 136-140.16; 136-140.17; 136-140.18; 136-140.19; 143B-346; 143B-348; 143B-350(f); Temporary Adoption Eff. January 1, 2003.

SECTION .1200 – PRIVATE PROPERTY OWNERS

19A NCAC 02E .1201 PURPOSE

The North Carolina Department of Transportation's Public Vehicular Area designation exists to allow private property to be designated as a public vehicular area by the private property owner.

History Note: Authority G.S. 20-4.01(32); 20-219.4; 143B-346; 143B-348; 143B-350(f); Temporary Adoption Eff. January 1, 2003.

19A NCAC 02E .1202 DEFINITIONS

For the purposes of the rules in this Section, the following definitions shall apply:

- (1) "Department" shall mean the North Carolina Department of Transportation.
- (2) "Participants" shall mean the private property owners who have registered property as a Public Vehicular Area.

History Note: Authority G.S. 20-4.01(32); 20-219.4; 143B-346; 143B-348; 143B-350(f); Temporary Adoption Eff. January 1, 2003.

19A NCAC 02E .1203 PARTICIPATION

(a) The Division Engineer or his designee shall acknowledge receipt and registration of applications from participants applying to participate in designating a Public Vehicular Area.

(b) By certified check or money order, each participant shall pay a one time non-refundable, transferable fee of two hundred

dollars (\$200.00) for each registration. This registration fee shall cover the cost of one certified copy of the registration of the Public Vehicular Area. Requests for additional certified copies shall be submitted to the Division Engineer in writing along with a check or money order for five dollars (\$5.00) per copy.

(c) All applications shall be submitted on a form furnished by the Department.

History Note: Authority G.S. 20-4.01(32); 20-219.4; 143B-346; 143B-348; 143B-350(f); Temporary Adoption Eff. January 1, 2003.

19A NCAC 02E .1204 RESPONSIBILITIES OF PARTICIPANTS AND DEPARTMENT

(a) The Department shall provide a copy of the official design of the signs that shall state "Public Vehicular Area G.S. 20-219.4."

(b) Any participant shall:

- (1) locate signs in a manner that does not inhibit sight distance or create a safety hazard;
- (2) fabricate, install, and maintain signs in accordance with the Manual on Uniform Traffic Control Devices; and
- (3) erect signs to provide reasonable notice to the motorist. Signs indicating Public Vehicular Area shall be placed at the driveway entrances to the area or outside of right-of-way for areas with adjacent non-public vehicular areas.

History Note: Authority G.S. 20-4.01(32); 20-219.4; 143B-346; 143B-348; 143B-350(f); Temporary Adoption Eff. January 1, 2003.

19A NCAC 02E .1205 TERMINATION OF THE AGREEMENT

(a) Any participant may choose to cancel the agreement by notifying the Department. No prorated refund shall be given to the participant due to cancellation of agreement.

(b) A participant may choose to modify the agreement by resubmitting an application and two hundred dollars (\$200.00) fee for each registration.

History Note: Authority G.S. 20-4.01(32); 20-219.4; 143B-346; 143B-348; 143B-350(f); Temporary Adoption Eff. January 1, 2003.

This Section contains information for the meeting of the Rules Review Commission on Thursday, January 16, 2002, 10:00 a.m. at 1307 Glenwood Avenue, Assembly Room, Raleigh, NC. Anyone wishing to submit written comment on any rule before the Commission should submit those comments by Friday, December 10, 2002 to the RRC staff, the agency, and the individual Commissioners. Specific instructions and addresses may be obtained from the Rules Review Commission at 919-733-2721. Anyone wishing to address the Commission should notify the RRC staff and the agency at least 24 hours prior to the meeting.

RULES REVIEW COMMISSION MEMBERS

Appointed by Senate

Thomas Hilliard, III
Robert Saunders
Laura Devan
Jim Funderburke
David Twiddy

Appointed by House

Paul Powell - Chairman
Jennie J. Hayman Vice - Chairman
Dr. Walter Futch
Jeffrey P. Gray
Dr. John Tart

RULES REVIEW COMMISSION MEETING DATES

January 16, 2003 February 20, 2003
March 20, 2003 April 17, 2003
May 15, 2003 June 19, 2003

RULES REVIEW COMMISSION

December 19, 2002

MINUTES

The Rules Review Commission met on Thursday morning, December 19, 2002, in the Assembly Room of the Methodist Building, 1307 Glenwood Avenue, Raleigh, North Carolina. Commissioners present: Vice Chairman Jennie Hayman, Jim Funderburk, Walter Futch, Jeffrey Gray, Thomas Hilliard, and John Tart.

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

The following people attended:

Andy Ellen	NC Retail Merchants Association
Jennie Wilhelm Mau	NC Board for Licensing of Geologists
Tom West	Poyner and Spruill, LLP
Torrey McLean	DHHS/Public Health
Susan Collins	DHHS/DMH,DD,SAS
Matt Deslandez	DHHS/DMH,DD,SAS
Allan Russ	Secretary of State
Lynne Berry	Division of Aging
Phyllis Stewart	Division of Aging
Bob Rhinehardt	Department of Administration
Ellie Sprengel	Department of Insurance
Jean Holliday	Department of Insurance
Frank Folger	Department of Insurance
Bart Grimes	NC Substance Abuse Professional Licensing Board
Brooks Skinner	Department of Administration
Gretchen Aycock	Department of Administration
Barbara Stone Newton	Department of Administration
Kari Barsness	DENR
Thomas Allen	DENR/DAQ
Dedra Alston	DENR
Robin Smith	DENR
Barbara Jackson	NC Department of Labor
Kris Horton	DHHS/DMA

RULES REVIEW COMMISSION

Lonnie Christopher	NC Banking Commission
Bill Finlay	NC Banking Commission
Randy Yardley	Psychology Board
Robert Brooks	NC Board of CPA Examiners
Denise Stanford	Pharmacy Board
Ann Christian	NC Substance Abuse Professional Licensing Board
Audrey Edmisten	Division of Aging
Portia Rochelle	DHHS/DMA
Daniel Garner	NC Banking Commission
Sabra Faires	Department of Revenue
John Hoamani	NC Department of Labor
Staci Mayer	Department of Juvenile Justice
Roberta Ouellette	Appraisal Board
Joan Troy	Wildlife Resources Commission
David Cobb	Wildlife Resources Commission
Karen Long	Tobacco Trust Fund Commission
William Upchurch	Tobacco Trust Fund Commission
Bayard Alcorn	Division of Parks & Recreation
David McLeod	Department of Agriculture
Paul Sun	Ellis & Winters, LLP/Dental Board
Molly Masich	Office of Administrative Hearings

APPROVAL OF MINUTES

The meeting was called to order at 10:45 a.m. with Vice-Chairman Hayman presiding. Vice-Chairman Hayman asked for any discussion, comments, or corrections concerning the minutes of the November 21, 2002, meeting. The minutes were approved as written.

FOLLOW-UP MATTERS

10 NCAC 3D .2508; .2521; .2522; .2601; .2602; .2701; .2901; .2902; .2905; .2908; .2909; .3001; .3002; .3003; .3101: DHHS/Medical Care Commission – There was no response from the agency. The Commission took no action on these rules.

10 NCAC 3Q .1408: DHHS/Medical Care Commission – The Commission approved the rewritten rule.

10 NCAC 3R .1125; .2714; .3704; .6385: DHHS/Department of Health & Human Services – The Commission approved the rewritten rules.

10 NCAC 14G .0102: DHHS/CMH, DD, SAS – The Commission approved the rewritten rule.

10 NCAC 14V .0202; .0203; .0204; .5602; .5603: DHHS/CMH, DD, SAS – The Commission approved the rewritten rules.

15A NCAC 1C .0106; .0306; .0406: DENR – The Commission approved the rewritten rules.

15A NCAC 2B .0234: DENR/Environmental Management Commission – The Commission approved the rewritten rule.

15A NCAC 2D .0912; .0952; .0959; .0960: DENR/Environmental Management Commission – The Commission approved the rewritten rules.

15A NCAC 9C .1219; .1227: DENR/Division of Forest Resources – The Commission approved the rewritten rules.

15A NCAC 10B .0403: Wildlife Resources Commission – The Commission approved the rewritten rule.

15A NCAC 10K .0101: Wildlife Resources Commission – The Commission approved the rewritten rule.

15A NCAC 18A .2117: DENR/Commission for Health Services – The Commission approved the rewritten rule.

15A NCAC 19A .0103; .0203: DHHS/Commission for Health Services – The Commission approved the rewritten rules.

15A NCAC 21A .0819; .0820; .0822: DHHS/Commission for Health Services – The Commission approved the rewritten rules.

15A NCAC 21H .0111: DHHS/Commission for Health Services – The Commission approved the rewritten rule.

17 NCAC 12A .0502: Department of Revenue – The Commission approved the rewritten rule.

17 NCAC 12B .0412: Department of Revenue – The Commission approved the rewritten rule.

18 NCAC 6 .1308; .1715: Secretary of State – The Commission approved the rewritten rules.

21 NCAC 8F .0103: State Board of CPA Examiners – The Commission approved the rewritten rule conditioned upon receiving technical changes by the end of the day. The technical changes were subsequently received.

21 NCAC 8F .0105: State Board of CPA Examiners – The Commission approved the rewritten rule.

21 NCAC 8M .0105; .0107: State Board of CPA Examiners – The Commission approved the rewritten rules.

21 NCAC 8N .0402: State Board of CPA Examiners – The Commission approved the rewritten rule.

Commissioner Futch recused himself from the Board of Dental Examiners rules.

21 NCAC 16E .0101: NC State Board of Dental Examiners – Mr. Paul Sun requested that the Commission reconsider its objection to this rule and approve it. There was no substantive discussion of this request and no Commissioner moved to reconsider the objection. Since a response from the agency is not yet due, the Commission took no further action on this rule.

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21 NCAC 16R .0106: NC State Board of Dental Examiners – The Commission approved the rewritten rule with Commissioner Hilliard opposed to approval.

21 NCAC 21 .0107; .0514; .0515; .0604; .0607; .0803; .0903: Board of Licensing Geologists – The Commission approved the rewritten rules.

21 NCAC 36 .0221: Board of Nursing – The Commission took no action on this rule.

21 NCAC 46 .1414; .1505; .1801: Board of Pharmacy – The Commission approved the rewritten rules.

21 NCAC 46 .2502: Board of Pharmacy – The Board submitted a rewritten paragraph (e) to respond to the objection of the Commission. The rewritten portion of the rule was approved. Mr. Andy Ellen of the NC Retail Merchants Association addressed the Commission and asked it to object to amended paragraph (p) of the rule, even though the Commission did not object to it last month. The Commission objected to this paragraph based on ambiguity. In (p) it is unclear whether the requirement to develop and maintain a system of accountability applies only to compounded medications from a pharmacy, to all prescription medications from a pharmacy where any medication is compounded, or to all pharmacies regardless of whether any prescription medications are compounded there.

21 NCAC 46 .1812; .2504: Board of Pharmacy – Since no response has been received from OSBM, the Commission could not take action on these rules.

The Commission adjourned at 12:32 p.m. for a break. The meeting reconvened at 12:42 p.m.

21 NCAC 54 .2803; .2804; .2805: Psychology Board – The Commission approved the rewritten rules.

21 NCAC 57B .0102; .0103: Appraisal Board – The Commission approved the rewritten rules.

21 NCAC 68 .0216; .0306: Substance Abuse Professional Certification Board – The Commission approved the rewritten rules. Ms. Christian, the Board's attorney introduced three members of the board to the Commission.

28 NCAC 2A .0111: Department of Juvenile Justice – This rule was withdrawn by the agency to satisfy the Commission's objection.

28 NCAC 2A .0201: Department of Juvenile Justice – The Commission approved the rewritten rule.

LOG OF FILINGS

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

1 NCAC 35 .0101; .0103; .0201; .0202; .0203; .0204; .0205; .0301; .0302; .0304; .0305; .0306; .0308; .0309: Department of Administration – The Commission carried these State Employees Combined Campaign rules over to the February meeting at the agency's request.

2 NCAC 52C .0701: Department of Agriculture – Commissioner Hayman recused herself from this rule and asked Jeffrey Gray to chair the meeting during discussion of this issue. She did this based on the fact that her husband is a member of the same firm as Tom West, who wished to address the Commission concerning this rule. The Commission objected to the above captioned rule based on lack of authority and ambiguity. There is no authority for the provision in (d) requiring that captive cervidae 18 months or older who die be tested for Chronic Wasting Disease. Other state law requires that this be done on any captive cervidae over the age of six months and there is no authority for this agency to alter that requirement. In addition the requirements in (f) are unclear. It is unclear how they relate to other, more detailed, rules concerning captive cervidae found in Wildlife Resource Commission rules. It is unclear what type of certification may be issued, what it may certify, or what type of examination or monitoring is required.

8 NCAC 1 .0101: Board of Elections – The Commission continued these rules to the January meeting at the agency's request.

8 NCAC 2 .0101; .0102; .0103; .0104; .0105; .0106; .0107; .0108; .0110; .0111; .0112; .0113: Board of Elections – The Commission carried these rules over to the January meeting at the agency's request.

8 NCAC 4 .0101; .0102; .0103; .0104; .0105; .0106;.0107; .0108; .0109; .0201; .0202; .0203; .0204; .0205; .0206; .0207; .0208; .0301; .0302; .0303; .0304; .0305; .0306; .0307: Board of Elections – The Commission carried these rules over to the January meeting at the agency's request.

8 NCAC 6B .0101; .0103; .0104; .0105: Board of Elections – The Commission carried these rules over to the January meeting at the agency's request.

8 NCAC 7B .0101; .0102: Board of Elections – The Commission carried these rules over to the January meeting at the agency's request.

8 NCAC 9 .0101-0109: Board of Elections – The Commission carried these rules over to the January meeting at the agency's request.

8 NCAC 10B .0101-.0108: Board of Elections – The Commission carried these rules over to the January meeting at the agency's request.

8 NCAC 12 .0101-.0111: Board of Elections – The Commission carried these rules over to the January meeting at the agency's request.

10 NCAC 26H .0211: Department of Health and Human Services – The Commission objected to the rule due to ambiguity. In (b), it is not clear what is meant by with or without "major problems." In (c) (1), it is not clear what would constitute a "recent" data set. In (c) (2), it is not clear what constitutes "low" and "high statistical outliers." It is also not clear what criteria DMA will employ to identify outliers. In (c) (3), it is not clear what "statistically valid methodology" is employed.

10 NCAC 26H .0213: Department of Health and Human Services – The Commission objected to the rule due to ambiguity. In (a) (1), it is not clear what constitutes a "rural area." In (e) (1), (f) (5) and (7), and (h) (2) and (3), it is not clear when the Director will determine an earlier period and what standards will be used in making the determination. In (e)(3), (f)(7), (h)(3), (i), and (j)(2), it is not clear how frequently payments will be made and whether they will cover periods proceeding or following the payment date.

10 NCAC 26H .0215: Department of Health and Human Services – The Commission objected to the rule due to ambiguity. In (a), it is not clear what the consequences of "are subject to review by the Director" are.

