

NORTH CAROLINA

IN THIS ISSUE



REGISTER

Volume 19, Issue 01
Pages 1 - 173

July 1, 2004

This issue contains documents officially filed through June 10, 2004.

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NORTH CAROLINA ADMINISTRATIVE CODE CLASSIFICATION SYSTEM

The North Carolina Administrative Code (NCAC) has four major classifications of rules. Three of these, titles, chapters, and sections are mandatory. The major classification 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. Subchapters are optional classifications to be used by agencies when appropriate.

NCAC TITLES		TITLE 21 LICENSING BOARDS	TITLE 24 INDEPENDENT AGENCIES
1	ADMINISTRATION	1 Acupuncture	1 Housing Finance
2	AGRICULTURE & CONSUMER SERVICES	2 Architecture	2 Agricultural Finance Authority
3	AUDITOR	3 Athletic Trainer Examiners	3 Safety & Health Review Board
4	COMMERCE	4 Auctioneers	4 Reserved
5	CORRECTION	6 Barber Examiners	5 State Health Plan Purchasing Alliance Board
6	COUNCIL OF STATE	8 Certified Public Accountant Examiners	
7	CULTURAL RESOURCES	10 Chiropractic Examiners	
8	ELECTIONS	11 Employee Assistance Professionals	
9	GOVERNOR	12 General Contractors	
10A	HEALTH AND HUMAN SERVICES	14 Cosmetic Art Examiners	
11	INSURANCE	16 Dental Examiners	
12	JUSTICE	17 Dietetics/Nutrition	
13	LABOR	18 Electrical Contractors	
14A	CRIME CONTROL & PUBLIC SAFETY	19 Electrolysis	
15A	ENVIRONMENT & NATURAL RESOURCES	20 Foresters	
16	PUBLIC EDUCATION	21 Geologists	
17	REVENUE	22 Hearing Aid Dealers and Fitters	
18	SECRETARY OF STATE	25 Interpreter/Transliterater (Reserved)	
19A	TRANSPORTATION	26 Landscape Architects	
20	TREASURER	28 Landscape Contractors	
21*	OCCUPATIONAL LICENSING BOARDS	29 Locksmith Licensing	
22	ADMINISTRATIVE PROCEDURES (REPEALED)	30 Massage & Bodywork Therapy	
23	COMMUNITY COLLEGES	31 Marital and Family Therapy	
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25	STATE PERSONNEL	33 Midwifery Joint Committee	
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		52 Podiatry Examiners	
		53 Professional Counselors	
		54 Psychology	
		56 Professional Engineers & Land Surveyors	
		57 Real Estate Appraisal	
		58 Real Estate Commission	
		60 Refrigeration Examiners	
		61 Respiratory Care	
		62 Sanitarian Examiners	
		63 Social Work Certification	
		64 Speech & Language Pathologists & Audiologists	
		65 Therapeutic Recreation Certification	
		66 Veterinary Medical	
		68 Substance Abuse Professionals	
		69 Soil Scientists	

Note: Title 21 contains the chapters of the various occupational licensing boards and Title 24 contains the chapters of independent agencies.

NORTH CAROLINA REGISTER
 Publication Schedule for January 2004 – December 2004

FILING DEADLINES			NOTICE OF TEXT		PERMANENT RULE			TEMPORARY RULES
Volume & issue number	Issue date	Last day for filing	Earliest date for public hearing	End of required comment period	Deadline to submit to RRC for review at next meeting	Earliest Eff. Date of Permanent Rule	Delayed Eff. Date of Permanent Rule (first legislative day of the next regular session)	270 th day from publication in the Register
18:13	01/02/04	12/08/03	01/17/04	03/02/04	03/22/04	05/01/04	05/10/04	09/28/04
18:14	01/15/04	12/19/03	01/30/04	03/15/04	03/22/04	05/01/04	05/10/04	10/11/04
18:15	02/02/04	01/09/04	02/17/04	04/02/04	04/20/04	06/01/04	01/26/05	10/29/04
18:16	02/16/04	01/26/04	03/02/04	04/16/04	04/20/04	06/01/04	01/26/05	11/12/04
18:17	03/01/04	02/09/04	03/16/04	04/30/04	05/20/04	07/01/04	01/26/05	11/26/04
18:18	03/15/04	02/23/04	03/30/04	05/14/04	05/20/04	07/01/04	01/26/05	12/10/04
18:19	04/01/04	03/11/04	04/16/04	06/01/04	06/21/04	08/01/04	01/26/05	12/27/04
18:20	04/15/04	03/24/04	04/30/04	06/14/04	06/21/04	08/01/04	01/26/05	01/10/05
18:21	05/03/04	04/12/04	05/18/04	07/02/04	07/20/04	09/01/04	01/26/05	01/28/05
18:22	05/17/04	04/26/04	06/01/04	07/16/04	07/20/04	09/01/04	01/26/05	02/11/05
18:23	06/01/04	05/10/04	06/16/04	08/02/04	08/20/04	10/01/04	01/26/05	02/26/05
18:24	06/15/04	05/24/04	06/30/04	08/16/04	08/20/04	10/01/04	01/26/05	03/12/05
19:01	07/01/04	06/10/04	07/16/04	08/30/04	09/20/04	11/01/04	01/26/05	03/28/05
19:02	07/15/04	06/23/04	07/30/04	09/13/04	09/20/04	11/01/04	01/26/05	04/11/05
19:03	08/02/04	07/12/04	08/17/04	10/01/04	10/20/04	12/01/04	01/26/05	04/29/05
19:04	08/16/04	07/26/04	08/31/04	10/15/04	10/20/04	12/01/04	01/26/05	05/13/05
19:05	09/01/04	08/11/04	09/16/04	11/01/04	11/22/04	01/01/05	01/26/05	05/29/05
19:06	09/15/04	08/24/04	09/30/04	11/15/04	11/22/04	01/01/05	01/26/05	06/12/05
19:07	10/01/04	09/10/04	10/16/04	11/30/04	12/20/04	02/01/05	05/00/06	06/28/05
19:08	10/15/04	09/24/04	10/30/04	12/14/04	12/20/04	02/01/05	05/00/06	07/12/05
19:09	11/01/04	10/11/04	11/16/04	12/31/04	01/20/05	03/01/05	05/00/06	07/29/05
19:10	11/15/04	10/22/04	11/30/04	01/14/05	01/20/05	03/01/05	05/00/06	08/12/05
19:11	12/01/04	11/05/04	12/16/04	01/31/05	02/21/05	04/01/05	05/00/06	08/28/05
19:12	12/15/04	11/22/04	12/30/04	02/14/05	02/21/05	04/01/05	05/00/06	09/11/05

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 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
An agency shall accept comments on the text of a proposed rule for at least 60 days after the text is published or until the date of any public hearings held on the proposed rule, whichever is longer.

DEADLINE TO SUBMIT TO THE RULES REVIEW COMMISSION: The Commission shall review a rule submitted to it on or before the twentieth of a month by the last day of the next month.

FIRST LEGISLATIVE DAY OF THE NEXT REGULAR SESSION OF THE GENERAL ASSEMBLY: This date is the first legislative day of the next regular session of the General Assembly following approval of the rule by the Rules Review Commission. See G.S. 150B-21.3, Effective date of rules.

**EXECUTIVE ORDER NO. 59
PROCLAMATION OF STATE OF DISASTER FOR THE TOWNS OF
BOLTON, LAKE WACCAMAW, CHADBOURN, TABOR CITY AND
FAIR BLUFF AND THE CITY OF WHITEVILLE**

WHEREAS, I have determined that a State of Disaster and State of Emergency, as defined in N.C.G.S. §§ 166A-4 and 14.288.1(10), exists in the State of North Carolina, specifically in the Towns of Bolton, Lake Waccamaw, Chadbourn, Tabor City, and Fair Bluff and the City of Whiteville as a result of the January 26-27, 2004, ice storm.

WHEREAS, on January 26 and 27, 2004, the Towns of Bolton, Lake Waccamaw, Chadbourn, Tabor City, and Fair Bluff and the City of Whiteville proclaimed a local State of Emergency;

WHEREAS, pursuant to N.C.G.S. § 166A-6, the criteria of Type I disaster are met including the following: 1) Receipt of the preliminary damage assessment from the Secretary of Crime Control and Public Safety; 2) The Towns of Bolton, Lake Waccamaw, Chadbourn, Tabor City and Fair Bluff and the City of Whiteville declared a local state of emergency pursuant to N.C.G.S. § 166A-8 and N.C.G.S. §§ 14-288.12, 14-288.13 and 14-288.14, and forwarded a written copy of the declaration to the Governor; 3) The preliminary damage assessment meets or exceeds the criteria established for the Small Business Disaster Loan Program pursuant to 13 C.F.R. Part 123, or meets or exceeds the State infrastructure criteria set out in N.C.G.S. § 166A-6.01(b)(2)a; and, 4) A major disaster declaration by the President of the United States pursuant to the Stafford Act has not been declared; and

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

Section 1. Pursuant to N.C.G.S. §§ 166A-6 and 14-288.15, a State of Disaster and State of Emergency is hereby declared for the Towns of Bolton, Lake Waccamaw, Chadbourn, Tabor City and Fair Bluff and the City of Whiteville. Brunswick Electric Membership Corporation in Columbus County and Four County Electric Membership Corporation in Bladen and Columbus Counties are eligible entities, for purposes of reimbursement, as defined by N.C.G.S. § 166A-4(3).

Section 2. State and local government entities and agencies are hereby ordered to cooperate in the implementation of the provisions of this proclamation and the provisions of the North Carolina Emergency Operations Plan.

Section 3. Bryan E. Beatty, Secretary of Crime Control and Public Safety and/or his designee, is hereby delegated all power and authority granted to me and required of me by Chapter 166A and Article 36A of Chapter 14 of the General Statutes for the purpose of implementing the said Emergency Operations Plan and to take such further action as is necessary to promote and secure the safety and protection of the populace in the above-referenced City.

Section 4. Further, Bryan E. Beatty, Secretary of Crime Control and Public Safety, as chief coordinating officer of the State of North Carolina, shall exercise the powers prescribed in N.C.G.S. § 143B-476.

Section 5. I authorize this proclamation: (a) to be distributed to the news media and other organizations calculated to bring its contents to the attention of the general public; (b) unless the circumstances of the state of disaster prevent or impede, to be promptly filed with the Secretary of Crime Control and Public Safety, the Secretary of State, and the clerks of superior court in the counties to which it applies; and (c) to be distributed to others as necessary to assure proper implementation of this proclamation.

Section 6. The Type I disaster declaration shall expire 30 days after the issuance of the state of disaster and state of emergency and Type I disaster proclamation for the Towns of Bolton, Lake Waccamaw, Chadbourn, Tabor City and Fair Bluff and the City of Whiteville, issued on June 1, 2004, unless renewed by the Governor or the General Assembly. Such renewals may be made in increments of 30 days each, not to exceed a total of 120 days from the date for first issuance. The Joint Legislative Commission on Governmental Operations shall be notified prior to the issuance of any renewal of a Type I disaster declaration.

Done in the Capital City of Raleigh, North Carolina this the 1st day of June, 2004.

MICHAEL F. EASLEY
GOVERNOR

ATTEST:

ELAINE MARSHALL
SECRETARY OF STATE

Pursuant to N.C. Gen. Stat. § 105-241.2(b), the Tax Review Board reviewed all the documents, records, data, evidence and other materials that the parties presented at the hearing before the Assistant Secretary. Based upon the Board's review of the documentation, that evidence is incorporated by reference and is made a part of this administrative decision.

FINDINGS OF FACT

The Board reviewed and considered the following findings of fact entered by the Assistant Secretary in his decision regarding this matter:

1. The Taxpayer is primarily engaged in business as a financial organization; however the Taxpayer makes retail sales of no-recourse manufactured homes, which have been repossessed.
2. The Taxpayer financed manufactured homes, which were sold either on independent dealer sales lots or on related company sales lots (CMH Homes, Incorporated).
3. The homes sold on independent dealer sales lots were sold under a no-recourse agreement and those sold by a related company dealer sales lot were sold pursuant to a full recourse agreement.
4. The Taxpayer has no-recourse against the independent selling dealer in the event of default by the original buyer of the manufactured homes during the audit period.
5. The Taxpayer acquired ownership of the repossessed no-recourse manufactured homes at the time they were repossessed, due to the default of the purchaser on their financing agreement with the Taxpayer.
6. The Department has assessed tax on the sale of the repossessed manufactured homes, which were originally sold under a no-recourse agreement by independent dealer sales lots.
7. The Notice of Proposed assessment was mailed to the Taxpayer on August 15, 2001.
8. The Taxpayer notified the Department that it objected to the assessment on September 7, 2001 and timely requested a hearing.

CONCLUSIONS OF LAW

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

1. G.S. 105-164.13(16) provides an exemption from sales tax provided the article is repossessed by the selling vendor and sales tax was paid on the original sale of the article.
2. New, used and repossessed manufactured homes are offered for sale at various dealers lots; however, the taxable and non-taxable sales tax status of the homes cannot be used to seek an exemption from sales tax by any retailer. Perfect equality in the collection of the tax by retailers from consumers is, as a practical matter, impossible as between almost any two or more retailers by reason of the differences in types of merchandise sold and selling methods, *Fisher v. Jones*, 15 N.C. App. 737, 190 S.E.2d 663 (1972).
3. The Department has no record of receipt of any written request from the Taxpayer for advice or written approval regarding the Taxpayer's treatment of the sales tax liability on repossessed manufactured homes acquired and offered for sale. G.S.105-83 "Installment paper dealers" is administered by the Corporate, Excise and Insurance Tax Division and the sales and use tax assessment at issue is administered by the Sales and Use Tax Division. Therefore, the Department has not provided erroneous sales tax advice and is not precluded from assessing sales tax against the Taxpayer due to a prior Installment Paper Dealer audit for a prior period.
4. G.S. 105-164.3(1) cites no specific number of sales, which would constitute non-taxable "isolated or occasional sales".
5. The Taxpayer's retail sales of \$18,257,966.11 during the audit period do not constitute occasional or isolated sales.
6. The Taxpayer is a retailer making retail taxable sales under G.S. 105-164.3(13) and (14).
7. The Taxpayer is liable for the 2% State sales tax with a maximum of \$300.00 per article on its sales of no-recourse repossessed manufactured homes sold on independent dealer lots.
8. Notice of proposed assessment for the period August 1, 1995 through June 30, 2001 was properly issued pursuant to G.S. 105-241.1.

DECISION

The scope of administrative review for petitions filed with the Tax Review Board is governed by N.C. Gen. Stat. § 105-241.2(b2). After the Tax Review Board conducts an administrative hearing, this statute provides in pertinent part:

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

The Board having conducted an administrative hearing in this matter, and having considered the petition, the briefs, the whole record and the Assistant Secretary's final decision, concludes that the findings of fact made by the Assistant Secretary were

supported by competent evidence in the record; that based upon the findings of fact, the Assistant Secretary's conclusions of law were fully supported by the findings of fact; therefore the decision of the Assistant Secretary should be confirmed.

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

Made and entered into this 23rd day of March 2004.

Signature _____
Richard H. Moore, Chairman
State Treasurer

Signature _____
Jo Anne Sanford, Member
Chair, Utilities Commission

Signature _____
Noel L. Allen, Appointed Member

CONCLUSIONS OF LAW

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

1. An assessment of tax is presumed to be correct.
2. The burden is upon the Taxpayer who objects to an assessment to overcome this presumption, and this burden was partially met.
3. The Taxpayer possessed in discrete taxable quantities a total of eight ounces (226.8 grams) of cocaine between January and July, 2000, and was therefore a dealer as that term is defined in G.S. 105-113.106.
4. The Taxpayer is liable for tax in the sum of \$11,350.00 and penalty in the sum of \$4,540.00, plus accrued interest.

DECISION

The scope of administrative review for petitions filed with the Tax Review Board is governed by N.C. Gen. Stat. § 105-241.2(b2).

After the Tax Review Board conducts an administrative hearing, this statute provides in pertinent part:

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

Assessments of tax are presumed to be correct and the taxpayer has the burden to show that the assessment is not proper. It is the function of this Board, upon administrative review, to review the record and determine whether the final decision is proper based upon the evidence presented at the hearing before the Assistant Secretary. Pursuant to N.C. Gen. Stat. § 105-241.1(a), a proposed tax assessment is presumed to be correct and the burden is on the taxpayer to rebut that presumption. In order to rebut the presumption, the Taxpayer must offer evidence to show that the assessment is not proper.

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

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

Made and entered into the 18th day of March 2004.

Signature _____
Richard H. Moore, Chairman
State Treasurer

Signature _____
Jo Anne Sanford, Member
Chair, Utilities Commission

Signature _____
Noel L. Allen, Appointed Member

3. The Taxpayer had unauthorized possession of 2,000 dosages of methamphetamine on April 30, 2001 and was therefore a dealer as that term is defined in G.S. 105-113.106 (3).
4. The Taxpayer is liable for \$10,000 tax, \$4,000.00 penalty and interest until date of full payment.

DECISION

The scope of administrative review for petitions filed with the Tax Review Board is governed by N.C. Gen. Stat. § 105-241.2(b2).

After the Tax Review Board conducts an administrative hearing, this statute provides in pertinent part:

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

Assessments of tax are presumed to be correct and the taxpayer has the burden to show that the assessment is not proper. It is the function of this Board, upon administrative review, to review the record and determine whether the final decision is proper based upon the evidence presented to the Assistant Secretary. Pursuant to N.C. Gen. Stat. § 105-241.1(a), a proposed tax assessment is presumed to be correct and the burden is on the taxpayer to rebut that presumption. In order to rebut the presumption, the taxpayer must offer evidence to show that the assessment is not correct.

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

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

Made and entered into the 18th day of March 2004.

Signature _____
Richard H. Moore, Chairman
State Treasurer

Signature _____
Jo Anne Sanford, Member
Chair, Utilities Commission

Signature _____
Noel L. Allen, Appointed Member

agreements do not constitute a sale of tangible personal property and are not subject to sales tax and that the parts and supplies used by the Taxpayer to fulfill the optional maintenance agreements are subject to State and local use tax.

The Board having conducted an administrative hearing in this matter, and having considered the petition, the briefs, the documents of record and the Assistant Secretary's final decision, and having considered the arguments of counsel at the hearing, concludes that the record does not contain sufficient evidence to confirm the final decision in this matter. Thus, the Board concludes that the findings of fact made by the Assistant Secretary were not supported by competent evidence in the record; that based upon the findings of fact, the Assistant Secretary's conclusions of law were not fully supported by the findings of fact; therefore the decision of the Assistant Secretary should not be confirmed.

WHEREFORE, THE BOARD ORDERS that the Assistant Secretary's final decision be and is hereby Reversed.

Made and entered into 9th day of March 2004.

Signature _____
Jo Anne Sanford, Member
Chair, Utilities Commission

Signature _____
Noel L. Allen, Appointed Member

Chairman Richard H. Moore did not participate in the decision regarding this matter.

3. On October 18, 2000, the Taxpayer possessed 13 dosages of Adderall and 22 dosages of methadone and was therefore a dealer as that term is defined in G.S. 105-113.106.
4. The Taxpayer is liable for tax in the sum of \$700.00 tax, \$280.00 penalty and accrued interest until date of full payment.

DECISION

The scope of administrative review for petitions filed with the Tax Review Board is governed by N.C. Gen. Stat. § 105-241.2(b2).

After the Tax Review Board conducts an administrative hearing, this statute provides in pertinent part:
(b2). “The Board shall confirm, modify, reverse, reduce or increase the assessment or decision of the Secretary.”

Assessments of tax are presumed to be correct and the taxpayer has the burden to show that the assessment is not proper. It is the function of this Board, upon administrative review, to review the record and determine whether the final decision is proper based upon the evidence presented at the hearing before the Assistant Secretary. Pursuant to N.C. Gen. Stat. § 105-241.1(a), a proposed tax assessment is presumed to be correct and the burden is on the taxpayer to rebut that presumption. In order to rebut the presumption, the taxpayer must offer evidence to show that the assessment is not correct.

Thus, the Board having conducted an administrative hearing in this matter, and having considered the petition, the briefs, the whole record and the Assistant Secretary’s final decision, concluded that the findings of fact made by the Assistant Secretary were supported by competent evidence in the record; that based upon the findings of fact, the Assistant Secretary’s conclusions of law were fully supported by the findings of fact; therefore the decision of the Assistant Secretary should be confirmed.

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

Made and entered into 18th day of March 2004.

Signature _____
Richard H. Moore, Chairman
Chair, Utilities Commission

Signature _____
Jo Anne Sanford, Member
Chair, Utilities Commission

Signature _____
Noel L. Allen, Appointed Member

STATE OF NORTH CAROLINA

BEFORE THE
TAX REVIEW BOARD

COUNTY OF WAKE
IN THE MATTER OF:

The Proposed Assessments of Additional
Income Tax for the Taxable Years 1991,
and 1992 by the Secretary of Revenue

vs.

Sydney N. Shepard,
Taxpayer

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(ADMINISTRATIVE DECISION)
Number: 431

THIS MATTER is before the regular Tax Review Board (hereinafter "Board") upon petition for administrative review filed by Sydney N. Shepherd (hereinafter "Taxpayer") regarding the final decision of Eugene Cella, Assistant Secretary of Revenue (hereinafter "Assistant Secretary"), entered on March 12, 2003, sustaining the proposed assessments of additional individual income tax for taxable years 1991, and 1992.

Pursuant to G.S. 105-241.1, the Department of Revenue mailed the Taxpayer Notices of Individual Income Tax Assessments proposing the assessments of additional income tax, plus penalties, and accrued interest for the taxable years of 1991 and 1992. The Taxpayer objected to the assessments and filed a request for hearing. After conducting a hearing, the Assistant Secretary of Revenue entered a final decision on March 12, 2003, sustaining the proposed assessments. Pursuant to G.S. 105-241.2, the Taxpayer filed a notice of intent with the Board on April 11, 2003. On June 13, 2003, the Taxpayer filed a Petition to dismiss the State Tax Board Action, an Objection to Policy and a Motion to extend time to seek competent counsel. On September 23, 2003, the Secretary of Revenue filed a motion to dismiss this matter for failure of the Taxpayer to timely file the petition for administrative review with the Tax Review Board. The Board has reviewed the Department of Revenue's motion to dismiss the Taxpayer's appeal.

Pursuant to G.S. 105-241.2(c), the Board has examined the petition, and the records and documents transmitted by the Secretary of Revenue pertaining to this matter; and it appearing to the Board that the Taxpayer did not timely file the petition and while it may be appropriate to grant the motion to dismiss; the Taxpayer's petition is dismissed since the grounds and arguments upon which relief is sought have been repeatedly deemed by the Courts to be lacking in legal merit. Thus, the Board concludes that Taxpayer's petition is frivolous and is filed for the purpose of delay.

IT IS THEREFORE ORDERED that the Taxpayer's petition for review be and is hereby **Dismissed**.

Made and entered into 18th day of March 2004.

Signature _____
Richard H. Moore, Chairman
Chair, Utilities Commission

Signature _____
Jo Anne Sanford, Member
Chair, Utilities Commission

Signature _____
Noel L. Allen, Appointed Member

9. Using samples of green vegetable matter taken from each bundle, the SBI lab confirmed the material in each bundle was marijuana.
10. The Taxpayer made the statement to investigators that if they had come three weeks later the marijuana would not have been found since he was getting out of the business.
11. There is no evidence of law enforcement misconduct in the Taxpayer's case.
12. On August 2, 2002, an assessment of unauthorized substance tax was made against the Taxpayer comprised of excise tax in the amount of \$185,762.50, penalties totaling \$74,305.00, and interest in the amount of \$928.81, for a total proposed tax liability of \$260,996.31, based upon the Taxpayer's possession of 53,075 grams of marijuana. Notice of said assessment was served on the Taxpayer in person.
13. Upon being assessed, and in a timely manner, the Taxpayer requested in writing an administrative tax hearing.
14. On August 2, 2002, the Taxpayer possessed 53,075 grams of marijuana.
15. The Taxpayer offered no evidence that any of the seized marijuana was harvested marijuana stems and stalks that had been separated from and were not mixed with any other parts of the marijuana plant.
16. The Taxpayer has been arrested and convicted for possession of marijuana with intent to sell in the past.
17. No tax stamps were purchased for or affixed to the marijuana as required by law.

CONCLUSIONS OF LAW

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

1. A preponderance of the evidence supports the foregoing findings of fact; therefore the assessment of unauthorized substances tax against the Taxpayer is concluded to be correct.
2. A proviso in a statute taxing certain possessions at a lower rate than that made applicable in general is a partial exemption and is, therefore, to be strictly construed against the claim for such special or preferred treatment. Because the Taxpayer presented no evidence that separated marijuana stems and stalks comprised a portion of the marijuana that he is being taxed for possessing, the \$.40 per gram rate is not applicable. The applicable tax rate is the \$3.50 per grams rate generally applicable to marijuana.
3. Without authorization, the Taxpayer constructively possessed 53,075 grams of marijuana on August 2, 2002, and was therefore a "dealer" as that term is defined in N.C.G.S. 105-113.106(3).
4. N.C.G.S. 105-113.112 provides that any information obtained pursuant to the Unauthorized Substances Excise Tax Schedule (N.C.G.S. 105-113.105 et seq.) is confidential and may not be disclosed or used in a criminal prosecution, unless that information has been independently obtained by law enforcement officers. Thus, a taxpayer reporting possession of an unauthorized substance for tax purposes does not incriminate himself as the tax itself is not a criminal but a civil matter, the report may be made anonymously, and the report and any information obtained as a result of it cannot be disclosed by Department employees to law enforcement for use in a criminal proceeding.
5. The United States Supreme Court has held that the exclusionary rule is not constitutionally mandated, but is a judicially created means of deterring illegal searches and seizures. Where evidence is obtained in an allegedly illegal search in furtherance of a criminal investigation, it is generally unlikely that application of the exclusionary rule to bar the evidence in a secondary civil proceeding will deter future Fourth Amendment violations. Where, as in the instant unauthorized substance excise tax assessment proceedings, the exclusion of evidence is unlikely to deter future Fourth Amendment violations by law enforcement officers, the exclusionary rule does not apply, and evidence of possession of unauthorized substances found pursuant to an allegedly unconstitutional search by law enforcement officers can be used by revenue authorities to make a tax assessment.
6. The Taxpayer is liable for excise tax in the amount of \$185,762.50, penalties totaling \$74,305.00, and interest until date of full payment.

DECISION

The scope of administrative review for petitions filed with the Tax Review Board is governed by N.C. Gen. Stat. § 105-241.2(b2). After the Tax Review Board conducts an administrative hearing, this statute provides in pertinent part:

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

Assessments of tax are presumed to be correct and the taxpayer has the burden to show that the assessment is not proper. It is the function of this Board, upon administrative review, to review the record and determine whether the final decision is proper based upon the evidence presented at the hearing before the Assistant Secretary. Pursuant to N.C. Gen. Stat. § 105-241.1(a), a proposed tax assessment is presumed to be correct and the burden is on the taxpayer to rebut that presumption. In order to rebut the presumption, the Taxpayer must offer evidence to show that the assessment is not proper.

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

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

Made and entered into 8th day of April 2004.

Signature _____
Richard H. Moore, Chairman
Chair, Utilities Commission

Signature _____
Jo Anne Sanford, Member
Chair, Utilities Commission

Signature _____
Noel L. Allen, Appointed Member

8. There is no evidence of law enforcement misconduct in the Taxpayer's case.
9. On August 2, 2002, an assessment of unauthorized substance tax was made against the Taxpayer comprised of excise tax in the amount of \$185,762.50, penalties totaling \$74,305.00, and interest in the amount of \$928.81, for a total proposed tax liability of \$260,996.31, based upon the Taxpayer's possession of 53,075 grams of marijuana. Notice of said assessment was served on the Taxpayer in person.
10. Upon being assessed, and in a timely manner, the Taxpayer requested in writing an administrative tax hearing.
11. On August 2, 2002, the Taxpayer possessed 53,075 grams of marijuana.
12. The Taxpayer offered no evidence that any of the seized marijuana was harvested marijuana stems and stalks that had been separated from and were not mixed with any other parts of the marijuana plant.
13. No tax stamps were purchased for or affixed to the marijuana as required by law.

CONCLUSIONS OF LAW

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

1. A preponderance of the evidence supports the foregoing findings of fact; therefore the assessment of unauthorized substances tax against the Taxpayer is concluded to be correct.
2. A proviso in a statute taxing certain possessions at a lower rate than that made applicable in general is a partial exemption and is, therefore, to be strictly construed against the claim for such special or preferred treatment. Because the Taxpayer presented no evidence that separated marijuana stems and stalks comprised a portion of the marijuana that she is being taxed for possessing, the \$.40 per gram rate is not applicable. The applicable tax rate is the \$3.50 per grams rate generally applicable to marijuana.
3. Where, inter alia, such a large quantity of marijuana is found on the Taxpayer's property in close proximity to the house located thereon, and where the Taxpayer's personal property (a tanning bed) is found in the same location as the seized marijuana, and where large amounts of cash which cannot be explained by the Taxpayer are found within the house along with several firearms, and where the Taxpayer is present when the marijuana is seized, and where the Taxpayer knew that her husband had been convicted of possessing marijuana with intent to sell it in the past, it is permissible to infer that the Taxpayer had constructive possession of the seized marijuana.
4. Without authorization, the Taxpayer constructively possessed 53,075 grams of marijuana on August 2, 2002, and was therefore a "dealer" as that term is defined in N.C.G.S. 105-113.106(3).
5. N.C.G.S. 105-113.112 provides that any information obtained pursuant to the Unauthorized Substances Excise Tax Schedule (N.C.G.S. 105-113.105 et seq.) is confidential and may not be disclosed or used in a criminal prosecution, unless that information has been independently obtained by law enforcement officers. Thus, a taxpayer reporting possession of an unauthorized substance for tax purposes does not incriminate herself as the tax itself is not a criminal but a civil matter, the report may be made anonymously, and the report and any information obtained as a result of it cannot be disclosed by Department employees to law enforcement for use in a criminal proceeding.
6. The United States Supreme Court has held that the exclusionary rule is not constitutionally mandated, but is a judicially created means of deterring illegal searches and seizures. Where evidence is obtained in an allegedly illegal search in furtherance of a criminal investigation, it is generally unlikely that application of the exclusionary rule to bar the evidence in a secondary civil proceeding will deter future Fourth Amendment violations. Where, as in the instant unauthorized substance excise tax assessment proceedings, the exclusion of evidence is unlikely to deter future Fourth Amendment violations by law enforcement officers, the exclusionary rule does not apply, and evidence of possession of unauthorized substances found pursuant to an allegedly unconstitutional search by law enforcement officers can be used by revenue authorities to make a tax assessment.
7. The Taxpayer is liable for excise tax in the amount of \$185,762.50, penalties totaling \$74,305.00, and interest until date of full payment.

DECISION

The scope of administrative review for petitions filed with the Tax Review Board is governed by N.C. Gen. Stat. § 105-241.2(b2).

After the Tax Review Board conducts an administrative hearing, this statute provides in pertinent part:

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

Pursuant to N.C. Gen. Stat. § 105-241.1(a), a proposed tax assessment is presumed to be correct and the burden is on the taxpayer to rebut that presumption. In order to rebut the presumption, the Taxpayer must offer evidence to show that the assessment is not proper. It is the function of this Board, upon administrative review, to review the record and determine whether the final decision is proper based upon the evidence in the record. From a review of the record, the Board determines that the Taxpayer did not provide sufficient evidence to show that the assessment is not proper.

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

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

Made and entered into this 8th day of April 2004.

Signature _____
Richard H. Moore, Chairman
State Treasurer

Signature _____
Jo Anne Sanford, Member
Chair, Utilities Commission

Signature _____
Noel L. Allen, Appointed Member

3. On November 30, 2001, the Taxpayer had possession of 480 dosages of methamphetamine and was therefore a dealer as that term is defined in G.S. 105-113.106.
4. The Taxpayer is liable for tax in the sum of \$2,400.00 and penalty in the sum of \$960.00, plus accrued interest.

DECISION

The scope of administrative review for petitions filed with the Tax Review Board is governed by N.C. Gen. Stat. § 105-241.2(b2). After the Tax Review Board conducts an administrative hearing, this statute provides in pertinent part:

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

Pursuant to N.C. Gen. Stat. § 105-241.1(a), a proposed tax assessment is presumed to be correct and the burden is on the taxpayer to rebut that presumption. In order to rebut the presumption, the Taxpayer must offer evidence to show that the assessment is not proper.

It is the function of this Board, upon administrative review, to review the record and determine whether the final decision is proper based upon the evidence presented at the hearing before the Assistant Secretary. From a review of the record the Board determines that the Taxpayer did not provide sufficient evidence to show that the assessment is not proper. Thus, the Board having conducted an administrative hearing in this matter, and having considered the petition, the brief, the whole record and the Assistant Secretary's final decision, concluded that the findings of fact made by the Assistant Secretary were supported by competent evidence in the record; that based upon the findings of fact, the Assistant Secretary's conclusions of law were fully supported by the findings of fact; therefore the decision of the Assistant Secretary should be confirmed.

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

Made and entered into this 8th day of April 2004.

Signature _____
Richard H. Moore, Chairman
State Treasurer

Signature _____
Jo Anne Sanford, Member
Chair, Utilities Commission

Signature _____
Noel L. Allen, Appointed Member

2. The burden is upon the Taxpayer who objects to an assessment to overcome that presumption, and this burden was not met.
3. On November 30, 2001, the Taxpayer had possession of 480 dosages of methamphetamine and was therefore a dealer as that term is defined in G.S. 105-113.106.
4. The Taxpayer is liable for tax in the sum of \$2,400.00 and penalty in the sum of \$960.00, plus accrued interest.

DECISION

The scope of administrative review for petitions filed with the Tax Review Board is governed by N.C. Gen. Stat. § 105-241.2(b2). After the Tax Review Board conducts an administrative hearing, this statute provides in pertinent part:

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

Pursuant to N.C. Gen. Stat. § 105-241.1(a), a proposed tax assessment is presumed to be correct and the burden is on the taxpayer to rebut that presumption. In order to rebut the presumption, the Taxpayer must offer evidence to show that the assessment is not proper.

It is the function of this Board, upon administrative review, to review the record and determine whether the final decision is proper based upon the evidence presented at the hearing before the Assistant Secretary. From a review of the record the Board determines that the Taxpayer did not provide sufficient evidence to show that the assessment is not proper. Thus, the Board having conducted an administrative hearing in this matter, and having considered the petition, the brief, the whole record and the Assistant Secretary’s final decision, concluded that the findings of fact made by the Assistant Secretary were supported by competent evidence in the record; that based upon the findings of fact, the Assistant Secretary’s conclusions of law were fully supported by the findings of fact; therefore the decision of the Assistant Secretary should be confirmed.

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

Made and entered into this 8th day of April 2004.

Signature _____
Richard H. Moore, Chairman
State Treasurer

Signature _____
Jo Anne Sanford, Member
Chair, Utilities Commission

Signature _____
Noel L. Allen, Appointed Member

Signature _____
Richard H. Moore, Chairman
State Treasurer

Signature _____
Jo Anne Sanford, Member
Chair, Utilities Commission

Signature _____
Noel L. Allen, Appointed Member

STATE OF NORTH CAROLINA

BEFORE THE
TAX REVIEW BOARD

COUNTY OF WAKE
IN THE MATTER OF:

The Proposed Assessment of Unauthorized
Substance Tax dated September 17, 2003
by the Secretary of Revenue)
)
)
)
vs.)
)
)
Marshall Neal Morris,)
Taxpayer)

(ADMINISTRATIVE DECISION)
Number: 437

This Matter was heard before the Regular Tax Review Board (hereinafter "Board") in the City of Raleigh, Wake County, North Carolina, in the office of the State Treasurer, on Wednesday, January 14, 2004, pursuant to the petition of Marshall Neal Morris (hereinafter "Taxpayer") for administrative review of the final decision entered by the Assistant Secretary of Revenue on June 19, 2003, sustaining the proposed tax assessment together with penalty and interest against the Taxpayer.

Pursuant to G.S. 105-113.111(a) and G.S. 105-241.1, a notice of proposed assessment was delivered to the Taxpayer by leaving a copy of same at the Taxpayer's residence located at 7811 Haverstraw Ct., Charlotte, NC 28212. The notice alleged that during the 80 weeks prior to September 17, 2002, the Taxpayer was in unauthorized possession of 9,080 grams (20 pounds) of marijuana, to which no tax stamps were affixed. The notice proposed an assessment comprised of excise tax in the amount of \$31,780.00, penalties totaling \$12,712.00, and interest in the amount of \$158.90, for a total proposed tax liability of \$44,650.90.

The Taxpayer protested the assessment and requested a hearing before the Secretary of Revenue. On February 19, 2003, Eugene J. Cella, Assistant Secretary conducted a hearing upon Taxpayer's timely application and objection to the proposed assessment. On June 19, 2003, the Assistant Secretary issued the final decision, which sustained the proposed tax assessment together with penalty and interest. Thereafter, the Taxpayer timely filed a petition for administrative review of the final decision with the Board.

ISSUE

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

EVIDENCE

Pursuant to N.C. Gen. Stat. § 105-241.2(b), the Board reviewed all the documents, records, data, evidence and other materials that the parties presented at the hearing before the Assistant Secretary and reviewed the final decision entered by the Assistant Secretary in this matter.

DECISION

The scope of administrative review for petitions filed with the Tax Review Board is governed by N.C. Gen. Stat. § 105-241.2(b2). After the Tax Review Board conducts an administrative hearing, this statute provides in pertinent part:

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

The Board having conducted an administrative hearing in this matter, and having considered the petition, the brief, the whole record, the arguments presented, and the Assistant Secretary's final decision, concludes that the record does not contain sufficient evidence to determine that the Taxpayer possessed 9,080 grams on marijuana. The Board concludes that the findings of fact made by the Assistant Secretary were not supported by competent evidence in the record as to the Taxpayer's unauthorized possession of 9,080 grams of marijuana during the 80 weeks prior to September 17, 2002; that based upon the findings of fact, the Assistant Secretary's conclusions of law were not fully supported by the findings of fact regarding Taxpayer's unauthorized possession of 9,080 grams of marijuana during the 80 weeks prior to September 17, 2002. Thus, the Board deems it necessary to remand this matter to the Assistant Secretary for a further proceeding to compute the specific grams of the unauthorized substance that the Taxpayer possessed on September 17, 2002.

THEREFORE, it is the decision of the Board to **Remand** this matter to the Assistant Secretary for a further proceeding.

Made and entered into the 8th day of April 2004.

Signature _____
Richard H. Moore, Chairman
State Treasurer

Signature _____
Jo Anne Sanford, Member
Chair, Utilities Commission

Signature _____
Noel L. Allen, Appointed Member

3. The Taxpayer had constructive possession of 2,324 grams of marijuana on September 20, 2000, and was therefore a dealer as that term is defined in G.S. 105-113.106 (3).
4. A finding of "no probable cause" in District Court on the concomitant criminal charges is not binding on the administrative review of the civil tax assessment.
5. The Taxpayer is liable for \$8,134.00 tax, \$3,253.60 penalty and interest until date of full payment.

DECISION

The scope of administrative review for petitions filed with the Tax Review Board is governed by N.C. Gen. Stat. § 105-241.2(b2). After the Tax Review Board conducts an administrative hearing, this statute provides in pertinent part:

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

Assessments of tax are presumed to be correct and the taxpayer has the burden to show that the assessment is not proper. It is the function of this Board, upon administrative review, to review the record and determine whether the final decision is proper based upon the evidence presented at the hearing before the Assistant Secretary. Pursuant to N.C. Gen. Stat. § 105-241.1(a), a proposed tax assessment is presumed to be correct and the burden is on the taxpayer to rebut that presumption. In order to rebut the presumption, the Taxpayer must offer evidence to show that the assessment is not proper.

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

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

Made and entered into this 8th day of April 2004.

Signature _____
Richard H. Moore, Chairman
State Treasurer

Signature _____
Jo Anne Sanford, Member
Chair, Utilities Commission

Signature _____
Noel L. Allen, Appointed Member

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

1. Based on the foregoing findings of fact, which are supported by a preponderance of the evidence, an assessment of unauthorized substance tax against the Taxpayer is appropriate.
2. Without authorization, the Taxpayer had constructive possession of 612.8 grams of cocaine and 4,466.5 grams of marijuana on July 16, 2002, and was therefore a “dealer” as that term is defined in N.C.G.S. 105-113.106(3).
3. The Taxpayer is liable for excise tax in the amount of \$46,284.50, penalties totaling \$18,513.80, and interest until date of full payment.

DECISION

The scope of administrative review for petitions filed with the Tax Review Board is governed by N.C. Gen. Stat. § 105-241.2(b2). After the Tax Review Board conducts an administrative hearing, this statute provides in pertinent part:

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

Pursuant to N.C. Gen. Stat. § 105-241.1(a), a proposed tax assessment is presumed to be correct and the burden is on the taxpayer to rebut that presumption. In order to rebut the presumption, the taxpayer must offer evidence to show that the assessment is not correct. It is the function of this Board, upon administrative review, to review the record and determine whether the final decision is proper based upon the evidence presented at the hearing before the Assistant Secretary.

The Board having conducted an administrative hearing in this matter, and having considered the petition, the brief, the whole record and the Assistant Secretary’s final decision, concluded that the findings of fact made by the Assistant Secretary were supported by competent evidence in the record; that based upon the findings of fact, the Assistant Secretary’s conclusions of law were fully supported by the findings of fact; therefore the decision of the Assistant Secretary should be confirmed.

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

Made and entered into this 2nd day of June 2004.

Signature _____
Richard H. Moore, Chairman
State Treasurer

Signature _____
Jo Anne Sanford, Member
Chair, Utilities Commission

Signature _____
Noel L. Allen, Appointed Member

STATE OF NORTH CAROLINA

BEFORE THE
TAX REVIEW BOARD

COUNTY OF WAKE
IN THE MATTER OF:

The Proposed Assessment of Sales and Use)
Tax for the period January 1, 1997 through September 30,)
2000, by the Secretary of Revenue of North Carolina)
vs.)
Old Man Precision Automotive, Inc.,)
Taxpayer)

(ADMINISTRATIVE DECISION)
Number: 443

This Matter was heard before the Regular Tax Review Board (hereinafter "Board") in the City of Raleigh, Wake County, North Carolina, in the office of the State Treasurer, on Tuesday, April 13, 2004, upon a petition filed by Old Man Precision Automotive, Inc. (hereafter "Taxpayer") for administrative review of the Final Decision of the Assistant Secretary of Revenue entered on April 2, 2002, sustaining the sales and use tax assessment imposed against the Taxpayer for the period of January 1, 1997 through September 30, 2000, per the notice of amended sales and use tax assessment, dated March 19, 2002.

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

ISSUE

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

1. Is the amount of the assessment correct?
2. Was the Taxpayer "engaged in business" as a retailer in North Carolina and liable for collecting sales or use tax on the sales of automotive parts to customers in this State?

EVIDENCE

Pursuant to N.C. Gen. Stat. § 105-241.2(b), the Board reviewed all the documents, records, data, evidence and other materials that the parties presented at the hearing before the Assistant Secretary. Based upon the Board's review of the documentation, that evidence is incorporated by reference and is made a part of this administrative decision

FINDINGS OF FACT

The Board reviewed and considered the following findings of fact entered by the Assistant Secretary in his decision regarding this matter:

1. The Taxpayer sold complete automobile racing transmissions during the audit period.
2. The Taxpayer primarily received orders from customers in North Carolina for specialty transmissions that were used by customers in automobile races.
3. The Taxpayer purchased complete transmissions and transmission parts exempt from sales or use tax in New York.
4. When the Taxpayer sold transmissions in North Carolina, it shipped complete transmissions and/or transmission parts to transmission builders (subcontractors) in North Carolina who assembled or modified the transmissions to meet the customers' specifications.
5. The Taxpayer had ownership of property (stock transmissions and parts) consigned to its subcontractors for assembly, repair, or modification in this State throughout the audit period. The property held by the subcontractors for and on behalf of the Taxpayer is construed as inventory the Taxpayer stored temporarily, directly, or indirectly at locations for distribution in this State.
6. One of the Taxpayer's subcontractors is Progear, a proprietorship operated by Kenneth C. Bainbridge, son of Kenneth A. Bainbridge, the Taxpayer's corporate president.
7. After the subcontractors finished their work, the completed transmissions were distributed from their locations. The customers either picked up the transmissions at the subcontractors' places of business or the subcontractors delivered the transmissions to the customers' locations.
8. The Taxpayer mailed invoices from its New York location to customers who had taken delivery of the completed transmissions in North Carolina from the Taxpayer's subcontractors.
9. The Taxpayer did not charge, collect or remit North Carolina State or local sales or use tax on invoices issued to customers in North Carolina during the audit period.

- 10. The customers mailed their payments directly to the Taxpayer in New York.
- 11. The Department assessed tax on the Taxpayer's sales of transmissions to customers in North Carolina.
- 12. The Notice of Proposed assessment was mailed to the Taxpayer on November 7, 2000.
- 13. The Taxpayer notified the Department that it objected to the assessment on December 5, 2000 and timely requested a hearing.

CONCLUSIONS OF LAW

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

- 1. The Taxpayer was, at all material times, a retailer engaged in the business of making retail sales of tangible personal property subject to sales or use tax.
- 2. The Taxpayer's North Carolina subcontractors, including Progear, acted as the Taxpayer's representatives by delivering property on behalf of the Taxpayer that it had agreed to sell to customers in North Carolina. Therefore, the Taxpayer's subcontractors/representatives "transacted business" on its behalf in this State within the purview of G.S. 105-164.8(b)(3).
- 3. Whereas the Taxpayer's representatives transacted business on its behalf in North Carolina; the Taxpayer held inventory stored at its subcontractors' locations which functioned as temporary storage places in this State; and the Taxpayer's subcontractors delivered transmissions sold to customers from the subcontractors' locations functioning as places of distribution for the Taxpayer in this State; the Taxpayer was "engaged in business" in North Carolina within G.S. 105-164.3(5).
- 4. The general rate of state tax and the applicable local tax is due on the Taxpayer's sales of transmissions delivered by its representatives to customers in North Carolina under G.S. 105-164.4.
- 5. The additional tax assessed is presumed to be correct under G.S. 105-241.1(a), and the burden is upon the Taxpayer to overcome the presumption of correctness.

DECISION

The scope of administrative review for petitions filed with the Tax Review Board is governed by N.C. Gen. Stat. § 105-241.2(b2). After the Tax Review Board conducts an administrative hearing, this statute provides in pertinent part:

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

Assessments of tax are presumed to be correct and the taxpayer has the burden to show that the assessment is not proper. Having reviewed the record, the Board determines that there is sufficient evidence to show that the Taxpayer was engaged in the business of making retail sales of racecar transmissions during the period at issue. Thus, the Board concludes that the Taxpayer failed to furnish evidence to show that the assessment is not proper. The Board, after conducting an administrative hearing in this matter, and after considering the petition, the brief, the whole record and the Assistant Secretary's final decision, concludes that the findings of fact made by the Assistant Secretary were supported by competent evidence in the record; that based upon the findings of fact, the Assistant Secretary's conclusions of law were fully supported by the findings of fact; therefore the decision of the Assistant Secretary should be confirmed.

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

Made and entered into this 2nd day of June 2004.

Signature _____
Richard H. Moore, Chairman
State Treasurer

Signature _____
Jo Anne Sanford, Member
Chair, Utilities Commission

Signature _____
Noel L. Allen, Appointed Member

Note from the Codifier: The notices published in this Section of the NC Register include the text of proposed rules. The agency must accept comments on the proposed rule(s) for at least 60 days from the publication date, or until the public hearing, or a later date if specified in the notice by the agency. If the agency adopts a rule that differs substantially from a prior published notice, the agency must publish the text of the proposed different rule and accept comment on the proposed different rule for 60 days.

Statutory reference: G.S. 150B-21.2.

TITLE 01 – DEPARTMENT OF ADMINISTRATION

- State
- Local
- Substantive (≥\$3,000,000)
- None

Notice is hereby given in accordance with G.S. 150B-21.2 that the State Building Commission intends to amend the rule cited as 01 NCAC 30D .0302.

Proposed Effective Date: November 1, 2004

Public Hearing:

Date: July 27, 2004

Time: 12:30 p.m. – 1:30 p.m.

Location: New Education Building, 301 North Wilmington Street, Main Level Conference Room (behind Receptionist), Raleigh, NC

Reason for Proposed Action: This amendment was adopted by the State Building Commission in March 2004.

Procedure by which a person can object to the agency on a proposed rule: Written objections may be submitted to the Director of the State Construction Office. Objections will be received by mail, delivery service, hand delivery or facsimile transmission. Objections may be directed to: Speros Fleggas, Director, NC State Construction Office, MSC 1307, Raleigh, NC 27699-1307. Fax (919)807-4110.

Written comments may be submitted to: Speros Fleggas, Director, State Construction Office, 1307 Mail Service Center, Raleigh NC 27699-1309, Phone (919)807-4100, Fax (919)807-4110, Email speros.fleggas@ncmail.net.

Comment period ends: August 30, 2004

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact

SUBCHAPTER 30D - STATE BUILDING COMMISSION DESIGNER AND CONSULTANT SELECTION POLICY

SECTION .0300 - SELECTION OF DESIGNERS OR CONSULTANTS

01 NCAC 30D .0302 PRE-SELECTION

A pre-selection committee shall be established for all projects requiring professional service. On minor projects the pre-selection committee shall consist of at least the Capital Projects Coordinator, a representative of the using agency and one representative from the State Construction Office. On major projects the pre-selection committee shall consist of at least the Capital Projects Coordinator, a representative of the using agency and two representatives from the State Construction Office. At least one member of all pre-selection committees shall be a licensed design professional.

- (1) General Procedure for All Projects: The Capital Projects Coordinator shall review with the using agency the requirements of the project. This step should normally take place prior to public advertisement in the Purchase Directory, because designers and consultants have a significant need to know in advance the program intent of a project in order to demonstrate their qualifications for the project in their letter of interest. The Capital Projects Coordinator shall receive all letters of interest and other qualification information either directly or from the designated contact person. After a pre-selection priority list is prepared, the list will remain confidential except to the Secretary of the SBC. If fewer than three letters of interest are received on major projects, the project will be readvertised in the Purchase Directory. If fewer than three letters of interest are received following the re-advertisement, the Capital Projects Coordinator may proceed with the selection process using the data received or may advertise again.
- (2) Special Procedures for Minor Projects: The Capital Projects Coordinator shall again review with the using agency the requirements of the project and the qualifications of all firms expressing interest in a specific project. The

Capital Projects Coordinator and a representative of the using agency shall meet with the representative from the State Construction Office for the evaluation of each firm and development of a list of three firms in priority order to be presented to the SBC. The Capital Projects Coordinator may institute the interview procedures, under major projects, where special circumstances dictate such need. The Capital Projects Coordinator shall submit to the Secretary of the SBC the list of three firms in priority order, including pre-selection information and written recommendations, to be presented to the SBC. The Capital Projects Coordinator shall state in the submission to the SBC that the established rules for public announcement and pre-selection have been followed or shall state full particulars if exceptions have been taken.

(3) Special Procedures for Major Projects: The pre-selection committee shall review the requirements of a specific project and the qualification of all firms expressing interest in that project and shall select from that list not more than six nor less than three firms to be interviewed and evaluated. The pre-selection committee shall interview each of the selected firms, evaluate each firm interviewed, and rank in order three firms. The Capital Projects Coordinator shall state in his submission that the established rules for public announcement and pre-selection have been followed or shall state full particulars if exceptions have been taken.

(4) Special Procedures for Emergency Projects: On occasion, emergency design or consultation services may be required for restoration or correction of a facility condition which by its nature poses a significant hazard to persons or property, or when an emergency exists. Should this situation occur, in all likelihood there will not be sufficient time to follow the normal procedures described herein. The Capital Projects Coordinator on these rare occasions is authorized to declare an emergency, notify the State Construction Office and then obtain the services of a competent designer or consultant for consultation or design of the corrective action. In all cases, such uses of these emergency powers will involve a written description of the condition and rationale for employing this special authority signed by the head of the agency and presented to the SBC at its next normal meeting. Timeliness for obligation of funds or other non-hazardous or non-emergency situations do not constitute sufficient grounds for invoking this special authority.

(5) Annual Contract: A Funded Agency or a Using Agency may require the services of designer(s) or consultant(s) for small miscellaneous projects on a routine basis. In such cases, designer(s) or consultant(s) for annual contracts will be selected in accordance with the above procedures for minor projects. In addition, no annual contract fee will exceed One Hundred Fifty Thousand Dollars (~~(\$50,000.00)~~ (\$150,000) in total volume and no single fee shall exceed ~~Ten Thirty Six Thousand Dollars~~ (~~(\$10,000)-~~ (\$36,000). Annual contracts may be extended for one additional year. However, if extended for an additional one-year period, the designer may not be selected for the next annual contract. Total annual fees will not exceed One Hundred Fifty Thousand Dollars (~~(\$50,000.00)~~ (\$150,000) for first year or One Three Hundred Thousand Dollars (~~(\$100,000)~~ (\$300,000) for two-year period. If and when these fees are used to limit, the agency must readvertise.

(6) Special Procedures for Department of Environment and Natural Resources: For Division of Water Quality projects under the Wetlands Restoration Program, the Funded Agency may require the services of multiple designer(s) or consultant(s) for design and construction management of wetland, stream and riparian buffer restoration projects on a routine basis. In such cases, designer(s) or consultant(s) for such open-ended contracts will be selected in accordance with the procedures described for minor projects. This does not preclude the Funded Agency's use of the designer selection procedures specified for major or minor projects if it elects to do so. The total volume of business in terms of negotiated design fee shall not exceed Seven Hundred Thousand Dollars (\$700,000) for the biannual contract term and no single project fee is to exceed Three Hundred Fifty Thousand Dollars (\$350,000). In no case will individual projects exceeding One Million Five Hundred Thousand Dollars (\$1,500,000) in total costs be assigned for design under an open-end agreement. Open-end agreements under this procedure shall not be extended beyond a two-year term. The Funded Agency must readvertise on a biannual basis .

Authority G.S. 143-135.25; 143-135.26;
S.L. 2001-442, Sec. 6(c).

Notice is hereby given in accordance with G.S. 150B-21.2 that the Department of Administration, Office for Historically

Underutilized Businesses (HUB) intends to adopt the rules cited as 01 NCAC 30I .0301-.0313.

Proposed Effective Date: November 1, 2004

Public Hearing:

Date: August 25, 2004

Time: 2:00-4:00 p.m.

Location: NC Archives Auditorium, 109 East Jones St., Raleigh, NC. Persons wishing to speak shall sign up by 3:00 p.m. To ensure accuracy, please submit all public comments in writing.

Reason for Proposed Action: Compliance with G.S. 143-128.3(e).

Procedure by which a person can object to the agency on a proposed rule: Written objections may be submitted to the Assistant to the Secretary, Office of Historically Underutilized Businesses. Objections will be received by mail, delivery service, hand delivery or facsimile transmission. Objections may be directed to Bridget Wall, Assistant to Secretary, Office for Historically Underutilized Businesses, 1336 Mail Service Center, Raleigh, NC 27699-1336, fax (919) 807-2335.

Written comments may be submitted to: Bridget Wall, 1336 Mail Service Center, Raleigh, NC 27699-1336, phone (919) 807-2330, fax (919) 807-2335, and email bridget.wall@ncmail.net.

Comment period ends: August 30, 2004

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact

- State
Local
Substantive (>=\$3,000,000)
None

CHAPTER 30 - STATE CONSTRUCTION OFFICE

SUBCHAPTER 30I - MINORITY BUSINESS PARTICIPATION GOALS

SECTION .0300 - RECRUITMENT AND SELECTION

OF MINORITY BUSINESSES FOR PARTICIPATION IN STATE CONSTRUCTION CONTRACTS

01 NCAC 30I .0301 SCOPE

These Rules apply to minority business participation in single-prime bidding, separate-prime bidding, construction manager at risk, and alternative contracting methods, on State and local government construction projects as defined in G.S. 143-128.2(a). The legislation provides that the State shall have a verifiable 10 percent goal for participation by minority businesses in the total value of work for each project for which a contract or contracts are awarded.

Authority G.S. 143-128.3(e).

01 NCAC 30I .0302 LIMITATION

Nothing in these Rules shall be construed to require contractors or awarding authorities to award contracts or subcontracts to or to make purchases of materials or equipment from minority-business contractors or minority-business subcontractors who do not submit the lowest responsible, responsive bid or bids.

Authority G.S. 143-128.3(e).

01 NCAC 30I .0303 DEFINITIONS

- (a) "Public Entity" means State and all public subdivisions and local governmental units.
(b) "Owner" means the State of North Carolina, through the Agency/Institution named in the contract.
(c) "Designer" means any person, firm, partnership, or corporation, which has contracted with the State of North Carolina to perform architectural or engineering work.
(d) "Bidder" means any person, firm, partnership, corporation, association, or joint venture seeking to be awarded a public contract or subcontract.
(e) "Contract" means a mutually binding legal relationship or any modification thereof obligating the seller to furnish equipment, materials or services, including construction, and obligating the buyer to pay for them.
(f) "Contractor" means any person, firm, partnership, corporation, association, or joint venture which has contracted with the State of North Carolina to perform construction work or repair
(g) "Subcontractor" means a firm under contract with the prime contractor or construction manager at risk for supplying materials or labor and materials and/or installation. The subcontractor may or may not provide materials in his subcontract.
(h) "HUB Office" means Department of Administration Office for Historically Underutilized Businesses.

Authority G.S. 143-128.3(e).

01 NCAC 30I .0304 ADJUSTMENTS TO GOAL

The Secretary shall review the data compiled by the Office for Historically Underutilized Businesses and identify the appropriate percentage goal for minority business category based upon the preceding year's historically underutilized business participation and the availability of businesses in each category

as indicated by firms designated as historically underutilized businesses by the Department of Administration.

Authority G.S. 143-128.3(e).

01 NCAC 30I .0305 FORMAT FOR PUBLIC ENTITY FORECASTING

(a) All public entities shall report their anticipated capital projects to the State Construction Office yearly. In the forecasting report, public entities should:

- (1) Identify the types of projects that will likely attract increased minority participation; and
- (2) Identify projects that are suitable to be broken down into economically feasible units to facilitate minority business participation.

(b) Public entities that need assistance or guidance with the above shall contact the State Construction Office and Office for Historically Underutilized Businesses. The State Construction Office in conjunction with the HUB Office shall provide assistance to the public entities by reviewing the projects with the public entity to determine:

- (1) Whether the project or scopes of work within the project are suitable to be broken down into economically feasible units to facilitate the increased use of minority contractors; or
- (2) Whether the elements of work may be combined in an effort to increase minority business participation.

Authority G.S. 143-128.3(e).

01 NCAC 30I .0306 CONSTRUCTION MANAGER AT RISK UTILIZATION

(a) Public entities that contract with a construction manager at risk shall report to the Office for Historically Underutilized Businesses the items enumerated in G.S. 143-64.31(b).

(b) In addition, each public entity shall report the following:

- (1) The minority business outreach plan of the construction manager at risk selected; and
- (2) Documentation regarding the means by which minority businesses were contacted to solicit their participation in bid proposals.

(c) This report shall be due within 15 calendar days of the contract being signed with the selected construction manager at risk.

Authority G.S. 143-128.3(e).

01 NCAC 30I .0307 OFFICE FOR HISTORICALLY UNDERUTILIZED BUSINESSES RESPONSIBILITIES

(a) The HUB Office has established a program that allows interested businesses to register as a minority business as defined in G.S. 143-128.2(g). The information provided by the minority business shall be used by the HUB Office to:

- (1) Identify those areas of work for which there are minority businesses, and assist those public entities who are in the process of developing a minority business outreach plan for a particular project.

- (2) Make available to interested parties a list of minority business contractors and subcontractors.
- (3) Maintain a current list of minority businesses based upon information provided by the minority businesses.

(b) The HUB Office shall also:

- (1) Provide training and technical assistance to minority businesses on how to identify and obtain contracting and subcontracting opportunities through the State Construction Office and other public entities.
- (2) Provide training and technical assistance to public entities on how to identify and obtain minority contractor and subcontractor participation on projects subject to the goal requirements of G.S. 143-128.2.
- (3) Develop positive relationships with North Carolina trade and professional organizations to improve the ability of minority businesses to participate in State construction projects.
- (4) Monitor public entity compliance with the goal requirements of G.S. 143-128.2.
- (5) Review, monitor and develop corrective action plans for those public entities found to be out of compliance with G.S. 143-128.2.
- (6) Report to the Office of the Attorney General:
 - (i) Failure by a public entity to report data to the Secretary in accordance with G.S. 143-128.3 (f)(1); and
 - (ii) False statements knowingly provided in any affidavit or documentation under G.S. 143-128.2 to the State or other public entity. The HUB Office shall turn over all evidence casting doubt upon the veracity of statements received by affidavit to the Attorney General for further disposition.

Authority G.S. 143-128.3(e).

01 NCAC 30I .0308 STATE CONSTRUCTION OFFICE RESPONSIBILITIES

The State Construction Office shall be responsible for the following:

- (1) Furnish to the HUB Office a minimum of twenty-one days prior to the bid opening the following:
 - (a) Project description and location;
 - (b) Locations where bidding documents may be reviewed;
 - (c) Name of a representative of the owner who can be contacted during the advertising period to advise who the prospective bidders are;
 - (d) Date, time and location of the bid opening; and
 - (e) Date, time and location of prebid conference, if scheduled.

- (2) Attending scheduled prebid conference, if necessary, to clarify requirements of the general statutes regarding minority-business participation, including the bidders' responsibilities.
- (3) Reviewing the apparent low bidders' statutory compliance with the requirements listed in the proposal, that must be complied with, if the bid is to be considered as responsive, prior to award of contracts. The State reserves the right to reject any or all bids and to waive informalities.
- (4) Reviewing of minority business requirements at Preconstruction conference.
- (5) Monitoring of contractors' compliance with minority business requirements in the contract documents during construction.
- (6) Prepare and produce such appendices to the General Conditions of the Contract of the State Construction Manual as may be necessary to facilitate the administration of the Minority Business Participation Goal program.
- (7) Provide statistical data and required reports to the HUB Office.
- (8) Resolve protests and disputes arising from implementation of the minority business participation outreach plan, in conjunction with the HUB Office.
- (9) Report to the Office of the Attorney General:
 - (a) Failure by a public entity to report data to the Secretary in accordance with G.S. 143-128.3 (f)(1); and
 - (b) False statements knowingly provided in any affidavit or documentation under G.S. 143-128.2 to the State or other public entity. The HUB Office shall turn over all evidence casting doubt upon the veracity of statements received by affidavit to the Attorney General for further disposition.

Authority G.S. 143-128.3(e).

01 NCAC 30I .0309 OWNER REQUIREMENTS

Before awarding a contract, owner shall do the following:

- (1) Develop and implement a minority business participation outreach plan to identify minority businesses that can perform public building projects and to implement outreach efforts to encourage minority business participation in these projects to include education, recruitment, and interaction between minority businesses and non-minority businesses.
- (2) Attend the scheduled prebid conference.
- (3) At least 10 days prior to the scheduled day of bid opening, notify minority businesses that have requested notices from the public entity for public construction or repair work and minority businesses that otherwise indicated to the Office for Historically Underutilized

Businesses an interest in the type of work being bid or the potential contracting opportunities listed in the proposal. The notification shall include the following:

- (a) A description of the work for which the bid is being solicited;
- (b) The date, time, and location where bids are to be submitted;
- (c) The name of the individual within the owner's organization who shall be available to answer questions about the project;
- (d) Where bid documents may be reviewed; and
- (e) Any special requirements that may exist.
- (4) Utilize other media, as appropriate, likely to inform potential minority businesses of the bid being sought.
- (5) Maintain documentation of any contacts, correspondence, or conversation with minority business firms made in an attempt to meet the goals.
- (6) Review, jointly with the designer, all requirements of G.S. 143-128.2(c) and G.S. 143-128.2(f) prior to recommendation of award to the State Construction Office.
- (7) Evaluate documentation to determine good faith effort has been achieved for minority business utilization prior to recommendation of award to State Construction Office.
- (8) Review prime contractors' pay applications for compliance with minority business utilization commitments prior to payment.
- (9) Forward documentation showing evidence of implementation of Owners requirements, above, to the State Construction Office and HUB Office.

Authority G.S. 143-128.3(e).

01 NCAC 30I .0310 DESIGNER REQUIREMENTS

Under the single-prime bidding, separate prime bidding, construction manager at risk, or alternative contracting method, the designer shall:

- (1) Attend the scheduled prebid conference to explain minority business requirements to the prospective bidders.
- (2) Assist the owner to identify and notify prospective minority business prime and subcontractors of potential contracting opportunities.
- (3) Maintain documentation of any contacts, correspondence, or conversation with minority business firms made in an attempt to meet the goals.
- (4) Review jointly with the owner, all requirements of G.S. 143-128.2(c) and G.S. 143-128.2(f) prior to recommendation of award.

- (5) During construction phase of the project, review "MBE Documentation for Contract Payment" for compliance with minority business utilization commitments. Submit Appendix E form with monthly pay applications to the owner and forward copies to the State Construction Office.
- (6) Forward documentation showing evidence of implementation of Designer's requirements, above, to the State Construction Office and HUB Office.

- affidavit listing good faith efforts as required by G.S. 143-128.2(c) and G.S. 143-128.2(f).
- (6) Forward documentation showing evidence of implementation of Prime Contractor, Construction Manager-at-Risk and First-Tier Subcontractor requirements to the State Construction Office and HUB Office.
- (7) Upon being named the apparent low bidder, the Bidder shall provide one of the following to the State Construction Office and the Office for Historically Underutilized Businesses:
 - (a) an affidavit (Affidavit C in the State Construction Manual) that includes a description of the portion of work to be executed by minority businesses, expressed as a percentage of the total contract price, which is equal to or more than the applicable goal; or
 - (b) if the percentage is not equal to the applicable goal, then documentation of all good faith efforts taken to meet the goal.

Failure to comply with these requirements is grounds for rejection of the bid and award to the next lowest responsible responsive bidder.

- (8) During the construction of a project, at any time, if it becomes necessary to replace a minority business subcontractor, immediately advise the owner, State Construction Office, and the Director of the HUB Office in writing, of the circumstances involved. The prime contractor shall make good faith efforts to replace a minority business subcontractor with another minority business subcontractor pursuant to G.S. 143-131(b).
- (9) If during the construction of a project additional subcontracting opportunities become available, make good faith efforts to solicit bids from minority businesses.

Authority G.S. 143-128.3(e).

01 NCAC 30I .0311 CONTRACTOR REQUIREMENTS

This Rule applies to all contractors utilizing single-prime bidding, separate-prime bidding, construction manager at risk and alternative contracting methods. These requirements apply to all contractors performing as prime contractors and first-tier subcontractors under construction manager at risk on state projects. These contractors shall:

- (1) Attend the scheduled prebid conference.
- (2) Identify or determine those work areas of a subcontract where minority businesses may have an interest in performing subcontract work.
- (3) At least 10 days prior to the scheduled day of bid opening, notify minority businesses of potential subcontracting opportunities listed in the proposal. The notification shall include the following:
 - (a) A description of the work for which the bid is being solicited.
 - (b) The date, time and location where bids are to be submitted.
 - (c) The name of the individual within the company who shall be available to answer questions about the project.
 - (d) Where bid documents may be reviewed.
 - (e) Any special requirements that may exist, such as insurance, licenses, bonds and financial arrangements.
 - (f) If there are more than three minority businesses in the general locality of the project who offer similar contracting or subcontracting services in the specific trade, the contractor(s) shall notify no less than three minority businesses in the general locality of the project. The contractor may contact more than three minority businesses.
- (4) During the bidding process, comply with the contractor(s) requirements listed in the owner's minority business participation outreach plan.
- (5) Identify on the bid, the minority businesses that shall be utilized on the project with corresponding total dollar value of the bid and

Authority G.S. 143-128.3(e).

01 NCAC 30I .0312 MINORITY BUSINESS RESPONSIBILITIES

(a) This Rule applies to all minority contractors performing or seeking to perform on state projects. Minority businesses seeking to be counted toward the minority business goals of G.S. 143-128.2 must be designated as Historically Underutilized Business by the Department of Administration.

(b) Minority and HUB contractors shall make a good faith effort to:

- (1) Attend the scheduled prebid conference.
- (2) Respond promptly whether or not they wish to submit a bid when contacted by owners or bidders.
- (3) Attend training and contractor outreach sessions given by owners, contractors and state agencies, when feasible.

- (4) Participate in Mentor/Protégé programs or other business development programs offered by owners, contractors or state agencies.
- (5) Negotiate in good faith with owners or contractors.

1645, phone (919) 571-4141 x201, fax (919) 571-4148, and email beverly.hall@ncmail.net.

Comment period ends: August 30, 2004

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact

- State**
- Local** 15A NCAC 11 .0702, .1614
- Substantive** (≥\$3,000,000)
- None** 15A NCAC 11 .0104, .0306, .0308-.0310, .0510, .0512, .0523, .1302, .1307-.1308, .1311-.1312, .1316, .1324, .1326-.1327, .1618-.1621

CHAPTER 11 – RADIATION PROTECTION

SECTION .0100 – GENERAL PROVISIONS

15A NCAC 11 .0104 DEFINITIONS

As used in these Rules, the following definitions shall apply.

- (1) "Absorbed dose" means the energy imparted by ionizing radiation per unit mass of irradiated material. The units of absorbed dose are the rad and the gray (Gy).
- (2) "Accelerator produced material" means any material made radioactive by use of a particle accelerator.
- (3) "Act" means North Carolina Radiation Protection Act as defined in G.S. 104E-1.
- (4) "Activity" is the rate of disintegration (transformation) or decay of radioactive material. The units of activity are the curie (Ci) and the becquerel (Bq).
- (5) "Adult" means an individual 18 or more years of age.
- (6) "Agency" means the North Carolina Department of Environment and Natural Resources, Division of ~~Radiation Protection~~, Environmental Health, Radiation Protection Section.
- (7) "Agreement state" means any state which has consummated an agreement with the United States Nuclear Regulatory Commission under the authority of section 274 of the Atomic

Authority G.S. 143-128.3(e).

01 NCAC 30I .0313 DISPUTE PROCEDURES

Any business disputes arising under these Rules shall be resolved as set forth in G.S. 143-128(g).

Authority G.S. 143-128.3(e).

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Radiation Protection Commission intends to adopt the rules cited as 15A NCAC 11 .1326-.1327 and amend the rules cited as 15A NCAC 11 .0104, .0306, .0308-.0310, .0510, .0512, .0523, .0702, .1302, .1307-.1308, .1311-.1312, .1316, .1324, .1614, .1618-.1621.

Proposed Effective Date: November 1, 2004

Public Hearing:

Date: July 21, 2004

Time: 2:00 p.m. and 7:00 p.m.

Location: Radiation Protection Section, 3825 Barrett Dr., Room 101, Raleigh, NC

Reason for Proposed Action: North Carolina is an agreement state with the U.S. Nuclear Regulatory Commission (NRC). As such, the authority to regulate radioactive materials in North Carolina has been transferred to the State. The Radiation Protection Section (RPS) of the Division of Environmental Health executes the duties of the agreement. The RPS's regulations must be compatible with the NRC's regulations to ensure that all users of radioactive materials are regulated equitably, uniformly and fairly. RPS is also correcting references to the agency to reflect the current organizational structure.

