

# NORTH CAROLINA

## REGISTER

## IN THIS ISSUE



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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.*

<b>NCAC TITLES</b>		<b>TITLE 21 LICENSING BOARDS</b>	<b>TITLE 24 INDEPENDENT AGENCIES</b>
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/Transliterator	
19A	TRANSPORTATION	26 Landscape Architects	
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		50 Plumbing, Heating & Fire Sprinkler Contractors	
		52 Podiatry Examiners	
		53 Professional Counselors	
		54 Psychology	
		56 Professional Engineers & Land Surveyors	
		57 Real Estate Appraisal	
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		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 2005 – December 2005

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 <sup>th</sup> day from publication in the Register
19:13	01/03/05	12/08/04	01/18/05	03/04/05	03/21/05	05/01/05	05/06	09/30/05
19:14	01/18/05	12/22/04	02/02/05	03/21/05	04/20/05	06/01/05	05/06	10/15/05
19:15	02/01/05	01/10/05	02/16/05	04/04/05	04/20/05	06/01/05	05/06	10/29/05
19:16	02/15/05	01/25/05	03/02/05	04/18/05	04/20/05	06/01/05	05/06	11/12/05
19:17	03/01/05	02/08/05	03/16/05	05/02/05	05/20/05	07/01/05	05/06	11/26/05
19:18	03/15/05	02/22/05	03/30/05	05/16/05	05/20/05	07/01/05	05/06	12/10/05
19:19	04/01/05	03/10/05	04/16/05	05/31/05	06/20/05	08/01/05	05/06	12/27/05
19:20	04/15/05	03/24/05	04/30/05	06/14/05	06/20/05	08/01/05	05/06	01/10/06
19:21	05/02/05	04/11/05	05/17/05	07/01/05	07/20/05	09/01/05	05/06	01/27/06
19:22	05/16/05	04/25/05	05/31/05	07/15/05	07/20/05	09/01/05	05/06	02/10/06
19:23	06/01/05	05/10/05	06/16/05	08/01/05	08/22/05	10/01/05	05/06	02/26/06
19:24	06/15/05	05/24/05	06/30/05	08/15/05	08/22/05	10/01/05	05/06	03/12/06
20:01	07/01/05	06/10/05	07/16/05	08/30/05	09/20/05	11/01/05	05/06	03/28/06
20:02	07/15/05	06/23/05	07/30/05	09/13/05	09/20/05	11/01/05	05/06	04/11/06
20:03	08/01/05	07/11/05	08/16/05	09/30/05	10/20/05	12/01/05	05/06	04/28/06
20:04	08/15/05	07/25/05	08/30/05	10/14/05	10/20/05	12/01/05	05/06	05/12/06
20:05	09/01/05	08/11/05	09/16/05	10/31/05	11/21/05	01/01/06	05/06	05/29/06
20:06	09/15/05	08/25/05	09/30/05	11/14/05	11/21/05	01/01/06	05/06	06/12/06
20:07	10/03/05	09/12/05	10/18/05	12/02/05	12/20/05	02/01/06	05/06	06/30/06
20:08	10/17/05	09/26/05	11/01/05	12/16/05	12/20/05	02/01/06	05/06	07/14/06
20:09	11/01/05	10/11/05	11/16/05	01/03/06	01/20/06	03/01/06	05/06	07/29/06
20:10	11/15/05	10/24/05	11/30/05	01/17/06	01/20/06	03/01/06	05/06	08/12/06
20:11	12/01/05	11/07/05	12/16/05	01/30/06	02/20/06	04/01/06	05/06	08/28/06
20:12	12/15/05	11/22/05	12/30/05	02/13/06	02/20/06	04/01/06	05/06	09/11/06

## 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 NUMBER 77

TEACHER ADVISORY COMMITTEE

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

Section 1      Establishment

There is hereby established a Teacher Advisory Committee ("Committee"). The Committee shall be composed of up to twenty members appointed by the Governor. The North Carolina Teacher of the Year shall serve *ex officio*. As determined by the Chairman of the Committee, one half of the current members' terms are extended for six months and the other half of the current members' terms are extended for one year. Hence forth, newly appointed members of the Committee shall serve two-year terms. Members may be reappointed. The Governor shall also appoint the Chair.