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10 NCAC 26H .0304: Department of Health and Human Services – The Commission objected to the rule due to ambiguity. In (a), It is not clear what standards the state will use selecting the base year period. In (b), it is not clear when the reclassification is to take place.

10 NCAC 26H .0506: Department of Health and Human Services – The Commission objected to the rule due to ambiguity. In (b) (1), it is not clear what is meant by “allowable” overhead.

11 NCAC 8 .0706: Code Officials Qualification Board – This rule was withdrawn by the agency.

15A NCAC 21D .0202; .0410; .0411; .0501; .0503; .0702; .0703; .0704; .0706; .0802; .0804; .0805; .0806; .0902-.0911: Commission for Health Services – These rules were withdrawn by the agency.

21 NCAC 50 .0103: Board of Examiners for Plumbing , Heating & Fire Sprinkler Contractors – The Commission objected to the rule due to lack of necessity. This rule deals only with the internal management of the agency and is not applicable to the public. It would be more appropriate in the agency bylaw than the Administrative Code.

COMMISSION PROCEDURES AND OTHER BUSINESS

The Commission requested that the staff work on developing a system to alert the Commissioners to rules that have more extensive technical changes and to be more diligent about avoiding requesting changes that have more substantive impact.

The next meeting of the Commission is Thursday, January 16, 2003 at 10:00 a.m.

The meeting adjourned at 2:30 p.m.

Respectfully submitted,
Lisa Johnson

Commission Review/Administrative Rules
Log of Filings (Log #193)
November 21, 2002 through December 20, 2002

DEPARTMENT OF INSURANCE

Definitions	11 NCAC 11F .0201	Amend
Contract Reserves	11 NCAC 11F .0205	Amend
Specific Standards for Morbidity Interest and	11 NCAC 11F .0207	Amend

DENR/ENVIRONMENTAL MANAGEMENT COMMISSION

Performance-Based Cleanups	15 NCAC 02P .0408	Adopt
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WILDLIFE RESOURCES COMMISSION

Importation of Wild Animals and Birds	15 NCAC 10B .0101	Amend
Warren County	15 NCAC 10F .0318	Amend
General Requirements	15 NCAC 10H .0301	Amend
Minimum Standards	15 NCAC 10H .0302	Amend
Forfeiture	15 NCAC 10H .0303	Amend

COMMISSION FOR HEALTH SERVICES

Definitions	15 NCAC 21D .0202	Amend
Participant Violations and Sanctions	15 NCAC 21D .0410	Amend
Dual Participation	15 NCAC 21D .0411	Adopt
Supplemental Foods	15 NCAC 21D .0501	Amend
Use of WIC Supplemental Foods	15 NCAC 21D .0503	Amend
Issuance of Food Instruments	15 NCAC 21D .0702	Amend
Use of Food Instruments	15 NCAC 21D .0703	Amend
Validity of WIC Food Instruments	15 NCAC 21D .0704	Amend
Validity of WIC Food Instruments	15 NCAC 21D .0704	Amend
Authorized WIC Vendors	15 NCAC 21D .0706	Amend
Appeals	15 NCAC 21D .0802	Amend
Continuation of Participation	15 NCAC 21D .0804	Amend
Decision	15 NCAC 21D .0805	Amend
Continuing Responsibilities	15 NCAC 21D .0806	Amend
General Conditions	15 NCAC 21D .0902	Amend
Availability	15 NCAC 21D .0903	Amend
Notification of the Right to a Fair Hearing	15 NCAC 21D .0904	Amend
Request for a Fair Hearing	15 NCAC 21D .0905	Amend

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Denial or Dismissal of a Request	15 NCAC 21D .0906	Amend
Continuation of Benefits	15 NCAC 21D .0907	Amend
Notice of Hearing	15 NCAC 21D .0908	Amend
Hearing Officer	15 NCAC 21D .0909	Amend
Hearing Procedure and Rights of the Aggrieved Part	15 NCAC 21D .0910	Amend
Decision	15 NCAC 21D .0911	Amend
HEALTH AND WELLNESS TRUST FUND COMMISSION		
Authorization	20 NCAC 10 .0101	Adopt
Definitions	20 NCAC 10 .0102	Adopt
Purpose	20 NCAC 10 .0201	Adopt
Types of Grants	20 NCAC 10 .0202	Adopt
Eligibility to Receive Grants	20 NCAC 10 .0203	Adopt
Application for Undirected General Grants	20 NCAC 10 .0204	Adopt
Applications for Grants Issued in Response to	20 NCAC 10 .0205	Adopt
Out of Cycle Award of Undirected General Grants	20 NCAC 10 .0206	Adopt
Review of Proposal	20 NCAC 10 .0207	Adopt
Award of Grants	20 NCAC 10 .0208	Adopt
Reporting	20 NCAC 10 .0209	Adopt
Policies Governing Grants	20 NCAC 10 .0210	Adopt
Gifts Made to the Commission	20 NCAC 10 .0301	Adopt
Gifts Accepted by the Commission	20 NCAC 10 .0302	Adopt
NC STATE BOARD OF COMMUNITY COLLEGES		
Curriculum Program Approvals and Terminations	23 NCAC 02E .0201	Amend

AGENDA

RULES REVIEW COMMISSION

January 16, 2003

- I. Call to Order and Opening Remarks
- II. Review of minutes of last meeting
- III. Follow Up Matters

Department of Administration – 1 NCAC 35 .0101; .0103; .0201; .0202; .0203; .0204; .0205; .0301; .0302; .0304; .0305; .0306; .0308; .0309 Carried over to February from 12/19/02 (DeLuca)

- A. Department of Agriculture – 2 NCAC 52C .0701 Objection 12/19/02 (DeLuca)
- B. Board of Elections – Carried over from 12/19/02 (DeLuca)
- C. DHHS/Medical Care Commission – 10 NCAC 3D .2508; .2521; .2522; .2601; .2602; .2701; .2901; .2902; .2905; .2908; .2909; .3001; .3002; .3003; .3101 Objection 11/21/02 (Bryan)
- D. Department of Health and Human Services – 10 NCAC 26H .0211; .0213; .0215; .0304; .0506 Objection 12/19/02 (Bryan)
- E. NC State Board of Dental Examiners – 21 NCAC 16E .0101 Objection 11/21/02 (DeLuca)
- F. Board of Nursing – 21 NCAC 36 .0221 Objection 11/21/02 (DeLuca)
- G. Board of Pharmacy – 21 NCAC 46 .1812; .2504 Referred to OSBM 11/21/02
- H. Board of Pharmacy – 21 NCAC 46 .2502 Objection 11/21/02 (DeLuca)
- I. Board of Examiners for Plumbing, Heating & Fire Sprinkler Contractors – 21 NCAC 50 .0103 Objection 12/19/02 (Bryan)

- IV. Commission Business
- V. Next meeting: February 20, 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 1116
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	
<u>UTILITIES COMMISSION</u>				
Tracy Woody v. State of NC Utilities Commission	02 COM 1004	Morrison	08/26/02	
<u>CRIME CONTROL AND PUBLIC SAFETY</u>				
Hattie Holt v. NC Crime Victims Compensation Commission	00 CPS 1067	Conner	05/30/02	
Linda Hawley v. NC Crime Victims Compensation Commission	02 CPS 0121	Conner	06/14/02	
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	
Brenda L. McQueen v. DHHS, Div. of Facility Services	01 DHR 2321	Morrison	10/17/02	

CONTESTED CASE DECISIONS

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
Debra A. Browner v. NC DHHS, Broughton Hospital	02 DHR 0405	Conner	08/28/02
NC Community Association v. NC DHHS, Off. of Economic Opportunity	02 DHR 0497	Morrison	12/11/02
Bill & Suzy Crawford for (NEELY) Crawford v. NC DHHS	02 DHR 0539	Wade	12/18/02
Mooresville 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
Robin Lee Arnold v. DHHS, Div. of Facility Services	02 DHR 0558	Conner	08/15/02
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Lisa Murphy v. DHHS, Division of Facility Services	02 DHR 0694	Mann	07/26/02
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Hazel Chea v. Department of Health & Human Services	02 DHR 0795	Mann	06/11/02
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Mooresville 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
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Maria Goretti Obialor v. DHHS, Div. of Facility Services	02 DHR 1187	Mann	09/11/02
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Timothy W Andrews for Ridgecrest Retirement LLC v. NC DHHS, Div of Facility Services	02 DHR 1417	Elkins	11/26/02
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17:12 NCR 1086

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San Antoni Equipment Co. v. NC Department of Administration	02 DOA 0430	Chess	06/26/02
James J. Lewis v. DOA, Gov. Advocacy Council for Persons w/Disabilities	02 DOA 0545	Chess	08/26/02

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Sara E Parker v. Consumer Protection [sic] & Rosemary D. Revis	02 DOJ 1038	Gray	08/08/02
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Alarm Systems Licensing Board

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Christopher Michael McVicker v. Alarm Systems Licensing Board	02 DOJ 0731	Gray	06/07/02
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Anthony Davon Webster v. Private Protective Services Board	01 DOJ 1857	Gray	06/07/02
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Clarence Raymond Adcock v. Criminal Justice Ed. & Trng. Stds. Comm.	02 DOJ 0104	Chess	09/09/02
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Sharon L. Joyner v. Sheriffs' Educ. & Training Stds. Commission	02 DOJ 0604	Morrison	09/05/02
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John R. Tucker v. Sheriffs' Education & Training Stds. Comm.	02 DOJ 0632	Morrison	06/26/02
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Michael & Nancy Lindsey & Donna M Lisenby in her capacity as The Catawba Riverkeeper & Brian McCarty, Cynthia Moore Jones, Mike Glover, Hubert Rowe Hass Jr, Paula G Martin, Lynn Teeter, Mark E Sleeper, & Carol and Larry Webb v. NC DENR, Div. of Water Quality and Hydraulics, LTD.	00 EHR 1475 ⁵	Conner	11/21/02
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Frederick M. and Anne C. Morris, et al v. NC DENR, Div. of Air Quality and Martin Marietta Materials, Inc.	02 EHR 0068	Gray	10/18/02		
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Philip M Keener v. Bd. of Trustees & Exec. Admin. for the State Health Plan	02 INS 0252	Mann	12/11/02	17:14 NCR	1205
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Robin Heavner Franklin v. Lincoln Co. Dept. of Social Services	98 OSP 1239	Conner	08/28/02		
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Donald B. Smith v. NC DOC, Div. of Community Corrections	02 OSP 1117	Chess	10/03/02	
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Carolyn Pickett v. Nash-Rocky Mt. School Systems, Nash-Rocky Mt. Board of Education	02 OSP 1136	Morrison	07/29/02	
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CONTESTED CASE DECISIONS

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
02 DHR 0497

NORTH CAROLINA COMMUNITY ACTION
ASSOCIATION,
Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF HEALTH AND
HUMAN SERVICES, OFFICE OF ECONOMIC
OPPORTUNITY
Respondent.

DECISION

This matter was heard by Senior Administrative Law Judge Fred G. Morrison Jr. on October 1, 2002, upon the petition of the North Carolina Community Action Association (“NCCAA”) for relief from arbitrary and excessive fines imposed by the Department of Health and Human Services, Office of Economic Opportunity (“OEO”).

APPEARANCES

Petitioner: R. Bruce Thompson II, Parker Poe Adams & Bernstein, L.L.P.

Respondent: John R. Corne, Special Deputy Attorney General
North Carolina Department of Justice

The undersigned finds as fact and concludes as law the following, which was stipulated by the parties:

STIPULATIONS

1. The parties agree that the \$265.00 owed to OEO by NCCAA pursuant to Reimbursement Request Form 286 has been returned and no other monies are owed in this category.
2. The parties agree that NCCAA must repay \$5,891.43 for excess charges for office space instead of the \$7,879.00 originally demanded by OEO.
3. The parties agree that NCCAA must repay \$1,148.00 for excess charges related to the compensation of the NCCAA Executive Director.

Based upon all the competent evidence of record, and reasonable inferences to be drawn therefrom, the undersigned makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. NCCAA is a non-profit organization, which serves as an advocate for low-income North Carolinians.
2. In 1998, NCCAA and OEO applied for a Residential Energy Assistance Challenge Option (“REACH”) grant from the federal government’s Low Income Heating Assistance Program (“LIHEAP”).
3. The purpose of the REACH grant is to provide the financial support necessary to help organizations seek long-term solutions to energy problems that affect low-income individuals and families.
4. NCCAA planned to establish a Public Interest Energy Service Cooperative (“PIESCO”) with the REACH grant funds.
5. The PIESCO would aggregate the buying power of low-income customers in order to increase their individual buying power, thereby allowing individual low-income households opportunities for greater self-sufficiency.

6. The REACH grant would also provide NCCAA the funds necessary to assist NCCAA in providing comprehensive education services on energy efficiency to low-income individuals and families.

7. The formation of the PIESCO and the education services (collectively the “REACH project”) would provide needed assistance to low-income North Carolinians.

8. In 1998, OEO submitted an application for a REACH grant to the Office of Community Services (“OCS”) of the U.S. Department of Health and Human Services.

9. In the Application, OEO designated NCCAA as the vendor that would carry out the proposed plan for the REACH grant in North Carolina.

10. OCS awarded the REACH grant to OEO and NCCAA (as OEO’s vendor) on September 9, 1999.

11. Following the award of the grant to OEO in September 1999, NCCAA was unable to begin work to implement the REACH program until January 2000 due to delays caused by both the OCS and OEO.

12. OEO completed the REACH Agreement in January 2000, and it became effective between NCCAA and OEO on January 15, 2000.

13. NCCAA was responsible for completing the activities listed in the REACH Agreement’s scope of work, following the conditions of the grant, and obtaining the services necessary from staff and outside consultants to perform the work necessary to establish the PIESCO.

14. The REACH Agreement provided an initial budget covering three years of the project. The budget allocated \$70,000.00 to be spent by NCCAA in year one of the project to hire a consultant for the development, operation and evaluation of the PIESCO.

15. It was essential that NCCAA obtain the services of a consultant with knowledge and experience in energy efficiency and bulk fuel purchasing in order to implement the REACH project.

16. NCCAA hired Jeff Brown as its consultant to assist in completing the tasks and services needed to set up the REACH project.

17. Brown was qualified and had the requisite experience for the position. Brown was previously the head of a low-income weatherization program which received national recognition. Brown also served on various national low-income advisory groups while employed at the North Carolina Department of Energy.

18. NCCAA hired Brown to, among other things: provide project development consultative services; draft a strategic document outlining the mission and structure of the PIESCO; assist in identifying, constituting and structuring a steering committee; identify a project evaluator; identify and interview prospective project staff; attend meetings of the Legislative Study Commission; and provide consultative services in the areas of electric utilities and energy efficiency.

19. Brown’s services were to begin in January 2000 and were to be completed by July 31, 2000. Brown was to be paid \$70,000.00 for his services as indicated in the REACH Application and the REACH Agreement.

20. Brown and NCCAA began developing the plan for the REACH project over the first several months of the year 2000. The developmental design of the PIESCO was completed by Brown in April 2000.