Procedure by which a person can object to the agency on a proposed rule: Objections may be submitted, in writing, to the individual listed below. Objections may also be submitted during the public hearings conducted on these rules. Objections must include the specific rule citation for the objectionable rule and the nature of the objection. Objections must include the complete name and contact information for the individual submitting the objection. Objections will be accepted until August 30, 2004. Objections may be mailed to Ms. Beverly O. Hall, Section Chief, 1645 Mail Service Center, Raleigh, NC 27699-1645.

Written comments may be submitted to: Beverly O. Hall, Section Chief, 1645 Mail Service Center, Raleigh, NC 27699-

- Energy Act of 1954 as amended, as authorized by compatible state legislation providing for acceptance by that state of licensing authority for agreement materials and the discontinuance of such licensing activities by the United States Nuclear Regulatory Commission, as defined in G.S. 104E-5(2).
- (8) "Air-purifying respirator" means a respirator with an air-purifying filter, cartridge, or canister that removes specific air contaminants by passing ambient air through the air-purifying element.
- (8)(9) "Airborne radioactive material" means any radioactive material dispersed in the air in the form of dusts, fumes, particulates, mists, vapors, or gases.
- (9)(10) "Airborne radioactivity area" means a room, enclosure, or area in which airborne radioactive materials, composed wholly or partly of licensed radioactive material, exist in concentrations:
- (a) in excess of the derived air concentrations (DACs) specified in Appendix B to 10 CFR 20.1001 - 20.2401; or
- (b) to such a degree that an individual present in the area without respiratory protective equipment could exceed, during the hours an individual is present in a week, an intake of 0.6 percent of the annual limit on intake (ALI) or 12 DAC-hours.
- (10)(11) "ALARA" (acronym for "as low as is reasonably achievable") means making every reasonable effort to maintain exposures to radiation as far below the dose limits in the rules of this Chapter as is practical consistent with the purpose for which the licensed or registered activity is undertaken, taking into account the state of technology, the economics of improvements in relation to benefits to the public health and safety, and other societal and socioeconomic considerations, and in relation to utilization of sources of radiation in the public interest.
- (11)(12) "Annual limit on intake" (ALI) means the derived limit for the amount of radioactive material taken into the body of an adult worker by inhalation or ingestion in a year. ALI is the smaller value of intake of a given radionuclide in an effective dose equivalent of five rems (0.05 Sv) or a committed dose equivalent of 50 rems (0.5 Sv) to any individual organ or tissue. (ALI values for intake by ingestion and by inhalation of selected radionuclides are given in Table 1, Columns 1 and 2, of Appendix B to 10 CFR 20.1001 - 20.2401).
- (12)(13) "Annually" means either:
- (a) at intervals not to exceed 12 consecutive months; or
- (b) once per year at the same time each year (completed during the same month each year over a period of multiple years).
- (14) "Assigned protection factor (APF)" means the expected workplace level of respiratory protection that would be provided by a properly functioning respirator or a class of respirators to properly fitted and trained users. APF can be divided into the ambient airborne concentrations to estimate inhaled air concentrations.
- (15) "Atmosphere-supplying respirator" means a respirator that supplies the respirator user with breathing air from a source independent of the ambient atmosphere and includes supplied-air respirators (SARs) and self-contained breathing apparatus (SCBA) units.
- (13)(16) "Authorized representative" means an employee of the agency, or an individual outside the agency when the individual is specifically so designated by the agency under Rule .0112 of this Section.
- (14)(17) "Authorized user" means an individual who is authorized by license or registration condition to use a source of radiation.
- (15)(18) "Background radiation" means radiation from cosmic sources; naturally occurring radioactive materials, including radon (except as a decay product of source or special nuclear material); and global fallout as it exists in the environment from the testing of nuclear explosive devices or from past nuclear accidents such as Chernobyl that contribute to background radiation and are not under the control of the licensee or registrant. "Background radiation" does not include sources of radiation regulated by the agency.
- (16)(19) "Becquerel" is the SI unit of radioactivity. One becquerel is equal to one disintegration per second (s^{-1}).
- (17)(20) "Bioassay" or "radiobioassay" means the determination of kinds, quantities or concentrations, and, in some cases, the locations of radioactive material in the human body, whether by direct measurement (in vivo counting) or by analysis and evaluation of materials excreted or removed from the human body.
- (18)(21) "Byproduct material" means any radioactive material, except special nuclear material, yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material, as defined in G.S. 104E-5(4).
- (19)(22) "Class", "lung class" or "inhalation class" means a classification scheme for inhaled material according to its rate of clearance from the pulmonary region of the lung. Materials

are classified as D, W, or Y, which applies to a range of clearance half-times as follows:

CLASSIFICATION OF
INHALED MATERIAL

Class	Clearance half-time
Class D (Day)	less than 10 days
Class W (Weeks)	10 days to 100 days
Class Y (Years)	greater than 100 days

- ~~(20)~~(23) "Collective dose" is the sum of the individual doses received in a given period of time by a specified population from exposure to a specified source of radiation.
- ~~(21)~~(24) "Commission" means the North Carolina Radiation Protection Commission.
- ~~(22)~~(25) "Committed dose equivalent" ($H_{T,50}$) means the dose equivalent to organs or tissues of reference (T) that will be received from an intake of radioactive material by an individual during the 50-year period following the intake.
- ~~(23)~~(26) "Committed effective dose equivalent" ($H_{E,50}$) is the sum of the products of the weighting factors applicable to each of the body organs or tissues that are irradiated and the committed dose equivalent to these organs or tissues ($H_{E,50} = \sum W_T H_{T,50}$).
- ~~(24)~~(27) "Constraint (dose constraint)" means a value above which specified licensee actions are required.
- ~~(25)~~(28) "Controlled area" means an area, outside of a restricted area but inside the site boundary, access to which can be limited by the licensee or registrant for any reason.
- ~~(26)~~(29) "Critical group" means the group of individuals reasonably expected to receive the greatest exposure to residual radioactivity for any applicable set of circumstances.
- ~~(27)~~(30) "Curie" is the special unit of radioactivity. One curie is equal to 3.7×10^{10} disintegrations per second = 3.7×10^{10} becquerels = 2.22×10^{12} disintegrations per minute.
- ~~(28)~~(31) "Declared pregnant woman" means a woman who has voluntarily informed the licensee or registrant, in writing, of her pregnancy and the estimated date of conception. The declaration remains in effect until the declared pregnant woman withdraws the declaration in writing or is no longer pregnant.
- ~~(29)~~(32) "Decommission" means to remove (as a facility) safely from service and reduce residual radioactivity to a level that permits release of the property for either unrestricted use and termination of the license or for restricted use and termination of the license.
- ~~(30)~~(33) "Deep-dose equivalent" (H_d), which applies to external whole-body exposure, is the dose equivalent at a tissue depth of one cm (1000 mg/cm^2).
- (34) "Demand respirator" means an atmosphere-supplying respirator that admits breathing air

to the facepiece only when a negative pressure is created inside the facepiece by inhalation.

- ~~(31)~~(35) "Department" means the North Carolina Department of Environment and Natural Resources.
- ~~(32)~~(36) "Depleted uranium" means the source material uranium in which the isotope uranium-235 is less than 0.711 weight percent of the total uranium present. Depleted uranium does not include special nuclear material.
- ~~(33)~~(37) "Derived air concentration" (DAC) means the concentration of a given radionuclide in air which, if breathed by the reference man for a working year of 2,000 hours under conditions of light work (inhalation rate 1.2 cubic meters of air per hour), results in an intake of ALI. DAC values are given in Table 1, Column 3, of Appendix B to 10 CFR 20.1001 - 20.2401).
- ~~(34)~~(38) "Derived air concentration-hour" (DAC-hour) is the product of the concentration of radioactive material in air (expressed as a fraction or multiple of the derived air concentration for each radionuclide) and the time of exposure to that radionuclide, in hours. A licensee may take 2,000 DAC-hours to represent one ALI, equivalent to a committed effective dose equivalent of five rems (0.05 Sv).
- ~~(35)~~(39) "Diagnostic clinical procedures manual" means a collection of written procedures governing the use of radioactive material that describes each method by which the licensee performs diagnostic clinical procedures and includes other instructions and precautions. Each diagnostic clinical procedure including but not limited in content to the radiopharmaceutical, dosage and route of administration, shall be approved by an authorized user prior to inclusion in the manual. The radiation safety officer shall ensure that the manual includes the approved written procedure for all diagnostic clinical procedures performed at the facility.
- (40) "Disposable respirator" means a respirator for which maintenance is not intended and that is designed to be discarded after excessive breathing resistance, sorbent exhaustion, physical damage, or end-of-service-life renders it unsuitable for use. Examples of this type of respirator are a disposable half-mask respirator or a disposable escape-only self-contained breathing apparatus (SCBA).
- ~~(36)~~(41) "Distinguishable from Background" means that the detectable concentration of a radionuclide is statistically different from the background concentration of that radionuclide in the vicinity of the site or, in the case of structures, in similar materials using measurement technology, survey and

- statistical techniques as defined in 10 CFR 20.1003.
- ~~(37)~~(42) "Dose" (or radiation dose) is a generic term that means absorbed dose, dose equivalent, effective dose equivalent, committed dose equivalent, effective dose equivalent, or total effective dose equivalent, as defined in other Items of this Rule.
- ~~(38)~~(43) "Dose equivalent" (H_T) means the product of the absorbed dose in tissue, quality factor, and all other necessary modifying factors at the location of interest. The units of dose equivalent are the rem and sievert (Sv).
- ~~(39)~~(44) "Dose limits" (see "Limits" defined in this Rule).
- ~~(40)~~(45) "Dosimetry processor" means an individual or an organization that processes and evaluates individual monitoring equipment in order to determine the radiation dose delivered to the equipment.
- ~~(41)~~(46) "Effective dose equivalent" (H_E) is the sum of the products of the dose equivalent to the organ or tissue (H_T) and the weighting factors (w_T) applicable to each of the body organs or tissues that are irradiated ($H_E = \sum w_T H_T$).
- ~~(42)~~(47) "Embryo/fetus" means the developing human organism from conception until the time of birth.
- ~~(43)~~(48) "Entrance or access point" means any location through which an individual could gain access to radiation areas or to a source of radiation. This includes entry or exit portals of sufficient size to permit human entry, irrespective of their intended use.
- ~~(44)~~(49) "Equipment services" means the selling, installation, rebuilding, conversion, repair, inspection, testing, survey or calibration of equipment which can affect compliance with these Rules by a licensee or registrant.
- ~~(45)~~(50) "Exposure" means being exposed to ionizing radiation or to radioactive material.
- ~~(46)~~(51) "Exposure rate" means the exposure per unit of time, such as R/min and mR/h.
- ~~(47)~~(52) "External dose" means that portion of the dose equivalent received from radiation sources outside the body.
- ~~(48)~~(53) "Extremity" means hand, elbow, arm, arm below the elbow, foot, knee, or leg below the knee.
- ~~(49)~~(54) "Eye dose equivalent" (See "Lens dose equivalent" as defined in this Rule).
- (55) "Filtering facepiece (dust mask)" means a negative pressure particulate respirator with a filter as an integral part of the facepiece or with the entire facepiece composed of the filtering medium, not equipped with elastomeric sealing surfaces and adjustable straps.
- (56) "Fit factor" means a quantitative estimate of the fit of a particular respirator to a specific individual, and typically estimates the ratio of the concentration of a substance in ambient air to its concentration inside the respirator when worn.
- (57) "Fit test" means the use of a protocol to qualitatively or quantitatively evaluate the fit of a respirator on an individual.
- ~~(50)~~(58) "Generally applicable environmental radiation standards" means standards issued by the U.S. Environmental Protection Agency (EPA) under the authority of the Atomic Energy Act of 1954 (42 U.S.C. 2D11 et seq.), as amended, that impose limits on radiation exposures or levels, or concentrations or quantities of radioactive material, in the general environment outside the boundaries of locations under the control of persons possessing or using sources of radiation.
- ~~(51)~~(59) "Gray" (Gy) is the SI unit of absorbed dose. One gray is equal to an absorbed dose of one joule/kilogram (100 rads).
- (60) "Helmet" means a rigid respiratory inlet covering that also provides head protection against impact and penetration.
- ~~(52)~~(61) "High radiation area" means an area, accessible to individuals, in which radiation levels from sources external to the body could result in an individual receiving a dose equivalent in excess of 0.1 rem (1 mSv) in one hour at 30 centimeters from the radiation source or from any surface that the radiation penetrates.
- (62) "Hood" means a respiratory inlet covering that completely covers the head and neck and may also cover portions of the shoulders and torso.
- ~~(53)~~(63) "Hospital" means a facility that provides as its primary functions diagnostic services and intensive medical and nursing care in the treatment of acute stages of illness.
- ~~(54)~~(64) "Human use" means the internal or external administration of radiation or radioactive materials to human beings.
- ~~(55)~~(65) "Individual" means any human being.
- ~~(56)~~(66) "Individual monitoring" means:
- (a) the assessment of dose equivalent by the use of devices designed to be worn by an individual;
 - (b) the assessment of committed effective dose equivalent by bioassay (see Bioassay) or by determination of the time-weighted air concentrations to which an individual has been exposed, i.e., DAC-hours; or
 - (c) the assessment of dose equivalent by the use of survey data.
- ~~(57)~~(67) "Individual monitoring devices" or "individual monitoring equipment" means devices designed to be worn by a single individual for the assessment of dose equivalent such as film badges, thermoluminescence dosimeters

- (TLDs), pocket ionization chambers, and personal ("lapel") air sampling devices.
- ~~(58)~~(68) "Inhalation class" (see "Class" defined in this Rule).
- ~~(59)~~(69) "Inspection" means an official examination or observation to determine compliance with rules, orders, requirements and conditions of the agency or the Commission.
- ~~(60)~~(70) "Internal dose" means that portion of the dose equivalent received from radioactive material taken into the body.
- ~~(61)~~(71) "Lens dose equivalent" or "LDE" applies to the external exposure of the lens of the eye and is taken as the dose equivalent at a tissue depth of 0.3 cm (300 mg/cm²).
- ~~(62)~~(72) "License", except where otherwise specified, means a license issued pursuant to Section .0300 of this Chapter.
- ~~(63)~~(73) "Licensee" means any person who is licensed by the agency pursuant to Section .0300 of this Chapter.
- ~~(64)~~(74) "Licensing state" means any state designated as such by the Conference of Radiation Control Program Directors, Inc. Unless the context clearly indicates otherwise, use of the term Agreement State in this Chapter shall be deemed to include licensing state with respect to naturally occurring and accelerator produced radioactive material (NARM).
- ~~(65)~~(75) "Limits" or "dose limits" means the permissible upper bounds of radiation doses.
- (76) "Loose-fitting facepiece" means a respiratory inlet covering that is designed to form a partial seal with the face.
- ~~(66)~~(77) "Lost or missing licensed radioactive material" means licensed radioactive material whose location is unknown. It includes material that has been shipped but has not reached its destination and whose location cannot be readily traced in the transportation system.
- ~~(67)~~(78) "Lung class" (see "Class" as defined in this Rule).
- ~~(68)~~(79) "Medical use" means the intentional internal or external administration of radioactive material or the radiation therefrom to patients or human research subjects under the supervision of an authorized user.
- ~~(69)~~(80) "Member of the public" means any individual except when that individual is receiving an occupational dose.
- ~~(70)~~(81) "Minor" means an individual less than 18 years of age.
- ~~(71)~~(82) "Misadministration" means the administration of the following:
- (a) a diagnostic radiopharmaceutical dosage:
 - (i) involving a dose to the patient that exceeds 5 rems effective dose equivalent or 50 rems dose equivalent to any individual organ; and
 - (A) the wrong patient;
 - (B) the wrong radiopharmaceutical;
 - (C) the wrong route of administration; or
 - (D) an administered dosage that differs from the prescribed dosage by more than 20 percent of the prescribed dosage; or
 - (ii) for sodium iodide I-125 or I-131 involving:
 - (A) the wrong patient or wrong radiopharmaceutical; or
 - (B) an administered dosage that differs from the prescribed dosage by more than 20 percent of the prescribed dosage and the difference between the administered dosage and prescribed dosage exceeds 30 microcuries;
 - (b) a therapeutic radiopharmaceutical dosage:
 - (i) involving:
 - (A) the wrong patient;
 - (B) wrong radiopharmaceutical;
 - (C) wrong route of administration; or
 - (D) when the administered dosage differs from the prescribed dosage by more than 20 percent of the prescribed dosage; or
 - (ii) when the administered dosage of sodium iodide I-125 or I-131 differs from the prescribed dosage by more than 20 percent of the prescribed dosage;
 - (c) a teletherapy or accelerator radiation dose:
 - (i) involving:

- (A) the wrong patient;
 - (B) the wrong mode of treatment; or
 - (C) wrong treatment site;
 - (ii) when the treatment consists of three or fewer fractions and the calculated total administered dose differs from the total prescribed dose by more than 10 percent of the total prescribed dose;
 - (iii) when the calculated weekly administered dose is 30 percent greater than the weekly prescribed dose; or
 - (iv) when the calculated total administered dose differs from the total prescribed dose by more than 20 percent of the total prescribed dose;
 - (d) a brachytherapy radiation dose:
 - (i) involving:
 - (A) the wrong patient;
 - (B) the wrong radioisotope; or
 - (C) the wrong treatment site. This excludes, for permanent implants, seeds that were implanted in the correct site but migrated outside the treatment site;
 - (ii) involving a sealed source that is leaking;
 - (iii) when, for a temporary implant, one or more sealed sources are not removed upon completion of the procedure; or
 - (iv) when the calculated administered dose differs from the prescribed dose by more than 20 percent of the prescribed dose; or
 - (e) a gamma stereotactic radiosurgery radiation dose:
 - (i) involving the wrong patient or wrong treatment site; or
 - (ii) when the calculated total administered dose differs from the total prescribed dose by more than 10 percent of the total prescribed dose.
- ~~(72)~~(83) "Mobile nuclear medicine service" means the transportation and medical use of radioactive material.
 - ~~(73)~~(84) "Monitoring", "radiation monitoring" or "radiation protection monitoring" means the measurement of radiation levels, concentrations, surface area concentrations or quantities of radioactive material and the use of the results of these measurements to evaluate potential exposures and doses.
 - ~~(74)~~(85) "Natural radioactivity" means radioactivity of naturally occurring nuclides.
 - (86) "Negative pressure respirator" means a tight-fitting respirator in which the air pressure inside the facepiece is negative during inhalation with respect to the ambient air pressure outside of the respirator.
 - ~~(75)~~(87) "Nonstochastic effect" means health effects, the severity of which varies with the dose and for which a threshold is believed to exist. Radiation-induced cataract formation is an example of a nonstochastic effect (also called a deterministic effect).
 - ~~(76)~~(88) "NRC" means the United States Nuclear Regulatory Commission or its duly authorized representatives.
 - ~~(77)~~(89) "Occupational dose" means the dose received by an individual in the course of employment in which the individual's assigned duties involve exposure to radiation or radioactive material from licensed and unlicensed sources of radiation, whether in the possession of the licensee or registrant or other person. Occupational dose does not include dose received from background radiation, as a patient from medical practices, from exposure to individuals administered radioactive material and released in accordance with Rule .0358 of this Chapter, from voluntary participation in medical research programs, or as a member of the general public.
 - ~~(78)~~(90) "Particle accelerator" means any machine capable of accelerating electrons, protons, deuterons, or other charged particles.
 - ~~(79)~~(91) "Person" means any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, agency, political subdivision of this state, any other state or political subdivision or agency thereof, and any legal successor, representative, agent or agency of the foregoing, other than the United States Nuclear Regulatory Commission, or any successor thereto, and other than federal government agencies licensed by the United States Nuclear Regulatory Commission, or any successor thereto, as defined in G.S. 104E-5(11).
 - ~~(80)~~(92) "Personnel monitoring equipment" means devices, such as film badges, pocket dosimeters, and thermoluminescent

- dosimeters, designed to be worn or carried by an individual for the purpose of estimating the dose received by the individual.
- ~~(81)~~(93) "Pharmacist" means an individual licensed by this state to compound and dispense drugs, prescriptions and poisons.
- ~~(82)~~(94) "Physician" means an individual currently licensed to practice medicine in this state.
- ~~(83)~~(95) "Planned special exposure" means an infrequent exposure to radiation, separate from and in addition to the annual dose limits.
- (96) "Positive pressure respirator" means a respirator in which the pressure inside the respiratory inlet covering exceeds the ambient air pressure outside the respirator.
- (97) "Powered air-purifying respirator (PAPR)" means an air-purifying respirator that uses a blower to force the ambient air through air-purifying elements to the inlet covering.
- ~~(84)~~(98) "Prescribed dosage" means the quantity of radiopharmaceutical activity documented in a written directive by an authorized user.
- ~~(85)~~(99) "Prescribed dose" means:
- (a) for teletherapy or accelerator radiation:
 - (i) the total dose; and
 - (ii) the dose per fraction as documented in the written directive;
 - (b) for brachytherapy:
 - (i) the total source strength and exposure time; or
 - (ii) the total dose, as documented in the written directive; or
 - (c) for gamma stereotactic radiosurgery, the total dose as documented in the written directive.
- (100) "Pressure demand respirator" means a positive pressure atmosphere-supplying respirator that admits breathing air to the facepiece when the positive pressure is reduced inside the facepiece by inhalation.
- ~~(86)~~(101) "Public dose" means the dose received by a member of the public from exposure to radiation or radioactive material released by a licensee or registrant, or to another source of radiation within a licensee's or registrant's control. It does not include occupational dose or doses received from background radiation, as a patient from medical practices, from exposure to individuals administered radioactive material and released in accordance with Rule .0358 of this Chapter, or from voluntary participation in medical research programs.
- (102) "Qualitative fit test (QLFT)" means a pass/fail fit test to assess the adequacy of respirator fit that relies on the individual's response to the test agent.
- ~~(87)~~(103) "Quality factor" (Q) means the modifying factor that is used to derive dose equivalent from absorbed dose. Quality factors are provided in the definition of rem in this Rule.
- (104) "Quantitative fit test (QNFT)" means an assessment of the adequacy of respirator fit by numerically measuring the amount of leakage into the respirator.
- ~~(88)~~(105) "Quarter" means a period of time equal to one-fourth of the year observed by the licensee or registrant (approximately 13 consecutive weeks), providing that the beginning of the first quarter in a year coincides with the starting date of the year and that no day is omitted or duplicated in consecutive quarters.
- ~~(89)~~(106) "Quarterly" means either:
- (a) at intervals not to exceed 13 weeks; or
 - (b) once per 13 weeks at about the same time during each 13 week period (completed during the same month of the quarter (first month, second month or third month) each quarter over a time period of several quarters.
- ~~(90)~~(107) "Rad" is the special unit of absorbed dose. One rad is equal to an absorbed dose of 100 ergs/gram or 0.01 joule/kilogram (0.01 gray).
- ~~(91)~~(108) "Radiation" (ionizing radiation), except as otherwise defined in Section .1400 of this Chapter, means gamma rays and x-rays, alpha and beta particles, high-speed electrons, protons, neutrons, and other nuclear particles, and electromagnetic radiation consisting of associated and interacting electric and magnetic waves including those with frequencies between three times 10 to the eighth power cycles per second and three times 10 to the twenty-fourth power cycles per second and wavelengths between one times 10 to the minus fourteenth power centimeters and 100 centimeters as defined in G.S. 104E-5(12).
- ~~(92)~~(109) "Radiation area" means an area, accessible to individuals, in which radiation levels could result in an individual receiving a dose equivalent in excess of 0.005 rem (0.05 mSv) in one hour at 30 centimeters from the radiation source or from any surface that the radiation penetrates.
- ~~(93)~~(110) "Radiation dose" means dose.
- ~~(94)~~(111) "Radiation machine" means any device designed to produce or which produces radiation or nuclear particles when the associated control devices of the machine are operated as defined in G.S. 104E-5(13).
- ~~(95)~~(112) "Radiation safety officer" means one who has the knowledge and responsibility to apply appropriate radiation protection rules.
- ~~(96)~~(113) "Radioactive material" means any solid, liquid, or gas, which emits ionizing radiation spontaneously as defined in G.S. 104E-5(14).

~~(97)~~(114) "Radioactive waste disposal facility" means any low-level radioactive waste disposal facility, as defined in G.S. 104E-5(9c), established for the purpose of receiving low-level radioactive waste, as defined in Rule .1202 of this Chapter, generated by another licensee for the purpose of disposal.

~~(98)~~(115) "Radioactive waste processing facility" means any low-level radioactive waste facility, as defined in G.S. 104E-5(9b), established for the purpose of receiving waste, as defined in this Rule, generated by another licensee to be stored, compacted, incinerated or treated.

~~(99)~~(116) "Radioactivity" means the disintegration of unstable atomic nuclei by emission of radiation.

~~(100)~~(117) "Radiobioassay" means bioassay.

~~(101)~~(118) "Recordable event" means the administration of the following:

- (a) a radiopharmaceutical or radiation from a licensed source without a written directive where a written directive is required by Sub-items 167(a)(i) and 167(b)-(f) of this Rule;
- (b) a radiopharmaceutical or radiation from a licensed source where a written directive is required by Sub-items 167(a)(i) and 167(b)-(f) of this Rule without recording each administered radiopharmaceutical dosage or radiation dose in the appropriate record on a daily basis;
- (c) a radiopharmaceutical dosage of greater than 30 microcuries of sodium iodide I-125 and I-131 when:
 - (i) the administered dosage differs from the prescribed dosage by more than 10 percent of the prescribed dosage; and
 - (ii) the difference between the administered dosage and prescribed dose exceeds 15 microcuries;

(d) a therapeutic dosage of any radiopharmaceutical dosage other than sodium iodide I-125 or I-131 when the administered dosage differs from the prescribed dosage by more than 10 percent of the prescribed dosage;

(e) a teletherapy or accelerator radiation dose when the calculated weekly administered dose is 15 percent greater than the weekly prescribed dose; or

(f) a brachytherapy radiation dose when the calculated administered dose differs from the prescribed dose by more than 10 percent of the prescribed dose.

~~(102)~~(119) "Reference man" means a hypothetical aggregation of human physical and physiological characteristics arrived at by international consensus as published by the International Commission on Radiological Protection. These characteristics may be used by researchers and public health workers to standardize results of experiments and to relate biological insult to a common base.

~~(103)~~(120) "Registrant" means any person who is registered with the agency as required by provisions of these Rules or the Act.

~~(104)~~(121) "Registration" means registration with the agency in accordance with these Rules.

~~(105)~~(122) "Regulations of the U.S. Department of Transportation" means the regulations in 49 CFR Parts 100-189.

~~(106)~~(123) "Rem" is the special unit of any of the quantities expressed as dose equivalent. The dose equivalent in rems is equal to the absorbed dose in rads multiplied by the quality factor (1 rem = 0.01 sievert). As used in this Chapter, the quality factors for converting absorbed dose to dose equivalent are as follows:

QUALITY FACTORS AND ABSORBED DOSE EQUIVALENCIES

<u>TYPE OF RADIATION</u>	<u>Quality Factor (Q)</u>	<u>Absorbed Dose Equal to a Unit Dose Equivalent^a</u>
X-, gamma, or beta radiation	1	1
Alpha particles, multiple-charged particles, fission fragments and heavy particles of unknown charge	20	0.05
Neutrons of unknown energy	10	0.1
High-energy protons	10	0.1

^a Absorbed dose in rad equal to one rem or the absorbed dose in gray equal to one sievert.

If it is more convenient to measure the neutron fluence rate than to determine the neutron dose equivalent rate in rems per hour or sieverts per hour, one rem (0.01 Sv) of neutron radiation of unknown energies may, for purposes of the rules of this Chapter, be assumed to result from a total fluence of 25 million neutrons per square centimeter incident upon the body.

If sufficient information exists to estimate the approximate energy distribution of the neutrons, the licensee or registrant may use the fluence rate per unit dose equivalent or the appropriate Q value from the following table to convert a measured tissue dose in rads to dose equivalent in rems:

MEAN QUALITY FACTORS, Q, AND FLUENCE PER UNIT DOSE EQUIVALENT FOR MONOENERGETIC NEUTRONS

	Neutron Energy (MeV)	Quality Factor ^a (Q)	Fluence per Unit Dose Equivalent ^b (neutrons cm ⁻² rem ⁻¹)
(thermal)	2.5 x 10 ⁻⁸	2	980 x 10 ⁶
	1 x 10 ⁻⁷	2	980 x 10 ⁶
	1 x 10 ⁻⁶	2	810 x 10 ⁶
	1 x 10 ⁻⁵	2	810 x 10 ⁶
	1 x 10 ⁻⁴	2	840 x 10 ⁶
	1 x 10 ⁻³	2	980 x 10 ⁶
	1 x 10 ⁻²	2.5	1010 x 10 ⁶
	1 x 10 ⁻¹	7.5	170 x 10 ⁶
	5 x 10 ⁻¹	11	39 x 10 ⁶
	1	11	27 x 10 ⁶
	2.5	9	29 x 10 ⁶
	5	8	23 x 10 ⁶
	7	7	24 x 10 ⁶
	10	6.5	24 x 10 ⁶
	14	7.5	17 x 10 ⁶
	20	8	16 x 10 ⁶
	40	7	14 x 10 ⁶
	60	5.5	16 x 10 ⁶
	1 x 10 ²	4	20 x 10 ⁶
	2 x 10 ²	3.5	19 x 10 ⁶
3 x 10 ²	3.5	16 x 10 ⁶	
4 x 10 ²	3.5	14 x 10 ⁶	

^a Value of quality factor (Q) at the point where the dose equivalent is maximum in a 30-cm diameter cylinder tissue-equivalent phantom.

^b Monoenergetic neutrons incident normally on a 30-cm diameter cylinder tissue-equivalent phantom.

~~(107)~~(124) "Research and development" means:

- (a) theoretical analysis, exploration, or experimentation; or
- (b) the extension of investigative findings and theories of a scientific or technical nature into practical application for experimental and demonstration purposes, including the experimental production and testing of models, devices, equipment, materials, and processes.

Research and development does not include the internal or external administration of radiation or radioactive material to human beings.

~~(108)~~(125) "Residual radioactivity" means radioactivity in structures, materials, soils, groundwater, and other media at a site resulting from activities under the licensee's control. This includes radioactivity from all licensed and unlicensed sources used by the licensee, but excludes background radiation. It also includes radioactive materials remaining at the site as a result of routine or accidental releases of radioactive material at the site and previous burials at the site, even if the burials were made in accordance with the provisions of Section .1600 of this Chapter.

~~(109)~~(126) "Respiratory protective device" means an apparatus, such as a respirator, used to reduce

the individual's intake of airborne radioactive materials.

~~(110)~~(127) "Restricted area" means an area, access to which is controlled by the licensee or registrant for purposes of protecting individuals against undue risks from exposure to radiation and radioactive materials. Restricted area does not include areas used as residential quarters, but separate rooms in a residential building may be set apart as a restricted area.

~~(111)~~(128) "Roentgen" (R) means the special unit of exposure. One roentgen equals 2.58×10^4 coulombs/kilogram of air.

~~(112)~~(129) "Sanitary sewerage" means a system of public sewers for carrying off waste water and refuse, but excluding sewage treatment facilities, septic tanks, and leach fields owned or operated by the licensee.

~~(113)~~(130) "Sealed source" means radioactive material that is permanently bonded, fixed or encapsulated so as to prevent release and dispersal of the radioactive material under the most severe conditions which are likely to be encountered in normal use and handling.

(131) "Self-contained breathing apparatus (SCBA)" means an atmosphere-supplying respirator for which the breathing air source is designed to be carried by the user.

~~(114)~~(132) "Semiannually" means either:

- (a) at intervals not to exceed six months; or
- (b) once per six months at about the same time during each six month period (completed during the sixth month of each six month period over multiple six month periods).

~~(115)~~(133) "Shallow-dose equivalent" (H_s), which applies to the external exposure of the skin or an extremity, is taken as the dose equivalent at a tissue depth of 0.007 centimeter (7 mg/cm^2) averaged over an area of one square centimeter.

~~(116)~~(134) "SI unit" means a unit of measure from the International System of Units as established by the General Conference of Weights and Measures.

~~(117)~~(135) "Sievert" is the SI unit of any of the quantities expressed as dose equivalent. The dose equivalent in sieverts is equal to the absorbed dose in grays multiplied by the quality factor ($1 \text{ Sv} = 100 \text{ rems}$).

~~(118)~~(136) "Site boundary" means that line beyond which the land or property is not owned, leased, or otherwise controlled by the licensee or registrant.

~~(119)~~(137) "Source material" means:

- (a) uranium or thorium or any other material which the Department declares to be source material after

the United States Nuclear Regulatory Commission, or any successor thereto has determined the material to be such; or

- (b) ores containing one or more of the foregoing materials, in such concentrations as the Department declares to be source material after the United States Nuclear Regulatory Commission, or any successor thereto, has determined the material in such concentration to be source material as defined in G.S. 104E-5(15).

~~(120)~~(138) "Source of radiation" means any radioactive material, or any device or equipment emitting or capable of producing radiation.

~~(121)~~(139) "Special form radioactive material" means radioactive material which satisfies the following conditions:

- (a) It is either a single solid piece or is contained in a sealed capsule that can be opened only by destroying the capsule;
- (b) The piece or capsule has at least one dimension not less than five millimeters (0.197 inch); and
- (c) It satisfies the test requirements specified by the U.S. Nuclear Regulatory Commission, Subpart F of 10 CFR Part 71, and the tests prescribed in Rule .0114 of this Section. A special form encapsulation designed in accordance with the U.S. Nuclear Regulatory Commission requirements, Subpart F of 10 CFR Part 71, in effect on June 30, 1984, and constructed prior to July 1, 1985, may continue to be used. A special form encapsulation either designed or constructed after June 30, 1985, must meet requirements of this definition applicable at the time of its design or construction.

~~(122)~~(140) "Special nuclear material" means:

- (a) plutonium, uranium 233, uranium 235, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Department declares to be special nuclear material after the United States Nuclear Regulatory Commission, or any successor thereto, has determined the material to be such, but does not include source material; or
- (b) any material artificially enriched by any of the foregoing, but does not include source material as defined in G.S. 104E-5(16).

~~(123)~~(141) "Special nuclear material in quantities not sufficient to form a critical mass" means uranium enriched in the isotope uranium-235 in quantities not exceeding 350 grams of contained uranium-235; uranium-233 in quantities not exceeding 200 grams; plutonium in quantities not exceeding 200 grams; or any combination of uranium-235, uranium enriched in uranium-235 and plutonium in accordance with the following formula: For each kind of special nuclear material,

$$\frac{175 \text{ (gram contained U-235)}}{350} + \frac{50 \text{ (grams U-233)}}{200} + \frac{50 \text{ (grams Pu)}}{200} \text{ is } < \text{ or } = 1$$

~~(124)~~(142) "State" means the State of North Carolina.

~~(125)~~(143) "Stochastic effects" means health effects that occur randomly and for which the probability of the effect occurring, rather than its severity, is assumed to be a linear function of dose without threshold. Hereditary effects and cancer incidence are examples of stochastic effects.

(144) "Supplied-air respirator (SAR)" means an atmosphere-supplying respirator for which the source of breathing air is not designed to be carried by the user.

~~(126)~~(145) "Survey" means an evaluation of the radiological conditions and potential hazards incident to the production, use, transfer, release, disposal, or presence of sources of radiation. When appropriate, such an evaluation includes a physical survey of the location of sources of radiation and measurements or calculations of levels of radiation, or concentrations or quantities of radioactive material present.

~~(127)~~(146) "These Rules" means Chapter 11 of this Title.

(147) "Tight-fitting facepiece" means a respiratory inlet covering that forms a complete seal with the face.

~~(128)~~(148) "To the extent practicable" means to the extent feasible or capable of being done or carried out with reasonable effort.

~~(129)~~(149) "Total effective dose equivalent" (TEDE) means the sum of the deep-dose equivalent (for external exposures) and the committed effective dose equivalent (for internal exposures).

~~(130)~~(150) "Toxic or hazardous constituent of the waste" means the nonradioactive content of waste which, notwithstanding the radioactive content, would be classified as "hazardous waste" as defined in G.S. 130A-290(8).

~~(131)~~(151) "Type A quantity" means a quantity of radioactive material, the aggregate radioactivity of which does not exceed A₁ for special form radioactive material or A₂ for

determine the ratio between the quantity of that special nuclear material and the quantity specified in this Rule for the same kind of special nuclear material. The sum of these ratios for all the kinds of special nuclear material in combination shall not exceed unity. For example, the following quantities in combination would not exceed the limitations and are within the formula, as follows:

normal form radioactive material, where A₁ and A₂ are given in Rule .0113 of this Section or may be determined by procedures described in Rule .0113 of this Section. All quantities of radioactive material greater than a Type A quantity are Type B.

~~(132)~~(152) "Unit dosage" means a dosage intended for medical use in an individual that has been obtained from a manufacturer or preparer licensed pursuant to 10 CFR 32.72 or equivalent agreement state requirements.

~~(133)~~(153) "Unrefined and unprocessed ore" means ore in its natural form prior to any processing, such as grinding, roasting, beneficiating, or refining.

~~(134)~~(154) "Unrestricted area" means an area, access to which is neither limited nor controlled by the licensee or registrant.

(155) "User seal check (fit check)" means an action conducted by the respirator user to determine if the respirator is properly seated to the face. Examples include negative pressure check, positive pressure check, irritant smoke check, or isoamyl acetate check.

~~(135)~~(156) "Very high radiation area" means an area, accessible to individuals, in which radiation levels from sources external to the body could result in an individual receiving an absorbed dose in excess of 500 rads (5 grays) in one hour at one meter from a radiation source or from any surface that the radiation penetrates. At very high doses received at high dose rates, units of absorbed dose (e.g., rads and grays) are appropriate, rather than units of dose equivalent (e.g., rems and sieverts).

~~(136)~~(157) "Waste" means low-level radioactive waste as defined in G.S. 104E-5(9a) and includes licensed naturally occurring and accelerator produced radioactive material which is not subject to regulation by the U.S. Nuclear Regulatory Commission under the Atomic Energy Act of 1954, as amended, except as defined differently in Rule .1202 of this Chapter.

- (137)(158) "Waste, Class A" is defined in Rule .1650 of this Chapter.
- (138)(159) "Waste, Class B" is defined in Rule .1650 of this Chapter.
- (139)(160) "Waste, Class C" is defined in Rule .1650 of this Chapter.
- (140)(161) "Week" means seven consecutive days starting on Sunday.

(144)(162) "Weighting factor", w_T , for an organ or tissue (T) is the proportion of the risk of stochastic effects resulting from irradiation of that organ or tissue to the total risk of stochastic effects when the whole body is irradiated uniformly. For calculating the effective dose equivalent, the values of w_T are:

ORGAN DOSE WEIGHTING FACTORS

<u>Organ or Tissue</u>	<u>w_T</u>
Gonads	0.25
Breast	0.15
Red bone marrow	0.12
Lung	0.12
Thyroid	0.03
Bone surfaces	0.03
Remainder	0.30 ^a
Whole body	1.00 ^b

^a 0.30 results from 0.06 for each of 5 "remainder" organs (excluding the skin and the lens of the eye) that receive the highest doses.

^b For the purpose of weighting the external whole body dose (for adding it to the internal dose), a single weighting factor, $w_T = 1.0$, has been specified.

(142)(163) "Whole body" means, for purposes of external exposure, head, trunk (including male gonads), arms above the elbow, or legs above the knee.

(143)(164) "Worker" means an individual engaged in work under a license or registration issued by the agency and controlled by a licensee or registrant, but does not include the licensee or registrant.

(144)(165) "Working level" (WL) is any combination of short-lived radon daughters (for radon-222: polonium-218, lead-214, bismuth-214, and polonium-214; and for radon-220: polonium-216, lead-212, bismuth-212, and polonium-212) in one liter of air that will result in the ultimate emission of 1.3×10^5 MeV of potential alpha particle energy.

(145)(166) "Working level month" (WLM) means an exposure to one working level for 170 hours.

(146)(167) "Written directive" means an order in writing for a specific patient, dated and signed by an authorized user prior to the administration of a radiopharmaceutical or radiation from a licensed source, except as specified in Sub-item (e) of this definition, containing the following information:

- (a) for the diagnostic administration of a radiopharmaceutical:
 - (i) if greater than 30 microcuries of sodium iodide I-125 or I-131, the dosage to be administered in accordance with the

- diagnostic clinical procedures manual; or
- (ii) if not subject to Sub-item (a)(i) of this Item, the type of study to be performed in accordance with the diagnostic clinical procedures manual;
- (b) for the therapeutic administration of a radiopharmaceutical:
 - (i) radiopharmaceutical;
 - (ii) dosage; and
 - (iii) route of administration;
- (c) for teletherapy or accelerator radiation therapy:
 - (i) total dose;
 - (ii) dose per fraction;
 - (iii) treatment site; and
 - (iv) overall treatment period;
- (d) for high-dose-rate remote afterloading brachytherapy:
 - (i) radioisotope;
 - (ii) treatment site; and
 - (iii) total dose;
- (e) for all other brachytherapy:
 - (i) prior to implantation:
 - (A) radioisotope;
 - (B) number of sources to be implanted; and
 - (C) source strengths in millicuries; and

- (ii) after implantation but prior to completion of the procedure:
 - (A) radioisotope;
 - (B) treatment site; and
 - (C) either:
 - (I) total source strength and exposure time; or
 - (II) total dose;
- (f) for gamma stereotactic radiosurgery:
 - (i) target coordinates;
 - (ii) collimator size;
 - (iii) plug pattern; and
 - (iv) total dose.

~~(147)~~(168) "Year" means the period of time beginning in January used to determine compliance with the provisions of Section .1600 of this Chapter. The licensee or registrant may change the starting date of the year used to determine compliance by the licensee or registrant provided that the change is made at the beginning of the year and that no day is omitted or duplicated in consecutive years.

Authority G.S. 104E-7(a)(2).

SECTION .0300 – LICENSING OF RADIOACTIVE MATERIAL

15A NCAC 11 .0306 TYPES OF LICENSES: GENERAL AND SPECIFIC

- (a) General licenses provided in this Section are effective without the filing of applications with the agency or the issuance of licensing documents to the general licensee, although registration with the agency may be required by the particular general license. The general license is subject to all other applicable rules in this Chapter and any limitations contained in ~~the a general license.~~ license document, if issued.
- (b) Specific licenses require the submission of an application to the agency and the issuance of a licensing document by the agency. The licensee is subject to all applicable rules of this Chapter as well as any limitations and requirements specified in the licensing document.

Authority G.S. 104E-7; 104E-10(b).

15A NCAC 11 .0308 GENERAL LICENSES: OTHER THAN SOURCE MATERIAL

- (a) A general license shall be issued to transfer, receive, acquire, own, possess, and use radioactive material incorporated in the following devices or equipment which have been manufactured, tested and labeled by the manufacturer in accordance with a specific license issued to the manufacturer by the U.S. Nuclear Regulatory Commission for use pursuant to Section 31.3 of 10 CFR Part 31:

- (1) static elimination devices designed for use as static eliminators which contain as a sealed source or sources, radioactive material consisting of a total of not more than 500 microcuries of polonium-210 per device;
 - (2) ion generating tube designed for ionization of air and containing, as a sealed source or sources, radioactive material consisting of a total of not more than 500 microcuries of polonium-210 per device or a total of not more than 50 millicuries of hydrogen-3 (tritium) per device.
- (b) The general license in Paragraph (a) of this Rule is subject to the provisions of Rules .0107 to .0111, .0303(a), ~~.0337, .0338,~~ .0342, .0343 and .0345 of this Chapter and to labeling requirements in Section .1600 of this Chapter.

Authority G.S. 104E-7; 104E-10(b).

15A NCAC 11 .0309 GENERAL LICENSES: MEASURING GAUGING: CONTROLLING DEVICES

- (a) A general license shall be issued to commercial and industrial firms and research, educational and medical institutions, individuals in the conduct of their business, and federal, state, or local government agencies to acquire, receive, possess, use, or transfer in accordance with Paragraphs (b), (c), and (d) of this Rule, radioactive material contained in devices designed and manufactured for the purpose of detecting, measuring, gauging or controlling thickness, density, level, interface location, radiation leakage, or qualitative or quantitative chemical composition, or for producing light or an ionized atmosphere.

~~(b) The general license in Paragraph (a) of this Rule applies only to radioactive material contained in devices which have been manufactured and labeled in accordance with the specifications contained in a specific license issued pursuant to Rule .0328 of this Section or in accordance with the specifications contained in a specific license issued by the U.S. Nuclear Regulatory Commission or an agreement state which authorizes distribution of the devices to persons generally licensed pursuant to equivalent regulations.~~

(b) The general license in Paragraph (a) of this Rule applies only to radioactive material contained in devices which have been:

- (1) manufactured or initially transferred and labeled in accordance with the specifications contained in a specific license issued pursuant to Rule .0328 of this Section or in accordance with the specifications contained in a specific license issued by the U.S. Nuclear Regulatory Commission or an agreement state which authorizes distribution of the devices to persons generally licensed pursuant to equivalent regulations; and
- (2) received from one of the specific licensees referenced in Subparagraph (b)(1) of this Rule or through a transfer completed in accordance with Subparagraph (c)(8) of this Rule.

(c) Any person who acquires, receives, possesses, uses or transfers radioactive material in a device pursuant to the general license issued under Paragraph (a) of this Rule:

- (1) shall assure that all labels, affixed to the device at the time of receipt and bearing a statement that removal of the label is prohibited, are maintained thereon and shall comply with all instructions and precautions provided by the labels;
- (2) shall assure that the device is tested for leakage of radioactive material and proper operation of the on-off mechanism and indicator, if any, at no longer than six-month intervals or at such other intervals as are specified in the label, except as follows:
 - (A) Devices containing only krypton need not be tested for leakage of radioactive material;
 - (B) Devices containing only tritium or not more than 100 microcuries of other beta, gamma, or beta and gamma emitting material or ten microcuries of alpha emitting material and devices held in storage in the original shipping container prior to initial installation need not be tested for any purpose;
- (3) shall assure that the tests required by Subparagraph (c)(2) of this Rule and other testing, installation, servicing and removal from installation involving the radioactive materials, its shielding or containment are performed:
 - (A) in accordance with the instructions provided on labels affixed to the device, except that tests for leakage or contamination may be performed by the general licensee using leak test kits provided and analyzed by a specific licensee who is authorized to provide leak test kit services; or
 - (B) by a person holding a specific license or registration which authorizes the providing of services required by this Rule and which is issued pursuant to Rules .0205 and .0306 of this Chapter or equivalent regulations of the U.S. Nuclear Regulatory Commission or an agreement state.
- (4) shall maintain records, showing compliance with the requirements in Subparagraphs (c)(2) and (3) of this Rule, to include:
 - (A) the name of the person(s) performing the test(s) and the date(s) of the test(s);
 - (B) the name of the person(s) performing installation, servicing and removal of any radioactive material, shielding or containment;

- (C) retention of leakage or contamination, on-off mechanism and on-off indicator test records for one year after the next required test is performed or until the sealed source is disposed of or transferred, whichever is shorter;
 - (D) retention of other records of tests required in Subparagraph (c)(3) of this Rule for two years from the date of the recorded test or until the device is disposed of or transferred.
- (5) upon the occurrence of a failure of or damage to, or any indication of a possible failure of or damage to, the shielding of the radioactive material or the on-off mechanism or indicator, or upon the detection of 0.005 microcurie or more removable radioactive material, shall immediately suspend operation of the device until it has been:
- (A) repaired by the manufacturer or other person authorized to repair the device(s) by a specific license issued by the agency, the U.S. Nuclear Regulatory Commission, or an agreement state; or
 - (B) disposed of by transfer to a person authorized by a specific license to receive the radioactive material contained in the device; and within 30 days, furnish to the agency at the address in Rule .0111 of this Chapter a report containing a brief description of the event and the remedial action ~~taken;~~ taken. In the event that 0.005 microcurie or more of removable radioactive contamination is detected, or if the failure of or damage to a source of radiation is likely to result in the contamination of the facility or the environment, a plan for ensuring that the facility and the environment are acceptable for unrestricted use shall be submitted to the agency at the address in 15A NCAC 11 .0111.
- (6) shall not abandon the device containing radioactive material;
- (7) except as provided in Subparagraph (c)(8) of this Rule, shall transfer or dispose of the device containing radioactive material only by transfer to a person holding a specific license authorizing receipt of the device; and, within 30 days after transfer of a device to a specific licensee, shall furnish to the agency at the address in Rule .0111 of this Chapter, ~~identification of the device by manufacturer's name and model number and the name and address of the person receiving the device, except no report is required if the device is transferred to the specifically licensed~~

- ~~manufacturer or distributor in order to obtain a replacement device; a report that contains:~~
- (A) ~~the identification of the device by manufacturer's or initial transferor's name, model number, and serial number;~~
- (B) ~~the name, address and specific license number of the person receiving the device; and~~
- (C) ~~the date of the transfer.~~
- (8) shall transfer the device to another general licensee only where the device:
- (A) remains in use at a particular location.
- (i) In this case the transferor shall give the transferee a copy of this Section and any safety documents identified in the label of the device;
- (ii) The transferor shall, within 30 days of the transfer, report to the agency at the address in Rule .0111 of this Chapter, ~~Chapter~~ the manufacturer's ~~or initial transferor's name~~ name, serial number, and model number of device ~~transferred, transferred;~~ the name and mailing address of the ~~transferee, transferee;~~ and the ~~name and position of an individual who may constitute a point of contact between the Commission and the transferee. name, title, and telephone number of the individual identified by the transferee pursuant to Subparagraph (c)(10) of this Rule as having knowledge of and authority to take actions to ensure compliance with the requirements contained in these Rules; or~~
- (B) is held in storage by the licensee or an intermediate person in the original shipping container at its intended location of use prior to initial use by a general licensee.
- (9) shall comply with the provisions of Sections .0100 and .1600 of this Chapter for reporting radiation incidents, theft or loss of licensed material, but shall be exempt from the other requirements of Section .1600 of this Chapter.
- (10) shall appoint an individual responsible for having knowledge of the requirements contained in these Rules and the authority for taking the actions required to comply with these Rules. The general licensee, through this individual, shall ensure the day-to-day compliance with these Rules. The
- appointment of such an individual does not relieve the general licensee of any of its responsibility in this regard.
- (11) shall register, when required by the agency, any source of radiation subject to a general license in accordance with the Rules in this Section. Each address for a location of use represents a separate general license and requires a separate registration action.
- (12) shall register, on an annual basis, all devices containing, based on the activity indicated on the label, at least 10 mCi (370 MBq) of cesium-137, 0.1 mCi (3.7 MBq) of strontium-90, 1 mCi (37MBq) of cobalt-60, 1 mCi (37 MBq) of americium-241 or any other transuranic isotope. Each address for a location of use represents a separate general license and requires a separate registration action. Annual registration consists of verifying, correcting, and/or adding to the information provided in a request for annual registration within 30 days of a request from the agency. The general licensee shall furnish the following information for annual registration:
- (A) the name and mailing address of the general licensee;
- (B) specific information about each device to include the manufacturer or initial transferor, model number, serial number, the radioisotope, and the activity indicated on the label;
- (C) the name, title, and telephone number of the responsible person designated as a representative of the general licensee in accordance with Subparagraph (c)(10) of this Rule;
- (D) the address or location at which the device(s) are to be used and/or stored. For portable devices that are granted a general license by the agency, the address of the primary place of storage;
- (E) certification by the responsible person designated by the general licensee that the information concerning the device(s) has been verified through a physical inventory and a thorough check of label information; and
- (F) certification by the responsible person designated by the general licensee that they are aware of the requirements of the general license.
- (13) shall report changes to the mailing address to the agency within 30 days of the effective date of the change;
- (14) shall report changes to the name of the general licensee to the agency within 30 days of the effective date of the change.

(15) shall not hold devices that are not in use for longer than two years. If devices that have shutters are not in use, the shutter shall be locked in the closed position. Leak testing is not required during the period of storage; however, when devices are returned to service of transferred to another person, the devices must be tested for leakage and shutter operation.

(d) The general license in Paragraph (a) of this Rule does not authorize the manufacture or distribution of devices containing radioactive material.

(e) The general license in Paragraph (a) of this Rule is subject to the provisions of Rules .0107 to .0111, .0303(a), ~~.0337, .0338, .0342, .0343~~ and .0345 of this Chapter and to labeling requirements in Section .1600 of this Chapter.

Authority G.S. 104E-7; 104E-10(b).

**15A NCAC 11 .0310 GENERAL LICENSES:
MANUFACTURE, TRANSFER, INSTALL GENERALLY
LICENSED DEVICES**

Any person who is authorized to manufacture, install or service a device described in Rule .0309 of this Section pursuant to a specific license issued by the agency, the U.S. Nuclear Regulatory Commission or an agreement state is hereby granted a general license to install and service the device described in Rule .0309, provided the following requirements are met:

- (1) The person shall file a report with the agency within 30 days after the end of each calendar quarter in which any device is transferred to or installed in this state. Each report shall identify each general licensee, to whom the device is transferred by name and address, the type of device transferred, and the quantity and type of radioactive material contained in the device;
- (2) The device is manufactured, labeled, installed, and serviced in accordance with applicable provisions of the specific license issued to the person by the U.S. Nuclear Regulatory Commission or an agreement state;
- (3) The person shall assure that any labels satisfy the requirements in Rule .0309 of this Section and shall furnish to each general licensee, to whom he transfers a device or on whose premises he installs a device, a copy of the general license contained in Rule .0309 of this Section.
- (4) The person shall ensure that each device having a separable source housing that provides the primary shielding for the source also bears, on the source housing, a durable label containing the device model number, the isotope and quantity, the words "Caution: Radioactive Material," the radiation symbol described in 15A NCAC 11 .1623 and the name of the manufacturer or initial transferor.
- (5) The person shall ensure that each device meeting the criteria of Rule .0309 of this

Section bears a permanently embossed, etched, stamped or engraved label affixed to the source housing, if separable, or the device if the source housing is not separable. The label shall include the words, "Caution: Radioactive Materials," and, if space and accessibility permit, the radiation symbol described in 15A NCAC 11 .1623.

(6) If a device is to be transferred for use under the general license granted in Rule .0309(c)(12) of this Section, each person that is licensed under this Rule shall provide the following information to each person to whom the device is being transferred prior to the device being transferred. In the case of a transfer through an intermediate person, the information shall also be provided to the intended user prior to the initial transfer to the intermediate person. The required information includes:

- (a) a copy of the general license document referenced in 15A NCAC 11 .0306 or if no license document is issued, a copy of the letter issued by the agency indicating a license exists in accordance with Rule .0309 of this Section. If the prospective general licensee is in the jurisdiction of the Nuclear Regulatory Commission or another Agreement State, the notification shall include a statement advising the person receiving the device of the agency that has jurisdiction over the device;
- (b) a copy of Rule .0309 of this Section. If the prospective general licensee is in the jurisdiction of the Nuclear Regulatory Commission or another Agreement State, the notification of transfer shall include the name or title, address, and telephone number of the contact at the proper regulatory agency that has jurisdiction over the person receiving the device;
- (c) a list of services, as provided by the manufacturer, that can only be performed by a specific licensee;
- (d) information on acceptable disposal options, including estimated cost of disposal; and
- (e) a statement that loss or improper disposal of the device may result in formal enforcement actions.

(7) Each device transferred after November 1, 2004 shall meet the labeling requirements.

(8) Each person specifically licensed to initially transfer generally licensed devices to other persons shall comply with the requirements of this Paragraph.

- (a) The person shall report, on a quarterly basis, all transfers of devices to persons for use under a general license and all receipts of devices from generally licensed persons. The reports shall be provided to the agency at the address listed in 15A NCAC 11 .0111. The information shall be provided either on the Nuclear Regulatory Commission's Form 653-"Transfers of Industrial Devices Report" or in a clear and legible report that contains all of the information required by the form. The required information includes:
- (i) the identity of each general licensee by name and mailing address for the location of use. If there is no mailing address at the location of use, an alternate address for the general licensee shall be submitted along with the information on the actual location of use;
 - (ii) the name, title and telephone number of the person identified by the general licensee as having knowledge of, and authority to ensure compliance with these Rules;
 - (iii) the date of transfer;
 - (iv) the type, model number, and serial number of the device transferred; and
 - (v) the quantity and type of radioactive material contained in the device.
- (b) If one or more intermediate persons will temporarily possess the device at the intended use location prior to its use by the end user, the report shall include the same information for both the intended end user and each intermediate person, and clearly designate the intermediate person(s).
- (c) If the licensee makes changes to a device possessed by a general licensee such that the label must be changed to update required information, the report shall identify the general licensee, the device, and the changes to the information on the label.
- (d) The report shall cover a calendar quarter and must be filed within 30 days of the end of the calendar quarter. The report shall clearly identify the period covered by the report.
- (e) The report shall clearly identify the specific licensee submitting the report and include the license number of the specific licensee.
- (f) In providing information on devices received from a general licensee, the report shall include the identity of the general licensee by name and address, the type, model number and serial number of the device received, and, in the case of devices not initially transferred by the licensee submitting the report, the name of the manufacturer or initial transferor.
- (g) If no transfers have been made to or from persons generally licensed during the reporting period, the report shall so indicate.
- (9) The person providing the reports shall maintain all information concerning the transfers and receipts of devices required by this Rule for a period of three years following the date of the recorded event.

Authority G.S. 104E-7; 104E-10(b).

SECTION .0500 - SAFETY REQUIREMENTS FOR INDUSTRIAL RADIOGRAPHY OPERATIONS

15A NCAC 11 .0510 LIMITATIONS

- (a) The licensee or registrant shall not permit any person to act as a radiographer until the person:
- (1) has been instructed in the subjects outlined in Rule .0519 of this Section and has demonstrated understanding thereof by successful completion of a written test. ~~Within two years after the effective date of this Rule,~~ ~~the~~ ~~The~~ person shall also have a minimum of two months of on-the-job training, and be certified through a radiography certification program by a certifying entity in accordance with the requirements of Rule .0525 of this Section;
 - (2) has received copies of and instruction in the rules contained in this Section and in the applicable rules of Sections .0200, .0300,

.0900 and .1600 of this Chapter, in applicable U.S. Department of Transportation regulations referenced in Rule .0117 of this Chapter, and the licensee's or registrant's operating and emergency procedures, and has demonstrated understanding thereof by successful completion of a written test;

- (3) has received training in the use of the licensee or registrant's radiographic exposure devices, sealed sources, in the daily inspection of devices and associated equipment, and in the use of radiation survey instruments;
- (4) has demonstrated competence to use the radiographic exposure devices, sealed sources, related handling tools, radiation machines and survey instruments which will be employed in his assignment by successful completion of a practical examination covering this material; and
- (5) has demonstrated understanding of the instructions in Paragraph (a) of this Rule by successful completion of a written test on the subjects covered.

(b) The licensee or registrant shall not permit any person to act as a radiographer's assistant until the person:

- (1) has received copies of and instructions in the licensee's or registrant's operating and emergency procedures, and has demonstrated understanding thereof by successful completion of a written or oral test and practical examination on the subjects covered;
- (2) has demonstrated competence to use under the personal supervision of the radiographer, the radiographic exposure devices, sealed sources, related handling tools, radiation machines and radiation survey instruments which will be employed in his assignment; and
- (3) has demonstrated understanding of the instructions in Paragraph (b) of this Rule by successfully completing a written or oral test and a field examination on the subjects covered.

(c) Records of the training including copies of written tests and dates of oral tests and field examinations shall be maintained in accordance with Rule .0523 of this Section.

(d) Each licensee or registrant shall conduct an internal audit program to ensure that the agency's radioactive material license, registration conditions and the licensee's or registrant's operating and emergency procedures are followed by each radiographer and radiographer's assistant. These internal audits shall be performed and records maintained by the licensee or registrant as specified in Items (3) and (4) of Rule .0323 of this Chapter.

(e) The licensee or registrant shall provide periodic training for radiographers and radiographer's assistants at least once during every 12 months.

(f) Whenever radiography is performed outside of a permanent radiographic installation, the radiographer shall be accompanied by another radiographer or an individual with, at least, the qualifications of a radiographer's assistant. This person's responsibilities shall include but not be limited to observing the

operations and being capable and prepared to provide immediate assistance to prevent unauthorized entry.

(g) A licensee or registrant may conduct lay-barge, off-shore platform, or underwater radiography only if detailed procedures have been developed and submitted to the agency that ensure radiation exposure to the workers and the public are ALARA during the radiographic operation.

(h) The radiation safety officer shall ensure that radiation safety activities are being performed in accordance with approved procedures and regulatory requirements in the daily operation of the licensee's or registrant's program.

(1) The radiation safety officer's qualifications shall include:

- (A) completion of the training and testing requirements of Paragraph (a) of this Rule; and
- (B) Two thousand hours documented experience in industrial radiographic operations, with at least 40 hours of classroom training with respect to the establishment and maintenance of radiation protection programs; or
- (C) an equivalent combination of education and experience.

(2) The specific duties and authorities of the radiation safety officer shall include, but are not limited to the following:

- (A) to establish and oversee operating, emergency and ALARA procedures, and to review them regularly to assure that the procedures are current and conform with these Rules and to the license conditions;
- (B) to oversee and approve all phases of the training of radiographic personnel so that appropriate and effective radiation protection practices are taught;
- (C) to ensure that required radiation surveys and leak tests are performed and documented in accordance with this Rule, including any corrective measures when levels of radiation exceed established limits;
- (D) to ensure that personnel monitoring devices are calibrated and used properly by occupationally-exposed personnel, that records are kept of the monitoring results, and that timely notifications are made as required by Rule .1646 of this Chapter;
- (E) to assure that operations are conducted safely and to assume control and have the authority to institute corrective actions including stopping of operations when necessary in emergency situations or unsafe conditions.

Authority G.S. 104E-7; 10 C.F.R. Chapter 1, Commission

Notices, Policy Statements, Agreement States, 46 F.R. 7540; 10 C.F.R. 34.43; 10 C.F.R. Appendix A.

15A NCAC 11 .0512 PERSONNEL MONITORING

(a) The licensee or registrant shall not permit any individual to act as a radiographer or a radiographer's assistant unless, at all times during radiographic operations, each such individual wears on the trunk of the body a direct reading pocket dosimeter, an operating alarm ratemeter, and ~~either a film badge or a thermoluminescent dosimeter (TLD)~~ a personnel dosimeter that is processed and evaluated by an accredited National Voluntary Laboratory Accreditation Program (NVLAP) processor. At permanent radiography facilities where other alarming or warning devices are in routine use, the wearing of an alarming ratemeter is not required. Pocket dosimeters shall have a range from zero to 200 milliroentgens (2 millisieverts) and shall be recharged at the start of each shift. Electronic personal dosimeters may only be used in place of ion-chamber pocket dosimeters. Each ~~film badge and TLD~~ personnel dosimeter shall be assigned to and worn by only one individual. Film badges shall be exchanged at least monthly and ~~TLDs~~ other personnel dosimeters processed and evaluated by an accredited NVLAP processor shall be exchanged at least once each three months. After exchange, each ~~film badge or TLD~~ personnel dosimeter shall be promptly processed.

(b) Direct reading dosimeters such as electronic dosimeters or pocket dosimeters shall be read and exposures recorded at the beginning and end of each shift.

(c) Pocket dosimeters or electronic personal dosimeters shall be checked at periods not to exceed 12 months for correct response to radiation. Acceptable dosimeters shall read within plus or minus 20 percent of the true radiation exposure.

(d) If an individual's pocket dosimeter is found to be off-scale or if the individual's electronic personal dosimeter reads greater than 200 millirem (2 millisieverts), and the possibility of radiation exposure cannot be ruled out as the cause, their ~~film badge or TLD~~ personnel dosimeter shall be immediately sent for processing. In addition, the individual shall not work with sealed sources until a determination of his radiation exposure has been made by the radiation safety officer or his designee.

(e) If a ~~film badge or TLD~~ personnel dosimeter is lost or damaged, the worker shall cease work immediately until a replacement ~~film badge or TLD~~ personnel dosimeter is provided and exposure is calculated for the time period from issuance to loss or damage of the ~~film badge or TLD~~ personnel dosimeter.

(f) Each alarm ratemeter shall:

- (1) be checked to ensure that the alarm functions properly prior to use at the start of each shift;
- (2) be set to give an alarm signal at a preset rate not to exceed 500 mR/hr or 5 mSv/hr;
- (3) require special means to change the preset alarm function;
- (4) alarm within plus or minus 20 percent of the true radiation rate;
- (5) be calibrated at periods not to exceed one year for correct response to radiation.

(g) Records of daily dosimeter readings, determination of exposure as a result of a lost or damaged ~~film badge or TLD~~ personnel dosimeter, 12 month response checks on dosimeters and results from the ~~film badge or TLD~~ accredited NVLAP

personnel dosimeter processor shall be maintained in accordance with Rule .0523 of this Section.

(h) Notwithstanding the requirements of Paragraph (a) of this Rule, the agency may approve a higher pocket dosimeter range upon written request by the licensee or registrant if the agency determines that the requested range will afford the protection required by the rules in this Chapter.

Authority G.S. 104E-7; 104E-12(a)(2).

15A NCAC 11 .0523 RECORDS OF INDUSTRIAL RADIOGRAPHY

(a) Each licensee or registrant shall maintain, for a period of three years after the record is made, the following records for inspection by the agency:

- (1) copies of the following documents:
 - (A) radioactive materials license or registration issued by the agency;
 - (B) the complete application submitted for the license or registration that includes all amendments; and
 - (C) current operating and emergency procedures;
- (2) records showing the receipt and transfer of all sealed sources and devices using depleted uranium (DU) for shielding that include:
 - (A) date;
 - (B) individual making the record;
 - (C) radionuclide;
 - (D) activity in curies or becquerel or mass for depleted uranium; and
 - (E) make, model and serial number of each sealed source and device;
- (3) records of the calibrations of radiation detection instrumentation;
- (4) records of leak tests for sealed sources and devices containing depleted uranium in units of microcuries or becquerel;
- (5) records of quarterly inventories that include:
 - (A) radionuclide;
 - (B) activity in curies or becquerel;
 - (C) specific information on each sealed source and the radiographic exposure device, storage container or source changer which contains the sealed source to include:
 - (i) model numbers;
 - (ii) serial numbers; and
 - (iii) manufacturers names;
 - (D) location of sealed sources;
 - (E) name of the individual conducting the inventory; and
 - (F) the date of the inventory;
- (6) records of utilization logs showing the following information:
 - (A) a description of each radiographic exposure device, radiation machine or transport or storage container in which the sealed source is located that includes:

- (i) make;
 - (ii) model number; and
 - (iii) serial number;
 - (B) the identity and signature of the radiographer to whom assigned; and
 - (C) the plant or site where used; and
 - (D) dates of use that includes the dates removed and returned to storage;
- (7) records of inspection and maintenance of radiographic exposure devices, transport and storage containers, associated equipment, source changers and radiation machines. The record shall include:
- (A) date of the check;
 - (B) name of the individual performing the check;
 - (C) equipment involved;
 - (D) any problems found in daily checks and quarterly inspections; and
 - (E) any repairs or maintenance made and name of individual or company performing the repair;
- (8) records of alarm system tests for permanent radiographic installations;
- (9) records of the training and certification of each radiographer and radiographer's assistant as follows:
- (A) radiographer certification documents and verification of certification status;
 - (B) for initial training, copies of written tests, dates and results of oral tests and field examinations; and names of individuals conducting and receiving the oral test or field examination;
 - (C) for periodic training and semi-annual inspections of job performance, list of topics discussed, date(s) of the review, names of the instructors and the attendees; and
 - (D) for inspections of job performance, the records shall also include a list showing the items checked and any noncompliance observed by the Radiation Safety Officer.
- (10) records for pocket dosimeters to include daily exposure readings and yearly operability checks;
- (11) records of reports received from the ~~film badge or TLD~~ accredited National Voluntary Laboratory Accreditation Program (NVLAP) personnel dosimetry processor. These records shall be maintained until the agency terminates the license or registration or until authorized by the agency;
- (12) records of exposure device surveys performed at the end of the work day and prior to placing the device in storage;
- (13) records of area surveys required by Rule .0515 of this Section;
- (14) copy of current operating and emergency procedures until the agency terminates the license or registration and copies of superseded material shall be retained for three years after the change is made; and
- (15) evidence of the latest calibrations of alarm ratemeters and operability checks of pocket dosimeters or electronic personal dosimeters.
- (b) Each licensee or registrant conducting operations at temporary jobsites shall maintain copies of the following documents and records at the temporary jobsite until the radiographic operation is completed:
- (1) operating and emergency procedures required by Rule .0513 of this Section;
 - (2) radioactive materials license or registration;
 - (3) evidence of training of the radiographers and radiographer's assistants. The individuals shall either be listed on the radioactive materials license or registration and offer identification or shall have certification of his training and offer identification;
 - (4) evidence of the latest calibration of the radiation detection instrumentation in use at the site as required by Rule .0506 of this Section;
 - (5) evidence of the latest leak test of the sealed source required by Rule .0507 of this Section;
 - (6) records of the latest surveys required by Rule .0515 of this Section;
 - (7) records of current direct reading dosimeters such as pocket dosimeter or electronic personal dosimeter readings;
 - (8) shipping papers for the transportation of radioactive materials required by 10 CFR Part 71.5; and
 - (9) records of area surveys required by Rule .0515 of this Section;
 - (10) a copy of Section .0500 of this Chapter;
 - (11) utilization records for each radiographic exposure device dispatched from that location as required by Subparagraph (a) of Rule .0523 of this Section;
 - (12) records of equipment problems identified in daily checks of equipment; and
 - (13) when operating under reciprocity, a copy of the Nuclear Regulatory Commission or agreement state license authorizing the use of radioactive material.
- (c) Each record required by this Rule shall be legible throughout the specified retention period. The record may be an original, a reproduced copy or microform provided that the copy or microform is authenticated by the licensee and the microform is capable of reproducing a clear copy throughout the required record retention period. The record may also be stored in electronic media with the capability for producing legible, accurate and complete records during the required record retention period. Records, such as letters, drawings and specifications shall include all pertinent information, such as stamps, initials and signatures. The licensee or registrant shall maintain safeguards against tampering with and loss of records.

Authority G.S. 104E-7.