Section 2      Meetings

- (a) The Committee shall meet at least once each quarter and may hold special meetings at any time at the call of the Chair or the Governor (or his designee).
- (b) The Committee must meet as a quorum. A quorum, for the purposes of this Order, is defined as a simple majority.

Section 3      Administration

The Office of the Governor shall provide staff and administrative support services for the Committee.

Section 4      Duties

- (a) Advise the Governor as to the experiences and concerns of teachers in the classrooms of North Carolina.
- (b) Assist the Governor in his efforts to improve teaching and learning in North Carolina's schools.
- (c) Recommend strategies for recruiting and retaining quality educators.
- (d) Identify, recognize, and celebrate entrepreneurial schools and school systems in North Carolina.

This order is effective immediately.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh this 16<sup>th</sup> day of June 2005.

\_\_\_\_\_  
Michael F. Easley

ATTEST:

\_\_\_\_\_  
Elaine F. Marshall  
Secretary of State

**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**

*Notice is hereby given in accordance with G.S. 150B-21.2 that the Commission of Indian Affairs intends to amend the rules cited as 01 NCAC 15 .0201-.0205, .0207-.0209, .0212 and repeal the rules cited as 01 NCAC 15 .0211, .0213 and .0214.*

**Proposed Effective Date:** December 1, 2005

**Public Hearing:**

**Date:** August 26, 2005

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

**Location:** NC Indian Housing Authority, 2125 Sapona Road, Fayetteville, NC 28312

**Reason for Proposed Action:** *The Commission of Indian Affairs reviewed the Rules for Legal Recognition of Indian tribes and proposes the amendments to clarify the recognition process. The proposed amendments were approved by the Commission at its March 17, 2005 meeting.*

**Procedure by which a person can object to the agency on a proposed rule:** *Written objections may be submitted to the Executive Director of the NC Commission of Indian Affairs. Objections will be received by mail, delivery service, hand delivery or facsimile transmission. Objections may be directed to: Gregory A. Richardson, Executive Director, NC Commission of Indian Affairs, 217 W. Jones St., MSC 1317, Raleigh, NC 27699-1317. Fax (919)733-1207.*

**Written comments may be submitted to:** *Gregory A. Richardson, NC Commission of Indian Affairs, 217 W. Jones St., MSC 1317, Raleigh, NC 27699-1317, Phone (919)733-5998, fax (919)733-1207 or email greg.richardson@ncmail.net.*

**Comment period ends:** September 30, 2005

**Procedure for Subjecting a Proposed Rule to Legislative Review:** If an objection is not resolved prior to the adoption of the rule, 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 day following the day the Commission approves the rule. 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 15 - COMMISSION OF INDIAN AFFAIRS**

**SECTION .0200 - LEGAL RECOGNITION OF AMERICAN INDIAN GROUPS**

**01 NCAC 15 .0201 AUTHORIZATION**

The North Carolina Commission of Indian Affairs is authorized to establish procedures to provide for the legal recognition by the State of presently unrecognized American Indian groups.

*Authority G.S. 143B-406.*

**01 NCAC 15 .0202 DEFINITIONS**

~~When a group of Indians has identified themselves they should request organizational assistance from the commission. The commission will then explain organizational options to this group and assist them in developing a representative organization. The following terms shall have the following meanings:~~

- (1) "AMERICAN INDIAN TRIBE" means a population of Indian people all related to one another by blood or kingship, tracing their heritage to indigenous Indian tribes, and recognized by the State or federal government.
- (2) "COMMISSION" means the North Carolina Commission of Indian Affairs.
- (3) "GROUP" means the members of the community, inter-related by blood, and listed on submitted membership rolls as defined in Paragraph (5) below, and petitioning the state for official recognition as an American Indian tribe.
- (4) "INDIGENOUS" means native to North Carolina.
- (5) "MEMBERSHIP ROLL" means a list of those individuals who have been determined by the group to meet the group's membership requirements. At a minimum, the membership roll shall list the names, addresses, date of

birth, names of both parents (including mothers' maiden names), and telephones numbers of the people and relate each one to their kinship ties. These kinship ties shall be consistent with information documented in genealogy charts submitted in accordance with Rule .0212(2) of this Chapter.