21. In May of 2000, the OCS contacted NCCAA and requested that NCCAA pursue the possibility of capturing hog waste as a fuel for low-income homes, a process also known as thermophilic anaerobic digestion. Although NCCAA did not believe this to be a practical option, it discussed the request with OEO, and proceeded to formally investigate this possibility.

22. NCCAA found, after spending weeks investigating and considering the thermophilic anaerobic digestion proposal, that such was not a feasible option as a use of the REACH grant funds.

23. NCCAA also encountered difficulties with the adequacy of the budget for the project. This was caused by additional activities required by OEO, including administrative requirements such as the implementation of a cost allocation plan, purchase and implementation of a new accounting software, as well as unexpected project delays.

CONTESTED CASE DECISIONS

24. In February 2001, an audit of the REACH project was performed by the North Carolina Department of Health and Human Services, Office of Internal Auditor (“OIA”). However, OIA, did not complete its report and disclose its findings until June 2001. OIA submitted the findings of its “Contract Compliance Audit” in a letter dated June 7, 2001. In its report, OIA questioned various expenditures by NCCAA and demanded that NCCAA return \$95,468.00 in “questioned costs.”

25. NCCAA submitted a formal response to the audit findings in a letter dated August 9, 2001. In this letter, NCCAA admitted some administrative errors, but demonstrated to the auditors and the officials at OEO that the total questioned costs were incorrect and excessive.

26. Nevertheless, in a letter dated January 24, 2002, DHHS demanded that NCCAA return \$95,468.00 of the REACH grant funds. Contending that the State was still incorrect in its assessment of the total questioned costs, NCCAA filed a petition for contested case hearing with the Office of Administrative Hearings.

27. OEO contended that the following questioned costs should be returned by NCCAA:

Reimbursement Request Form 286	\$265.00
Accounting Software Costs	\$3,083.00
Excess Charges for Office Space	\$7,879.00
Contractual Agreements	\$70,000.00
Timesheet Business Manager	\$13,093.00
Executive Director’s Compensation	\$1,148.00
TOTAL	\$95,468.00

28. At the hearing, the parties stipulated that: (a) NCCAA had already returned the \$265.00 questioned on the Form 286; (b) only \$5,891.43 should be returned for excess charges for office space; and (c) \$1,148.00 was indeed the proper amount to be returned for the Executive Director’s Compensation. Thus, the categories of costs at issue before the Office of Administrative Hearings were narrowed to the Accounting Software Costs, Contractual Agreements; and Timesheet Business Manager.

29. OEO had notice of NCCAA’s contract with Brown and failed to object.

30. Roberta Spencer, Executive Director of NCCAA, provided OEO with a copy of Brown’s contract in February 2000.

31. OEO, by its actions, indicated that it was aware that NCCAA had contracted with Brown, and that it approved NCCAA’s payments to Brown under the contract.

32. The original budget for the REACH project, set out in the REACH Agreement between OEO and NCCAA, allocated funds to be used specifically in contracts with “third party consultants for development, design, monitoring and evaluation” of the REACH project. The REACH Agreement provided for \$70,000.00 to be used for such purposes during the first year of the project.

33. Over the course of the year 2000, NCCAA made payments to Brown in reliance on OEO’s continued reimbursement of those payments.

34. The amount of the charges submitted by Brown between February and May totaled \$70,000.00.

35. OEO further indicated its approval of NCCAA’s contract with Brown in a letter dated February 15, 2000. In this letter, Wilson indicates that OEO approved payment of the expenses listed in the Financial Status Report submitted by NCCAA to OEO for the period from January 15 to January 31, 2000, which included a payment to Brown for consulting services.

36. OEO acknowledges that the chronology of activities, as outlined by NCCAA in a February 2, 2001, letter to Lawrence Wilson and in a timeline prepared for the auditors, was accurate. The timeline demonstrates that Brown participated in numerous aspects of the REACH project over the course of the year 2000, including several meetings with OEO officials.

37. In a letter dated March 20, 2000, Lawrence Wilson asked NCCAA to provide a copy of any subcontracts. In response, Ms. Spencer delivered another copy of the Brown contract to Mr. Wilson’s office along with the Monthly Financial Report. The Monthly Financial Report also included a request to reimburse money that NCCAA paid to Mr. Brown. Again, OEO approved this reimbursement and continued to approve subsequent reimbursements after receiving a copy of Mr. Brown’s contract.

38. NCCAA was not required to competitively bid the consulting work for the REACH project according to the Administrative Manual for Nonprofit Agencies provided to NCCAA by OEO.

CONTESTED CASE DECISIONS

39. OEO did not expect NCCAA to competitively bid the consulting services contract. Danny Stewart, the director of the Office of Internal Audit, testified that competitive bidding was not required in the selection of a consultant in the REACH project.

40. OEO never indicated to NCCAA that it required NCCAA to competitively bid the contract.

41. Brown was one of the few candidates who had the experience and qualifications to perform the consulting work required for the REACH project. Brown successfully completed each of the tasks and services set forth in his contract with NCCAA, and played an integral role in the development and launching of the REACH Program in North Carolina, as well as design and development of the PIESCO.

42. Mr. Brown's qualifications are detailed in Petitioner's Exhibit 22 and NCCAA presented Petitioner's Exhibits 22A and 22B to detail some of the work product that he delivered as part of his contract.

43. A payment of \$70,000.00 was reasonable for Brown's services performed pursuant to his contract with NCCAA. The undersigned adopts the view of Carson Culbreth, an expert in energy programs for low-income persons, and Don Sykes, an expert on the REACH program, that \$70,000 was a reasonable fee for Brown's services.

44. OEO does not argue that \$70,000.00 was an excessive fee for Brown to be paid for his services.

45. OEO required that NCCAA utilize a cost allocation methodology in administering the REACH project. Although NCCAA believed it could utilize a direct cost method of allocating the costs of the REACH program, OEO would not allow NCCAA to do so.

46. OEO required that NCCAA purchase and install a particular fund accounting software package to be used in administering the REACH grant. NCCAA complied with this requirement and implemented the program. NCCAA then allocated the entire cost of the software to the REACH Project.

47. NCCAA would have utilized a free accounting program if OEO had not insisted that NCCAA purchase new software to track REACH expenditures.

48. Pursuant to the cost allocation methodology, NCCAA had to allocate the personnel cost of its business manager, Zena Collins, to the REACH project. NCCAA allocated 69% of her salary to the REACH project. This allocation percentage was determined by determining how much time Collins spent on the various NCCAA projects.

49. Ms. Collins spent a great deal of her time on the REACH program. She attended and arranged steering committee meetings, was involved in decision-making issues such as account changes, implemented the required fund accounting software and, in turn, transferred all of the accounting books to the new system. Additionally, she performed all of the business transactions called for by the REACH project.

50. According to OEO, only 25% of Collins' personnel cost should have been allocated to the REACH project. OEO based this finding on the number of financial transactions that NCCAA produced. This reasoning discounted the fact that in the first year of the project, not as many checks were processed and that Ms. Collins performed other duties with respect to the REACH project.

51. Mr. Donald Sykes, an expert witness on the REACH program, testified that measuring the costs attributed to Ms. Collins by simply looking at accounting transactions would be "a very narrow interpretation of the role of that person generally in a project like this." Instead, the auditors should have examined her participation in the entire REACH program.

52. For the period May 1, 2000, through December 31, 2000, NCCAA charged \$20,825.05 for Ms. Collins' time to the REACH grant. However, the analysis in Petitioner's Exhibit 28A reveals that NCCAA should have only charged \$15,855.37 for Ms. Collins' work that was directly attributable to the REACH program. Thus, the correct amount of questioned costs in this category that NCCAA should return to the State is \$4,969.68, representing the difference between the amount charged and the amount based on the actual percentage of hours worked by Ms. Collins.

CONCLUSIONS OF LAW

1. Under North Carolina law, the provisions of a contract may be modified or waived by conduct which naturally and justly leads the other party to believe that the provisions of the contract have been modified or waived. Son-Shine Grading, Inc. v. ADC Constr. Co., 68 N.C.App. 417, 315 S.E.2d 346 (1984); Camp v. Leonard, 133 N.C.App. 554, 515 S.E.2d 909 (1999).

CONTESTED CASE DECISIONS

2. A party to a contract may waive a substantial right under the contract by an express or implied promise to waive a provision and the other party's detrimental reliance on that promise. Wachovia Bank & Trust Co. v. Rubish, 306 N.C. 417, 427, 293 S.E.2d 749, 756 (1982).

3. OEO waived any right it had to strictly enforce the terms of the REACH Agreement provision regarding written approval of any subcontracts by, among other actions: (a) OEO's failure to object to NCCAA's contract with Brown; (b) OEO's repeated payment of invoices for Brown's services over the course of the year 2000; (c) OEO's written approval of the Financial Status Report submitted by NCCAA in February of 2000 which included services for Brown; and (d) OEO's numerous acknowledgements of Mr. Brown's work.

4. OEO, by its actions, naturally and justly led NCCAA to believe that the written approval provision of the REACH Agreement had been waived, and, as a result NCCAA detrimentally relied on that waiver by allowing Brown to continue to perform under his contract with NCCAA.

5. There is no contractual or legal requirement that NCCAA competitively bid the contract with Brown. See N.C.G.S. § 143-49(3) (2001); Carolina MediCorp, Inc. v. Board of Trustees, 118 N.C. App. 485, 456 S.E.2d 116, (1995).

6. The contract with Brown was a necessary and reasonable expenditure of the REACH grant funds. Furthermore, Brown was a qualified and experienced consultant. He successfully performed all of his obligations under his contract with NCCAA. Therefore, the fine of \$70,000 imposed by OEO on NCCAA is unreasonable and should not be upheld. A penalty in the amount of \$1,000.00 for this oversight would not be unreasonable.

7. NCCAA would not have purchased the fund accounting software but for OEO's requirement that it do so. However, NCCAA's allocation of the full price of the software to the REACH project was unreasonable. Therefore, the fine of \$3,083.00 is not unreasonable.

8. NCCAA's analysis of the business manager's time is competent evidence that the questionable costs in that category should be reduced to \$4,969.68 instead of the \$13,093.00 initially demanded by OEO.

DECISION

Based on the above stipulations, findings and conclusions, it is hereby decided that the penalties imposed by OEO should be reduced to \$16,092.11.

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, N.C. 27699-6714, in accordance with North Carolina General Statute 150B-36(b).

NOTICE

The decision of the Administrative Law Judge in this contested case will be reviewed by the agency making the final decision according to the standards found in G.S. 150B-26(b)(b1) and (b2). The agency making the final decision is required to give each party an opportunity to file exceptions to the decision of the Administrative Law Judge and to present written argument to those in the agency who will make the final decision. G.S. 150B-36(a).

The agency that will make the final decision in this contested case is the Department of Health and Human Services.

This the 11th day of December, 2002.

Fred G. Morrison Jr.
Senior Administrative Law Judge

STATE OF NORTH CAROLINA

COUNTY OF WILKES

**IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
02 INS 0252**

PHILIP M. KEENER,)	
Petitioner,)	
)	
)	
v.)	DECISION
)	
BOARD OF TRUSTEES AND EXECUTIVE)	
ADMINISTRATOR FOR THE STATE HEALTH PLAN.,)	
Respondent.)	

This contested case was heard before Julian Mann, III, Chief Administrative Law Judge, on July 30 and 31, 2002 in North Wilkesboro, North Carolina, upon the Petition for a Contested Case Hearing filed by Philip M. Keener ("Petitioner"). The Petitioner appeared and was represented by his counsel of record, John M. Logsdon, McElwee Firm, PLLC, North Wilkesboro, North Carolina. The Respondent Board of Trustees and Executive Administrator for the State Health Plan ("Respondent") appeared and were represented by their Counsel of Record, Anne Goco Kirby, N.C. Department of Justice, Raleigh, North Carolina.

ISSUES

1. Whether the Respondent’s decision to affirm the denial of home care services requested for Petitioner for the period May 3, 2001 through July 3, 2001 was erroneous?

2. Whether Respondent’s decision to affirm the denial of home care services requested for Petitioner for the period May 3, 2001 through July 3, 2001 was arbitrary or capricious?

3. Whether or not Respondent can be estopped from enforcing the applicable statutes and medical policies of the North Carolina Comprehensive Major Medical Plan based upon previous approvals of home care services for Petitioner?

APPLICABLE STATUTES AND POLICIES

- N.C. Gen. Stat. § 135-39.5(20)
- N.C. Gen. Stat. § 135-39.7
- N.C. Gen. Stat. § 135-40(b)
- N.C. Gen. Stat. § 135-40.1(9), (10), (11) & (17a)
- N.C. Gen. Stat. § 135-40.6(8c)
- N.C. Gen. Stat. § 135-40.7(2) and (22)
- N.C. Gen. Stat. § 135-41.1
- The Plan’s Home Care Policy
- The Plan’s Custodial Care Policy
- The Plan’s Skilled Nursing Facility Policy
- The Plan’s Administrative Appeals Policy

WITNESSES

For Petitioner: Jan Poff, R.N.
 Charles Essex, M.D.
 Philip Keener

For Respondent: Eugenie Komives, M.D.
 Jack Walker, Ph.D.