SECTION .0700 - USE OF SEALED RADIOACTIVE SOURCES IN THE HEALING ARTS

15A NCAC 11 .0702 INTERSTITIAL: INTRACAVITARY AND SUPERFICIAL APPLICATIONS

- (a) Accountability, storage and transit
 - (1) Each licensee shall provide accountability of sealed sources and shall keep a record of the issue and return of all sealed sources. A physical inventory shall be made at least every six months and a written record of the inventory maintained.
 - (2) When not in use, sealed sources and applicators containing sealed sources shall be kept in a protective enclosure of such material and wall thickness as necessary to assure compliance with the provisions of Rules .1604, .1609 and .1611 of this Chapter.
- (b) Testing sealed sources for leakage and contamination
 - (1) All sealed sources with a half-life greater than 30 days and in any form other than gas shall be tested for leakage and contamination prior to initial use and at intervals not to exceed six months. If there is reason to suspect that a sealed source might have been damaged, or might be leaking, it shall be tested for leakage before further use.
 - (2) Leak tests shall be capable of detecting the presence of 0.005 microcurie of radioactive material on the test sample, or in the case of radium, the escape of radon at rate of 0.001 microcurie per 24 hours. Any test conducted pursuant to Subparagraph (b)(1) of this Rule which reveals the presence of 0.005 microcurie or more of removable contamination or, in the case of radium, the escape of radon at the rate of 0.001 microcurie or more per 24 hours shall be considered evidence that the sealed source is leaking. The licensee shall immediately withdraw the source from use and shall cause it to be decontaminated and repaired or to be disposed of in accordance with applicable provisions of Section .1600 of this Chapter. A report describing the sealed sources involved, the test results and the corrective action taken shall be submitted in writing to the agency at the address stated in Rule .0111 of this Chapter within five days after the test.
 - (3) Leak test results shall be recorded in units of microcuries and maintained for inspection by the agency.
- (c) Radiation surveys
 - (1) The maximum radiation level at a distance of one meter from the patient in whom brachytherapy sources have been inserted shall be determined by measurement or calculation.

- (2) This radiation level shall be entered on the patient's chart and other signs as required in Paragraph (d) of this Rule.
- (2) The radiation surveying in Paragraph (c) of this Rule or a special survey shall be performed and shall include measurements necessary to comply with the following requirements:
 - (A) The therapeutic use of sealed sources shall not create radiation levels in areas occupied by patients not undergoing radiation therapy which would result in an accumulated dose in excess of ~~125~~ 100 millirem if a patient were continuously present during the entire treatment period.
 - (B) The licensee shall maintain a record of this survey and the calculation which demonstrates compliance with Subparagraph (c)(1) of this Rule.
 - (C) The licensee shall select rooms for hospitalization of these sealed source therapy patients in a manner so as to minimize radiation exposure of other patients, hospital staff, visitors and the public, especially those who are under 18 years of age or who are pregnant females.
 - (D) This Rule does not relieve the licensee of responsibility to monitor or limit occupational radiation exposure for the licensee's staff as provided in Section .1600 of this Chapter.
- (3) Immediately after implanting sources in an individual the licensee shall make a radiation survey of the individual and the area of use to confirm that no source has been misplaced. The licensee shall make a record of each survey.
- (4) Immediately after removing the last temporary implant source from an individual, the licensee shall make a radiation survey of the individual with a radiation detection survey instrument to confirm that all sources have been removed. The licensee may not release from confinement for medical care an individual treated by temporary implant until all sources have been removed.
- (d) A licensee shall maintain accountability for all brachytherapy sources in storage or in use. After removing sources from an individual, a licensee shall return brachytherapy sources to the storage area. A licensee shall ensure that all sources taken from the storage area have been returned, and shall make a record of the source accountability and retain the record for three years.
- (e) For temporary implants, the record shall include:
 - (1) the number and activity of sources removed from storage;

- (2) the date the sources were removed from storage;
 - (3) the number and activity of sources returned to storage; and
 - (4) the date the sources were returned to storage.
- (f) For permanent implants, the record shall include:
- (1) the number and activity of sources removed from storage;
 - (2) the date the sources were removed from storage;
 - (3) the number and activity of sources returned to storage;
 - (4) the date the sources were returned to storage; and
 - (5) the number and activity of sources permanently implanted in the individual.

(g) Signs and records

- (1) In addition to the requirements of Rule .1624 of this Chapter, the bed, cubicle, or room of the hospital brachytherapy patient shall be marked with a sign indicating the presence of brachytherapy sources. This sign shall incorporate the radiation symbol and specify the radionuclide, activity, date, and the individual(s) to contact for radiation safety instructions. The sign is not required provided the exception in Rule .1625 of this Chapter is satisfied.
- (2) The following information shall be included in the patient's chart:
 - (A) the radionuclide administered, number of sources, activity in millicuries and time and date of administration;
 - (B) the exposure rate at one meter, the time the determination was made, and by whom;
 - (C) the radiation symbol; and
 - (D) the precautionary instructions necessary to assure that the exposure of individuals does not exceed that permitted in Paragraph (c) of this Rule.

Authority G.S. 104E-7; 104E-12(a).

SECTION .1300 - REQUIREMENTS FOR WIRELINE-SERVICE OPERATORS AND SUBSURFACE-TRACER STUDIES

15A NCAC 11 .1302 DEFINITIONS

As used in this Section, the following definitions apply:

- (1) "Energy compensation sources (ECS)" means a small sealed source, with an activity not exceeding 100 microcuries (3.7 MBq), used within a logging tool or other tool components, to provide a reference standard to maintain the tool's calibration when in use.
- (2) "Field station" means a facility where radioactive sources may be stored or used and

- from which equipment is dispatched to temporary jobsites.
- ~~(2)~~(3) "Injection tool" means a device used for controlled subsurface injection of radioactive tracer material.
- ~~(3)~~(4) "Logging supervisor" means the individual who provides personal supervision of the utilization of sources of radiation at the well site.
- ~~(4)~~(5) "Logging tool" means a device used subsurface to perform well-logging.
- ~~(5)~~(6) "Mineral logging" means any logging performed for the purpose of mineral exploration other than oil or gas.
- ~~(6)~~(7) "Personal supervision" means guidance and instruction by the supervisor who is physically present at the jobsite and watching the performance of the operation in such proximity that contact can be maintained and immediate assistance given as required.
- ~~(7)~~(8) "Radioactive marker" means radioactive material placed subsurface or on a structure intended for subsurface use for the purpose of depth determination or direction orientation.
- ~~(8)~~(9) "Source holder" means a housing or assembly into which a radioactive source is placed for the purpose of facilitating the handling and use of the source in well-logging operations.
- ~~(9)~~(10) "Subsurface-tracer study" means the release of a substance tagged with radioactive material for the purpose of tracing the movement or position of the tagged substance in the well-bore or adjacent formation.
- ~~(10)~~(11) "Temporary jobsite" means a location to which radioactive materials have been dispatched to perform wireline-service operations or subsurface-tracer studies.
- (12) "Tritium neutron generator target source" means a tritium source used within a neutron generator tube to produce neutrons for use in well logging applications.
- ~~(11)~~(13) "Well-bore" means a drilled hole in which wireline-service operations and subsurface-tracer studies are performed.
- ~~(12)~~(14) "Well-logging" means the lowering and raising of measuring devices or tools which may contain sources of radiation into well-bores or cavities for the purpose of obtaining information about the well or adjacent formations.
- ~~(13)~~(15) "Wireline" means a cable containing one or more electrical conductors which is used to lower and raise logging tools in the well-bore.
- ~~(14)~~(16) "Wireline-service operations" means any evaluation or mechanical service which is performed in the well-bore using devices on a wireline.

Authority G.S. 104E-7.

15A NCAC 11 .1307 RADIATION SURVEY INSTRUMENTS

(a) The licensee shall maintain sufficient calibrated and operable radiation survey instruments at each field station and temporary jobsite to make physical radiation surveys as required by this Section and by Section .1600 of this Chapter. Instrumentation shall be capable of measuring beta and gamma radiation from 0.1 milliroentgen per hour through at least 50 milliroentgens per hour.

- (b) Each radiation survey instrument shall be calibrated:
- (1) at intervals not to exceed six months and after each instrument servicing;
 - (2) at energies and radiation levels appropriate for use; and
 - (3) so that accuracy within plus or minus 20 percent of the true radiation level can be demonstrated on each scale.

(c) Calibration records shall be maintained for a period of three years for inspection by the agency.

Authority G.S. 104E-7; 104E-12(a)(1).

15A NCAC 11 .1308 LEAK TESTING OF SEALED SOURCES

(a) Each licensee using sealed sources of radioactive material shall have the sources tested for leakage. Records of leak test results shall be kept in units of microcuries and maintained for inspection by the agency for six months after the next required leak test is performed or until transfer or disposal of the sealed source.

(b) Tests for leakage shall be performed only by persons specifically authorized to perform such tests by the agency, the U.S. Nuclear Regulatory Commission, an agreement state, or a licensing state. The test sample shall be taken from the surface of the source, source holder, or from the surface of the device in which the source is stored or mounted and on which one might expect contamination to accumulate. The test sample shall be analyzed for radioactive contamination, and the analysis shall be capable of detecting the presence of 0.005 microcurie of radioactive material on the test sample.

(c) Each sealed source of radioactive ~~material~~ material, with the exception of energy compensation sources (ECSs), shall be tested at intervals not to exceed six months. Each ECS source that is not exempted from leak testing pursuant to Paragraph (e) of this Rule shall be tested at intervals not to exceed three years. In the absence of a certificate from a transferor indicating that a test has been made prior to the transfer, the sealed source shall not put into use until tested. If, for any reason, it is suspected that a sealed source may be leaking, it shall be removed from service immediately and tested for leakage as soon as practical.

(d) If the test reveals the presence of 0.005 microcurie or more of leakage or contamination, the licensee shall immediately withdraw the source from use and shall cause it to be decontaminated, repaired, or disposed of in accordance with these Rules. A report describing the equipment involved, the test results, and the corrective action taken shall be filed with the agency.

(e) The following sources are exempt from the periodic leak test and notification requirements of this Rule:

- (1) hydrogen-3 (tritium) sources;

- (2) sources of radioactive material with a half-life of 30 days or less;
- (3) sealed sources of radioactive material in gaseous form;
- (4) sources of beta- or gamma-emitting radioactive material with an activity of 100 microcuries or less; and
- (5) sources of alpha-emitting radioactive material with an activity of ten microcuries or less.

Authority G.S. 104E-7; 104E-12(a).

15A NCAC 11 .1311 DESIGN: PERFORMANCE: AND CERTIFICATION CRITERIA

~~(a) Each sealed source, except those containing radioactive material in gaseous form, used in downhole operations and manufactured after October 1, 1989, shall be certified by the manufacturer, or other testing organization acceptable to the agency, to meet the following minimum criteria: Each sealed source used in downhole operations, except those containing radioactive material in gaseous form, shall meet the following minimum criteria:~~

- (1) be of doubly encapsulated construction;
- (2) contain radioactive material whose chemical and physical forms are as insoluble and non-dispersible as practical; and
- (3) ~~individually pressure tested to at least 24,656 pounds per square inch absolute without failure. meet the requirements in Paragraphs (b), (c) and (d) of this Rule.~~

~~(b) For sealed sources, except those containing radioactive material in gaseous form, acquired after October 1, 1989, in the absence of a certificate from a transferor certifying that an individual sealed source meets the requirements of this Rule, the sealed source shall not be put into use until such determinations and testing have been performed. For a sealed source manufactured on or before July 14, 1989, a licensee may use the sealed source for downhole operations if it meets the requirements of USASI N5.10-1968, "Classification of Sealed Radioactive Sources," or the requirements in Paragraphs (c) and (d) of this Rule.~~

~~(c) Each sealed source, except those containing radioactive material in gaseous form, used in downhole operations after October 1, 1989, shall be certified by the manufacturer, or other testing organization acceptable to the agency, as meeting the sealed source performance requirements for oil well logging as contained in the American National Standard N542, "Sealed Radioactive Sources, Classification" adopted November 1, 1977, and effective on October 1, 1989. For a sealed source manufactured after July 14, 1989, a licensee may use the sealed source for downhole operations if it meets the oil-well logging requirements of ANSI/HPS N43.6-1977, "Sealed Radioactive Sources, Classification."~~

~~(d) Certification documents shall be maintained for inspection by the agency for a period of two years after source disposal. If the source is abandoned downhole, the certification documents shall be maintained until the agency authorizes disposition. For a sealed source manufactured after July 14, 1989, a licensee may use the source for downhole operations if the sealed source's~~

prototype has been tested and found to maintain its integrity after being subjected to each of the following tests:

- (1) The test source shall be held at -40° C for 20 minutes, 600° C for one hour, and then be subjected to a thermal shock test with a temperature drop from 600° C to 20° C within 15 seconds;
- (2) A 5 kg steel hammer, 2.5 cm in diameter, shall be dropped from a height of 1 meter onto the test source;
- (3) The test source shall be subjected to a vibration from 25 Hz to 500 Hz at 5 g amplitude for 30 minutes;
- (4) A 1 gram hammer and pin, 0.3 cm pin diameter, shall be dropped from a height of 1 meter onto the test source; and
- (5) The test source shall be subjected to an external pressure of 24,600 pounds per square inch absolute (1.695x10⁷ pascals).

(e) The requirements of Paragraphs (a) through (d) of this Rule do not apply to energy compensation sources (ECSs).

Authority G.S. 104E-7.

15A NCAC 11 .1312 LABELING

(a) General requirements are as follows:

- (1) Each source, source holder, or logging tool containing radioactive material shall bear a durable, legible, and clearly visible marking or label, which has, as a minimum, the standard radiation caution symbol, without the conventional color requirement, and the following wording:

CAUTION
RADIOACTIVE MATERIAL

- (2) The marking or labeling required in Subparagraph (a)(1) of this Rule shall be on the smallest component transported as a separate piece of equipment.
- (3) Each transport container shall have permanently attached to it a durable, legible, and clearly visible label which has, as a minimum, the standard radiation caution symbol and the following wording:

CAUTION
RADIOACTIVE MATERIAL
NOTIFY CIVIL AUTHORITIES
(OR NAME OF COMPANY)

- (4) Each uranium sinker bar used by the licensee in downhole operations shall be legibly impressed with the following wording:

CAUTION
RADIOACTIVE DEPLETED URANIUM
NOTIFY CIVIL AUTHORITIES (OR NAME
OF COMPANY)

- (b) The word "danger" may be substituted for the word "caution" in the signs described in this Rule.

Authority G.S. 104E-7; 104E-12(a)(1).

15A NCAC 11 .1316 PERSONNEL MONITORING

(a) No licensee shall permit any individual to act as a logging supervisor or to assist in the handling of sources of radiation unless each such individual wears ~~either a film badge or a thermoluminescent dosimeter (TLD)~~ a personnel dosimeter that is processed and evaluated by an accredited National Voluntary Laboratory Accreditation Program (NVLAP) processor.

(b) Each ~~film badge or TLD~~ personnel dosimeter required in Paragraph (a) of this Rule shall be assigned to and worn by only one individual.

(c) Each film badge shall be replaced at least monthly and other personnel dosimeters shall be replaced at least quarterly.

~~(e)(d)~~ The licensee shall maintain personnel monitoring records for inspection until the agency authorizes disposal, terminates each pertinent license or registration requiring the record.

Authority G.S. 104E-7; 104E-12(a)(2).

15A NCAC 11 .1324 NOTIFICATION OF INCIDENTS: ABANDONMENT: AND LOST SOURCES

(a) The licensee shall comply with the applicable notification requirements in Section .1600 of this Chapter for incidents and sources lost in other than downhole logging operations.

(b) Whenever a sealed source or device containing radioactive material is lodged downhole, the licensee shall:

- (1) monitor at the surface for the presence of radioactive contamination with a radiation survey instrument or logging tool during logging tool recovery operations; and
- (2) notify the agency immediately by telephone if radioactive contamination is detected at the surface or if the source appears to be damaged.

(c) When it becomes apparent that efforts to recover the radioactive source will not be successful, the licensee shall:

- (1) advise the well-operator of the rules of the appropriate state agency with jurisdiction over abandonment and appropriate method of abandonment, which shall include:
 - (A) the immobilization and sealing in place of the radioactive source with a concrete plug;
 - (B) ~~the setting of a whipstock or other deflection device; and a means of preventing inadvertent intrusion on the source, unless the source is not accessible to any subsequent drilling operations; and~~
 - (C) the mounting of a permanent identification plaque, at the surface of the well, containing the ~~appropriate~~ information required by Paragraph (d) of this Rule;
- (2) notify the agency by telephone, giving the circumstances of the loss and requesting

- approval of the proposed abandonment procedures; and
- (3) file a written report with the agency within 30 days of the abandonment, setting forth the following information:
- (A) date of occurrence and a brief description of attempts to recover the source; and
 - (B) a description of the radioactive source involved, including radionuclide, quantity, and chemical and physical form;
 - (i) surface location and identification of well,
 - (ii) results of efforts to immobilize and set the source in place,
 - (iii) depth of the radioactive source,
 - (iv) depth of the top of the cement plug,
 - (v) depth of the well, and
 - (vi) information contained on the permanent identification plaque.

(d) Whenever a sealed source containing radioactive material is abandoned downhole, the licensee shall provide a permanent plaque for posting the well or well-bore. This plaque shall:

- (1) be constructed of long-lasting material, such as stainless steel or monel, and steel, brass, bronze, or monel;
- (2) be at least seven inches (17 cm) square and 1/8 inch (3mm) thick; and
- (3) contain the following information engraved on its face;
 - (A) the word "CAUTION";
 - (B) the radiation symbol without the conventional color requirement;
 - (C) the date of abandonment;
 - (D) the name of the well-operator or well owner;
 - (E) the well name and well identification number(s) or other designation;
 - (F) the sealed source(s) by radionuclide and quantity of activity;
 - (G) the source depth and the depth to the top of the plug; and
 - (H) an appropriate warning, depending on the specific circumstances of each abandonment, which may include:
 - (i) "Do not drill below plug back depth",
 - (ii) "Do not enlarge casing", or
 - (iii) "Do not re-enter the hole" before contacting the ~~Division of Radiation Protection~~ agency at the address in Rule .0111 of this Chapter.

(e) The licensee shall immediately notify the agency by telephone and subsequently by confirming letter if the licensee knows or has reason to believe that radioactive material has been lost in or to an underground potable water source. Such notice shall designate the well location and shall describe the magnitude and extent of loss of radioactive material, assess the consequences of such loss, and explain efforts planned or being taken to mitigate the consequences.

Authority G.S. 104E-7.

15A NCAC 11 .1326 ENERGY COMPENSATION SOURCES

The licensee shall use an energy compensation source (ECS) which is contained within a logging tool, or other tool components, only if the ECS contains quantities of licensed material not exceeding 100 microcuries (3.7 MBq).

- (1) For downhole operations utilizing a surface casing for protecting fresh water aquifers, use of the ECS is only subject to the requirements of Rules .1308, .1309, .1310, and .1323 of this Section.
- (2) For downhole operations without a surface casing for protecting fresh water aquifers, use of the ECS is only subject to the requirements of Rules .1303, .1308, .1309, .1310, .1323, and .1324 of this Section.

Authority G.S. 104E-7.

15A NCAC 11 .1327 TRITIUM NEUTRON GENERATOR TARGET SOURCES

(a) The use of a tritium neutron generator target source containing quantities of radioactive material not exceeding 30 Curies (1,110 MBq) in a well with a surface casing to protect fresh water aquifers is subject to the requirements of this Section excluding Rules .1303, .1311, and .1324 of this Section.

(b) The use of a tritium neutron generator target source which contains quantities of radioactive material exceeding 30 Curies (1,110 MBq) or which is used in a well without a surface casing to protect fresh water aquifers is subject to the requirements of this Section excluding Rule .1311 of this Section.

Authority G.S. 104E-7.

SECTION .1600 - STANDARDS FOR PROTECTION AGAINST RADIATION

15A NCAC 11 .1614 MONITORING OF EXTERNAL AND INTERNAL OCCUPATIONAL DOSE

Each licensee or registrant shall monitor exposures to radiation and radioactive material at levels sufficient to demonstrate compliance with the occupational dose limits of this Section. As a minimum:

- (1) Each licensee or registrant shall monitor occupational exposure to radiation and shall supply and require the use of individual monitoring devices by:
 - (a) adults likely to receive, in one year from sources external to the body, a

- dose in excess of 10 percent of the limits in Rule .1604(a) of this Section;
 - (b) minors likely to receive, in one year, from sources of radiation, a deep dose equivalent in excess of 0.1 rem (1 mSv), a lens dose equivalent in excess of 0.15 rem (1.5 mSv), or a shallow dose equivalent in excess of 0.5 rem (5 mSv);
 - (c) declared pregnant women likely to receive, during the entire pregnancy, from sources of radiation external to the body, a deep dose equivalent in excess of 0.1 rem (1 mSv); and
 - (d) individuals entering a high or very high radiation area.
- (2) Each licensee shall monitor the occupational intake of radioactive material by and assess the committed effective dose equivalent to:
- (a) adults likely to receive, in one year, an intake in excess of 10 percent of the applicable ALI(s) in Table 1, Columns 1 and 2, of Appendix B to 10 CFR 20.1001 - 20.2402;
 - (b) minors ~~and declared pregnant women~~ likely to receive, in one year, a committed effective dose equivalent in excess of 0.1 rem ~~(1mSv)~~ (1mSv); and
 - (c) ~~declared pregnant women likely to receive, during the entire pregnancy, a committed effective dose equivalent in excess of 0.1 rem (1mSv).~~

Authority G.S. 104E-7(a)(2).

15A NCAC 11 .1618 USE OF PROCESS OR OTHER ENGINEERING CONTROLS

The licensee shall use, to the extent practicable, process or other engineering controls (e.g., ~~containment~~ containment, decontamination, or ventilation) to control the concentrations of radioactive material in air.

Authority G.S. 104E-7(a)(2).

15A NCAC 11 .1619 USE OF OTHER CONTROLS TO RESTRICT INTERNAL EXPOSURE

~~When it is not practicable to apply process or other engineering controls to control the concentrations of radioactive material in air to values below those that define an airborne radioactivity area, the licensee shall, consistent with maintaining the total effective dose equivalent ALARA, increase monitoring and limit intakes of radionuclides by one or more of the following means:~~

- (1) ~~the control of access to the area;~~
- (2) ~~the limitation of exposure times of personnel in the area;~~
- (3) ~~the use of respiratory protection equipment; or~~
- (4) ~~other controls.~~

(a) When it is not practicable to apply process or other engineering controls to control the concentrations of radioactive material in air to values below those that define an airborne radioactivity area, the licensee shall, consistent with maintaining the total effective dose equivalent ALARA, increase monitoring and limit intakes of radionuclides by one or more of the following means:

- (1) the control of access to the area;
- (2) the limitation of exposure times of personnel in the area;
- (3) the use of respiratory protection equipment; or
- (4) other controls.

(b) If the licensee performs ALARA analyses to determine whether or not respirators are to be used, the licensee may consider safety factors other than radiological factors. The licensee shall also consider the impact of respirator use on workers' industrial health and safety.

Authority G.S. 104E-7(a)(2).

15A NCAC 11 .1620 USE OF INDIVIDUAL RESPIRATORY PROTECTION EQUIPMENT

~~(a) If the licensee uses respiratory protection equipment to limit intakes pursuant to Rule .1619 of this Section intakes, the licensee shall:~~

- (1) use only respiratory protection equipment that is tested and certified ~~or had certification extended~~ by the National Institute for Occupational Safety and ~~Health~~ Health/Mine Safety and Health Administration (NIOSH/MSHA); (NIOSH);
- (2) if the licensee wishes to use equipment that has not been tested or certified by NIOSH/MSHA, ~~has not had certification extended by NIOSH/MSHA, NIOSH,~~ or for which there is no schedule for testing or certification, submit an application to the agency for authorized use of that equipment, including a demonstration by testing, or a demonstration on the basis of reliable test information, that the material and performance characteristics of the equipment are capable of providing the proposed degree of protection under anticipated conditions of use;
- (3) implement and maintain a respiratory protection program that includes:
 - (A) air sampling sufficient to identify the potential hazard, permit proper equipment selection, and estimate exposures;
 - (B) surveys and bioassays, as appropriate, to evaluate actual intakes;
 - (C) testing of respirators for operability immediately prior to each use;
 - (D) written procedures ~~regarding selection, fitting, issuance, maintenance, and testing of respirators, including testing for operability immediately prior to each use; supervision and training of~~

- personnel; monitoring, including air sampling and bioassays; and record keeping; ~~regarding: monitoring, including air sampling and bioassays; supervision and training of respirator users; fit testing; respirator selection; breathing air quality; inventory and control; storage, issuance, maintenance, repair, testing, and quality assurance of respiratory protection equipment; recordkeeping; and limitations on periods of respirator use and relief from respirator use; and~~
- (E) ~~determination by a physician prior to initial fitting of respirators, of a face sealing respirator, prior to the first field use of a non-face sealing respirator, and at least every 12 months thereafter or periodically at a frequency determined by a physician, that the individual user is physically able to use the respiratory protection equipment; and~~
- (F) ~~Fit testing, with fit factor ≥ 10 times the APF for negative pressure devices, and a fit factor ≥ 500 for any positive pressure, continuous flow, and pressure-demand devices, before the first field use of tight fitting, face sealing respirators and periodically thereafter at a frequency not to exceed one year. Fit testing must be performed with the facepiece operating in the negative pressure mode.~~
- (4) ~~issue a written policy statement on respirator usage covering:~~
- (A) ~~the use of process or other engineering controls, instead of respirators;~~
- (B) ~~the routine, non-routine, and emergency use of respirators; and~~
- (C) ~~the periods of respirator use and relief from respirator use.~~
- (5)(4) ~~advise each respirator user that the user may leave the area at any time for relief from respirator use in the event of equipment malfunction, physical or psychological distress, procedural or communication failure, significant deterioration of operating conditions, or any other conditions that might require such relief; and~~
- (6)(5) ~~use equipment within limitations for type and mode of use and shall provide proper visual, communication, and other special capabilities, such as adequate skin protection, when needed, for vision correction, effective communication, low temperature work environments, the concurrent use of other~~
- ~~safety or radiological protection equipment, and assurance that other such equipment will be used in such a way as not to interfere with proper operation of the respirator.~~
- (6) ~~provide standby rescue personnel whenever one-piece atmosphere-supplying suits, or any combination of supplied air respiratory protection devices and personnel protective equipment are used from which an unaided individual would have difficulty extricating himself or herself. The standby rescue personnel shall:~~
- (A) ~~be equipped with respiratory protection devices or other apparatus appropriate for the potential hazards identified by the licensee;~~
- (B) ~~observe or otherwise maintain continuous communication with the workers through visual, voice, signal line, telephone, radio, or other means suitable for the environment;~~
- (C) ~~be immediately available to assist workers in the event of a failure of the air supply or for any other reason that requires relief from distress;~~
- (D) ~~be immediately available in sufficient number to assist all users of this type of equipment and to provide effective emergency rescue, if needed.~~
- (7) ~~provide atmosphere-supplying respirators with respirable air of grade D quality or better as defined by the Compressed Gas Association in publication G7.1, "Commodity Specification for Air," 1997 and included in Title 29 CFR 1910.134(i)(1)(ii)(A) – (E) of the Occupational Safety and Health Administration. Grade D quality air criteria include:~~
- (A) ~~Oxygen content of 19.5% - 23.5%;~~
- (B) ~~condensed Hydrocarbon content of 5 milligrams per cubic meter of air or less;~~
- (C) ~~Carbon Monoxide (CO) content of 1,000 ppm or less; and~~
- (D) ~~lack of noticeable odor.~~
- (8) ~~ensure that no objects, materials or substances, such as facial hair, or any conditions that interfere with the face-to-facepiece seal or valve function, and that are under the control of the respirator wearer, are present between the skin of the wearer's face and the sealing surface of a tight-fitting respirator facepiece.~~
- (b) ~~In estimating exposure of individuals to airborne radioactive materials, the licensee may make allowance for respiratory protection equipment used to limit intakes pursuant to Rule 1619 of this Section, provided that the following conditions, in addition to those in Paragraph (a) of this Rule, are satisfied:~~
- (1) ~~The licensee selects respiratory protection equipment that provides a protection factor, as specified in Appendix A to 10 CFR §§ 20.1001 – 20.2401, greater than the multiple by~~

~~which peak concentrations of airborne radioactive materials in the working area are expected to exceed the values specified in Appendix B to 10 CFR §§ 20.1001 - 20.2401, Table 1, Column 3. If the selection of a respiratory protection device with a protection factor greater than the peak concentration is inconsistent with the goal specified in Rule .1619 of this Section of keeping the total effective dose equivalent ALARA, the licensee may select respiratory protection equipment with a lower protection factor only if such a selection would result in keeping the total effective dose equivalent ALARA. The concentration of radioactive material in the air that is inhaled when respirators are worn may be initially estimated by dividing the average concentration in air, during each period of uninterrupted use, by the protection factor. If the exposure is later found to be greater than estimated, the corrected value shall be used. If the exposure is later found to be less than estimated, the corrected value may be used.~~

~~(2) The licensee shall obtain authorization from the agency before assigning respiratory protection factors in excess of those specified in Appendix A to 10 CFR §§ 20.1001 - 20.2401. The agency may authorize a licensee to use higher protection factors on receipt of an application that:~~

~~(A) describes the situation for which a need exists for higher protection factors, and~~

~~(B) demonstrates that the respiratory protection equipment provides these higher protection factors under the proposed conditions of use.~~

(b) In estimating the dose to individuals from intake of airborne radioactive materials, the concentration of radioactive material in the air that is inhaled when respirators are worn is initially assumed to be the ambient concentration in air without respiratory protection, divided by the assigned protection factor. If the dose is later found to be greater than the estimated dose, the corrected value must be used. If the dose is later found to be less than the estimated dose, the corrected value may be used.

(c) The licensee shall use as emergency devices only respiratory protection equipment that has been specifically certified or had certification extended for emergency use by NIOSH/MSHA.

(c) The licensee shall obtain authorization, in writing, from the agency before using assigned protection factors in excess of those specified in Appendix A to 10 CFR Part 20. The agency may authorize the use of higher assigned protection factors upon receipt of an application that:

(1) describes the situation for which a need exists for higher protection factors; and

(2) demonstrates that the respiratory equipment provides the higher protection factors under the proposed conditions of use.

(d) The licensee shall notify the agency, in writing, at least 30 days before the date that respiratory protection equipment is first

~~used under the provisions of either Paragraph (a) or (b) of this Rule.~~

~~Authority G.S. 104E-7(a)(2); 104E-12(a).~~

15A NCAC 11 .1621 RESTRICTIONS ON THE USE OF RESPIRATORY PROTECTION EQUIPMENT

The agency may impose restrictions in addition to those in Rules .1619 and .1620 of this Section, and Appendix A to 10 CFR §§ 20.1001 - 20.2401 when the agency determines that such requirements are necessary to:

(1) ensure that the respiratory protection program of the licensee is adequate to limit exposures of individuals to airborne radioactive materials to ~~the levels prescribed in this Section; that are~~ ALARA; and

(2) limit the extent to which a licensee may use respiratory protection equipment instead of process or other engineering controls when process or other engineering controls are appropriate to limit exposures of individuals to airborne radioactive materials to the levels prescribed in this Section.

~~Authority G.S. 104E-7(a)(2); 10 C.F.R. Chapter 1, Commission Notices, Policy Statements, Agreement States, 46 F.R. 7540.~~

TITLE 16 – DEPARTMENT OF PUBLIC EDUCATION

Notice is hereby given in accordance with G.S. 150B-21.2 that the State Board of Education intends to adopt the rule cited as 16 NCAC 06C .0406, amend the rules cited as 16 NCAC 06C .0202, .0312; 06D .0501, .0503, .0505-.0507; 06G .0305, .0501, and repeal the rule cited as 16 NCAC 06B .0108.

Proposed Effective Date: *December 1, 2004*

Public Hearing:

Date: *July 19, 2004*

Time: *1:00 p.m.*

Location: *Education Building, Room 228, 301 N. Wilmington St., Raleigh, NC*

Reason for Proposed Action:

16 NCAC 06B .0108 – statutory authority has been repealed.

16 NCAC 06C .0202 – amendment to allow independent colleges and universities an alternative means of accreditation for teacher education programs.

16 NCAC 06C .0312 – amendment to implement S.L. 2003-408.

16 NCAC 06C .0406 – adoption is to implement S.L. 2003-301.

16 NCAC 06D .0501, .0503, .0505-.0507; 06G .0305 – amendments are to comply with No Child Left Behind requirements.

16 NCAC 06G .0501 – amendment is to allow agency to respond to market conditions for liability insurance required for charter school operation.

Procedure by which a person can object to the agency on a proposed rule: Any person may submit written objections to the rule-making coordinator by mail, e-mail, facsimile transmission, or by oral comment at the public hearing.

Written comments may be submitted to: Harry E. Wilson, 6302 Mail Service Center, Raleigh, NC 27699-6302, phone (919) 807-3406, fax (919) 907-3198, and email hwilson@dpi.state.nc.us.

Comment period ends: August 30, 2004

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact

- State
- Local
- Substantive (≥\$3,000,000)
- None

CHAPTER 06 - ELEMENTARY AND SECONDARY EDUCATION

SUBCHAPTER 06B - STUDENT TRANSPORTATION SYSTEM

SECTION .0100 - STUDENT TRANSPORTATION SYSTEM

16 NCAC 06B .0108 PURCHASING FLEXIBILITY EXEMPTION

~~All supplies, equipment, and materials related to student transportation shall be exempted from the purchasing flexibility granted to LEAs under G.S. 115C-522.1.~~

Authority G.S. 115C-522.1(e).

SUBCHAPTER 06C – PERSONNEL

SECTION .0200 - TEACHER EDUCATION

16 NCAC 06C .0202 APPLICATION FOR APPROVAL; CRITERIA

(a) Each IHE that seeks approval for any teacher education program must file with the department a preliminary application.

(b) The IHE shall engage in self-study in accordance with the existing NCATE/state or TEAC/state protocol agreement.

(c) When the IHE has completed all preparation phases of the self-study, the department shall send a visitation committee to verify the reports for all specialty areas for which approval is sought.

(d) The SBE shall notify IHEs that are denied approval of the reasons for denial. The IHE may reapply after it has corrected the conditions that led to the denial of approval.

(e) Each approved IHE shall continually review its programs. The SBE shall annually monitor student performance based upon required examinations and progression toward continuing licensure. The IHE may request or the SBE may conduct a re-evaluation at any time.

(f) During the final year of the current approval period, the IHE shall arrange for a re-approval committee visit.

(g) The SBE must approve any revisions to approved programs.

(h) The SBE must approve each teacher education program before an IHE may recommend its graduates for licensure. In making recommendations to the SBE and in determining the approval status of an IHE teacher education program and its specialty area program, such as mathematics or science, the state evaluation committee and the SBE, respectively, shall weigh the following criteria:

- (1) SACS accreditation of the IHE;
- (2) either:
 - (A) full accreditation or accreditation with stipulations of the professional education unit by the National Council for Accreditation of Teacher Education (NCATE) at the basic and advanced levels, as appropriate; or
 - (B) ~~approval of the professional education unit by the state program approval process as follows:~~ full accreditation or provisional accreditation of the program(s) by the Teacher Education Accreditation Council;
 - (i) ~~the standards for unit approval must be equal to or higher than those applied by NCATE; and~~
 - (ii) ~~the state review team must include~~ out of state evaluators;
- (3) all IHE specialty area program reports at the undergraduate and graduate levels;
- (4) evidence that the IHE requires at least a 2.50 grade point average on a 4.00 scale for formal admission into teacher education;
- (5) evidence that during the two preceding consecutive years, 70% of the graduates of the IHE have passed the NTE/PRAXIS exams required for licensure;
- (6) evidence that during the two preceding consecutive years, 95% of the graduates of the IHE employed by public schools in the State have earned a continuing license as provided by Rule .0304 of this Subchapter; and

- (7) evidence that faculty members assigned by the IHE to teach undergraduate or graduate methods courses or to supervise field experiences for prospective teachers hold valid North Carolina teachers' licenses in the area(s) of their assigned responsibilities.

Authority G.S. 115C-12(9)a.; 115C-296(b);
N.C. Constitution, Article IX, s. 5.

SECTION .0300 – CERTIFICATION

16 NCAC 06C .0312 LICENSE SUSPENSION AND REVOCATION

(a) ~~The~~ Except for automatic revocations taken pursuant to G.S. 115C-296(d)(2), the SBE may deny an application for a license or may suspend or revoke a license issued by the department only for the following reasons:

- (1) fraud, material misrepresentation or concealment in the application for the license;
- (2) changes in or corrections of the license documentation that make the individual ineligible to hold a license;
- (3) conviction or entry of a plea of no contest, as an adult, of a crime if there is a reasonable and adverse relationship between the underlying crime and the continuing ability of the person to perform any of his/her professional functions in an effective manner;
- (4) final dismissal of a person by a local board pursuant to G.S. 115C-325(e)(1)b., if there is a reasonable and adverse relationship between the underlying misconduct and the continuing ability of the person to perform any of his/her professional functions effectively;
- (5) final dismissal of a person by a LEA under G.S. 115C-325(e)(1)e.;
- (6) resignation from employment with a LEA without thirty work days' notice, except with the prior consent of the local superintendent;
- (7) revocation of a license by another state;
- (8) any other illegal, unethical or lascivious conduct by a person, if there is a reasonable and adverse relationship between the underlying conduct and the continuing ability of the person to perform any of his/her professional functions in an effective manner; and
- (9) failure to report revocable conduct as required under Paragraph (b) of this Rule.

(b) In addition to any duty to report suspected child abuse under G.S. 7B-301, any superintendent, assistant superintendent, associate superintendent, personnel administrator or principal who knows or has substantial reason to believe that a licensed employee of the LEA has engaged in behavior that would justify revocation of the employee's license under Subparagraphs (3), (4) or (8) of Paragraph (a) of this Rule and which behavior involves physical or sexual abuse of a child shall report that information to the Superintendent of Public Instruction no later than five working days after the date of a dismissal or other

disciplinary action or the acceptance of a resignation based upon that conduct. For purposes of this section, the term "physical abuse" shall mean the infliction of serious physical injury other than by accidental means and other than in self-defense. The term "sexual abuse" shall mean the commission of any sexual act upon a student or causing a student to commit a sexual act, regardless of the age of the student and regardless of the presence or absence of consent. This paragraph shall apply to acts that occur on or after October 1, 1993.

(c) Upon the receipt of a written request and substantiating information from any LEA, local superintendent or other person in a position to present information as a basis for the suspension or revocation of a person's license, the Superintendent of Public Instruction will conduct an investigation sufficient to determine whether reasonable cause exists to believe that the person's license should be suspended or revoked.

- (1) If the Superintendent determines that reasonable cause exists to believe that the person's license should be suspended or revoked on one or more of the grounds specified in Paragraph (a) of this Rule, the Superintendent shall prepare and file written charges with the SBE.
- (2) The SBE will review the written charges and determine whether the person's license should be suspended or revoked based on the information contained in the written charges. If the SBE determines that the written charges constitute grounds for suspension or revocation, it shall provide the person with a copy of the written charges, and notify the person that it will revoke the person's license unless the person, within 60 days of receipt of notice, initiates administrative proceedings under G.S. 150B-3. The notice will be sent certified mail, return receipt requested.
- (3) If the person initiates administrative proceedings the SBE will defer final action on the matter until receipt of a proposed decision as provided for in G.S. 150B-34. If the person does not initiate administrative proceedings within 60 days of receipt of notice, the SBE may suspend or revoke the person's license at its next meeting.

(d) The SBE may suspend an individual's license for a stated period of time or may permanently revoke the license, except as limited by G.S. 115C-325(o).

(e) The SBE may accept the voluntary surrender of a license in lieu of seeking revocation of the license. Before it accepts a voluntary surrender the SBE shall make findings of fact regarding the circumstances surrounding the voluntary surrender to demonstrate that grounds existed under which the SBE could have initiated license revocation proceedings. The SBE shall treat a voluntary surrender the same as a revocation.

(f) The SBE may reinstate a suspended or revoked license or may grant a new license after denial of a license under Paragraph (a) of this Rule upon an individual's application submitted no sooner than six months after the suspension, revocation, or denial, and a showing of good cause, as defined by 26 NCAC 03 .0118, by the individual. The burden of proving good cause is on

~~the applicant. The SBE will not grant any request for reinstatement or for granting a new license unless it finds as facts that:~~

- (1) the action that resulted in suspension, revocation or denial of the license did not involve abuse of minors; moral turpitude or grounds listed in G.S. 115C-325 (e)(1)b;
- (2) the person has no record of subsequent behavior that could have resulted in license revocation; and
- (3) there is no court order or judicial determination that would prohibit the person from returning to or holding a licensed position.

(g) The SBE will notify all other states of all actions which involve the, suspension, revocation, surrender, or reinstatement of a certificate.

Authority G.S. 115C-12(9)a.; N.C. Constitution, Article IX, s. 5.

SECTION .0400 – LEAVE

16 NCAC 06C .0406 MILITARY DUTY WITHOUT LOSS OF PAY

Public school employees including charter school employees on leaves of absence for State or federal military duty under honorable service status, for required training, or for special emergency management service shall be paid the difference in military base pay and State salary, including non-performance based bonuses, when the military pay is less than the State salary. Differential pay for military duty after July 1, 2002 shall be paid from the same source of funds as the public school salary.

Authority G.S. 115C-302.1(g1).

SUBCHAPTER 06D – INSTRUCTION

SECTION .0500 – DEFINITIONS

16 NCAC 06D .0501 DEFINITIONS

As used in this Subchapter:

- (1) "adequate progress" shall mean student performance at or near grade level as indicated by student work, assessment data, and other evaluation information.
- (2) "focused intervention" shall mean help for students in attaining competency goals and objectives. The help or assistance shall be based on a diagnosis of what the student knows and is able to do. The strategies for helping the student shall be based on the diagnosis of the student's work.
- ~~(3) "functional curriculum" shall mean an adapted course of study that is age appropriate, presented in natural environments with natural routines, and referenced to critical, basic skills such as personal/home management, community integration, effective communication, and career/employment.~~

(4)(3) "grade level proficiency" shall mean Level III or above on end-of-grade tests in reading and mathematics in grades 3-8. In grades K-2, teachers shall identify those students who are not performing at grade-level expectations. The levels of student performance shall be defined as follows:

- (a) "Level I" shall mean that the student fails to achieve at a basic level. Students performing at this level do not have sufficient mastery of knowledge and skills in this subject area to be successful at the next grade level.
- (b) "Level II" shall mean that the student achieves at a basic level. Students performing at this level demonstrate inconsistent mastery of knowledge and skills that are fundamental in this subject area and that are minimally sufficient to be successful at the next grade level.
- (c) "Level III" shall mean that the student achieves at a proficient level. Students performing at this level consistently demonstrate mastery of grade level subject matter and skills and are well prepared for the next grade level.
- (d) "Level IV" shall mean that the student achieves at an advanced level. Students performing at this level consistently perform in a superior manner clearly beyond that required to be proficient at grade level work.

(5)(4) "instructionally sound" shall mean a practice or strategy that reflects research findings and the achievement needs of students. The practice shall take into account student learning styles, effective delivery of content and skills, diagnosis, monitoring, and evaluation.

Authority G.S. 115C-12(9b); 115C-81(b)(4); N.C. Constitution, Article IX, Sec. 5.

16 NCAC 06D .0503 STATE GRADUATION REQUIREMENTS

(a) In order to graduate and receive a high school diploma, public school students shall meet the requirements of Paragraph (b) of this Rule and shall attain passing scores on competency tests adopted by the SBE and administered by the LEA. Students who satisfy all state and local graduation requirements but who fail the competency tests shall receive a certificate of achievement and transcript and shall be allowed by the LEA to participate in graduation exercises. The passing score for the competency test, which is the same as grade-level proficiency as set forth in Rule .0502 of this Subchapter, shall be level III or higher. Special education students, other than students who are following the occupational course of study in Paragraph

(b)(1)(D) of this Rule, may apply in writing to be exempted from taking the competency tests. Before it approves the request, the LEA must assure that the parents, or the child if aged 18 or older, understand that each student must pass the competency tests to receive a high school diploma. Any student who has failed to pass the competency tests by the end of the last school month of the year in which the student's class graduates may receive additional remedial instruction and continue to take the competency tests during regularly scheduled testing until the student reaches maximum school age. Special education students who are following the occupational course of study in Paragraph (b)(1)(D) of this Rule, shall not be required to pass the competency test or the exit exam referred to in 16 NCAC 06D .0502(d)(2) in order to graduate and receive a diploma.

(b) In addition to the requirements of Paragraph (a) of this Rule, students must successfully complete 20 course units in grades 9-12 as specified below.

- (1) Effective with the class entering ninth grade for the first time in the 2000-2001 school year, students shall select one of the following four courses of study:

NOTE: All students are encouraged, but not required, to include at least one elective course in arts education. Unless included as career/technical education credits in the career preparation course of study, courses in R.O.T.C. qualify for credit as electives in any of the courses of study.

- (A) career preparation, which shall include:
 - (i) four credits in English language arts, which shall be English I, II, III, and IV;
 - (ii) three credits in mathematics, one of which shall be algebra I (except as limited by G.S. 115C-81(b));
 - (iii) three credits in science, which shall include biology, a physical science, and earth/environmental science;
 - (iv) three credits in social studies, which shall be Civics and Economics, U.S. history, and World history;
 - (v) one credit in health and physical education;
 - (vi) four credits in career/technical education, which shall be in a career concentration or pathway that leads to a specific career field and which shall include a second-level (advanced) course; or four credits in one of the four disciplines in arts education: theatre, music, visual arts, or dance; or four credits in R.O.T.C.;
 - (vii) two elective credits; and

- (viii) other credits designated by the LEA.
- (B) college technical preparation, which shall include:
 - (i) four credits in English language arts, which shall be English I, II, III, and IV;
 - (ii) three credits in mathematics, which shall be either algebra I, geometry, and algebra II; or algebra I, technical mathematics I, and technical mathematics II; or integrated mathematics I, II, and III;
 - (iii) three credits in science, which shall include biology, a physical science, and earth/environmental science;
 - (iv) three credits in social studies, which shall be Civics and Economics, U.S. history, and World history;
 - (v) one credit in health and physical education;
 - (vi) four credits in career/technical education, which shall be in a career concentration or pathway that leads to a specific career field and which shall include a second-level (advanced) course;
 - (vii) two elective credits; and
 - (viii) other credits designated by the LEA.

NOTE: A student who is pursuing this course of study may also meet the requirements of a college/university course of study by completing one additional mathematics course for which Algebra II is a prerequisite and, effective with the class entering the ninth grade for the first time in the 2002-03 school year, two credits in the same second language.

- (C) college/university preparation, which shall include:
 - (i) four credits in English language arts, which shall be English I, II, III, and IV;
 - (ii) three credits in mathematics, which shall be algebra I, algebra II, and geometry or a higher level course for which algebra II is a prerequisite; or integrated mathematics I, II, and III; however, effective with the class entering the ninth

- (iii) grade for the first time in the 2002-03 school year, this requirement shall become four credits in mathematics, which shall be algebra I, algebra II, geometry, and a higher level course for which algebra II is a prerequisite; or integrated mathematics I, II, III, and one course beyond integrated mathematics III;
 - (iv) three credits in science, which shall include biology, a physical science, and earth/environmental science;
 - (v) three credits in social studies, which shall be Civics and Economics, U.S. history, and World history;
 - (vi) one credit in health and physical education;
 - (vii) two credits in the same second language or demonstration of proficiency in a language other than English as determined by the LEA;
 - (viii) four elective credits, except that effective with the class entering the ninth grade for the first time in the 2002-03 school year, this shall be reduced to three elective credits; and
 - (ix) other credits designated by the LEA.
- (D) occupational, which shall include:
- (i) four credits in English language arts, which shall be Occupational English I, II, III, and IV;
 - (ii) three credits in mathematics, which shall be Occupational Mathematics I, II, and III;
 - (iii) two credits in science, which shall be Life Skills Science I and II;
 - (iv) two credits in social studies, which shall be Government/U.S. History and Self-Advocacy/Problem Solving;
 - (v) one credit in health and physical education;
 - (vi) six credits in occupational preparation education, which shall be Occupational Preparation I, II, III, IV, 300 hours of school-based training, 240 hours of community-based training, and 360 hours of paid employment;
- (vii) four vocational education elective credits;
 - (viii) computer proficiency as specified in the student's IEP;
 - (ix) a career portfolio; and
 - (x) completion of the student's IEP objectives.
- (2) LEAs may count successful completion of course work in the ninth grade at a school system which does not award course units in the ninth grade toward the requirements of this Rule.
- (3) LEAs may count successful completion of course work in grades 9-12 at a summer school session toward the requirements of this Rule.
- (4) LEAs may count successful completion of course work in grades 9-12 at an off-campus institution toward the locally-designated electives requirements of this Rule. 23 NCAC 2C .0305 shall govern enrollment in community college institutions.
- (c) Effective with the class of 2001, all students must demonstrate computer proficiency as a prerequisite for high school graduation. The passing scores for this proficiency shall be 47 on the multiple choice test and 49 on the performance test. This assessment shall begin at the eighth grade. A student with disabilities shall demonstrate proficiency by the use of a portfolio if this method is required by the student's IEP.
- (d) Special needs students as defined by G.S. 115C-109, excluding gifted and pregnant, who do not meet the requirements for a high school diploma shall receive a graduation certificate and shall be allowed to participate in graduation exercises if they meet the following criteria:
- (1) successful completion of 20 course units by general subject area (4 English, 3 math, 3 science, 3 social studies, 1 health and physical education, and 6 local electives) under Paragraph (b) of this Rule. These students are not required to pass the specifically designated courses such as Algebra I, Biology or United States history; and
 - (2) completion of all IEP requirements.

Authority G.S. 115C-12(9b); 115C-81(b)(4);
N.C. Constitution, Article IX, Sec. 5.

16 NCAC 06D .0505 LOCAL ACCOUNTABILITY PROCEDURES

(a) Promotion decisions shall be made according to local policy and discretion, but shall include statewide student accountability standards at grades 3, 5, 8 and high school. At a minimum, each local board of education shall adopt procedures to ensure that students are treated fairly. The policy shall recognize the statutory authority of the principal to make promotion decisions.

(b) Local boards of education policies shall be consistent with statewide student accountability policies. The policies shall include notification and involvement of parents and agreement of parental expectations signed by parents or guardians.

(c) School districts shall provide focused intervention to all students who do not meet statewide student accountability standards. This intervention shall involve extended instructional opportunities that are different and supplemental and that are specifically designed to improve these students' performance to grade level proficiency. Students who do not meet promotion standards shall have personalized education plans with the following components: diagnostic evaluation, intervention strategies, and monitoring strategies. Strategies may include, but are not limited to, alternative learning models, special homework, smaller classes, tutorial sessions, extended school day, Saturday school, modified instructional programs, parental involvement, summer school instruction, or retention.

(d) LEAs and schools shall report annually to the Department their progress in increasing the number of students who meet the standard for grade-level promotion. LEAs and schools shall use percentages of students who are above grade-level proficiency and of those who have moved from Level I to Level II to compare progress from year to year. Annually, local boards of education shall report the following information by race, ethnicity, exceptionality, and socio-economic status to the State Board of Education:

- (1) number and percent of students promoted by school who did not score at Level III or above on the designated tests at gateways 1, 2, and 3;
- (2) number and percent of students who have moved across achievement; and levels in reading and mathematics at gateways 1, 2, and 3.
- ~~(3) levels in reading and mathematics at gateways 1, 2, and 3.~~

(e) The NC standardized high school transcript shall certify a level of proficiency in high school courses through both grades and test scores. Test scores must be recorded on the standardized transcript. In order to inform parents and students of student progress, LEAs shall issue the transcript to students at the end of each year.

(f) End-of-course test results shall be used as part of the student's final grade. ~~Local school boards shall set policies regarding the use of end-of course test results in assigning final grades.~~ grade as provided in Rule 06D .0305(c).

Authority G.S. 115C-12(9b); 115C-81(b)(4); N.C. Constitution, Article IX, Sec. 5.

16 NCAC 06D .0506 STUDENTS WITH DISABILITIES

(a) Unless exempted pursuant to Paragraph (b) of this Rule, all students with disabilities shall participate in the statewide student accountability promotion standards for elementary, middle, and high school levels.

(b) Students with disabilities may be exempted from the statewide student accountability promotion standards by the IEP team, including the principal or school district ~~representative, if the team determines that the students do not have the ability to participate in the standard course of study.~~ However, these

~~representative. These students shall be enrolled in a functional curriculum and shall demonstrate evidence of progress on alternate assessments. Alternate assessments shall be performance measures that assess the educational progress of students with disabilities who are unable to participate in the general large-scale assessment system even when accommodations are provided to the student. These students shall receive a certificate of achievement or graduation certificate.~~

(c) All interventions/remediation and other opportunities, benefits and resources that are made available to students without disabilities shall be made available to students with disabilities who participate in the student promotion standards. All services offered shall be in addition to the special education services provided to the student.

Authority G.S. 115C-12(9b); 115C-81(b)(4); N.C. Constitution, Article IX, Sec. 5.

16 NCAC 06D .0507 STUDENTS WITH LIMITED ENGLISH PROFICIENCY

Students of limited English proficiency shall meet the same standards as all students. However, in accordance with federal law, English language proficiency ~~shall not~~ cannot be the factor that determines that a student has not met performance standards at each gateway. Therefore, LEAs shall use the following guidelines:

~~(1) Students who are exempt from statewide testing in accordance with the provisions of 16 NCAC 6G .0305(g)(1) shall also be exempt from the test standard for passage through each of the gateways. Instead, schools shall submit an instructional portfolio containing documentation of the students' English language proficiency and progress in all academic areas to a local committee of teachers and administrators to determine if students are ready to be promoted to the next level.~~

~~(2)~~(1) Gateways 1, 2, and 3. Once limited English proficient students are no longer eligible for exemption from statewide testing, these students shall be eligible for a waiver up to two additional years. These students shall receive a waiver from the test standard at the gateway the students first encounter if the student's English language proficiency is below "superior" in reading and writing. A local committee of teachers and administrators shall examine the students' instructional portfolios to determine whether:

~~(a) the students' English language proficiency is the cause of their inability to perform at grade level on the required test; and~~

~~(b) documentation indicates that a student is making adequate progress in all academic areas to be promoted to the next level.~~

(a) If a student scores below advanced in reading or writing on the state English language proficiency assessment, the student may be eligible for a waiver from the test standard for promotion through no more than two consecutive gateways.

(b) A local teacher or administrator or the student's parent or legal guardian must request the waiver. The person making the request for a waiver must submit evidence of student work to a local committee of teachers and administrators to determine if:

(i) the student's English language proficiency is the cause of the student's inability to perform at grade level on the required tests; and

(ii) documentation indicates that the student is making adequate progress in all academic areas to be promoted to the next level.

(3)(2) Gateway 4, High School Graduation Requirements. Limited English proficient students shall meet the same standards as all students for high school graduation.

(4)(3) School districts shall provide focused intervention for these students until they have met statewide promotion standards and high school graduation requirements (up to age 21). This intervention shall involve extended, supplemental instructional opportunities that include assistance in the development of English language proficiency. These students shall have personalized education plans with the following components: diagnostic evaluation, intervention strategies, and monitoring strategies.

Authority G.S. 115C-12(9b); 115C-81(b)(4);
N.C. Constitution, Article IX, Sec. 5.

**SUBCHAPTER 06G - EDUCATION AGENCY
RELATIONS**

**SECTION .0300 - PERFORMANCE-BASED
ACCOUNTABILITY PROGRAM**

**16 NCAC 06G .0305 ANNUAL PERFORMANCE
STANDARDS, GRADES K-12**

(a) For purposes of this Section, the following definitions shall apply to kindergarten through twelfth grade:

(1) "Accountability measures" are SBE-adopted tests designed to gauge student performance and achievement.

(2) "b₀" means the state average ~~rate of growth~~ used in the regression formula for the respective grades and content areas (reading and mathematics) in grades 3 through ~~8 and grade 10~~; ~~8~~; or the state average performance used in the prediction formula for respective high school end-of-course tests. The constant values for b₀ shall be as follows:

(A) for reading:

- (i) ~~6.28~~0 for grade 3;
- (ii) 5.2 for grade 4;
- (iii) 4.6 for grade 5;
- (iv) 3.0 for grade 6;
- (v) 3.3 for grade 7;
- (vi) 2.7 for grade ~~8~~; and 8;
- ~~(vii) 2.3 for grade 10.~~

(B) for mathematics:

- (i) ~~12.8~~14.3 for grade 3;
- (ii) 7.3 for grade 4;
- (iii) 7.4 for grade 5;
- (iv) 7.1 for grade 6;
- (v) 6.5 for grade 7; and
- (vi) 4.9 for grade ~~8~~; and 8;
- ~~(vii) 2.3 for grade 10.~~

(C) for EOC courses:

- (i) 60.4 for Algebra I;
- (ii) 55.2 for Biology;
- ~~(iii) 54.0 for ELPS (Economic, Legal, and Political Systems);~~
- ~~(iv)~~(iii) 53.3 for English I;
- ~~(v) 56.0 for U.S. History;~~
- ~~(vi)~~(iv) 59.3 for Algebra II;
- ~~(vii)~~(v) 56.9 for Chemistry;
- ~~(viii)~~(vi) 58.5 for Geometry;
- ~~(ix)~~(vii) 53.8 for Physical Science; and
- ~~(x)~~(viii) 56.1 for Physics.

(3) "b₁" means the value used to estimate true proficiency in the regression formulas for grades 3 through 8 and grade 10. The values for b₁ shall be as follows:

(A) for reading:

- (i) ~~0.46~~0.47 for grade 3; and
- (ii) 0.22 for grades 4 through ~~8~~; and 8;
- ~~(iii) 0.24 for grade 8 to 10.~~

(B) for mathematics:

- (i) ~~0.30~~0.20 for grade 3; and
- (ii) 0.26 for grades 4 through ~~8~~; and 8;
- ~~(iii) 0.28 for grade 8 to 10.~~

(4) "b₂" means the value used to estimate regression to the mean in the regression formula for grades 3 through 8. The values for b₂ shall as follows:

(A) for reading:

- (i) ~~-0.91-0.98~~ for grade 3; and
- (ii) -0.60 for grades 4 through 8.
- (B) for mathematics:
 - (i) ~~-0.47-0.58~~ for grade 3; and
 - (ii) -0.58 for grades 4 through 8.
- (5) "b_{IRP}" means the value used to estimate the effect of the school's average reading proficiency on the predicted average EOC test score. The values for b_{IRP} shall be as follows:
 - (A) 0.71 for Biology;
 - ~~(B) 0.88 for ELPS;~~
 - ~~(C)(B) 1.01 for English I;~~
 - ~~(D) 0.68 for U.S. History;~~
 - ~~(E)(C) 0.43 for Algebra II;~~
 - ~~(F)(D) 0.42 for Geometry; and~~
 - ~~(G)(E) 0.58 for Physical Science.~~
- (6) "b_{IMP}" means the value used to estimate the effect, as determined by analysis of empirical data, of the school's average math proficiency on the predicted average EOC test score. The values for b_{IMP} shall be as follows:
 - (A) 0.88 for Algebra I;
 - ~~(B) 0.318-0.32~~ for Biology;
 - ~~(C) 0.88 for ELPS;~~
 - ~~(D) 0.15 for U.S. History;~~
 - ~~(E)(C) 0.39 for Geometry;~~
 - ~~(F)(D) 0.34 for Physical Science; and~~
 - ~~(G)(E) 0.58 for Physics.~~
- ~~(7)~~ "b_{imp2}" means the value used to estimate the effect, as determined by analysis of empirical data, of the school's squared average math proficiency on the predicted average EOC test score. The values for b_{imp2} shall be as follows:
 - (A) ~~-0.01~~ for Biology.
- (8) "b_{imp3}" means the value used to estimate the effect, as determined by analysis of empirical data, of the school's cubed average math proficiency on the predicted average EOC test score. The values for b_{imp3} shall be as follows:
 - (A) ~~-0.001~~ for Biology.
- ~~(7)(9)~~ "b_{IAP}" means the value used to estimate the effect of the school's average Algebra I proficiency on the predicted average EOC test score. The values for b_{IAP} shall be as follows:
 - (A) 0.89 for Algebra II;
 - (B) 0.18 for Chemistry; and
 - (C) 0.43 for Geometry.
- ~~(8)(10)~~ "b_{BP}" means the value used to estimate the effect of the school's average Biology proficiency on the predicted average EOC test score. The values for b_{BP} shall be 0.51 for Chemistry and 0.66 for Physics.
- ~~(9)(11)~~ "b_{IEP}" means the value used to estimate the effect of the school's average English I proficiency on the predicted average EOC test score. The values for b_{IEP} shall be 0.27 for Chemistry and 0.32 for Physics.
- ~~(10)(12)~~ "Compliance commision" means that group of persons selected by the SBE and authorized by SBE policy EEO-B-000 to advise the SBE

- on testing and other issues related to school accountability and improvement. The commission shall be composed of two ~~members from each of the eight educational districts: five teachers, five principals, four central office staff representatives, two local school board representatives; representatives, a charter schools representative, and five~~ large members who represent parents, ~~business (two members), business,~~ and the community.
- ~~(11)(13)~~ "Composite score" means a summary of student performance in a school. A composite score shall include ~~reading, writing, and reading and~~ mathematics in grades 3 through 8 and ~~in~~ Algebra I & II, Biology, ~~ELPS,~~ English I, Geometry, Chemistry, Physics, and Physical Science, ~~and U.S. History~~ in a school where one or more of these EOC tests are administered, as well as student performance on the NC Computer Skills Test, competency passing rate, change in dropout rates, and percent diploma recipients who satisfy the requirements for College University Prep/College Tech Prep courses of study in grades 9 through 12 to the extent that any apply in a given school.
 - ~~(12)(14)~~ "Eligible students" means the total number of students in membership in the respective grades at the time the tests are administered or enrolled in the respective EOC courses at the time the tests are administered minus the number of students excluded from participation in a statewide assessment.
 - ~~(13)(15)~~ "Expected growth" means the amount of growth in student performance that is projected through use of the regression formula in grades 3 through 8 ~~and grade 10~~ in reading and mathematics.
 - ~~(14)(16)~~ "~~Exemplary High~~ growth" means the amount of growth in student performance in grades 3 through 8 ~~and grade 10~~ in reading and mathematics that is projected through use of the regression formula that includes the state average ~~rate of~~ growth adjusted by an additional 10%.
 - ~~(15)(17)~~ "Growth standards" means and includes collectively all the factors defined in this paragraph that are used in the calculations described in Paragraph (j) of this Rule to determine a school's growth/gain composite.
 - ~~(16)(18)~~ "IRM" is the index ~~for of~~ regression to the mean used in the regression formula. The SBE shall compute the IRM for reading by subtracting the North Carolina average reading scale score from the local school average reading scale score. The SBE shall compute the IRM for mathematics by subtracting the North Carolina average mathematics scale score from the local school average mathematics scale score. ~~The~~ For grades 3-8

the SBE shall base the state average (the baseline) on data from the 1994-95 school year. For the third grade pretest in reading the SBE shall base the state average on data from the 1996-97 school year. For the third grade pretest in mathematics the SBE shall base the state average on data from the 2000-01 school year.

~~(17)~~(19) "ITP" is the index ~~for of~~ true proficiency used in the regression formula. The SBE shall compute the ITP by adding the North Carolina average scale scores in reading and mathematics and subtracting that sum from the addition of the local school average scale scores in reading and mathematics. The SBE shall base the state ~~average (the baseline)~~ averages (the baselines) on data from the ~~1994-95 school year. years specified in Subparagraph (a)(18) of this Rule.~~

~~(18)~~(20) "IRP" is the index of reading proficiency used in the prediction formula. The SBE shall compute the "IRP" by calculating the average reading scale score for students in the school and subtracting the average reading scale score for North Carolina schools. The SBE shall base the state average for North Carolina schools ~~(the baseline)~~ on data from the 1998-99 school year.

~~(19)~~(21) "IMP" is the index of mathematics proficiency used in the prediction formula. The SBE shall compute the "IMP" by calculating the average mathematics scale score for students in the school and subtracting the average mathematics scale score for North Carolina schools. The SBE shall base the state average for North Carolina schools (the baseline) on data from the 1998-99 school year.

~~(20)~~(22) "IAP" is the index of Algebra I proficiency used in the prediction formula. The SBE shall compute the "IAP" by calculating the average Algebra I scale score for students in the school and subtracting the average Algebra I scale score for North Carolina schools. The SBE shall base the state average for North Carolina schools (the baseline) on data from the 1998-99 school year.

~~(21)~~(23) "IBP" is the index of Biology proficiency used in the prediction formula. The SBE shall compute the "IBP" by calculating the average Biology scale score for students in the school and subtracting the average Biology scale score for North Carolina schools. The SBE shall base the state average for North Carolina schools (the baseline) on data from the 1998-99 school year.

~~(22)~~(24) "IEP" is the index of English I proficiency used in the prediction formula. The SBE shall compute the "IEP" by calculating the average English I scale score for students in the school and subtracting the average English I scale

score for North Carolina schools. The SBE shall base the state average for North Carolina schools (the baseline) on data from the 1998-99 school year.

~~(23)~~(25) "Performance Composite" is the percent of scores of students in a school that are at or above Achievement Level III, are at a passing level on the Computer Skills Test (students in eighth grade only) as specified by 16 NCAC 06D .0503(c), and at proficiency level or above on the North Carolina Alternate Assessment Portfolio or the North Carolina Alternate Assessment Academic Inventory to the extent that any apply in a given ~~school.~~ school and consistent with United States Department of Education regulations concerning alternate assessments based on alternate achievement standards. The SBE shall:

(A) determine the number of scores that are at Level III or IV in reading, or mathematics, or writing (starting in the 2004-05 school year) across grades 3 through 8, or on all EOC tests administered as a part of the statewide testing program; add the number of scores that are at a passing level on the NC Computer Skills Test (students in eighth grade only); add the number of scores that are proficient or above on the North Carolina Alternative Assessment Portfolio; add the number of student scores on the North Carolina Alternate Assessment Academic Inventory and use the total of these numbers as the numerator;

(B) determine the number of student scores in reading, or mathematics, or writing (starting in the 2004-05 school year), across grades 3 through 8, or on all EOC tests administered as part of the statewide testing program; add the number of student scores on the N.C. Computer Skills Test (students in eighth grade only); add the number of student scores on the North Carolina Alternate Assessment Portfolio; add the number of student scores on the North Carolina Alternate Assessment Academic Inventory and use the total of these numbers as the denominator; and

(C) total the numerators for each content area and subject, total the denominators for each content area and subject, and divide the denominator into the numerator and multiply the quotient by 100 to compute the performance composite.

- ~~(24)~~(26) "Predicted EOC mean" is the average student performance in a school on an EOC test that is projected through the use of the prediction formula.
- ~~(25)~~(27) "Predicted EOC ~~exemplary-high~~ mean" is the average student performance in a school on an EOC test that is projected through the use of the prediction formula that includes the state average adjusted by an additional ~~five percent~~ three percent.
- ~~(26)~~(28) "Prediction formula" means a regression formula used in predicting a school's EOC test mean for one school year.
- ~~(27)~~(29) "Regression formula" means a formula that defines one variable in terms of one or more other variables for the purpose of making a prediction or constructing a model.
- ~~(28)~~(30) "Standard deviation" is a statistic that indicates how much a set of scores vary. Standard deviation baseline values used for the growth standards are as follow:
- (A) for reading in grades K-8:
- (i) ~~1.7-1.6~~ for grade 3;
 - (ii) 1.3 for grade 4;
 - (iii) 1.2 for grade 5;
 - (iv) 1.3 for grade 6;
 - (v) 1.1 for grade 7; and
 - (vi) 1.2 for grade 8; and 8.
 - ~~(vii) 1.6 for grade 10.~~
- (B) for mathematics in grades K-8:
- (i) ~~2.6-1.7~~ for grade 3;
 - (ii) 2.1 for grade 4;
 - (iii) 2.0 for grade 5;
 - (iv) 2.1 for grade 6;
 - (v) 2.0 for grade 7; and
 - (vi) 1.7 for grade 8; and 8.
 - ~~(vii) 2.0 for grade 10.~~
- (C) for courses with an EOC test:
- (i) 3.3 for Algebra I;
 - (ii) 2.6 for Biology;
 - ~~(iii) 3.1 for ELPS;~~
 - ~~(iv)~~(iii) 1.8 for English I;
 - ~~(v) 2.2 for U.S. History;~~
 - ~~(vi)~~(iv) 2.9 for Algebra II;
 - ~~(vii)~~(v) 2.5 for Chemistry;
 - ~~(viii)~~(vi) 2.5 for Geometry;
 - ~~(ix)~~(vii) 2.5 for Physical Science;
 - ~~(x)~~(viii) 3.3 for Physics;
 - ~~(xi)~~(ix) 10.0 for College University Prep/College Tech Prep ~~(CP/CTP); (CUP/CTP);~~
 - ~~(xii)~~(x) 12.8 for Competency Passing Rate; and
 - ~~(xiii)~~(xi) 2.1 for the ABCs Dropout Rate ~~will be determined based upon data from the 2000-01 school year.~~ Rate.
- ~~(29)~~(31) "Weight" means the number of students used in the calculation of the amount of growth/gain for a subject or content area.

(b) In carrying out its duty under G.S. 115C-105.35 to establish annual performance goals for each school, the SBE shall use both growth standards and performance standards. (NOTE: see SBE policy HSP-C-020, which lists the components of the ABCs Accountability Program including Adequate Yearly Progress (AYP).)

- (1) The SBE shall calculate the expected growth ~~rate~~ for grades 3 through 8 and grade 10 in an individual school by using the regression formula "Expected Growth = $b_0 + (b_1 \times \text{ITP}) + (b_2 \times \text{IRM})$."
- (2) The SBE shall calculate the predicted EOC expected mean for courses in which end-of-course tests are administered by using the prediction formulas that follow.
- (A) "Predicted Algebra I Mean Score = $b_0 + (b_{\text{IMP}} \times \text{IMP})$," where $(b_{\text{IMP}} \times \text{IMP})$ is the impact of Mathematics Proficiency.
- (B) "Predicted Biology Mean Score = $b_0 + (b_{\text{IRP}} \times \text{IRP}) + (b_{\text{IMP}} \times \text{IMP}) + (b_{\text{IMP}}^2 \times \text{IMP}^2) + (b_{\text{IMP}}^3 \times \text{IMP}^3)$," where $(b_{\text{IRP}} \times \text{IRP})$ is the impact of Reading Proficiency and $(b_{\text{IMP}} \times \text{IMP})$ is the impact of Mathematics Proficiency.
- ~~(C) "Predicted ELPS Mean Score = $b_0 + (b_{\text{IRP}} \times \text{IRP})$," where $(b_{\text{IRP}} \times \text{IRP})$ is the impact of Reading Proficiency.~~
- ~~(D)~~(C) "Predicted English I Mean Score = $b_0 + (b_{\text{IRP}} \times \text{IRP})$," where $(b_{\text{IRP}} \times \text{IRP})$ is the impact of Reading Proficiency.
- ~~(E) "Predicted U.S. History Mean Score = $b_0 + (b_{\text{IRP}} \times \text{IRP}) + (b_{\text{IMP}} \times \text{IMP}) + (b_{\text{IMP}}^2 \times \text{IMP}^2)$," where $(b_{\text{IRP}} \times \text{IRP})$ is the impact of Reading Proficiency and $(b_{\text{IMP}} \times \text{IMP})$ is the impact of Mathematics Proficiency.~~
- ~~(F)~~(D) "Predicted Algebra II Mean Score = $b_0 + (b_{\text{IRP}} \times \text{IRP}) + (b_{\text{IAP}} \times \text{IAP})$," where $(b_{\text{IRP}} \times \text{IRP})$ is the impact of Reading Proficiency and $(b_{\text{IAP}} \times \text{IAP})$ is the impact of Algebra Proficiency.
- ~~(G)~~(E) "Predicted Chemistry Mean Score = $b_0 + (b_{\text{IAP}} \times \text{IAP}) + (b_{\text{IBP}} \times \text{IBP}) + (b_{\text{IEP}} \times \text{IEP})$," where $(b_{\text{IAP}} \times \text{IAP})$ is the impact of Algebra Proficiency, $(b_{\text{IBP}} \times \text{IBP})$ is the impact of Biology Proficiency, and $(b_{\text{IEP}} \times \text{IEP})$ is the impact of English I Proficiency.
- ~~(H)~~(F) "Predicted Geometry Mean Score = $b_0 + (b_{\text{IRP}} \times \text{IRP}) + (b_{\text{IMP}} \times \text{IMP}) + (b_{\text{IAP}} \times \text{IAP})$," where $(b_{\text{IRP}} \times \text{IRP})$ is the impact of Reading Proficiency, $(b_{\text{IMP}} \times \text{IMP})$ is the impact of Mathematics Proficiency, and $(b_{\text{IAP}} \times \text{IAP})$ is the impact of Algebra I Proficiency.
- ~~(I)~~(G) "Predicted Physical Science Mean Score = $b_0 + (b_{\text{IRP}} \times \text{IRP}) + (b_{\text{IMP}} \times$

IMP)," where $(b_{IRP} \times IRP)$ is the impact of Reading Proficiency and $(b_{IMP} \times IMP)$ is the impact of Mathematics Proficiency.