- (6) "NOTICE OF INTENT TO PETITION" means a letter without supporting petition-related documents from a group requesting official recognition by the State of North Carolina.
- (7) "PETITION" means the presented documents and arguments made by a group to substantiate its claims that it satisfies the criteria identified in Rules .0203 and .0212 of this Chapter.
- (8) "PETITIONER" means any group that has submitted a Notice of Intent to Petition to the Commission requesting State recognition as an American Indian tribe.
- (9) "SPLINTER GROUP" means a political faction, community, or group of any character that separates or has separated from the main body of a state or federally recognized American Indian tribe, and has not functioned throughout history as an autonomous American Indian tribe.
- (10) "STATE" means the State of North Carolina.

*Authority G.S. 143B-406.*

**01 NCAC 15 .0203      GROUPS ELIGIBLE FOR PETITIONING PROCESS**

~~(a) Each group seeking recognition shall organize itself as an Indian tribe, as defined in 1 NCAC 15. 0208, and shall meet the criteria set out in 1 NCAC .0209 and .0211. Methods of tribal organization acceptable to the commission are:~~

- ~~(1) to organize a private nonprofit corporation under the laws of North Carolina~~
- ~~(2) to organize a tribal council~~

~~(b) Once recognized by the Commission, the tribal organization may represent the group both locally and at the commission level.~~

~~(c) The type of organization is to be representative and give opportunity for all Indians in the area to be represented. When more than one group is involved, opportunity shall be given for all areas to be represented on either the tribal board of directors or the tribal council.~~

(a) Only American Indian groups located in North Carolina who can trace their historic origins to indigenous American Indian tribes prior to 1790 are eligible to petition or to be considered for State recognition as an American Indian tribe.

(b) Each group seeking recognition shall document their organizational status and structure. The formal status and type of organizational structure of the petitioning group shall not be a factor in the recognition process.

*Authority G.S. 143B-406.*

**01 NCAC 15 .0204      GROUPS INELIGIBLE FOR RECOGNITION**

~~Once an acceptable method of tribal organization has been achieved the group may petition the commission for recognition. The petition shall include name, number, location, origin and existing recognition.~~

The following groups and entities are ineligible to petition for official State recognition as American Indian tribes:

- (1) Splinter Groups – as defined in Rule .0202 of this Chapter.
- (2) Previously denied petition groups or entities - Groups, or successors in interest of groups, that have petitioned for and been denied or refused recognition as an American Indian tribe under the State's administrative rules for State recognition as an American Indian tribe, unless the group has substantial new evidence to justify the petition.
- (3) Parties to certain actions – Any group that –
  - (a) in any action in State or federal court of competent jurisdiction to which the group was a party attempted to establish its status as an American Indian tribe or successor in interest to an American Indian tribe; and
  - (b) was determined by that court –
    - (i) not to be an American Indian tribe; or
    - (ii) not to be a successor in interest to an American Indian tribe; or
    - (iii) to be incapable of establishing one or more of the criteria set forth in Rules .0203 or .0212 of this Chapter.

*Authority G.S. 143B-406.*

**01 NCAC 15 .0205      COMMISSION ASSISTANCE TO PETITIONER**

~~Once a petition for recognition has been filed it is reviewed by the commission. It may then, in its discretion, extend legal recognition by letter stating the services available to recognized tribes.~~

(a) When a group has identified itself as an American Indian group, it shall request technical assistance from the Commission. The Commission shall explain the administrative processes for the legal recognition of an American Indian group.

(b) The Commission of Indian Affairs assistance to the Petitioner shall be limited to an explanation of the procedure and technical advice.

*Authority G.S. 143B-406.*

**01 NCAC 15 .0207      NOTICE OF INTENT TO PETITION FOR RECOGNITION**

The procedure to be followed for recognition shall be:

- (1) ~~Petitioner submits a petition as set out in Rule .0204 of this Section to the Commission of Indian Affairs;~~
- (2) ~~Commission certifies receipt and explains procedure to petitioner;~~
- (3) ~~With assistance from the Commission, petitioner prepares a full application (may take up to one year), which is sent to the special committee on recognition;~~
- (4) ~~Hearing before the special committee on recognition;~~
- (5) ~~Decision is rendered by special committee on recognition;~~
- (6) ~~If petitioner is not satisfied with the decision of the special committee on recognition, an appeal may be taken to the full Commission;~~
- (7) ~~The decision by the full Commission shall be rendered by at least a two thirds majority of Indian members;~~
- (8) ~~If requested, an informal hearing shall be held before the full Commission;~~
- (9) ~~If the decision is for recognition, the group is recognized as an Indian tribe by the state. If the decision is against recognition, petitioner may apply to the Office of Administrative Hearings for a formal hearing pursuant to G.S. 150B-23.~~

(a) A petitioning American Indian group shall file a Notice of Intent to Petition (hereinafter referred to as the "Notice of Intent") with the Commission's Recognition Committee. The Commission shall acknowledge receipt of the Petitioner's Notice of Intent.

(b) The Notice of Intent shall be produced, dated and shall be signed by each member of the governing body of the petitioning American Indian group, and shall include the group's name, address, number of members, geographic location of the petitioning group's members, historic origin and existing recognition.

*Authority G.S. 143B-406.*

**01 NCAC 15 .0208 RECOGNITION COMMITTEE**

~~A petitioner may apply to be recognized as an "Indian tribe", defined as a population of Indian people all related to one another by blood, tracing their heritage to Indian tribes indigenous to North Carolina within the last 200 years.~~

(a) The Recognition Committee shall be appointed by the chairperson of the Commission of Indian Affairs from the Commission members who are representing the recognized American Indian tribes and organizations in North Carolina.

(b) Once a Petitioner has completed the recognition process, the Recognition Committee shall make a recommendation to the Commission regarding the group's State recognition as an American Indian tribe. Thereafter, the Commission shall render its decision as under Rule .0209 of this Chapter.

*Authority G.S. 143B-406.*

**01 NCAC 15 .0209 PROCEDURE FOR RECOGNITION**

~~(a) The criteria to be used in the decision whether to extend official state recognition as a tribe are:~~

- (1) ~~traditional North Carolina Indian names;~~
- (2) ~~kinship relationships with other recognized Indian tribes;~~
- (3) ~~official records such as birth, church, school or other recognizing the people as Indian;~~
- (4) ~~letters or statements from state or federal authorities recognizing the people as Indian;~~
- (5) ~~anthropological or historical accounts tied to the tribes' Indian ancestry;~~
- (6) ~~letters or statements from presently recognized tribes or groups or their representatives attesting to the Indian heritage of the tribe.~~
- (7) ~~any other documented traditions, customs, legends, etc. that signify the tribes' Indian heritage;~~
- (8) ~~participation in or grants from sources or programs designated as for Indian only.~~

~~(b) In addition to the criteria listed in (a) of this Rule, the following are also relevant to the decision:~~

- (1) ~~any other material or documents the tribe may wish to present;~~
- (2) ~~any other material or documents the commission or special committee on recognition may request.~~

~~(c) Five of the recognition criteria listed in (a) of this Rule must be satisfactorily met to achieve state recognition.~~

The procedure to be followed for recognition shall be:

- (1) Petitioner shall submit a Notice of Intent to Petition, as set out in Rule .0207 of this Chapter, to the Commission of Indian Affairs.
- (2) The Commission shall acknowledge receipt of the Petitioner's Notice of Intent to Petition and shall explain procedure to Petitioner;
- (3) Upon receipt of the Notice of Intent, the Commission shall notify, in writing, the following interested parties:
  - (a) State recognized Indian tribes and organizations; and
  - (b) local and county governments in proximity to the Petitioner's geographic area;
- (4) All petitions and responses to petitions must be received at least 10 days prior to the meeting at which they are to be considered.
- (5) The Petitioner shall provide an original and at least five copies when submitting petitions, responses to petitions, or other supplementary information to the Commission during the petition process.
- (6) The Petitioner shall complete and submit a fully documented petition to the Recognition Committee, including current membership rolls as defined in Rule .0202 of this Chapter,