EXHIBITS

The following exhibits were admitted into evidence:

Petitioner:

- 1) December 19, 2001 Letter from Harold Wright
- 2) September 12, 2001 Letter from Michelle Overby
- 3) May 24, 2001 Letter from Michelle Overby
- 4) April 25, 2001 Letter from Colleen Larusso
- 5) Letter from Fawn Wolf
- 6) July 14, 1997 Letter from Harold Wright
- 7)
- 8) February 26, 1997 Letter from Ron Bergen
- 9) January 3, 1997 Letter from Michelle Overby to Dr. Bowman
- 11) November 28, 1989 Letter from Martha Kruhm to Dr. Bowman
- 12) 12/ 27 Letter from Fawn Talley
- 13) June 8, 1990 Letter from Michelle Overby

Respondent:

- 1) CV for Dr. Eugenie Komives
- 2) Administrative Appeals Review Policy
- 3) Home Care Policy
- 4) 2/12/01 Request for Prior Approval from Robin Johnson of Home Care of WRMC regarding various patients, including Phillip Keener, for 1/29/01 thru 3/29/01. (5 pages--fax cover, letter 2/12/01, and plan of treatment for same period)
- 5) Custodial Care Policy
- 6) Skilled Nursing Facility Policy
- 7) February 19, 2001 letter from Fawn Wolf, Senior Medical Review Examiner, to Home Care of WRMC approving home care aide services and skilled nursing visits for a grace period of 2/2/01 to 5/2/01 and denying same services for period of 5/3/01 to 7/3/01.
- 8) May 24, 2001 Letter Denying Petitioner's First Level Appeal
- 9) June 28, 2001 letter from Keener to Michelle Overby, Appeals Coordinator, requesting a Second Level Appeal from the May 24, 2002 letter denying First Level Appeal
- 10) Second Level Appeal Memorandum from Dr. Eugenie Komives to Michelle Overby, Appeals Coordinator, dated 8/31/01
- 11) April 17, 2001 Request for Prior Approval from Robin Johnson for Phillip Keener *for 3/30/01 thru 5/28/01*, with enclosed "Home Health Certification and Plan of Treatment" for same period and Statement of Medical necessity forms
- 12) "Home Health Certification and Plan of Treatment" form for Phillip Keener *for 5/29/01 to 7/27/01* (3 pages)
- 13) February 28, 2001 Skilled Nursing Visit Assessment for Phillip Keener
- 14) Janice Poff's March 26, 2001 Skilled Nursing Visit Note for Phillip Keener
- 15) Janice Poff's March 26, 2001 Skilled Nursing Assessment of Phillip Keener

- 16) Janice Poff's May 28, 2001 Skilled Nursing Assessment
- 17) Janice Poff's June 20, 2001 Skilled Nursing Visit Note
- 18) April 18, 2001 letter from Dr. Bowman, Petitioner's physician
- 19) June 19, 2001 Letter from Dr. Essex, Petitioner's physician
- 20) Janice Poff's June 21, 2001 Nursing Evaluation of Phillip Keener (fax to Dr. Essex)
- 21) September 12, 2001 letter to Phillip Keener from Michelle Overby denying Second Level Appeal
- 22) November 28, 2001 Memo from Dr. Komives to Dr. Vernon Hunt regarding Petitioner's Third Level Appeal and Dr. Hunt's response recommending denial be upheld.
- 23) Documents submitted to the Board of Trustees and Executive Administrator at the Third Level Appeal:
 - (a) October 17, 2001 letter from Petitioner Keener to Board of Trustees and Executive Administrator Requesting Level III Appeal *for DOS 5/3/01 thru 7/3/01*, with attached physicians letters.
 - (b) Dr. Komive's February 2001 opinion on Request for Prior Approval
 - (c) 2/19/01 letter from Fawn Wolf, Senior Medical Review Examiner, to Home Care of WRMC approving home care aide services and skilled nursing visits for a grace period of 2/2/01 to 5/2/01 and denying same services for period of 5/3/01 to 7/3/01.
 - (d) June 28, 2001 letter requesting second level appeal
 - (e) Second Level Appeal Memorandum from Dr. Komives to Michelle Overby, Appeals Coordinator
 - (f) September 12, 2001 letter to Phillip Keener from Michelle Overby denying Second Level Appeal for dates of service May 3, 2001 thru July 3, 2001
 - (g) November 28, 2001 Memo from Dr. Komives to Dr. Vernon Hunt regarding Petitioner's 3rd level appeal and Dr. Hunt's response recommending denial be upheld.
- 24) December 19, 2001 letter from Deputy Executive Administrator Harold Wright to Phillip Keener informing him of the Board of Trustees' and Executive Administrator's decision to deny appeal.

STIPULATIONS

In the Order on Final Pretrial Conference, entered in the record on July 30, 2002, the parties agreed to and the undersigned approved the following:

1. All parties are properly before the Office of Administrative Hearings, and that the Office of Administrative Hearings has jurisdiction of the parties and of the subject matter.
2. Petitioner and Respondent have been correctly designated, and there are no questions as to misjoinder or nonjoinder of parties.
3. On February 12, 2001, Home Care of WRMC made a written Request for Prior Approval for home care services for Petitioner to the Medical Review section of Blue Cross Blue Shield, the North Carolina Teacher's and State Employees' Comprehensive Major Medical Plan's Claims Processing Contractor.
4. By letter dated February 19, 2001 from Fawn Wolfe, Senior Medical Review Examiner, to Home Care of WRMC, the Claims Processing Contractor approved certain home care services for a grace period of February 2, 2001 to May 2, 2001 and denied services for the period May 3, 2001 through July 2, 2001.
5. Petitioner appealed the denial of home care services for May 3, 2001 through July 2, 2001 to the first and second level appeals committees of the Claims Processing Contractor pursuant to the procedures set forth in the State Health Plan's policy for

appeals. The first and second level appeals committees affirmed the decision to deny home care services for May 3, 2001 through July 2, 2001.

6. By letter to the Respondent Board of Trustees and Executive Administrator of the State Health Plan dated October 17, 2001, Petitioner requested a Level III appeal of the denial of home care services for the period May 3, 2001 through July 3, 2001.

7. On December 12, 2001, the Respondent met and reviewed Petitioner's Level III appeal. By certified letter from Deputy Executive Administrator Harold Wright to Petitioner dated December 19, 2001, Petitioner was informed of Respondent's decision to affirm the denial of home care services.

Based upon the preponderance of the admissible evidence, the undersigned makes the following:

FINDINGS OF FACT

1. Petitioner is a resident of North Wilkesboro, Wilkes County, North Carolina. Petitioner holds an educational doctorate from the University of Georgia in administration, curriculum and supervision. Petitioner was formerly the President and Headmaster of the Frederica Academy in Saint Simon's Island, Georgia. Petitioner suffers from Multiple Sclerosis (onset 1972) and diabetes mellitus. As a result of Multiple Sclerosis, Petitioner has functional limitations, which consist of "incontinence, paralysis, endurance, and ambulation." [T p 145, R. Ex. 4, p. 4, par. 18A] Since 1989, Petitioner received home care services through the Teachers' and State Employees' Comprehensive Major Medical Plan [hereinafter, "Plan"] . Although Petitioner is totally disabled and immobile, he has been able to remarkably contribute to his community as a member of the Board of Commissioners of the Town of North Wilkesboro, of the North Wilkesboro Planning Board and Chairman of the Wilkes Regional Medical Center Review Board. Due to Petitioner's personal tenacity, he is able to achieve such extraordinary accomplishments when others, similarly situated, are confined to nursing homes. Petitioner is mentally sharp, astute and competent.

2. The Plan is a state agency organized under Article 3 of Chapter 135 of the North Carolina General Statutes. Its undertaking is to pay certain hospital and medical benefits for State employees, retirees, and dependents enrolled and eligible for coverage under the Plan. Respondent Jack Walker has been the Executive Administrator of the Plan since 1999. [T p 214-215]

3. Pursuant to Article 3, Part 2 of Chapter 135, the Respondent Board of Trustees and Executive Administrator are responsible for administration of the Plan. Pursuant to N.C. Gen. Stat. § 135-39.5(20), the Respondent's powers and duties include the determination of "administrative and medical policies that are not in direct conflict with Part 3 of this Article upon the advice of the Claims Processor and upon the advice of the Plan's consulting actuary . . ."

4. Pursuant to N.C. Gen. Stat. § 135-40(b), Plan benefits are administered by a third party administrator or "Claims Processor" [hereinafter, "Claims Processing Contractor"] under contract with the State. The Claims Processing Contractor determines benefits and other questions arising under the Plan, including requests for prior approval of Plan benefits, pursuant to the terms of its contract and pertinent statutes and medical policies of the Plan. The Plan's Claims Processor is Blue Cross Blue Shield. [T p 216]

5. The Administrative Appeals Review Policy ["Appeals Policy"] adopted by the Respondent and N.C. Gen. Stat. § 135-39.7 provide the procedures for administrative appeals of the Claims Processing Contractor's decisions. The Appeals Policy requires members to submit their appeal to a First and then Second Level Appeal Committee of the Claims Processing Contractor before submitting a Third Level appeal to the Respondent. [Appeals Policy, R. Ex. 2, T p 132] Third level appeals are made in writing and presented to the Respondent in Executive Session of the Board of Trustees' meeting. The Board of Trustees makes a recommendation to the Executive Administrator on resolution of the appeal, who then reviews the appeal, makes a final decision, and notifies appellant of the decision in writing. [R Ex. 2, p 2-3, T p 217-218]

6. The Plan provides coverage for certain home health agency services pursuant to Article 3, Part 3, N.C. Gen. Stat. § 135-40.6(8c) and the Home Care Policy established by the Respondent. [Home Care Policy, R. Ex. 3]

7. The Home Care Policy sets forth procedures for prior approval of home care services. These procedures require a letter of medical necessity, a referral and treatment plan signed and dated by the physician, or an RN-certified plan of treatment to be submitted with the request for prior approval. [R. Ex. #3, p 1, Tp 137-138] The Home Care Policy lists criteria for the Claims Processor's Medical Review section to apply in determining whether proposed home care service is covered. [R. Ex. 3, par. 5(a) through (j), T p 137] The Home Care Policy also lists limitations and exclusions to home care coverage. [R. Ex. 3, page 3, paragraphs 1-11, T p 138]

8. The Home Care policy requires that "*the need for skilled service must be the primary purpose of the care rendered*" and excludes coverage "[i]f the patient does not require skilled services." [R. Ex. 3, p 3, Limitations and Exclusions, par. 11](Emphasis added).

9. N.C. Gen. Stat. § 135-40.7(2) excludes coverage for care in a nursing home, adult care home, convalescent home, or *in any other facility or location* for custodial or for rest cures. Respondent has adopted a “Custodial Care” policy which sets forth guidelines for determining what constitutes noncovered custodial care. The Custodial Care policy defines “custodial care” as:

[C]are designed essentially to assist an individual in his activities of daily living, with or without routine nursing care and the supervisory care of a doctor. While some skilled services are provided, the patient does not require continuing skilled service 24 hours daily. The individual is not under specific medical, surgical, or psychiatric treatment to reduce a physical or mental disability to the extent necessary to enable the patient to live outside an institution providing care nor is there a reasonable likelihood that the disability will be reduced to that level even with treatment. The controlling factor in determining whether a patient is receiving custodial care is the level of care and medical supervision being received rather than other considerations such as type of condition, or degree of functional limitation.”

[Custodial Care Policy, R. Ex. 5, T p 154-155].

10. Dr. Eugenie Marie Komives testified for the Respondent. Dr. Komives holds a B.S. in Biochemistry from the University of Wisconsin (1977-1981), Doctor of Medicine, Harvard Medical School (1981-1985), Internal Medicine Internship, Beth Israel Hospital, Boston, MA (1985-1986), and Family Medicine Residency, Duke-Watts Family Medicine Program, Durham, N.C. (1986-1989). Dr. Komives is a Diplomate of the American Board of Quality Assurance and Utilization Review Physicians (1998-2002) and Board Certified by the American Board of Family Practice (1989) (Recertified 1995, 2001). Dr. Komives previously was the Associate Medical Director for Utilization Management and Health Care Policy, the Carolina Permanente Medical Group (1995-1999), and she also was extensively engaged in clinical practice (1987-1999). She currently maintains the rank of Clinical Associate Professor, UNC School of Medicine (1995-2002). Dr. Komives was admitted as an expert in the fields of utilization management, which is the review of health care services to determine the appropriateness and the coverage of those services, and family practice. [T p 126, 130] Dr. Komives has been the Medical Director for the Plan at Blue Cross Blue Shield of North Carolina since October 31, 2000. [T p 125-126] As Medical Director, Dr. Komives is responsible for reviewing requests for prior approval and retrospective approval of health care services to determine the appropriateness and coverage of those services. [T p 126, 130-131] In determining coverage, Dr. Komives applies the relevant provisions of the North Carolina General Statutes and the medical policies of the Plan. [T p 131] Based upon her review of the approval requests, Dr. Komives makes recommendations on coverage which the Claims’ Processor’s Medical Review Section is required to follow. [T p 131-132] (R. Ex. 1)

11. Dr. Komives testified that in her professional opinion the purpose of the home care services provided under the Home Care Policy is to “assist a patient with activities of daily living and personal care during the period of time that they’re receiving skilled services which are intended to be of a rehabilitative nature and to assist in establishing a program or plan for patients that need continuing support in the home after that period of time.” It is further Dr. Komives’ professional opinion that the benefit was not intended to provide an ongoing, long term care benefit, but rather was intended to “supply an assisted bridge between an institutional setting--or a patient with an acute injury or health problem during the acute recovery period so that the patient can get into the home setting and then be supported in the home setting by family members or other assistants.” [T p 139-40]

12. Home Care of WRMC [hereinafter, “WRMC”] is a licensed Home Health Care Agency within the meaning of N.C. Gen. Stat. § 135-40.1(10). [T p 26] On February 12, 2001, WRMC submitted a request for prior approval of home care services for the Petitioner for an additional 60 day period from January 29, 2001 through March 29, 2001 to the Medical Review Section of the Plan’s Claims Processor. A written Plan of Care and Treatment [“Plan of Treatment”] was attached to the request. [R. Ex. 4] WRMC requested a monthly skilled nursing visit and home health aides for 28 hours a week to implement the plan of treatment. [T p 142]

13. The February 12, 2001 request for prior approval was referred to Dr. Komives for utilization review. [T p 134] Based upon her review of the proposed Plan of Treatment, Dr. Komives concluded that the care did not meet the criteria for coverage under the Home Care policy or the applicable statutes and that it was excluded under the Plan’s Custodial Care policy. [T p147-148, 154-157]

14. According to Dr. Komives’ expert testimony, the orders for care in the Plan of Treatment submitted for Petitioner required the nurse to perform a monthly skilled assessment of Petitioner, which she explained is an evaluative function which involves looking at and examining the patient and talking to him. Dr. Komives testified that skilled assessments are covered under the home care policy in some situations. However, such assessments are generally done at the beginning of a period of treatment. [T p 146] The orders for care also required the nurse to do the following during her monthly visit: perform vital signs, check Petitioner’s skin integrity and blood sugar diary, assess signs and symptoms of urinary tract infection and aspiration. [T p 145-146]

15. According to Dr. Komives’ expert testimony, the Plan of Treatment required the home care aides to provide personal care, including activities of daily living, bathing, dressing, and transfers. Home care aides also performed range of motion exercises, which is basically moving the patient’s limbs and joints around. [T p 147]

16. In Dr. Komives' professional opinion the services which were being provided to Petitioner did not meet the Plan's criteria for ongoing skilled care in the home. [T p 149, 158-160] Dr. Komives determined that the skilled assessments or services called for in the Plan of Treatment were not skilled services under Paragraph 5(d) of the Home Care Policy because they "could be performed safely and adequately by the average non-medical person . . . without the direct supervision of a trained nurse." Dr. Komives testified that the average nonmedical person could be trained to provide the services called for in the Plan of Treatment safely and adequately. [T p 150, 161] By way of example, Dr. Komives explained that the Petitioner, his family, and his caregivers could be taught to recognize the signs and symptoms of urinary tract infection and to report them, to recognize and report the signs and symptoms of aspiration, to monitor the blood sugars and contact the physician regarding those results as necessary, and to provide skin care and report changes in the status of Petitioner's skin to his physician. [T p 148] Thus, Petitioner, his family members, and his home care aides could working together provide the care and perform the assessments called for in the Plan of Treatment. [T p 148, 150]

17. According to Dr. Komives' expert testimony, the Plan of Treatment failed to meet the requirement that skilled services be provided, as stated in Paragraph 5(b) of the Home Care Policy, because the services called for in the Plan of Treatment were not required by North Carolina law to be rendered by licensed health professionals. [T p 150, 161]