~~(H)~~ "Predicted Physics Mean Score = $b_0 + (b_{IMP} \times IMP) + (b_{IBP} \times IBP) + (b_{IEP} \times IEP)$," where $(b_{IMP} \times IMP)$ is the impact of Mathematics Proficiency, $(b_{IBP} \times IBP)$ is the impact of Biology Proficiency, and $(b_{IEP} \times IEP)$ is the impact of English I Proficiency.

(c) Schools shall be accountable for student performance and achievement. This Paragraph describes the conditions under which an eligible student's scores shall be included in the accountability measures for the school that the student attended at the time of testing.

(1) To be included in accountability measures for the growth standard, a student in grade three through grade eight must:

(A) have a pre-test score and a post-test score in reading and mathematics. For students in grade three the pre-test score refers to the score from the third-grade end-of-grade test administered in the Fall of the third grade and the post-test score refers to the score from the end-of-grade test administered in the Spring of the third grade. For students in grades four through eight, the pre-test score refers to the score from the previous year's end-of-grade test and the post-test score refers to the score from the current year's end-of-grade test; and

(B) have been in membership ~~more than one-half of the instructional period for the full academic year (defined as 91-140 of 180 days).~~ days as of the time of EOG testing.

(2) To be included in accountability measures for Algebra I, Algebra II, Biology, Chemistry, ~~Economic Legal and Political Systems,~~ English I, Geometry, Physical Science, or Physics, ~~or U.S. History,~~ a student must have scores for all tests used in the prediction formula.

(3) Students shall be included in the performance composite without reference to pretest scores or length of membership.

(d) The SBE shall include in the accountability system on the ~~same basis as all other public schools of SBE policy HSP-C-013~~ each alternative school with an identification number assigned by the Department. Test scores for students who attend programs or classes in a facility that does not have a separate school number shall be reported to and included in the students' home schools.

(e) Each K-8 school shall test at least ~~98-95~~ percent of its eligible students. If a school fails to test at least ~~98-95~~ percent of its eligible students for two consecutive school years, the SBE may designate the school as low-performing and may target the

school for assistance and intervention. Each school shall make public the percent of eligible students that the school tests.

(f) High schools shall test at least 95 percent of enrolled students who are subject to EOC tests, regardless of exclusions. High schools that test fewer than 95 percent of enrolled students for two consecutive years may be designated as low-performing by the SBE.

~~(g) All students who are following the standard course of study and who are not eligible for exclusion as set out in paragraph (h) of this Rule shall take the SBE-adopted tests. Every student, including those students who are excluded from testing, student in membership in a grade or course in which testing is required shall complete or have completed by a school employee designated by the principal an answer document (except in writing). The answer sheet for an excluded student shall contain only student identification information and the reason the student was excluded. Both the school and the LEA shall maintain records on the exclusions of students from testing. The Department may audit these records.~~

~~(h) Individual students may be excluded from SBE-adopted tests as follows: Students identified as limited English proficient and students with disabilities shall be included in the statewide testing program as follows: standard test administration, standard test administration with accommodations/modifications, or the state-designated alternate assessments (North Carolina Alternate Assessment Academic Inventory (NCAAI) or North Carolina Alternate Assessment Portfolio (NCAAP)).~~

(1) Limited English proficient students ~~may be excluded for one year beginning with the time of enrollment in the LEA if the student's English language proficiency has been assessed as novice/low to intermediate/low in listening, reading, and writing. A student whose English language proficiency has been assessed as intermediate/high or advanced may be excluded from tests in which the student writes responses for up to two years. Twelve months after a limited English proficient student has enrolled in the LEA, the student must be reassessed on the same language proficiency test that was used as a part of the identification of the student for inclusion in the limited English proficiency program in that LEA. A student assessed as novice/low to intermediate/low after 12 months may be excluded for an additional 12 months. A student assessed as intermediate/high or above must participate in the state testing program. After two years from the time of initial enrollment in the LEA, all limited English proficiency students must participate in the state testing program. LEAs shall report results of the initial language proficiency test and the results on the same test 12 months after enrollment in the LEA to the Department. LEAs shall use other assessment methods for excluded students to demonstrate that these students are progressing in other subject areas. who have been assessed on the state identified~~

language proficiency test as below intermediate/high in reading may participate in the NCAAAI as an alternate assessment for up to two years in US schools. The NCAAAI may be used as an alternate assessment in the areas of reading and mathematics at grades 3-8 and 10, writing at grades 4, 7, and 10, and in high school courses in which an end-of-course test is administered. Limited English proficient students who have been assessed on the state identified language proficiency test (SBE policy HSP-A-011) as below superior in writing may participate in the NCAAAI in writing for grades 4, 7, and 10 for up to two years in US schools.

(2) All students identified as limited English proficient must be assessed using the state identified language proficiency test at initial enrollment and annually thereafter during the window of February 1 to April 30. A student who enrolls after January 1 does not have to be retested during the same school year. Limited English proficient students who are administered the NCAAAI shall not be assessed off grade level.

(3) Schools shall:

(A) continue to administer state reading and mathematics tests for LEP students who score at or above Intermediate High on the reading section of the language proficiency test during their first year in US schools. Results from these assessments will be included in the ABCs and AYP.

(B) not require LEP students who score below Intermediate High on the reading section of the language proficiency test in their first year in US schools to be assessed on the reading end-of-grade tests, High School Comprehensive Test in Reading, or the NC Alternate Assessment Academic Inventory (NCAAAI) for reading.

(C) for purposes of determining the 95% tested rule in reading, use the language proficiency test from the spring administration for these students.

(D) not count mathematics results in determining AYP or ABCs performance composite scores for LEP students who score below Intermediate High on the reading section of the language proficiency test in their first year in US schools.

(E) include students previously identified as LEP, who have exited LEP identification during the last two

years, in the calculations for determining the status of the LEP subgroup for AYP only if that subgroup already met the minimum number of 40 students required for a subgroup.

~~(2)(4)~~ All students with disabilities including those identified under Section 504 in membership in grades 3-8 and 10 and in high school courses in which an end-of-course test is administered shall be included in the statewide testing program through the use of state tests with or without appropriate accommodations or through the use of other state assessments designed for these students, an alternate assessment. The student's IEP team shall determine whether a testing accommodation is appropriate for that student's disability or whether the student should be assessed using another state assessment designed for that student's disability. ~~The state-designed NCAAAI as the alternate assessment.~~

(i) Students with disabilities in grades 3-8 and 10 with IEPs and serious cognitive deficits documented in their Individualized Education Programs (IEPs) and whose program of study focuses on functional/life skills shall participate in the North Carolina Alternate Assessment Portfolio or the North Carolina Alternate Assessment Academic Inventory (NCAAAI) (if three years or more below grade level) as an alternative-alternate assessment.

(j) The SBE shall calculate a school's expected growth/gain growth composite in student performance using the following process:

(1) Review expected and exemplary-high growth standards for all grades and grades, subjects, and review the predicted EOC mean for expected standard gain and the exemplary standard gain for EOC courses.

(2) Determine the actual growth in reading and mathematics at each grade level included in the state testing program, using data on groups of students identified by Paragraph (c)(1) of this Rule and determine the actual EOC mean for EOC tests using data on the groups of students identified by Paragraph (c)(2) of this Rule from one point in time to another point in time.

(3) Subtract the expected growth from the actual growth in reading and mathematics at grades 3 through 8 and grade 10; ~~8;~~ then subtract the predicted EOC mean from the actual EOC mean for EOC tests.

(4) Divide the differences for reading and mathematics by the standard deviations of the respective differences in growth/gain at each grade level and for each EOC to determine the standard growth score.

(5) The SBE shall calculate a school's gain composite-growth component in college university prep/college tech prep using the following process:

- (A) Compute the percent of graduates who receive diplomas ~~(minus the diploma recipients who completed the Occupational Course of Study)~~ who completed either course of study in the current accountability year. Students shall be counted only once if they complete more than one course of study.
 - (B) Find the baseline, which is the average of the two prior school years' percent of graduates who received diplomas and who completed a course of ~~study, study (except for the Occupational Course of Study).~~
 - (C) Subtract the baseline from the current year's percentage.
 - (D) Subtract 0.1, unless the percentages are both 100. If both percentages are 100, the gain is zero.
 - (E) Divide by the associated standard deviation. The result is the standard ~~gain-growth~~ for college university prep/college tech prep.
- (6) The SBE shall calculate a school's expected ~~gain composite-growth component~~ in the competency passing rate by comparing the grade 10 competency passing rate to the grade 8 passing rate for the group of students in grade 10 who also took the 8th-grade end-of-grade test.
- (A) Subtract the grade 8 rate from the grade 10 rate.
 - (B) Subtract 0.1.
 - (C) Divide by the standard deviation. The result is the standard ~~gain-growth~~ in competency passing rate.
- (7) Multiply the expected standard growth scores for reading and mathematics at each grade level from grade 3 to 8, EOC prediction, ~~gain in~~ competency passing rate, ~~gain in~~ college university prep/college tech prep, and change in ABCs dropout rate by the respective weight for each, as they may apply in a given school. These values shall be summed and divided by the sum of all the weights. If the resulting number is zero or above, the school has made the expected growth standard.
- (8) The SBE shall compute ~~exemplary-high~~ growth using the ~~exemplary-high~~ growth standard ($b_o \times 1.10$) in the accountability formula for grades 3 through 8 in reading and mathematics, and ($b_o \times 1.03$) for predicted EOC means. There is no ~~exemplary-high~~ growth standard for competency passing rate or college university prep/college tech prep ~~gain-prep~~.
- (9) To determine the composite score for ~~exemplary-high~~ growth standards:

- (A) Subtract the ~~exemplary-growth/gain high growth~~ standard from the actual ~~growth/gain~~ standard ~~growth~~ in reading and mathematics at grades 3 through 8; subtract the predicted ~~exemplary-high growth~~ EOC mean from the actual EOC mean for each EOC test.
- (B) Divide the ~~difference-differences in~~ ~~growth/gain-growth~~ by the standard deviations of the respective differences in ~~growth/gain-growth~~ to determine the high standard ~~growth/gain~~ ~~score-scores~~.
- (C) Multiply the ~~exemplary-high~~ standard ~~growth/gain~~ ~~growth~~ scores for reading and mathematics at each grade level from grade 3 to 8, EOC ~~gain-high~~ standard growth scores, expected standard ~~gain-growth~~ in Competency Passing Rate, Dropout Rate, and for College University Prep/College Tech Prep by the respective weight for each, as they may apply in a given school. These values shall be summed and divided by the sum of all the weights. If the resulting number is zero or above, the school has met the ~~exemplary-high~~ growth standard.

(k) If school officials believe that the school's growth standards were unreasonable due to specific, compelling reasons, the school may appeal its growth standards to the SBE. The SBE shall appoint ~~an appeals committee composed of a panel selected from~~ the compliance commission to review written appeals from schools. The school officials must clearly document the circumstances that made the goals unrealistic and must submit its appeal to the SBE within 30 days of receipt of notice from the Department of the school's performance. The appeals committee shall review all appeals and shall make recommendations to the SBE. The SBE shall make the final decision on the reasonableness of the growth goals.

(l) In compliance with the No Child Left Behind Act of 2001 (P.L. 107-110), its subsequent final regulations (34 CFR Part 200) released November 26, 2002, and pursuant to GS. 115C-105.35 the SBE shall incorporate adequate yearly progress (AYP) as the "closing the achievement gap" component of the ABCs. The calculations shall use 40 students' scores as the minimum number of scores for a group to be statistically reliable and valid for AYP purposes along with the use of a confidence interval around the percentage of students scoring proficient on the assessments.

Authority G.S. 115C-12(9)c4.

SECTION .0500 - CHARTER SCHOOLS

16 NCAC 06G .0501 LIABILITY INSURANCE

(a) Each charter school shall obtain ~~the following types and amounts of liability insurance coverage; and maintain liability~~

~~insurance and maintain liability insurance and fidelity bonding of the types and amounts specified in the charter agreement.~~

- ~~(1) errors and omissions: one million dollars (\$1,000,000) per claim;~~
- ~~(2) general liability: one million dollars (\$1,000,000) per occurrence;~~
- ~~(3) boiler and machinery: the replacement cost of the building;~~
- ~~(4) real and personal property: the appraised value of the building and contents;~~
- ~~(5) fidelity bonds: the amount of funds received by the charter school in the previous fiscal year from state and local sources;~~
- ~~(6) automobile liability: one million dollars (\$1,000,000) per occurrence; and~~
- ~~(7) workers' compensation: as specified by G.S. 97.~~

~~(b) The provisions of this Rule shall not preclude any charter school from obtaining liability insurance coverage in addition to or in excess of the requirements of this Rule.~~

Authority G.S. 115C-238.29F(c)(1).

TITLE 21 – OCCUPATIONAL LICENSING BOARDS

CHAPTER 46 – BOARD OF PHARMACY

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Board of Pharmacy intends to amend the rule cited as 21 NCAC 46 .2507 with changes from the proposed text noticed in the Register, Volume 18, Issue 07, pages 476-477.

Proposed Effective Date: *November 1, 2004*

Reason for Proposed Action: *To allow for more widespread access to immunization for greater public protection.*

Procedure by which a person can object to the agency on a proposed rule: *The Board will accept written objections until the expiration of the comment period on August 30, 2004. Written objections should be directed to David R. Work.*

Written comments may be submitted to: *David R. Work, PO Box 4560, Chapel Hill, NC 27515-4560.*

Comment period ends: *August 30, 2004*

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a

rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact

- State
- Local
- Substantive (≥\$3,000,000)
- None

SECTION .2500 - MISCELLANEOUS PROVISIONS

21 NCAC 46 .2507 ADMINISTRATION OF VACCINES BY PHARMACISTS

~~A pharmacist who has successfully completed a course of training approved by the Board, and the North Carolina Medical Board, or the North Carolina Board of Nursing, may administer immunizations.~~

(a) Purpose. The purpose of this Section is to provide standards for pharmacists engaged in the administration of vaccines as authorized in G.S. 90-85.3(r) of the North Carolina Pharmacy Practice Act.

(b) Definitions. The following words and terms, when used in this Section, shall have the following meanings, unless the context clearly indicates otherwise.

- (1) "ACPE" means Accreditation Council for Pharmacy Education.
- (2) "Administer" means the direct application of a drug to the body of a patient by injection, inhalation, ingestion, or other means by:
 - (A) a pharmacist, an authorized agent under his/her supervision, or other person authorized by law; or
 - (B) the patient at the direction of a practitioner.
- (3) "Antibody" means a protein in the blood that is produced in response to stimulation by a specific antigen. Antibodies help destroy the antigen that produced them. Antibodies against an antigen usually equate to immunity to that antigen.
- (4) "Antigen" means a substance recognized by the body as being foreign; it results in the production of specific antibodies directed against it.
- (5) "Board" means the North Carolina Board of Pharmacy.
- (6) "Confidential record" means any health-related record that contains information that identifies an individual and that is maintained by a pharmacy or pharmacist such as a patient medication record, prescription drug order, or medication order.
- (7) "Immunization" means the act of inducing antibody formation, thus leading to immunity.
- (8) "Medical Practice Act" means the North Carolina Medical Practice Act.

- (9) "Physician" means a currently licensed M.D. or D.O. in good standing with the North Carolina Medical Board who is responsible for the on-going, continuous supervision of the pharmacist pursuant to written protocols between the pharmacist and the physician.
- (10) "Vaccination" means the act of administering any antigen in order to induce immunity; is not synonymous with immunization since vaccination does not imply success.
- (11) "Vaccine" means a specially prepared antigen, which upon administration to a person will result in immunity.
- (12) Written Protocol--A physician's order, standing medical order, or other order or protocol. A written protocol must be prepared, signed and dated by the physician and pharmacist and contain the following:
 - (A) the name of the individual physician authorized to prescribe drugs and responsible for authorizing the written protocol;
 - (B) the name of the individual pharmacist authorized to administer vaccines;
 - (C) the immunizations or vaccinations that may be administered by the pharmacist;
 - (D) procedures to follow, including any drugs required by the pharmacist for treatment of the patient, in the event of an emergency or severe adverse reaction following vaccine administration;
 - (E) the reporting requirements by the pharmacist to the physician issuing the written protocol, including content and time frame;
 - (F) locations at which the pharmacist may administer immunizations or vaccinations; and
 - (G) the requirement for annual review of the protocols by the physician and pharmacist.

(c) Policies and Procedures

- (1) Pharmacists must follow a written protocol as specified in Subparagraph (b)(12) of this Rule for administration of vaccines and the treatment of severe adverse events following administration.
- (2) The pharmacist administering vaccines must maintain written policies and procedures for handling and disposal of used or contaminated equipment and supplies.
- (3) The pharmacist or pharmacist's agent must give the appropriate vaccine information to the patient or legal representative with each dose of vaccine. The pharmacist must ensure that the patient or legal representative is available and has read, or has had read to them, the information provided and has had their

- questions answered prior to administering the vaccine.
- (4) The pharmacist must report adverse events to the primary care provider as identified by the patient.
- (5) The pharmacist shall not administer vaccines to patients under 18 years of age.
- (d) Pharmacist requirements. Pharmacists who enter into a written protocol with a physician to administer vaccines shall:
 - (1) hold a current provider level cardiopulmonary resuscitation (CPR) certification issued by the American Heart Association or the American Red Cross or equivalent;
 - (2) successfully complete a certificate program in the administration of vaccines accredited by the Centers for Disease Control, the ACPE or a similar health authority or professional body approved by the Board;
 - (3) maintain documentation of:
 - (A) completion of the initial course specified in Subparagraph (2) of this Paragraph;
 - (B) three hours of continuing education every two years beginning January 1, 2006, which are designed to maintain competency in the disease states, drugs, and administration of vaccines;
 - (C) current certification specified in Subparagraph (1) of this Paragraph;
 - (D) original written physician protocol;
 - (E) annual review and revision of original written protocol with physician;
 - (F) any problems or complications reported; and
 - (G) items specified in Paragraph (g) of this Rule.
- (e) Supervising Physician responsibilities. Physicians who enter into a written protocol with a pharmacist to administer vaccines shall:
 - (1) be responsible for the formulation or approval and periodic review of the written protocols;
 - (2) be easily accessible to the pharmacist administering the vaccines or be available through direct telecommunication for consultation, assistance, direction, and provide adequate back-up coverage; and
 - (3) review written protocol with pharmacist at least annually and revise if necessary.
- (f) Supervision. Pharmacists involved in the administration of immunizations or vaccinations shall be under the supervision of a physician. Physician supervision shall be considered adequate if the delegating physician:
 - (1) is responsible for the formulation or approval of the physician's order, standing medical order, standing delegation order, or other order or protocol and periodically reviews the order or protocol and the services provided to a patient under the order or protocol;

- (2) is geographically located so as to be easily accessible to the pharmacist administering the immunization or vaccination;
- (3) receives, as appropriate, a periodic status report on the patient, including any problem or complication encountered; and
- (4) is available through direct telecommunication for consultation, assistance, and direction.

(g) Drugs. The following requirements pertain to drugs administered by a pharmacist:

- (1) Drugs administered by a pharmacist under the provisions of this Section shall be in the legal possession of:
 - (A) a pharmacy, which shall be the pharmacy responsible for drug accountability, including the maintenance of records of administration of the immunization or vaccination; or
 - (B) a physician, who shall be responsible for drug accountability, including the maintenance of records of administration of the immunization or vaccination;
- (2) Drugs shall be transported and stored at the proper temperatures indicated for each drug;
- (3) Pharmacists while actively engaged in the administration of vaccines under written protocol, may have in their custody and control the vaccines identified in the written protocol and any other drugs listed in the written protocol to treat adverse reactions; and
- (4) After administering vaccines at a location other than a pharmacy, the pharmacist shall return all unused prescription medications to the pharmacy or physician responsible for the drugs.

(h) Record Keeping and Reporting

- (1) A pharmacist who administers any vaccine shall maintain the following information,

readily retrievable, in the pharmacy records regarding each administration:

- (A) The name, address, and date of birth of the patient;
- (B) The date of the administration;
- (C) The administration site of injection (e.g., right arm, left leg, right upper arm);
- (D) route of administration of the vaccine;
- (E) The name, manufacturer, lot number, and expiration date of the vaccine;
- (F) Dose administered;
- (G) The name and address of the patient's primary health care provider, as identified by the patient; and
- (H) The name or identifiable initials of the administering pharmacist.

- (2) A pharmacist who administers vaccines shall document annual review with physician of written protocol in the records of the pharmacy that is in possession of the vaccines administered.

(i) Confidentiality.

- (1) The pharmacist shall comply with the privacy provisions of the federal Health Insurance Portability and Accountability Act of 1996 and any rules adopted pursuant to this act.
- (2) Any other confidentiality provisions of federal or state laws.
- (3) Violations of these rules by a pharmacist and/or supervising physician shall constitute grounds by the licensee's respective Board to initiate disciplinary action against that licensee's license.

Authority G.S. 90-85.3; 90-85.6.

APPROVED RULES

*This Section includes the Register Notice citation to rules approved by the Rules Review Commission (RRC) at its meeting May 20, 2004, and reported to the Joint Legislative Administrative Procedure Oversight Committee pursuant to G.S. 150B-21.16. The full text of rules are published below when the rules have been approved by RRC in a form different from that originally noticed in the Register or when no notice was required to be published in the Register. The rules published in full text are identified by an * in the listing of approved rules. Statutory Reference: G.S. 150B-21.17.*

These rules have been entered into the North Carolina Administrative Code

APPROVED RULE CITATION				REGISTER CITATION TO THE NOTICE OF TEXT
02	NCAC	09B	.0116*	18:09 NCR
02	NCAC	34	.0102*	18:07 NCR
02	NCAC	34	.0505*	18:07 NCR
02	NCAC	34	.0604	18:07 NCR
02	NCAC	43L	.0104-.0108	18:14 NCR
02	NCAC	43L	.0113-.0116	18:14 NCR
02	NCAC	43L	.0201-.0206	18:14 NCR
02	NCAC	43L	.0401-.0409	18:14 NCR
02	NCAC	43L	.0701-.0702	18:14 NCR
02	NCAC	48A	.1208*	18:14 NCR
04	NCAC	03C	.1601	18:16 NCR
04	NCAC	05A	.0106	18:15 NCR
10A	NCAC	13F	.0213*	18:12 NCR
10A	NCAC	13F	.0504*	18:12 NCR
10A	NCAC	13F	.0507*	18:12 NCR
10A	NCAC	13F	.0702*	18:12 NCR
10A	NCAC	13F	.0905-.0906*	18:12 NCR
10A	NCAC	13F	.1206*	18:12 NCR
10A	NCAC	13G	.0204*	18:12 NCR
10A	NCAC	13G	.0504*	18:12 NCR
10A	NCAC	13G	.0507*	18:12 NCR
10A	NCAC	13G	.0705*	18:12 NCR
10A	NCAC	26C	.0501-.0504*	18:13 NCR
10A	NCAC	27G	.0402*	18:13 NCR
10A	NCAC	27G	.0404*	18:13 NCR
10A	NCAC	27G	.0506*	18:13 NCR
10A	NCAC	27G	.0601-.0610*	18:13 NCR
10A	NCAC	39A	.0102-.0105*	18:13 NCR
10A	NCAC	39A	.0106-.0107	18:13 NCR
10A	NCAC	39A	.0109*	18:13 NCR
10A	NCAC	39A	.0111	18:13 NCR
10A	NCAC	45A	.0303*	18:13 NCR
10A	NCAC	45A	.0403	18:13 NCR
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15A	NCAC	02B	.0225*	18:11 NCR
15A	NCAC	02B	.0316*	18:11 NCR
15A	NCAC	02D	.0101*	18:08 NCR
15A	NCAC	02D	.0521*	18:08 NCR
15A	NCAC	02D	.0538*	18:08 NCR
15A	NCAC	02D	.0933	18:08 NCR
15A	NCAC	02D	.1404*	18:08 NCR
15A	NCAC	02D	.1409*	18:08 NCR
15A	NCAC	02D	.1416*	18:08 NCR
15A	NCAC	02D	.1417-.1419	18:08 NCR
15A	NCAC	02D	.1422*	18:08 NCR
15A	NCAC	02D	.1901-.1902	18:08 NCR
15A	NCAC	02D	.1903*	18:08 NCR
15A	NCAC	02D	.1906	18:08 NCR
15A	NCAC	02Q	.0806	18:08 NCR

15A	NCAC	02Q	.0809*	18:08 NCR
15A	NCAC	10B	.0409*	18:10 NCR
15A	NCAC	10F	.0333*	18:11 NCR
15A	NCAC	12K	.0103*	18:14 NCR
15A	NCAC	12K	.0105*	18:14 NCR
15A	NCAC	18A	.3506*	18:14 NCR
15A	NCAC	18A	.3508	18:14 NCR
19A	NCAC	03G	.0207*	18:16 NCR
19A	NCAC	03G	.0209*	18:16 NCR
21	NCAC	46	.1604*	18:07 NCR
21	NCAC	46	.1806*	18:07 NCR
21	NCAC	46	.2504*	18:07 NCR
21	NCAC	58A	.0104-.0105*	18:08 NCR
21	NCAC	58A	.0107-.0108*	18:14 NCR
21	NCAC	58A	.0110*	18:08 NCR
21	NCAC	58A	.0302	18:08 NCR
21	NCAC	58A	.0503-.0504*	18:14 NCR
21	NCAC	58A	.0506	18:14 NCR
21	NCAC	58A	.1801	18:14 NCR
21	NCAC	58A	.1802-.1803*	18:14 NCR
21	NCAC	58A	.1804-.1806	18:14 NCR
21	NCAC	58A	.1807*	18:14 NCR
21	NCAC	58A	.1808	18:14 NCR
21	NCAC	58A	.1809*	18:14 NCR
21	NCAC	58A	.1810	18:14 NCR
21	NCAC	58B	.0601	18:14 NCR

These rules are subject to the next Legislative Session. (See G.S. 150B-21.3(b1))

15A	NCAC	02Q	.0702*	18:08 NCR
15A	NCAC	02Q	.0711*	18:08 NCR

TITLE 2 - DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

02 NCAC 09B .0116 ADOPTIONS BY REFERENCE

(a) The Board incorporates by reference, including subsequent amendments and editions, "Official Methods of Analysis of AOAC," published by the Association of Official Analytical Chemists. Copies of this document may be obtained from the Association of Official Analytical Chemists International, Department 0742, 1970 Chain Bridge Road, McLean, VA 22109-0742, at a cost of three hundred fifty-nine dollars (\$359.00).

(b) The Board incorporates by reference, including subsequent amendments and editions, "U.S. Pharmacopeia National Formulary USP XXI-NFXVI" and supplements, published by the U.S. Pharmacopeial Convention, Inc. Copies of this document may be obtained from The United States Pharmacopeial Convention, Inc., Attention: Customer Service, 12601 Twinbrook Parkway, Rockville, MD 20852, at a cost of four hundred fifty dollars (\$450.00).

(c) The Board incorporates by reference, including subsequent amendments and editions, "ASTM Standards on Engine Coolants," published by the American Society for Testing Materials. Copies of this document may be obtained from the American Society for Testing Materials, 1916 Race Street, Philadelphia, PA 19103, at a cost of seventy-two dollars (\$72.00).

(d) The Board incorporates by reference, including subsequent amendments and editions, "EPA Manual of Chemical Methods for Pesticides and Devices" and supplements, published by AOAC. Copies of this document may be obtained from the Association of Official Analytical Chemists International, Department 0742, 1970 Chain Bridge Road, McLean, VA 22109-0742, at a cost of one hundred forty-nine dollars (\$149.00).

(e) The Board incorporates by reference, including subsequent amendments and editions, "Pesticide Analytical Manual," Volumes I and II, published by the United States Department of Health, Education and Welfare, Food and Drug Administration. Copies of this document may be obtained from the National Technical Information Service, Attention: Orders Department, 5285 Port Royal Road, Springfield, VA 22161, at a cost of sixty-one dollars (\$61.00) for Volume I and two hundred twenty-four dollars (\$224.00) for Volume II.

(f) The Board incorporates by reference, including subsequent amendments and editions, "FDA Compliance Policy Guides," published by the United States Department of Health, Education and Welfare, Food and Drug Administration. Copies of this document may be obtained from the National Technical Information Service, Attention: Orders Department, 5285 Port Royal Road, Springfield, VA 22161, at a cost of one hundred seventy-five dollars (\$175.00).

(g) The Board incorporates by reference, including subsequent amendments and editions, "Bergey's Manual of Determinative

Bacteriology," R. E. Buchanan and N. E. Gibbons, Editors, Williams & Wilkins Company, Baltimore. Copies of this document may be obtained from the Williams & Wilkins Company, Attention: Book Order Department, 428 East Preston Street, Baltimore, MD 21202, at a cost of sixty-five dollars (\$65.00).

(h) The Board incorporates by reference, including subsequent amendments and editions, "Microbiology Laboratory Guidebook," published by the United States Department of Agriculture, Animal and Plant Health Inspection Service, Meat and Poultry Inspection Program, Washington, DC. Copies of this document may be obtained from the USDA -Food Safety and Inspection Service, ALA Room 80, South Building, 14th and Independence Avenues, Southwest, Washington, DC 20250, at no charge.

(i) The Board incorporates by reference, including subsequent amendments and editions, "FDA Bacteriological Analytical Manual," published by the Association of Official Analytical Chemists. Copies of this document may be obtained from the Association of Official Analytical Chemists International, Department 0742, 1970 Chain Bridge Road, McLean, VA 22109-0742, at a cost of one hundred twenty-three dollars (\$123.00).

(j) The Board incorporates by reference, including subsequent amendments and editions, "Standard Methods for the Examination of Dairy Products," E. H. Marth, Editor, published by the American Public Health Association. Copies of this document may be obtained from the American Public Health Association, 1015 Fifteenth Street, Northwest, Washington, DC 20005, at a cost of fifty-five dollars (\$55.00).

(k) The Board incorporates by reference, including subsequent amendments and editions, "Compendium of Methods for the Microbiological Examination of Foods," M. L. Speck, Editor, published by the American Public Health Association. Copies of this document may be obtained from the American Public Health Association, 1015 Fifteenth Street, Northwest, Washington, DC 20005, at a cost of ninety dollars (\$90.00).

(l) The Board incorporates by reference, including subsequent amendments and editions, "Bergey's Manual of Systematic Bacteriology," Vol. I, Kreg and Holt, Editors, William E. Wilkins Company, Baltimore. Copies of this document may be obtained from the Williams & Wilkins Company, Attention: Book Order Department, 428 East Preston Street, Baltimore, MD 21202, at a cost of one hundred fifteen dollars (\$115.00).

(m) The Board incorporates by reference, including subsequent amendments and editions, "Manual of Clinical Microbiology," E. H. Lennette, Balows, et al., Editors, published by the American Society for Microbiology. Copies of this document may be obtained from the American Society for Microbiology, PO Box 605, Herndon, VA 22070, at a cost of ninety-eight dollars (\$98.00).

(n) The Board incorporates by reference, including subsequent amendments and editions, "Standard Methods for the Examination of Water and Waste Water," published by American Public Health Association, American Water Works Association, and Water Pollution Control Federation. Copies of this document may be obtained from the American Public Health Association, 1015 Fifteenth Street, Northwest, Washington, DC 20005, at a cost of one hundred sixty dollars (\$160.00).

(o) The Board incorporates by reference, including subsequent amendments and editions, the following parts or sections of the Code of Federal Regulations, Title 21, Chapter I, as promulgated by the Commissioner of the Food and Drug Administration under the authority of the Federal Food, Drug, and Cosmetic Act:

	Part or Section	Subject of Part or Section
(1)	1.1	General
(2)	1.3	Labeling - Definitions
(3)	1.20	Presence of Mandatory Label Information
(4)	1.21	Failure to Reveal Material Facts
(5)	1.24	Exemptions from Required Label Statements
(6)	1.31	Package Size Savings
(7)	1.35	"Cents-off," or Other Savings Representations
(8)	2.25	Grain Seed Treated with Poisonous Substances; Color Identification to Prevent Adulteration of Human and Animal Food
(9)	2.35	Use of Secondhand Containers for the Shipment or Storage of Food and Animal Feed
(10)	7.12	Guaranty
(11)	7.13	Suggested Forms of Guaranty
(12)	70	Color Additives
(13)	70.3	Definitions
(14)	70.5	General Restrictions on Use
(15)	70.10	Color Additives in Standardized Foods, New Drugs, and Antibiotics
(16)	70.11	Related Substances
(17)	70.20	Packaging Requirements for Straight Colors (Other Than Hair Dyes)
(18)	70.25	Labeling Requirements for Color Additives (Other Than Hair Dyes)
(19)	73	Listing of Color Additives Exempt from Certification
(20)	74	Listing of Color Additives Subject to Certification
(21)	81	General Specifications and General Restrictions for Provisioned Color Additives for Use in Foods, Drugs and Cosmetics
(22)	82	Listing of Certified Provisionally Listed Colors and Specifications
(23)	100	General
(24)	101	Food Labeling (Except 101.11 and 101.103)
(25)	102	Common or Usual Name for Nonstandardized Foods
(26)	103	Quality Standards for Foods with No Identity Standards
(27)	104	Nutritional Quality Guidelines for Foods
(28)	105	Foods for Special Dietary Use
(29)	106	Infant Formula Quality Control Procedures
(30)	107	Infant Formula
(31)	108	Emergency Permit Control

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|------|-----|--|-------|-----|--|
| (32) | 109 | Unavoidable Contaminants in Food for Human Consumption and Food-Packaging Material | (72) | 182 | Substances Generally Recognized as Safe |
| (33) | 110 | Current Good Manufacturing Practice in Manufacturing, Processing, Packing, or Holding Human Food | (73) | 184 | Direct Food Substances Affirmed as Generally Recognized as Safe |
| (34) | 113 | Thermally Processed Low-Acid Foods Packaged in Hermetically Sealed Containers | (74) | 186 | Indirect Food Substances Affirmed as Generally Recognized as Safe |
| (35) | 114 | Acidified Foods | (75) | 189 | Substances Prohibited from Use in Human Food |
| (36) | 120 | Hazard Analysis and Critical Control Point (HACCP) Systems | (76) | 193 | Tolerances for Pesticides in Food Administered by the Environmental Protection Agency |
| (37) | 123 | Frozen Raw Breaded Shrimp | (77) | 200 | General |
| (38) | 129 | Processing and Bottling of Bottled Drinking Water (Except as amended by 02 NCAC 09C .0700 - Bottled Water) | (78) | 201 | Labeling |
| (39) | 130 | Food Standards: General | (79) | 202 | Prescription Drug Advertising |
| (40) | 131 | Milk and Cream | (80) | 210 | Current Good Manufacturing Practices in Manufacturing, Processing, Packing or Holding of Drugs; General |
| (41) | 133 | Cheeses and Related Cheese Products | (81) | 211 | Current Good Manufacturing Practice for Finished Pharmaceuticals |
| (42) | 135 | Frozen Desserts | (82) | 225 | Current Good Manufacturing Practice for Medicated Feeds |
| (43) | 136 | Bakery Products | (83) | 226 | Current Good Manufacturing Practice for Medicated Premixes |
| (44) | 137 | Cereal Flours and Related Products | (84) | 250 | Special Requirements for Specific Human Drugs |
| (45) | 139 | Macaroni and Noodle Products | (85) | 290 | Controlled Drugs |
| (46) | 145 | Canned Fruits | (86) | 299 | Drugs; Official Names and Established Names |
| (47) | 146 | Canned Fruit Juices | (87) | 300 | General |
| (48) | 150 | Fruit Butters, Jellies, Preserves, and Related Products | (88) | 310 | New Drugs |
| (49) | 152 | Fruit Pies | (89) | 312 | New Drugs for Investigational Use |
| (50) | 155 | Canned Vegetables | (90) | 314 | New Drug Applications |
| (51) | 156 | Vegetable Juices | (91) | 320 | Bioavailability and Bioequivalence Requirements |
| (52) | 158 | Frozen Vegetables | (92) | 329 | Habit-Forming Drugs |
| (53) | 160 | Eggs and Egg Products | (93) | 330 | Over-the-Counter (OTC) Human Drugs Which Are Generally Recognized as Safe and Effective and Not Misbranded |
| (54) | 161 | Fish and Shellfish (Except Section 161.30 and 161.130 through 161.145) | (94) | 331 | Antacid Products for Over-the-Counter (OTC) Human Use |
| (55) | 163 | Cacao Products | (95) | 332 | Antiflatulent Products for Over-the-Counter Human Use |
| (56) | 164 | Tree Nut and Peanut Products | (96) | 361 | Prescription Drugs for Human Use Generally Recognized as Safe and Effective and Not Misbranded: Drugs Used in Research |
| (57) | 165 | Nonalcoholic Beverages | (97) | 369 | Interpretive Statements Re: Warnings on Drugs and Devices for Over-the-Counter Sale |
| (58) | 166 | Margarine | (98) | 429 | Drugs Composed Wholly or Partly of Insulin |
| (59) | 168 | Sweeteners and Table Syrups | (99) | 430 | Antibiotic Drugs: General |
| (60) | 169 | Food Dressings and Flavorings | (100) | 431 | Certification of Antibiotic Drugs |
| (61) | 170 | Food Additives | (101) | 432 | Packaging and Labeling of Antibiotic Drugs |
| (62) | 172 | Food Additives Permitted for Direct Addition to Food for Human Consumption | (102) | 433 | Exemptions from Antibiotic Certification and Labeling Requirements |
| (63) | 173 | Secondary Direct Food Additives Permitted in Food for Human Consumption | (103) | 436 | Tests and Methods of Assay of Antibiotic and Antibiotic-Containing Drugs |
| (64) | 174 | Indirect Food Additives: General | (104) | 440 | Penicillin Antibiotic Drugs |
| (65) | 175 | Indirect Food Additives: Adhesive Coatings and Components | (105) | 442 | Cepha Antibiotics |
| (66) | 176 | Indirect Food Additives: Paper and Paperboard Components | | | |
| (67) | 177 | Indirect Food Additives: Polymers | | | |
| (68) | 178 | Indirect Food Additives: Adjuvants, Production Aids, and Sanitizers | | | |
| (69) | 179 | Irradiation in the Production, Processing and Handling of Food | | | |
| (70) | 180 | Food Additives Permitted in Food on an Interim Basis or in Contact with Food Pending Additional Study | | | |
| (71) | 181 | Prior-Sanctioned Food Ingredients | | | |

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| (106) | 444 | Oligosaccharide Antibiotic Drugs | (142) | 540 | Penicillin Antibiotic Drugs for Animal Use |
| (107) | 446 | Tetracycline Antibiotic Drugs | (143) | 544 | Oligosaccharide Certifiable Antibiotic Drugs for Animal Use |
| (108) | 448 | Peptide Antibiotics | (144) | 546 | Tetracycline Antibiotic Drugs for Animal Use |
| (109) | 449 | Antifungal Antibiotics | (145) | 548 | Certifiable Peptide Antibiotic Drugs for Animal Use |
| (110) | 450 | Antitumor Antibiotic Drugs | (146) | 555 | Chloramphenicol Drugs for Animal Use |
| (111) | 452 | Macrolide Antibiotic Drugs | (147) | 556 | Tolerances for Residues of New Animal Drugs in Food |
| (112) | 453 | Lincomycin Antibiotic Drugs | (148) | 558 | New Animal Drugs for Use in Animal Feeds |
| (113) | 455 | Certain Other Antibiotic Drugs | (149) | 561 | Tolerances for Pesticides in Animal Feeds Administered by the Environmental Protection Agency |
| (114) | 460 | Antibiotic Drugs Intended for Use in Laboratory Diagnosis of Disease | (150) | 564 | Definitions and Standards for Animal Food |
| (115) | 809 | In Vitro Diagnostic Products for Human Use | (151) | 570 | Food Additives |
| (116) | 812 | Investigational Device Exemptions | (152) | 573 | Food Additives Permitted in Feed and Drinking Water of Animals |
| (117) | 813 | Investigational Exemptions for Intraocular Lenses | (153) | 582 | Substances Generally Recognized as Safe |
| (118) | 820 | Good Manufacturing Practices for Medical Devices: General | (154) | 584 | Food Substances Affirmed as Generally Recognized as Safe in Feed and Drinking Water of Animals |
| (119) | 860 | Medical Device Classification Procedures | (155) | 589 | Substances Prohibited from Use in Animal Food or Feed |
| (120) | 861 | Procedures for Performance Standards Development | (156) | 700 | General |
| (121) | 870 | Cardiovascular Devices | (157) | 701 | Cosmetic Labeling |
| (122) | 882 | Neurological Devices | (158) | 720 | Voluntary Filing of Cosmetic Product Ingredient and Cosmetic Raw Material Composition Statements |
| (123) | 884 | Obstetrical and Gynecological Devices | (159) | 730 | Voluntary Filing of Cosmetic Product Experiences |
| (124) | 895 | Banned Devices | (160) | 740 | Cosmetic Product Warning Statements |
| (125) | 500 | General | Copies of the Code of Federal Regulations may be obtained at no cost by accessing the website of the U.S. Government Printing Office at http://www.gpoaccess.gov/cfr/index.html .
(p) The Board incorporates by reference, including subsequent amendments and editions, "Tolerances and Exemptions from Tolerances for Pesticide Chemicals in or on Raw Agricultural Commodities," 40 C.F.R. Part 180. Copies of the Code of Federal Regulations may be obtained from the Superintendent of Documents, Government Printing Office, Washington, DC 20402, at a cost of twenty-four dollars (\$24.00).
(q) The Board incorporates by reference, including subsequent amendments and editions, "Definitions and Standards of Identity or Composition for Meats, Meat By-products, and Meat Food Products," 9 C.F.R. Part 319. Copies of the Code of Federal Regulations may be obtained from the Superintendent of Documents, Government Printing Office, Washington, DC 20402, at a cost of twenty-three dollars (\$23.00).
(r) The Board incorporates by reference, including subsequent amendments and editions, "Definitions and Standards of Identity or Composition for Poultry and Poultry Products," 9 C.F.R. Sections 381.155 through 381.170. Copies of the Code of Federal Regulations may be obtained from the Superintendent of | | |
| (126) | 501 | Animal Food Labeling | | | |
| (127) | 502 | Common or Usual Names for Nonstandardized Animal Foods | | | |
| (128) | 505 | Interpretive Statements Re: Warnings on Animal Drugs for Over-the-Counter Sale | | | |
| (129) | 507 | Thermally Processed Low-Acid Animal Foods Packaged in Hermetically Sealed Containers | | | |
| (130) | 508 | Emergency Permit Control | | | |
| (131) | 509 | Unavoidable Contaminants in Animal Food and Food-Packaging Material | | | |
| (132) | 510 | New Animal Drugs | | | |
| (133) | 511 | New Animal Drugs for Investigational Use | | | |
| (134) | 514 | New Animal Drug Applications | | | |
| (135) | 520 | Oral Dosage Form New Animal Drugs Not Subject to Certification | | | |
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| (137) | 524 | Ophthalmic and Topical Dosage Form New Animal Drugs Not Subject to Certification | | | |
| (138) | 526 | Intramammary Dosage Forms Not Subject to Certification | | | |
| (139) | 529 | Certain Other Dosage Form New Animal Drugs Not Subject to Certification | | | |
| (140) | 536 | Tests for Specific Antibiotic Dosage Forms | | | |
| (141) | 539 | Bulk Antibiotic Drugs Subject to Certification | | | |

Documents, Government Printing Office, Washington, DC 20402, at a cost of twenty-three dollars (\$23.00).

(s) The Board incorporates by reference, including subsequent amendments and editions, Title 9, Part 317.2(1) of the Code of Federal Regulations. A copy of this material may be obtained at no cost from the Food and Drug Protection Division of the Department of Agriculture and Consumer Services.

(t) The Board incorporates by reference, including subsequent amendments and editions, Title 9, Part 381.125(b) of the Code of Federal Regulations. A copy of this material may be obtained at no cost from the Food and Drug Protection Division of the Department of Agriculture and Consumer Services.

(u) The Board incorporates by reference, including subsequent amendments and editions, a document entitled, "Fresh Air '2000' - A Look At FDA's Medical Gas Requirements," published by the United States Food and Drug Administration. Copies of this material may be obtained at the FDA website at <http://www.fda.gov/cder/dmpq/freshair.htm>. A copy of this material may also be obtained at no cost from the Food and Drug Protection Division of the North Carolina Department of Agriculture and Consumer Services.

History Note: Authority G.S. 106-139; 106-267; 106-267.2; Eff. December 14, 1981; Amended Eff. June 1, 2004; April 1, 2003; June 1, 1995; April 1, 1992; June 1, 1988; October 1, 1987.

02 NCAC 34 .0102 DEFINITIONS

In addition to the definitions contained in the Act, the following definitions apply:

- (1) "Act or law" means the Structural Pest Control Act of North Carolina of 1955.
- (2) "Active infestation of a specific organism" means evidence of present activity by that organism, visible in, on, or under a structure, or in or on debris under the structure.
- (3) "Active ingredient" means an ingredient which will or is intended to prevent, destroy, repel, or mitigate any pest.
- (4) "Acutely toxic rodenticidal baits" means all baits that, as formulated, are classified as Toxicity Category I or II (Signal Word "Danger" or "Warning") under 40 CFR Part 156.10.
- (5) "Board of Agriculture" means the Board of Agriculture of the State of North Carolina.
- (6) "Commercial certified applicator" shall mean any certified applicator employed by a licensed individual.
- (7) "Commercial structure" means any structure which is not a residential structure, including but not limited to shopping centers, offices, nursing homes, and similar structures.
- (8) "Complete surface residual spray" means the over-all application of any pesticide by spray or otherwise, to any surface areas within, on, under, or adjacent to, any structure in such a manner that the pesticide will adhere to surfaces and remain toxic to household pests

- (9) "Continuing education units" or "CEU" means units of noncredit education awarded by the Division of Continuing Studies, North Carolina State University or comparable educational institution, for satisfactorily completing course work.
- (10) "Continuing certification unit" or "CCU" means a unit of credit awarded by the Division upon satisfactory completion of one clock hour of approved classroom training.
- (11) "Crack and crevice application" means an application of pesticide made directly into a crack or void area with equipment capable of delivering the pesticide to the target area.
- (12) "Deficient soil sample" shall mean any soil sample which, when analyzed, is found to contain less than 25 percent, expressed in parts per million (ppm), of the termiticide applied by a licensee which would be found if the termiticide had been applied at the lowest concentration and dosage recommended by the labeling.
- (13) "Department" means the Department of Agriculture and Consumer Services of the State of North Carolina.
- (14) "Disciplinary action" means any action taken by the Committee as provided under the provisions of G.S. 106-65.28.
- (15) "Division" means the Structural Pest Control Division of the Department of Agriculture and Consumer Services of the State of North Carolina.
- (16) "Enclosed space" means any structure by whatever name known, including household structures; commercial buildings; warehouses; docks; vacant structures; places where people congregate such as hospitals, schools, churches, and others; railroad cars; trucks; ships; aircraft; and common carriers. It shall also mean vaults, tanks, chambers, and special rooms designed for use, being used, or intended to be used for fumigation operations.
- (17) "EPA" means the Environmental Protection Agency of the United States Government.
- (18) "EPA registration number" means the number assigned to a pesticide label by EPA.
- (19) "Flammable pesticidal fog" means the fog dispelled into space and produced:
 - (a) from oil solutions of pesticides finely atomized by a blast of heated air or exhaust gases from a gasoline engine; or
 - (b) from mixtures of water and pesticidal oil solutions passed through a combustion chamber, the water being converted to steam, which exerts a shearing action, breaking up the

- pesticidal oil into small droplets (thermal fog); or
- (c) from oil solutions of pesticides which are forced through very narrow space by centrifugal force and atomized as they are thrown off into the air (mechanical or cold fogs).
- (20) "Fog or fogging" means micron sized particles of pesticide(s) dispersed by means of a thermal or centrifugal fogger or a pressurized aerosol pesticide.
- (21) "Fumigation" means the use of fumigants within an enclosed space, or in, or under a structure, in concentrations which may be hazardous to man.
- (22) "Fumigation crew" or "crew" means personnel performing the fumigation operation.
- (23) "Fumigation operation" means all details prior to application of fumigant(s), the application of fumigant(s), fumigation period, and post fumigation details as outlined in these Rules.
- (24) "Fumigation period" means the period of time from application of fumigant(s) until ventilation of the fumigated structure(s) is completed and the structure or structures are declared safe for occupancy for human beings or domestic animals.
- (25) "Fumigator" means a person licensed under the provisions of G.S. 106-65.25(a)(3) or certified under the provisions of G.S. 106-65.26 to engage in or supervise fumigation operations.
- (26) "Gas-retaining cover" means a cover which will confine fumigant(s) to the space(s) intended to be fumigated.
- (27) "General fumigation" means the application of fumigant(s) to one or more rooms and their contents in a structure, at the desired concentration and for the necessary length of time to control rodents, insects, or other pests.
- (28) "Household" means any structure and its contents which are used for man.
- (29) "Household pest" means any vertebrate or invertebrate organism occurring in a structure or the surrounding areas thereof, including but not limited to insects and other arthropods, commensal rodents, and birds which have been declared pests under G.S. 143-444. "Household pest" does not include wood-destroying organisms.
- (30) "Household pest control" means that phase of structural pest control other than the control of wood-destroying organisms and fumigation and shall include the application of remedial measures for the purpose of curbing, reducing, preventing, controlling, eradicating, and repelling household pests.
- (31) "Inactive license" shall mean any structural pest control license held by an individual who has no employees and is not engaged in any structural pest control work except as a certified applicator or registered technician.
- (32) "Infestation of a specific organism" means evidence of past or present activity by that organism, visible in, on, or under a structure, or in or on debris under the structure.
- (33) "Inspection for a specific wood-destroying organism" means the visual examination of all accessible areas of a building and the probing of accessible structural members adjacent to slab areas, chimneys, and other areas particularly susceptible to attack by wood-destroying organisms to determine the presence of and the damage by that specific wood-destroying organism.
- (34) "Inspector" means any employee of the Structural Pest Control Division of the Department of Agriculture and Consumer Services of the State of North Carolina.
- (35) "Licensed structural pest control operation," or "pest control operation," or "operator," or "licensed operator" means any person licensed under the provisions of G.S. 106-65.25(a) or unlicensed who, for direct or indirect hire or compensation is engaged in the business of structural pest control work, as defined in G.S. 106-65.24(23).
- (36) "Liquefied gas aerosol" means the spray produced by the volatilization of a compressed and liquefied gas, to which has been added a nonvolatile oil solution containing a pesticide.
- (37) "Noncommercial certified applicator" shall mean any certified applicator not employed by a licensed individual.
- (38) "Open porch" means any porch without fill in which the distance from the bottom of the slab to the top of the soil beneath the slab is greater than 12 inches.
- (39) "Physical barrier" as used in 02 NCAC 34 .0500, means a barrier, which, by its physical properties and proper installation, is capable of preventing the passage of subterranean termites into a structure to be protected from subterranean termites.
- (40) "Residential structure" means any structure used, or suitable for use, as a dwelling such as a single- or multi-family home, house trailer, motor home, mobile home, a condominium or townhouse, or an apartment or any other structure, or portion thereof.
- (41) "Secretary" means the Secretary to the North Carolina Structural Pest Control Committee.
- (42) "Service vehicle" means any vehicle used regularly to transport the licensee or certified applicator or registered technician or other employee or any equipment or pesticides used in providing structural pest control services.
- (43) "Slab-on-ground" means a concrete slab in which all or part of that concrete slab is resting

- on or is in direct contact with the ground immediately beneath the slab.
- (44) "Solid masonry cap" means a continuous concrete or masonry barrier covering the entire top, width and length, of any wall, or any part of a wall, that provides support for the exterior or structural parts of a building.
- (45) "Space spray" means any pesticide, regardless of its particle size, which is applied to the atmosphere within an enclosed space in such a manner that dispersal of the pesticide particles is uncontrolled. Pesticidal fogs or aerosols, including those produced by centrifugal or thermal fogging equipment or pressurized aerosol pesticides, shall be considered space sprays.
- (46) "Spot fumigation" means the application of a fumigant to a localized space or harborage within, on, under, outside of, or adjacent to, a structure for local household pest or rodent control.
- (47) "Spot surface residual spray" means the application of pesticidal spray directly to a surface and only in specific areas where necessary and in such a manner that the pesticidal material will largely adhere to the surface where applied and will remain toxic to household pests or rodents or other pests for which applied for an extended period of time.
- (48) "Structure" means all parts of a building, whether vacant or occupied, in all stages of construction.
- (49) "Structural pests" means all pests that occur in any type of structure of man and all pests associated with the immediate environs of such structures.
- (50) "Sub-slab fumigation" means the application of a fumigant below or underneath a concrete slab and is considered spot fumigation.
- (51) "Supervision," as used in 02 NCAC 34 .0325, shall mean the oversight by the licensee of the structural pest control activities performed under that license. Such oversight may be in person by the licensee or through instructions, verbal, written or otherwise, to persons performing such activities. Instructions may be disseminated to such persons either in person or through persons employed by the licensee for that purpose.
- (52) "Termiticide(s)" (as used in these Rules) means those pesticides specified in 02 NCAC 34 .0502, Pesticides for Subterranean Termite Prevention and/or Control.
- (53) "Termiticide barrier" shall mean an area of soil treated with an approved termiticide, which, when sampled, is not deficient in termiticide.
- (54) "To use any pesticide in a manner inconsistent with its labeling" means to use any pesticide in a manner not permitted by the labeling. Provided that, the term shall not include:
- (a) applying a pesticide at any dosage, concentration, or frequency less than that specified on the labeling unless the labeling specifically prohibits deviation from the specified dosage, concentration, or frequency;
- (b) applying a pesticide against any target pest not specified on the labeling if the application is to the site specified on the labeling, unless the EPA has required that the labeling specifically state that the pesticide may be used only for the pests specified on the labeling; or
- (c) employing any method of application not prohibited by the labeling unless the labeling specifically states that the product may be applied only by the methods specified by the labeling.
- (55) "Type of treatment" means the method used to apply a pesticide formulation to a specific location, including but not limited to: space spray, crack and crevice, complete surface residual, spot surface residual, bait placement, or fog.
- (56) "Unauthorized personnel" means any individual or individuals not given specific authorization by the licensee or certified applicator to enter areas to which access is restricted by these Rules.
- (57) "Waiver" means a standard form prescribed by the Committee pursuant to 02 NCAC 34 .0603 which will, when completed correctly, permit the licensee to deviate from or omit one or more of the minimum treatment methods and procedures for structural pests which are set forth in the Committee rules, definitions, and requirements.
- (58) "Wood-decaying fungi" means any of the brown or white rot fungi in the Class Hymenomycetes that are capable of digesting or consuming the structural elements of wood after installation and causing a significant decline in strength or failure of wooden structural members.
- (59) "Wood-destroying insect report" means any written statement or certificate issued by an operator or his authorized agent, regarding the presence or absence of wood-destroying insects or their damage in a structure.
- (60) "Wood-destroying organism" is an organism such as a termite, beetle, other insect, or fungus which may devour or destroy wood or wood products and other cellulose material in, on, under, in contact with, and around structures.
- (61) "Wood-destroying organism report" means any written statement or certificate issued by an operator or his authorized agent, regarding

the presence or absence of wood-destroying organisms or their damage in a structure.

History Note: Authority G.S. 106-65.29;

Eff. July 1, 1976;

Readopted Eff. November 22, 1977;

Amended Eff. July 1, 2004; August 1, 2002; July 1, 2000; July 1, 1998; August 3, 1992; January 1, 1991; January 1, 1989.

02 NCAC 34 .0505 SUBTERRANEAN TERMITE PREVENTION/RES BLDGS UNDER CONST

(a) All treatments performed pursuant to this Rule shall be performed at the label recommended rate and concentration only.

(b) The following standards and requirements shall apply to the treatment of a building for subterranean termite control during construction if the building has a basement or crawl space:

- (1) Establish a vertical barrier in the soil by trenching or trenching and rodding along inside of the main foundation wall; the entire perimeter of all multiple masonry chimney bases, pillars, pilasters, and piers; and both sides of partition or inner walls with a termiticide from the top of the grade to the top of the footing or to a minimum depth of 30 inches, whichever is less. Where footings are exposed, treatment shall be performed adjacent to the footing but not below the bottom of the footing. Trench shall be no less than six inches in depth or to the bottom of the footing, whichever is less. Where drain tile, french drains, or other foundation drainage systems present a hazard of contamination outside the treatment zone, treatment shall be performed in a manner that will not introduce termiticide into the drainage system.
- (2) After a building or structure has been completed and the excavation filled and leveled, so that the final grade has been reached along the outside of the main foundation wall, establish a vertical barrier in the soil by trenching or trenching and rodding adjacent to the outside of the main foundation wall with a termiticide from the top of the grade to the top of the footing or to a minimum depth of 30 inches, whichever is less. Where footings are exposed, treatment shall be performed adjacent to the footing and not below the bottom of the footing. Trench shall be no less than six inches in depth or to the bottom of the footing, whichever is less. Where drain tile, french drains, or other foundation drainage systems present a hazard of contamination outside the treatment zone, treatment shall be performed in a manner that will not introduce termiticide into the drainage system.
- (3) Establish a horizontal termiticide barrier in the soil within three feet of the main foundation, under slabs, such as patios, walkways,

driveways, terraces, gutters, etc., attached to the building. Treatment shall be performed before slab is poured, but after fill material or fill dirt has been spread.

- (4) Establish a horizontal termiticide barrier in the soil under the entire surface of floor slabs, such as basements, porches, entrance platforms, garages, carports, breezeways, sun rooms, etc. The treatment shall be performed before slab is poured but after fill material or fill dirt has been spread.
 - (5) Establish a vertical termiticide barrier in the soil around all critical areas, such as expansion and construction joints and plumbing and utility conduits, at their point of penetration of the slab or floor or, for crawl space construction, at the point of contact with the soil.
 - (6) If concrete slabs are poured prior to treatment, treatment of slabs shall be performed as required by 02 NCAC 34 .0503(a) or (b): Except that; the buyer of the property or his authorized agent may release the licensee from further treatment of slab areas under this Rule provided such release is obtained in writing on the Subterranean Termite Sub-Slab Release Form provided by the Division, which shall contain the name of the builder, address of property, identification of the slab areas not treated, name and address of the structural pest control company and shall be signed by the company representative and the home buyer. This form may be obtained by writing the North Carolina Department of Agriculture and Consumer Services, Structural Pest Control Division, 1001 Mail Service Center, Raleigh, NC 27699-1001 or by calling (919) 733-6100.
- (c) Slab-on-Ground Construction. All parts of Paragraph (a) of this Rule shall be followed, as applicable, in treating slab-on-ground construction.
- (d) All treating requirements specified in this Rule shall be completed within 60 days following the completion of the structure, as described in Subparagraph (b)(2) of this Rule.
- (e) Paragraphs (b) and (c) of this Rule shall not apply to subterranean termite treatment performed using termite bait(s) labeled for protection of the entire structure when the licensee provides a warranty for the control of subterranean termites on the entire structure.
- (f) Paragraphs (b) and (c) of this Rule shall not apply to subterranean termite treatment performed using EPA registered topically applied wood treatment termiticides labeled for the protection of the entire structure when the licensee applies the material according to labeled directions and provides a warranty for the control of subterranean termites on the entire structure.
- (g) No later than the date of the completion of any treatment performed under this Rule, the licensee or his employee shall place a durable sticker/label, no less than three inches square, on the meter base, circuit breaker box or inside surface of kitchen cabinet door or other readily noticeable location providing, at a minimum, the following information:

- (1) The statement: "This structure was treated for the prevention of subterranean termites. A warranty has been issued to the builder. If you did not receive your copy of this warranty at closing, contact your builder or the company below for additional warranty information." in boldface type;
- (2) Name, address and telephone number of the company performing the treatment; and
- (3) Date of final treatment.

History Note: Authority G.S. 106-65.29;
 Eff. July 1, 1976;
 Readopted Eff. November 22, 1977;
 Amended Eff. August 1, 1980;
 Temporary Repeal Eff. August 24, 1987 for a period of 30 days to expire on September 22, 1987;
 Temporary Repeal Expired Eff. September 22, 1987;
 Amended Eff. July 1, 2004; August 1, 2002; April 1, 2001;
 July 1, 1998; January 1, 1991; January 1, 1989.

02 NCAC 48A .1208 NURSERY DEALER CERTIFICATE

- (a) Persons who maintain no regular nursery but who deal in nursery stock grown in certified or registered nurseries or who deal in collected plants shall be required to possess a nursery dealer certificate. To obtain such a certificate, the nursery dealer shall submit an application listing all sources of nursery stock and collected plants to be distributed or sold. It shall be a violation of this Section for a nursery dealer to distribute or sell nursery stock or collected plants which have not been inspected and certified by an inspector in North Carolina or an authorized plant pest regulatory official of another state or country.
- (b) The annual fee for a nursery dealer certificate shall be fifty dollars (\$50.00) for each location from which nursery stock is sold, bartered, exchanged or given away. This certificate expires December 31 of each year.
- (c) All nursery stock or collected plants in the custody of any dealer shall be subject to inspection at any time and shall be maintained in certifiable condition. Dealer certificates may be revoked at any time for cause. Records shall be kept of all plant acquisitions and shall be made available to any inspector of the North Carolina Department of Agriculture and Consumer Services upon request.

History Note: Authority G.S. 106-65.45; 106-65.46;
 106-284.18; 106-420;
 Eff. January 1, 1985;
 Amended Eff. June 1, 1990;
 Temporary Amendment Eff. November 24, 2003;
 Amended Eff. June 1, 2004.

TITLE 10A - DEPARTMENT OF HEALTH & HUMAN SERVICES

10A NCAC 13F .0213 APPEAL OF LICENSURE ACTION

The licensee of an adult care home may appeal a licensure action by commencing a contested case according to G.S. 150B-23

following attempts at informal resolution according to G.S. 150B-22.

History Note: Authority G.S. 131D-2; 143B-165;
 S.L. 2002-0160;
 Eff. January 1, 1977;
 Readopted Eff. October 31, 1977;
 Temporary Amendment Eff. July 1, 2003;
 Amended Eff. July 1, 2004.

10A NCAC 13F .0504 COMPETENCY VALIDATION FOR LICENSED HEALTH PROFESSIONAL SUPPORT TASKS

(a) An adult care home shall assure that non-licensed personnel and licensed personnel not practicing in their licensed capacity as governed by their practice act and occupational licensing laws are competency validated by return demonstration for any personal care task specified in Subparagraph (a)(1) through (28) of Rule .0903 of this Subchapter prior to staff performing the task and that their ongoing competency is assured through facility staff oversight and supervision.

(b) Competency validation shall be performed by the following licensed health professionals:

- (1) A registered nurse shall validate the competency of staff who perform personal care tasks specified in Subparagraphs (a)(1) through (28) of Rule .0903 of this Subchapter.
- (2) In lieu of a registered nurse, a respiratory care practitioner licensed under G.S. 90, Article 38, may validate the competency of staff who perform personal care tasks specified in Subparagraphs (a)(6), (a)(11), (a)(16), (a)(18), (a)(19) and (a)(21) of Rule .0903 of this Subchapter.
- (3) In lieu of a registered nurse, a registered pharmacist may validate the competency of staff who perform the personal care task specified in Subparagraph (a)(8) of Rule .0903 of this Subchapter.
- (4) In lieu of a registered nurse, an occupational therapist or physical therapist may validate the competency of staff who perform personal care tasks specified in Subparagraphs (a)(17) and (a)(22) through (27) of Rule .0903 of this Subchapter.

(c) Competency validation of staff, according to Paragraph (a) of this Rule, for the licensed health professional support tasks specified in Paragraph (a) of Rule .0903 of this Subchapter and the performance of these tasks is limited exclusively to these tasks except in those cases in which a physician acting under the authority of G.S. 131D-2(a1) certifies that non-licensed personnel can be competency validated to perform other tasks on a temporary basis to meet the resident's needs and prevent unnecessary relocation.

History Note: Authority G.S. 131D-2; 143B-165;
 S.L. 2002-0160;
 Temporary Adoption Eff. September 1, 2003;
 Eff. July 1, 2004.

10A NCAC 13F .0507 TRAINING ON CARDIO-PULMONARY RESUSCITATION

Each adult care home shall have at least one staff person on the premises at all times who has completed within the last 24 months a course on cardio-pulmonary resuscitation and choking management, including the Heimlich maneuver, provided by the American Heart Association, American Red Cross, National Safety Council, American Safety and Health Institute and Medic First Aid, or by a trainer with documented certification as a trainer on these procedures from one of these organizations.

History Note: Authority G.S. 131D-2; 143B-165; S.L. 2002-0160; Temporary Adoption Eff. September 1, 2003; Eff. July 1, 2004.

10A NCAC 13F .0702 DISCHARGE OF RESIDENTS

(a) The discharge of a resident initiated by the facility shall be according to conditions and procedures specified in Paragraphs (a) through (g) of this Rule. The discharge of a resident initiated by the facility involves the termination of residency by the facility resulting in the resident's move to another location and the facility not holding the bed for the resident based on the facility's bed hold policy.

(b) The discharge of a resident shall be based on one of the following reasons:

- (1) the discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility as documented by the resident's physician, physician assistant or nurse practitioner;
- (2) the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility as documented by the resident's physician, physician assistant or nurse practitioner;
- (3) the safety of other individuals in the facility is endangered;
- (4) the health of other individuals in the facility is endangered as documented by a physician, physician assistant or nurse practitioner;
- (5) failure to pay the costs of services and accommodations by the payment due date according to the resident contract after receiving written notice of warning of discharge for failure to pay; or
- (6) the discharge is mandated under G.S. 131D-2(a1).

(c) The notices of discharge and appeal rights as required in Paragraph (e) of this Rule shall be made by the facility at least 30 days before the resident is discharged except that notices may be made as soon as practicable when:

- (1) the resident's health or safety is endangered and the resident's urgent medical needs cannot be met in the facility under Subparagraph (b)(1) of this Rule; or
- (2) reasons under Subparagraphs (b)(2), (b)(3), and (b)(4) of this Rule exist.

(d) The reason for discharge shall be documented in the resident's record. Documentation shall include one or more of

the following as applicable to the reasons under Paragraph (b) of this Rule:

- (1) documentation by physician, physician assistant or nurse practitioner as required in Paragraph (b) of this Rule;
- (2) the condition or circumstance that endangers the health or safety of the resident being discharged or endangers the health or safety of individuals in the facility, and the facility's action taken to address the problem prior to pursuing discharge of the resident;
- (3) written notices of warning of discharge for failure to pay the costs of services and accommodations; or
- (4) the specific health need or condition of the resident that the facility determined could not be met in the facility pursuant to G.S. 131D-2(a1)(4) and as disclosed in the resident contract signed upon the resident's admission to the facility.

(e) The facility shall assure the following requirements for written notice are met before discharging a resident:

- (1) The Adult Care Home Notice of Discharge with the Adult Care Home Hearing Request Form shall be hand delivered, with receipt requested, to the resident on the same day the Adult Care Home Notice of Discharge is dated. These forms may be obtained at no cost from the Division of Medical Assistance, 2505 Mail Service Center, Raleigh, NC 27699-2505.
- (2) A copy of the Adult Care Home Notice of Discharge with a copy of the Adult Care Home Hearing Request Form shall be hand delivered, with receipt requested, or sent by certified mail to the resident's responsible person or legal representative on the same day the Adult Care Home Notice of Discharge is dated.
- (3) Failure to use and simultaneously provide the specific forms according to Subparagraphs (e)(1) and (e)(2) of this Rule shall invalidate the discharge. Failure to use the latest version of these forms shall not invalidate the discharge unless the facility has been previously notified of a change in the forms and been provided a copy of the latest forms by the Department of Health and Human Services.
- (4) A copy of the completed Adult Care Home Notice of Discharge, the Adult Care Home Hearing Request Form as completed by the facility prior to giving to the resident and a copy of the receipt of hand delivery or the notification of certified mail delivery shall be maintained in the resident's record.

(f) The facility shall provide sufficient preparation and orientation to residents to ensure a safe and orderly discharge from the facility as evidenced by:

- (1) notifying staff in the county department of social services responsible for placement services;

- (2) explaining to the resident and responsible person or legal representative why the discharge is necessary;
 - (3) informing the resident and responsible person or legal representative about an appropriate discharge destination; and
 - (4) offering the following material to the caregiver with whom the resident is to be placed and providing this material as requested prior to or upon discharge of the resident:
 - (A) a copy of the resident's most current FL-2;
 - (B) a copy of the resident's most current assessment and care plan;
 - (C) a copy of the resident's current physician orders;
 - (D) a list of the resident's current medications;
 - (E) the resident's current medications;
 - (F) a record of the resident's vaccinations and TB screening;
 - (5) providing written notice of the name, address and telephone number of the following, if not provided on the discharge notice required in Paragraph (e) of this Rule:
 - (A) the regional long term care ombudsman; and
 - (B) the protection and advocacy agency established under federal law for persons with disabilities.
- (g) If an appeal hearing is requested:
- (1) the facility shall provide to the resident or legal representative or the resident and the responsible person, and the Hearing Unit copies of all documents and records that the facility intends to use at the hearing at least five working days prior to the scheduled hearing; and
 - (2) the facility shall not discharge the resident before the final decision resulting from the appeal has been rendered, except in those cases of discharge specified in Paragraph (c) of this Rule.
- (h) If a discharge is initiated by the resident or responsible person, the administrator may require up to a 14-day written notice from the resident or responsible person which means the resident or responsible person may be charged for the days of the required notice if notice is not given or if notice is given and the resident leaves before the end of the required notice period.. Exceptions to the required notice are cases in which a delay in discharge or transfer would jeopardize the health or safety of the resident or others in the facility. The facility's requirement for a notice from the resident or responsible person shall be established in the resident contract or the house rules provided to the resident or responsible person upon admission.
- (i) The discharge requirements in this Rule do not apply when a resident is transferred to an acute inpatient facility for mental or physical health evaluation or treatment and the adult care facility's bed hold policy applies based on the expected return of the resident. If the facility decides to discharge a resident who

has been transferred to an acute inpatient facility and there has been no physician-documented level of care change for the resident, the discharge requirements in this Rule apply.