- and all past membership lists of the group; the failure to submit these membership rolls is sufficient grounds to deny the petition.
- (7) The Petitioner may submit additional petition documentation and materials throughout the petition process until such time as a recognition decision is made by the full Commission, as described below.
- (8) The Recognition committee shall conduct initial review of petition and shall notify Petitioner of preliminary findings and deficiencies.
- (9) Upon receipt of the Recognition Committee's preliminary findings, Petitioner shall have 180 days in which to respond, in writing, to any deficiencies in the petition noted by the Recognition Committee. Not less than 30 days prior to the expiration of the initial response period, Petitioner may request an additional 180 days to respond. If requested, the additional response period shall commence on the 181st day after the receipt of the Recognition Committee's preliminary findings. No further requests for additional time shall be granted.
- (10) The Recognition Committee shall conduct a hearing to consider the petition, including Petitioner's responses to all deficiencies initially noted.
- (11) The Recognition Committee shall introduce its recommendation at the next Commission meeting. Further Commission action shall not take place until the second Commission meeting after the Recognition Committee's decision.
- (12) If the Recognition Committee's recommendation is against recognizing the Petitioner, within 30 days following the receipt of that recommendation the Petitioner may request a hearing before the full Commission. If a request for a hearing is made, the hearing shall not take place prior to the next regularly scheduled quarterly Commission of Indian Affairs meeting. In the event that a Petitioner does not request a hearing within 30 days, the petition is deemed withdrawn.
- (13) At a subsequent meeting after the Recognition Committee's recommendation is introduced, the Commission may, as permitted by these rules, request additional information, conduct additional hearings, approve or deny the petition, or return the petition to the Recognition Committee if it has received additional information.
- (14) A decision by the full Commission regarding State recognition shall be rendered by a majority of members present and voting

- (abstentions not counted) at a duly constituted meeting.
- (15) If the Commission's decision is for recognition, the group is recognized as an American Indian tribe by the State. Thereafter, the Commission shall explain all services available to the tribe through the Commission.
- (16) If the decision is against recognition, the Petitioner may appeal to the Office of Administrative Hearings for a hearing pursuant to G.S. 150B-23.
- (17) A Petitioner may withdraw from the petition process at any time prior to the decision of the full Commission. After a petition is withdrawn, the Petitioner may not initiate a new petition until one year from the date of the withdrawal.
- (18) During the petition process, the following are also relevant to the Commission's decision, any such other material or documents the Recognition Committee or Commission may request. Any additional materials or documents shall be:
- (a) relevant to the recognition decision;  
or  
 (b) shall be directly related to recognition requirement deficiencies as outlined by the Recognition Committee or the full Commission.
- (19) The Commission shall issue a public notification to the news media in the Petitioner's area, giving notification of the group's status as a State recognized American Indian tribe.

*Authority G.S. 143B-406; 150B-23.*

**01 NCAC 15 .0211 RECOGNITION REQUIREMENT**  
~~Only groups tracing back to Indian tribes indigenous to North Carolina at least for the last 200 years shall be considered for recognition by the Commission.~~

*Authority G.S. 143B-407.*

**01 NCAC 15 .0212 CRITERIA FOR RECOGNITION AS AN AMERICAN INDIAN TRIBE**  
~~The Commission of Indian Affairs assistance to the petitioner will be limited to a full explanation of the procedure, informational requests, and limited technical advice. In deciding whether to grant recognition to petitioner, the Commission shall proceed as follows:~~

(1) The Petitioner shall demonstrate continuous American Indian identity on a historic basis in satisfying each of these criteria. Documents that shall be used to demonstrate the group's American Indian identity shall include, but are not limited to, family bible accounts, baptismal