18. In determining that the Plan of Treatment did not require skilled services, Dr. Komives also relied upon a provision in the Plan's Skilled Nursing Facility Policy ["SNF Policy"] containing a noninclusive list of services which are not to be considered skilled services. Those services listed as not skilled include: assistance with activities of daily living, routine care of incontinent patient, care of decubitus ulcers that are not infected or extensive (Stage I/II), passive range of motion exercises, observation and monitoring of patients receiving routine care for the listed nonskilled services, and routine measurement of vital signs. [SNF Policy, R. Ex. 6, p 3, par. 4(c), T p 158-160] Dr. Komives testified that all of the services listed in Petitioner's Plan of Treatment were listed under this list of nonskilled services, with the possible exception of the skilled assessment. [T p 160]

19. According to Dr. Komives' expert testimony, because skilled services were not necessary, the Plan of Treatment also failed to meet the requirements that: (a) nursing care be furnished by or under the direct supervision of a registered nurse, as set forth in Paragraph 5(a) of the Home Care policy and (b) the services by the home care aide be "part of an overall treatment plan, as an adjunct to or extension of concurrent medically necessary skilled services," as set forth in Paragraph 5(g) of the Home Care Policy. [T p 148-151]

20. Paragraph 5(j) of the Home Care Policy states that "At a point in time, a patient may no longer need skilled nursing or other therapeutic services. This may mean that the primary purpose of the care being rendered is to assist the individual in meeting the activities of daily living. . . . Because no skilled services are required at this point, the care becomes noncovered. . . ." Dr. Komives testified that in her professional opinion, Petitioner no longer needed skilled nursing and that the primary purpose of the care provided to Petitioner was to assist him in meeting the activities of daily living. Dr. Komives' opinion was based in part upon the infrequency of the nursing visits and the fact that the home health aide was able to perform the vast majority of the services listed, other than the phlebotomy (which was merely due to the agency not having the aides certified in phlebotomy). [T p 150-152] Thus, for the reasons explained in Paragraph 5(j) of the Home Care Policy, Petitioner's care was no longer covered. [R. Ex. 3, par. 5(j), T p 150-151]

21. Dr. Komives similarly testified that it is her professional opinion that skilled services are no longer required for Petitioner's care and that the primary purpose of Petitioner's care plan was to provide private-duty aide services and to supervise those services. Thus, Petitioner's home care aide services were expressly excluded under Paragraph 11 of the Limitations and Exclusions of the Home Care Policy, which states that "The need for skilled service must be the primary purpose of the care rendered. If the patient does not require skilled services, home care aide services will not be covered." [T p 153, R. Ex. 3, p 3, par. 11]

22. It is also Dr. Komives' professional opinion that Petitioner's care was excluded under Paragraph 7 of the Limitations and Exclusions set forth in the Home Care Policy, which states that "[t]here must be a reasonable expectation that the services will produce significant improvement in the patient's condition in a reasonable and generally predictable period of time or are necessary to the *establishment of a safe and effective maintenance program.*" [R. Ex. 3, p 3, par. 7, T p 152](Emphasis added) Given the number of years that home care had been provided to Petitioner, it is Dr. Komives' professional opinion that a safe and effective maintenance program had been established and that the continuing care was for the purpose of monitoring that program of care. [T p 152]

23. Dr. Komives further testified that in her professional opinion Petitioner met the definition of custodial care set forth in the custodial care policy and he met criteria listed in the custodial policy for determining when custodial care has occurred in that: (a) Petitioner is not acutely ill and his condition is stable, (b) no definitive therapeutic services or monitoring of vital signs requiring an inpatient setting had been ordered, (c) the nursing care provided is primarily maintenance of daily living, and (d) Petitioner has no potential for rehabilitation or progress beyond the current level. Dr. Komives' opinion that Petitioner has no potential for rehabilitation or progress beyond the current level was based upon her review of the documentation in the rehabilitation section of the care plan and some previous care plans for Petitioner which appeared to show that there had not been any substantial change or improvement in Petitioner's condition over a period of time. [T pp 155-157].

24. The Plan of Treatment for January 29, 2001 to March 29, 2001 listed the goals of the treatment plan as follows: (1) Adequate knowledge of diabetes mellitus as evidence by client/ patient care giver, verbalizations of medication administration, blood testing, long-term care, diabetes (ongoing), (2) Patient will maintain normal labs per M.D. for duration of care, and (3) Patient-client's personal care needs will be met by home health aide, and (4) Patient will be free of complications associated with decreased mobility." [R. Ex. 4, T p 162] The Plan of Treatment also stated that the potential discharge plan was to "Discharge when venipuncture is no longer needed and private-duty aides are no longer needed."

25. Dr. Komives testified that in her professional opinion, the goals set forth in Petitioner's Plan of Treatment are inconsistent with the purpose for which home care services are provided under the Home Care Policy because these goals do not really give an opportunity for discharge, there is no potential for the Petitioner to be rehabilitated to an independent or different level of care, and the Plan of Treatment is in essence a long-term care plan. [T p 162-163]

26. Upon Dr. Komives' recommendation, the Medical Review section allowed the requested home care benefits for Petitioner for a 90 day grace period and denied coverage for the period of May 3, 2001 through July 3, 2001. [R. Ex. 7, Letter dated February 19, 2001 from Fawn Wolf to WRMC, T p 163-164]

27. Petitioner appealed the decision to deny benefits for the period May 3, 2001 through July 3, 2001 to the First and then Second Level Appeals Committees per the Appeals Policy. [R. Ex. 8 and 9, T p 103,106, 164]

28. In August 2001, Dr. Komives reviewed additional information submitted by and for Petitioner, including written Plans of Treatment authorized by Petitioner's physician for March through May 2001 and May through July 2001. [R. Ex. 11 through 20] The additional Plans of Treatment Dr. Komives reviewed in August 2001 were essentially the same as the one submitted by WRMC on February 12, 2001. [R. Ex. 11 and 12, T p 168-169] The additional information reviewed by Dr. Komives in August 2001 included a skilled nurse visit assessment from February 28, 2001 [R. Ex. 13], skilled nursing visit notes for March 26, 2001 and June 20, 2001 [R. Ex. 14 and 17, respectively], and OASIS assessments for March 26, 2001 and May 28, 2001 [R. Ex. 15 and 16, respectively]. None of those records caused Dr. Komives to change her previous opinion that the services were not covered. [T p 169-172]

29. In August 2001, Dr. Komives also reviewed an April 18, 2001 letter from Dr. Bowman, Petitioner's former physician, and a June 19, 2001 letter from Dr. Charles Essex, Petitioner's current physician. [R. Ex. 18 and 19, T p 173-176] Dr. Komives conceded that while the letter from Dr. Bowman raised some concerns that might have merited a change in the decision, the nursing notes did not substantiate those concerns. [T p 174] None of the statements in Dr. Essex's letter indicated that Petitioner's conditions required skilled services or other therapy that would be covered under the Home Care Policy. Dr. Essex's letter mentioned concerns regarding Petitioner's diabetes and his decubitus ulcers. With respect to these conditions Petitioner's diabetes appeared to be under adequate, if not perfect control, and that the care of Petitioner's decubitus ulcers did not require skilled nursing intervention. Such care essentially requires frequent repositioning of Petitioner to prevent prolonged pressure to any one area and other preventive measures which were being provided by the home care aide. [T p 175-76] Finally, Dr. Komives reviewed a note to Dr. Essex from nurse Jan Poff dated June 21, 2001, which essentially confirmed that Petitioner's diabetes was in adequate control and that although he had an area on his coccyx, the care being provided for it with repositioning and skin care was sufficient. [T p 178]

30. Based upon Dr. Komives review of the additional information provided to her in August 2001, Dr. Komives again concluded that the Petitioner does not meet the criteria for coverage and thus recommended that the Second Level Appeals Committee continue to deny the home care services. [R. Ex. 10, T p 165-167]

31. By letter dated September 12, 2001, the Second Level Appeals Committee denied Petitioner's appeal of the decision to deny service for May 3, 2001 through July 3, 2001. [R. Ex. 21, T p 179] By letter dated October 17, 2001, Petitioner filed a request for a Level III appeal. [R. Ex. 23A, T p 226-227]

32. In November 2001, Dr. Komives referred Petitioner's case file to Dr. Vernon B. Hunt, another Medical Director at Blue Cross, to review and give an additional opinion on coverage. Dr. Hunt gave his opinion that the requirements for coverage were not met because the care being provided is to maintain the current level of functioning, did not require skilled nursing services, and there was no rehabilitative intent or therapy. [R Ex. 22, T p 180-185]

33. Dr. Komives conceded that Petitioner could qualify for certain home care services in the future if, for example, he developed a Stage III or IV decubitus that required skilled nursing intervention. Thus, the denial of the home care services requested for May through July 2001 is not a permanent denial of home care services. [T p 176]

34. According to the testimony of Jack Walker ["Executive Administrator"], the Respondent considered Petitioner's appeal at their December 2001 meeting. [Respondent's Exhibit 24, Letter dated December 19, 2001, T p 218] The Respondent reviewed and considered documents pertinent to the appeal, including letters from Petitioner's physicians and the written opinions and recommendations of Medical Directors Dr. Komives and Dr. Hunt. [R. Ex. 23 (a) through (g), T p 219-221]. Based upon their review, the Board recommended that the Executive Administrator deny the benefits for May 3, 2001 through July 3, 2001. [T p 222]

35. Upon reviewing the appeal, the Executive Administrator agreed with the Board. The Executive Administrator relied upon the expertise of Dr. Komives and upon the information presented, as well as the Board's recommendation, in deciding to deny the benefits for May 3, 2001 through July 3, 2001. [T p 222] The Executive Administrator decided to deny the benefits because the care being provided was custodial in nature and that no skilled services were being given. The Executive Administrator conceded that if Petitioner could qualify for coverage under the Plan's long term care program, much of the custodial care which Petitioner had been receiving would be covered under that program. [T p 224-225]

36. By letter dated December 19, 2001, the Deputy Executive Administrator informed Petitioner of Respondent's decision to deny the benefits for May 3, 2001 through July 3, 2001. [R Ex 24, T p 223-224] Respondent's December 19, 2001 decision outlines the statutes and medical policy provisions upon which the decision was based. [T p 224] The statutes referenced in the December 19, 2001 decision included N.C. Gen. Stat. §§ 135-40.1(11)(definition of home health coverage), 135-40.1(17a)(definition of skilled services), 135-40.6(8)c(provision for home health agency services), 135-40.7(2)(exclusion for custodial cures), and 135-40.7(22)(exclusion for charges for services covered by the long-term care benefits provision of the Plan). Respondent's December 19, 2001 decision also referenced the Home Care Policy's criteria that services which can be performed safely and adequately by the average non-medical person or be self-administered without the direct supervision of a trained nurse cannot be regarded as a skilled service and that the need for skilled services must be the primary purpose of the care rendered. The December 19, 2001 decision referenced the exclusion of custodial care under the Custodial Care policy.

37. Dr. Charles Essex, a family practitioner (not admitted as an expert witness), testified that he has been a family physician at Riverside Medical Associates for four years. Dr. Essex has been Petitioner's primary care physician for one year. Prior to that time, Dr. Essex would occasionally see Petitioner when Petitioner's previous physician was unavailable. [T p 54]

38. Petitioner suffers from advanced Multiple Sclerosis and diabetes mellitus, which are active diseases that will progressively worsen. [T p 54-55] Petitioner has lost the voluntary motion of his arms and legs. It is Dr. Essex's opinion that Petitioner's conditions require continued surveillance on a day-to-day basis. [T p 56] Because of Petitioner's Multiple Sclerosis and his immobile state, he is susceptible to skin breakdown and that there is thus a need to make continuing assessments of Petitioner's skin for breakdown. In addition, due to Petitioner's diabetes mellitus, there is a need to continuously monitor Petitioner's blood sugar level. [T p 54-59, 85] It is Dr. Essex's opinion that the home care aides do not have the requisite skills to assess and diagnose these conditions. [T p 58]

39. With respect to Petitioner's skin conditions, Dr. Essex in the past year has not observed a decubitus or skin wound on Petitioner beyond Stage II. [T p 58] Because Petitioner is immobile, he needs to be repositioned, at least every two hours, in order to prevent skin breakdown. [T p 59] Dr. Essex testified that early management and treatment of small decubitus can prevent the decubitus from becoming worse. [T p 60-61] While everyone involved in Petitioner's care needs to watch Petitioner's skin for breakdown and make early assessments of decubitus, it is Dr. Essex's opinion that there is a "significant skill component involved in judging skin breakdown" and that skilled nursing supervision of Petitioner's care is necessary to the establishment of a safe and effective maintenance program. [T p 61-66]

40. In Dr. Essex's opinion, it is necessary to have a hierarchy of care for the Petitioner, which consists of the physician at the top of the hierarchy, then the nurse, and then the certified nursing assistant. Under this hierarchy, the home health aide reports concerns to the nurse, instead of the physician, and the nurse then reports to the physician. It is thus Dr. Essex's opinion that skilled nursing is necessary for Petitioner's care. [T p 63-67] It is also Dr. Essex's opinion that some of the services of a home care aide under the supervision of a registered nurse are an extension of medically necessary services. [T p 80]

41. Dr. Essex initially testified that in his opinion, the services in the plan of care and treatment can not be safely and adequately performed by the average nonmedical person. [T p 79] However, he later clarified his testimony, stating that "there are many elements of the care plan which could be carried out by any person with common sense," and that it is the "skilled assessment and evaluation," called for in the plans of treatment which, in his opinion, can not be performed safely and adequately by a nonmedical person. [T pp 82-83]

42. Dr. Essex saw Petitioner in his office on June 19, 2001 in order to follow up on his multiple medical problems and the insurance ramifications of those problems. [T p 74] After seeing Petitioner, Dr. Essex wrote a letter of support for Petitioner's appeal dated June 19, 2001 to the Claims Processor's State Medical Review section. [R. Ex. 19]

43. In his June 19, 2001 letter of support, Dr. Essex stated that Petitioner "has a relatively small sacral decubitus, but he is a great risk for it to become worse and it needs aggressive intervention now." Dr. Essex clarified that the "aggressive intervention" means "aggressively repositioning" the Petitioner to get off of that spot and that those services can be performed by an unlicensed health care professional. [T p 75-76] He further stated that "skilled nursing *may well be* necessary for both decubitus management as well as for diabetic care." [Emphasis added] [R. Ex. 19, T p 75-76] Dr. Essex testified that when he stated that "skilled nursing may well be necessary," but he was speaking to the future, and not the present. [T p 75-76]

44. Although Dr. Essex saw Petitioner on June 19, 2001 and examined Petitioner's sacral decubitus at that time, he ordered WRMC to reassess Petitioner with regard to the need for skilled nursing for both decubitus management as well as for diabetic care. [R. Ex. 19, T p 74, 76-77]

45. In June 2001, Janice Patricia Poff, a registered nurse and case manager with WRMC, performed the reassessment of Petitioner's sacral decubitus and his diabetic care which Dr. Essex requested. On June 21, 2001, Ms. Poff reported the results of her assessments to Dr. Essex by fax, indicating that Petitioner has a "small area on coccyx" and there is "no inflammation; tissue pink, no open area seen." Ms. Poff described the area as small, and occasionally the area drains serous fluid. Ms. Poff further stated that "no dressing used or needed at present." Ms. Poff also assessed Petitioner's diabetic care. As a result of her assessments, Ms. Poff reported to Dr. Essex that she could see "no need to increase visit frequency or change therapy" for these conditions. [R. Ex. 20, T p 50-51]