History Note: Authority G.S. 131D-2; 131D-4.5; 131D-21; 143B-165; S.L. 2002-0160; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Temporary Amendment Eff. July 1, 2003; Amended Eff. July 1, 2004.

10A NCAC 13F .0905 ACTIVITIES PROGRAM

- (a) Each adult care home shall develop a program of activities designed to promote the residents' active involvement with each other, their families, and the community. The program shall provide social, physical, intellectual, and recreational activities in a planned, coordinated, and structured manner.
- (b) The program shall be designed to promote involvement by all residents but is not to require any individual to participate in any activity against his will.
- (c) Each home shall assign a person to be the activities coordinator, who meets the qualifications specified in Rule.0404 of this Subchapter. The activities coordinator shall respond to the residents' need and desire for meaningful activities, by:
 - (1) Reviewing upon admission personal information about each resident's interests and capabilities recorded on an individualized index card or the equivalent. This card shall be completed from, at least, the information recorded on the Resident register, Form DSS-1865. It shall be maintained for use by the activities coordinator for developing activities and is to be updated as needed;
 - (2) Using the information on the residents' interests and capabilities to arrange for and provide planned individual and group activities for the residents. In addition to individual activities, there shall be a minimum of 10 hours of planned group activities per week. Homes designated for residents with HIV disease are exempt from the 10-hour requirement as long as the facility can demonstrate each resident's involvement in a structured volunteer program that provides the required range of activities;
 - (3) Preparing a monthly calendar of planned group activities which is to be in easily readable print, posted in a prominent location on the first day of each month, and updated when there are any changes;
 - (4) Involving community resources, such as recreational, volunteer, religious, aging and developmentally disabled-associated agencies, to enhance the activities available to residents. The coordinator may use the home's aides in carrying out some activities with residents; and
 - (5) Evaluating and documenting the overall effectiveness of the activities program at least every six months with input from the residents to determine what have been the most valued

activities and to elicit suggestions of ways to enhance the program.

(d) A variety of group and individual activities shall be provided. The program is to include, at least, the following types of activities:

(1) Social and Recreational Activities:

(A) Opportunity shall be available for both individual and group social and recreational activities sufficiently diverse to accommodate the residents' varied interests and capabilities. These activities emphasize increasing self-confidence and stimulating interest and friendships;

(B) Individual activity includes one to one interactions in mutually enjoyable activity, such as buddy walks, card playing and horseshoes as well as activity by oneself, such as bird watching, nature walks, and card playing;

(C) Each resident shall have the opportunity to participate in at least one planned group social or recreational activity weekly. A group activity is one which involves a number of residents in physical and mental interaction. Each resident shall be encouraged to participate in an activity which best matches his physical, mental and emotional capability. Such activities may include group singing, dancing, bingo, and exercise classes;

(D) Each resident shall have the opportunity to participate in at least one outing every other month. A resident interested in involving himself in the community more frequently shall be encouraged and helped to do so. The coordinator is to contact volunteers and residents' families to assist in the effort to get residents involved in activities outside the home;

(E) If a resident cannot participate actively in community events, arrangements shall be made so that the more active residents can still participate in such outings. If there is a question about a resident's ability to participate in an activity, the resident's physician shall be consulted to obtain a statement regarding the resident's capabilities; and

(F) The activities planned and offered shall take into account possible cultural differences of the residents;

(2) Diversional and Intellectual Activities:

(A) Opportunity for both individual and group diversional and intellectual activities sufficiently diverse to accommodate the residents' varied interests and capabilities shall be available. There shall be adequate supplies and supervision provided to enable each resident to participate;

(B) Individual activities emphasize individual accomplishments, creative expression, increased knowledge and the learning of new skills. Such activities may include sewing, crafts, painting, reading, creative writing, and wood carving;

(C) Each resident shall have the opportunity to participate in at least one planned group activity weekly that emphasizes group accomplishment, creative expression, increased knowledge, and the learning of new skills. Such activities may include discussion groups, drama, resident council meetings, book reviews, music appreciation, review of current events, and spelling bees; and

(D) The activities planned and offered shall take into account possible cultural differences of the residents.

(3) Work-Type and Volunteer Service Activities: Each resident shall have the opportunity to participate in meaningful work-type and volunteer service activities in the home or in the community, but participation shall be on an entirely voluntary basis. Under no circumstances shall this activity be forced upon a resident. Residents shall not be assigned these tasks in place of staff. Examples of work-type and volunteer services activities range from bedmaking, personal ironing, and assisting another resident, to more structured activities such as general ironing, making or repairing toys for children, telephone reassurance, and gardening.

History Note: Authority G.S. 131D-2; 143B-165; S.L. 2002-0160; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Amended Eff. April 1, 1987; April 1, 1984; Temporary Amendment Eff. July 1, 2003; Amended Eff. July 1, 2004.

10A NCAC 13F .0906 OTHER RESIDENT CARE AND SERVICES

(a) Transportation. The administrator shall assure the provision of transportation for the residents of adult care homes to necessary resources and activities, including transportation to the nearest appropriate health facilities, social services agencies,

shopping and recreational facilities, and religious activities of the resident's choice. The resident shall not be charged any additional fee for this service. Sources of transportation may include community resources, public systems, volunteer programs, family members as well as facility vehicles.

(b) Mail.

- (1) Residents shall receive their mail promptly and it shall be unopened unless there is a written, witnessed request authorizing management staff to open and read mail to the resident. This request shall be recorded on Form DSS-1865, the Resident Register or the equivalent;
- (2) Outgoing mail written by a resident shall not be censored; and
- (3) Residents shall be encouraged and assisted, if necessary, to correspond by mail with close relatives and friends. Residents shall have access to writing materials, stationery and postage and, upon request, the home shall provide such items at cost. It is not the home's obligation to pay for these items.

(c) Laundry.

- (1) Laundry services shall be provided to residents without any additional fee; and
- (2) It is not the home's obligation to pay for a resident's personal dry cleaning. The resident's plans for personal care of clothing shall be indicated on Form DSS-1865, the Resident Register.

(d) Telephone.

- (1) A telephone shall be available in a location providing privacy for residents to make and receive calls.
- (2) A pay station telephone is not acceptable for local calls; and
- (3) It is not the home's obligation to pay for a resident's toll calls.

(e) Personal Lockable Space.

- (1) Personal lockable space shall be provided for each resident to secure his personal valuables. One key shall be provided free of charge to the resident. Additional keys shall be provided to residents at cost upon request. It is not the home's obligation to pay for additional keys; and
- (2) While a resident may elect not to use lockable space, it shall still be available in the home since the resident may change his mind. This space shall be accessible only to the resident and the administrator or supervisor-in-charge. The administrator or supervisor-in-charge shall determine at admission whether the resident desires lockable space, but the resident may change his mind at any time.

(f) Visiting.

- (1) Visiting in the home and community at reasonable hours shall be encouraged and arranged through the mutual prior

understanding of the residents and administrator;

- (2) There shall be at least 10 hours each day for visitation in the home by persons from the community. If a home has established visiting hours or any restrictions on visitation, information about the hours and any restrictions shall be included in the house rules given to each resident at the time of admission and posted conspicuously in the home;
- (3) A signout register shall be maintained for planned visiting and other scheduled absences which indicates the resident's departure time, expected time of return and the name and telephone number of the responsible party;
- (4) If the whereabouts of a resident are unknown and there is reason to be concerned about his safety, the person in charge in the home shall immediately notify the resident's responsible person, the appropriate law enforcement agency and the county department of social services.

History Note: Authority G.S. 131D-2; 143B-165; S.L. 2002-0160; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Amended Eff. April 1, 1987; April 1, 1984; Temporary Amendment Eff. July 1, 2003; Amended Eff. July 1, 2004.

10A NCAC 13F .1206 ADVERTISING

The adult care home may advertise provided:

- (1) The name used is as it appears on the license.
- (2) Only the services and accommodations for which the home is licensed are used.
- (3) The home is listed under proper classification in telephone books, newspapers or magazines.

History Note: Authority G.S. 131D-2; 143B-165; S.L. 2002-0160; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Temporary Amendment Eff. July 1, 2003; Amended Eff. July 1, 2004.

10A NCAC 13G .0204 APPLICATION TO LICENSE AN EXISTING BUILDING

(a) An application for a license to operate a family care home for adults in an existing building where no alterations are necessary shall be made at the county department of social services.

(b) The following forms and reports shall be submitted through the county department of social services to the Division of Facility Services:

- (1) the Initial License Application;
- (2) a photograph of each side of the existing structure and one set of schematic floor plans or blueprints of the building showing the floor plan; type of construction; location, size and

- (3) height of windows; location and type of heating system; the use of basement and attic; location of doors and closets;
- (3) the Fire and Building Safety Inspection Report to be submitted with completion of construction or renovation; and
- (4) the Sanitation Report or a permit to begin operation from the sanitary division of the county health department.

(c) If during the study of the administrator and the home it does not appear that qualifications of the administrator or requirements for the home can be met, the county department of social services shall so inform the applicant, indicating in writing the reason, and give the applicant an opportunity to withdraw the application. Upon the applicant's request, the application shall be completed and submitted to the Division of Facility Services for consideration.

(d) The Division of Facility Services shall notify the applicant and the county department of social services of any required changes.

(e) Following review of application, references and all forms, a pre-licensing visit shall be made by a consultant of the Division of Facility Services.

(f) The consultant shall report his findings and recommendations to the Division of Facility Services which shall promptly notify, in writing, the applicant and the county department of social services of the decision to license or not to license the family care home.

History Note: Authority G.S. 131D-2; 143B-165; S.L. 2002-0160; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Amended Eff. July 1, 1990; April 1, 1987; April 1, 1984; ARRC Objection Lodged November 14, 1990; Amended Eff. May 1, 1991; Temporary Amendment Eff. September 1, 2003; Amended Eff. July 1, 2004.

10A NCAC 13G .0504 COMPETENCY VALIDATION FOR LICENSED HEALTH PROFESSIONAL SUPPORT TASKS

(a) A family care home shall assure that non-licensed personnel and licensed personnel not practicing in their licensed capacity as governed by their practice act and occupational licensing laws are competency validated by return demonstration for any personal care task specified in Subparagraph (a)(1) through (28) of Rule .0903 of this Subchapter prior to staff performing the task and that their ongoing competency is assured through facility staff oversight and supervision.

(b) Competency validation shall be performed by the following licensed health professionals:

- (1) A registered nurse shall validate the competency of staff who perform personal care tasks specified in Subparagraphs (a)(1) through (28) of Rule .0903 of this Subchapter.
- (2) In lieu of a registered nurse, a respiratory care practitioner licensed under G.S. 90, Article 38, may validate the competency of staff who perform personal care tasks specified in

Subparagraphs (a)(6), (11), (16), (18), (19) and (21) of Rule .0903 of this Subchapter.

(3) In lieu of a registered nurse, a registered pharmacist may validate the competency of staff who perform the personal care task specified in Subparagraph (a)(8) of Rule .0903 of this Subchapter.

(4) In lieu of a registered nurse, an occupational therapist or physical therapist may validate the competency of staff who perform personal care tasks specified in Subparagraphs (a)(17) and (a)(22) through (27) of Rule .0903 of this Subchapter.

(c) Competency validation of staff, according to Paragraph (a) of this Rule, for the licensed health professional support tasks specified in Paragraph (a) of Rule .0903 of this Subchapter and the performance of these tasks is limited exclusively to these tasks except in those cases in which a physician acting under the authority of G.S. 131D-2(a1) certifies that non-licensed personnel can be competency validated to perform other tasks on a temporary basis to meet the resident's needs and prevent unnecessary relocation.

History Note: Authority 131D-2; 143B-165; S.L. 2002-0160; Temporary Adoption Eff. September 1, 2003; Eff. July 1, 2004.

10A NCAC 13G .0507 TRAINING ON CARDIO-PULMONARY RESUSCITATION

Each family care home shall have at least one staff person on the premises at all times who has completed within the last 24 months a course on cardio-pulmonary resuscitation and choking management, including the Heimlich maneuver, provided by the American Heart Association, American Red Cross, National Safety Council, American Safety and Health Institute and Medic First Aid, or by a trainer with documented certification as a trainer on these procedures from one of these organizations. If the only staff person on site has been deemed physically incapable of performing these procedures by a licensed physician, that person is exempt from the training.

History Note: Authority 131D-2; 143B-165; S.L. 2002-0160; Temporary Adoption Eff. September 1, 2003; Eff. July 1, 2004.

10A NCAC 13G .0705 DISCHARGE OF RESIDENTS

(a) The discharge of a resident initiated by the facility shall be according to conditions and procedures specified in Paragraphs (a) through (g) of this Rule. The discharge of a resident initiated by the facility involves the termination of residency by the facility resulting in the resident's move to another location and the facility not holding the bed for the resident based on the facility's bed hold policy.

(b) The discharge of a resident shall be based on one of the following reasons:

- (1) the discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility as documented by the resident's

- physician, physician assistant or nurse practitioner;
 - (2) the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility as documented by the resident's physician, physician assistant or nurse practitioner;
 - (3) the safety of other individuals in the facility is endangered;
 - (4) the health of other individuals in the facility is endangered as documented by a physician, physician assistant or nurse practitioner;
 - (5) failure to pay the costs of services and accommodations by the payment due date according to the resident contract after receiving written notice of warning of discharge for failure to pay; or
 - (6) the discharge is mandated under G.S. 131D-2(a1).
- (c) The notices of discharge and appeal rights as required in Paragraph (e) of this Rule shall be made by the facility at least 30 days before the resident is discharged except that notices may be made as soon as practicable when:
- (1) the resident's health or safety is endangered and the resident's urgent medical needs cannot be met in the facility under Subparagraph (b)(1) of this Rule; or
 - (2) reasons under Subparagraphs (b)(2), (b)(3), and (b)(4) of this Rule exist.
- (d) The reason for discharge shall be documented in the resident's record. Documentation shall include one or more of the following as applicable to the reasons under Paragraph (b) of this Rule:
- (1) documentation by physician, physician assistant or nurse practitioner as required in Paragraph (b) of this Rule;
 - (2) the condition or circumstance that endangers the health or safety of the resident being discharged or endangers the health or safety of individuals in the facility, and the facility's action taken to address the problem prior to pursuing discharge of the resident;
 - (3) written notices of warning of discharge for failure to pay the costs of services and accommodations; or
 - (4) the specific health need or condition of the resident that the facility determined could not be met in the facility pursuant to G.S. 131D-2(a1)(4) and as disclosed in the resident contract signed upon the resident's admission to the facility.
- (e) The facility shall assure the following requirements for written notice are met before discharging a resident:
- (1) The Adult Care Home Notice of Discharge with the Adult Care Home Hearing Request Form shall be hand delivered, with receipt requested, to the resident on the same day the Adult Care Home Notice of Discharge is dated. These forms may be obtained at no cost from the Division of Medical Assistance, 2505 Mail Service Center, Raleigh, NC 27699-2505.
 - (2) A copy of the Adult Care Home Notice of Discharge with a copy of the Adult Care Home Hearing Request Form shall be hand delivered, with receipt requested, or sent by certified mail to the resident's responsible person or legal representative on the same day the Adult Care Home Notice of Discharge is dated.
 - (3) Failure to use and simultaneously provide the specific forms according to Subparagraphs (e)(1) and (e)(2) of this Rule shall invalidate the discharge. Failure to use the latest version of these forms shall not invalidate the discharge unless the facility has been previously notified of a change in the forms and been provided a copy of the latest forms by the Department of Health and Human Services.
 - (4) A copy of the completed Adult Care Home Notice of Discharge, the Adult Care Home Hearing Request Form as completed by the facility prior to giving to the resident and a copy of the receipt of hand delivery or the notification of certified mail delivery shall be maintained in the resident's record.
- (f) The facility shall provide sufficient preparation and orientation to residents to ensure a safe and orderly discharge from the facility as evidenced by:
- (1) notifying staff in the county department of social services responsible for placement services;
 - (2) explaining to the resident and responsible person or legal representative why the discharge is necessary;
 - (3) informing the resident and responsible person or legal representative about an appropriate discharge destination; and
 - (4) offering the following material to the caregiver with whom the resident is to be placed and providing this material as requested prior to or upon discharge of the resident:
 - (A) a copy of the resident's most current FL-2;
 - (B) a copy of the resident's most current assessment and care plan;
 - (C) a copy of the resident's current physician orders;
 - (D) a list of the resident's current medications;
 - (E) the resident's current medications; and
 - (F) a record of the resident's vaccinations and TB screening.
 - (5) providing written notice of the name, address and telephone number of the following, if not provided on the discharge notice required in Paragraph (e) of this Rule:
 - (A) the regional long term care ombudsman; and

- (B) the protection and advocacy agency established under federal law for persons with disabilities.
- (g) If an appeal hearing is requested:
 - (1) the facility shall provide to the resident or legal representative or the resident and the responsible person, and the Hearing Unit copies of all documents and records that the facility intends to use at the hearing at least five working days prior to the scheduled hearing; and
 - (2) the facility shall not discharge the resident before the final decision resulting from the appeal has been rendered, except in those cases of discharge specified in Paragraph (c) of this Rule.
- (h) If a discharge is initiated by the resident or responsible person, the administrator may require up to a 14-day written notice from the resident or responsible person which means the resident or responsible person may be charged for the days of the required notice if notice is not given or if notice is given and the resident leaves before the end of the required notice period.. Exceptions to the required notice are cases in which a delay in discharge or transfer would jeopardize the health or safety of the resident or others in the facility. The facility's requirement for a notice from the resident or responsible person shall be established in the resident contract or the house rules provided to the resident or responsible person upon admission.
- (i) The discharge requirements in this Rule do not apply when a resident is transferred to an acute inpatient facility for mental or physical health evaluation or treatment and the adult care facility's bed hold policy applies based on the expected return of the resident. If the facility decides to discharge a resident who has been transferred to an acute inpatient facility and there has been no physician-documented level of care change for the resident, the discharge requirements in this Rule apply.

History Note: Authority G.S. 131D-2; 131D-4.5; 131D-21; 143B-165; S.L. 99-0334; 2002-0160; Temporary Adoption Eff. January 1, 2000; December 1, 1999; Eff. April 1, 2001; Temporary Amendment Eff. July 1, 2003; Amended Eff. July 1, 2004.

10A NCAC 26C .0501 SCOPE

This Section sets forth rules governing summary suspension and revocation of authorization to receive public funding for providing mental health, developmental disabilities and substance abuse services.

History Note: Authority G.S. 122C-112.1; 143B-139.1; 150B-21.1; Eff. July 1, 2004.

10A NCAC 26C .0502 DEFINITIONS

As used in the rules in this Section, the following terms have the meanings specified:

- (1) "Authorization to receive public funding for providing services" means approval from the

Department to receive funding through one or more of the following mechanisms;

- (a) enrollment of a provider with Medicaid, as defined in 42 C.F.R. 440.90, 42 C.F.R. 440.130(D), and 42 C.F.R. 440.180 and SL 2002-164; or
- (b) compliance with contract or funding requirements for state or federal funds, as defined in 10A NCAC 27A, Sections .0100 through .0200.
- (2) "Funding authority" means the state agency that is responsible for administering state or federal funds, or the area authority or county program that is responsible for administering local funds.
- (3) "Provider" means any person or entity authorized to provide publicly funded services.
- (4) "Services" means publicly funded mental health, developmental disabilities and substance abuse services.
- (5) "Statutes or rules" mean the North Carolina General Statutes, North Carolina Administrative Code.
- (6) "Substantial failure to comply" means evidence of one or more of the following:
 - (a) the provider has not addressed issues that endanger the health, safety or welfare of clients receiving services;
 - (b) the provider has been convicted of a crime specified in G.S. 122C-80;
 - (c) the provider has not made available and assessable all sources of information necessary to complete the monitoring processes set out in G.S. 122C-112.1;
 - (d) the provider has created or altered documents to avoid sanctions;
 - (e) the provider has created or altered documents to avoid sanctions;
 - (f) the provider has not submitted, revised or implemented a plan of correction in the specified timeframes; or
 - (g) the provider has not removed the cause of a summary suspension in the specified timeframes.

History Note: Authority G.S. 122C-112.1; 143B-139.1; 150B-21.1; Eff. July 1, 2004.

10A NCAC 26C .0503 SUMMARY SUSPENSION

- (a) The DMH/DD/SAS shall issue a written order of agency-wide, site-limited or service-specific summary suspension of state or federal mental health, developmental disabilities and substance abuse services funds and shall refer findings concerning licensed providers for investigation by the licensing agency, when it determines that a client's health, safety or welfare is in immediate jeopardy, as defined in 10A NCAC 27G .0602(5). Where funding is authorized by other public sources,

the DMH/DD/SAS shall refer its findings to the funding authority and shall refer findings concerning licensed providers for investigation by the licensing agency, when it determines that a client's health, safety or welfare is in immediate jeopardy. The DMH/DD/SAS shall include its findings in the order or referral.

(b) An order of summary suspension shall be effective on the date specified in the order or on the date of the first attempt to deliver notification at the last known address of the provider, whichever is later.

(c) The order shall specify a date by which the provider shall remove the cause for the emergency action and authorization for funding shall resume.

(d) The provider may contest the order by requesting a contested case hearing pursuant to G.S. 150B. Requesting a contested hearing does not stay the order for summary suspension.

History Note: Authority G.S. 122C-112.1; 143B-139.1; 150B-21.1; Eff. July 1, 2004.

10A NCAC 26C .0504 REVOCATION

(a) The DMH/DD/SAS shall revoke authorization to receive funding to provide services utilizing state or federal mental health, developmental disabilities and substance abuse services funds and make a recommendation to DMA to revoke enrollment for Medicaid, when it finds that there has been substantial failure to comply with statutes or pursuant to Rule .0502(5) of this Section. Where funding is authorized by other public sources, the DMH/DD/SAS shall refer its findings to the funding authority. Regardless of funding authority, the DMH/DD/SAS shall refer findings concerning licensed providers for investigation by the licensing agency when it determines there has been substantial failure to comply with statutes or rules. The DMH/DD/SAS shall include its findings in the revocation order, recommendation or referral.

(b) Before revoking authorization, making a recommendation to the Division of Medical Assistance (DMA) or making a referral to another funding authority or licensing agency, the DMH/DD/SAS shall provide written notice to the provider stating that continued failure to comply with statutes or rules will result in the revocation, recommendation and referral.

(c) The DMH/DD/SAS shall give the provider written notice of the revocation order, the recommendation to DMA or referral of findings to the funding authority or licensing agency, as applicable. The written notice shall include the reasons for the action, and the grievance/appeal process or contested case procedures pursuant to G.S. 150B.

(d) The revocation notice shall be effective on the date specified in the notice or on the date of the first attempt to deliver notification at the last known address of the provider, whichever is later.

(e) The DMH/DD/SAS shall provide to DMA or other funding authority a written notice of the revocation order and a recommendation to revoke Medicaid enrollment. The DMH/DD/SAS shall also provide a copy of the notice and recommendation to the licensing agency, as applicable.

(f) The provider may contest the order by requesting a contested case hearing pursuant to G.S. 150B. Requesting a contested case hearing does not stay the revocation order.

History Note: Authority G. S. 122C-112.1; 143B-139.1; 150B-21.1; Eff. July 1, 2004.

10A NCAC 27G .0402 LICENSE ISSUANCE

(a) Applications for licensure shall be requested and completed on the form provided by DFS at least 30 days prior to the planned operation date of a new facility. Copies of reports, findings or recommendations issued by any accreditation agency and corrective action plans shall be submitted with the application for licensure.

(b) The content of license applications shall include:

- (1) Name of person (as defined in G.S. 122C-3) submitting the application;
- (2) Business name of facility, if applicable;
- (3) Street location of the facility (including multiple addresses if more than one building at one site);
- (4) Name and title of the operator of the facility;
- (5) Type of facility; services offered; ages served; and, when applicable, capacity and a floor plan showing bed locations and room numbers, any unlocked time-out rooms, and any locked interior or exterior doors which would prohibit free egress of clients; and
- (6) Indication of whether the facility is operated by an area program, is under contract with an area program, or is a private facility; and
- (7) All application for a new license shall disclose the names of individuals who are owners, partners or shareholders holding an ownership or controlling interest of 5% or more of the applicant entity.

(c) DFS shall conduct an on-site inspection to determine compliance with all rules and statutes. If the facility is operated by or contracted with an area program, DFS may, in lieu of conducting an on-site inspection, accept written verification from the area program or DMH/DD/SAS that the area program or DMH/DD/SAS has conducted an on-site review and the facility is in compliance with rules and statutes. The written verification shall be in such form as DFS may require.

(d) DFS shall issue a license after it determines a facility is in compliance with:

- (1) Certificate of Need law (G.S. 131E-183) and Certificate of Need rules as codified in 10 NCAC 3R .2400, .2500, or .2600, whichever is applicable;
- (2) Building Code and physical plant requirements in these Rules;
- (3) Annual fire and safety and sanitation requirements, with the exception of a day/night or periodic service that does not handle food for which a sanitation inspection report is not required; and
- (4) Applicable rules and statutes.

- (e) Licenses shall be issued to the specific premise for types of services indicated on the application.
- (f) A separate license shall be required for each facility which is maintained on a separate site, even though the sites may be under the same ownership or management.

History Note: Authority G.S. 122C-3; 122C-23; Eff. May 1, 1996; Amended Eff. July 1, 2004.

10A NCAC 27G .0404 OPERATIONS DURING LICENSED PERIOD

- (a) A license shall be valid for a period not to exceed two years from the date on which the license is issued.
- (b) For all facilities providing periodic and day/night services, the license shall be posted in a prominent location accessible to public view within the licensed premises.
- (c) For 24-hour facilities, the license shall be readily available for review upon request.
- (d) A facility shall accept no more clients than the number for which it is licensed.
- (e) DFS may conduct inspections of facilities without advance notice. For facilities that are not operated by or contracted with area programs, and that are not subject to the Accreditation Review described in Section .0600 of these Rules, DFS shall conduct an on-site inspection at least once every two years. For purposes of this inspection, DFS may accept DMH/DD/SAS or area program verification in accordance with Rule .0402(c) of this Section, or deemed status in accordance with Rule .0403 of this Section.
- (f) Written notification must be submitted to DFS prior to any of the following:
 - (1) Construction of a new facility or any renovation of an existing facility;
 - (2) Increase or decrease in capacity by program service type;
 - (3) Change in program service;
 - (4) Change in ownership including any change in a partnership;
 - (5) Change of name of facility; or
 - (6) Change in location of facility.

(g) When a licensee plans to close a facility or discontinue a service, written notice at least 30 days in advance shall be provided to DFS, to all affected clients, and when applicable, to the legally responsible persons of all affected clients. This notice shall address continuity of services to clients in the facility.

(h) Licenses shall expire unless renewed by DFS for an additional period. Thirty days prior to the expiration of a license, the licensee shall submit to DFS the following information:

- (1) Brief description of any changes in the facility since the last written notification was submitted;
- (2) Annual local fire and sanitation inspection reports, with the exception of a day/night or periodic service that does not handle food for which a sanitation inspection report is not required;

- (3) Copies of deficiencies and corrective action issued by an area program, DMH/DD/SAS, or any accreditation agency; and
- (4) All applications for license renewal shall disclose the names of individuals who are owners, partners or shareholders holding an ownership or controlling interest of 5% or more of the applicant entity.

History Note: Authority G.S. 122C-23; 122C-25; 122C-27; Eff. May 1, 1996; Amended Eff. July 1, 2004.

10A NCAC 27G .0506 COMMUNICATION PROCEDURES FOR OUT OF HOME COMMUNITY PLACEMENT

(a) The purpose of this Rule is to address communication procedures concerning out of the home-community placements for children and adolescents. This includes children and adolescents served through the area authority or county program developmental disabilities, mental health and substance abuse services system and those children and adolescents residing in ICF-MR facilities in their catchment areas.

(b) Area authority or county program representative(s) shall meet with the parent(s) or legal guardian and other representatives involved in the care and treatment of the child or adolescent, including local Department of Social Services (DSS), Local Education Agency (LEA) and criminal justice agency, to make service planning decisions prior to the placement of the child and adolescent out of the home-community. The area authority or county program may use existing child and family teams for this purpose.

(c) The home-community area authority or county program shall be responsible for notification of placement. The notification of placement shall be made via e-mail, fax or hard copy within three business days after out of home-community placement occurs. In case of an emergency, notification may be by telephone with written notification occurring the next day. The following entities shall be notified:

- (1) legal guardian;
- (2) other representatives involved in the care and treatment of the child or adolescent;
- (3) host-community provider; and
- (4) host-community representatives (may include the court counselor, county DSS, regional Children's Developmental Services Agency (CDSA) or the LEA.

(d) Notification shall be completed on a form provided by the Secretary, to include the following information:

- (1) child or adolescent information: name, date of birth, grade, identification number, social security number, date of placement out of home-community;
- (2) parent/legal guardian information: name, address, telephone number;
- (3) home-DDS and host-DSS information: county; contact person name, address, telephone number;
- (4) home-area authority/county program and host-area authority/county program information:

- (5) name of program; contact person name, address, telephone number; home-school and host-school information: school name, address, telephone number, principal, special education program administrator; or
- (6) person completing notification form information: name, date form completed, agency, address and telephone number.

History Note: Authority G.S. 122C-113; 143B-139.1; 150B-21.1; Eff. July 1, 2004.

10A NCAC 27G .0601 SCOPE

- (a) This Section governs area authority or county program monitoring of the provision of public services in the area authority's or county program's catchment area.
- (b) The area authority or county program shall monitor the provision of public services in the area authority's or county program's catchment area pursuant to G.S. 122C-11.
- (c) The area authority or county program shall develop and implement written policies governing monitoring of the provision of public services that include:
 - (1) receiving, reviewing and responding to level II and level III incident reports as set forth in Rules .0605 and .0609 of this Section;
 - (2) receiving and responding to complaints concerning the provision of public services; as set forth in Rules .0606 and .0607;
 - (3) conducting local monitoring of Categories A and B providers of public services as set forth in Rule .0608 of this Section; and
 - (4) analyzing trends in the information identified in Subparagraph (c)(1) through (c)(3) of this Rule.
- (d) As set forth in G.S. 122C-111, monitoring as specified in this Section shall not supercede or duplicate the regulatory authority or functions of the Department of Health and Human Services.
- (e) An area authority, county program or provider of public services shall exchange information, including confidential information, when necessary to coordinate and carry out the monitoring functions set forth in this Section. The exchange of information shall apply as follows:
 - (1) as area authority or county program to another area authority or county program;
 - (2) a provider of public services to an area authority or county program; and
 - (3) a provider of public services to another provider of public services.

History Note: Authority G.S. 122C-112.1; G.S. 143B-139.1; Eff. July 1, 2004.

10A NCAC 27G .0602 DEFINITIONS

- In addition to the terms defined in G.S. 122C-3 and Rules .0103 and .0104 of this Subchapter, the following terms shall apply:
- (1) "Complaint investigation" means the process of determining if an allegation made against a

- provider concerning the provision of public services is substantiated.
- (2) "Confidential information" means the same as defined in G.S. 122C-3(9). The definition contained in the statute controls regardless of the rule language that follows. At the time of adoption, the definition of confidential information was as follows: information whether recorded or not, relating to an individual served by a facility that was received in connection with the performance of any function of the facility. "Confidential information" does not include statistical information from reports and records or information regarding treatment or services which is shared for training, treatment, habilitation or monitoring purposes that does not identify clients either directly or by reference to publicly known or available information.
- (3) "ICF/MR" means a facility certified for Medicaid as an Intermediate Care Facility for the Mentally Retarded.
- (4) "Incident" means the same as defined in 10A NCAC 27G .0103(b)(32). The definition contained in the statute controls regardless of the rule language that follows. At the time of adoption, the definition of incident was as follows: any happening which is not consistent with the routine operation of a facility or service or the routine care of a client and that is likely to lead to adverse effects upon a client.
- (5) "Level I incident" means the same as defined in 10A NCAC 27G .0103(b)(32) and does not meet the definition of a level II incident or level II incident.
- (6) "Level II incident" means the same as defined in 10A NCAC 27G .0103(b)(32) and results in a threat to a client's health, safety; or a threat to the health, safety of others due to client behavior and does not meet definition of a level III incident.
- (7) "Level III incident" means the same as defined in 10A NCAC 27G .0103(b)(32) and results in:
 - (a) a death, permanent physical or psychological impairment to a client;
 - (b) a death, permanent physical or psychological impairment caused by a client; or
 - (c) a threat to public safety caused by a client.
- (8) "Local Monitoring" means area authority or county program monitoring of the provision of public services in its catchment area that are provided by Categories A and B providers. The area authority or county program shall collaborate with State Agencies and other local

agencies to ensure statewide oversight of Categories A and B providers.

- (9) "Monitor" or "Monitoring" means the interaction between the area authority or county program and a provider of public services regarding the functions set forth in Rule .0601(c) of this Section.
- (10) "Provider category" means the type of facility in which a client receives services or resides. The provider category determines the extent of monitoring that a provider receives and is determined as follows:
 - (a) Category A - facilities licensed pursuant to G.S. 122C, Article 2, except for hospitals; these include 24-hour residential facilities, day treatment and outpatient services;
 - (b) Category B – G.S. 122C, Article 2, community based providers not requiring State licensure;
 - (c) Category C - hospitals, state-operated facilities, nursing homes, adult care homes, family care homes, foster care homes or child care facilities; and
 - (d) Category D - individuals providing only outpatient or day services and are licensed or certified to practice in the State of North Carolina.
- (11) "Public services" means the same as defined in G.S. 122C-3 (30b). The definition contained in the statute controls regardless of the rule language that follows. At the time of adoption, the definition of public services was as follows: publicly funded mental health, developmental disabilities and substance abuse services, whether provided by public or private providers.

History Note: Authority G.S. 122C-112.1; 143B-139.1; Eff. July 1, 2004.

10A NCAC 27G .0603 INCIDENT RESPONSE REQUIREMENTS FOR CATEGORIES A AND B PROVIDERS

- (a) Categories A and B providers shall respond to level I, II or III incidents by:
 - (1) attending to the health and safety needs of individuals involved in the incident;
 - (2) determining the cause of the incident;
 - (3) developing and implementing corrective measures;
 - (4) developing and implementing measures to prevent similar incidents;
 - (5) assigning person(s) to be responsible for implementation of the corrections and preventive measures; and
 - (6) maintaining documentation regarding Subparagraphs (a)(1) through (a)(5) of this Rule.

(b) In addition to the requirements set forth in Paragraph (a) of this Rule, Categories A and B providers shall respond to a level III incident that occurs while the client is in the care of a provider or on the provider's premises by:

- (1) immediately securing the client record by:
 - (A) obtaining the client record;
 - (B) making a photocopy;
 - (C) certifying the copy's completeness; and
 - (D) transferring the copy to a peer review team;
- (2) convening a meeting of a peer review team within 24 hours of the incident. The peer review team shall:
 - (A) review the copy of the client record as specified in Subparagraph (b)(1) of this Rule;
 - (B) gather other information needed; and
 - (C) issue a report concerning the incident to the provider and to the client's home area authority or county program to facilitate the monitoring of services as required by G.S. 122C-111 and other State statutes; and
- (3) immediately notifying the following:
 - (A) the area authority or county program responsible for the catchment area where the services are provided pursuant to Rule .0604;
 - (B) the client's legal guardian, as applicable; and
 - (C) any other authorities required by law.

History Note: Authority G.S. 122C-112.1; 143B-139.1; Eff. July 1, 2004.

10A NCAC 27G .0604 AREA AUTHORITY OR COUNTY PROGRAM RESPONSE TO COMPLAINTS

- (a) Categories A and B providers shall report a level II or level III incident to the area authority or county program responsible for the catchment area where services are provided within 72 hours of the incident. The report shall be submitted on a form provided by the Secretary. The report may be submitted via mail, in person, facsimile or other electronic means. The report shall include the following information:
 - (1) reporting provider contact and identification information;
 - (2) client identification information;
 - (3) type of incident;
 - (4) description of incident;
 - (5) status of the effort to determine the cause of the incident; and
 - (6) other individuals or authorities notified or responding.
- (b) Categories A and B providers shall explain any missing or incomplete information. By the end of the next business day, the provider shall update the report by:
 - (1) notifying the area authority or county program when it has reason to believe that information

- (2) provided in the report may be erroneous, misleading or otherwise unreliable; and submitting to the area authority or county program information required on the incident form that was previously unavailable.

(c) Categories A and B providers shall submit, upon request by the area authority or county program, other information obtained regarding the incident, including:

- (1) hospital records including confidential information;
- (2) reports by other authorities; and
- (3) the provider's response to the incident.

(d) Categories A and B providers shall send a report quarterly to the area authority or county program. The report shall be submitted on a form provided by the Secretary via electronic means and shall include summary information as follows:

- (1) medication errors that do not meet the definition of a level II or level III incident;
- (2) searches of a client or his living area; and
- (3) seizures of client property or property in the possession of a client.

(e) Categories A and B providers shall send a copy of all level III incident reports to DFS and DMH/DD/SAS for Category A providers and to DMH/DD/SAS for Category B providers immediately upon receipt of the report.

History Note: Authority G.S. 122C-112.1; 143B-139.1; Eff. July 1, 2004.

10A NCAC 27G .0605 AREA AUTHORITY OR COUNTY PROGRAM MANAGEMENT OF INCIDENTS

Upon learning of a level III incident that occurs while a client is in the care of a provider or on a provider's premises, the area authority or county program shall respond by:

- (1) ensuring the necessary actions have been taken to protect the client's health and safety;
- (2) ensuring the client records are secured as set forth in Rule .0603 of this Section;
- (3) ensuring a meeting of a peer review team is convened within 24 hours as set forth in Rule .0603 of this Section;
- (4) ensuring the client's legal guardian, as applicable, and other authorities are notified as set forth in Rule .0603 of this Section;
- (5) reviewing the peer review team report; and
- (6) conducting local monitoring of the provider according to the requirements as set forth in Rule .0608 of this Section.

History Note: Authority G.S. 122C-112.1; 143B-139.1; Eff. July 1, 2004.

10A NCAC 27G .0606 AREA AUTHORITY REQUIREMENTS CONCERNING COMPLAINTS PERTAINING TO ALL PROVIDER CATEGORIES

(a) The area authority or county program shall respond to complaints received concerning the provision of public services pertaining to all provider categories. The area authority or county program shall:

- (1) establish a written notification procedure to inform each client of the complaint process concerning the provision of public services. The procedure shall include the provision of written information explaining the client's right to contact the area authority or county program, the DMH/DD/SAS, DFS and the Governor's Advocacy Council for Persons with Disabilities;
- (2) seek to resolve issues of concern through informal agreement between the client and the provider and document the attempts at resolution; and
- (3) develop and implement written policies for receiving, processing, referring, investigating and following up on complaints. The policies shall include:
 - (A) safeguards for protecting the identity of the complainant;
 - (B) safeguards for protecting the complainant and any staff person from harassment or retaliation;
 - (C) procedures to receive and track complaints;
 - (D) procedures to assist a client in initiating the complaint process;
 - (E) procedures for encouraging the complainant to communicate with the provider to allow for resolution of the issue;
 - (F) methods to be used in investigating a complaint;
 - (G) options to be considered in resolving a complaint, including corrective action and referral to the DMH/DD/SAS, DFS, DSS or other agencies as required; and
 - (H) procedures governing appeals made by the provider;

(b) When the area authority or county program refers the complaint to the State or local government agency responsible for the regulation and oversight of the provider, the area authority or county program shall send a letter to the complainant informing them of the referral and the contact person at the agency where the referral was made.

(c) The area authority or county program shall contact the State or local government agency where the referral was made within 120 days of the date the area authority or county program received the complaint to determine the actions the State or local government agency has taken in response to the complaint. The area authority or county program shall ensure the State or local government agency's response is provided to the complainant and the client's home area authority or county program, if different.

History Note: Authority G.S. 122C-112.1; 143B-139.1; Eff. July 1, 2004.

10A NCAC 27G .0607 COMPLAINTS PERTAINING TO CATEGORY A OR CATEGORY B PROVIDERS

EXCLUDING ICF/MR FACILITIES

(a) The area authority or county program shall respond to complaints received concerning the provision of public services pertaining to Categories A and B providers within its catchment area, except ICF/MR facilities.

(b) The area authority or county program shall make contact with the provider when investigating a complaint. The area authority or county program shall state the purpose of the contact and inform the provider that the area authority or county program is in receipt of a complaint concerning the provider.

(c) The area authority or county program shall complete the complaint investigation within 30 days of the date of the receipt of the complaint.

(d) Upon completion of the complaint investigation, the area authority or county program shall submit a report of investigation findings to the complainant, the provider and the client's home area authority or county program, if different. The report shall be submitted within 10 working days of the date of completion of the investigation. The complaint investigation report shall include:

- (1) statements of the allegations or complaints lodged;
- (2) steps taken and information reviewed to reach conclusions about each allegation or complaint;
- (3) conclusions reached regarding each allegation or complaint;
- (4) citations of law and rule pertinent to each allegation or complaint; and
- (5) required action regarding each allegation or complaint.

(e) The provider shall submit a plan of correction to the area authority or county program for each issue requiring correction identified in the report. The plan of correction shall be submitted to the area authority or county program within 10 working days from the date the provider receives the complaint investigation report. The corrective actions shall not exceed 60 days from the date of the complaint investigation report.

(f) The area authority or county program shall review and respond in writing to the provider's plan of correction with approval or a description of additional required information. The area authority or county program shall respond to the provider within 10 working days of receipt of the plan of correction.

(g) The area authority or county program shall follow-up on issues requiring correction in the investigation report no later than 60 days from the date the plan of correction is approved.

(h) The area authority or county program shall refer investigation of a complaint concerning a Category A provider to DFS, or a Category B provider to DMH/DD/SAS when the area authority or county program is a party to the complaint.

(i) The area authority or county program shall provide information regarding the disposition of the complaint to the complainant and the client's home area authority or county program, if different, as soon as the investigation is concluded.

(j) The area authority or county program shall maintain copies of complaint investigation, resolution and follow-up reports for Category A and B providers for review by the Department of Health and Human Services.

Eff. July 1, 2004.

10A NCAC 27G .0608 LOCAL MONITORING

(a) The area authority or county program shall develop and implement written policies governing local monitoring of Categories A and B providers. The written policies shall address:

- (1) the frequency and extent of local monitoring based on the following:
 - (A) number and severity of level II or level III incidents reported by the provider;
 - (B) the provider's response to the incidents; and
 - (C) the provider's compliance with the reporting requirements as set forth in Rule .0604 of this Section;
 - (D) the number and types of complaints received concerning a provider ;
 - (E) the provider's response to the complaints;
 - (F) the conclusions reached from investigation of the complaints;
 - (G) the results of reviews conducted by DFS, DMH/DD/SAS or DSS;
 - (H) compliance with the requirements of the provision of public services;
 - (I) the addition of a new service; and
 - (J) accreditation by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO), the Council on Accreditation (COA), the Council for Accreditation of Rehabilitation Facilities (CARF) or the Council on Quality and Leadership, and the results of the accreditation agencies reviews of the provider.
- (2) the referral of local monitoring of a Category A provider to DFS or a Category B provider to DMH/DD/SAS based on the following:
 - (A) local monitoring identifies an issue a State agency is required to review;
 - (B) a plan of correction resulting from local monitoring is not submitted to the area authority or county program within the designated timeframe;
 - (C) issues identified in a local monitoring report are not corrected by the provider; or
 - (D) the area authority or county program is the provider of the service to be monitored; and
- (3) the appeal of the results of local monitoring.

(b) When local monitoring occurs, the area authority or county program shall communicate the results to the provider within 10 working days of completion. The communication of the results shall constitute a local monitoring report that includes:

- (1) identification of each service monitored;

History Note: Authority G.S. 122C-112.1; 143B-139.1;

- (2) identification of any issues requiring correction; and
- (3) the timelines for implementing the corrections which shall not exceed 60 days from the date the provider receives the local monitoring report.

(c) An area authority or county program that conducts the local monitoring of a provider serving another area authority's or county program's client shall provide a copy of the local monitoring report to the client's home area authority or county program, upon request, within 10 days of completion.

(d) The area authority or county program shall submit a report of local monitoring activities to DFS and DMH/DD/SAS not less than monthly on a form provided by the Secretary via electronic means. The monthly monitoring report shall include:

- (1) identification information for providers monitored during the reporting period;
- (2) whether issues requiring correction were identified; and
- (3) an explanation of any uncorrected issues.

History Note: Authority G.S. 122C-111; 143B-139.1; Eff. July 1, 2004.

10A NCAC 27G .0609 AREA AUTHORITY OR COUNTY PROGRAM REPORTING REQUIREMENTS

(a) The area authority or county program shall review, not less than quarterly, level II and level III incidents, complaints concerning the provision of public services and local monitoring results as part of its quality improvement process as set forth in Rule .0201(a)(7) of this Subchapter.

(b) The area authority or county program shall provide a report based on the review specified in Paragraph (a) of this Rule. The report shall be submitted to DMH/DD/SAS, the local Client Rights Committee and the Governor's Advocacy Council for Persons with Disabilities quarterly on a form provided by the Secretary via electronic means.

The report shall include the following:

- (1) summary numbers of the types of complaints, incidents and results of local monitoring;
- (2) trends identified through analyses of complaints, level II and level III incidents and local monitoring; and
- (3) use of the analyses for improvement of the service system and planning of future monitoring activities.

History Note: Authority G.S. 122C-112.1; 143B-139.1; Eff. July 1, 2004.

10A NCAC 27G .0610 REQUIREMENTS CONCERNING THE NEED FOR PROTECTIVE SERVICES

(a) If the circumstances identified surrounding an incident, complaint or routine local monitoring give reasonable cause to believe that reveal that a disabled an adult receiving services from a Category A or Category B provider may be abused, neglected or exploited and in need of protective services, the area authority or county program shall ensure initiate the procedures outlined in G.S. 108A, Article 6, are initiated.

(b) If the circumstances surrounding an incident, complaint or local monitoring reveal that a child or adolescent may be abused, neglected or exploited and in need of protective services, the area authority or county program shall ensure the procedures outlined in G..S. 7B, Article 3, are initiated.

History Note: Authority G.S. 122C-112.1; 143B-139.1; Eff. July 1, 2004.

10A NCAC 39A .0102 DEFINITIONS

The following definitions shall apply throughout this Section:

- (1) "Agriculture" means farming of the land in all its branches including cultivation, tillage, growing, harvesting, preparation, and processing for market or storage.
- (2) "Migrant" means an individual present in North Carolina whose principal employment is agriculture on a seasonal basis, as opposed to year-round employment, and who establishes a temporary abode for seasonal employment. The term includes an individual who has been so employed within the past 24 months and the individual's dependents.
- (3) "Migrant Health Clinic" means a health department, physician's office, or other entity that, under contract with the North Carolina Farmworker Health Program, provides health or dental services to migrants on a regularly scheduled basis, pursuant to the Migrant Health Program.
- (4) "Migrant Health Program" means the program described in the rules of this Section.
- (5) "Primary Care" means preventive, diagnostic, treatment, consultant, referral, and other services rendered by physicians, physician assistants and nurse practitioners; routine associated laboratory services; diagnostic radiologic services; and emergency health services.
- (6) "North Carolina Farmworker Health Program" means the program within the Office of Research, Demonstrations, and Rural Health Development that administers the Migrant Health Program.
- (7) "Migrant Health Entry Point" means an entity designated by the North Carolina Farmworker Health Program to certify migrants for participation in the fee-for-service component of the Migrant Health Program. In designating Migrant Health Entry Points, the program shall consider the following criteria: density of farmworkers in the agency's service area; number of farmworker patients served by the agency; and the agency's ability to offer linguistically appropriate services, night or weekend hours, and outreach services. A list of designated Migrant Health Entry Points can be obtained by writing to the North Carolina Farmworker Health Program, Office of Research, Demonstrations, and Rural Health

Development, 2009 Mail Service Center,
Raleigh, NC 27699-2009.

Eff. January 1, 1983;
Amended Eff. June 1, 2004; April 1, 1995; September 1, 1990.

History Note: Authority G.S. 130A-223; Sec. 329, 95 Stat 569;
Eff. January 1, 1983;
Amended Eff. June 1, 2004.

10A NCAC 39A .0103 MIGRANT HEALTH PROGRAM SERVICES

(a) The North Carolina Farmworker Health Program may contract with local health departments, public or private agencies or providers to provide the following health services to migrants:

- (1) primary care services;
- (2) dental services;
- (3) outreach services;
- (4) health status assessments;
- (5) referrals for medical and dental care; and
- (6) other services as specified in the contract.

(b) A local health department, public or private agency or provider interested in contracting for migrant health services may submit a brief proposal to the North Carolina Farmworker Health Program. The proposal shall include:

- (1) a description of service area;
- (2) a statement of needs to be addressed, expressed in quantitative terms to the extent possible;
- (3) a statement of specific goals and objectives for addressing needs;
- (4) an outline of methodology and activities for achieving goals and objectives;
- (5) a statement of monitoring methods to be used in measuring outcome of activities; and
- (6) a projected detailed budget.

(c) Contracts may be renewed on an annual basis based upon determination of a continuing need for these services in the area served by the provider and the need for services in other areas of the State and the availability of funds.

History Note: Authority G.S. 130A-223; Sec. 329, Public Health Services Act, 95 Stat. 569(42 U.S.C. 254b);
Eff. January 1, 1983;
Amended Eff. June 1, 2004; September 1, 1990.

10A NCAC 39A .0104 CO-PAYMENTS

(a) Migrant Health Clinics shall adopt a schedule of co-payments for all covered services provided to migrants. Patients shall be charged for covered services based on that schedule. Copies of the schedule of co-payments shall be sent to the North Carolina Farmworker Health Program and may be inspected at or obtained from that agency. No one shall be denied service at a sponsored Migrant Health Clinic based solely on an inability or failure to pay.

(b) The patient co-payment for the fee-for-service component of the Migrant Health Program shall be in accordance with 10A NCAC 45A.

History Note: Authority G.S. 130A-223; Sec. 329, Public Health Services Act, 95 Stat. 569(42 U.S.C. 259B);
42 C.F.R. 56.302(f);

10A NCAC 39A .0105 FEE-FOR-SERVICE REIMBURSEMENT

The North Carolina Farmworker Health Program shall purchase medical care for migrants on a fee-for-service basis in accordance with the rules of this Section and the rules contained in 10A NCAC 45A.

History Note: Authority G.S. 130A-223; Sec. 329, 95 Stat 569;
Eff. January 1, 1983;
Amended Eff. June 1, 2004.

10A NCAC 39A .0109 COVERED SERVICES

(a) The following services are covered by the Migrant Health Program when provided to eligible migrant farmworkers:

- (1) Ambulatory care services that are necessary and essential for immediate health needs in the form of:
 - (A) primary care services;
 - (B) hospital outpatient services;
 - (C) basic preventive, simple restorative, and simple surgical dental services that are specifically listed in a Dental Guide established by the North Carolina Farmworker Health Program based upon the following factors: the most urgent dental needs of migrant patients; the cost of effectiveness of the procedure; and the need to maximize the benefits to patients utilizing finite program dollars. A copy of the Dental Guide may be obtained free of charge by writing to the North Carolina Farmworker Health Program, Office of Research, Demonstrations, and Rural Health Development, 2009 Mail Service Center, Raleigh, NC 27699-2009;
 - (D) laboratory tests, diagnostic X-rays;
 - (E) drugs on a formulary established by the North Carolina Farmworker Health Program based upon the following factors: the medical needs of migrant patients, the cost effectiveness of the drugs, the availability of generic or other less costly alternatives, and the need to maximize the benefits to patients utilizing finite program dollars. A copy of this formulary may be obtained free of charge by writing to the NCFHP, Office of Research, Demonstrations, and Rural Health Development, 2009 Mail Service Center, Raleigh, North Carolina, 27699-2009;

- (F) mental health services (limited to two visits per patient per FY); and
- (G) medical supplies necessary for administering covered drugs.

(2) The following services must receive approval from the Program Director before being considered for reimbursement, and shall be reviewed on a case-by-case basis considering the extent to which the services are necessary and essential for the immediate health care needs of the patient, the total cost of the plan of treatment, and the probability of the patient completing the course of therapy:

- (A) home health services;
- (B) physical therapy and occupational therapy; and
- (C) rental or purchase of durable medical equipment.

(b) Services not covered by the Migrant Health Program include the following:

- (1) inpatient care, custodial care, hospice care;
- (2) any elective procedure;
- (3) routine physical exams, routine vision or hearing exams;
- (4) eyeglasses or hearing aids;
- (5) speech therapy;
- (6) chiropractic therapy;
- (7) emergency room services;
- (8) ground and air ambulance transportation; and
- (9) medical supplies (except those necessary for administering covered drugs).

History Note: Authority G.S. 130A-223; Eff. January 1, 1983; Amended Eff. October 1, 1990; January 1, 1986; Temporary Amendment Eff. July 6, 1992 for a Period of 180 Days to Expire on January 2, 1993; Amended Eff. June 1, 2004; April 1, 1995; October 1, 1992.

10A NCAC 45A .0303 PAYMENT LIMITATIONS

(a) Payment program payments shall be made for authorized services only when funds are available.

(b) During the last six months of the fiscal year, the State Health Director may limit payment program benefits that can be authorized when the total amount of outstanding authorizations, plus the estimated authorizations for the remainder of the fiscal year, less estimated cancellations, exceeds 100 percent of the program's cash balance. The State Health Director shall rescind the limitations at the end of the fiscal year, or prior to the end of the fiscal year if sufficient funds become available to authorize full program benefits for the remainder of the fiscal year. The Director of the Office of Research, Demonstrations, and Rural Health Development may limit payment program benefits for the Migrant Health Program when the cost of the services is projected to surpass the program's cash balance within the fiscal year. The Director of the Office of Research, Demonstrations, and Rural Health Development shall rescind the limitations if sufficient funds become available to reimburse for program benefits for the Migrant Health Program.

(c) Payment program benefits shall be available only for services or appliances which are not covered by another third party payor or which cannot be paid for out of funds received in settlement of a civil claim. Patients shall apply for Medicaid or Medicare benefits to which they may be entitled. However, payment program benefits shall be available for Children's Special Health Services sponsored clinic patients who cannot reasonably be examined or treated by a Medicaid provider or an authorized provider for another third party payor because of transportation problems, a need for emergency care, or similar exceptional situations. All exceptions must be approved by the Children's Special Health Services program's medical director. Also, Children's Special Health Services may make payments for services provided to Medicaid patients when acting as a Medicaid provider under an agreement making the program eligible for reimbursement from Medicaid. Providers shall take reasonable measures to collect other third party payments. For the purposes of this Subchapter, third party payor means any person or entity that is or may be indirectly liable for the cost of services or appliances furnished to a patient. Third party payors include the following:

- (1) School services, including physical or occupational therapy, speech and language pathology and audiology services, and nursing services for special needs children;
- (2) Medicaid;
- (3) Medicare, Part A and Part B;
- (4) Insurance;
- (5) Social Services;
- (6) Worker's compensation;
- (7) CHAMPUS; and
- (8) Head Start programs.

(d) The Department shall not pay Medicaid co-payments or in any other way supplement Medicaid payments.

(e) If prior to the Department's payment for particular services or appliances, the provider, the patient, or a person responsible for the patient receives partial or total payment for the services or appliances from a third party payor, or receives funds in settlement of a civil claim, the Department shall pay only the amount, if any, by which the Department's payment rate exceeds the amount received by the person. For the purpose of this Rule the Department's payment rate means the rate of reimbursement established in 10A NCAC 45A .0400.

(f) Notwithstanding Paragraph (e) of this Rule, when the provider, the patient or a person responsible for the patient receives other third party payments equal to or exceeding the Department's payment rate, the Department shall pay the difference between the other third party payments and the provider's charge for an adopted child that meets the requirements of 10A NCAC 43F .0801. The Department's payment shall not exceed the payment rate in Section .0400 of the Subchapter.

(g) If after the Department makes payment for particular services or appliances, the provider, the patient, or a person responsible for the patient receives partial or total payment for the services or appliances from a third party payor, or receives funds in settlement of a civil claim which are available to pay for the services or appliances, the person receiving the payment shall reimburse the Department to the extent of the amount received by the person without exceeding the amount of the

Department's prior payment to the provider. This reimbursement shall be made to the Department within 45 days after receipt of the third party payment.

(h) Notwithstanding Paragraph (g) of this Rule, if after the Department makes payment for particular services or appliances for an adopted child that meets the requirements of 10A NCAC 43F .0801, the provider receives partial or total payment from a third party payor, the provider shall only be required to reimburse the Department the amount by which the total of payments exceeds the provider's charge.

(i) If the Department requests a refund of a payment made to a provider, the refund shall be made to the Department within 45 days after the date of the refund request.

History Note: Authority G.S. 130A-5(3); 130A-124; 130A-127; 130A-129; 130A-205; Eff. July 1, 1981; Amended Eff. February 1, 1990; September 1, 1989; March 1, 1989; Transferred and Recodified from 10 NCAC 4C .0303 Eff. April 4, 1990; Amended Eff. June 1, 2004; April 1, 1992; February 1, 1992; May 1, 1991; February 1, 1991.

TITLE 12 - DEPARTMENT OF JUSTICE

12 NCAC 07D .0707 TRAINING REQUIREMENTS FOR UNARMED SECURITY GUARDS

(a) Applicants for an unarmed security guard registration shall complete a basic training course for unarmed security guards within 30 days from hire. The course shall consist of a minimum of 16 hours of classroom instruction including:

- (1) The Security Officer in North Carolina - (minimum of one hour);
- (2) Legal Issues for Security Officers - (minimum of three hours);
- (3) Emergency Response - (minimum of three hours);
- (4) Communications - (minimum of two hours);
- (5) Patrol Procedures - (minimum of three hours);
- (6) Note Taking and Report Writing - (minimum of three hours);
- (7) Deportment - (minimum of one hour).

A minimum of four hours of classroom instruction shall be completed prior to a security guard being placed on a duty station. These four hours shall include The Security Officer in North Carolina and Legal Issues for Security Officers.

(b) Licensees shall submit the name and resume for a proposed certified unarmed security guard trainer to the Director for Board approval.

(c) Training shall be conducted by a Board certified unarmed security guard trainer. A Board approved lesson plan covering the training requirements in 12 NCAC 07D .0707(a) shall be made available to each trainer. The Board shall approve other media training materials that deliver the training requirements of 12 NCAC 07D .0707(a).

(d) These provisions shall not apply to:

- (1) temporary unarmed security guards as defined by G.S. 74C-11(f); and

- (2) any unarmed security guard registered with the Board on January 1, 1990.

History Note: Authority G.S. 74C-5; 74C-11; 74C-13; Eff. January 1, 1990; Amended Eff. June 1, 2004.

TITLE 15A - DEPARTMENT OF ENVIRONMENT & NATURAL RESOURCES

15A NCAC 02B .0225 OUTSTANDING RESOURCE WATERS

(a) General In addition to the existing classifications, the Commission may classify unique and special surface waters of the state as outstanding resource waters (ORW) upon finding that such waters are of exceptional state or national recreational or ecological significance and that the waters have exceptional water quality while meeting the following conditions:

- (1) that the water quality is rated as excellent based on physical, chemical or biological information;
- (2) the characteristics which make these waters unique and special may not be protected by the assigned narrative and numerical water quality standards.

(b) Outstanding Resource Values. In order to be classified as ORW, a water body must exhibit one or more of the following values or uses to demonstrate it is of exceptional state or national recreational or ecological significance:

- (1) there are outstanding fish (or commercially important aquatic species) habitat and fisheries;
- (2) there is an unusually high level of water-based recreation or the potential for such recreation;
- (3) the waters have already received some special designation such as a North Carolina or National Wild and Scenic River, Native or Special Native Trout Waters, National Wildlife Refuge, etc, which do not provide any water quality protection;
- (4) the waters represent an important component of a state or national park or forest; or
- (5) the waters are of special ecological or scientific significance such as habitat for rare or endangered species or as areas for research and education.

(c) Quality Standards for ORW

- (1) Freshwater: Water quality conditions shall be maintained to protect the outstanding resource values of waters classified ORW. Management strategies to protect resource values shall be developed on a site specific basis during the proceedings to classify waters as ORW. No new discharges or expansions of existing discharges shall be permitted, and stormwater controls for all new development activities requiring an Erosion and Sedimentation Control Plan in accordance with rules established by the NC

Sedimentation Control Commission or an appropriate local erosion and sedimentation control program shall be required to follow the stormwater provisions as specified in 15A NCAC 02H .1000. Specific stormwater requirements for ORW areas are described in 15A NCAC 02H .1007.

- (2) Saltwater: Water quality conditions shall be maintained to protect the outstanding resource values of waters classified ORW. Management strategies to protect resource values shall be developed on a site-specific basis during the proceedings to classify waters as ORW. New development shall comply with the stormwater provisions as specified in 15A NCAC 02H .1000. Specific stormwater management requirements for saltwater ORWs are described in 15A NCAC 02H .1007. New non-discharge permits shall meet reduced loading rates and increased buffer zones, to be determined on a case-by-case basis. No dredge or fill activities shall be allowed if those activities would result in a reduction of the beds of submerged aquatic vegetation or a reduction of shellfish producing habitat as defined in 15A NCAC 03I .0101(b)(20)(A) and (B), except for maintenance dredging, such as that required to maintain access to existing channels and facilities located within the designated areas or maintenance dredging for activities such as agriculture. A public hearing is mandatory for any proposed permits to discharge to waters classified as ORW.

Additional actions to protect resource values shall be considered on a site specific basis during the proceedings to classify waters as ORW and shall be specified in Paragraph (e) of this Rule. These actions may include anything within the powers of the Commission. The Commission shall also consider local actions which have been taken to protect a water body in determining the appropriate state protection options. Descriptions of boundaries of waters classified as ORW are included in Paragraph (e) of this Rule and in the Schedule of Classifications (15A NCAC 02B .0302 through 02B .0317) as specified for the appropriate river basin and shall also be described on maps maintained by the Division of Water Quality.

(d) Petition Process. Any person may petition the Commission to classify a surface water of the state as an ORW. The petition shall identify the exceptional resource value to be protected, address how the water body meets the general criteria in Paragraph (a) of this Rule, and the suggested actions to protect the resource values. The Commission may request additional supporting information from the petitioner. The Commission or its designee shall initiate public proceedings to classify waters as ORW or shall inform the petitioner that the waters do not meet the criteria for ORW with an explanation of the basis for this decision. The petition shall be sent to:

Director
DENR/Division of Water Quality
1617 Mail Service Center
Raleigh, North Carolina 27699-1617

The envelope containing the petition shall clearly bear the notation: RULE-MAKING PETITION FOR ORW CLASSIFICATION.

(e) Listing of Waters Classified ORW with Specific Actions
Waters classified as ORW with specific actions to protect exceptional resource values are listed as follows:

- (1) Roosevelt Natural Area [White Oak River Basin, Index Nos. 20-36-9.5-(1) and 20-36-9.5-(2)] including all fresh and saline waters within the property boundaries of the natural area shall have only new development which complies with the low density option in the stormwater rules as specified in 15A NCAC 2H .1005(2)(a) within 575 feet of the Roosevelt Natural Area (if the development site naturally drains to the Roosevelt Natural Area).
- (2) Chattooga River ORW Area (Little Tennessee River Basin and Savannah River Drainage Area): the following undesignated waterbodies that are tributary to ORW designated segments shall comply with Paragraph (c) of this Rule in order to protect the designated waters as per Rule .0203 of this Section. However, expansions of existing discharges to these segments shall be allowed if there is no increase in pollutant loading:
 - (A) North and South Fowler Creeks;
 - (B) Green and Norton Mill Creeks;
 - (C) Cane Creek;
 - (D) Ammons Branch;
 - (E) Glade Creek; and
 - (F) Associated tributaries.
- (3) Henry Fork ORW Area (Catawba River Basin): the following undesignated waterbodies that are tributary to ORW designated segments shall comply with Paragraph (c) of this Rule in order to protect the designated waters as per Rule .0203 of this Section:
 - (A) Ivy Creek;
 - (B) Rock Creek; and
 - (C) Associated tributaries.
- (4) South Fork New and New Rivers ORW Area [New River Basin (Index Nos. 10-1-33.5 and 10)]: the following management strategies, in addition to the discharge requirements specified in Subparagraph (c)(1) of this Rule, shall be applied to protect the designated ORW areas:
 - (A) Stormwater controls described in Subparagraph (c)(1) of this Rule shall apply to land within one mile of and that drains to the designated ORW areas;
 - (B) New or expanded NPDES permitted wastewater discharges located upstream of the designated ORW shall be permitted such that the

following water quality standards are maintained in the ORW segment:

- (i) the total volume of treated wastewater for all upstream discharges combined shall not exceed 50 percent of the total instream flow in the designated ORW under 7Q10 conditions, which are defined in Rule .0206(a)(1) of this Section;
 - (ii) a safety factor shall be applied to any chemical allocation such that the effluent limitation for a specific chemical constituent shall be the more stringent of either the limitation allocated under design conditions (pursuant to 15A NCAC 02B .0206) for the normal standard at the point of discharge, or the limitation allocated under design conditions for one-half the normal standard at the upstream border of the ORW segment;
 - (iii) a safety factor shall be applied to any discharge of complex wastewater (those containing or potentially containing toxicants) to protect for chronic toxicity in the ORW segment by setting the whole effluent toxicity limitation at the higher (more stringent) percentage effluent determined under design conditions (pursuant to 15A NCAC 02B .0206) for either the instream effluent concentration at the point of discharge or twice the effluent concentration calculated as if the discharge were at the upstream border of the ORW segment;
- (C) New or expanded NPDES permitted wastewater discharges located upstream of the designated ORW shall comply with the following:
- (i) Oxygen Consuming Wastes: Effluent limitations shall be as follows: BOD = 5 mg/l, and NH3-N = 2 mg/l;
 - (ii) Total Suspended Solids: Discharges of total suspended solids (TSS) shall be limited to effluent concentrations of 10 mg/l for trout waters and to 20 mg/l for all other waters;
- (iii) Emergency Requirements: Failsafe treatment designs shall be employed, including stand-by power capability for entire treatment works, dual train design for all treatment components, or equivalent failsafe treatment designs;
 - (iv) Nutrients: Where nutrient overenrichment is projected to be a concern, effluent limitations shall be set for phosphorus or nitrogen, or both.
- (5) Old Field Creek (New River Basin): the undesignated portion of Old Field Creek (from its source to Call Creek) shall comply with Paragraph (c) of this Rule in order to protect the designated waters as per Rule .0203 of this Section.
- (6) In the following designated waterbodies, no additional restrictions shall be placed on new or expanded marinas. The only new or expanded NPDES permitted discharges that shall be allowed shall be non-domestic, non-process industrial discharges. The Alligator River Area (Pasquotank River Basin) extending from the source of the Alligator River to the U.S. Highway 64 bridge including New Lake Fork, North West Fork Alligator River, Juniper Creek, Southwest Fork Alligator River, Scouts Bay, Gum Neck Creek, Georgia Bay, Winn Bay, Stumpy Creek Bay, Stumpy Creek, Swann Creek (Swann Creek Lake), Whipping Creek (Whipping Creek Lake), Grapevine Bay, Rattlesnake Bay, The Straits, The Frying Pan, Coopers Creek, Babbitt Bay, Goose Creek, Milltail Creek, Boat Bay, Sandy Ridge Gut (Sawyer Lake) and Second Creek, but excluding the Intracoastal Waterway (Pungo River-Alligator River Canal) and all other tributary streams and canals.
- (7) In the following designated waterbodies, the only type of new or expanded marina that shall be allowed shall be those marinas located in upland basin areas, or those with less than 10 slips, having no boats over 21 feet in length and no boats with heads. The only new or expanded NPDES permitted discharges that shall be allowed shall be non-domestic, non-process industrial discharges.
- (A) The Northeast Swanquarter Bay Area including all waters northeast of a line from a point at Lat. 35E 23N

- 51O and Long. 76E 21N 02O thence southeast along the Swanquarter National Wildlife Refuge hunting closure boundary (as defined by the 1935 Presidential Proclamation) to Drum Point.
- (B) The Neuse-Southeast Pamlico Sound Area (Southeast Pamlico Sound Section of the Southeast Pamlico, Core and Back Sound Area); (Neuse River Basin) including all waters within an area defined by a line extending from the southern shore of Ocracoke Inlet northwest to the Tar-Pamlico River and Neuse River basin boundary, then southwest to Ship Point.
- (C) The Core Sound Section of the Southeast Pamlico, Core and Back Sound Area (White Oak River Basin), including all waters of Core Sound and its tributaries, but excluding Nelson Bay, Little Port Branch and Atlantic Harbor at its mouth, and those tributaries of Jarrett Bay that are closed to shellfishing.
- (D) The Western Bogue Sound Section of the Western Bogue Sound and Bear Island Area (White Oak River Basin) including all waters within an area defined by a line from Bogue Inlet to the mainland at SR 1117 to a line across Bogue Sound from the southwest side of Gales Creek to Rock Point, including Taylor Bay and the Intracoastal Waterway.
- (E) The Stump Sound Area (Cape Fear River Basin) including all waters of Stump Sound and Alligator Bay from marker Number 17 to the western end of Permuda Island, but excluding Rogers Bay, the Kings Creek Restricted Area and Mill Creek.
- (F) The Topsail Sound and Middle Sound Area (Cape Fear River Basin) including all estuarine waters from New Topsail Inlet to Mason Inlet, including the Intracoastal Waterway and Howe Creek, but excluding Pages Creek and Futch Creek.
- (8) In the following designated waterbodies, no new or expanded NPDES permitted discharges and only new or expanded marinas with less than 10 slips, having no boats over 21 feet in length and no boats with heads shall be allowed.
- (A) The Swanquarter Bay and Juniper Bay Area (Tar-Pamlico River Basin) including all waters within a line beginning at Juniper Bay Point and running south and then west below Great Island, then northwest to Shell Point and including Shell Bay, Swanquarter and Juniper Bays and their tributaries, but excluding all waters northeast of a line from a point at Lat. 35E 23N 51O and Long. 76E 21N 02O thence southeast along the Swanquarter National Wildlife Refuge hunting closure boundary (as defined by the 1935 Presidential Proclamation) to Drum Point and also excluding the Blowout Canal, Hydeland Canal, Juniper Canal and Quarter Canal.
- (B) The Back Sound Section of the Southeast Pamlico, Core and Back Sound Area (White Oak River Basin) including that area of Back Sound extending from Core Sound west along Shackleford Banks, then north to the western most point of Middle Marshes and along the northwest shore of Middle Marshes (to include all of Middle Marshes), then west to Rush Point on Harker's Island, and along the southern shore of Harker's Island back to Core Sound.
- (C) The Bear Island Section of the Western Bogue Sound and Bear Island Area (White Oak River Basin) including all waters within an area defined by a line from the western most point on Bear Island to the northeast mouth of Goose Creek on the mainland, east to the southwest mouth of Queen Creek, then south to green marker No. 49, then northeast to the northern most point on Huggins Island, then southeast along the shoreline of Huggins Island to the southeastern most point of Huggins Island, then south to the northeastern most point on Dudley Island, then southwest along the shoreline of Dudley Island to the eastern tip of Bear Island.
- (D) The Masonboro Sound Area (Cape Fear River Basin) including all waters between the Barrier Islands and the mainland from Carolina Beach Inlet to Masonboro Inlet.
- (9) Black and South Rivers ORW Area (Cape Fear River Basin) [Index Nos. 18-68-(0.5), 18-68-(3.5), 18-68-(11.5), 18-68-12-(0.5), 18-68-12-(11.5), and 18-68-2]; the following management strategies, in addition to the discharge requirements specified in Subparagraph (c)(1) of this Rule, shall be applied to protect the designated ORW areas:

- (A) Stormwater controls described in Subparagraph (c)(1) of this Rule shall apply to land within one mile of and that drains to the designated ORW areas;
- (B) New or expanded NPDES permitted wastewater discharges located one mile upstream of the stream segments designated ORW (upstream on the designated mainstem and upstream into direct tributaries to the designated mainstem) shall comply with the following discharge restrictions:
 - (i) Oxygen Consuming Wastes: Effluent limitations shall be as follows: BOD = 5 mg/l and NH₃-N = 2 mg/l;
 - (ii) Total Suspended Solids: Discharges of total suspended solids (TSS) shall be limited to effluent concentrations of 20 mg/l;
 - (iii) Emergency Requirements: Failsafe treatment designs shall be employed, including stand-by power capability for entire treatment works, dual train design for all treatment components, or equivalent failsafe treatment designs;
 - (iv) Nutrients: Where nutrient overenrichment is projected to be a concern, effluent limitations shall be set for phosphorus or nitrogen, or both.
 - (v) Toxic substances: In cases where complex discharges (those containing or potentially containing toxicants) may be currently present in the discharge, a safety factor shall be applied to any chemical or whole effluent toxicity allocation. The limit for a specific chemical constituent shall be allocated at one-half of the normal standard at design conditions. Whole effluent toxicity shall be allocated to protect for chronic toxicity at an effluent concentration equal to twice that which is acceptable under flow design criteria (pursuant to 15A NCAC 02B .0206).