- records, and any other material that can substantiate the petitioning group's historic and continuous identification as an American Indian entity. For periods of time where this identification cannot be documented, the Petitioner shall submit a narrative to explain the lack of continuous American Indian identification.
- (2) The criteria to be used in the decision whether to extend State recognition as an American Indian tribe are listed below in Subitems (a) through (h).
- (a) Traditional North Carolina American Indian names, as they relate to the petitioning group. Surnames among the petitioning group that have been commonly identified as being American Indian since 1790 in the Petitioner's local geographic area shall be considered to be traditional North Carolina American Indian names;
- (b) Kinship relationships with other recognized American Indian tribes. Relationships with other recognized American Indian tribes shall be based on the petitioner's identification as an American Indian group or community, and shall be evidenced by historic blood and marriage kinship ties and communal interaction of spiritual, educational, and social institutions; or other cultural relationships between known (recognized) tribal communities and the petitioner's community;
- (c) Official records, which may include, but are not limited to, birth, church, school, military, medical, local or county government records, or other official records identifying the group as American Indian. Vital records shall also be used in assisting the group's documentation of American Indian identity;
- (d) State or federal documents identifying the group as American Indian. Any instance of historic government-to-government relationships between the Petitioner and federal or state governments shall be evidenced;
- (e) Anthropological, historical, or genealogical documents identifying the group as American Indian and demonstrating the group's American Indian ancestry;
- (f) Identification from State or federally recognized American Indian tribes attesting to the petitioning group's identification as American Indian, based on both the historic and current relationship existing between the tribe and the petitioning group;
- (g) Any other documented traditions, customs, legends, etc., that are uniquely American Indian and signify the petitioning group's American Indian heritage;
- (h) Participation in grants from sources or programs designated as for American Indian only.
- (3) Five of the recognition criteria listed in Item (2) of this Rule must be satisfactorily met to achieve state recognition.

*Authority G.S. 143B-406.*

**01 NCAC 15 .0213 SPECIAL COMMITTEE ON RECOGNITION**

~~A special committee on recognition will be established when the petition process is initiated. The committee will be appointed by the chairperson of the Commission of Indian Affairs from the present commission members who are Indians.~~

*Authority G.S. 143B-406.*

**01 NCAC 15 .0214 TRIBAL ROLL**

~~Each petitioning group must submit to the Commission a roll of its members as a condition to recognition. The roll shall list the names and addresses of the people and relate each one to their kinship ties. This roll must be submitted prior to the recognition decision of the Commission of Indian Affairs.~~

*Authority G.S. 143B-406.*

**TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES**

*Notice is hereby given in accordance with G.S. 150B-21.2 that the Department of Environment and Natural Resources intends to amend the rule cited as 15A NCAC 01R .0101.*

**Proposed Effective Date:** *January 1, 2006*

**Public Hearing:**

**Date:** *August 17, 2005*

**Time:** *10:00 a.m. – 12:00 p.m.*

**Location:** *Conference Room #3, 14<sup>th</sup> Floor, Archdale Bldg, 512 N. Salisbury St, Raleigh, NC*

**Reason for Proposed Action:** *Pursuant to G.S. 143B-289.4(b) and 143B-289.44, the Department of Environment and Natural Resources has authority to establish and set admission fees for*

the three North Carolina Aquariums. General appropriations to the Aquariums have been reduced in fiscal years 2002, 2003 and 2004; reductions were anticipated to be covered by admission fees. The Aquarium Division is also obligated to a lease/debt payment schedule for expansion of the North Carolina Aquarium at Pine Knoll Shores. The existing admission fee schedule does not produce sufficient revenues in order to maintain the Admission Fund so that the Aquariums can rely upon these revenues for operational costs and the lease/debt payment. Admission fees at comparable in-State attractions and other aquariums are significantly higher. The increased admission fee schedule is imperative to provide funds that will allow the North Carolina Aquariums to meet their mission and provide a reasonable level of service and education to visitors.

**Procedure by which a person can object to the agency on a proposed rule:** An objection may be submitted in writing to: David R. Griffin, North Carolina Aquariums, 417 North Blount Street, Raleigh, NC 27601-1009.

**Written comments may be submitted to:** David R. Griffin, North Carolina Aquariums, 417 North Blount Street, Raleigh, NC 27601-1009, phone (919)733-2290, fax (919)733-4271 or email david.griffin@ncmail.net.

**Comment period ends:** September 30, 2005

**Procedure for Subjecting a Proposed Rule to Legislative Review:** If an objection is not resolved prior to the adoption of the rule, 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 day following the day the Commission approves the rule. 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 01 - DEPARTMENTAL RULES

SUBCHAPTER 01R – NORTH CAROLINA AQUARIUMS

SECTION .0100 – FEES

15A NCAC 01R .0101 FEE SCHEDULE

(a) The following schedule of fees shall be applicable to govern admission to the North Carolina Aquariums:

(1)	Roanoke Island:		
	Adults, 18 and over	\$7.00	\$8.00
	Senior Citizens, 62 & over	\$6.00	\$7.00
	<del>Active Military</del>	<del>\$6.00</del>	<del>\$6.00</del>
	Ages 6-17	\$5.00	\$6.00
(2)	Fort Fisher:		
	Adults, 18 and over	\$7.00	\$8.00
	Senior Citizens, 62 & over	\$6.00	\$7.00
	<del>Active Military</del>	<del>\$6.00</del>	<del>\$6.00</del>
	Ages 6-17	\$5.00	\$6.00
(3)	Pine Knoll Shores:		
	Adults, 18 and over	\$7.00	\$8.00
	Senior Citizens, 62 & over	\$6.00	\$7.00
	<del>Active Military</del>	<del>\$6.00</del>	<del>\$6.00</del>
	Ages 6-17	\$5.00	\$6.00

(b) Free admission is offered to the following groups:

- (1) Aquarium Society Members;
- (2) North Carolina School groups;
- (3) American Zoo and Aquarium Association reciprocals; and
- (4) Children under the age of six.

Free admission will be offered on the following holidays: Martin Luther King, Jr. Day, Valentine's Day, Day and Veteran's Day, and Christmas Eve. Day.

Authority G.S. 143B-289.41(b); 143B-289.44.

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Notice is hereby given in accordance with G.S. 150B-21.2 that the Commission for Health Services intends to amend the rules cited as 15A NCAC 18A .2532, .2539.

**Proposed Effective Date:** January 1, 2006

**Public Hearing:**

**Date:** September 27, 2005

**Time:** 2:00p.m.-3:00 p.m.

**Location:** Conf. Room 1a201, Parker Lincoln Bldg, 2728 Capital Blvd., Raleigh, NC

**Reason for Proposed Action:**

15A NCAC 18A .2532 – to correct the computer glitch that occurred in switching from Word Perfect to Microsoft Word.

15A NCAC 18A .2539 (a) – to correct a grammatical error.

15A NCAC 18A .2539 (b) – to correct the typo in the acronym.

**Procedure by which a person can object to the agency on a proposed rule:**

Contact Jim Hayes, Branch Head, DENR Environmental Health Services Section, 1632 Mail Service Center, Raleigh, NC 27699-1632, email jim.hayes@ncmail.net, phone (919)715-0924 or (919)733-3123.

**Written comments may be submitted to:** Jim Hayes, 1632 Mail Service Center, Raleigh, NC 27699-1632, email jim.hayes@ncmail.net, phone (919)715-0924, or fax (919)715-4739.

**Comment period ends:** *September 30, 2005*

**Procedure for Subjecting a Proposed Rule to Legislative Review:**

If an objection is not resolved prior to the adoption of the rule, 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 day following the day the Commission approves the rule. 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 18 - ENVIRONMENTAL HEALTH**

**SUBCHAPTER 18A – SANITATION**

**SECTION .2500 - PUBLIC SWIMMING POOLS**

**15A NCAC 18A .2532 SPAS AND HOT TUBS**

Spas and hot tubs shall meet all design specifications for swimming pools and wading pools included in Rules .2512-.2530 of this Section with the following exceptions:

- (1) The circulation system equipment shall provide a turnover rate for the entire water capacity at least once every 30 minutes.
- (2) The arrangement of water inlets and outlets shall produce a uniform circulation of water so as to maintain a uniform disinfectant residual throughout the spa.
- (3) A minimum of two inlets shall be provided with inlets added as necessary to maintain required flowrate.
- (4) Water outlets shall be designed so that each pumping system in the spa (filter systems or booster systems if so equipped) provides the following:
  - (a) Two drains connected by "T" piping. Connecting piping shall be of the same diameter as the main drain outlet. Filter system drains shall be capable of emptying the spa completely. In spas constructed after April 1, 2000 drains shall be installed at least three feet apart or located on two different planes of the pool structure.