46. On cross examination, Dr. Essex maintained that Ms. Poff's statements that she saw no need for change in treatment or therapy did not tell him anything and that Petitioner did not need a change in therapy, he "needs continued assessment forever." [T p 78]

47. Dr. Essex is not familiar with the provisions of the North Carolina General Statutes regarding home care coverage provided by the Plan, nor is he familiar with the provisions of the Plan's Home Care and Custodial Care policies. [T p 78]

48. Ms. Poff, since approximately 1994, has been supervising the home care of a number of patients and supervising the home health aides who provide care to those patients. Petitioner was one of the patients assigned to Ms. Poff around 1994 and she has been supervising Petitioner's care and the home health aides assigned to Petitioner since that time. [T p 20-21, 26]

49. As case manager for Petitioner, Ms. Poff has assisted his physicians in writing the Plans of Treatment which have been submitted to the Plan for Petitioner. Ms. Poff, under those Plans of Treatment, has been making one monthly visit to Petitioner for many years. [T p 28-29]

50. During Ms. Poff's monthly nursing visit to Petitioner, she checks his vital signs, listens for breath sounds, checks for signs of aspiration, assesses skin integrity, checks for edema, listens for bowel sounds, performs venipunctures for any lab work that may have been ordered, monitors medications, and supervises the services that the home health aide has provided. Ms. Poff also reviews the blood sugar diary maintained by Petitioner's home health aide. [T p 22-23] Ms. Poff records her assessments of Petitioner's skin and other conditions during each visits and gives a status report to Petitioner's physician every 60 days. [T p 25]

51. According to Ms. Poff's testimony, Petitioner has required venipunctures to monitor the effects of medications he takes. Because of his diabetes, Petitioner also needs "finger stick blood sugars" to make sure that his blood sugar stays within a range acceptable to his physician. [T p 22]

52. According to Ms. Poff's testimony, because Petitioner has had problems with skin integrity, they monitor his skin condition. This involves moving Petitioner around to prevent skin breakdown and treating skin breakdown as may be necessary. [T p 22-23] Ms. Poff explained how skin wounds are categorized by the terms Stage I, Stage II, Stage III, and Stage IV. Within the past year, Petitioner's has not had any wounds or decubitus beyond a Stage II, which Ms. Poff testified is "an abrasion, a blister, a scratch, anything that would compromise the integrity of the skin." [T p 32-33].

53. Ms. Poff explained that venipunctures are blood draws which require phlebotomy training. WRMC's home health aides do not perform the venipunctures because WRMC does not provide phlebotomy training for its home health aides and does not permit them to perform venipunctures. [T p 25, 34] Ms. Poff admitted that if phlebotomy training were provided to the home care aides at a different agency, they could probably perform the venipunctures which she performs during her monthly visit.

54. According to Ms. Poff's testimony, the services of a home care aide under her supervision are necessary for the safe and effective maintenance of Petitioner's conditions. [T p 26] Because of the need to monitor Petitioner, Ms. Poff thinks that Petitioner "probably would" require hospitalization or placement in a skilled nursing facility without these services. [T p 27]

55. Ms. Poff authorized and signed the Plan of Treatment (R. Ex. 4) for the period January 29, 2001 to March 29, 2001. [T p 30-32] This Plan of Treatment called for home health aides 4 hours a day, seven days a week, and one monthly nurse visit. [T p 141] Under this Plan of Treatment, Ms. Poff was required to evaluate vital signs and skin integrity and take a venipuncture during her monthly visit. Although not written in the Plan of Treatment, Ms. Poff also made a generalized assessment of all systems.[T p 31]

56. Under the January 29, 2001 to March 29, 2001 Plan of Treatment, the home health aides were required to perform personal care, range of motion exercises, and assist with transfers. According to Ms. Poff's testimony, personal care by the home health aides

included all aspects, such as feeding, toileting, skin care, bathing, and movement. [T p 33] Home care aides also assess Petitioner's skin integrity, monitor his vital signs, and assess his signs and symptoms of urinary tract infections. [T p 33-34]

57. One of the reasons for Ms. Poff's monthly visit is to provide the supervision of the home health aides required by the Plan. [T p 34-5] Petitioner has managed well with the home care aides and that the aides understand how to implement the Plan of Treatment. [T p 35]

58. According to Ms. Poff's testimony regarding the "goals, rehabilitation, potential discharge plans" written in the Plan of Treatment for January 29, 2001 to March 29, 2001, she believes that the first written goal, "Adequate knowledge of diabetes mellitus as evidence by client/ patient care giver, verbalizations of medication administration, blood testing, long-term care, diabetes (ongoing)," has probably been a part of Petitioner's Plan of Care and Treatment for a long time. The second goal, "Patient will maintain normal labs per M.D. for duration of care," means to check lab results as they come in to make sure they remain in the normal range. The third listed goal is "Patient-client's personal care needs will be met by home health aide and patient will be free of complications associated with decreased mobility every visit." This goal, the provision of personal care to Petitioner, is probably the primary goal of Petitioner's Plan of Treatment. [T p 36-37]

59. The written discharge plan states "[d]ischarge when venipuncture no longer needed and private-duty aides no longer needed," Ms. Poff believed that given Petitioner's condition, he probably would never be discharged from home care services under this discharge plan and that WRMC would continue to provide those services if this Plan of Treatment continued to be approved by the Plan. [T p 38]

60. Regarding the written Plans of Treatment which were submitted for Petitioner for the periods March 30, 2001 through May 28, 2001 [R. Ex. 11] and for May 29, 2001 through July 2001 [R. Ex. 12], Ms. Poff testified that these Plans of Treatment contained the same orders for discipline and treatment, goals for rehabilitation, and potential discharge plans as in the Plan of Treatment which was submitted for January 29, 2001 to March 29, 2001. [T p 41-42]

61. Without consulting Petitioner's physician, Ms. Poff wrote an unsigned Physician's Statement of Medical Necessity dated April 16, 2001 which was submitted on April 17, 2001 to the Plan's Claims Processor along with the Plan of Treatment for March 30, 2001 through May 28, 2001. In this Statement, Ms. Poff stated that Petitioner had Multiple Sclerosis and diabetes NIDDM. She further stated that he requires home health aide service of at least 4 hours a day because he is quadriplegic and unable to move anything but his head, that Petitioner requires total care; transfers per Hoyer lift, and would have to be in a facility, nursing home, or skilled nursing unit in order to receive needed care otherwise. She stated that nursing visits are to supervise aide care, assess skin integrity, draw blood for high-risk treatment and necessary exam. [R. Ex. 11, p. 2, T pp 39- 40]

62. In the April 16, 2001 Statement, Ms. Poff stated that the estimated length of therapy for Petitioner was "ongoing until patient demise." Ms. Poff's opinion is that Petitioner needs the care listed in this statement until he dies. [T p 40]

63. According to the Petitioner's testimony his skin breakdown has been going on a regular basis for a number of years and that he needs constant repositioning. A home health aide from WRMC assists in his care by bathing him, caring for his skin in areas where there is breakdown or potential breakdown, and assessing his skin integrity. [T p 90-91] Petitioner and his home health aide can together keep his skin in pretty good shape. [T p 91]

64. Petitioner has been receiving home care services since approximately 1989 and that from October 9, 1989 through 1997 he continuously received approvals for home health services from the Plan's Claims Processor. [T p 93-95, 97, P Ex 11] For a number of these years, the Plan paid for home health aides 8 hours a day, and a nursing visit twice a month for Petitioner. However, in 1995 or 1996, the Plan's Claims Processor reduced the nursing visits to once a month. [T p 97, 101] Moreover, in 1997, the Plan's Claims Processor denied prior approval of continuing home health aides for 8 hours a day, reducing those hours to four hours a day. [T p 98, P. Ex. 9]. Petitioner appealed this decision to the Board of Trustees and Executive Administrator of the Plan who were responsible for administering the Plan in 1997, which affirmed the reduction of Petitioner's hours to four hours a day in 1997. [T p 98-100, P. Ex. 6]

65. According to Dr. Komives' expert opinion and based upon her review of the records, previous decisions to approve home care services for Petitioner made by representatives of the Plan's Claims Processor were not in keeping with the requirements of the medical policy and the statutes. [T p 212]

66. No one with the Plan has ever represented to Petitioner he would be entitled to receive home care benefits continuously, and several of the letters of approval from the Plan's claims processor which Petitioner submitted into evidence clearly stated that such prior approvals did not set a precedent for other similar services. [T p 119, P. Ex. 11, 12, and 13] Beginning on October 9, 1989, the Plan, through its Supervisor of its Medical Review Section, gave prior approval to Petitioner to receive eight hours per day of services from a home care aide. In-home skilled nursing visits once every two weeks were approved beginning December 9, 1989. As required by the Plan, Petitioner periodically requested prior approval for continued home care aide services and in-home skilled nursing visits, which were consistently approved through December 31, 1996. In response to Petitioner's request for prior approval of

home care aide services and in-home nursing visits for the period from January 1, 1997 to March 31, 1997, the Plan, through its Medical Review Section, informed Petitioner that he was eligible to receive home care aide services limited to four hours per day, seven days per week, and in-home skilled nursing visits once per month. Petitioner appealed the decision of the Medical Review Section to reduce the amount of his home care aide services and skilled nursing visits as provided under the appeal provisions of the Plan. By letter dated July 14, 1997, Petitioner was informed of the decision of the Board of Trustees and Executive Administrator of the Plan of the denial of his appeal. Petitioner did not take further appeal, and this decision became a final agency action. As required by the Plan, Petitioner periodically requested prior approval for four hours per day of home care aide services and monthly in-home skilled nursing visits, which were consistently approved from January 1, 1997 through May 3, 2001. By letter dated February 19, 2001, the Plan, through its Medical Review Examiner, denied home care aide services and skilled nursing visits after May 3, 2001, without stating any reasons for the denial. Petitioner appealed the denial of his benefits in accordance with the provisions of the Plan. By letter dated December 19, 2001, Petitioner was informed of the decision of the Board of Trustees and Executive Administrator of the Plan of the denial of his appeal. From the final agency action, Petitioner timely filed a Petition for Contested Case Hearing.

67. Petitioner testified that he needs long term care. In 1989, when such coverage first became available through the Plan, Petitioner applied for long term care coverage. However, Petitioner was informed that because of his preexisting Multiple Sclerosis he was not eligible for long term care coverage under the Plan. [T p 119-122] Because he needs attention almost around the clock, Petitioner has paid for certified nursing assistants to tend to his needs 24 hours a day for a number of years. [T p 113-115] Petitioner's present CNA is Jerry Allen Church.

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

CONCLUSIONS OF LAW

1. All parties are properly before the Office of Administrative Hearings [OAH] and OAH has jurisdiction of the parties and of the subject matter.
2. All parties have been correctly designated, and there is no question as to misjoinder or nonjoinder of parties.
3. Pursuant to N.C. Gen. Stat. 150B-34 the decision of the Administrative Law Judge, as adjudicated herein, must be decided "based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency." The specialized knowledge of the Respondent agency was primarily established through the expert testimony of Dr. Komives. Not only was Dr. Komives' opinion not refuted by any other expert witness, properly qualified and admitted as an expert witness, but her articulation of the Respondent's expertise with respect to the facts as found herein require deference by the undersigned in reaching the Decision in this contested case. Due regard, in reaching the Decision herein, was properly accorded to this highly qualified expert agency witness. Her expert testimony remained largely unrefuted, and, as such, her testimony strongly influences the burden of proof required of the Respondent by the preponderance of the evidence in this contested case hearing conducted under the administrative procedures found in Article 3 of Chapter 150B of the General Statutes. This is a legal standard that is particularly difficult to apply in light of the Petitioner's medical condition, his testimony, the testimony of his physician and caregivers. Nevertheless, the law requires its application.
4. N.C. Gen. Stat. § 135-40.1(11) defines home care coverage as "coverage for home care and treatment established and approved in writing by a physician for an individual whom continual hospital confinement would be required without the care and treatment specified by this coverage."
5. N.C. Gen. Stat. § 135-40.6(8c) defines home health agency services as "services provided in a covered individual's home, when ordered by the attending physician and hospital or skilled nursing facility confinement would be required for the patient without such treatment and cannot be readily provided by family members. Services may include . . . nursing services. . . ."
6. N.C. Gen. Stat. § 135-40.6(8c) expressly limits home health nursing services to the services of the following: 1) a registered nurse (RN), 2) a licensed practical nurse (LPN) under the supervision of a RN, and 3) "*services of a home health aide which are an adjunct to or extension of concurrent medically necessary skilled services under the supervision of a RN,*" not to exceed four hours a day. (Emphasis added). N.C. Gen. Stat. 135-40.6(8c) limits coverage for home health services to 60 days per fiscal year, but permits additional home health services to be provided "on an individual basis if prior approval is obtained from the Claims Processor" [T p 135-138]
7. N.C. Gen. Stat. § 135-40.1(9) defines a Home Health Aide as "an individual who provides medical or therapeutic care and who reports to and is under the direct supervision of a Home Health Care Agency." N.C. Gen. Stat. § 135-40.1(10) defines a Home Health Care Agency as "an agency which is constituted, licensed and operated in accordance with the laws pertaining to agencies providing home health care."

8. N.C. Gen. Stat. § 135-40.1(17a) defines “skilled care” as “medically necessary services that can only be rendered under State law or regulation by licensed health professionals such as a . . . licensed practical nurse or registered nurse.”

9. Pursuant to Part 4 of Article 3, Chapter 135, N.C. Gen. Stat. § 135-41, the Plan provides optional long-term care benefits to qualified employees and retired employees who voluntarily elect to provide such benefits for themselves and their qualified dependents. Pursuant to N.C. Gen. Stat. § 135-41.1, those benefits include nursing home benefits and custodial benefits. Pursuant to N.C. Gen. Stat. § 135-41.1(7), these benefits are “for the purpose of meeting the requirements for assistance from the loss of functional capacity associated with a chronic illness, disease, or disabling injury for extended periods of time.” N.C. Gen. Stat. § 135-40.7(22) excludes coverage for charges for services that are covered by the long-term care benefits provision of Part 4 of Article 3.

10. In order to receive home care services under N.C.G.S. § 135-40.6(8c) and the Plan’s Home Care Policy, Petitioner must need “skilled services” within the meaning of N.C.G.S. 135-40.1(17a) and the provisions of the Home Care Policy. The need for skilled services must be the primary purpose of Petitioner’s care, otherwise it is excluded under the Home Care Policy.

11. To constitute skilled services within the meaning of N.C.G.S. § 135-40.1(17a) and the Home Care Policy, the services provided to Petitioner under a proposed Plan of Treatment must be those which are both medically necessary and required under State law or regulation to be rendered only by a licensed health care professional such as a licensed practical nurse or registered nurse. Pursuant to Paragraph 5(d) of the Home Care Policy, services which “could be performed safely and adequately by the average non-medical person. . . without the direct supervision of a trained nurse,” are not considered skilled services.