- (10) Lake Waccamaw ORW Area (Lumber River Basin) [Index No. 15-2]: all undesignated waterbodies that are tributary to Lake Waccamaw shall comply with Paragraph (c) of this Rule in order to protect the designated waters as per Rule .0203 of this Section.
- (11) Swift Creek and Sandy Creek ORW Area (Tar-Pamlico River Basin) [portion of Index No. 28-78-(0.5) and Index No. 28-78-1-(19)]: all undesignated waterbodies that drain to the designated waters shall comply with Paragraph (c) of this Rule in order to protect the designated waters as per Rule .0203 of this Section and to protect outstanding resource values found in the designated waters as well as in the undesignated waters that drain to the designated waters.

History Note: Authority G.S. 143-214.1; Eff. October 1, 1995; Amended Eff. August 1, 2003 (see S.L. 2003-433, s.2); August 1, 2000; April 1, 1996; January 1, 1996; Temporary Amendment Eff. October 7, 2003; Amended Eff. June 1, 2004.

15A NCAC 02B .0316 TAR-PAMLICO RIVER BASIN

- (a) The schedule may be inspected at the following places:
 - (1) Clerk of Court:
 - Beaufort County
 - Dare County
 - Edgecombe County
 - Franklin County
 - Granville County
 - Halifax County
 - Hyde County
 - Martin County
 - Nash County
 - Pamlico County
 - Person County
 - Pitt County
 - Vance County
 - Warren County
 - Washington County
 - Wilson County
 - (2) North Carolina Department of Environment and Natural Resources:
 - (A) Raleigh Regional Office
3800 Barrett Drive
Raleigh, North Carolina
 - (B) Washington Regional Office
943 Washington Square Mall
Washington, North Carolina.
- (b) Unnamed Streams. All drainage canals not noted in the schedule are classified "C Sw," except the main drainage canals to Pamlico Sound and its bays which shall be classified "SC."
- (c) The Tar-Pamlico River Basin Schedule of Classification and Water Quality Standards was amended effective:
 - (1) March 1, 1977;
 - (2) November 1, 1978;
 - (3) June 8, 1980;

- (4) October 1, 1983;
- (5) June 1, 1984;
- (6) August 1, 1985;
- (7) February 1, 1986;
- (8) August 1, 1988;
- (9) January 1, 1990;
- (10) August 1, 1990;
- (11) August 3, 1992;
- (12) April 1, 1994;
- (13) January 1, 1996;
- (14) September 1, 1996;
- (15) October 7, 2003;
- (16) June 1, 2004.

(d) The Schedule of Classifications and Water Quality Standards for the Tar-Pamlico River Basin has been amended effective August 1, 1988 as follows:

- (1) Tar River (Index No. 28-94) from a point 1.2 miles downstream of Broad Run to the upstream side of Tranters Creek from Class C to Class B.

(e) The Schedule of Classifications and Water Quality Standards for the Tar-Pamlico River Basin has been amended effective January 1, 1990 by the reclassification of Pamlico River and Pamlico Sound [Index No. 29-(27)] which includes all waters within a line beginning at Juniper Bay Point and running due south to Lat. 35° 18' 00", long. 76° 13' 20", thence due west to lat. 35° 18' 00", long 76° 20' 00", thence northwest to Shell Point and including Shell Bay, Swanquarter and Juniper Bays and their tributaries, but excluding the Blowout, Hydeland Canal, Juniper Canal and Quarter Canal were reclassified from Class SA and SC to SA ORW and SC ORW.

(f) The Schedule of Classifications and Water Quality Standards for the Tar-Pamlico River Basin has been amended effective January 1, 1990 by adding the supplemental classification NSW (Nutrient Sensitive Waters) to all waters in the basin from source to a line across Pamlico River from Roos Point to Persimmon Tree Point.

(g) The Schedule of Classifications and Water Quality Standards for the Tar-Pamlico River Basin was amended effective August 3, 1992 with the reclassification of all water supply waters (waters with a primary classification of WS-I, WS-II or WS-III). These waters were reclassified to WS-I, WS-II, WS-III, WS-IV or WS-V as defined in the revised water supply protection rules, (15A NCAC 2B .0100, .0200 and .0300) which became effective on August 3, 1992. In some cases, streams with primary classifications other than WS were reclassified to a WS classification due to their proximity and linkage to water supply waters. In other cases, waters were reclassified from a WS classification to an alternate appropriate primary classification after being identified as downstream of a water supply intake or identified as not being used for water supply purposes.

(h) The Schedule of Classifications and Water Quality Standards for the Tar-Pamlico River Basin was amended effective April 1, 1994 with the reclassification of Blounts Creek from Herring Run to Blounts Bay [Index No. 29-9-1-(3)] from Class SC NSW to Class SB NSW.

(i) The Schedule of Classifications and Water Quality Standards for the Tar-Pamlico River Basin was amended effective January 1, 1996 with the reclassification of Tranters Creek [Index

Numbers 28-103- (4.5), 28-103- (13.5), 28-103- (14.5) and 28-103-(16.5)] from a point 1.5 miles upstream of Turkey Swamp to the City of Washington's former auxiliary water supply intake, including tributaries, from Class WS-IV Sw NSW and Class WS-IV CA Sw NSW to Class C Sw NSW.

(j) The Schedule of Classifications and Water Quality Standards for the Tar-Pamlico River Basin was amended effective September 1, 1996 with the addition of Huddles Cut (previously unnamed in the schedule) classified as SC NSW with an Index No. of 29-25.5.

(k) The Schedule of Classifications and Water Quality Standards for the Tar-Pamlico River Basin was temporarily amended effective October 7, 2003 and permanently amended June 1, 2004 with the reclassification of a portion of Swift Creek [Index Number 28-78-(0.5)] and a portion of Sandy Creek [Index Number 28-78-1-(19)] from Nash County SR 1004 to Nash County SR 1003 from Class C NSW to Class C ORW NSW, and the waters that drain to these two creek portions to include only the ORW management strategy as represented by "+". The "+" symbol as used in this paragraph means that all undesignated waterbodies that drain to the portions of the two creeks referenced in this Paragraph shall comply with Paragraph (c) of Rule .0225 of this Subchapter in order to protect the designated waters as per Rule .0203 of this Subchapter and to protect outstanding resource values found in the designated waters as well as in the undesignated waters that drain to the designated waters.

History Note: Authority G.S. 143-214.1; 143-215.1; 143-215.3(a)(1); Eff. February 1, 1976; Amended Eff. August 1, 2003 (see S.L. 2003-433, s.1); September 1, 1996; January 1, 1996; April 1, 1994; August 3, 1992; August 1, 1990; Temporary Amendment Eff. October 7, 2003; Amended Eff. June 1, 2004.

15A NCAC 02D .0101 DEFINITIONS

The definition of any word or phrase used in Rules of this Subchapter is the same as given in Article 21, G.S. 143, as amended. The following words and phrases, which are not defined in the article, have the following meaning:

- (1) "Act" means "The North Carolina Water and Air Resources Act."
- (2) "Air pollutant" means an air pollution agent or combination of such agents, including any physical, chemical, biological, radiative substance or matter emitted into or otherwise entering the ambient air.
- (3) "Ambient air" means that portion of the atmosphere outside buildings or other enclosed structures, stacks or ducts, and that surrounds human, animal or plant life, or property.
- (4) "Approved" means approved by the Director of the Division of Air Quality according to these Rules.
- (5) "Capture system" means the equipment (including hoods, ducts, fans, etc.) used to contain, capture, or transport a pollutant to a control device.

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| <p>(6) "CFR" means "Code of Federal Regulations."</p> <p>(7) "Combustible material" means any substance that, when ignited, will burn in air.</p> <p>(8) "Construction" means change in method of operation or any physical change, including on-site fabrication, erection, installation, replacement, demolition, or modification of a source, that results in a change in emissions or affects the compliance status.</p> <p>(9) "Control device" means equipment (fume incinerator, adsorber, absorber, scrubber, filter media, cyclone, electrostatic precipitator, or the like) used to destroy or remove air pollutant(s) before discharge to the ambient air.</p> <p>(10) "Day" means a 24-hour period beginning at midnight.</p> <p>(11) "Director" means the Director of the Division of Air Quality unless otherwise specified.</p> <p>(12) "Division" means Division of Air Quality.</p> <p>(13) "Dustfall" means particulate matter that settles out of the air and is expressed in units of grams per square meter per 30-day period.</p> <p>(14) "Emission" means the release or discharge, whether directly or indirectly, of any air pollutant into the ambient air from any source.</p> <p>(15) "Facility" means all of the pollutant emitting activities, except transportation facilities as defined under Rule .0802 of this Subchapter, that are located on one or more adjacent properties under common control.</p> <p>(16) "FR" means Federal Register.</p> <p>(17) "Fugitive emission" means those emissions that could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.</p> <p>(18) "Fuel burning equipment" means equipment whose primary purpose is the production of energy or power from the combustion of any fuel. The equipment is generally used for, but not limited to, heating water, generating or circulating steam, heating air as in warm air furnace, or furnishing process heat by transferring energy by fluids or through process vessel walls.</p> <p>(19) "Garbage" means any animal and vegetable waste resulting from the handling, preparation, cooking and serving of food.</p> <p>(20) "Incinerator" means a device designed to burn solid, liquid, or gaseous waste material.</p> <p>(21) "Opacity" means that property of a substance tending to obscure vision and is measured as percent obscuration.</p> <p>(22) "Open burning" means any fire whose products of combustion are emitted directly into the outdoor atmosphere without passing through a stack or chimney, approved incinerator, or other similar device.</p> <p>(23) "Owner or operator" means any person who owns, leases, operates, controls, or supervises</p> | <p>a facility, source, or air pollution control equipment.</p> <p>(24) "Particulate matter" means any material except uncombined water that exists in a finely divided form as a liquid or solid at standard conditions.</p> <p>(25) "Particulate matter emissions" means all finely divided solid or liquid material, other than uncombined water, emitted to the ambient air as measured by methods specified in this Subchapter.</p> <p>(26) "Permitted" means any source subject to a permit under this Subchapter or Subchapter 15A NCAC 02Q.</p> <p>(27) "Person" means any individual, partnership, co-partnership, firm, company, corporation, association, joint stock company, trust, estate, political subdivision, or any other legal entity, or its legal representative, agent or assigns.</p> <p>(28) "PM10" means particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers as measured by methods specified in this Subchapter.</p> <p>(29) "PM10 emissions" means finely divided solid or liquid material, with an aerodynamic diameter less than or equal to a nominal 10 micrometers emitted to the ambient air as measured by methods specified in this Subchapter.</p> <p>(30) "PM2.5" means particulate matter with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers as measured by methods specified in this Subchapter.</p> <p>(31) "Refuse" means any garbage, rubbish, or trade waste.</p> <p>(32) "Rubbish" means solid or liquid wastes from residences, commercial establishments, or institutions.</p> <p>(33) "Rural area" means an area that is primarily devoted to, but not necessarily limited to, the following uses: agriculture, recreation, wildlife management, state park, or any area of natural cover.</p> <p>(34) "Salvage operation" means any business, trade, or industry engaged in whole or in part in salvaging or reclaiming any product or material, including, but not limited to, metal, chemicals, motor vehicles, shipping containers, or drums.</p> <p>(35) "Smoke" means small gas-borne particles resulting from incomplete combustion, consisting predominantly of carbon, ash, and other burned or unburned residue of combustible materials that form a visible plume.</p> <p>(36) "Source" means any stationary article, machine, process equipment, or other contrivance; or any combination; or any tank-truck, trailer, or railroad tank car; from which</p> |
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- air pollutants emanate or are emitted, either directly or indirectly.
- (37) "Sulfur oxides" means sulfur dioxide, sulfur trioxide, their acids and the salts of their acids. The concentration of sulfur dioxide is measured by the methods specified in this Subchapter.
- (38) "Total suspended particulate" means any finely divided solid or liquid material, except water in uncombined form, that is or has been airborne as measured by methods specified in this Subchapter.
- (39) "Trade wastes" means all solid, liquid, or gaseous waste materials or rubbish resulting from combustion, salvage operations, building operations, or the operation of any business, trade, or industry including, but not limited to, plastic products, paper, wood, glass, metal, paint, grease, oil and other petroleum products, chemicals, and ashes.
- (40) "ug" means micrograms.

History Note: Authority G.S. 143-213; 143-215.3(a)(1); Eff. February 1, 1976; Amended Eff. December 1, 1989; July 1, 1988; July 1, 1984; Temporary Amendment Eff. March 8, 1994 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner; Amended Eff. June 1, 2004; July 1, 1998; July 1, 1996; July 1, 1994.

15A NCAC 02D .0521 CONTROL OF VISIBLE EMISSIONS

- (a) Purpose. The intent of this Rule is to prevent, abate and control emissions generated from fuel burning operations and industrial processes where an emission can reasonably be expected to occur, except during startup, shutdowns, and malfunctions approved according to procedures set out in Rule .0535 of this Section.
- (b) Scope. This Rule shall apply to all fuel burning sources and to other processes that may have a visible emission. However, sources subject to a visible emission standard in Rules .0506, .0508, .0524, .0543, .0544, .1110, .1111, .1205, .1206, or .1210 of this Subchapter shall meet that standard instead of the standard contained in this Rule. This Rule does not apply to engine maintenance, rebuild, and testing activities where controls are infeasible, except it does apply to the testing of peak shaving and emergency generators. (In deciding if controls are infeasible, the Director shall consider emissions, capital cost of compliance, annual incremental compliance cost, and environmental and health impacts.)
- (c) For sources manufactured as of July 1, 1971, visible emissions shall not be more than 40 percent opacity when averaged over a six-minute period. However, except for sources required to comply with Paragraph (g) of this Rule, six-minute averaging periods may exceed 40 percent opacity if:
 - (1) No six-minute period exceeds 90 percent opacity;
 - (2) No more than one six-minute period exceeds 40 percent opacity in any hour; and

- (3) No more than four six-minute periods exceed 40 percent opacity in any 24-hour period.
- (d) For sources manufactured after July 1, 1971, visible emissions shall not be more than 20 percent opacity when averaged over a six-minute period. However, except for sources required to comply with Paragraph (g) of this Rule, six-minute averaging periods may exceed 20 percent opacity if:
 - (1) No six-minute period exceeds 87 percent opacity;
 - (2) No more than one six-minute period exceeds 20 percent opacity in any hour; and
 - (3) No more than four six-minute periods exceed 20 percent opacity in any 24-hour period.
- (e) Where the presence of uncombined water is the only reason for failure of an emission to meet the limitations of Paragraph (c) or (d) of this Rule, those requirements shall not apply.
- (f) Exception from Opacity Standard in Paragraph (d) of this Rule. Sources subject to Paragraph (d) of this Rule may be allowed to comply with Paragraph (c) of this Rule if:
 - (1) The owner or operator of the source demonstrates compliance with applicable particulate mass emissions standards; and
 - (2) The owner or operator of the source submits data necessary to show that emissions up to those allowed by Paragraph (c) of this Rule shall not violate any national ambient air quality standard.

The burden of proving these conditions shall be on the owner or operator of the source and shall be approached in the following manner. The owner or operator of a source seeking an exception shall apply to the Director requesting this modification in its permit. The applicant shall submit the results of a source test within 90 days of application. Source testing shall be by the appropriate procedure as designated by rules in this Subchapter. During this 90-day period the applicant shall submit data necessary to show that emissions up to those allowed by Paragraph (c) of this Rule will not contravene ambient air quality standards. This evidence shall include, as a minimum, an inventory of past and projected emissions from the facility. In its review of ambient air quality, the Division may require additional information that it considers necessary to assess the resulting ambient air quality. If the applicant can thus show that it will be in compliance both with particulate mass emissions standards and ambient air quality standards, the Director shall modify the permit to allow emissions up to those allowed by Paragraph (c) of this Rule.

- (g) For sources required to install, operate, and maintain continuous opacity monitoring systems (COMS), compliance with the numerical opacity limits in this Rule shall be determined as follows excluding startups, shutdowns, maintenance periods when fuel is not being combusted, and malfunctions approved as such according to procedures approved under Rule .0535 of this Section:
 - (1) No more than 10 six-minute periods shall exceed the opacity standard in any one day; and
 - (2) The percent of excess emissions (defined as the percentage of monitored operating time in a calendar quarter above the opacity limit) shall not exceed 0.8 percent of the total

operating hours. If a source operates less than 500 hours during a calendar quarter, the percent of excess emissions shall be calculated by including hours operated immediately previous to this quarter until 500 operational hours are obtained.

In no instance shall excess emissions exempted under this Paragraph cause or contribute to a violation of any emission standard in this Subchapter or 40 CFR Part 60, 61, or 63 or any ambient air quality standard in Section 15A NCAC 02D .0400 or 40 CFR Part 50.

History Note: Authority G.S. 143-215.3(a)(1); 143-215.107(a)(5); Eff. February 1, 1976; Amended Eff. June 1, 2004; April 1, 2003; April 1, 2001; July 1, 1998; July 1, 1996; December 1, 1992; August 1, 1987; January 1, 1985; May 30, 1978.

15A NCAC 02D .0538 CONTROL OF ETHYLENE OXIDE EMISSIONS

(a) For purposes of this Rule, "medical devices" means instruments, apparatus, implements, machines, implants, in vitro reagents, contrivances, or other similar or related articles including their components, parts, and accessories, intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; or intended to affect the structure or any function of the body of man or other animals.

(b) This Rule applies to emissions of ethylene oxide resulting from use as a sterilant in:

- (1) the production and subsequent storage of medical devices; or
- (2) the packaging and subsequent storage of medical devices for sale;

at facilities for which construction began after August 31, 1992.

(c) This Rule does not apply to hospital or medical facilities.

(d) Facilities subject to this Rule shall comply with the following standards:

- (1) For sterilization chamber evacuation, a closed loop liquid ring vacuum pump, or equipment demonstrated to be as effective at reducing emissions of ethylene oxide shall be used;
- (2) For sterilizer exhaust, a reduction in the weight of uncontrolled emissions of ethylene oxide of at least 99.8 percent by weight shall be achieved;
- (3) For sterilizer unload and backdraft valve exhaust, a reduction:
 - (A) in uncontrolled emissions of ethylene oxide of at least 99 percent by weight shall be achieved; or
 - (B) to no more than one part per million by volume of ethylene oxide shall be achieved;
- (4) Sterilized product ethylene oxide residual shall be reduced by:
 - (A) a heated degassing room to aerate the products after removal from the sterilization chamber; the temperature of the degassing room shall be

maintained at a minimum of 95 degrees Fahrenheit during the degassing cycle, and product hold time in the aeration room shall be at least 24 hours; or

(B) a process demonstrated to be as effective as Part (d)(4)(A) of this Rule.

(5) Emissions of ethylene oxide from the degassing area (or equivalent process) shall be vented to a control device capable of reducing uncontrolled ethylene oxide emissions by at least 99 percent by weight or to no more than one part per million by volume of ethylene oxide.. The product aeration room and the product transfer area shall be maintained under a negative pressure.

(e) Before installation of the controls required by Paragraph (d) of this Rule, and annually thereafter, a written description of waste reduction, elimination, or recycling plan shall be submitted [as specified in G.S. 143-215.108(g)] to determine if ethylene oxide use can be reduced or eliminated through alternative sterilization methods or process modifications.

(f) The owner or operator of the facility shall conduct a performance test to verify initial efficiency of the control devices. The owner or operator shall maintain temperature records to demonstrate proper operation of the degassing room. Such records shall be retained for a period of at least two calendar years and shall be made available for inspection by Division personnel.

(g) If the owner or operator of a facility subject to the Rule demonstrates, using the procedures in Rule .1106 of this Section, that the emissions of ethylene oxide from all sources at the facility do not cause the acceptable ambient level of ethylene oxide in Rule .1104 of this Section to be exceeded, then the requirements of Paragraphs (d) through (e) of this Rule shall not apply. This demonstration shall be at the option of the owner or operator of the facility. If this option is chosen, the Director shall write the facility's permit to satisfy the requirements of Rule .1104(a) of this Section.

History Note: Authority G.S. 143-215.3(a)(1); 143-215.107(a)(4),(5); 143-215.108(c); Eff. September 1, 1992; Amended Eff. June 1, 2004; August 1, 2002.

15A NCAC 02D .1404 RECORDKEEPING: REPORTING: MONITORING:

(a) General requirements. The owner or operator of any source shall comply with the monitoring, recordkeeping and reporting requirements in Section .0600 of this Subchapter and shall maintain all records necessary for determining compliance with all applicable limitations and standards of this Section for five years.

(b) Submittal of information to show compliance status. The owner or operator of any source shall maintain and, when requested by the Director, submit any information required by these Rules to determine the compliance status of an affected source.

(c) Excess emissions reporting. The owner or operator shall report excess emissions following the procedures under Rule .0535 of this Subchapter.

(d) Continuous emissions monitors.

(1) The owner or operator shall install, operate, and maintain a continuous emission monitoring system according to 40 CFR Part 75, Subpart H, with such exceptions as may be allowed under 40 CFR Part 75, Subpart H or 40 CFR Part 96 if:

(A) a source is covered under Rules .1416, .1417, or .1418 of this Section except internal combustion engines; or

(B) any source that opts into the nitrogen oxide budget trading program under Rule .1419 of this Section.

(2) The owner or operator of a source that is subject to the requirements of this Section but not covered under Subparagraph (1) of this Paragraph and that uses a continuous emissions monitoring system to measure emissions of nitrogen oxides shall operate and maintain the continuous emission monitoring system according to 40 CFR Part 60, Appendix B, Specification 2, and Appendix F or Part 75, Subpart H. If diluent monitoring is required, 40 CFR Part 60, Appendix B, Specification 3, shall be used. If flow monitoring is required, 40 CFR Part 60, Appendix B, Specification 6, shall be used.

(3) The owner or operator of the following sources shall not be required to use continuous emission monitors unless the Director determines that a continuous emission monitor is necessary under Rule .0611 of this Subchapter to show compliance with the rules of this Section:

(A) a boiler or indirect-fired process heater covered under Rule .1407 of this Section with a maximum heat input less than or equal to 250 million Btu per hour;

(B) stationary internal combustion engines covered under Rule .1409 of this Section except for engines covered under Rules .1409(b) and .1418 of this Section.

(e) Missing data.

(1) If data from continuous emission monitoring systems required to meet the requirements of 40 CFR Part 75 are not available at a time that the source is operated, the procedures in 40 CFR Part 75 shall be used to supply the missing data.

(2) For continuous emissions monitors not covered under Subparagraph (1) of this Paragraph, data shall be available for at least 95 percent of the emission sources operating hours for the applicable averaging period,

where four equally spaced readings constitute a valid hour. If data from continuous emission monitoring systems are not available for at least 95 percent of the time that the source is operated, the procedures in 40 CFR 75.33 through 75.37 shall be used to supply the missing data.

(f) Quality assurance for continuous emissions monitors.

(1) The owner or operator of a continuous emission monitor required to meet 40 CFR Part 75, Subpart H, shall follow the quality assurance and quality control requirements of 40 CFR Part 75, Subpart H.

(2) For a continuous emissions monitor not covered under Subparagraph (1) of this Paragraph, the owner or operator of the continuous emissions monitor shall follow the quality assurance and quality control requirements of 40 CFR Part 60, Appendix F, if the monitor is required to be operated annually under another rule. If the continuous emissions monitor is being operated only to satisfy the requirements of this Section, then the quality assurance and quality control requirements of 40 CFR Part 60, Appendix F, shall apply except that:

(A) A relative accuracy test audit shall be conducted after January 1 and before May 1 of each year;

(B) One of the following shall be conducted at least once between May 1 and September 30 of each year:

(i) a linearity test, according to 40 CFR Part 75, Appendix A, Section 3.2, 6.2, and 7.1;

(ii) a relative accuracy audit, according to 40 CFR Part 60, Appendix F, Section 5 and 6; or

(iii) a cylinder gas audit according to 40 CFR Part 60, Appendix F, Section 5 and 6; and

(C) A daily calibration drift test shall be conducted according to 40 CFR Part 60, Appendix F, Section 4.0.

(g) Interim reporting for large sources. The owner or operator of a source covered under Rules .1416, .1417, or .1418 of this Section shall report to the Director no later than July 30 the tons of nitrogen oxides emitted during the previous May and June. No later than October 30, the owner or operator shall report to the Director the tons of nitrogen oxides emitted during the previous ozone season. The Division of Air Quality shall make this information publicly available.

(h) Recordkeeping and reporting requirements for large sources. The owner or operator of a source covered under Rules .1416, .1417, or .1418 of this Section shall comply with the recordkeeping and reporting requirements of 40 CFR Part 96, Budget Trading Program for State Implementation Plans.

(i) Averaging time for continuous emissions monitors. When compliance with a limitation established for a source subject to the requirements of this Section is determined using a continuous emissions monitoring system, a 24-hour block average as described under Rule .0606 of this Subchapter shall be recorded for each day beginning May 1 through September 30 unless a specific rule requires a different averaging time or procedure. Sources covered under Rules .1416, .1417, or .1418 of this Section shall comply with the averaging time requirements of 40 CFR Part 75. A 24-hour block average described in Rule .0606 of this Subchapter shall be used when a continuous emissions monitoring system is used to determine compliance with a short-term pounds-per-million-Btu standard in Rule .1418 of this Section.

- (j) Heat input. Heat input shall be determined:
- (1) for sources required to use a monitoring system meeting the requirements of 40 CFR Part 75, using the procedures in 40 CFR Part 75; or
 - (2) for sources not required to use a monitoring system meeting the requirements of 40 CFR Part 75, using:
 - (A) a method in 15A NCAC 02D .0501; or
 - (B) the best available heat input data.

(k) Source testing. When compliance with a limitation established for a source subject to the requirements of this Section is determined using source testing, the source testing shall follow the procedures of Rule .1415 of this Section.

(l) Alternative monitoring and reporting procedures. The owner or operator of a source covered under this Rule, except for sources covered under Rule .1419 of this Section, may request alternative monitoring or reporting procedures under Rule .0612, Alternative Monitoring and Reporting Procedures.

History Note: Authority G.S. 143-215.3(a)(1); 143-215.65; 143-215.66; 143-215.107(a)(5), (7), (10); Eff. April 1, 1995; Amended Eff. April 1, 1999; Temporary Amendment Eff. November 1, 2000; Amended Eff. April 1, 2001; Temporary Amendment Eff. August 1, 2001; Amended Eff. June 1, 2004; July 18, 2002.

15A NCAC 02D .1409 STATIONARY INTERNAL COMBUSTION ENGINES

(a) The owner or operator of a stationary internal combustion engine having a rated capacity of 650 horsepower or more that is not covered under Paragraph (b) of this Rule or Rule .1418 of this Section shall not allow emissions of NO_x from the stationary internal combustion engine to exceed the following limitations:

MAXIMUM ALLOWABLE NO_x EMISSION RATES FOR STATIONARY INTERNAL COMBUSTION ENGINES (GRAMS PER HORSEPOWER HOUR)

Engine Type	Fuel Type	Limitation
Rich-burn	Gaseous	2.5
Lean-burn	Gaseous	2.5
Comp Ignition	Liquid	8.0

(b) Engines identified in the table in this Paragraph shall not exceed the emission limit in the table during the ozone season; for the 2002 and 2003 ozone season, there shall not be any restrictions on emissions of nitrogen oxides from these engines under this Rule.

SUM OF MAXIMUM ALLOWABLE OZONE SEASON NO_x EMISSIONS (tons per ozone season)

FACILITY	REGULATED SOURCES	ALLOWABLE EMISSIONS 2004	ALLOWABLE EMISSIONS 2005	ALLOWABLE EMISSIONS 2006 and later
Transcontinental Pipeline Station 150	Gas Mainline engines #12, 13, 14, and 15	311	189	76
Transcontinental Pipeline Station 155	Gas Mainline engines #2, 3, 4, 5, and 6	509	314	127
Transcontinental Pipeline Station 160	Gas Mainline engines #11, 12, 13, 14, and 15	597	367	149

Compliance shall be determined by summing the actual emissions from the engines listed in the table at each facility for the ozone season and comparing those sums to the limits in the table. Compliance may be achieved through trading under Paragraph (g) of this Rule if the trades are approved before the ozone season.

(c) If this Rule becomes applicable to a stationary internal combustion engine pursuant to Rule .1402(d), then, if after reasonable effort as defined in Rule .1401 of this Section, the emissions from that stationary internal combustion engine are greater than the applicable limitation in Paragraph (a) of this Rule, or if the requirements of this Rule are not RACT for the

particular stationary internal combustion engine, the owner or operator may petition the Director for an alternative limitation or standard according to Rule .1412 of this Section.

(d) For the engines identified in Paragraph (b) of this Rule and any engine involved in emissions trading with one or more of the engines identified in Paragraph (b) of this Rule, the owner or operator shall determine compliance using:

- (1) a continuous emissions monitoring system which meets the applicable requirements of Appendices B and F of 40 CFR part 60 and Rule .1404 of this Section; or

- (2) an alternate monitoring and recordkeeping procedure based on actual emissions testing and correlation with operating parameters.

The installation, implementation, and use of this alternate procedure allowed under Subparagraph (d)(2) of this Paragraph shall be approved by the Director before it may be used. The Director may approve the alternative procedure if he finds that it can show the compliance status of the engine.

(e) If a stationary internal combustion engine is permitted to operate more than 475 hours during the ozone season, compliance with the limitation established for a stationary internal combustion engine under Paragraph (a) of this Rule shall be determined using annual source testing according to Rule .1415 of this Section. If a source covered under this rule can burn more than one fuel, then the owner or operator of the source may choose not to burn one or more of these fuels during the ozone season. If the owner or operator chooses not to burn a particular fuel, the source testing required under this Rule shall not be required for that fuel.

(f) If a stationary internal combustion engine is permitted to operate no more than 475 hours during the ozone season, the owner or operator of the stationary internal combustion engine shall show compliance with the limitation under Paragraph (a) of this Rule with source testing during the first ozone season of operation according to Rule .1415 of this Section. Each year after that, the owner or operator of the stationary internal combustion engine shall comply with the annual tune-up requirements of Rule .1414 of this Section.

(g) The owner or operator of a source covered under Paragraph (b) of this Rule may offset part or all of the emissions of that source by reducing the emissions of another stationary internal combustion engine at that facility by an amount equal to or greater than the emissions being offset. Only actual decreased emissions that have not previously been relied on to comply with Subchapter 02D or 02Q of this Title or Title 40 of the Code of Federal Regulations can be used to offset the emissions of another source. The person requesting the offset shall submit the following information to the Director:

- (1) identification of the source, including permit number, providing the offset and what the new allowable emission rate for the source will be;
- (2) identification of the source, including permit number, receiving the offset and what the new allowable emission rate for the source will be;
- (3) the amount of allowable emissions in tons per ozone season being offset;

- (4) a description of the monitoring, recordkeeping, and reporting that shall be used to show compliance; and

- (5) documentation that the offset is an actual decrease in emissions that has not previously been relied on to comply with Subchapter 02D or 02Q of this Title or Title 40 of the Code of Federal Regulations.

The Director may approve the offset if he finds that all the information required by this Paragraph has been submitted and that the offset is an actual decrease in emissions that have not previously been relied on to comply with Subchapter 02D or 02Q of this Title or Title 40 of the Code of Federal Regulations. If the Director approves the offset, he shall put the new allowable emission rates in the respective permits.

History Note: Authority G.S. 143-215.3(a)(1); 143-215.66; 143-215.107(a)(5), (7), (10); Eff. April 1, 1995; Temporary Amendment Eff. August 1, 2001; November 1, 2000; Amended Eff. June 1, 2004; July 18, 2002.

15A NCAC 02D .1416 EMISSION ALLOCATIONS FOR UTILITY COMPANIES

(a) After November 1, 2000 but before the EPA promulgation of revisions to 40 CFR Part 51, Subpart G, revising the nitrogen oxide budget for North Carolina, the following limits apply:

- (1) Carolina Power & Light. The total emissions from all the coal-fired boilers and combustion turbines that are not listed in Rule .1417 of this Section at Carolina Power & Light Company's Asheville, Cape Fear, Lee, Mayo, Roxboro, Sutton, and Weatherspoon facilities shall not exceed:
 - (A) 12,019 tons per ozone season for 2004;
 - (B) 15,566 tons per ozone season for 2005;
 - (C) 14,355 tons per ozone season for 2006 and each year thereafter until revised according to Rule .1420 of this Section; and

Furthermore, except as allowed under Paragraph (d) of this Rule, individual sources at these facilities named in the table in this Subparagraph shall not exceed during the ozone season the nitrogen oxide emission allocations in the table.

FACILITY	SOURCE	EMISSION ALLOCATIONS (tons/ozone season) 2004	EMISSION ALLOCATIONS (tons/ozone season) 2005	EMISSION ALLOCATIONS (tons/ozone season) 2006 and later
Asheville, Buncombe Co.	1	551	714	659
	2	538	697	643
Cape Fear Chatham Co	5	286	371	342
	6	406	526	485
Lee - Wayne Co	1	145	188	173
	2	159	206	190
	3	465	603	556

APPROVED RULES

FACILITY	SOURCE	EMISSION ALLOCATIONS (tons/ozone season) 2004	EMISSION ALLOCATIONS (tons/ozone season) 2005	EMISSION ALLOCATIONS (tons/ozone season) 2006 and later
Mayo - Person Co	1	1987	2572	2373
Roxboro - Person Co	1	861	1115	1028
	2	1602	2075	1914
	3	1773	2295	2116
	4	1698	2199	2028
L V Sutton New Hanover Co.	1	182	236	217
	2	198	256	236
	3	806	1044	962
Weatherspoon Robeson Co.	1	85	110	102
	2	97	125	116
	3	180	234	215

(2) Duke Power. The total emissions from all the coal-fired boilers and combustion turbines that are not listed in Rule .1417 of this Section at Duke Power Company's Allen, Belevs Creek, Buck, Cliffside, Dan River, Marshall, and Riverbend facilities shall not exceed:

- (A) 17,816 tons per ozone season for 2004;
- (B) 23,072 tons per ozone season for 2005;

(C) 21,278 tons per ozone season for .2006 and each year thereafter until revised according to Rule .1420 of this Section; and

Furthermore, except as allowed under Paragraph (d) of this Rule, individual sources at these facilities named in the table in this Subparagraph shall not exceed during the ozone season the nitrogen oxide emission allocations in the table.

FACILITY	SOURCE	EMISSION ALLOCATIONS (tons/ozone season) 2004	EMISSION ALLOCATIONS (tons/season) 2005	EMISSION ALLOCATIONS (tons/season) 2006 and later
G G Allen Gaston Co.	1	350	453	418
	2	355	460	424
	3	590	764	705
	4	528	683	630
	5	678	748	690
Belevs Creek Stokes Co.	1	2591	3356	3095
	2	3020	3911	3608
Buck Rowan Co.	5	66	86	79
	6	73	95	87
	7	78	101	93
	8	319	413	381
	9	337	437	403
Cliffside Cleveland and Rutherford Co.	1	76	98	91
	2	82	106	98
	3	107	138	128
	4	120	156	144
	5	1326	1717	1584
Dan River Rockingham Co.	1	132	171	157
	2	144	186	172
	3	304	394	363
Marshall Catawba Co.	1	1011	1309	1207
	2	1056	1367	1261
	3	1784	2311	2131
	4	1764	2285	2107
Riverbend Gaston Co.	10	299	387	357
	7	216	280	258
	8	225	291	268

APPROVED RULES

FACILITY	SOURCE	EMISSION ALLOCATIONS (tons/ozone season) 2004	EMISSION ALLOCATIONS (tons/season) 2005	EMISSION ALLOCATIONS (tons/season) 2006 and later
	9	285	369	340

(b) After November 1, 2000, and after any EPA promulgation of revisions to 40 CFR Part 51, Subpart G, revising the nitrogen oxide budget for North Carolina, the following limits apply:

(1) Carolina Power & Light. The total emissions from all the coal-fired boilers and combustion turbines that are not listed in Rule .1417 of this Section at Carolina Power & Light Company's Asheville, Cape Fear, Lee, Mayo, Roxboro, Sutton, and Weatherspoon facilities shall not exceed:

(A) 12,019 tons per ozone season in 2004;

(B) 15,024 tons per ozone season for 2005;

(C) 11,320 tons per ozone season for 2006 and each year thereafter until revised according to Rule .1420 of this Section; and

Furthermore, except as allowed under Paragraph (d) of this Rule, individual sources at these facilities named in the table in this Subparagraph shall not exceed during the ozone season the nitrogen oxide emission allocations in the table.

FACILITY	SOURCE	EMISSION ALLOCATIONS (tons/ozone season) 2004	EMISSION ALLOCATIONS (tons/ozone season) 2005	EMISSION ALLOCATIONS (tons/ozone season) 2006 and later
Asheville Buncombe Co	1	551	689	519
	2	538	672	507
Cape Fear Chatham Co	5	286	358	270
	6	406	508	382
Lee Wayne Co.	1	145	182	137
	2	159	199	150
	3	465	582	438
Mayo Person Co	1	1987	2483	1872
Roxboro Person Co	1	861	1076	811
	2	1602	2003	1509
	3	1773	2215	1669
	4	1698	2122	1599
L V Sutton New Hanover Co.	1	182	228	171
	2	198	247	186
	3	806	1007	759
Weatherspoon Robeson Co.	1	85	107	80
	2	97	121	91
	3	180	225	170

(2) Duke Power. The total emissions from all the coal-fired boilers and combustion turbines that are not listed in Rule .1417 of this Section at Duke Power Company's Allen, Belews Creek, Buck, Cliffside, Dan River, Marshall, and Riverbend facilities shall not exceed:

(A) 17,816 tons per ozone season;
 (B) 22,270 tons per ozone season for 2005;

(C) 16,780 tons per ozone season for 2006 and each year thereafter until revised according to Rule .1420 of this Section; and

Furthermore, except as allowed under Paragraph (d) of this Rule, individual sources at these facilities named in the table in this Subparagraph shall not exceed during the ozone season the nitrogen oxide emission allocations in the table.

FACILITY	SOURCE	EMISSION ALLOCATIONS (tons/ozone season) 2004	EMISSION ALLOCATIONS (tons/ozone season) 2005	EMISSION ALLOCATIONS (tons/ozone season) 2006 and later
G G Allen Gaston Co.	1	350	437	329
	2	355	444	334
	3	590	737	556
	4	528	660	497
	5	578	722	544
Belews Creek Stokes Co.	1	2591	3239	2441
	2	3020	3775	2846
Buck Rowan Co.	5	66	83	63
	6	73	91	69
	7	78	97	73
	8	319	399	300
	9	337	422	318
Cliffside Cleveland and Rutherford Co.	1	76	95	71
	2	82	102	77
	3	107	134	101
	4	120	150	113
	5	1326	1658	1249
Dan River Rockingham Co.	1	132	165	124
	2	144	180	135
	3	304	380	286
Marshall Catawba Co.	1	1011	1263	952
	2	1056	1320	994
	3	1784	2230	1680
	4	1764	2206	1662
Riverbend Gaston Co.	10	299	374	282
	7	216	270	204
	8	225	281	212
	9	285	356	268

(c) Posting of emission allocation. The Director shall post the emission allocations for sources covered under this Rule on the Division's web page.

(d) Trading. Sources shall comply with the requirements of this Rule using the nitrogen oxide budget trading program set out in Rule .1419 of this Section.

(e) Monitoring. The owner or operator of a source subject to this Rule shall show compliance using a continuous emission monitor that meets the requirements of 40 CFR Part 75, Subpart H, with such exceptions as allowed under 40 CFR Part 75, Subpart H or 40 CFR Part 96.

(f) Operation of control devices. All emission control devices and techniques installed to comply with this Rule shall be operated during the ozone season in the manner in which they are designed and permitted to be operated.

(g) Days of violations. For the purposes of this Rule, the number of days of violation for a source shall be determined after the end of the ozone season as follows:

- (1) To the source's allocation in this Rule, the allocations acquired before December 1 of that year under Rule .1419 of this Section are added and the allocations transferred before December 1 of that year under Rule .1419 of this Section are subtracted.

- (2) The value calculated under Subparagraph (1) of this Paragraph is compared to the actual emissions from the source for the ozone season. If the value calculated under Subparagraph (1) of this Paragraph is greater than or equal to the actual emissions from the source for the ozone season, the source is in compliance. If the value calculated under Subparagraph (1) of this Paragraph is less than the actual emissions from the source for the ozone season, the source is not in compliance.
- (3) If the source is not in compliance, beginning with September 30, the actual emissions for that day and each preceding day are subtracted from the actual emissions for the ozone season until the value calculated under Subparagraph (1) of this Paragraph is greater than or equal to the actual emissions. Each day that the source operated after this day to September 30 is a day of violation.

(h) Modification and reconstruction. The modification or reconstruction of a source covered under this Rule shall not make that source a "new" source under this Rule. A source that is modified or reconstructed shall retain its emission allocations under Paragraph (a) or (b) of this Rule.

(i) Additional controls. The Environmental Management Commission may specify through rulemaking a specific emission limit lower than that established under this Rule for a specific source if compliance with the lower emission limit is required as part of the State Implementation Plan to attain or maintain the ambient air quality standard for ozone.

History Note: Authority G.S. 143-215.3(a)(1); 143-215.107(a)(5), (7), (10); Temporary Adoption Eff. November 1, 2000; Eff. April 1, 2001; Temporary Amendment Eff. August 1, 2001; Amended Eff. June 1, 2004; July 18, 2002.

15A NCAC 2D .1422 COMPLIANCE SUPPLEMENT POOL CREDITS

(a) Purpose. The purpose of this Rule is to regulate North Carolina's eligibility for and use of the Compliance Supplement Pool under 40 CFR 51.121(e)(3).

(b) Eligibility. Sources covered under Rule .1416 of this Section may earn Compliance Supplement Pool Credits for those nitrogen oxide emissions reductions required by Rule .1416 of this Section that are achieved during the ozone season after September 30, 1999 and are demonstrated using baseline and current emissions determined according to 40 CFR Part 75 before May 1, 2003, and are beyond the total emission reductions required under 40 CFR Part 76 or any other provision of the federal Clean Air Act.

(c) Credits. The Compliance Supplement Pool Credits earned under this Rule shall be tabulated in tons of nitrogen oxides reduced per ozone season. The control device, modification, or change in operational practice that enables the combustion source or sources to achieve the emissions reductions shall be permitted. The facility shall provide the Division of Air Quality with written notification certifying the installation and operation of the control device or the modification or change in operational practice that enables the combustion source or sources to achieve the emissions reduction. Only emission reductions that are beyond emission reductions required under 40 CFR Part 76 or any other provision of the federal Clean Air Act are creditable Compliance Supplement Pool Credits. Credits are counted in successive seasons through May 1, 2003. Seasonal credits shall be recorded in a Division of Air Quality database and will accumulate in this database until May 1, 2003. At that point a cumulative total of all the Compliance Supplement Pool Credits earned during the entire period shall be tabulated. These credits will then be available for use by the State of North Carolina to achieve compliance with the State ozone season NOx budget.

(d) Requesting credits. In order to earn Compliance Supplement Pool Credits, the owner or operator of the facility shall provide the following written documentation to the Director before January 1, 2003.

- (1) the combustion source or sources involved in the emissions reduction;
- (2) the start date of the emissions reduction;
- (3) a description of the add-on control device, modification, or change in operational practice that enables the combustion source or sources to achieve the emissions reduction;

- (4) the current and baseline emissions of nitrogen oxides of the combustion source or sources involved in this reduction in terms of tons of nitrogen oxides per season;
- (5) the amount of reduction of emissions of nitrogen oxides achieved by this action in tons of nitrogen oxides per season per combustion source involved;
- (6) the total reduction of nitrogen oxides achieved by this action in tons of nitrogen oxides per season for all the combustion sources involved;
- (7) a demonstration that the proposed action has reduced the emissions of nitrogen oxides from the combustion sources involved by the amount specified in Subparagraphs (d)(5) and (d)(6) of this Rule; and
- (8) a description of the monitoring, recordkeeping, and reporting plan used to ensure continued compliance with the proposed emissions reduction activity; continuous emissions monitors shall be used to monitor emissions.

(e) Approving requests. Before any Compliance Supplement Pool Credits can be allocated, the Director shall have to approve them. The Director shall approve credits if he finds that:

- (1) early emissions reductions are demonstrated using baseline and current emissions determined according to 40 CFR Part 75 to be beyond the reductions required under 40 CFR Part 76, Acid Rain Nitrogen Oxides Emission Reduction Program and any other requirement of the federal Clean Air Act;
- (2) the emission reductions are achieved after September 30, 1999, and before May 1, 2003, and
- (3) all the information and documentation required under Paragraph (d) of this Rule have been submitted.

The Director shall notify the owner or operator of the source and EPA of his approval or disapproval of a request and of the amount of Compliance Supplement Pool Credits approved. If the Director disapproves a request or part of a request, he shall explain in writing to the owner or operator of the source the reasons for disapproval.

(f) Compliance supplement pool. The Director shall verify that the Compliance Supplement Pool Credits do not exceed a statewide total of 10,737 tons for all the ozone seasons of the years 2003, 2004, and 2005.

(g) Interim report. The owner or operators of the facility shall submit to the Director by January 1, 2001 and January 1, 2002 an interim report that contains the information in Paragraph (d) of this Rule for the previous ozone season.

(h) Recording credits. Based on the interim reports submitted under Paragraph (g) of this Rule, the Division shall record the Compliance Supplement Pool Credits earned under this Rule in a central database. The Division of Air Quality shall maintain this database. These credits shall be recorded in tons of emissions of nitrogen oxides reduced per season with the actual start date of the reduction activity. Based on the final formal request submitted under Paragraph (d) of this Rule as approved under

Paragraph (e) of this Rule, the Director shall finalize the Compliance Supplement Pool Credits earned and record the final earned credits in the Division's database. .

(i) Use of credits. Final earned Compliance Supplement Pool Credits shall be available for Carolina Power & Light Co. and Duke Power Co. to use in 2003. The allocations of Carolina Power & Light Co.'s sources and Duke Power Co.'s sources in Rule .1416 of this Section shall be reduced for 2004 or 2005 by the amount of Compliance Supplement Pool Credits used in 2003 using the procedures in Paragraph (k) of this Rule. Compliance Supplement Pool Credits not used in 2003 shall be available for use by the Director of the Division of Air Quality to offset excess emissions of nitrogen oxides in order to achieve compliance with the North Carolina ozone season NOx budget after May 30, 2004, but no later than September 30, 2005. The credits shall be used on a one for one basis, that is, one ton per season of credit can be used to offset one ton, or less, per season of excess emissions to achieve compliance with the requirements of Rule .1416 or .1417 of this Section. All credits shall expire and will no longer be available for use after November 30, 2005.

(j) Reporting. The Director shall report:

- (1) to the EPA, Carolina Power & Light Co. and Duke Power Co. by:
 - (A) March 1, 2003 the Compliance Supplement Pool Credits earned by Carolina Power & Light Co. and by Duke Power Co.; and
 - (B) March 1, 2004 the reductions in allocations calculated under Paragraphs (k) and (l) of this Rule; and
- (2) to the EPA by:
 - (A) December 1, 2003, the Compliance Supplement Pool Credits used beginning May 1 through September 30, 2003;
 - (B) December 1, 2004, the Compliance Supplement Pool Credits used beginning May 31 through September 30, 2004; and
 - (C) December 1, 2005, the Compliance Supplement Pool Credits used beginning May 1 through September 30, 2005.

(k) Using Compliance Supplement Pool Credits in 2003. Carolina Power & Light Co. and Duke Power Co. may use Compliance Supplement Pool Credits in 2003. If they do use Compliance Supplement Pool Credits in 2003, then the allocations for their sources in Rule .1416 of this Section shall be reduced for 2004 or 2005 by the amount of Compliance Supplement Pool Credits used in 2003. Before the Director approves the use of Compliance Supplement Pool Credits in 2003, the company shall identify the sources whose allocations are to be reduced to offset the Compliance Supplement Pool Credits requested for 2003 and the year (2004 or 2005) in which the allocation is reduced. The Director shall approve no more than 4,295 tons for Carolina Power & Light Co. and no more than 6,442 tons for Duke Power Co. The Director shall approve no more than 5,771 tons being offset by reductions in allocations

in 2004 and no more than 4,966 tons being offset by reductions in allocations in 2005.

(l) Failure to receive sufficient credits. If the sum of Compliance Supplement Pool Credits received by Carolina Power & Light Co. and Duke Power Co. are less than 10,737 tons, the following procedure shall be used to reduce the allocations in Rule .1416 of this Section:

- (1) If the Compliance Supplement Pool Credits received by Carolina Power & Light Co. are less than 4,295 tons, and the Compliance Supplement Pool Credits received by Duke Power Co. are greater than or equal to 6,442 tons, the allocation for Carolina Power & Light Co.'s sources shall be reduced by the amount obtained by subtracting from 10,737 tons the sum of Compliance Supplement Pool Credits received by Carolina Power & Light Co. and Duke Power Co. The allocations of Carolina Power & Light Co.'s sources shall be reduced using the procedure in Subparagraph (4) of this Paragraph.
- (2) If the Compliance Supplement Pool Credits received by Duke Power Co. are less than 6,442 tons, and the Compliance Supplement Pool Credits received by Carolina Power & Light Co. are greater than or equal to 4,295 tons, the allocation for Duke Power Co.'s sources shall be reduced by the amount obtained by subtracting from 10,737 tons the sum of Compliance Supplement Pool Credits received by Carolina Power & Light Co. and Duke Power Co. The allocations of Duke Power Co.'s sources shall be reduced using the procedure in Subparagraph (4) of this Paragraph.
- (3) If the Compliance Supplement Pool Credits received by Carolina Power & Light Co. are less than 4,295 tons, and the Compliance Supplement Pool Credits received by Duke Power Co. are less than 6,442 tons:
 - (A) The allocation for Carolina Power & Light Co.'s sources shall be reduced by the amount obtained by subtracting from 4,295 tons the Compliance Supplement Pool Credits received by Carolina Power & Light Co. The allocations of Carolina Power & Light Co.'s sources shall be reduced using the procedure in Subparagraph (4) of this Paragraph; and
 - (B) The allocation for Duke Power Co.'s sources shall be reduced by the amount obtained by subtracting from 6,442 tons the Compliance Supplement Pool Credits received by Duke Power Co. The allocations of Duke Power Co.'s sources shall be reduced using the procedure in Subparagraph (4) of this Paragraph.

- (4) When the allocations in Rule .1416 of this Section for Carolina Power & Light Co.'s sources or for Duke Power Co.'s sources are required to be reduced, the following procedure shall be used:
- (A) If the reduction required is less than or equal to 4,966 tons, then following procedure shall be used:
- (i) The allocation of all sources listed in Rule .1416 of this Section for 2005 for Carolina Power & Light Co. or Duke Power Co. are summed.
 - (ii) The reduction required under Subparagraph (1), (2), or (3) of this Paragraph is subtracted from the sum computed under Subpart (i) of this Part.
 - (iii) The allocation of each source listed in Rule .1416 of this Section for 2005 for Carolina Power & Light Co. or Duke Power Co. is multiplied by the value computed under Subpart (ii) of this Part and divided by the value computed under Subpart (i) of this Part. The result is the revised allocation for that source.
- (B) If the reduction required is more than 4,966 tons, then the following procedure shall be used:
- (i) The reduction for the allocations for 2005 is determined using the procedure under Part (A) of this Subparagraph and substituting 4,966 as the reduction required under Subpart (A)(ii) of this Subparagraph.
 - (ii) The reduction for the allocations for 2004 shall be determined using the following procedure:
 - (I) The reduction required under Subparagraph (1), (2), or (3) of this Paragraph is subtracted from 4,966.
 - (II) The allocations of all sources listed in Rule .1416 of this Section for 2004 for Carolina Power & Light Co. or Duke Power Co. for 2004 are summed.
 - (III) The allocation of each source listed in Rule .1416 of this Section for 2004 for Carolina Power & Light Co. or Duke Power Co. is multiplied by the value computed under Sub-Subpart (I) of this Subpart and divided by the value computed Sub-Subpart (II) of this Subpart. The result is the revised allocation for that source
 - (m) If allocations are reduced in 2004 or 2005 for Carolina Power & Light Co. or Duke Power Co. under Paragraph (k) or (l) of this Rule, the company whose allocations are reduced shall reduce its allocations by returning allowances through the use of allowance transfers to the State following the procedures in 40 CFR Part 96. These allowances shall be retired.
- History Note: Authority G.S. 143-215.3(a)(1); 143-215.65; 143-215.66; 143-215.107(a)(5), (7), (10); Temporary Adoption Eff. August 1, 2001; Eff. July 18, 2002; Amended Eff. June 1, 2004.*
- 15A NCAC 2D .1903 PERMISSIBLE OPEN BURNING WITHOUT AN AIR QUALITY PERMIT**
- (a) All open burning is prohibited except open burning allowed under Paragraph (b) of this Rule or Rule .1904 of this Section. Except as allowed under Paragraphs (b)(3) through (b)(7), or (b)(9) of this Rule, open burning shall not be initiated in an ozone forecast area that the Department, or the Forsyth County Environmental Affairs Department for the Triad ozone forecast area, has forecasted to be in an Ozone Action Day Code "Orange" as defined in 40 CFR Part 58, Appendix G status or above during the time period covered by that forecast.
- (b) The following types of open burning are permissible without an air quality permit:
- (1) open burning of leaves, tree branches or yard trimmings, excluding logs and stumps, if the following conditions are met:
 - (A) The material burned originates on the premises of private residences and is burned on those premises;
 - (B) There are no public pickup services available;
 - (C) Non-vegetative materials, such as household garbage, lumber, or any other synthetic materials are not burned;

- (D) The burning is initiated no earlier than 8:00 a.m. and no additional combustible material is added to the fire between 6:00 p.m. on one day and 8:00 a.m. on the following day;
 - (E) The burning does not create a nuisance; and
 - (F) Material is not burned when the Division of Forest Resources has banned burning for that area.
- (2) open burning for land clearing or right-of-way maintenance if the following conditions are met:
- (A) The wind direction at the time that the burning is initiated and the wind direction as forecasted by the National Weather Service during the time of the burning are away from any area, including public road within 250 feet of the burning as measured from the edge of the pavement or other roadway surface, which may be affected by smoke, ash, or other air pollutants from the burning;
 - (B) The location of the burning is at least 1,000 feet from any dwelling, group of dwellings, or commercial or institutional establishment, or other occupied structure not located on the property on which the burning is conducted. The regional office supervisor shall grant exceptions to the setback requirements if:
 - (i) a signed, written statement waiving objections to the open burning associated with the land clearing operation is obtained and submitted to and the exception granted by the regional office supervisor before the burning begins from a resident or an owner of each dwelling, commercial or institutional establishment, or other occupied structure within 1,000 feet of the open burning site. In the case of a lease or rental agreement, the lessee or renter shall be the person from whom permission shall be gained prior to any burning; or
 - (ii) an air curtain burner that complies with Rule .1904 of this Section, is utilized at the open burning site;
 - (C) Only land cleared plant growth is burned. Heavy oils, asphaltic materials such as shingles and other roofing materials, items containing natural or synthetic rubber, or any materials other than plant growth shall not be burned; however, kerosene, distillate oil, or diesel fuel may be used to start the fire;
 - (D) Initial burning begins only between the hours of 8:00 a.m. and 6:00 p.m., and no combustible material is added to the fire between 6:00 p.m. on one day and 8:00 a.m. on the following day, except that, under meteorological conditions that are conducive to the rise and dispersion of smoke, deviation from these hours of burning shall be granted by the regional office supervisor. The landowner or operator of the open burning operation shall be responsible for obtaining written approval for burning during periods other than those specified in this Part;
 - (E) No fires are initiated or vegetation added to existing fires when the Division of Forest Resources has banned burning for that area; and
 - (F) Materials are not carried off-site or transported over public roads for open burning unless the materials are carried off-site or transported over public roads to facilities permitted according to Rule .1904 of this Section for the operation of an air curtain burner at a permanent site;
- (3) camp fires and fires used solely for outdoor cooking and other recreational purposes, or for ceremonial occasions, or for human warmth and comfort and which do not create a nuisance and do not use synthetic materials or refuse or salvageable materials for fuel;
 - (4) fires purposely set to forest land for forest management practices for which burning is acceptable to the Division of Forest Resources;
 - (5) fires purposely set to agricultural lands for disease and pest control and fires set for other agricultural or apicultural practices for which burning is currently acceptable to the Department of Agriculture;
 - (6) fires purposely set for wildlife management practices for which burning is currently acceptable to the Wildlife Resource Commission;
 - (7) fires for the disposal of dangerous materials when it is the safest and most practical method of disposal;
 - (8) fires for the disposal of material generated as a result of a natural disaster, such as tornado, hurricane, or flood, if the regional office supervisor grants permission for the burning. The person desiring to do the burning shall

document and provide written notification to the regional office supervisor of the appropriate regional office that there is no other practical method of disposal of the waste. Factors that the regional office supervisor shall consider in granting permission for the burning include type, amount, location of the burning, and nature of combustible substances. The regional office supervisor shall not grant permission for the burning if the primary purpose of the fire is to dispose of synthetic materials or refuse or recovery of salvageable materials. Fires authorized under this Subparagraph shall comply with the conditions of Subparagraph (b)(2) of this Rule.

- (9) fires purposely set by manufacturers of fire extinguishing materials or equipment, testing laboratories, or other persons, for the purpose of testing or developing these materials or equipment in accordance with a standard qualification program;
- (10) fires purposely set for the instruction and training of fire-fighting personnel, including fires at permanent fire-fighting training facilities, or when conducted under the supervision of or with the cooperation of one or more of the following agencies:
 - (A) the Division of Forest Resources;
 - (B) the North Carolina Insurance Department;
 - (C) North Carolina technical institutes; or
 - (D) North Carolina community colleges, including:
 - (i) the North Carolina Fire College; or
 - (ii) the North Carolina Rescue College; and
- (11) fires not described in Subparagraph (10) of this Paragraph, purposely set for the instruction and training of fire-fighting personnel, provided that:
 - (A) The regional office supervisor of the appropriate regional office and the HHCB have been notified according to the procedures and deadlines contained in the appropriate regional notification form. This form may be obtained by writing the appropriate regional office at the address in Rule .1905 of this Section and requesting it, and
 - (B) The regional office supervisor has granted permission for the burning. Factors that the regional office supervisor shall consider in granting permission for the burning include type, amount, and nature of combustible substances. The regional office supervisor shall not grant

permission for the burning of salvageable items, such as insulated wire and electric motors or if the primary purpose of the fire is to dispose of synthetic materials or refuse. The regional office supervisor of the appropriate regional office shall not consider previously demolished structures as having training value. However, the regional office supervisor of the appropriate regional office may allow an exercise involving the burning of motor vehicles burned over a period of time by a training unit or by several related training units. Any deviations from the dates and times of exercises, including additions, postponements, and deletions, submitted in the schedule in the approved plan shall be communicated verbally to the regional office supervisor of the appropriate regional office at least one hour before the burn is scheduled.

(c) The authority to conduct open burning under this Section does not exempt or excuse any person from the consequences, damages or injuries that may result from this conduct. It does not excuse or exempt any person from complying with all applicable laws, ordinances, rules or orders of any other governmental entity having jurisdiction even though the open burning is conducted in compliance with this Section.

History Note: Authority G.S. 143-215.3(a)(1); 143-215.107(a)(5); Eff. July 1, 1996; Amended Eff. June 1, 2004; July 1, 1998.

15A NCAC 02Q .0702 EXEMPTIONS

- (a) A permit to emit toxic air pollutants shall not be required under this Section for:
- (1) residential wood stoves, heaters, or fireplaces;
 - (2) hot water heaters that are used for domestic purposes only and are not used to heat process water;
 - (3) maintenance, structural changes, or repairs that do not change capacity of that process, fuel-burning, refuse-burning, or control equipment, and do not involve any change in quality or nature or increase in quantity of emission of any regulated air pollutant or toxic air pollutant;
 - (4) housekeeping activities or building maintenance procedures, including painting buildings, resurfacing floors, roof repair, washing, portable vacuum cleaners, sweeping, use and associated storage of janitorial products, or non-asbestos bearing insulation removal;

- (5) use of office supplies, supplies to maintain copying equipment, or blueprint machines;
- (6) paving parking lots;
- (7) replacement of existing equipment with equipment of the same size, type, and function if the new equipment:
 - (A) does not result in an increase to the actual or potential emissions of any regulated air pollutant or toxic air pollutant;
 - (B) does not affect compliance status; and
 - (C) fits the description of the existing equipment in the permit, including the application, such that the replacement equipment can be operated under that permit without any changes to the permit;
- (8) comfort air conditioning or comfort ventilation systems that do not transport, remove, or exhaust regulated air pollutants to the atmosphere;
- (9) equipment used for the preparation of food for direct on-site human consumption;
- (10) non-self-propelled non-road engines, except generators, regulated by rules adopted under Title II of the federal Clean Air Act;
- (11) stacks or vents to prevent escape of sewer gases from domestic waste through plumbing traps;
- (12) use of fire fighting equipment;
- (13) the use for agricultural operations by a farmer of fertilizers, pesticides, or other agricultural chemicals containing one or more of the compounds listed in 15A NCAC 02D .1104 if such compounds are applied according to agronomic practices acceptable to the North Carolina Department of Agriculture;
- (14) asbestos demolition and renovation projects that comply with 15A NCAC 02D .1110 and that are being done by persons accredited by the Department of Health and Human Services under the Asbestos Hazard Emergency Response Act;
- (15) incinerators used only to dispose of dead animals or poultry as identified in 15A NCAC 02D .1201(c)(4) or incinerators used only to dispose of dead pets as identified in 15A NCAC 02D .1208(a)(2)(A);
- (16) refrigeration equipment that is consistent with Section 601 through 618 of Title VI (Stratospheric Ozone Protection) of the federal Clean Air Act, 40 CFR Part 82, and any other regulations promulgated by EPA under Title VI for stratospheric ozone protection, except those units used as or with air pollution control equipment;
- (17) laboratory activities:
 - (A) bench-scale, on-site equipment used exclusively for chemical or physical analysis for quality control purposes,
- staff instruction, water or wastewater analyses, or non-production environmental compliance assessments;
- (B) bench scale experimentation, chemical or physical analyses, training or instruction from nonprofit, non-production educational laboratories;
- (C) bench scale experimentation, chemical or physical analyses, training or instruction from hospital or health laboratories pursuant to the determination or diagnoses of illnesses; and
- (D) research and development laboratory activities that are not required to be permitted under Section .0500 of this Subchapter provided the activity produces no commercial product or feedstock material;
- (18) combustion sources as defined in 15 NCAC 02Q .0703 until 18 months after promulgation of the MACT or GACT standards for combustion sources. (Within 18 months following promulgation of the MACT or GACT standards for combustion sources, the Commission shall decide whether to keep or remove the combustion source exemption. If the Commission decides to remove the exemption, it shall initiate rulemaking procedures to remove this exemption.)
- (19) storage tanks used only to store:
 - (A) inorganic liquids with a true vapor pressure less than 1.5 pounds per square inch absolute;
 - (B) fuel oils, kerosene, diesel, crude oil, used motor oil, lubricants, cooling oils, natural gas, liquefied petroleum gas, or petroleum products with a true vapor pressure less than 1.5 pounds per square inch absolute;
- (20) dispensing equipment used solely to dispense diesel fuel, kerosene, lubricants or cooling oils;
- (21) portable solvent distillation systems that are exempted under 15A NCAC 02Q .0102(c)(1)(I).
- (22) processes:
 - (A) electric motor burn-out ovens with secondary combustion chambers or afterburners;
 - (B) electric motor bake-on ovens;
 - (C) burn-off ovens for paint-line hangers with afterburners;
 - (D) hosiery knitting machines and associated lint screens, hosiery dryers and associated lint screens, and hosiery dyeing processes where bleach or solvent dyes are not used;

- (E) blade wood planers planing only green wood;
- (F) saw mills that saw no more than 2,000,000 board feet per year provided only green wood is sawed;
- (G) perchloroethylene drycleaning processes with 12-month rolling total consumption of:
 - (i) less than 1366 gallons of perchloroethylene per year for facilities with dry-to-dry machines only;
 - (ii) less than 1171 gallons of perchloroethylene per year for facilities with transfer machines only; or
 - (iii) less than 1171 gallons of perchloroethylene per year for facilities with both transfer and dry-to-dry machines;
- (23) wood furniture manufacturing operations as defined in 40 CFR 63.801(a) that comply with the emission limitations and other requirements of 40 CFR Part 63 Subpart JJ, provided that the terms of this exclusion shall not affect the authority of the Director under 15A NCAC 02Q .0712;
- (24) wastewater treatment systems at pulp and paper mills for hydrogen sulfide and methyl mercaptan only;
- (25) gasoline dispensing facilities or gasoline service station operations that comply with 15A NCAC 02D .0928 and .0932 and that receive gasoline from bulk gasoline plants or bulk gasoline terminals that comply with 15A NCAC 02D .0524, .0925, .0926, .0927, .0932, and .0933 via tank trucks that comply with 15A NCAC 02D .0932;
- (26) the use of ethylene oxide as a sterilant in the production and subsequent storage of medical devices or the packaging and subsequent storage of medical devices for sale if the emissions from all new and existing sources at the facility described in 15A NCAC 02D .0538(d) are controlled at least to the degree described in 15A NCAC 02D .0538(d) and the facility complies with 15A NCAC 02D .0538(e) and (f);
- (27) bulk gasoline plants, including the storage and handling of fuel oils, kerosenes, and jet fuels but excluding the storage and handling of

- (28) other organic liquids, that comply with 15A NCAC 02D .0524, .0925, .0926, .0932, and .0933; unless the Director finds that a permit to emit toxic air pollutants is required under Paragraph (b) of this Rule or Rule .0712 of this Section for a particular bulk gasoline plant; or bulk gasoline terminals, including the storage and handling of fuel oils, kerosenes, and jet fuels but excluding the storage and handling of other organic liquids, that comply with 15A NCAC 02D .0524, .0925, .0927, .0932, and .0933 if the bulk gasoline terminal existed before November 1, 1992; unless:
 - (A) the Director finds that a permit to emit toxic air pollutants is required under Paragraph (b) of this Rule or Rule .0712 of this Section for a particular bulk gasoline terminal, or
 - (B) the owner or operator of the bulk gasoline terminal meets the requirements of 15A NCAC 02D .0927(i).

(b) Emissions from the activities identified in Subparagraphs (a)(25) through (a)(28) of this Rule shall be included in determining compliance with the toxic air pollutant requirements in this Section and shall be included in the permit if necessary to assure compliance. Emissions from the activities identified in Subparagraphs (a)(1) through (a)(24) of this Rule shall not be included in determining compliance with the toxic air pollutant requirements in this Section.

(c) The addition or modification of an activity identified in Paragraph (a) of this Rule shall not cause the source or facility to be evaluated for emissions of toxic air pollutants.

(d) Because an activity is exempted from being required to have a permit does not mean that the activity is exempted from any applicable requirement or that the owner or operator of the source is exempted from demonstrating compliance with any applicable requirement.

History Note: Authority G.S. 143-215.3(a)(1); 143-215.108; 143B-282; S.L. 1989, c. 168, s. 45; Rule originally codified as part of 15A NCAC 02H .0610; Eff. July 1, 1998; Amended Eff. April 1, 2005; July 1, 2002; July 1, 2000.