12. None of the services required to be performed by the nurse once a month under the Plans of Treatment which WRMC submitted on Petitioner’s behalf for the period January 29, 2001 through March 29, 2001, and subsequently submitted for March through May 2001 and May through July 2001 were services which are required by State law or regulation to only be performed by a licensed health care professional. All of the services required to be performed by the nurse once a month under the Plans of Treatment which WRMC submitted on Petitioner’s behalf for these periods, “could be performed safely and adequately by the average non-medical person. . . without the direct supervision of a trained nurse,” and thus are not considered skilled services under the criteria set forth in Paragraph 5(d) of the Home Care Policy. Petitioner did not require skilled services within the meaning of N.C.G.S. § 135-40.1(17a) and the Home Care Policy. Much of the reason that Petitioner does not need skilled services is due to the excellent care that he is presently receiving.

13. Since N.C. Gen. Stat. § 135-40.6(8c) and Paragraph 5(g) of the Home Care Policy limits the services of a home health aide to those which are “an adjunct to or an extension of concurrent medically necessary skilled services under the supervision of an RN,” and Petitioner did not require skilled care within the meaning of N.C. Gen. Stat. § 135-40.1(17a) and the Home Care Policy, the home care aides requested under the Plan of Treatment were not covered by N.C. Gen. Stat. § 135-40.6(8c) and the Home Care Policy.

14. Since skilled services were not necessary, the Plan of Treatment also failed to meet the requirement under Paragraph 5(a) of the Home Care Policy that nursing care be furnished by or under the direct supervision of a registered nurse.

15. Since Petitioner did not require skilled care, the home care proposed under the Plans of Treatment for January through July 2001 was limited and excluded under Paragraph 11 of the Limitations and Exclusions of the Home Care Policy, which states that “The need for skilled service must be the primary purpose of the care rendered. If the patient does not require skilled services, home care aide services will not be covered.” The requested home care services failed to meet the criteria for coverage under the Home Care Policy because the primary purpose of the care being provided to Petitioner is the need to provide Petitioner with assistance in performing the activities in daily living through private duty aides and to supervise the services provided by those private duty aides. For the same reason, the exclusion stated in Paragraph 5(j) of the Home Care Policy applies to Petitioner’s proposed home care.

16. Petitioner’s care was excluded under Paragraph 7 of the Limitations and Exclusions set forth in the Home Care Policy, which states that “[t]here must be a reasonable expectation that the services will produce significant improvement in the patient’s condition in a reasonable and generally predictable period of time or are necessary to the *establishment of* a safe and effective maintenance program.” The preponderance of the evidence showed that a safe and effective maintenance program had already been established and in place for many years. The continuing home care services were merely being provided to monitor that program of care and were not covered.

17. The home care services which were provided to Petitioner under the proposed Plans of Treatment for January 2001 through July 2001 met the definition of custodial care as set forth in the Plan’s Custodial Care Policy and met the criteria for determining when custodial care has occurred. These home care services were excluded from coverage under the terms of the Custodial Care Policy and N.C. Gen. Stat. § 135-40.7(2).

18. The Plans of Treatment submitted on Petitioner’s behalf for January through July 2001 were actually long term care plans devised for the purpose of meeting the Petitioner’s requirements for assistance from the loss of functional capacity associated with

CONTESTED CASE DECISIONS

Multiple Sclerosis for an extended period of time. If Petitioner were eligible for long term care coverage, the home care requested under these Plans of Treatment would be covered by the long-term care benefits provisions of Part 4 of Article 3. The requested home care was excluded from coverage under N.C. Gen. Stat. § 135-40.7(22). The Plan's Executive Administrator has conceded (Finding of Fact #35) that if Petitioner could qualify for coverage under the Plan's long term care program, much of the custodial care which Petitioner has been receiving would be covered under that program.

19. Petitioner contends that Respondent's decision to affirm the denial of home care services was erroneous and was arbitrary and capricious because the Plan's Claims Processor has approved previous requests for home care services for Petitioner and because the Board of Trustees and Executive Administrator responsible for administering the Plan in 1997 affirmed the reduction of Petitioner's home care aide hours from 8 hours to 4 hours per day in 1997. However, in reviewing appeals under N.C. Gen. Stat. § 135-39.7, the Respondent must determine whether Petitioner meets the criteria for coverage under the applicable statutes and medical policies. Decisions of the Plan's Claims Processor on previous requests for prior approval of home care services for Petitioner do not preclude or estop the Respondent from denying future requests for prior approval of home care services, including the WRMC's request for prior approval for January through July 2001. The decision made by the Board of Trustees and Executive Administrator responsible for administering the Plan in 1997 does not preclude or estop the Respondent from denying future requests for prior approval of home care services, including the WRMC's request for prior approval for January through July 2001 although the lack of a legal estoppel is counterintuitive.

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

DECISION

The Board of Trustees and Executive Administrator, who will make a final agency decision pursuant to N.C. Gen. Stat. § 135-39.7, should deny the home care services requested for the period May 3, 2001 through July 3, 2001.

ORDER

It is hereby ordered that the Board of Trustees and the Executive Administrator serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with North Carolina General Statute 150B-36(b).

NOTICE

The decision of the Administrative Law Judge in this contested case will be reviewed by the agency making the final decision according to the standards found in N.C. Gen. Stat. § 150B-36(b)(b1) and (b2). The agency making the final decision is required to give each party an opportunity to file exceptions to the decision of the Administrative Law Judge and to present written argument to those in the agency who will make the final decision. N.C. Gen. Stat. § 150B-36(a).

This the 11th day of December, 2002.

Julian Mann, III
Chief Administrative Law Judge

CONTESTED CASE DECISIONS

STATE OF NORTH CAROLINA

COUNTY OF CRAVEN

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
02 OSP 0103

GWENDOLYN L. GORDON

Petitioner,

v.

N.C. DEPARTMENT OF CORRECTION,

Respondent.

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DECISION

APPEARANCES

Petitioner: Brenda J. Bryant, Esq.
D. Mitchell King, Esq.

Respondent: Neil Dalton, Assistant Attorney General

ISSUE

Whether Respondent discriminated against Petitioner on the basis of race or gender when it denied her application for promotion in 2001 to the position of Superintendent of the Pamlico Correctional Institution.

FINDINGS OF FACT

1. Petitioner has been employed with Respondent since May, 1974 when she began as a secretary. After three years as a secretary, Petitioner progressed up through the ranks from Programs Assistant I to Programs Director III. She was serving as Assistant Superintendent for Programs at Craven Correctional Institution at the time of her application for the position of Superintendent for the Pamlico Correctional Institution, position number 58000, in July, 2001. Petitioner served nine months at Craven Correctional Institution as Acting Superintendent, prior to appointment of David Chester, her present supervisor, as Superintendent for Craven. In her present capacity as Assistant Superintendent, she acts as Superintendent when David Chester is away from the facility.

2. Petitioner, at the time of her application for position number 58000, held a four year degree in Business Administration and Management from East Carolina University. In addition, she had completed a forty hour course at East Carolina University for professional managers.

3. During her twenty-seven years employment with Respondent, Petitioner consistently has received performance appraisals of "outstanding", the highest rating possible in Respondent's personnel system. She was rated outstanding in performance during the time she was Acting Superintendent for nine months at Craven Correctional Institution.

4. Although most of Petitioner's career has been in the area of Programs, she has dealt face to face with inmates on a daily basis during her seven years at Craven. She has served on numerous State Task Forces representing the Department of Correction and devised the Educational Matrix for inmates now used statewide by Respondent.

5. The successful applicant for the position of Superintendent for Craven Correctional Institution, Robert Hines, grew up in and resides in Goldsboro. He began his career with Respondent at the Greene Correctional Center in 1978 as a correctional officer. Robert Hines progressed up through the ranks from correctional officer to sergeant, lieutenant, captain, and assistant superintendent before his promotion to Superintendent of Pamlico Correctional Institution in 2001. At the time of his application for the position of Superintendent at Pamlico, Robert Hines had twenty-three and one-half years of service with Respondent, all of which has been in custody and operations.

6. Robert Hines has a two year Associate Degree in Recreational Grounds Management from Wayne Community College plus an unspecified number of credit hours in Business Administration from Wayne Community College for which he did not receive a degree. Robert Hines had been an assistant superintendent with Respondent for nine years and nine months at the time of his application for the position of Superintendent of Pamlico Correctional Institution.

7. At all times pertinent in this contested case, Joseph Lofton was Eastern Regional Director for the Division of Prisons and was the hiring manager for position number 58000. Joseph Lofton has sixteen prison units under his supervision. As Regional Director, Director Lofton had the duty of posting the notice of vacancy for position number 58000, appointing an interview team, and making a recommendation to his superiors as to whom should be selected to fill the position. Position number 58000 was posted internally in the Department of Correction with a closing date of July 26, 2001.

8. In addition to appointing himself, Director Lofton appointed South Central Regional Director Pat Chavis, American Indian female, and Danny Thompson, Caucasian male, Assistant Director for Auxiliary Services of the Division of Prisons, to the interviewing committee for position number 58000. Both Pat Chavis and Danny Thompson began careers with Respondent as correctional officers. Pat Chavis worked her way up through the ranks in custody and operations. Director Lofton established a cutoff of sixty (60) points as the minimum score for inclusion in the most qualified pool of applicants. Both Robert Hines and Petitioner scored well enough to be placed into the most qualified pool.

9. The committee interviewed at least four (4) applicants, including Robert Hines and Petitioner, both of whom were interviewed on August 8, 2001. The only documents placed before the committee concerning Robert Hines and Petitioner were their applications, forms PD 107. The committee members were not given the TAP, performance appraisals, of either candidate, even though the committee was charged with determining the best qualified candidate for the position. It is normal practice of interview committees to consider recent performance appraisals in scrutinizing candidates for promotion. Director Joseph Lofton had seen the recent performance appraisals of both Robert Hines and Petitioner because he reviewed and signed off on them as Regional Director. Those recent performance appraisals show that Robert Hines had been rated as very good while Petitioner had been rated as outstanding. Petitioner adduced evidence that Respondent failed to follow state-mandated policies and procedures for promotions. An employer's failure to follow established procedures for hiring or promotion traditionally has been considered indicative of pretext. See North Carolina Department of Correction v. Hodge, supra, 99 N.C.App. at 614, 394 S.E.2d at 292. The interview team in this case did not identify the selection tools on which the promotion decision purportedly was based until after the selection had been made. The percentages used in screening the applicants were not consistent with Respondent's practice in other areas of the State or even with other positions in the Eastern Region. Respondent offered no credible evidence to explain the inconsistency in its own procedures and policies regarding promotions. The interview team in this case did not identify the selection tools on which the promotion decision purportedly was based until after the selection had been made.

10. Neither Joseph Lofton nor any committee member sought the recommendation of the immediate supervisor, the person most familiar with current work, of either Robert Hines, whose supervisor was Carla O'Konek-Smith, or Petitioner, whose supervisor was David Chester. Carla O'Konek-Smith, Robert Hines' supervisor for the immediate two (2) years prior to his promotion to Superintendent at Pamlico, testified that she would have given Robert Hines an unfavorable recommendation, had she been asked. David Chester, Petitioner's immediate supervisor for the last three (3) years prior to her application for position number 58000, testified that Petitioner's job performance under his supervision had been outstanding.

11. Eastern Region Director Joseph Lofton testified that he did not know Robert Hines prior to going to Wayne Correctional Institution to discuss communication issues with Superintendent Carla O'Konek-Smith but met him at that time. Director Lofton lives in Goldsboro, as does Robert Hines. Both are members of Minority Pioneers. Director Lofton and Robert Hines worked together as Correctional Officers early in their careers at Greene Correctional Institution. There were ten to twelve officers working at Greene at the time and Director Lofton and Robert Hines sometimes worked on the same shift. The two of them have worked together in Minority Pioneers affairs, including an annual banquet. Robert Hines' brother Herbert Hines, was supervised at one time by Director Lofton when he was at Neuse Correctional Institution. The testimonies of Director Lofton and Robert Hines were contradictory, with Director Lofton asserting that he did not know Robert Hines other than meeting him one time at Wayne and with Robert Hines asserting that he had worked with Director Lofton in the past as stated in this paragraph.

12. Petitioner testified that she had received a letter from a supervisor in the past counseling her to watch her tone of voice and volume when talking with staff. Director Lofton testified that rumors about Petitioner having an intimidating personality were considered by the interview committee in making its decision of whom to recommend for promotion. Robert Hines testified that he had left Wayne Correctional Institution on occasion without telling his supervisor as required. There was no evidence given in this hearing that Robert Hines's admitted infraction of rules was placed before the interview committee as was Petitioner's ascribed rumors about an intimidating personality.

13. On or about July 17, 2001, a vacancy for the position of Superintendent IV, number 58000, pay grade 77, was posted for Pamlico Correctional Institution, a constituent institution in the Division of Prisons of the Department of Correction. Both Petitioner and Robert Hines made timely application for the posted position. The posting for position number 58000 contained the following statement of qualifications for education and experience:

Graduation from a four year college or university and three years of supervisory, Administrative or consultative experience in correction or related work; or graduation from high school and five years of supervisory experience in corrections or related work; or an equivalent combination of education and experience.

14. Screening for position number 58000 was done by Wayne Harris, Administrative Officer II for the Eastern Region, in consultation with George Hedrick, a personnel analyst for Respondent and who is the person recognized by the Department as the in-house authority on screening of applicants. Respondent's screening procedures have been approved by the Office of State Personnel. Both Robert Hines and Petitioner screened into the highly qualified pool.

15. Information for the screening usually is taken off the application. In this screening, Wayne Harris noticed that Robert Hines had listed on his application form, PD107, only his last three positions in the Division of Prisons. Wayne Harris knew that Robert Hines had been with the Division longer than that shown on the PD 107 so he went into Respondent's computer database and gave Robert Hines credit for all of the other positions he had held over previous years with Respondent. While that practice is not envisioned in the procedures printed by the Office of State Personnel, it is standard practice at Respondent and not prohibited by the Office of State Personnel.

16. Robert Hines filed a PD 107 for a promotion in 1996 which indicates that he has four (4) years of college, although he did not indicate a particular degree earned. In his July 2001 application for position number 58000, he filled out his application in such a manner that it would lead one to believe that he had attended Wayne Community College for four (4) years and earned a degree in Business Administration. For screening purposes, Wayne Harris gave Robert Hines credit for only two (2) years college. Danny Thompson, a member of the three person interview committee, testified that at the time of the interviews, he took Robert Hines's application at face value and believed that Robert Hines graduated in 1977 from Wayne Community College with a degree in Business Administration.

17. At the time of the posting and filling of position number 58000, the Eastern Region under Director Joseph Lofton had sixteen (16) prisons of which two (2) were under the supervision of a female superintendent. In its EEO Opportunity Plan for the years 2000-02, Respondent's underutilization figures for the Eastern Region showed the following statistics of underutilization for black males and white females:

2000: b/m -1, w/f -4
2001: b/m -2, w/f -5
2002: b/m -2, w/f -6

These figures demonstrate an almost three to one EEO underutilization incentive for Respondent to have promoted/hired a white female in the position in controversy, number 58000. The last time a female was promoted to the position of Superintendent at a male facility in the Eastern Region was 1991.

18. At a time when Joseph Lofton was her supervisor, as Eastern Regional Director, Superintendent Carla O'Konek-Smith testified that Director Lofton told her that she should not give Robert Hines a "below good" on his performance appraisal or he might have to do the same to hers. Superintendent O'Konek-Smith and Robert Hines had some communications issues between them when she supervised him at Wayne Correctional Institution just before his promotion into position number 58000. Robert Smith, Superintendent IV at Eastern Correctional Institution, testified that Director Lofton has in the past instructed him to process the paperwork on a particular candidate for promotion. Superintendent Smith interpreted this to mean that he should fill out a form 154, recommendation for promotion, for the named candidate. Larry Dail, Assistant Superintendent for Custody and Operations at Eastern, testified that Director Lofton had called him in the past and instructed him to process the paperwork, DOC 154, for a particular candidate.

19. Respondent asserted as its principle reason for promoting Robert Hines over Petitioner that he had more experience in custody and operations than Petitioner and that she had limited herself geographically as to where she would take assignments in the State. Witnesses Danny Thompson, Pat Chavis, Joseph Lofton, Boyd Bennett, Director of Prisons, Dan Steineke, Deputy Secretary, and Theodis Beck, Secretary of Corrections, all asserted a belief that Robert Hines was better suited for the Superintendent's position at Pamlico because of his greater experience in custody and operations as opposed to Petitioner's greater experience in programs and because Pamlico was converting from a privately run prison to a State run prison.

20. On the PD 107 applications of Robert Hines and Petitioner for position number 58000, Robert Hines answered no to the question of whether he would accept assignment to anywhere in the State and indicated that he only would accept work in Wayne, Johnston, Sampson, Greene, and Pamlico counties. To the same question, Petitioner answered that she would accept work anywhere in the State of North Carolina. Petitioner at one time applied for the position of Assistant Superintendent for Custody and Operations at Craven Correctional Institution and was awarded the promotion. Respondent asked Petitioner to accommodate it by giving up that position and taking a position as Assistant Superintendent for Programs, which she did. Witnesses for Respondent in this hearing were critical of Petitioner for not taking assignments in custody and operations and for not having more geographic diversity in her work experience.

21. On September 12, 2001, Secretary Beck transmitted an email to Director Lofton stating:

This is good. I am a little more comfortable in defending a Hines decision rather than a Washington decision in the event we are challenged by GG. Your 154 needs to give him all he is entitled to and I will take care of the rest if it becomes an issue. Thanks for the heads up. At some point, we need to talk about security leaks.

Testimony at the hearing established that the Washington referred to in this email was Oliver Washington, an African-American male. The GG referred to in the email also was established to be a reference to Petitioner, Gwendolyn Gordon. Oliver Washington, another candidate for position number 58000, was not as qualified as either Robert Hines or Petitioner. This email tends to show that Respondent intended to hire an African-American male over the white female applicant regardless of qualification.

22. Respondent made an error in its screening of Petitioner's application. It subtracted thirty-six (36) points from Petitioner's score erroneously, a mistake which Respondent denied in its answers to Petitioner's Second Requests for Admissions but admitted during testimony in the hearing. Respondent also gave one hundred percent (100%) credit to each applicant's prior service in a relevant position, a practice not shown by Respondent as common in its selection process. The evidence showed that this was uncommon; Robert Hines was screened in 1996 for an application to Assistant Superintendent for Custody and Operations at Wayne Correctional with 50% credit given for months of service as Correctional Sergeant, 80% credit for months as Correctional Lieutenant, and 100% credit for months as Correctional Captain and Assistant Superintendent. The screening sheet for Robert Hines for position number 58000 shows that Respondent gave 100% credit for months of service for experience in rank as Correctional Sergeant, Lieutenant, Captain, and Assistant Superintendent. Petitioner also received 100% credit for months of service in relevant ranks. The net effect of this departure was to raise the screening score of a candidate, in this case Robert Hines, with less time in higher rank than a candidate, Petitioner, with more time in higher rank.

23. It is found as a fact that both Robert Hines and Petitioner were highly qualified for promotion to position number 58000. As between the two candidates, Petitioner was more qualified in the following respects:

1. Petitioner has greater length of service, 27 years compared to 24 years,
2. Petitioner has more education, a 4 year degree compared to a 2 year associate degree,
3. Petitioner has achieved consistent ratings of outstanding on her performance appraisals compared to very good ratings for Robert Hines,
4. Petitioner has made significant contributions to the Department of Correction and served on statewide task forces, and
5. Petitioner scored higher on both the interview for position 58000 and on the screening instrument.

24. Respondent has in the past promoted employees who had work experience in programs in the Department to Superintendent positions. Both David Chester, Superintendent of Craven Correctional Institution and Robert Smith, Superintendent of Eastern Correctional Institution, came up through the ranks of the Department on the Programs side. Several other superintendents in the Department with extensive experience in programs similarly have been promoted into superintendent positions. Petitioner has experience in the opening of a new facility, Craven, as an Assistant Superintendent for Programs. In the hiring recommendation for Superintendent David Chester, this type of experience was cited as one of the reasons he was selected for promotion, in addition to his extensive experience in programs.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the following conclusions of law are made:

1. All parties properly are before the Office of Administrative Hearings (herein "OAH") and the OAH has jurisdiction of the parties and of the subject matter in this action.
2. All parties correctly have been designated and there is no question as to misjoinder or nonjoinder of parties.
3. In interpreting North Carolina General Statute 126-36, the North Carolina Courts look to federal case law addressing federal discrimination statutes for guidance. See North Carolina Department of Correction v. Gibson, 308 N.C. 131,136, 301 S.E.2d 78, 82 (1983).
4. Under the three-part scheme of proof for disparate treatment cases developed by the United States Supreme Court, a plaintiff has the initial burden of establishing a prima facie case of discrimination. Once the plaintiff presents a prima facie case, the defendant has the burden of articulating a legitimate, non-discriminatory reason for the adverse employment action. At that point, the plaintiff has the burden of establishing that the reason asserted by the defendant is not the true reason for its decision, but a pretext for

CONTESTED CASE DECISIONS

discrimination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); North Carolina Department of Correction v. Hodge, 99 N.C. App. 602, 394 S.E.2d 285 (1990).

5. In the context of a promotion, the prima facie case requires the plaintiff to show: (a) membership in a protected group; (b) application and qualification for a job; (c) rejection despite the plaintiff's qualifications; and (d) continued solicitation for applicants, or the filling of the position with an applicant of a different group.

6. Petitioner has met her burden of establishing a prima facie case of race and gender discrimination. Petitioner, on the basis of race and gender, established that she was a member of a protected group. Petitioner is a caucasian female. Robert Hines, the successful applicant for position 58000 is an African-American male. Petitioner was qualified for the position for which she applied. Respondent acknowledges that Petitioner was in the "most qualified" pool of applicants and was listed as number two (2) in the applicant recommendation memorandum.

7. Respondent has articulated as a non-discriminatory reason for its selection of Robert Hines that he was more qualified by virtue of having extensive experience in custody and operations for the Superintendent IV position.

8. Petitioner has met her burden of proving by a preponderance of the evidence that Respondent's asserted reason for promoting Robert Hines was pretextual and designed to mask its true discriminatory reasons. The screening, interview, and evaluation process demonstrated intent to promote an African-American male over Petitioner, a caucasian female.

9. Petitioner was not selected for the position of Superintendent IV, Position 58000. The person selected was selected under circumstances giving rise to an inference of discrimination. As such, Petitioner established a prima facie case of sex and race discrimination.

10. As set forth in Oncale v. Sundowner Offshore Services, 523 US 75, 118 S.Ct. 998, 940 L.Ed. 201 (1998) and Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 US 669, 103 S.Ct. 2622, 77 L.Ed.2d 89 (1983), Title VII prohibitions as to discrimination on the basis of gender apply to women such as Petitioner in this case.

11. The Respondent made race and gender a determining factor in the selection of the Superintendent IV, Position 58000 Pamlico Correctional Institution, and thus illegally affected Petitioner's terms, conditions and privileges of employment. Respondent violated federal and state civil rights statutes relating to employment discrimination (Title VII of the Civil Rights Act of 1964 (42 USC 2000e(a)(1) and N.C.G.S. 143-422.2) when the illegitimate factors of race and gender played an actual role in the employment decision.

12. Based upon the entire record, the preponderance of the evidence establishes that Respondent's explanation is unworthy of credence. The inclusion of a person less qualified than Robert Hines or Petitioner, Oliver Washington, in the September 12, 2001 email from Secretary Theodis Beck to Director Lofton further establishes that race and gender were the motivating factors of Respondent's promotion decision in this case.

13. Petitioner has proven pretext by establishing that Respondent's conduct manifested certain recognized indicia of pretext, for which Respondent has offered no legitimate explanation. Initially, Petitioner has established that she was more qualified for the Superintendent IV position than Robert Hines in accordance with the state-mandated criteria for promotion—demonstrated capacity, quality and length of service.

14. Based upon an analysis of the state-mandated criteria for the position of Superintendent IV, Petitioner was more qualified than Robert Hines for the position, and Respondent's selection of a less qualified candidate is indicative of race and gender discrimination. See Dorsey v. University of North Carolina-Wilmington, 122 N.C. App. 58, 468 S.E.2d 557,660 (1996).

15. Petitioner also adduced evidence that Respondent failed to follow state-mandated policies and procedures for promotions. An employer's failure to follow established procedures for hiring or promotion has traditionally been considered indicative of pretext. See North Carolina Department of Correction v. Hodge, supra, 99 N.C. App. at 614, 394 S.E.2d at 292. The interview team in this case did not identify the selection tools on which the promotion decision purportedly was based until after the selection had been made. The percentages used in screening the applicants were not consistent with Respondent's practice in other areas of the State or even with other positions in the Eastern Region. Respondent offered no credible evidence to explain the inconsistency in its own procedures and policies regarding promotions.

16. Based upon the latitude accorded the trier of fact in discrimination cases, it is concluded from the facts and circumstances of this case that Respondent unlawfully discriminated against Petitioner because of her race and gender when it denied Petitioner's application for promotion to Superintendent IV, Position 58000, Pamlico Correctional Institution.

DECISION

CONTESTED CASE DECISIONS

Based upon the foregoing findings of fact and conclusions of law, it is found that Respondent discriminated against Petitioner Gwendolyn Gordon because of her race and gender when it denied her application for promotion to the position of Superintendent for Pamlico Correctional Institution, position number 58000. It hereby is ordered that Petitioner be paid back pay and all benefits which she would have received had she been promoted to position number 58000 from the date Robert Hines was placed into pay status in position number 58000. It is ordered, further, that Petitioner receive front pay until such time as she is promoted to a comparable Superintendent IV position, or to some other similar position, acceptable to Petitioner, at a pay grade not less than that accorded to a Superintendent IV. It is ordered that Petitioner shall receive attorney's fees in reasonable amount to be determined after appropriate affidavits are filed in support of, and if Respondent so elects, in opposition to attorney's fees.

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, N.C. 27699-6714, in accordance with North Carolina General Statute 150B-36(b).

NOTICE

The decision of the Administrative Law Judge in this contested case will be reviewed by the agency making the final decision according to the standards found in G.S. 150B-26(b)(b1) and (b2). The agency making the final decision is required to give each party an opportunity to file exceptions to the decision of the Administrative Law Judge and to present written argument to those in the agency who will make the final decision. G.S. 150B-36(a).

The agency that will make the final decision in this contested case is the North Carolina State Personnel Commission.

This the 24th day of October, 2002.

Beecher R. Gray
Administrative Law Judge

STATE OF NORTH CAROLINA
COUNTY OF PITT

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
02 OSP 0103

GWENDOLYN GORDON)	
Petitioner,)	
)	
v.)	ORDER FOR ATTORNEYS' FEES
)	
NORTH CAROLINA DEPARTMENT OF CORRECTION,)	
Respondent.)	

A hearing on the merits was conducted in this contested case on July 29 and 30, 2002 in Farmville and July 31, 2002 in Greenville, North Carolina. A decision in favor of Petitioner was issued on October 24, 2002. Following the decision, which provides for back pay and finds discrimination, the parties were asked to file proposals and responses, with supporting documents, for an award of attorneys' fees to counsel for Petitioner under the provisions of G.S. 150B-33(b)(11). That section provides:

An administrative law judge may: [o]rder the assessment of reasonable attorneys' fees and witness fees against the State agency involved in contested cases decided under Chapter 126 where the administrative law judge finds discrimination, harassment, or orders reinstatement or back pay.

This case was decided under Chapter 126, the State Personnel Act. Counsel for Petitioner filed an affidavit of Petitioner's attorneys' fees and costs on October 09, 2002. Counsel for Respondent was not furnished with a copy of this affidavit until sometime after November 01, 2002. On November 08, 2002, counsel for Respondent filed a response to Petitioner's affidavit for attorneys' fees. Counsel for Petitioner filed a response to Respondent's response on November 15, 2002.

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On October 09, 2002, counsel for Petitioner filed affidavits for attorneys' fees and costs, a detailed billing statement, and a fee agreement with Petitioner, each of which are attached and incorporated by reference. Counsel for Respondent filed a response on November 08, 2002 seeking specific reductions in the hours and amounts requested. Having considered the affidavits, the fee agreement, and Respondent's objections, I make the following findings:

1. The hourly rate of \$200, according to affidavits of counsel for Petitioner, is the usual and customary rate charged for litigation work by experienced attorneys, which I find counsel for Petitioner to be, in the geographical area where they practice. I find the rate of \$200 per hour to be a reasonable hourly rate under the facts and circumstances of this case.

2. I find that counsel for Petitioner billed for two attorneys during all of the actual trial time, approximately 122 hours. I find that billing unnecessarily duplicative and therefore reduced to 61 hours for a single attorney. There is no question that the second attorney present was useful; that usefulness, however, does not rise to the level of necessity compelling duplicative reimbursement. There was nothing so unusual or difficult about the trial of this contested case as to justify the presence and full reimbursement of a second counsel.

3. I find that travel time by counsel should be billed at one-half the attorney rate and hereby reduce the billed travel time by 9.25 hours.

4. I find that discussions with the EEOC Office were not a direct part of this contested case hearing and therefore not qualified for reimbursement. Accordingly, 8.25 hours of attorney time should be disallowed.

5. I find that four hours of attorney time were, or could have been, spent by a paralegal or clerk performing appropriate duties. Accordingly, the total attorney time is reduced by four hours.

The total attorneys' fees awarded under this order are forty-six thousand, six hundred and seventy dollars (\$46,670), based on a reduction of 82.5 hours of the 315.85 requested at a rate of \$200 per hour. Costs associated with this contested case hearing are as found on the attached affidavits of attorneys' fees and costs.

This the 25th day of November, 2002.

Beecher R. Gray
Administrative Law Judge