15A NCAC 02Q .0711 EMISSION RATES REQUIRING A PERMIT

A permit to emit toxic air pollutants shall be required for any facility whose actual (or permitted if higher) rate of emissions from all sources are greater than any one of the following toxic air pollutant permitting emissions rates:

Pollutant (CAS Number)	Carcinogens lb/yr	Chronic Toxicants lb/day	Acute Systemic Toxicants lb/hr	Acute Irritants lb/hr
acetaldehyde (75-07-0)				6.8
acetic acid (64-19-7)				0.96
acrolein (107-02-8)				0.02

APPROVED RULES

Pollutant (CAS Number)	Carcinogens	Chronic Toxicants	Acute Systemic Toxicants	Acute Irritants
	lb/yr	lb/day	lb/hr	lb/hr
acrylonitrile (107-13-1)	10			
ammonia (7664-41-7)				0.68
aniline (62-53-3)			0.25	
arsenic and inorganic arsenic compounds	0.016			
asbestos (1332-21-4)	1.9 X 10 ⁻⁶			
aziridine (151-56-4)		0.13		
benzene (71-43-2)	8.1			
benzidine and salts (92-87-5)	0.0010			
benzo(a)pyrene (50-32-8)	2.2			
benzyl chloride (100-44-7)			0.13	
beryllium (7440-41-7)	0.28			
beryllium chloride (7787-47-5)	0.28			
beryllium fluoride (7787-49-7)	0.28			
beryllium nitrate (13597-99-4)	0.28			
bioavailable chromate pigments, as chromium (VI) equivalent	0.0056			
bis-chloromethyl ether (542-88-1)	0.025			
bromine (7726-95-6)				0.052
1,3-butadiene (106-99-0)	12			
cadmium (7440-43-9)	0.37			
cadmium acetate (543-90-8)	0.37			
cadmium bromide (7789-42-6)	0.37			
carbon disulfide (75-15-0)		3.9		
carbon tetrachloride (56-23-5)	460			
chlorine (7782-50-5)		0.79		0.23
chlorobenzene (108-90-7)		46		
chloroform (67-66-3)	290			
chloroprene (126-99-8)		9.2	0.89	
cresol (1319-77-3)			0.56	
p-dichlorobenzene (106-46-7)				16.8
dichlorodifluoromethane (75-71-8)		5200		
dichlorofluoromethane (75-43-4)		10		
di(2-ethylhexyl)phthalate (117-81-7)		0.63		
dimethyl sulfate (77-78-1)		0.063		
1,4-dioxane (123-91-1)		12		
epichlorohydrin (106-89-8)	5600			
ethyl acetate (141-78-6)			36	
ethylenediamine (107-15-3)		6.3	0.64	
ethylene dibromide (106-93-4)	27			
ethylene dichloride (107-06-2)	260			
ethylene glycol monoethyl ether (110-80-5)		2.5	0.48	
ethylene oxide (75-21-8)	1.8			
ethyl mercaptan (75-08-1)			0.025	
fluorides		0.34	0.064	
formaldehyde (50-00-0)				0.04
hexachlorocyclopentadiene (77-47-4)		0.013	0.0025	
hexachlorodibenzo-p-dioxin (57653- 85-7)	0.0051			
n-hexane (110-54-3)		23		
hexane isomers except n-hexane				92
hydrazine (302-01-2)		0.013		
hydrogen chloride (7647-01-0)				0.18
hydrogen cyanide (74-90-8)		2.9	0.28	

APPROVED RULES

Pollutant (CAS Number)	Carcinogens	Chronic Toxicants	Acute Systemic Toxicants	Acute Irritants
	lb/yr	lb/day	lb/hr	lb/hr
hydrogen fluoride (7664-39-3)		0.63		0.064
hydrogen sulfide (7783-06-4)		1.7		
maleic anhydride (108-31-6)		0.25	0.025	
manganese and compounds		0.63		
manganese cyclopentadienyl tricarbonyl (12079-65-1)		0.013		
manganese tetroxide (1317-35-7)		0.13		
mercury, alkyl		0.0013		
mercury, aryl and inorganic compounds		0.013		
mercury, vapor (7439-97-6)		0.013		
methyl chloroform (71-55-6)		250		64
methylene chloride (75-09-2)	1600		0.39	
methyl ethyl ketone (78-93-3)		78		22.4
methyl isobutyl ketone (108-10-1)		52		7.6
methyl mercaptan (74-93-1)			0.013	
nickel carbonyl (13463-39-3)		0.013		
nickel metal (7440-02-0)		0.13		
nickel, soluble compounds, as nickel		0.013		
nickel subsulfide (12035-72-2)	0.14			
nitric acid (7697-37-2)				0.256
nitrobenzene (98-95-3)		1.3	0.13	
n-nitrosodimethylamine (62-75-9)	3.4			
non-specific chromium (VI) compounds, as chromium (VI) equivalent	0.0056			
pentachlorophenol (87-86-5)		0.063	0.0064	
perchloroethylene (127-18-4)	13000			
phenol (108-95-2)			0.24	
phosgene (75-44-5)		0.052		
phosphine (7803-51-2)				0.032
polychlorinated biphenyls (1336-36-3)	5.6			
soluble chromate compounds, as chromium (VI) equivalent		0.013		
styrene (100-42-5)			2.7	
sulfuric acid (7664-93-9)		0.25	0.025	
tetrachlorodibenzo-p-dioxin (1746-01-6)	0.00020			
1,1,1,2-tetrachloro-2,2,- difluoroethane (76-11-9)		1100		
1,1,2,2-tetrachloro-1,2- difluoroethane (76-12-0)		1100		
1,1,2,2-tetrachloroethane (79-34-5)	430			
toluene (108-88-3)		98		14.4
toluene diisocyanate,2,4-(584-84-9) and 2,6-(91-08-7) isomers		0.003		
trichloroethylene (79-01-6)	4000			
trichlorofluoromethane (75-69-4)			140	
1,1,2-trichloro-1,2,2-trifluoroethane (76-13-1)				240
vinyl chloride (75-01-4)	26			
vinylidene chloride (75-35-4)		2.5		
xylene (1330-20-7)		57		16.4

*Rule originally codified as part of 15A NCAC 02H .0610;
Eff. July 1, 1998;
Amended Eff. April 1, 2005; April 1, 2001.*

*History Note: Authority G.S. 143-215.3(a)(1); 143-215.108;
143B-282; S L. 1989, c. 168, s. 45;*

15A NCAC 02Q .0809 CONCRETE BATCH PLANTS

(a) This Rule applies to concrete batch plants that use fabric filters or equivalently effective control devices to control particulate emissions from the storage silos and the weigh hopper that receives materials from the cement and cement supplemental (mineral admixture) silos.

(b) For the purpose of this Rule, potential emissions shall be determined using actual cubic yards of wet concrete produced.

(c) Any concrete batch plant that produces less than 1,210,000 cubic yards of wet concrete per year shall be exempted from the requirements of Section .0500 of this Subchapter.

(d) The owner or operator of any concrete batch plant exempted by this Rule from Section .0500 of this Subchapter shall submit to the regional supervisors of the appropriate Division regional office by March 1 of each year a report containing the following information:

- (1) name and location of the concrete batch plant;
- (2) current air permit number;
- (3) number of cubic yards of wet concrete produced during the previous calendar year; and
- (4) signature of the appropriate official as identified in Rule .0304(j) of this Subchapter certifying as to the truth and accuracy of the report.

(e) The owner or operator of any concrete batch plant exempted by this Rule from Section .0500 of this Subchapter shall provide documentation of the cubic yards of wet concrete produced to the Director upon request. The owner or operator of a concrete batch plant exempted by this Rule from Section .0500 of this Subchapter shall retain records to document the cubic yards of wet concrete produced per year for the previous three years.

(f) For concrete batch plants covered by this Rule, the owner or operator shall report to the Director any exceedance of a requirement of this Rule within one week of its occurrence.

History Note: Authority G.S. 143-215.3(a); 143-215.107(a)(10); 143-215.108; Eff. June 1, 2004.

15A NCAC 10B .0409 SALE OF LIVE FOXES AND COYOTES TO CONTROLLED FOX HUNTING PRESERVES

Licensed trappers may, subject to the restrictions on taking foxes in G.S.113- 291.4, live-trap foxes and coyotes during any open trapping season for foxes and coyotes, and sell them to licensed controlled fox hunting preserves in accordance with the following conditions:

- (1) Licensed trappers are exempt from caging, captivity permit or captivity license requirements set forth in 15A NCAC 10H .0300 for any live-trapped foxes or coyotes trapped for the purpose of sale to controlled hunting preserves. This exemption shall apply during the trapping season and for a period of 10 days after the trapping season.
- (2) Licensed trappers are exempt from tagging requirements set forth in this Section so long as the foxes are kept alive.

- (3) Live foxes and coyotes taken under a depredation permit may be sold to controlled hunting preserves.

History Note: Authority G.S. 113-134; 113-273(g);113-291.4; Eff. January 1, 1992; Amended Eff. June 1, 2004.

15A NCAC 10F.0333 MECKLENBURG AND GASTON COUNTIES

(a) Regulated Areas. This Rule applies to the following waters of Lake Wylie in Mecklenburg and Gaston Counties:

- (1) McDowell Park – The waters of the coves adjoining McDowell Park and the Southwest Nature Preserve in Mecklenburg County, including the entrances to the coves on either side of Copperhead Island;
- (2) Gaston County Wildlife Club Cove – The waters of the cove at the Gaston County Wildlife Club on South Point Peninsula in Gaston County;
- (3) Buster Boyd Bridge- The areas 250 feet to the north and 150 feet to the south of the Buster Boyd Bridge;
- (4) Highway 27 Bridge – The area beginning 50 yards north of the NC 27 Bridge and extending 50 yards south of the southernmost of two railroad trestles immediately downstream from the NC 27 Bridge;
- (5) Brown's Cove – The area beginning at the most narrow point of the entrance to Brown's Cove and extending 250 feet in both directions; and
- (6) Paradise Point Cove – The waters of the Paradise Point Cove between Paradise Circle and Lakeshore Drive as delineated by appropriate markers.
- (7) Withers Cove - The area 50 feet on either side of Withers Bridge.

(b) Speed Limit Near Ramps. No person shall operate a vessel at greater than no-wake speed within 50 yards of any public boat-launching ramp, dock, pier, marina, boat storage structure or boat service area..

(c) Speed Limit in Marked Swimming or Mooring Areas. No person shall operate a vessel at greater than no-wake speed within 50 yards of any marked mooring area or marked swimming area.

(d) Placement and Maintenance of Markers. The Lake Wylie Marine Commission is designated a suitable agency for placement and maintenance of markers implementing this Rule.

History Note: Authority G.S. 75A-3; 75A-15; Eff. July 1, 1980; Amended Eff. July 1, 1994; June 1, 1985; June 1, 1984; March 1, 1983; Temporary Amendment Eff. January 1, 1998; Amended Eff. July 1, 1998; Temporary Amendment Eff. February 4, 2000; Amended Eff. June 1, 2004; July 1, 2000.

15A NCAC 12K .0103 FUNDING CYCLE

Annual funding schedule dates shall be the following:

- (1) An announcement letter describing the funding schedule and how to apply shall be mailed to all eligible applicants by September 30. This information shall be made available to other interested parties who contact the Department of Environment and Natural Resources (Department) at: NC Division of Parks and Recreation, PO Box 27687, Raleigh, North Carolina 27611-7687.
- (2) Local governments may request a maximum of five hundred thousand dollars (\$500,000) in PARTF assistance with each application.
- (3) Applications shall be received by the Department or its designee by 5:00 p.m. on January 31. If the deadline falls on a weekend or holiday, applications are due by 5:00 p.m. on the following business day.
- (4) The Authority shall meet within 120 days of the application deadline to select projects for funding. The Authority shall meet within 30 days after the end of the fiscal year to select projects for funding using revenues credited to PARTF during the fourth quarter.

History Note: Authority G.S. 113-44.15; Temporary Adoption Eff. November 1, 1994, for a period of 180 days or until the permanent rule becomes effective, whichever is sooner; Eff. April 1, 1995; Amended Eff. June 1, 2004; August 1, 1998.

15A NCAC 12K .0105 EVALUATION OF APPLICATIONS

- (a) Each completed application shall be evaluated by the Department or its designee on the information provided in the application and in accordance with the PARTF criteria described in Paragraph (d) of this Rule.
- (b) The Authority shall review the project evaluations and other relevant data prepared by the applicant and by Department staff. The Authority shall approve projects for funding.
- (c) All general criteria in Paragraph (d) of this Rule shall be addressed by the applicant. The Department or its designee shall review all applications for completeness. Incomplete applications shall be returned to the applicant.
- (d) The following general criteria shall be used to evaluate projects.
 - (1) New public recreation facilities provided by the project;
 - (2) The degree of local recreational planning for the project and how the specific elements in the project conform to the plan(s);
 - (3) The acquisition or the conservation of unique natural, cultural, recreational, or scenic resources;
 - (4) The level of public involvement in developing and supporting the project;

- (5) The applicant's commitment to operating and maintaining the project;
- (6) The suitability of the site for the proposed project development;
- (7) The level of compliance with prior grant agreements; and
- (8) Other factors, such as the geographic distribution of projects, the presence or absence of other funding sources, the population of the applicant, the amount of funds available, and the amount of funds requested.

History Note: Authority G.S. 113-44.15; Temporary Adoption Eff. November 1, 1994, for a period of 180 days or until the permanent rule becomes effective, whichever is sooner; Eff. April 1, 1995; Amended Eff. June 1, 2004; August 1, 1998.

15A NCAC 18A .3506 SANITATION

Primitive experience camps may conduct cookouts, overnight trips or similar primitive camping activities provided accepted sanitation standards are maintained in accordance with the provisions of this Section. Written procedures regarding sanitation standards shall be posted or made readily available for inspection by the Department. It is the responsibility of the primitive experience camp to ensure that the approved procedures are being practiced, utilized and maintained.

- (1) Off Site Food: Storage, Preparation and Cooking shall meet the following requirements.
 - (a) Temperature control, food preparation and food protection methods shall be implemented to ensure all potentially hazardous foods stored and prepared for off-site cooking maintain temperatures of 45 degrees or less or 140 degrees or higher and are protected from contamination. Written procedures describing the specific off site cooking activity and the proposed temperature control methods shall be submitted to the Department for approval. Any proposed changes to current procedures shall be submitted at least 10 working days prior to the scheduled activity. Specific approvals will remain valid so long as the activity remains part of the camp program unless the Department determines that procedures are not being maintained in accordance with the approval. The owner may request modifications to the original approval by submitting the request at least 10 working days prior to the scheduled activity. Where potentially hazardous foods are prepared off site, written

- procedures shall also include methods to prevent cross contamination. For the purpose of off-site food storage coolers with ice or ice packs are considered an approved method of temperature control. Off site potentially hazardous foods once cooked shall be consumed within two hours or discarded. Poultry stuffings, stuffed meats, and stuffings containing meat shall not be used.
- (b) Potentially hazardous foods shall be thawed:
 - (i) in cold holding units at a temperature not to exceed 45° F (7°C);
 - (ii) under potable running water of a temperature of 70° F (21°C), or below, with sufficient water velocity to agitate and float off loose food particles into the overflow; or
 - (iii) as a part of the conventional cooking process.
 - (c) Potentially hazardous foods requiring cooking shall be cooked to heat all parts of the food to a temperature of at least 140° F (60° C) except as follows:
 - (i) poultry shall be cooked to at least 165° F (74°C) with no interruption of the cooking process; and
 - (ii) pork and any food containing pork shall be cooked to heat all parts of the food to at least 150° F (66° C); and
 - (iii) ground beef and foods containing ground beef shall be cooked to an internal temperature of at least 155° F (68° C); and
 - (iv) rare roast beef shall be cooked to an internal temperature of at least 130° F (54° C); and
 - (v) rare beef steak shall be cooked to a temperature of 130° F (54°C) unless otherwise ordered by the immediate consumer.
 - (d) Liquid eggs, uncooked dry eggs and egg products shall be cooked before consumption. This Paragraph does not apply to pasteurized products.
 - (e) A food thermometer accurate to +/- 2 degrees F (+/- 1 degree C) shall be available to check food temperatures.
- (2) Off-Site Drinking Water
 - (a) Water transported for off site drinking shall be from an approved source and shall be transported and stored in clean, sanitized containers designated solely for this purpose. Where it is not practical to transport drinking water for off site activities, bactericidal treatment measures shall be provided to ensure that drinking water is free from disease causing organisms.
 - (b) Water shall be taken from free-flowing streams, springs and wells, however, water may be taken from still sources when free-flowing sources are unavailable. Water to be treated shall be visibly clear and free from debris, trash and organic matter.
 - (3) Approved Methods of Bactericidal Treatment of Off-Site Drinking Water
 - (a) Boiling: Water shall be brought to a rolling boil for a minimum of 5 minutes.
 - (b) Chlorine: A minimum of 2 ppm free chlorine residual must be maintained for a minimum of 30 minutes. This method shall be used in conjunction with Subitem (3)(a) or (d) of this Rule.
 - (c) Iodine: A minimum of 5 drops of 2% tincture of iodine per liter of water. For commercially prepared tablets, use per manufacturer's directions. This method shall be used in conjunction with Subitem (3)(a) or (d) of this Rule.
 - (d) Filtration: Filter systems shall be capable of removing bacteria, cysts, and viruses. Filters shall have an absolute pore size of one micron or smaller.
 - (4) Utensils and Equipment shall meet the following requirements:
 - (a) All eating, drinking, and cooking utensils, and other items used in connection with the preparation of food shall be kept clean and in good repair.
 - (b) All surfaces intended for multi use between campers or staff with which food or drink comes in contact shall consist of smooth, not readily corrodible, non-toxic materials in which there are no open cracks or joints that will collect food particles, slime, and be kept clean.

- (c) Multi-use drinking and eating utensils intended for individual use shall be constructed of not readily corrodible, non toxic materials. Those multi-use drinking and eating utensils which do not meet all the construction provisions of Subitem (4)(b) of this Rule, shall be used by only one person and not reassigned to or reused by another individual.
- (d) Where multi-use utensils are used, they shall be assigned to one individual and not shared until cleaned and sanitized by approved methods.
- (5) Cleaning of Utensils and Equipment shall meet the following requirements:
 - (a) Utensils and equipment shall be kept clean.
 - (b) Water used for cleaning shall meet the requirements of Items (2) and (3) of this Rule.
 - (c) Where an approved sanitizing process can not be implemented, each individual's multi-use utensils shall be cleaned separately to prevent cross contamination.
 - (d) Multi-use utensils may be cleaned together provided they are washed, rinsed, and sanitized by approved methods.
- (6) Handwashing for food preparers shall be in compliance with Rule .3515(c) of this Section.
- (7) Toxic materials shall be labeled and stored to prevent contamination of food, equipment and utensils.
- (8) Where permanent human waste disposal facilities which meet the requirements of 15A NCAC 18A .1900 are not provided at an off site activity, written procedures for waste disposal shall be provided to and approved by the Department. Disposal of human waste shall be in a hole that is at least six inches deep and has a diameter of at least four inches located at least 200 feet from any surface water. After use the hole shall be back filled with a soil to a depth of six inches.

History Note: Authority G.S. 130A-248; Eff. June 1, 2004.

from the written tests, provided he has accumulated no more than three points on his driving record since his last certification and has had at least one hour of in-service training for each year since his last certification. A driver whose certification expires may be re-certified within 30 days in the same manner as though his certification had not expired. Any driver whose certification expires for more than 30 days may be re-certified within the next year following the expiration upon passing the four written tests (general knowledge, passenger transport, school bus, and air brakes), the three skills tests (pre-trip inspection, basic skills, and road), and an eye screening. If more than one year has elapsed since the expiration of the most recent certification, the applicant must complete the full training course required of a beginning driver.

History Note: Authority G.S. 20-39(b); 20-218; Eff. April 1, 1989; Amended Eff. June 1, 2004; August 1, 2000; July 1, 1994; August 1, 1991.

19A NCAC 03G .0209 CANCELLATION OF CERTIFICATION

- (a) The Division of Motor Vehicles shall cancel the school bus driver certificate of any driver for the following reasons:
- (1) Any determination that the certificate was issued on the basis of misinformation, false statements, or fraud.
 - (2) A suspension, revocation, or cancellation of the driver license.
 - (3) Conviction of any of the following motor vehicle moving offenses:
 - (A) Driving while impaired;
 - (B) Passing a stopped school bus;
 - (C) Hit and run;
 - (D) Careless and reckless driving;
 - (E) Excessive speeding involving a single charge of speeding more than 15 miles per hour above the posted speed limit;
 - (F) Two convictions within a period of 12 months;
 - (G) A violation committed while operating a school bus.
 - (H) A violation of any State or local law relating to motor vehicle traffic control, other than a parking violation, arising in connection with a fatal accident;
 - (I) Improper or erratic lane changes;
 - (J) Following the vehicle ahead too closely;
 - (K) Driving a commercial motor vehicle without obtaining a commercial drivers license;
 - (L) Driving a commercial motor vehicle without a commercial drivers license in the driver's possession. However, a person shall not be convicted of failing to carry a commercial drivers license if by the date the person is

TITLE 19A - DEPARTMENT OF TRANSPORTATION

19A NCAC 03G .0207 RENEWAL OF CERTIFICATION

Every driver must be re-certified at the time of the expiration of his Commercial Driver License upon passing the four written tests (general knowledge, passenger transport, school bus, and air brakes), a pre-trip inspection observation, a driving observation, and an eye screening. A driver shall be exempted

required to appear in court for the violation he or she produces to the court a commercial drivers license that was valid on the date of the offense;

- (M) Driving a commercial motor vehicle without the proper class of commercial drivers license or endorsements for the specific vehicle group being operated or for the passenger or type of cargo being transported.
- (4) A determination of physical or mental inadequacy under the provisions of the physical requirements noted in Rule .0205 of this Section.
- (5) A local cancellation of certification, in the discretion of the local administrative unit, for violation of local regulations, submitted to the Driver Education Specialist for cancellation at the state level. If there is not an offense or conviction that would require a mandatory cancellation by the Section, the Driver Education Specialist shall handle the cancellation locally by canceling the certificate at the garage and retain the pocket card in his files.
- (6) A driving record which in its overall character arouses question about the reliability, judgment, or emotional stability of the driver.
- (7) Conviction of a violation of G.S. 20-142.1 through 20-142.5 when the driver is operating a commercial motor vehicle. The driver shall be disqualified from driving a commercial motor vehicle as follows:
 - (A) For a period of 60 days if convicted of a first violation of a railroad grade crossing offense listed in this Subparagraph;
 - (B) For a period of 120 days if convicted during any three-year period of a second violation of any combination of railroad grade crossing offenses listed in this subparagraph;
 - (C) For a period of one year if convicted during any three-year period of a third or subsequent violation of any combination of railroad grade crossing offenses listed in this Subparagraph.

(b) Upon recommendation of the Driver Education Specialist or local school officials, the Division of Motor Vehicles shall require re-examination of any certified driver whose qualifications become questionable or who exhibits evidence of improper or unsafe driving practices and driving procedures. If such a re-examination reveals a problem, the Driver Education Specialist shall suspend the certified driver from driving any school bus pending re-training of the driver. If the problem cannot be corrected, the Driver Education Specialist shall cancel the certification of the school bus driver.

History Note: Authority G.S. 20-39(b); 20-218; Eff. April 1, 1989; Amended Eff. June 1, 2004; August 1, 2000; December 1, 1993; August 1, 1991; September 1, 1990.

TITLE 21 - OCCUPATIONAL LICENSING BOARDS

CHAPTER 46 - BOARD OF PHARMACY

21 NCAC 46.1604 WHEN NEW PERMIT NOT REQUIRED

- (a) A new pharmacy, device or medical equipment permit is not required in the following situations:
 - (1) the permit holder is a publicly-traded corporation and continues to hold the permit; or
 - (2) the permit holder is a corporation which is a wholly-owned subsidiary, and any change in the ownership of any corporation in the chain of ownership above the permit holder is due to the stock of such corporation being publicly-traded.
- (b) A permit which has been served with a notice of hearing for a pending disciplinary proceeding before the Board may not be surrendered.

History Note: Authority G.S. 90-85.6; 90-85.21; 90-85.22; Eff. May 1, 1989; Amended Eff. June 1, 2004; April 1, 2001; August 1, 1998; May 1, 1997; September 1, 1995.

21 NCAC 46.1806 TRANSFER OF PRESCRIPTION INFORMATION

- (a) The transfer of original prescription information for the purpose of refill dispensing is permissible between pharmacies subject to the following requirements:
 - (1) the transfer is communicated directly from either a pharmacist or certified technician to either a pharmacist or certified technician and not by only one pharmacist or certified technician gaining access to an information file containing data for several locations, unless all locations accessed are under common ownership or accessed pursuant to contractual agreement of the pharmacies;
 - (2) the transferring pharmacist or certified technician invalidates the prescription and any remaining refills at the transferring pharmacy by marking the word "void" on the face of the prescription or its equivalent;
 - (3) the transferring pharmacist or certified technician records the name and address of the pharmacy to which it was transferred and the name of the pharmacist or certified technician receiving the prescription information on the reverse of the invalidated prescription;
 - (4) the transferring pharmacist or certified technician records the date of the transfer and

the name of the pharmacist or certified technician transferring the information.

(b) The pharmacist or certified technician receiving the transferred prescription information shall reduce to writing the following:

- (1) The word "transfer" on the face of the transferred prescription;
- (2) All information required to be on a prescription, including:
 - (A) Date of issuance of original prescription;
 - (B) Number of refills authorized on original prescription;
 - (C) Date and time of transfer;
 - (D) Number of valid refills remaining and date of last refill;
 - (E) Pharmacy's name, address and original prescription number from which the prescription information was transferred;
 - (F) Name of transferring pharmacist or certified technician; and
 - (G) Manufacturer or brand of drug dispensed.

(c) The transferred prescription, as well as the original, must be maintained for a period of three years from the date of last refill.

(d) Dispensing is permitted only within the original authorization for refills and no dispensing on such transfer shall occur beyond that authorized on the original prescription. Any dispensing beyond that originally authorized or one year, whichever is less, may occur only on a new prescription.

(e) The requirements of Paragraphs (a) and (b) of this Rule may be facilitated by use of a computer or data system without reference to an original prescription document. The system must be able to identify transferred prescriptions and prevent subsequent prescription refills at that pharmacy.

(f) This Rule applies to the transfer of prescriptions issued by prescribers in other states, provided that the pharmacist or certified technician receiving the prescription actually knows or reasonably should know that a physician-patient relationship exists and dispensing the drug is in the patient's best interests.

(g) All records pertinent to this Rule shall be readily retrievable.

(h) A system must be in place that will allow only authorized access by a pharmacist or certified technician to all records pertinent to this Rule and will indicate on the prescription record when and by whom such access was made.

(i) The transfer of original prescription information for the purpose of refill dispensing is permissible between device and medical equipment permit holders so long as the transferring permit holder provides all records and documentation necessary for dispensing and does not interfere with the service and claims processing procedures of the receiving permit holder.

History Note: Authority G.S. 90-85.6(a); 90-85.32; Eff. December 31, 1985; Amended Eff. June 1, 2004; September 1, 1995; July 1, 1992; May 1, 1989.

21 NCAC 46 .2504 PATIENT COUNSELING

(a) "Patient Counseling" shall mean the effective communication of information, as defined in this Rule, to the patient or representative in order to improve therapeutic outcomes by maximizing proper use of prescription medications, devices, and medical equipment. All provisions of this Rule shall apply to device and medical equipment permit holders, except Subparagraph (a)(8) of this Rule and except where otherwise noted. Specific areas of patient counseling include, but are not limited to, those matters listed in this Rule that in the exercise of the pharmacist's or device and medical equipment permit holder's professional judgment are considered significant:

- (1) name, description, and purpose of the medication;
- (2) route, dosage, administration, and continuity of therapy;
- (3) special directions for use by the patient;
- (4) common severed side or adverse effects or interactions and therapeutic contraindications that may be encountered, including their avoidance, and the action required if they occur;
- (5) techniques for self-monitoring drug therapy;
- (6) proper storage;
- (7) prescription refill information; and
- (8) action to be taken in the event of a missed dose.

(b) An offer to counsel shall be made on new or transfer prescriptions at the time the prescription is dispensed or delivered to the patient or representative. Ancillary personnel may make the offer to counsel, but the pharmacist must personally conduct counseling if the offer is accepted. Counseling by device and medical equipment permit holders must be conducted by personnel proficient in explaining and demonstrating the safe and proper use of devices and equipment. The person in charge shall be responsible for ensuring that all personnel conducting counseling are proficient in explaining and demonstrating the safe and proper use of devices and equipment and for documenting the demonstration of such proficiency. The offer shall be made orally and in person when delivery occurs at the pharmacy. When delivery occurs outside of the pharmacy, whether by mail, vehicular delivery or other means, the offer shall be made either orally and in person, or by telephone from the pharmacist to the patient. If delivery occurs outside of the pharmacy, the pharmacist shall provide the patient with access to a telephone service that is toll-free for long-distance calls. A pharmacy whose primary patient population is accessible through a local measured or toll-free exchange need not be required to offer toll-free service. Counseling may be conducted by the provision of printed information in a foreign language if requested by the patient or representative. Professional judgment shall be exercised in determining whether or not to offer counseling for prescription refills. An offer to counsel shall be communicated in a positive manner to encourage acceptance.

(c) In order to counsel patients effectively, a reasonable effort shall be made to obtain, record, and maintain significant patient information, including:

- (1) name, address, telephone number;
- (2) date of birth (age), gender;
- (3) medical history;

- (A) disease state(s);
- (B) allergies/drug reactions;
- (C) current list on non-prescription and prescription medications, devices, and medical equipment.

- (4) comments relevant to the individual's drug therapy.

A "reasonable effort" shall mean a good faith effort to obtain from the patient or representative the foregoing patient information. Ancillary personnel may collect, record, and obtain patient profile information, but the pharmacist or person in charge of the facility holding the device and medical equipment permit must review and interpret patient profile information and clarify confusing or conflicting information. Professional judgment shall be exercised as to whether and when individual patient history information should be sought from other health care providers.

(d) Once patient information is obtained, this information shall be reviewed and updated by the pharmacist or person in charge of the facility holding the device and medical equipment permit before each prescription is filled or delivered, typically at the point-of-sale or point of distribution to screen for potential drug therapy problems due to:

- (1) therapeutic duplication;
- (2) drug-disease contraindication;
- (3) drug-drug interactions, including serious interactions with prescription or over-the-counter drugs;
- (4) incorrect drug dosage or duration of drug treatment;
- (5) drug-allergy interactions; and
- (6) clinical abuse/misuse.

(e) Unless refused by the patient or representative, patient counseling shall be provided as follows:

- (1) counseling shall be "face to face" by the pharmacist, or personnel of a device and medical equipment permit holder when possible;
- (2) alternative forms of patient information may be used to supplement patient counseling;
- (3) patient counseling, as described in this Rule, shall be required for outpatient and discharge patients of hospitals, health maintenance organizations, health departments, and other institutions; however, compliance with this Rule in locations in which non-pharmacists are authorized by law or regulations to dispense may be accomplished by such authorized non-pharmacists; and
- (4) patient counseling, as described in this Rule, shall not be required for inpatients of hospitals or other institutions where a nurse or other licensed health care professional administers the medication(s).

(f) Pharmacists that distribute prescription medication by mail, and where the practitioner-pharmacist-patient relationship does not exist, shall provide counseling services for recipients of such medication in accordance with this Rule.

(g) Records resulting from compliance with this Rule, including documentation of refusals to receive counseling, shall be

maintained for three years in accordance with Section .2300 of this Chapter.

(h) Personnel of device and medical equipment permit holders shall give written notice of warranty, if any, regarding service after the sale. The permit holder shall maintain documentation demonstrating that the written notice of warranty was given to the patient.

(i) Offers to counsel and patient counseling for inmates need not be "face to face", but rather, may be conducted through a correctional or law enforcement officer or through printed material. A pharmacist or a device and medical equipment permit holder dispensing drugs or devices or delivering medical equipment to inmates need not comply with Paragraph (c) of this Rule. However, once such patient information is obtained, the requirements of Paragraph (d) of this Rule shall be followed.

History Note: Authority G.S. 90-85.6; 90-85.22; 90-85.32; 42 U.S.C. 1396r-8(g); Eff. January 4, 1993; Amended Eff. June 1, 2004; July 1, 1996; September 1, 1995.

CHAPTER 58 - REAL ESTATE COMMISSION

21 NCAC 58A .0104 AGENCY AGREEMENTS AND DISCLOSURE

(a) Every agreement for brokerage services in a real estate transaction and every agreement for services connected with the management of a property owners association shall be in writing. Every agreement for brokerage services between a broker and an owner of the property to be the subject of a transaction must be in writing from the time of its formation. Every agreement for brokerage services between a broker and a buyer or tenant shall be express and shall be reduced to writing not later than the time one of the parties makes an offer to purchase, sell, rent, lease, or exchange real estate to another. However, every agreement between a broker and a buyer or tenant which seeks to bind the buyer or tenant for a period of time or to restrict the buyer's or tenant's right to work with other agents or without an agent shall be in writing from its formation. A broker or salesperson shall not continue to represent a buyer or tenant without a written agreement when such agreement is required by this Rule. Every written agreement for brokerage services of any kind in a real estate transaction shall provide for its existence for a definite period of time and shall provide for its termination without prior notice at the expiration of that period, except that an agency agreement between a landlord and broker to procure tenants or receive rents for the landlord's property may allow for automatic renewal so long as the landlord may terminate with notice at the end of any contract period and any subsequent renewals. For the purposes of this rule, an agreement between licensees to cooperate or share compensation shall not be considered an agreement for brokerage services and, except as required by Rule .1807 of this Subchapter, need not be memorialized in writing.

(b) Every listing agreement, written buyer agency agreement or other written agreement for brokerage services in a real estate sales transaction shall contain the following provision: The broker shall conduct all his brokerage activities in regard to this agreement without respect to the race, color, religion, sex, national origin, handicap or familial status of any buyer,

prospective buyer, seller or prospective seller. The provision shall be set forth in a clear and conspicuous manner which shall distinguish it from other provisions of the agreement. For the purposes of this Rule, the term, familial status, shall be defined as it is in G.S. 41A-3(1b).

(c) In every real estate sales transaction, a broker or salesperson shall, at first substantial contact directly with a prospective buyer or seller, provide the prospective buyer or seller with a copy of the publication "Working with Real Estate Agents," review it with him or her, and determine whether the agent will act as the agent of the buyer or seller in the transaction. If the first substantial contact with a prospective buyer or seller occurs by telephone or other electronic means of communication where it is not practical to provide the "Working with Real Estate Agents" publication, the broker or salesperson shall at the earliest opportunity thereafter, but in no event later than three days from the date of first substantial contact, mail or otherwise transmit a copy of the publication to the prospective buyer or seller and review it with him or her at the earliest practicable opportunity thereafter. For the purposes of this Rule, "first substantial contact" shall include contacts between a broker or salesperson and a consumer where the consumer or broker or salesperson begins to act as though an agency relationship exists and the consumer begins to disclose to the broker or salesperson personal or confidential information.

(d) A real estate broker or salesperson representing one party in a transaction shall not undertake to represent another party in the transaction without the written authority of each party. Such written authority must be obtained upon the formation of the relationship except when a buyer or tenant is represented by a broker without a written agreement in conformity with the requirements of Paragraph (a) of this Rule. Under such circumstances, the written authority for dual agency must be reduced to writing not later than the time that one of the parties represented by the broker or salesperson makes an offer to purchase, sell, rent, lease, or exchange real estate to another party.

(e) In every real estate sales transaction, a broker or salesperson working directly with a prospective buyer as a seller's agent or subagent shall disclose in writing to the prospective buyer at the first substantial contact with the prospective buyer that the broker or salesperson represents the interests of the seller. If the first substantial contact occurs by telephone or by means of other electronic communication where it is not practical to provide written disclosure, the broker or salesperson shall immediately disclose by similar means whom he represents and shall immediately mail or otherwise transmit a copy of the written disclosure to the buyer. In no event shall the broker or salesperson mail or transmit a copy of the written disclosure to the buyer later than three days from the date of first substantial contact with the buyer.

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

he represents the interests of the buyer. The written confirmation may be made in the buyer's offer to purchase.

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

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

(i) A firm which represents more than one party in the same real estate transaction is a dual agent and, through the brokers and salespersons associated with the firm, shall disclose its dual agency to the parties.

(j) When a firm represents both the buyer and seller in the same real estate transaction, the firm may, with the prior express approval of its buyer and seller clients, designate one or more individual agents associated with the firm to represent only the interests of the seller and one or more other individual brokers and salespersons associated with the firm to represent only the interests of the buyer in the transaction. The authority for designated agency must be reduced to writing not later than the time that the parties are required to reduce their dual agency agreement to writing in accordance with Paragraph (d) of this Rule. An individual broker or salesperson shall not be so designated and shall not undertake to represent only the interests of one party if the broker or salesperson has actually received confidential information concerning the other party in connection with the transaction. A broker-in-charge shall not act as a designated agent for a party in a real estate sales transaction when a salesperson under his or her supervision will act as a designated agent for another party with a competing interest.

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

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

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

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

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

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

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

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

History Note: Authority G.S. 41A-3(1b); 41A-4(a); 93A-3(c); 93A-9; Eff. February 1, 1976; Readopted Eff. September 30, 1977; Amended Eff. July 1, 2004; April 1, 2004; September 1, 2002; July 1, 2001; October 1, 2000; August 1, 1998; July 1, 1997; August 1, 1996; July 1, 1995.

21 NCAC 58A .0105 ADVERTISING

(a) Blind Ads. A licensee shall not advertise the sale, purchase, exchange, rent or lease of real estate, for another or others, in a manner indicating the offer to sell, purchase, exchange, rent, or lease is being made by the licensee's principal only. Every such advertisement shall conspicuously indicate that it is the advertisement of a broker or brokerage firm and shall not be confined to publication of only a post office box number, telephone number, or street address.

(b) Registration of Assumed Name. In the event that any licensee shall advertise in any manner using a firm name or an assumed name which does not set forth the surname of the licensee, the licensee shall first file the appropriate certificate with the office of the county register of deeds in compliance with G.S. 66-68 and notify the Commission in writing of the use of such a firm name or assumed name.

(c) Authority to Advertise.

- (1) A salesperson shall not advertise the sale, purchase, exchange, rent or lease of real estate for another or others without his or her broker's consent and without including in the advertisement the name of the broker or firm with whom the salesperson is associated.

- (2) A licensee shall not advertise or display a "for sale" or "for rent" sign on any real estate without the consent of the owner or his or her authorized agent.

(d) Business names. A licensee shall not include the name of a salesperson or an unlicensed person in the name of a sole proprietorship, partnership or non-corporate business formed for the purpose of real estate brokerage.

(e) A person licensed as a limited nonresident commercial broker or salesperson shall comply with the provisions of Rule .1809 of this Subchapter in connection with all advertising concerning or relating to his or her status as a North Carolina licensee.

History Note: Authority G.S. 55B-5; 66-68; 93A-3(c); 93A-9; Eff. February 1, 1976; Readopted Eff. September 30, 1977; Amended Eff. July 1, 2004; October 1, 2000; August 1, 1998; April 1, 1997; July 1, 1989; February 1, 1989.

21 NCAC 58A .0107 HANDLING AND ACCOUNTING OF FUNDS

(a) All monies received by a licensee acting in his or her fiduciary capacity shall be deposited in a trust or escrow account maintained by a broker not later than three banking days following receipt of such monies except that earnest money deposits paid by means other than currency which are received on offers to purchase real estate and tenant security deposits paid by means other than currency which are received in connection with real estate leases shall be deposited in a trust or escrow account not later than three banking days following acceptance of such offer to purchase or lease; the date of acceptance of such offer to purchase or lease shall be set forth in the purchase or lease agreement. All monies received by a salesperson shall be delivered immediately to the broker by whom he or she is employed, except that all monies received by nonresident commercial licensees shall be delivered as required by Rule .1808 of this Subchapter.

(b) In the event monies received by a licensee while acting in a fiduciary capacity are deposited in a trust or escrow account which bears interest, the broker having custody over such monies shall first secure from all parties having an interest in the monies written authorization for the deposit of the monies in an interest-bearing account. Such authorization shall specify how and to whom the interest will be disbursed, and, if contained in an offer, contract, lease, or other transaction instrument, such authorization shall be set forth in a conspicuous manner which shall distinguish it from other provisions of the instrument.

(c) Closing statements shall be furnished to the buyer and the seller in the transaction at the closing or not more than five days after closing.

(d) Trust or escrow accounts shall be so designated by the bank or savings and loan association in which the account is located, and all deposit tickets and checks drawn on said account as well as the monthly bank statement for the account shall bear the words "Trust Account" or "Escrow Account."

(e) A licensee shall maintain and retain records sufficient to identify the ownership of all funds belonging to others. Such records shall be sufficient to show proper deposit of such funds in a trust or escrow account and to verify the accuracy and

proper use of the trust or escrow account. The required records shall include:

- (1) bank statements;
- (2) canceled checks which shall be referenced to the corresponding journal entry or check stub entries and to the corresponding sales transaction ledger sheets or for rental transactions, the corresponding property or owner ledger sheets. Checks shall conspicuously identify the payee and shall bear a notation identifying the purpose of the disbursement. When a check is used to disburse funds for more than one sales transaction, owner, or property, the check shall bear a notation identifying each sales transaction, owner, or property for which disbursement is made, including the amount disbursed for each, and the corresponding sales transaction, property, or owner ledger entries. When necessary, the check notation may refer to the required information recorded on a supplemental disbursement worksheet which shall be cross-referenced to the corresponding check. In lieu of retaining canceled checks, a licensee may retain digitally imaged copies of the canceled checks provided that such images are legible reproductions of the front and back of the original instruments with no more than four instruments per page and no smaller images than 2.25 x 5.0 inches, and provided that the licensee's bank retains the original checks on file for a period of at least five years and makes them available to the licensee and the Commission upon request;
- (3) deposit tickets. For a sales transaction, the deposit ticket shall identify the purpose and remitter of the funds deposited, the property, the parties involved, and a reference to the corresponding sales transaction ledger entry. For a rental transaction, the deposit ticket shall identify the purpose and remitter of the funds deposited, the tenant, and the corresponding property or owner ledger entry. For deposits of funds belonging to or collected on behalf of a property owner association, the deposit ticket shall identify the property or property interest for which the payment is made, the property or interest owner, the remitter, and the purpose of the payment. When a single deposit ticket is used to deposit funds collected for more than one sales transaction, property owner, or property, the required information shall be recorded on the ticket for each sales transaction, owner, or property, or the ticket may refer to the same information recorded on a supplemental deposit worksheet which shall be cross-referenced to the corresponding deposit ticket;

- (4) a payment record sheet for each property or interest for which funds are collected and deposited into a property owner association trust account as required by Paragraph (i) of this Rule. Payment record sheets shall identify the amount, date, remitter, and purpose of payments received, the amount and nature of the obligation for which payments are made, and the amount of any balance due or delinquency;
- (5) a separate ledger sheet for each sales transaction and for each property or owner of property managed by the broker identifying the property, the parties to the transaction, the amount, date, and purpose of the deposits and from whom received, the amount, date, check number, and purpose of disbursements and to whom paid, and the running balance of funds on deposit for the particular sales transaction or, in a rental transaction, the particular property or owner of property. Monies held as tenant security deposits in connection with rental transactions may be accounted for on a separate tenant security deposit ledger for each property or owner of property managed by the broker. For each security deposit the tenant security deposit ledger shall identify the remitter, the date the deposit was paid, the amount, the tenant, landlord, and subject property. For each disbursement of tenant security deposit monies, the ledger shall identify the check number, amount, payee, date, and purpose of the disbursement. The ledger shall also show a running balance. When tenant security deposit monies are accounted for on a separate ledger as provided herein, deposit tickets, canceled checks and supplemental worksheets shall reference the corresponding tenant security deposit ledger entries when appropriate;
- (6) a journal or check stubs identifying in chronological sequence each bank deposit and disbursement of monies to and from the trust or escrow account, including the amount and date of each deposit and a reference to the corresponding deposit ticket and any supplemental deposit worksheet, and the amount, date, check number, and purpose of disbursements and to whom paid. The journal or check stubs shall also show a running balance for all funds in the account;
- (7) copies of contracts, leases and management agreements;
- (8) closing statements and property management statements;
- (9) covenants, bylaws, minutes, management agreements and periodic statements relating to the management of a property owner association; and

- (10) invoices, bills, and contracts paid from the trust account, and any documents not otherwise described herein necessary and sufficient to verify and explain record entries.

Records of all receipts and disbursements of trust or escrow monies shall be maintained in such a manner as to create an audit trail from deposit tickets and canceled checks to check stubs or journals and to the ledger sheets. Ledger sheets and journals or check stubs must be reconciled to the trust or escrow account bank statements on a monthly basis. To be sufficient, records of trust or escrow monies must include a worksheet for each such monthly reconciliation showing the ledger sheets, journals or check stubs, and bank statements to be in agreement and balance.

(f) All trust or escrow account records shall be made available for inspection by the Commission or its authorized representatives in accordance with Rule 21 NCAC 58A .0108.

(g) In the event of a dispute between the seller and buyer or landlord and tenant over the return or forfeiture of any deposit other than a residential tenant security deposit held by a licensee, the licensee shall retain said deposit in a trust or escrow account until the licensee has obtained a written release from the parties consenting to its disposition or until disbursement is ordered by a court of competent jurisdiction. If it appears to a broker holding a disputed deposit that a party has abandoned his or her claim, the broker may disburse the money to the other claiming parties according to their written agreement provided that the broker first makes a reasonable effort to notify the party who has apparently abandoned his or her claim and provides that party with an opportunity to renew his or her claim to the disputed funds. Tenant security deposit monies shall be disposed of in accordance with the requirements of G.S. 42-50 through 56 and G.S. 42A-18.

(h) A broker may transfer earnest money deposits in his or her possession collected in connection with a sales transaction from his or her trust account to the closing attorney or other settlement agent not more than ten days prior to the anticipated settlement date. A licensee shall not disburse prior to settlement any earnest money in his or her possession for any other purpose without the written consent of the parties.

(i) The funds of a property owner association, when collected, maintained, disbursed or otherwise controlled by a licensee, are trust monies and shall be treated as such in the manner required by this Rule. Such funds must be deposited into and maintained in a trust or escrow account or accounts dedicated exclusively for funds belonging to a single property owners association and may not be commingled with funds belonging to other property owner associations or other persons or parties. A licensee who undertakes to act as manager of a property owner association or as the custodian of funds belonging to a property owner association shall provide the association with periodic statements which report the balance of association funds in the licensee's possession or control and which account for the funds the licensee has received and disbursed on behalf of the association. Such statements must be made in accordance with the licensee's agreement with the association, but in no event shall the statements be made less frequently than every 90 days.

(j) Every licensee shall safeguard the money or property of others coming into his or her possession in a manner consistent with the requirements of the Real Estate License Law and the

rules adopted by the Commission. A licensee shall not convert the money or property of others to his or her own use, apply such money or property to a purpose other than that for which it was paid or entrusted to him or her, or permit or assist any other person in the conversion or misapplication of such money or property.

(k) In addition to the records required by Paragraph (e) of this Rule, a licensee acting as agent for the landlord of a residential property used for vacation rentals shall create and maintain a subsidiary ledger sheet for each property or owner of such properties onto which all funds collected and disbursed are identified in categories by purpose. On a monthly basis, the licensee shall reconcile the subsidiary ledger sheets to the corresponding property or property owner ledger sheet.

(l) In lieu of maintaining a subsidiary ledger sheet, the licensee may maintain an accounts payable ledger sheet for each owner or property and each vendor to whom trust monies are due for monies collected on behalf of the owner or property identifying the date of receipt of the trust monies, from whom the monies were received, rental dates, and the corresponding property or owner ledger sheet entry including the amount to be disbursed for each and the purpose of the disbursement. The licensee may also maintain an accounts payable ledger sheet in the format described in Paragraph (k) of this Rule for vacation rental tenant security deposit monies and vacation rental advance payments.

History Note: Authority G.S. 93A-3(c); 93A-9;

Eff. February 1, 1976;

Readopted Eff. September 30, 1977;

Amended Eff. July 1, 2004; July 1, 2003; September 1, 2002;

August 1, 2000; August 1, 1998; July 1, 1996; July 1, 1993;

May 1, 1990.

21 NCAC 58A .0108 RETENTION OF RECORDS

Licensees shall retain records of all sales, rental, and other transactions conducted in such capacity, whether the transaction is pending, completed or terminated prior to its successful conclusion. The licensee shall retain such records for three years after all funds held by the licensee in connection with the transaction have been disbursed to the proper party or parties or until the successful or unsuccessful conclusion of the transaction, whichever occurs later. Such records shall include contracts of sale, written leases, agency contracts, options, offers to purchase, trust or escrow records, earnest money receipts, disclosure documents, closing statements, brokerage cooperation agreements, declarations of affiliation, and any other records pertaining to real estate transactions. All such records shall be made available for inspection and reproduction by the Commission or its authorized representatives without prior notice.

History Note: Authority G.S. 93A-3(c); 93A-9;

Eff. February 1, 1976;

Readopted Eff. September 30, 1977;

Amended Eff. July 1, 2004; September 1, 2002; August 1, 1998;

February 1, 1989; February 1, 1988.

21 NCAC 58A .0110 BROKER-IN-CHARGE

(a) Every real estate firm shall designate a broker to serve as the broker-in-charge at its principal office and a broker to serve as

broker-in-charge at any branch office. No broker shall be broker-in-charge of more than one office or branch office. If a firm shares office space with one or more other firms, one broker may serve as broker-in-charge of each firm at that location. No office or branch office of a firm shall have more than one designated broker-in-charge. A broker who is a sole proprietor shall designate himself or herself as a broker-in-charge if the broker engages in any transaction where the broker is required to deposit and maintain monies belonging to others in a trust account, engages in advertising or promoting his or her services as a broker in any manner, or has one or more brokers or salespersons affiliated with him or her in the real estate business. Each broker-in-charge shall make written notification of his or her status as broker-in-charge to the Commission on a form prescribed by the Commission within 10 days following the broker's designation as broker-in-charge. The broker-in-charge shall assume the responsibility at his or her office for:

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

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

- (1) "Branch Office" means any office in addition to the principal office of a broker which is operated in connection with the broker's real estate business; and

- (2) "Office" means any place of business where acts are performed for which a real estate license is required.

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

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

(e) A licensed real estate firm shall not be required to designate a broker-in-charge if it:

- (1) has been organized for the sole purpose of receiving compensation for brokerage services furnished by its principal broker through another firm or broker;
- (2) is designated a Subchapter S corporation by the United States Internal Revenue Service;
- (3) has no principal or branch office; and
- (4) has no person associated with it other than its principal broker.

(f) Except as provided herein every broker-in-charge designated before October 1, 2000 shall complete the Commission's broker-in-charge course not later than October 1, 2005 in order to remain broker-in-charge on that date and thereafter. Except as provided herein, every broker-in-charge designated after October 1, 2000 shall complete the broker-in-charge course within 120 days following designation in order to remain broker-in-charge thereafter. Every broker who has completed the broker-in-charge course shall take the course on a recurring basis at intervals not to exceed five years between courses in order to remain eligible to be designated broker-in-charge of the principal or branch office of any real estate firm. If a broker who is designated broker-in-charge fails to complete the broker-in-charge course within the prescribed time period, the broker-in-charge status of that broker shall be immediately terminated, and the broker must complete the broker-in-charge course before he or she may again be designated as broker-in-charge. A broker-in-charge residing outside of North Carolina who is the broker-in-charge of a principal or branch office not located in North Carolina shall not be required to complete the broker-in-charge course.

(g) A nonresident commercial real estate broker licensed under the provisions of Section .1800 of this Subchapter shall not act as or serve in the capacity of a broker-in-charge of a firm or office in North Carolina.

History Note: Authority G.S. 93A-2; 93A-3(c); 93A-4; 93A-9; Eff. September 1, 1983; Amended Eff. July 1, 2004; April 1, 2004; September 1, 2002; July 1, 2001; October 1, 2000; August 1, 1998; April 1, 1997; July 1, 1995; July 1, 1994.

FOR OPERATING WHILE LICENSE EXPIRED

(a) **(Effective until January 1, 2006)** All real estate licenses issued by the Commission under G.S. 93A, Article 1 shall expire on the 30th day of June following issuance. Any licensee desiring renewal of a license shall apply for renewal within 45 days prior to license expiration by submitting a renewal application on a form prescribed by the Commission and submitting with the application the required renewal fee of forty dollars (\$40.00).

(a) **(Effective January 1, 2006)** All real estate licenses issued by the Commission under G.S. 93A, Article 1 shall expire on the 30th day of June following issuance. Any licensee desiring renewal of a license shall apply for renewal within 45 days prior to license expiration by submitting a renewal application on a form provided by the Commission and submitting with the application the required renewal fee of forty-five dollars (\$45.00).

(b) Any person desiring to renew his or her license on active status shall, upon the second renewal of such license following initial licensure, and upon each subsequent renewal, have obtained all continuing education required by G.S. 93A-4A and Rule .1702 of this Subchapter.

(c) A person renewing a license on inactive status shall not be required to have obtained any continuing education in order to renew such license; however, in order to subsequently change his or her license from inactive status to active status, the licensee must satisfy the continuing education requirement prescribed in Rule .1703 or .1711 of this Subchapter.

(d) Any person or firm which engages in the business of a real estate broker or salesperson while his, her, or its license is expired is subject to the penalties prescribed in G.S. 93A-6.

History Note: Authority G.S. 93A-3(c); 93A-4(c),(d); 93A-4A; 93A-6;

Eff. February 1, 1976;

Readopted Eff. September 30, 1977;

Amended Eff. July 1, 1994; February 1, 1991;

February 1, 1989;

Temporary Amendment Eff. April 24, 1995 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;

Amended Eff. January 1, 2006; July 1, 2004; December 4, 2002; April 1, 1997; July 1, 1996; August 1, 1995.

21 NCAC 58A .0504 ACTIVE AND INACTIVE LICENSE STATUS

(a) Except for licenses that have expired or that have been revoked, suspended or surrendered, all licenses issued by the Commission shall be designated as being either on active status or inactive status. The holder of a license on active status may engage in any activity requiring a real estate license and may be compensated for the provision of any lawful real estate brokerage service. The holder of a license on inactive status may not engage in any activity requiring a real estate license, including the referral for compensation of a prospective seller, buyer, landlord or tenant to another real estate licensee or any other party. A licensee holding a license on inactive status must renew such license and pay the prescribed license renewal fee in order to continue to hold such license. The Commission may take disciplinary action against a licensee holding a license on

inactive status for any violation of G.S. 93A or any rule promulgated by the Commission, including the offense of engaging in an activity for which a license is required while a license is on inactive status.

(b) Except as provided by Rule .1804 of this Subchapter, a salesperson's license shall, upon initial licensure, be assigned to inactive status. The license of a broker or firm shall be assigned to active status. Except for persons licensed under the provisions of Section .1800 of this Subchapter, a broker or salesperson may change the status of his or her license from active to inactive status by submitting a written request to the Commission. Except for salespersons licensed under Section .1800 of this Subchapter, a salesperson's license shall be assigned by the Commission to inactive status when the salesperson is not under the active, personal supervision of a broker-in-charge. A firm's license shall be assigned by the Commission to inactive status when the firm does not have a principal broker. Except for persons licensed under the provisions of Section .1800 of this Subchapter, a broker or salesperson shall also be assigned to inactive status if, upon the second renewal of his or her license following initial licensure, or upon any subsequent renewal, he or she has not satisfied the continuing education requirement described in Rule .1702 of this Subchapter.

(c) A salesperson with an inactive license who desires to have such license placed on active status must comply with the procedures prescribed in Rule .0506 of this Section.

(d) A broker with an inactive license who desires to have such license placed on active status shall file with the Commission a request for license activation on a form prescribed by the Commission containing identifying information about the broker, a statement that the broker has satisfied the continuing education requirements prescribed by Rule .1703 of this Subchapter, the date of the request, and the signature of the broker. Upon the mailing or delivery of this form, the broker may engage in real estate brokerage activities requiring a license; however, if the broker does not receive from the Commission a written acknowledgment of the license activation within 30 days of the date shown on the form, the broker shall immediately terminate his or her real estate brokerage activities pending receipt of the written acknowledgment from the Commission. If the broker is notified that he or she is not eligible for license activation due to a continuing education deficiency, the broker must terminate all real estate brokerage activities until such time as the continuing education deficiency is satisfied and a new request for license activation is submitted to the Commission.

(e) A firm with an inactive license which desires to have its license placed on active status shall file with the Commission a request for license activation on a form prescribed by the Commission containing identifying information about the firm and its principal broker. If the principal broker has an inactive license, he or she must satisfy the requirements of Paragraph (d) of this Rule. Upon the mailing or delivery of the completed form by the principal broker, the firm may engage in real estate brokerage activities requiring a license; however, if the firm's principal broker does not receive from the Commission a written acknowledgment of the license activation within 30 days of the date shown on the form, the firm shall immediately terminate its real estate brokerage activities pending receipt of the written

acknowledgment from the Commission. If the principal broker is notified that the firm is not eligible for license activation due to a continuing education deficiency on the part of the principal broker, the firm must terminate all real estate brokerage activities until such time as the continuing education deficiency is satisfied and a new request for license activation is submitted to the Commission.

(f) A person licensed as a broker or salesperson under Section .1800 of this Subchapter shall maintain his or her license on active status at all times as required by Rule .1804 of this Subchapter.

History Note: Authority G.S. 93A-3(c); 93A-4(d); 93A-4A; 93A-6; 93A-9; Eff. February 1, 1976; Readopted Eff. September 30, 1977; Amended Eff. July 1, 2004; October 1, 2000; April 1, 1997; July 1, 1996; July 1, 1995; July 1, 1994; February 1, 1989; December 1, 1985.

21 NCAC 58A .1802 DEFINITIONS

For the purposes of this Section:

- (1) "Commercial Real Estate" means any real property or interest therein, whether freehold or non-freehold, which at the time the property or interest is made the subject of an agreement for brokerage services:
 - (a) is lawfully used primarily for sales, office, research, institutional, warehouse, manufacturing, industrial or mining purposes or for multifamily residential purposes involving five or more dwelling units;
 - (b) may lawfully be used for any of the purposes listed in Subitem (1)(a) of this Rule by a zoning ordinance adopted pursuant to the provisions of G.S. 153A, Article 18 or G.S. 160A, Article 19 or which is the subject of an official application or petition to amend the applicable zoning ordinance to permit any of the uses listed in Subitem (1)(a) of this Rule which is under consideration by the government agency with authority to approve the amendment; or
 - (c) is in good faith intended to be immediately used for any of the purposes listed in Subitem (1)(a) of this Rule by the parties to any contract, lease, option, or offer to make any contract, lease, or option.
- (2) "Qualifying state" means the state or territory of the United States where an applicant for, and the holder of, a limited nonresident commercial license issued under this Section is licensed in good standing as a real estate broker or salesperson. The qualifying state must be the state or territory where the applicant or limited nonresident commercial

licensee maintains his or her primary place of business as a real estate broker or salesperson. Under no circumstances may North Carolina be a qualifying state.

History Note: Authority G.S. 93A-4; 93A-9; Eff. July 1, 2004.

21 NCAC 58A .1803 REQUIREMENTS FOR LICENSURE; APPLICATION AND FEE

(a) A person desiring to obtain a broker or salesperson license under this Section shall demonstrate to the Real Estate Commission that:

- (1) he or she is a resident of a state or territory of the United States other than North Carolina;
- (2) he or she is licensed as a real estate broker or salesperson in a qualifying state and that said license is on active status and not in abeyance for any reason. If licensed as a salesperson, he or she shall also demonstrate that he or she is acting under the supervision of a broker in accordance with the applicable governing statutes or regulations in the qualifying state; and
- (3) he or she possesses the requisite honesty, truthfulness, integrity, and moral character for licensure as a broker or salesperson in North Carolina.

A person applying for licensure under this Section shall not be required to show that the state or territory where he or she is currently licensed offers reciprocal licensing privileges to North Carolina brokers and salespersons.

(b) A person desiring to be licensed under this Section shall submit an application on a form prescribed by the Commission and shall show the Commission that he or she has satisfied the requirements set forth in Paragraph (a) of this Rule. In connection with his or her application a person applying for licensure under this Rule shall provide the Commission with a certification of license history from the qualifying state where he or she is licensed. He or she shall also provide the Commission with a report of his or her criminal history from the service designated by the Commission. An applicant for licensure under this Section shall be required to update his or her application as required by Rule .0302(c) of this Subchapter.

(c) The fee for persons applying for licensure under this Section shall be one hundred dollars (\$100.00) and shall be paid in the form of a certified check, bank check, cashier's check, money order, or by credit card. Once paid, the application fee shall be non-refundable.

(d) If the Commission has received a complete application and the required application fee and if the Commission is satisfied that the applicant possesses the moral character necessary for licensure, the Commission shall issue to the applicant a limited nonresident commercial real estate broker or salesperson license corresponding to the license the applicant possesses in the qualifying state.

History Note: Authority G.S. 93A-4; 93A-9; Eff. July 1, 2004.

21 NCAC 58A .1807 AFFILIATION WITH RESIDENT BROKER

(a) No person licensed under this Section shall enter North Carolina to perform any act or service for which licensure as a real broker or salesperson is required unless he or she has first entered into a brokerage cooperation agreement and declaration of affiliation with an individual who is a resident in North Carolina licensed as a North Carolina real estate broker.

(b) A brokerage cooperation agreement as contemplated by this Rule shall be in writing and signed by the resident North Carolina broker and the non-resident commercial licensee. It shall contain:

- (1) the material terms of the agreement between the signatory licenses;
- (2) a description of the agency relationships, if any, which are created by the agreement among the nonresident commercial licensee, the resident North Carolina broker, and the parties each represents;
- (3) a description of the property or the identity of the parties and other information sufficient to identify the transaction which is the subject of the affiliation agreement; and
- (4) a definite expiration date.

(c) A declaration of affiliation shall be written and on the form prescribed by the Commission and shall identify the nonresident commercial licensee and the affiliated resident North Carolina licensee. It shall also contain a description of the duties and obligations of each as required by the North Carolina Real Estate License Law and rules duly adopted by the Commission. The declaration of affiliation may be a part of the brokerage cooperation agreement or separate from it.

(d) A nonresident commercial licensee may affiliate with more than one resident North Carolina broker at any time. However, a nonresident commercial licensee may be affiliated with only one resident North Carolina broker in a single transaction.

(e) A resident North Carolina broker who enters into a brokerage cooperation agreement and declaration of affiliation with a nonresident commercial licensee shall:

- (1) verify that the nonresident commercial licensee is licensed in North Carolina;
- (2) actively and personally supervise the nonresident commercial licensee in a manner which reasonably insures that the nonresident commercial licensee complies with the North Carolina Real Estate License Law and rules adopted by the Commission; and
- (3) promptly notify the Commission if the nonresident commercial licensee violates the Real Estate License Law or rules adopted by the Commission; and
- (4) insure that records are retained in accordance with the requirements of the Real Estate License Law and rules adopted by the Commission.

(f) The nonresident commercial licensee and the affiliated resident North Carolina broker shall each retain in his or her records a copy of brokerage cooperation agreements and declarations of affiliation from the time of their creation and for at least three years following their expiration. Such records shall be made available for inspection and reproduction by the Commission or its authorized representatives without prior notice.

History Note: Authority G.S. 93A-4; 93A-9; Eff. July 1, 2004.

21 NCAC 58A .1809 ADVERTISING

In all advertising involving a nonresident commercial licensee's conduct as a North Carolina real estate broker or salesperson and in any representation of such person's licensure in North Carolina, the advertising or representation shall conspicuously identify the nonresident commercial licensee as a "Limited Nonresident Commercial Real Estate Broker (or Salesperson)."

History Note: Authority G.S. 93A-4; 93A-9; Eff. July 1, 2004.

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 http://www.ncoah.com/hearings.

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Senior Administrative Law Judge
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ADMINISTRATIVE LAW JUDGES

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Beecher R. Gray
Melissa Owens Lassiter

James L. Conner, II
Beryl E. Wade
A. B. Elkins II

RULES DECLARED VOID

04 NCAC 02S .0212 CONSUMPTION: INTOXICATION BY PERMITTEE PROHIBITED
Pursuant to G.S. 150B-33(b)(9), Administrative Law Judge James L. Conner, II declared 04 NCAC 02S .0212(b) void as applied in NC Alcoholic Beverage Control Commission v. Midnight Sun Investments, Inc. t/a Tiki Cabaret (03 ABC 1732).

20 NCAC 02B .0508 FAILURE TO RESPOND
Pursuant to G.S. 150B-33(b)(9), Administrative Law Judge Melissa Owens Lassiter declared 20 NCAC 02B .0508 void as applied in Burton L. Russell v. Department of State Treasurer, Retirement Systems Division (03 DST 1715).

Table with 5 columns: AGENCY, CASE NUMBER, ALJ, DATE OF DECISION, PUBLISHED DECISION REGISTER CITATION. Rows include categories like HEALTH AND HUMAN SERVICES, DEPARTMENT OF PUBLIC INSTRUCTION, ENVIRONMENT AND NATURAL RESOURCES, and OFFICE OF STATE PERSONNEL.

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
02 EDC 2310

Alice Bins Rainey, Michele R Rotosky)
and Madeline Davis Tucker)
Petitioner)
vs.)
North Carolina Department of)
Public Instruction)
Respondent)

DECISION

Pursuant to N.C. Gen. Stat. §§ 150B-23 through 37, on December 1 through December 3, 2003, Administrative Law Judge Melissa Owens Lassiter conducted a contested case hearing in this matter in Raleigh, North Carolina. On March 1, 2004, the parties submitted and filed proposed Decisions.

APPEARANCES

For Petitioners: Pamela A. Scott
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BURDEN OF PROOF

Petitioners have the burden of proof by a preponderance of the evidence. N.C. Gen. Stat. §§ 150B-23(a) and 150B-29(a) (2003).

ISSUES

Whether Respondent deprived Petitioners of property or otherwise substantially prejudiced their rights and whether Respondent:

- (a) exceeded its authority or jurisdiction;
- (b) acted erroneously;
- (c) failed to use proper procedure;
- (d) acted arbitrarily or capriciously; or
- (e) failed to act as required by law or rule;

when it denied Petitioners a statutorily authorized 12% salary increase for National Board for Professional Teaching Standards ("NBPTS") certified teachers?

RECORD OF THE CASE

At the hearing, the following testimony was received:

<u>Transcript Volume Number</u>	<u>Witness</u>	<u>Affiliation</u>	<u>Pages</u>
Volume I	Michele Rotosky	Petitioner	35-95

	Alice Rainey	Petitioner	96-131
	Karen Garr	NBPTS	132-174
	Madeline Davis Tucker	Petitioner	175-242
	Michele Rotosky	Petitioner	245-248
	Alice Rainey	Petitioner	248-252
Volume II	Kenneth Smith	Respondent	259-308
	Philip Price	Respondent	313-381
	Gary Jarrett	Respondent	381-485
	Alexis Schauss	Respondent	486-545
Volume III	Alexis Schauss	Respondent	554-580
	Marie Houston	Respondent	581-595

The following exhibits were admitted into evidence:

Exhibits Admitted Through Official Notice

1. N.C.G.S. § 115C-296.2
2. N.C.G.S. § 115C-325(a)(6)
3. Respondent Rule re CEUs
4. Session Laws re NBPTS
33. State Board Web Site (July 19, 2002)
34. Attorney General's Opinion (August 1997)

Petitioners' Exhibits

5. Rotosky Licenses
6. Rotosky Lesson Planning Docs
7. Speech/Language Instruction
8. Rotosky Teacher Evaluations
9. Rotosky Classroom
10. Rotosky Applications for NBPTS (September 2000)
11. Correspondence re: Rotosky Eligibility
12. Rotosky Pay, CEU

13. Letter to Respondent Requesting Relief (June 11, 2002)
14. Letter to Respondent Requesting Ruling (July 25, 2002)
15. Letter to Respondent Requesting Ruling (September 4, 2002)
16. Letter from Sneed Denying Relief (October 29, 2002)
17. Rainey's Licenses and Pay Stubs
18. Rainey Lesson Planning Docs
- 18A. Rainey General Weekly Schedule
19. Rainey Classroom
20. Rainey Application for NBPTS
- 20A. Rainey CEU History Report
- 20B. N.C. Guidelines for Speech-Language Pathology Services in Schools – Draft 8-24-03
21. Correspondence re Rainey Eligibility
22. Tucker Licenses
23. Tucker Job Description
24. Tucker Classroom
25. Tucker Pay Stubs
26. Tucker Application for NBPTS
27. Respondent Conference (October 29-30, 1999)
28. NBPTS Certification Overviews
29. Tucker CEU Credits
30. Letter to Tucker from Bennett Denying Relief (May 23, 2001)
31. Letter to Kirk from Tucker (June 27, 2001)
32. Guidelines Created by Schauss
35. Respondent's Answers to Discovery

Respondent's Exhibits

2. Licensure Salary Page for Alice Rainey
3. Licensure Salary Page for Michele Rotosky
4. Licensure Salary Page for Madeline Tucker
13. N.C. Public School Personnel Employee Salary and Benefits Manual 2002-2003 Part I

- 15. N.C. Public Schools Uniform Chart of Accounts
- 17. Job Description for Speech Language Specialists

FINDINGS OF FACT

1. By letter dated October 29, 2002, Respondent notified Petitioners that it was denying Petitioners, the salary incentives authorized for NBPTS Certified teachers (“Denial Letter”). (Pet. Exh. 16). Respondent’s Denial Letter is the document constituting agency action at issue in this contested case. (See Document Constituting Agency Action filed by Respondent on January 30, 2003)

2. Each Petitioner is a North Carolina public school teacher who completed the NBPTS Certification program and obtained NBPTS Certification in the area in which she teaches.

A. **NORTH CAROLINA’S NBPTS PROGRAM**

3. At the administrative hearing, Karen Garr, Manager of NBPTS’ Southeast Regional Office, explained NBPTS, and the history and objectives of North Carolina’s NBPTS program. Ms. Garr has worked with the North Carolina program since its inception, first as Education Advisor to Governor James B. Hunt from 1993-2001, and since then, in her current position as a regional manager for NBPTS. Prior to becoming Governor Hunt’s teacher advisor, Ms. Garr was an elementary school teacher for many years. (T. Vol. I, Garr, pp. 132-40).

4. In 1994, North Carolina’s NBPTS program was initially implemented through a special provision of the budget bill. In 2000, the program was codified pursuant to N.C. Gen. Stat. § 115C-296.2(a). When North Carolina’s NBPTS certification program first began, there were two areas of certification available. Each year since that time, NBPTS has added several additional areas of certification. In 2003, NBPTS added a certification area for guidance counseling. (T. Vol. I, Garr, pp. 136-39).

5. During the eight years she served as Education Advisor to Governor Hunt, part of Ms. Garr’s job responsibilities was to lobby for, and help implement North Carolina’s NBPTS program. She worked with Respondent to develop procedures for funding the North Carolina program and the promissory note to be signed by teachers participating in the program. She also worked with the N.C. Association of Educators to establish a support program for teachers pertaining to NBPTS certification. (T. Vol. I, Garr, pp. 139-40).

6. In N.C. Gen. Stat. § 115C-296.2(a), the General Assembly declared the public policy underlying the NBPTS Certification program in North Carolina – “to provide opportunities and incentives for good teachers to become excellent teachers and to retain them in the teaching profession.” This statement of the goal of North Carolina’s NBPTS program is the best evidence of the legislative intent underlying the program and N.C. Gen. Stat. § 115C-296.2.

7. N.C. Gen. Stat. § 115C-296.2 requires the State to pay “a significant salary differential to teachers who attain national certification from [NBPTS].” N.C. Gen. Stat. § 115C-296.2(a) (2003).

8. Ms. Garr explained that the purpose of North Carolina’s NBPTS program at its inception, and currently, is to “identify, recognize, and reward accomplished teachers who met those standards of the National Board.” (T. Vol. I, Garr, p. 140).

9. N.C. Gen. Stat. § 115C-296.2(a) provides that:

the State shall support the efforts of teachers to achieve national certification by providing approved paid leave time for teachers participating in the process, paying the participation fee, and paying a significant salary differential to teachers who attain national certification from the National Board for Professional Teaching Standards (NBPTS).

In addition to these benefits provided by statute, Respondent has adopted a rule which provides that each teacher earning NBPTS certification will receive 15 units of continuing education renewal credit. 16 NCAC 06C .0307 (2003).

10. N.C. Gen. Stat. § 115C-296.2(b)(2) defines a “teacher” as a person who:

- a. Either:
 - 1. Is certified to teach in North Carolina; or
 - 2. Holds a certificate or license issued by the State Board of Education that meets the professional license requirement for NBPTS certification;
- b. Is a State-paid employee of a North Carolina public school;
- c. Is paid on the teacher salary schedule; and
- d. Spends at least seventy percent (70%) of his or her work time:

1. In classroom instruction, if the employee is employed as a teacher. Most of the teacher's remaining time shall be spent in one or more of the following: mentoring teachers, doing demonstration lessons for teachers, writing curricula, developing and leading staff development programs for teachers; or
2. In work within the employee's area of certification or licensure, if the employee is employed in an area of NBPTS certification other than direct classroom instruction.

Thus, in N.C. Gen. Stat. § 115C-296.2(b), the General Assembly recognizes two different categories of teachers who are eligible to participate in the State's NBPTS program: (i) teachers who are employed as teachers and engaged in classroom instruction, and (ii) teachers who work in areas of NBPTS certification other than direct classroom instruction.

11. Although North Carolina's NBPTS program distinguishes between classroom and non-classroom teachers, NBPTS does not categorize its certification areas as applying to either "direct classroom instruction" or "other than direct classroom instruction." The requirements for achieving NBPTS certification in every area, including counseling, library and media, and career and technical education, include teaching and classroom components. The National Board for Professional Teaching Standards construes the concept of the "classroom" broadly to include learning environments other than the traditional classroom in which a teacher teaches the same assigned students every day. (T. Vol. I, Garr, pp. 142-43, 153-57; Pet. Exh. 28).

12. The substantive terms of the NBPTS Certification application forms ("NBPTS Application") that Petitioners completed and filed with Respondent are virtually identical. (Pet. Exhs. 10, p. 3; 20, p. 5; and 26).

- (a) The NBPTS Application listed the following eligibility criteria which NBPTS candidates must meet in order to receive State funding:
 - (i) be paid entirely from State funds;
 - (ii) have at least three full years' experience teaching in North Carolina public schools;
 - (iii) hold a valid, clear and continuing North Carolina teaching license; and
 - (iv) have not previously received State funds for participating in the NBPTS assessment.
- (b) The NBPTS Application listed the following benefits public school teachers participating in the State's NBPTS program would receive:
 - (i) assessment fee paid by Respondent,
 - (ii) three leave days provided to allow candidate to prepare;
 - (iii) 12% salary increase for teachers earning NBPTS Certification; and
 - (iv) credit for one full renewal cycle of continuing education provided to candidates who submit a complete portfolio.

With regard to the salary incentive, the NBPTS Application stated, "Teachers holding National Board Certification will be paid, on an annual basis, a salary appropriate to the certification. (Currently this is a 12% premium)." (emphasis added) (Pet. Exh. 10, p. 3; Pet Exh 20, p 4).

13. Earning NBPTS certification is a rigorous and time-consuming process which requires a teacher to first develop an extensive portfolio of her work over a period of several months, and then pass a multi-part assessment exam. The portfolio must include at least two video tapes of lessons in a small group and a large group. A candidate teacher is also required to submit, as part of her portfolio: examples of her students' work, evidence of student achievement over time, and evidence of contribution to the profession and involvement with parents and the community. North Carolina has the highest percentage of NBPTS certified teachers in the United States. (T. Vol. I, Garr, pp. 144-46; Tucker, pp. 231-32; Vol. II, Jarrett, p. 396).

B. PETITIONER MICHELE ROTOSKY

14. Ms. Rotosky teaches exceptional needs elementary school students who have moderate to severe impairments in their ability to understand and use spoken language. She teaches 29 students every week, but the particular students she teaches each day vary depending upon the individual students' educational needs. Ms. Rotosky spends all but approximately 30 minutes of her time each work day in direct instruction of students. Ms. Rotosky teaches her exceptional need students either in a regular classroom setting, or in her resource classroom setting. (T. Vol. I, Rotosky, pp. 37-38, 49-53; Pet. Exhs. 6 and 8).

15. In addition to teaching, Ms. Rotosky helps evaluate students who may need exceptional children's services, helps develop individualized education plans ("IEP's") for students who need special education, and works with other teachers and the students' parents to monitor and implement these IEP's. She is also responsible for routine supervision of students before school hours for car pool duty every morning. (T. Vol. I, Rotosky, pp. 52-54).

16. Ms. Rotosky maintains a Master's level N.C. Teaching License in Speech Language Pathology, a Class M Certificate, and is paid on the schedule for speech language pathologists. This salary schedule begins at the fifth step of the teacher's "M" salary schedule. She has six years experience teaching in the Durham Public Schools, and is employed in a full-time, permanent teaching position. (T. Vol. I, Rotosky, pp. 36-40, 76-77; Pet. Exhs. 5 and 12, pp. 1-6).

17. Like other teachers in her school, Ms. Rotosky's performance is evaluated periodically by administrators in her school. These evaluations are based upon the standard teacher evaluation form used to evaluate all other teachers in her school system. Part of these evaluations involves identifying how the lessons correlate with the standard courses of study for the academic subjects at issue. (T. Vol. I, Rotosky, pp. 54-57).

18. Ms. Rotosky develops her own lesson plans for her students. Her lesson plans "relate to the standard course of study objectives that are being taught for each individual lesson." (Vol I, T p 47)

19. Before submitting her application for NBPTS Certification, Ms. Rotosky contacted the three NBPTS coordinators identified in the application materials. The State NBPTS coordinators were: Karen Garr, then Education Advisor to Governor Hunt; Chris Godwin with Respondent; and Marian Stallings Cook with the National Education Association. (Pet. Exh. 10, p. 1.) Ms. Rotosky asked these coordinators whether she was eligible as a speech-language pathologist for North Carolina's NBPTS program and the related salary increase.

20. Before Ms. Rotosky submitted her NBPTS Certification application, Ms. Garr and Ms. Cook informed Ms. Rotosky that she was eligible to receive the salary incentive under the Exceptional Needs certification area. NBPTS also informed Ms. Rotosky that she was eligible to pursue certification in the Exceptional Needs area. Respondent's Mr. Godwin and David Howell told Ms. Rotosky it was questionable whether speech language pathologists were eligible to participate in the State's NBPTS program. Mr. Godwin suggested that Ms. Rotosky contact Ms. Garr for further clarification. Ms. Garr repeatedly told Ms. Rotosky that she was eligible to participate in the program. (Pet. Exh. 11, pp. 1-3; T. Vol. I, Rotosky, pp. 59-62).

21. The following NBPTS Certification application materials that Respondent provided to Ms. Rotosky, represented in pertinent part:

The State of North Carolina will pay – up front – the candidate assessment fee for eligible (definition on back) teachers. Teachers do not have to repay the fee as long as they complete the full National Board Certification process and teach the year following completion. The state also provides up to three days of release time to work on the [certification] process, provides a 12% salary increase to those achieving National Board Certification, and grants full renewal credit to those completing the assessment process."

(Pet. Exh. 10, p. 1)

22. To complete her NBPTS Certification application, Ms. Rotosky submitted the following along with her NBPTS application: a copy of her N.C. teaching license (showing her licensure as a "Speech Language Pathologist"), a verification of her 3 years teaching experience in N.C. public schools, and an agreement to teach the following year in North Carolina. Ms. Rotosky's school system verified that she was teaching in a State-funded position. (Pet. Exhs. 10 and 11, p. 7; T. Vol. I, Rotosky, pp. 63-64).

23. Ms. Rotosky signed her NBPTS application on May 19, 2000, and submitted such application for NBPTS certification in late May 2000. Because she received conflicting information regarding her eligibility for North Carolina's NBPTS program from the above-noted State coordinators, Ms. Rotosky submitted copies of her e-mail communication with these coordinators, with her NBPTS application to Respondent. (Pet. Exh. 11, pp. 1-2). She also submitted an e-mail from NBPTS confirming her eligibility. Ms. Rotosky submitted copies of these e-mail communications with her application, to allow Respondent to make an ultimate decision regarding her eligibility for the North Carolina NBPTS program, by either approving or not approving her application and paying or not paying the NBPTS assessment fee for her. (T. Vol. I, Rotosky, pp. 61-62, 247).

24. Respondent approved Ms. Rotosky's application for funding to complete the Certification process in the area of Exceptional Needs – Mild to Moderate Disabilities. In June 2001, Ms. Rotosky completed and passed the NBPTS Certification program. (Pet. Exh. 11, pp. 7-8; T. Vol. I, Rotosky, p. 65).

25. Consistent with the terms of the NBPTS Application, Respondent paid the \$2,300.00 NBPTS assessment fee for Ms. Rotosky, and provided Ms. Rotosky three paid leave days to allow her to complete the NBPTS Certification program. Respondent furnished Ms. Rotosky renewal credit for one full renewal cycle of continuing education. (Pet. Exh. 12, p. 7; T. Vol. I, Rotosky, pp. 42, 69-70).

26. However, Respondent refused to pay Ms. Rotosky the 12% salary incentive after she earned her NBPTS Certification. The Durham Public Schools Human Resources Department advised Rotosky that they could not adjust her salary, because Respondent did not authorize an adjustment her salary, as she was a speech-language pathologist. Rotosky attempted to obtain this authorization from Jeanne Washburn, Respondent's designated NBPTS Certification contact person, and Respondent's Cecil Banks. Ms. Washburn had processed Rotosky's Certification application. In December 2001, Mr. Banks told Rotosky that she was not eligible for the salary increase, because she was a speech-language pathologist. (T. Vol. I, Rotosky, pp. 65-67; Pet. Exh. 11, pp. 9-10).

27. By letter dated January 18, 2002, Ms. Rotosky contacted Brad Sneed, Respondent's Deputy Superintendent, and requested his assistance in resolving the NBPTS salary increase issue. By letter dated February 25, 2002, Mr. Sneed advised Ms. Rotosky that based on discussions with legislative staff, she was not eligible for the 12% salary increase for NBPTS Certification, because (1) she was not paid on the teacher salary schedule, and (2) the salary schedule on which she was paid, did not include provisions for NBPTS Certification. (Pet. Exh. 11, pp. 12-13; T. Vol. I, Rotosky, p. 67).

28. When Ms. Rotosky applied for NBPTS certification, and when she became NBPTS certified, Ms. Rotosky's paycheck still indicated that she was paid as an "exceptional teacher." It was not until Rotosky's August 29, 2003 paycheck that her employer indicated that she was paid as a "speech pathologist." (Petitioner's Exh 10; Vol I, T p 42)

29. Ms. Rotosky's responsibilities as a Durham County School employee did not change from the time she signed the NBPTS promissory note on May 19, 2000 until the date of this administrative hearing. (Vol I, T p 245)

C. PETITIONER ALICE BINS RAINEY

30. Ms. Rainey teaches exceptional needs middle school students who have moderate to severe impairments in their ability to understand and use spoken language, have fluency disorders such as stuttering, and/or have speech sound disorders which impair their intelligibility and ability to communicate effectively in the school environment. (T. Vol. I, Rainey, pp. 102-03, ; Pet. Exhs. 18, 18A).

31. Ms. Rainey teaches 42 exceptional needs students every week in language arts and math. The particular students Rainey teaches each day vary depending upon the individual students' educational needs. Included in her students are the same five 8th grade students and the same five 6th grade students each week. (Vol I, T p 252) Rainey co-teaches in a number of classrooms in her school, plus teaches students in her own classroom. (Vol I, p 106) Rainey spends at least 85% of her work time each week in direct instruction of students. (T. Vol. I, Rainey, pp. 105-08, 110-11, 250-52) When Rainey is absent from school, she leaves lesson plans that she has developed, for her students. (Vol I, T p 102,104)

32. In addition to teaching, Ms. Rainey helps evaluate students who may need exceptional children's services, helps develop IEP's for students who need special education, and works with other teachers and the students' parents to monitor and implement these IEP's. She is also responsible for routine supervision of students before, during, and after school hours for such things as bus, hall, cafeteria and athletic event duty on a rotating basis with other teachers. Ms. Rainey also serves as a mentor teacher to younger teachers in her school. (Vol. I, Rainey, T pp. 108-110).

33. Ms. Rainey maintains an Advanced level N.C. Teaching License in Speech Language Pathology, a Class M Certificate, as well as provisional Bachelor's level teaching licenses in two areas of exceptional needs education – mentally disabled and learning disabled. She is paid on the salary schedule for masters' level speech pathologists, which begins at the fifth step of the teacher's "M" salary schedule. Ms. Rainey has taught in the Lee County Public Schools for 17 years, and is employed in a full-time, permanent position. (T. Vol. I, Rainey, p. 97, 99-102; Pet. Exh. 17).

34. On September 3, 1999, Ms. Rainey signed her NBPTS application and the attached promissory note. On or about September 13, 1999, Ms. Rainey submitted such application for NBPTS certification. In completing her NBPTS certification application, Ms. Rainey also submitted the following: a copy of her N.C. teaching license (showing licensure as a teacher in the area of "Speech Language Impaired"), a verification of 11 years teaching experience in N.C. public schools, and an agreement to teach the following year in North Carolina. Ms. Rainey's school system also verified that she was teaching in a State-funded position.

35. Respondent approved Ms. Rainey's application for funding to complete the Certification process in the area of Exceptional Needs – Mild to Moderate Disabilities.

36. In April 2001, Ms. Rainey completed the NBPTS Certification program. (T. Vol. I, Rainey, pp. 112, 118; Pet. Exh. 20).

37. Ms. Rainey chose to seek NBPTS certification in the area of Exceptional Needs – Mild to Moderate Disabilities, because most of her students have mild to moderate speech and language disabilities. (T. Vol. I, Rainey, p. 116).

38. The NBPTS Certification application materials, prepared and provided by Respondent to Ms. Rainey represented, in pertinent part, that the State would pay the \$2,000 NBPTS assessment fee, provide up to three days of leave time to candidates, pay NBPTS Certified teachers a salary differential of 12% of their State salary for the life of the Certificate (10 years); and grant complete licensure renewal credit for completion of the NBPTS assessment process. (Pet. Exh. 20, p. 4).

39. Consistent with the terms of the NBPTS Application, Respondent paid the \$2,000.00 NBPTS assessment fee for Ms. Rainey, and provided Ms. Rainey three paid leave days to allow her to complete the NBPTS Certification program. Respondent furnished Ms. Rainey credit for one full renewal cycle of continuing education. (T. Vol. I, Rainey, pp. 114-16; Pet. Exh. 20A).

40. However, Respondent refused to pay Ms. Rainey the 12% salary incentive after she earned her NBPTS Certification. In December 2001, Ms. Rainey learned from the Lee County Schools Payroll Office that although her name was on the list of NBPTS certified teachers, Respondent did not certify a new salary for her. Later that same month, Cecil Banks, Manager of Recruitment and Retention for Respondent's Division of Human Resource Management, informed Ms. Rainey that according to legislative staff, she was not eligible for the salary increase as a speech language pathologist, because she was not paid on the teacher salary schedule. Specifically, Mr. Banks said she was paid on salary schedule part labeled "School Psychologist Scale," rather than the schedule labeled "M Scale." (T. Vol. I, Rainey, pp. 120-23; Pet. Exh. 21).

41. Until July 1, 2003, Ms. Rainey was a State-paid teacher. From the time Rainey applied for NBPTS certification in September 1999 until July 1, 2003, Ms. Rainey's paycheck indicated that she was paid as a "teacher." (Pet Exh 17, p 3)

42. Since July 1, 2003, Rainey's position has been paid for by federal funds. (T. Vol. I, Rainey, pp. 100-01; Vol. III, pp. 551-53).

43. When Ms. Rainey applied for NBPTS certification in September 1999, her North Carolina teaching license was titled "exceptional needs speech." On July 8, 2003, Respondent renewed her NC teaching license, and issued her a new teaching license. However, Respondent changed the name of her renewed license from "exceptional needs speech" to "speech language pathologist." (Vol I, p 125)

D. PETITIONER MADELINE DAVIS TUCKER

44. Ms. Tucker is a career and technical education teacher, and curriculum instruction coordinator with the Onslow County Schools. She spends 100% of her work time providing career development and education services to students and teachers in all of the career and technical education program areas in the Onslow County Public Schools. (T. Vol. I, Tucker, pp. 175-77, 215).

45. As a curriculum instruction coordinator, Ms. Tucker serves as a lead teacher. Her job responsibilities include: helping career and technical education teachers develop and implement their lesson plans; mentoring and co-teaching with career and technical education teachers; working with students to help them develop and meet a four-year education and career development plan, explore their career interests, and perform career assessments; coordinating efforts to teach students employment-related skills; and developing and implementing a program for students, parents and the business community to publicize the placement program in vocational education. Her position requires completion of a master's degree, a minimum of five years teaching experience in career and technical education, and current teacher licensure in Career and Technical Education. (T. Vol. I, Tucker, pp. 182-83, 187-90, 208-215; Pet. Exh. 23).

46. Ms. Tucker's office is located at the school system's central office so that she has ready and equal access to all of the schools where she works. Although Ms. Tucker is based at the Onslow County School's central office, she works and is paid as a teacher, not an administrator. (T. Vol. I, Tucker, pp. 183-85; Pet. Exh. 25).

47. Ms. Tucker maintains a Master's level N.C. Teaching License in Business Education (Grades 9-12), and Bachelor's level teaching licenses in the areas of career development coordinator, career exploration (Grades 6-9), and mentoring. She is paid on the schedule for masters' level teachers, the teacher's "M" salary schedule. Ms. Tucker has taught in North Carolina public schools for 12 years, and is employed in a full-time, permanent teaching position. (Pet. Exhs. 22, 23, p. 1, and 25; T. Vol. I, Tucker, pp. 175-80).

48. Career and technical education is a diverse area which includes many different programs aimed at helping students explore, identify and progress toward their desired vocations and careers. Much of the instruction provided by career and technical education teachers occurs outside of the classroom setting, where students learn by observing and practicing the skills necessary to work in their chosen fields. (T. Vol. I, Tucker, pp. 187-204).

For example, many career and technical education courses include job-shadowing and internship components. This component allows students to work with local businesses to observe, and begin learning and practicing how to perform jobs in the students' selected trades or professions. Career and technical education teachers supervise the students' participation in these on-the-job learning opportunities, and work with the students and the students' employers to ensure that these opportunities are educational, and achieve identified learning objectives. (T. Vol. I, Tucker, pp. 193-99, 204-06; Vol. II, Smith, pp. 266-68).

49. Career and technical education teachers also work with special needs students to help them transition from high school to the work place. (T. Vol. I, Tucker, pp. 200-01; Vol. II, Smith, pp. 272-73).

50. Under North Carolina's recently revised graduation requirements, ninth-grade students are required to choose a pathway to earn one of four different diplomas available: career preparation, college technical preparation, college/university preparation, and occupational preparation. (See 16 NCAC 6D.0503 (2003)). Career and technical education teachers play an important role in helping students choose one of these four pathways, and fulfill the requirements of their selected pathway. (T. Vol. I, Tucker, pp. 190-92, 197-98, 202-03).

51. In 1999, Ms. Tucker applied to participate in North Carolina's NBPTS program, the first year NBPTS offered certification in the area of vocational education (now career and technical education). (T. Vol. I, Tucker, pp. 186-87).

52. In May 1999, Ms. Tucker and other curriculum instruction coordinators attended an informational seminar sponsored by the Association for Career and Technical Education. Ms. Tucker and the other curriculum instruction coordinators explained their job responsibilities to the seminar faculty, and asked whether they would qualify to participate in North Carolina's NBPTS program. The faculty included representatives from NBPTS and the North Carolina Association of Educators ("CAE"). The faculty repeatedly told Tucker and her colleagues that if they had three years' teaching experience, a salary code beginning with a "1," and were paid on the teacher salary schedule, then they were eligible to participate, even if they did not teach in a traditional classroom. (T. Vol. I, Tucker, pp. 218-20).

53. In October 1999, Respondent's Work Force Development Division, and the N.C. Professional Teaching Standards Commission sponsored a seminar to educate career and technical education teachers about North Carolina's NBPTS program, and to encourage these teachers to participate in the program. (T. Vol. I, Tucker, pp. 220-22; Vol. II, Smith, pp. 273-74, 282; Pet. Exh. 27).

Ken Smith, Section Chief of Respondent's Business and Marketing Education Section, coordinated this October 1999 seminar. Because career and technical education was a brand new NBPTS certification area in 1999, and because NBPTS certification was a rigorous and time-intensive process, Mr. Smith and Respondent's Business and Marketing Education Section wanted to be sure that they provided accurate information to teachers regarding North Carolina's program, and regarding how to qualify and participate in the program.

(a) In order to do this, Smith selected recognized experts in North Carolina's NBPTS program to serve as faculty for the seminar: Karen Garr, then Education Advisor to Governor Hunt; Tom Blanford, then Executive Director of the N.C. Professional Teaching Standards Commission; and Angela Farthing of NCAE. Mr. Smith chose these individuals, because they were known to have expertise regarding the State's NBPTS program, and because he was not aware of anyone within Respondent who was knowledgeable enough about North Carolina's NBPTS program to help plan and present the seminar. (T. Vol. II, Smith, pp. 259-60, 286-90, 303-04, 307-08; Vol. I, Tucker, p. 222, 227-28).

(b) At the administrative hearing, Mr. Smith explained:

[W]e didn't want to give people misinformation or lead people in the wrong direction. This is a major commitment professionally for these teachers and we wanted to be sure that when we were providing information to teachers on the process . . . and the benefits, that we were giving accurate information and information that would be beneficial to them and help them through the process

(T. Vol. II, Smith, pp. 290-91).

54. Mr. Smith is a veteran administrator in the area of career and technical education, and a former career and technical education teacher. As such, he is familiar with the job responsibilities of curriculum instruction coordinators such as Ms. Tucker. Mr. Smith also is personally familiar with Ms. Tucker's job duties, because he has worked with her in various workshops and education initiatives over the past 10 years. (T. Vol. II, Smith, pp. 260-66, 282-84; Vol. I, Tucker, pp. 224-25).

55. Prior to the October 1999 seminar, Mr. Smith received a list of individuals who had signed up to attend the seminar. He noticed that Ms. Tucker and several other curriculum instruction coordinators were planning to attend. Because Mr. Smith was not

certain whether curriculum instruction coordinators would qualify to participate in North Carolina's NBPTS program, he consulted Tom Blanford about whether such individuals would be eligible to participate in the program. Mr. Blanford informed Mr. Smith that Ms. Tucker and other curriculum instruction coordinators were eligible to participate in all aspects of the State's NBPTS program, including receiving the 12% salary increase. (T. Vol. II, Smith, pp. 291-92).

56. After the seminar faculty presented the program at this October 1999 seminar, Ms. Tucker and several other career and technical education curriculum coordinators explained their job responsibilities to Ms. Garr, Mr. Blanford, and Ms. Farthing. They asked the panelists if they would be eligible, as curriculum instruction coordinators, to participate in the State's NBPTS program, and to receive the 12% salary incentive. Each of the panel members advised Tucker and her colleagues that they were eligible to participate in the program and receive the salary incentive. (T. Vol. I, Tucker, pp. 223-24, 229-30).

57. Because Ms. Tucker was repeatedly assured that she satisfied the NBPTS' eligibility credentials, she pursued NBPTS Certification in vocational education. On June 19, 2000, Tucker completed the certification process, believing that she would receive the promised 12% salary increase. On November 30, 2000, Tucker was notified that she had achieved National Board Certification. (T. Vol. I, Tucker, pp. 230-32; Pet. Exh. 31).

58. Consistent with the terms of the NBPTS Application, Respondent paid the \$2,000.00 NBPTS assessment fee for Ms. Tucker, and provided her three paid leave days to allow her to complete the NBPTS Certification program. Respondent furnished Ms. Tucker credit for one full renewal cycle of continuing education. (T. Vol. I, Tucker, pp. 217-18; Pet. Exh. 29).

59. However, Respondent refused to pay Ms. Tucker the 12% salary incentive after she earned her NBPTS Certification. In December 2000, Ms. Tucker learned that she had not been approved to receive the 12% salary increase. Shortly after learning this, Ms. Tucker contacted Mr. Smith to inquire about her eligibility to receive the pay increase. In turn, Mr. Smith spoke with Mr. Blanford to confirm his understanding that curriculum instruction coordinators were eligible to receive the NBPTS salary incentive. Mr. Blanford confirmed his prior statement that these individuals were eligible. (T. Vol. I, Tucker, pp. 233, Vol. II, Smith, pp. 292-96).

60. In early 2001, Respondent's officials told Ms. Tucker that she was not eligible for the 12% pay increase due to new legislation, N.C. Gen. Stat. § 115C-296.2(b)(2)(d) that was passed in July 2000, one month after Ms. Tucker fulfilled all requirements for NBPTS certification. (T. Vol. I, Tucker, pp. 233-35; Pet. Exhs. 30 and 31).

61. By letter dated February 27, 2001, Respondent's Jennifer Bennett informed Ms. Tucker that she did not qualify for the NBPTS pay increase because she did not spend at least 70% of her time in classroom instruction, and her area of certification was not designed for classroom instruction. By letter dated May 23, 2001, Ms. Bennett informed Ms. Tucker that after having received "a more detailed clarification of the intent of the legislation," Respondent's position continued to be that she did not qualify for the 12% salary increase because her area of certification was not designed for classroom instruction. In this letter, Ms. Bennett explained that N.C. Gen. Stat. § 115C-296.2(b)(2)d "is designed for the NBPTS certification in certified student support or certified instructional support areas where direct student interaction is involved such as media or guidance (when available)." (T. Vol. I, Tucker, pp. 234-36; Pet. Exh. 30).

62. After receiving Ms. Bennett's letters, Ms. Tucker wrote to Phillip J. Kirk, Jr., then Chairman of the State Board of Education, to explain her situation, and seek his assistance in obtaining the 12% salary incentive. In response, Respondent again informed Ms. Tucker that she was not eligible for the NBPTS 12% salary increase because she was not in the classroom 70% of the time. (T. Vol. I, p. 236; Pet. Exh. 31).

63. In March 2002, Ms. Tucker continued to pursue her eligibility for the NBPTS salary incentive, and contacted Ms. Garr again. Ms. Garr reiterated her initial opinion that, because Ms. Tucker and other career and technical education curriculum instruction coordinators are teachers, they were eligible to receive the 12% salary increase. (T. Vol. I, Tucker, p. 240).

E. RESPONDENT'S DENIAL OF NBPTS SALARY INCENTIVE

64. When Ms. Rainey and Ms. Rotosky first contacted Respondent to ask why they were not approved to receive the NBPTS salary incentive, Respondent told them that they were not eligible to receive the salary increase, because they were not paid on the teacher salary schedule. (Pet. Exhs. 11, p. 12, and 21).

65. Yet, in its Denial letter, Respondent used a different rationale. It stated that Ms. Rainey and Ms. Rotosky were not eligible for the NBPTS salary incentives because although they were employed within their area of certification or licensure, but they were not "employed in an area of NBPTS certification" because (i) there is no NBPTS certification for speech and language specialists, and (ii)

the NBPTS certification area of Exceptional Needs – Mild to Moderate Disabilities is for classroom teachers, not speech and language specialists. Respondent further stated that “until NBPTS establishes an area of certification for speech and language specialists, Ms. Rainey and Ms. Rotosky cannot be employed as speech and language specialists and qualify for the NBPTS salary incentives.” (Pet. Exh. 16, pp. 2-3).

In addition, Respondent declared that the issue of Rotosky and Rainey’s salary schedule:

is not the issue for purposes of determining whether Ms. Rainey or Ms. Rotosky qualify for the NBPTS salary incentives. Insofar as neither Ms. Rainey nor Ms. Rotosky is “employed as a teacher” subject to G.S. § 115C-296.2(b)(2)(d)(1), the issue is: Does either of them meet all the requirements to be deemed a “teacher” for purposes of NBPTS under G.S. § 115C-296.2(b)(2)(d)(2)?

(Pet. Exh. 16, p. 2) (emphasis added).

66. Even though Respondent has represented that the Denial Letter is the document constituting agency action in this case, and has stated in answer to interrogatories that the Denial Letter speaks for itself, Respondent returned to its initial salary schedule/ budget code rationale during the contested case hearing. Respondent’s witnesses explained that Ms. Rainey and Ms. Rotosky were not eligible to receive the NBPTS salary incentive, because (1) they were not “classroom teachers,” as Respondent construes that term, and (2) they did not have teacher budget codes, and were not paid on the teacher salary schedule. (T. Vol. II, Jarrett, pp. 440-41; Schauss, pp. 499-503, 514; Pet. Exh. 35).

67. In its Denial Letter, Respondent stated that Ms. Tucker is not eligible for the salary incentives, because (1) she is not employed as a teacher and does not spend 70% of her time in the classroom, and (2) she is “not employed in an area of NBPTS certification other than teaching and [she has] NBPTS certification in an area of direct classroom instruction, i.e., career and technical education.” (Pet. Exh. 16, p. 2).

68. In the Denial Letter, Respondent’s final rationale for Ms. Tucker’s ineligibility for the 12% salary increase, was also contrary to its initial position that career and technical education was not an area of certification designed for classroom instruction. (Pet. Exh. 30, ¶ 2, “nor is your area of certification designed for classroom instruction.”) During the contested case hearing, Respondent’s witnesses explained that although Ms. Tucker is paid on the teacher salary schedule, she is not eligible to receive the NBPTS salary increase, because she is an administrator, and is not paid under a teacher budget code. (T. Vol. II, Jarrett, pp. 441-42, 471).

69. In its Denial Letter, Respondent made clear that the issue for each Petitioner was whether she met the definition of “teacher” set forth in N.C. Gen. Stat. § 115C-296.2(b)(2). Specifically, “G.S. § 115C-296.2(b)(2)(d)(1) and (2) are the provisions directly at issue” (Pet. Exh. 16, p. 1). Respondent did not cite any other criteria in the definition of “teacher” set forth in N.C. Gen. Stat. § 115C-296.2(b)(2) as a basis for denying any Petitioner the salary benefit at issue in this case.

70. Yet, during the contested case hearing, Respondent’s core contention was that North Carolina’s NBPTS program was designed primarily for “classroom teachers” or teachers engaged in “direct classroom instruction,” and that the only exception to this general rule was for guidance counselors and library media personnel.

71. Respondent also contended that Ms. Rainey and Ms. Rotosky do not qualify to receive the NBPTS salary increase, because they are not coded as classroom teachers under the financial and information coding system established and maintained by Respondent. Likewise, Respondent contended that Ms. Tucker is not eligible to receive the NBPTS salary incentive, because she is coded as an administrator.

(a) Each Petitioners’ local school system assigns financial and information codes to each employee. These assigned codes are based on the Uniform Chart of Accounts developed and maintained by Respondent. An individual employee’s actual salary is determined from the State salary schedule prepared by Respondent, purportedly in compliance with the salary schedule provisions adopted by the General Assembly in the budget bill each year. Whether a particular individual is eligible to receive the NBPTS salary incentive is determined by the business rules Respondent writes into its information system, regarding which positions are eligible to receive the salary increase. These business rules are based on Respondent’s interpretation of the legislation adopted by the General Assembly. (Vol. II, Schauss, pp. 519-20, 522-25, 31-32).

(b) At hearing, Ms. Alexis Schauss, Chief of Respondent’s Information and Analysis Section, conceded that Respondent’s information system will do whatever Respondent tells it to do. (Vol. II, Schauss, T p. 532). Therefore, the budget and information codes assigned to Petitioners are not relevant, because they do not determine whether Petitioners are eligible to receive the NBPTS salary incentive. It is the business rules written by Respondent into Respondent’s information system that determine how an

individual employee is paid, and whether that employee qualifies to receive the NBPTS 12% salary incentive. These rules can be rewritten as needed to correctly reflect the mandate of the NBPTS statute.

E. ANALYSIS

Petitioners Rotosky and Rainey

N.C. Gen. Stat. § 115C-296.2(b)(2)a. & b.

72. Respondent concedes that Petitioners Rotosky and Rainey meet subsections a. and b. of N.C. Gen. Stat. § 115C-296.2(b)(2).

N.C. Gen. Stat. § 115C-296.2(b)(2)c.

73. Respondent contends that Petitioners Rotosky and Rainey are not paid on the “teacher salary schedule,” because the General Assembly established a separate salary schedule for speech language pathologists. In accordance with the General Assembly’s directives, Respondent developed the separate speech language pathologist salary schedule included in Respondent’s Salary Manual. (T. Vol. II, Jarrett, p. 434-35; Schauss, pp. 576, 579-80). However, the speech language pathologist salary schedule prepared by Respondent does not include the NBPTS component of the teacher’s M salary schedule, and therefore is not consistent with how the General Assembly has mandated that speech language pathologists be paid.

74. During the administrative hearing, Respondent’s position on this specific issue was not supported by the evidence. First, Respondent witnesses conceded that: (1) only the General Assembly has authority to create the salary schedules pursuant to which public education personnel are paid, and (2) Respondent does not have authority to alter the salary schedules enacted by the General Assembly in the Session Laws. (T. Vol. II, Jarrett, pp. 431, 455, 480; Schauss, p. 527-28). Second, Respondent offered no evidence of its authority to delete the NBPTS component of the teacher’s M schedule from the speech language pathologists salary schedule it created.

(a) Third, since at least 1997, the General Assembly has consistently provided that speech language pathologists holding master’s degrees “shall be paid on the school psychologist salary schedule.” (SL 2003-284, § 7.1(e); Pet. Exh. 4). The General Assembly has also consistently provided that “the first step of the salary schedule for school psychologists shall be equivalent to Step 5, corresponding to five years of experience, on the salary schedule established in this section for certified personnel of the public schools who are classified as “M” teachers.” (SL 2003-284, § 7.1(d) (emphasis added); Pet. Exh. 4).

(b) Fourth, the salary schedule for “M” teachers set forth in the session laws, contains an NBPTS component beginning with Year 4, when a master’s level teacher would be eligible to participate in North Carolina’s NBPTS program. (SL 2003-284, § 7.1(b); Pet. Exh. 4). However, Respondent did not include this NBPTS component in the salary schedule it prepared for master’s degree level speech language pathologists. This newly created salary schedule was to be used by Respondent and local school systems to determine how these employees should be paid. (Resp. Exh. 13, p. D-20).

(c) Fifth, Mr. Jarrett acknowledged that speech language pathologists and school psychologists are paid on the same salary schedule. (T. Vol. II, Jarrett, p. 434). Respondent’s witnesses repeatedly stated that although the speech language pathologist salary schedule mirrors the teacher salary schedule, and is derived from the teacher salary schedule, the two schedules are nonetheless distinct and separate. (T. Vol. II, Jarrett, pp. 441, 454, 465-66, 472; Schauss, pp. 497, 499-500). Yet, Ms. Alexis Schauss confirmed that the teacher’s M salary schedule (for master’s degree level teachers), as well as the school psychologist and speech language pathologist salary schedules, are derived from the teacher’s A salary schedule (for bachelor’s degree level teachers). (T. Vol. II, Schauss, p. 497).

75. In a 1997 opinion, the North Carolina Attorney General’s office opined that speech language pathologists are paid on the M teacher salary schedule. (Pet Exh 34) Senior Deputy Attorney General Speas explained in this opinion:

All the General Assembly has done is to identify the salary schedules for teachers with masters degrees at which school psychologists will be paid. . . . The General Assembly’s action with respect to speech pathologists is essentially the same. Like psychologists, they are paid on the salary schedule for teachers with masters’ degrees, albeit at a higher starting point on the schedule and no separate schedule was established by the General Assembly for them.

(Emphasis added; Pet. Exh. 34 (internal citations omitted)).

76. At the administrative hearing, Mr. Jarrett’s testimony was consistent with Mr. Speas’ statutory construction in that:

So we were required in the School Business School Salary Section to establish a salary schedule for school psychologists that started at an M5 [step 5 of the teacher's M schedule] for school psychologists. And as verified or as indicated in 7.1(e), . . . speech and language pathologists were placed on the same salary schedule as school psychologists.

(T. Vol. II, Jarrett, p. 481).

77. Lastly, in Respondent's Division of School Business' "Employee Salary and Benefits Manual 2002-2003, Part I: Salary," Respondent acknowledges that speech language pathologists are paid on a teacher salary schedule. In this Manual, Respondent specifically states that:

. . . speech-language pathologists employed with the Public Schools of North Carolina are paid on the "M" teacher salary schedule, with 5 years of experience on the "M" teacher salary schedule corresponding to 0 years of experience as a . . . speech-language pathologist.

(Resp Exh 13, p D-2, Section I. C.)

78. Based upon a preponderance of the foregoing evidence, Petitioners Rotosky and Rainey are paid on the teacher "M" salary schedule.

N.C. Gen. Stat. § 115C-292.6(b)(2)d.1.

79. Regarding this criteria, Respondent contends that Petitioners Rotosky and Rainey are not "teachers" who spend at least seventy percent of their work time in "classroom instruction." Respondent contends that the terms "teacher" and "classroom instruction," as used in N.C. Gen. Stat. § 115C-296.2(b)(2)d.1, include only classroom teachers who perform duties such as meeting with students on a regular basis, being directly responsible for grading and promoting students, and teaching the standard course of study developed by the State Board of Education for a particular academic subject or content area. (T. Vol. II, Jarrett, pp. 406-09, 413-17, 468; Price, pp. 361-69; Schauss, pp. 534-35).

80. In supporting its position, Respondent relies upon its authority given in N.C. Gen. Stat. § 115C-296.2(f), to adopt guidelines for implementing N.C. Gen. Stat. § 115C-296.2. Respondent uses these "Guidelines for National Board for Professional Teaching Standards (NBPTS) Pay Differential" and the definition of "classroom instruction" therein, to deny Petitioners Rotosky and Rainey the 12% salary incentive outlined in N.C. Gen. Stat. § 115C-296.2. In its Guidelines, Respondent construes that "the intent of this legislation is to encourage highly qualified teachers to remain in the classroom, providing direct instruction to students." (Pet Exh 13, p 1) It specifically interprets the term "classroom instruction" used in N.C. Gen. Stat. § 115C-292.6(b)(2)d.1, and defines that term to determine whether a "teacher" meets N.C. Gen. Stat. § 115C-296.2(b)(2)d.1. Their definition states as follows:

DEFINITION OF CLASSROOM INSTRUCTION

The decision of whether a person is providing direct classroom instruction involves consideration of all the individual duties, obligations and activities, including but not limited to: . . .

(Emphasis added; Pet Exh 13, pp 1-2)

81. However, Respondent's definition of "classroom instruction" is not set forth anywhere in Chapter 115C of the General Statutes governing public education. This definition is not set forth in any duly promulgated administrative rule by Respondent. Further, nothing in N.C. Gen. Stat. § 115C-296.2(b)(2)d.1 indicates that the General Assembly intended to limit the NBPTS program to Respondent's concept of the traditional classroom teacher.

82. Although Respondent contends that the State's NBPTS program was designed primarily for traditional classroom teachers responsible for teaching the standard course of study, the terms "classroom teacher" and "standard course of study" appear nowhere in N.C. Gen. Stat. § 115C-296.2, or the session laws governing the NBPTS program which preceded this statute. Instead, the General Assembly has always used the simple term "teacher."

83. The plain meaning of the term "classroom instruction" is teaching students in a classroom setting. Applying that definition to N.C. Gen. Stat. § 115C-296.2(b)(2)d.1., and the Petitioners in this case, a preponderance of the evidence at hearing showed that Petitioners Rotosky and Rainey spend more than 80% of their work time teaching exceptional needs students in the classroom setting. Their daily classroom setting includes each Petitioner's classroom, and each Petitioner's students' regularly assigned classrooms.

(a) Both Ms. Rotosky and Ms. Rainey teach the same group of exceptional needs students every week. They teach some of these students every day, and other students less frequently, ranging from one to several days per week. Like other teachers, they both prepare lesson plans for their classes. Rotosky is evaluated like the other teachers in her school. Ms. Rotosky and Ms. Rainey spend the vast majority of their work time teaching exceptional needs students in classrooms. (T. Vol. I, Rotosky, pp. 48-51; Rainey, pp. 106-08, 110; Pet. Exhs. 9 and 19). Moreover, Ms. Rainey and Ms. Rotosky are employed within their area of Respondent’s licensure: Speech Language Pathology, as well as their area of NBPTS Certification of Exceptional Needs - Mild to Moderate Disabilities.

(b) Assuming that teachers must teach the standard course of study in order to be engaged in classroom instruction, for purposes of § 115C-296.2(b)(2)d.1, the evidence established that Ms. Rainey and Ms. Rotosky routinely teach their students the standard courses of study related to several different subjects. (Vol. I, Rotosky, pp. 47-48, 57, 84-85; Rainey, pp. 126-27; Pet. Exh. 7).

84. Respondent contends that Ms. Rainey and Ms. Rotosky are not classroom teachers, because they are not licensed in a teaching area. According to Mr. Jarrett, Ms. Rainey and Ms. Rotosky would need to be licensed by Respondent in a teaching area in order to be eligible to participate in the State’s NBPTS program. (T. Vol. II, Jarrett, p. 401). All of Respondent’s licensure areas are for classroom teaching, except for counseling and library media. (T. Vol. II, Jarrett, p. 400). However, the preponderance of evidence at hearing showed otherwise.

(a) The preponderance of the evidence showed that Ms. Rotosky is licensed and employed in the teaching areas of speech and language pathology, and hearing impaired. (Pet Exh 5) Ms. Rainey is licensed and employed in the teaching areas of speech and language pathology, learning disabled, and mentally disabled. (Pet Exh 17) Further, the certification area codes assigned to Ms. Rainey “correspond specifically to a specific area of teaching licensure that’s found in that [Licensure Procedures] manual” prepared by Respondent. (T. Vol. II, Jarrett, p. 420). Respondent has assigned similar certification codes to Ms. Rotosky. (Resp. Exhs. 2 and 3). Ms. Rainey and Ms. Rotosky both have budget codes which indicate they work in an exceptional children program area, and they both have Respondent’s purpose code of 124. That code is denoted in the Uniform Chart of Accounts prepared by Respondent as “Teacher – Speech Pathologist / Speech and Language Services.” (T. Vol. II, Jarrett, pp. 421, 478; Resp. Exhs. 2 and 3).

(b) Respondent presented evidence that speech language pathologists provide therapy and training to help students overcome or compensate for communication disorders (T. Vol. II, Jarrett, p. 423, 467; Resp. Exh. 17, p. 2). However, the evidence presented by Petitioners regarding the job responsibilities of Ms. Rainey and Ms. Rotosky indicate that their work is much more in the nature of classroom teaching than therapy.

85. Although Ms. Rainey’s position has been funded by federal monies since July 2003, this change does not impact her eligibility to receive the 12% NBPTS salary increase after she earned her NBPTS certification. This change in funding source for Ms. Rainey’s position merely disqualifies her to receive the NBPTS salary incentive for as long as her position is not State-funded. If her position becomes State-funded again during the 10-year term of her NBPTS certification, she would once again qualify to receive the 12% salary incentive.

86. A preponderance of the evidence at hearing proved that Petitioners Rotosky and Rainey are teachers who spend at least 70% of their work time in classroom instruction, and thus, are “teachers” within the definition of N.C. Gen. Stat. § 115C-296.2(b)(2).

Petitioner Tucker

N.C. Gen. Stat. § 115C-296.2(b)(2) a., b., & c.

87. Respondent concedes that Petitioner Tucker meet subsections a., b., and c. of N.C. Gen. Stat. § 115C-296.2(b)(2).

N.C. Gen. Stat. § 115C-296.2(b)(2)d.1.

88. Respondent contends that Petitioner Tucker cannot qualify for the subject salary incentive under N.C. Gen. Stat. § 115C-296.2(b)(2)d.1., because as a curriculum instruction coordinator assigned to the central office staff, she is not employed as a teacher who spent at least 70% of her work time in “classroom instruction.” Respondent contends that Petitioner Tucker cannot qualify for the subject salary incentive under N.C. Gen. Stat. § 115C-296.2(b)(2)d.2., because she is “not employed in an area of NBPTS certification other than teaching” and she has “NBPTS certification in an area of direct classroom instruction, ie. career and technical education.” (October 29, 2002 Denial letter)

89. In June 2000, Petitioner Tucker completed the NBPTS certification process. N.C. Gen. Stat. § 115C-296.2 was not codified and effective till July 1, 2000. Because Ms. Tucker completed her NBPTS certification process before N.C. Gen. Stat. § 115C-296.2

was adopted, her eligibility to participate in the program should be determined under the law that governed the NBPTS program when Tucker applied for and completed her NBPTS certification. In its October 29, 2002 Denial Letter, Respondent failed to explain why or how Ms. Tucker should be required to qualify for the 12% salary incentive under N.C. Gen. Stat. § 115C-296.2, when she completed the NBPTS program one month before this statute was enacted.

90. When Ms. Tucker applied for and completed the NBPTS certification program, the General Assembly had provided that teachers were eligible to participate in North Carolina's NBPTS program if they were:

State-paid teachers who (i) have completed three years of teaching in North Carolina schools operated by local board of education . . . prior to application for NBPTS certification, and (ii) have not previously received State funds for participating in any certification area in the NBPTS program.

(SL 1997-443, § 8.23(a).)

(a) Ms. Tucker clearly meets these requirements because she taught for approximately 8 years in North Carolina public schools before she first applied for NBPTS certification in 1999, and had not previously received State funds for participating in the NBPTS assessment.

(b) Ms. Tucker also met the eligibility criteria set forth in her NBPTS Application that Respondent both prepared and provided to her. She was paid entirely from State funds; had at least three full years' experience teaching in North Carolina public schools; held a valid, clear and continuing North Carolina teaching license; and had not previously received State funds for participating in the NBPTS assessment.

91. No evidence was presented at hearing that Respondent ever informed or represented to Ms. Tucker, before she applied for the NBPTS program, or while she was completing the certification process, that she had to spend at least 70% of her time in classroom instruction in order to be eligible to participate in the State's NBPTS program.

92. After attending the October 1999 seminar on NPBTS certification in the area of career and technical education, Ms. Tucker reasonably concluded that according to Respondent, she was eligible to participate in the State's NBPTS program and receive the salary incentive. (T. Vol. II, Smith, p. 308).

93. Assuming arguendo, that Ms. Tucker must qualify under N.C. Gen. Stat. § 115C-296.2 in order to receive the NBPTS 12% salary increase, the evidence at hearing supports the conclusion that Ms. Tucker is a "teacher" under this statute. The evidence presented, established that Ms. Tucker is a lead teacher and curriculum coordinator in the area of career and technical education. A significant portion of instruction in this subject occurs outside of the traditional classroom. Ms. Tucker's responsibilities also include counseling students regarding their career development and education plans, a task very similar to services provided by a guidance counselor. (T. Vol. I, Tucker, pp. 186-206, 213-14; Garr, p. 154).

94. As Ms. Tucker does not spend 70% of her time in direct classroom instruction, she must spend at least 70% of her time working in her area of certification or licensure, and be employed in an area of NBPTS certification other than direct classroom instruction, to be eligible to participate in the State's NBPTS program under § 115C-296.2(b)(2)d.2.

95. Respondent admits that Ms. Tucker is employed within her area of certification or licensure. (Pet. Exh. 16, p. 2). All of the evidence supports a finding that Ms. Tucker spends 100% of her work time in her area of State licensure. Therefore, the question is whether she is employed in "an area of NBPTS certification other than direct classroom instruction."

96. NBPTS does not classify any of its certification areas as applying to classroom instruction or other than classroom instruction. The overviews of the NBPTS certificate areas reveal that each area includes teaching and classroom components. This "classroom instruction"/"other than classroom instruction" distinction is a distinction created by North Carolina as part of its NBPTS program. (T. Vol. I, Garr, pp. 142-43; Pet. Exh. 28). Therefore, the relevant question in determining if an individual works in an area of NBPTS certification other than classroom instruction, is whether in fact, the individual works in an area of education other than direct classroom instruction.

97. Respondent concedes that library media and school counseling are NBPTS certificates in areas "other than direct classroom instruction." It also concedes that individuals who are licensed in these areas, and work in these areas at least 70% of their work time, are "teachers" eligible to participate in the State's NBPTS program under N.C. Gen. Stat. § 115C-296.2(b)(2)d.2.

98. Career and technical education, library media, and school counseling NBPTS certificates each require candidates to work with students in a class, and plan and deliver a lesson for a specific class. Due to the nature of these areas of education, much of this work occurs outside the traditional classroom setting. The National Board construes the classroom component of these certificate areas broadly. NBPTS recognizes that due to differences in subject matter, candidates seeking certificates in areas other than traditional academic subjects, such as career and technical education, may perform much of their work outside the traditional classroom setting. A media specialist's classroom could be the library or media center, the entire school, or a specific classroom. A school counselor's classroom could be the portion of the school population that the counselor serves. (Pet. Exh. 28; T. Vol. I, Garr, pp. 153-57).

99. Career and technical education, library media, and school counseling all relate to areas other than direct classroom instruction by the nature of their subject content. Similarly, if a person licensed and working in the area of library media or school counseling is eligible to participate in North Carolina's NBPTS program under N.C. Gen. Stat. § 115C-296.2(b)(2)d.2, then it follows logically and legally that a person licensed and working in career and technical education, is equally eligible to participate in the NBPTS program under this same subsection of the NBPTS statute.

100. Respondent contends that the component of the State's NBPTS program for teachers who are not employed in classroom instruction, was designed to accommodate media and guidance counseling personnel only. (T. Vol. II, Jarrett, pp. 415, 417). Yet, the plain language of N.C. Gen. Stat. § 115C-296.2(b)(2)d.2 does not support Respondent's position. The language of N.C. Gen. Stat. § 115C-296.2(b)(2)d.2. provides that a person is a teacher eligible to participate in the North Carolina NBPTS program, if she spends at least 70% of her work time:

[i]n work within the employee's area of certification or licensure, if the employee is employed in an area of NBPTS certification other than direct classroom instruction.

N.C. Gen. Stat. § 115C-296.2(b)(2)d.2 does not restrict this category by stating that the employee is employed in the NBPTS certification areas of media and guidance counseling only.

101. Nor does the language of N.C. Gen. Stat. § 115C-296.2(b)(2) support Respondent's assertion that the NBPTS program was designed primarily for individuals employed as teachers and engaged in classroom instruction. The statute states that individuals engaged in classroom instruction, and individuals who work in an area of NBPTS certification other than direct classroom instruction, are both eligible as teachers to participate in the State's NBPTS program. There is no indication in the statute that one of these categories of teachers is more or less deserving than the other to participate in the NBPTS program.

102. Respondent contends that in order for a person to be eligible to receive the NBPTS salary incentive pursuant to the "other than direct classroom instruction" provision in N.C. Gen. Stat. § 115C-296.2(b)(2)d.2, the position in which the individual is employed must match exactly her NBPTS certification area. (Denial Letter, p. 2; Vol. II, Price, pp. 372-76). However, this assertion is contrary to the plain meaning of N.C. Gen. Stat. § 115C-296.2(b)(2)d.2. Under this statute, a teacher is eligible to participate in the North Carolina NBPTS program if she spends at least 70% of her work time within the employee's area of certification or licensure, if the employee is employed in an area of NBPTS certification other than direct classroom instruction. Nowhere in this definition of teacher, or elsewhere in § 115C-296.2, is there any requirement that a teacher's job title and NBPTS certification areas must match precisely.

103. It is clear from the evidence and testimony presented that Respondent's licensure areas and job titles are much more specific than the certification areas established by NBPTS. Respondent issues more than 100 different types of licenses, while NBPTS has only 24 areas of certification. (Pet. Exh. 28; T. Vol. II, Jarrett, p. 399). Mr. Jarrett conceded that "The National Board certification areas are much broader than what you have in North Carolina licensure." (Vol. II, Jarrett, p. 396). To require a teacher's job title and area of NBPTS certification to match exactly, in order for her to qualify for the State's NBPTS program pursuant to § 115C-296.2(b)(2)d.2, would significantly limit the teachers who are eligible to participate in the program. This limitation would be contrary to, and inhibit, the achievement of the North Carolina NBPTS programs' stated goal – "to keep excellent teachers in the teaching profession." N.C. Gen. Stat. § 115C-296.2(a)

104. A preponderance of the evidence at hearing demonstrated that Petitioner Tucker spends at least 70% of her time working as a lead teacher and curriculum coordinator within her area of licensure: Career and Technical Education, and she is employed in an area of NBPTS Certification other than direct classroom instruction: Career and Technical Education.

105. When Respondent approved each Petitioner's application to participate in the North Carolina NBPTS program, it was fully informed how each Petitioner was licensed and employed. Each Petitioner holds the same teaching licenses, and has the same job responsibilities today as she did when she applied to participate in the State's NBPTS program. (T. Vol. I, Rotosky, p. 245; Rainey, p. 249; Tucker, pp. 186, 218; Pet. Exhs. 5, 17, 22)

106. Petitioners were motivated to pursue NBPTS Certification, in significant part, because of the salary increase provided by law to NBPTS certified teachers. (T. Vol. I, Rotosky, p. 68; Tucker, p. 221). In reliance on Respondent's assurances of a 12% salary increase, each Petitioner signed a promissory note to personally reimburse the State for the costs of the Certification, if she did not complete the NBPTS certification process, or if she completed the process, but did not teach in a North Carolina public school for at least one year immediately following her Certification. Each Petitioner satisfied the conditions of her respective promissory note by earning NBPTS certification and teaching in a North Carolina public school for at least one year afterwards.

107. Each Petitioner was reasonable to conclude that the eligibility criteria and benefits stated in the NBPTS Application pertained to the question of each Petitioner's eligibility to participate in North Carolina's entire NBPTS certification program. (T. Vol. I, Rotosky, pp. 68-69, 91-93; Rainey, pp. 114, 117-18; Garr, pp. 162-64).

108. After approving each Petitioner's NBPTS application, Respondent provided each Petitioner all of the benefits of the State's NBPTS program, except for the 12% salary increase. If each Petitioner is a "teacher" eligible to receive the assessment fee, paid leave days, and continuing education credit benefits of the NBPTS program, then it follows logically and legally that each Petitioner is also a "teacher" eligible to receive the 12% salary incentive benefit of the NBPTS program.

109. Respondent has not presented any statute or rule which proves that the eligibility criteria used to determine whether an NBPTS Certified teacher will receive the salary incentive mandated under N.C. Gen. Stat. § 115C-296.2, are more stringent than the criteria used to determine whether Respondent will pay teachers' NBPTS assessment fee, provide teachers three leave days, and provide teachers a full continuing education renewal credit.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the undersigned makes the following Conclusions of Law. To the extent any of the foregoing denominated Findings of Fact contain mixed Findings of Fact and Conclusions of Law, or are otherwise more appropriately considered to be Conclusions of Law, those Findings of Fact or parts thereof, shall be deemed incorporated herein as Conclusions of Law:

1. The Office of Administrative Hearings has subject matter and personal jurisdiction over this contested case.
2. In 1994, North Carolina's NBPTS program was initially implemented through a special provision of the budget bill. In July 2000, the program was codified pursuant to N.C. Gen. Stat. § 115C-296.2(a).
3. In N.C. Gen. Stat. § 115C-296.2(a), the General Assembly declared the public policy underlying the North Carolina NBPTS Certification program was "to provide opportunities and incentives for good teachers to become excellent teachers and to retain them in the teaching profession."
4. N.C. Gen. Stat. § 115C-296.2(a) specifically provides that:

the State **shall** support the efforts of teachers to achieve national certification by providing approved paid leave time for teachers participating in the process, paying the participation fee, and paying a significant salary differential to teachers who attain national certification from the National Board for Professional Teaching Standards (NBPTS).

(Emphasis added) In addition to these statutory benefits, Respondent adopted a rule which provided that each teacher earning NBPTS certification will receive 15 units of continuing education renewal credit. 16 NCAC 6C.0307 (2003).

5. In defining who is eligible for these statutory benefits in North Carolina, as a result of earning NBPTS certification, the General Assembly defines "teacher" as a person who:
 - a. Either:
 1. Is certified to teach in North Carolina; or
 2. Holds a certificate or license issued by the State Board of Education that meets the professional license requirement for NBPTS certification;
 - b. Is a State-paid employee of a North Carolina public school;
 - c. Is paid on the teacher salary schedule; and
 - d. Spends at least seventy percent (70%) of his or her work time:

1. In classroom instruction, if the employee is employed as a teacher. Most of the teacher's remaining time shall be spent in one or more of the following: mentoring teachers, doing demonstration lessons for teachers, writing curricula, developing and leading staff development programs for teachers; or

2. In work within the employee's area of certification or licensure, if the employee is employed in an area of NBPTS certification other than direct classroom instruction.

(Emphasis added; N.C. Gen. Stat. § 115C-296.2(b)(2)) Thus, in N.C. Gen. Stat. § 115C-296.2(b), our General Assembly recognizes two different categories of teachers who are eligible to participate in the State's NBPTS program: (i) teachers who are employed as teachers and engaged in classroom instruction, and (ii) teachers who work in areas of NBPTS certification other than direct classroom instruction.

6. Although North Carolina's program for rewarding NBPTS certified teachers distinguishes between classroom and non-classroom teachers, NBPTS does not categorize its certification areas as applying to either "direct classroom instruction" or "other than direct classroom instruction." The requirements for achieving NBPTS certification in every area, including counseling, library and media, and career and technical education, include teaching and classroom components. The National Board for Professional Teaching Standards construes the concept of the classroom broadly to include learning environments other than the traditional classroom in which a teacher teaches the same assigned students every day. (T. Vol. I, Garr, pp. 142-43, 153-57; Pet. Exh. 28).

7. In this case, the ultimate question is whether each Petitioner meets the statutory definition of "teacher" under N.C. Gen. Stat. § 115C-296.2(b)(2). Respondent contends that its refusal to pay Petitioners the NBPTS salary incentive is consistent with its understanding of the legislative intent underlying N.C. Gen. Stat. § 115C-296.2 – to keep "classroom teachers," as that term is construed by Respondent, in the classroom.

8. Legislative intent is an important compass in statutory construction. It is well established that the best indicia of the General Assembly's intent are first, the plain language of the statute, then the legislative history, and finally, the spirit of the act and what the act seeks to accomplish. Lenox, Inc. v. Tolson, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001); Polaroid Corp. v. Offerman, 349 N.C. 290, 297 507 S.E.2d 284, 290 (1998).

9. Where the language of a statute is clear, there is no room for judicial construction, and courts must construe the statute according to its plain meaning. Burgess v. Your House of Raleigh, Inc., 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990) (citing Utilities Comm. v. Edmisten, Atty. General, 291 N.C. 451, 232 S.E.2d 184 (1977)).

10. An administrative agency's interpretation of a statute it administers may be entitled to some deference, but the agency's interpretation is not controlling. State ex rel. Utilities Commission v. Public Staff – North Carolina Utilities Commission, 309 N.C. 195, 211-12, 306 S.E.2d 435, 444-45 (1983); Brooks, Comr. of Labor v. McWhirter Grading Co., 303 N.C. 573, 580-81, 281 S.E.2d 24, 29 (1981). It is the courts, and not the administrative agency, that are the final interpreters of legislation. Wells v. Consolidated Judicial Retirement System, 345 N.C. 313, 319, 553 S.E.2d 877, 881 (2001)

11. Here, the best evidence of the legislative intent underlying the N.C. NBPTS program is stated in the State's policy and goal of N.C. Gen. Stat. § 115C-296.2(a). In N.C. Gen. Stat. § 115C-296.2(a), the General Assembly declared the public policy underlying the NBPTS Certification program in North Carolina is "to provide opportunities and incentives for good teachers to become excellent teachers and to retain them in the teaching profession." By providing two categories of teachers who qualify for statutory benefits under the State's NBPTS program, N.C. Gen. Stat. § 115C-296.2 itself clearly indicates that teachers not involved in direct classroom instruction, are also eligible under the State's NBPTS program for these statutory benefits. Thus, the plain meaning of N.C. Gen. Stat. § 115C-296.2, construed in the context of the statute's goal in N.C. Gen. Stat. § 115C-296.2(a), shows that the General Assembly intended to provide the benefits of the State's NBPTS program to all teachers, not just those who fall within Respondent's definition of a traditional "classroom teacher."

N.C. Gen. Stat. § 115C-296.2(b)(2)a. & b.

12. In applying the definition of "teacher" to each of these Petitioners, it is clear from the evidence, and Respondent concedes, that each Petitioner meets subsections a. and b. of N.C. Gen. Stat. § 115C-296.2(b)(2)'s definition of "teacher."

N.C. Gen. Stat. § 115C-296.2(b)(2)c.

13. A preponderance of the evidence presented at hearing establishes that Petitioners Rotosky and Rainey are paid on the teacher "M" salary schedule. Speech pathologists are paid on the salary schedule for teachers with masters' degrees, albeit at a higher starting

point on the schedule. The General Assembly did not establish a separate salary schedule for speech pathologists when it identified a level on the salary schedules for **teachers** with masters degrees, at which speech pathologists will be paid.

14. With no dispute in the evidence, Petitioner Tucker meets subsection c of N.C. Gen. Stat. § 115C-296.2(b)(2)c., because she is paid on the Teacher “M” salary schedule.

N.C. Gen. Stat. § 115C-296.2(b)(2)d.1.

15. N.C. Gen. Stat. § 115C-296.2(b)(2)d.1. fails to define either the term “teacher” used in the context of subsection d.1.’s language of “employed as a teacher,” or the term “classroom instruction” as used in subsection d.1 of this statute.

16. N.C. Gen. Stat. § 115C-296.2(f) states: Rules - The State Board shall adopt policies and guidelines to implement this Section.

17. Here, Respondent relied upon the authority in N.C. Gen. Stat. § 115C-296.2(f) to “adopt policies and guidelines to implement” N.C. Gen. Stat. § 115C-296.2, and established “Guidelines for National Board for Professional Teaching Standards (NBPTS) Pay Differential (“Guidelines”).” In these Guidelines, Respondent not only interpreted its understanding of the legislative intent of N.C. Gen. Stat. § 115C-296.2, but defined the undefined terms of “teacher” and “classroom instruction,” and interpreted scenarios describing teachers who qualify for the subject salary incentive in N.C. Gen. Stat. § 115C-296.2. (Pet Exh 32)

In construing its understanding of the legislative intent of N.C. Gen. Stat. § 115C-296.2, it defined the term “teacher” in N.C. Gen. Stat. § 115C-296.2 to mean only persons who teach direct classroom instruction. “The intent of this legislation is to encourage highly qualified teachers to remain in the classroom, providing direct instruction to students.” It also defined “classroom instruction” by providing a nonexclusive listing of some duties, obligations, and activities that “teachers” must perform in order to be teaching “classroom instruction.” (Pet Exh 32)

18. However, Respondent’s “Guidelines for National Board for Professional Teaching Standards (NBPTS) Pay Differential” were not duly promulgated as an administrative rule. Nonetheless, Respondent uses its definitions of “teacher” and “classroom instruction” in these “Guidelines” to determine whether any teacher who applies for North Carolina’s NBPTS program is eligible to receive the subject 12% salary incentive under N.C. Gen. Stat. § 115C-296.2. In this case, Respondent used its Guidelines’ definitions to make its determination that Petitioners Rotosky and Rainey were not eligible for the subject 12% salary incentive under N.C. Gen. Stat. § 115C-296.2, because they were not employed as “teachers” who spent 70% of their work time in “classroom instruction.”

19. N.C. Gen. Stat. § 150B-2(8a) defines the term “Rule” as:

any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term does not include the following:

- c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.

20. In Comr. of Insurance v. Rate Bureau, 300 N.C. 381, 411, 269 S.E.2d 547, 568, *reh’g denied*, 301 N.C. 107, 273 S.E.2d 300 (1980), the North Carolina Supreme Court held that, “Rules operate to fill the interstices of the statutes, and go beyond mere interpretation of statutory language or application of such language[,] and within statutory limits set down additional substantive requirements.” (See Dillingham v. N.C. Dep’t of Human Resources, 132 N.C. App. 704, 513 S.E.2d 823 (1999)- ruling that a provision of an agency manual created a binding standard interpreting eligibility provisions of Medicaid law.)

21. In this case, N.C. Gen. Stat. § 115C-296.2(f) is entitled “Rules.” It authorizes the State Board to adopt guidelines to “implement” this statute. In this case, Respondent’s “Guidelines” are binding standards that implement and interpret the eligibility provisions of N.C. Gen. Stat. § 115C-296.2. These Guidelines “fill the interstices” of the statutes regarding the definitions of the terms “teacher” and “classroom instruction,” and create additional requirements that any applicant for NBPTS certification must meet before he/she is eligible for the statutory benefits outlined in N.C. Gen. Stat. § 115C-296.2. As a result, Respondent’s “Guidelines” constitute a “Rule” under N.C. Gen. Stat. § 150B-2(8a).

22. By applying this unpromulgated rule to find that Petitioners Rotosky and Rainey were not eligible for the 12% salary incentive, and thus, refuse to pay these Petitioners the 12% salary incentive, Respondent deprived Petitioners Rotosky and Rainey of property, substantially prejudiced their rights, exceeded its authority, and acted erroneously.

23. The terms “classroom teacher” and “standard course of study” appear nowhere in N.C. Gen. Stat. § 115C-296.2, or in the session laws governing the NBPTS program which preceded this statute. Instead, the General Assembly has always used the simple term “teacher.” Because N.C. Gen. Stat. § 115C-296.2 fails to define the terms “teacher” and “classroom instruction” and the language of that statute is unclear as to the definition of these terms, these terms must be construed to given their ordinary meaning.

24. When construing a statute, the words used therein will be given their ordinary meaning, unless it appears from the context that they should be taken in a different sense. Abernethy v. Board of Comm’rs, 169 N.C. 631, 86 S.E. 577 (1915).

25. In this case, a broader construction of the definition of “teacher” set forth in N.C. Gen. Stat. § 115C-296.2(b)(2) is consistent with the goal of the NBPTS program set forth in subsection (a) of this statute: “to provide opportunities and incentives for good teachers to become excellent teachers and to retain them in the teaching profession ...”

26. The plain ordinary meaning of “teacher” is “one who teaches or instructs” (Black’s Law Dictionary, 5th Ed. 1979). The plain ordinary meaning of the term “classroom instruction” is instructing or teaching in a classroom. Applying those definitions to Petitioners Rotosky and Rainey in the context of N.C. Gen. Stat. § 115C-296.2(b)(2)d.1, a preponderance of the evidence at hearing proves that Petitioners Rotosky and Rainey are teachers who spend at least 70% of their work time in classroom instruction.

27. Because Petitioners Rotosky and Rainey meet the criteria in N.C. Gen. Stat. § 115C-296.2(b)(2)d.1, they are “teachers” within under N.C. Gen. Stat. § 115C-296.2(b)(2). As such, each is eligible to participate in and receive all the benefits of the North Carolina NBPTS program, including the salary increase authorized pursuant to N.C. Gen. Stat. § 115C-296.2.

N.C. Gen. Stat. § 115C-296.2(b)(2)d.2.

28. Because Ms. Tucker completed her NBPTS certification process before N.C. Gen. Stat. § 115C-296.2 was adopted, her eligibility to participate in the program should be determined under the law that governed the NBPTS program when Tucker applied for and completed her NBPTS certification.

29. When Ms. Tucker applied for and completed the NBPTS certification program, the General Assembly provided that teachers were eligible to participate in North Carolina’s NBPTS program if they were:

State-paid teachers who (i) have completed three years of teaching in North Carolina schools operated by local board of education . . . prior to application for NBPTS certification, and (ii) have not previously received State funds for participating in any certification area in the NBPTS program.

(SL 1997-443, § 8.23(a).)

30. Ms. Tucker clearly meets these requirements because she taught for approximately 8 years in North Carolina public schools before she first applied for NBPTS certification in 1999, and had not previously received State funds for participating in the NBPTS assessment.

31. The language of N.C. Gen. Stat. § 115C-296.2(b)(2) provides that a person is a teacher eligible to participate in the North Carolina NBPTS program, if she spends at least 70% of her work time:

[i]n work within the employee’s area of certification or licensure, if the employee is employed in an area of NBPTS certification other than direct classroom instruction.

This statute does not restrict application of subsection d.2. by stating that the employee is employed in the NBPTS certification areas of media and guidance counseling only. In addition, nowhere in N.C. Gen. Stat. § 115C-296.2 is there any requirement that a teacher’s job title and NBPTS certification areas must match precisely in order to qualify for the benefits of N.C. Gen. Stat. § 115C-296.2(b)(2).

32. Like library media and school counseling, career and technical education relates to areas other than direct classroom instruction by the nature of its subject content. If a person licensed and working in the area of library media or school counseling is eligible to participate in North Carolina’s NBPTS program under N.C. Gen. Stat. § 115C-296.2(b)(2)d.2, then it follows logically and legally that a person licensed and working in career and technical education, is equally eligible to participate in the NBPTS program under this same subsection of the NBPTS statute.

33. Assuming arguendo, that Ms. Tucker must qualify under N.C. Gen. Stat. § 115C-296.2 in order to receive the NBPTS 12% salary increase, the evidence at hearing demonstrates that Petitioner Tucker spends at least 70% of her time working as a lead teacher

and curriculum coordinator within her area of licensure: Career and Technical Education, and is employed in an area of NBPTS Certification other than direct classroom instruction: Career and Technical Education.

34. Petitioners Tucker meets the criteria under N.C. Gen. Stat. § 115C-296.2(b)(2)d.2. to be a “teacher” under N.C. Gen. Stat. § 115C-296.2(b)(2). As such, she is eligible to participate in, and receive all the benefits of the North Carolina NBPTS program, including the salary increase authorized pursuant to N.C. Gen. Stat. § 115C-296.2.

35. Petitioners proved by the preponderance of the evidence that each Petitioner earned NBPTS certification in her respective area of expertise, and is employed in that area at a North Carolina public school. Each Petitioner is a “teacher” as defined in N.C. Gen. Stat. § 115C-296.2(b)(2), and is entitled to receive the 12% salary increase under N.C. Gen. Stat. § 115C-296.2, effective July 1 of the school year in which they obtained their Certification.

36. Petitioners proved by the preponderance of the evidence that Respondent deprived Petitioners of property and otherwise substantially prejudiced their rights, when Respondent refused to pay Petitioners the NBPTS salary increase authorized by N.C. Gen. Stat. § 115C-296.2. Petitioners proved by the preponderance of the evidence that Respondent exceeded its authority, acted erroneously, failed to use proper procedure, and failed to act as required by law or rule, when it refused to pay Petitioners the NBPTS salary increased authorized by N.C. Gen. Stat. § 115C-296.2.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby determines that Respondent’s decision to deny Petitioners the NBPTS salary increase authorized by N.C. Gen. Stat. § 115C-296.2, should be **REVERSED**. Respondent shall award each Petitioner all of the benefits of the North Carolina NBPTS program, including payment of the salary increase authorized by N.C. Gen. Stat. § 115C-296.2 without delay.

Respondent shall award Petitioner Rainey the NBPTS salary increase for the period of July 1, 2001 through June 30, 2003, Petitioner Rotosky the NBPTS salary increase from and after July 1, 2001, and Petitioner Tucker the NBPTS salary increase from and after July 1, 2000.

ORDER AND NOTICE

The North Carolina State Board of Education is the agency that will make the final decision in this contested case. N.C. Gen. Stat. § 150B-36(b),(b1),(b2), and (b3) enumerate the standard of review and procedures the agency must follow in making its Final Decision, and adopting and/or not adopting the Findings of Fact and Decision of the Administrative Law Judge.

Pursuant to N.C. Gen. Stat. § 150B-36(a), before the agency makes a Final Decision in this case, it is required to give each party an opportunity to file exceptions to this decision, and to present written arguments to those in the agency who will make the Final Decision. N.C. Gen. Stat. § 150B-36(b)(3) requires the agency to serve a copy of its Final Decision on each party, and furnish a copy of its Final Decision to each party’s attorney of record and to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.

This the 1st day of June, 2004.

Melissa Owens Lassiter
Administrative Law Judge