- (b) Filtration systems shall provide at least one surface skimmer per 100 square feet, or fraction thereof of surface area.
- (5) The water velocity in spa or hot tub discharge piping shall not exceed 10 feet per second (3.05 m/second); except for copper pipe where water velocity shall not exceed eight feet per second (2.44 m/second). Suction water velocity in any piping shall not exceed six feet per second (1.83 m/second).
- (6) Spa recirculation systems shall be separate from companion swimming pools.
  - (a) Where a two-pump system is used, one pump shall provide the required turnover rate, filtration and disinfection for the spa water. The other pump shall provide water or air for hydrotherapy turbulence without interfering with the operation of the recirculation system. The timer switch shall activate only the hydrotherapy pump.
  - (b) Where a single two-speed pump is used, the pump shall be designed and installed to provide the required turnover rate for filtration and disinfection of the spa water at all times without exceeding the maximum filtration rates specified in Rule .2519 of this Section. The timer switch shall activate only the hydrotherapy portion of the pump.
  - (c) Where a single one-speed pump is used, a timer switch shall not be provided.
- (7) A timer switch shall be provided for the hydrotherapy turbulence system with a maximum of 15 minutes on the timer. The switch shall be placed such that a bather must leave the spa to reach the switch.
- (8) The maximum operational water depth shall be four feet (1.22 m) measured from the water line.
- (9) The maximum depth of any seat or sitting bench shall be two feet (61 cm) measured from the waterline.
- (10) A minimum height between the top of the spa/hot tub rim and the ceiling shall be 7 ½ feet.
- (11) Depth markers are not required at spas.
- (12) Steps, step-seats, ladders or recessed treads shall be provided where spa and hot tub depths are greater than 24 inches (61 cm).
- (13) Contrasting color bands or lines shall be used to indicate the leading edge of step treads, seats, and benches.

- (14) A spa or hot tub shall be equipped with at least one handrail (or ladder equivalent) for each 50 feet (15.2 m) of perimeter, or portion thereof, to designate points of entry and exit.
- (15) Where water temperature exceeds 90° Fahrenheit (32° C), a caution sign shall be mounted adjacent to the entrance to the spa or hot tub. It shall contain the following warnings in letters at least ~~2-inch~~ 1/2 inch in height:
  - (a) CAUTION:
  - (b) -Pregnant women; elderly persons, and persons suffering from heart disease, diabetes, or high or low blood pressure should not enter the spa/hot tub without prior medical consultation and permission from their doctor;
  - (c) -Do not use the spa/hot tub while under the influence of alcohol, tranquilizers, or other drugs that cause drowsiness or that raise or lower blood pressure;
  - (d) -Do not use alone;
  - (e) -Unsupervised use by children is prohibited;
  - (f) -Enter and exit slowly;
  - (g) -Observe reasonable time limits (that is, 10-15 minutes), then leave the water and cool down before returning for another brief stay;
  - (h) -Long exposure may result in nausea, dizziness, or fainting;
  - (i) -Keep all breakable objects out of the area.
- (16) Spas shall meet the emergency telephone and signage requirements for swimming pools in Rule .2530(f).
- (17) A sign shall also be posted requiring a shower for each user prior to entering the spa or hot tub and prohibiting oils, body lotion, and minerals in the water.
- (18) Spas shall not be required to provide the lifesaving equipment described in Rule .2530(a) of this Section
- (19) In spas less than four feet deep the slope of the pool wall may exceed 11 degrees from plumb, but shall not exceed 15 degrees from plumb.

Authority G.S. 130A-282.

**15A NCAC 18A .2539 SUCTION HAZARD REDUCTION**

(a) At all public wading pools that use a single main drain for circulation of water, signs shall be posted ~~stating~~ stating, "WARNING: To prevent serious injury do not allow children in wading pool if drain cover is broken or ~~missing~~ missing." Signs shall be in letters at least one-half inch in height

and shall be posted where they are visible to people entering the wading pool.

(b) No public swimming pool shall operate with a single outlet to any pump. Where flow from a single drain is balanced with flow from a surface skimmer, the skimmer valve shall be kept in the open position and immobilized with a lock, tie or other method to secure against tampering. Effective April 1, 2006 all public swimming pools with a single main drain shall be protected from potential bather entrapment by a safety vacuum release system installed on the drain piping and single drains smaller than 12 inches in diameter shall be protected by an anti-entrapment drain cover meeting ~~AMSE/ANSI~~ ASME/ANSI A112.19.8M Standard that is incorporated by reference including any subsequent amendments and additions. This material is available for inspection at the Department of Environment and Natural Resources, Division of Environmental Health, 2728 Capital Boulevard, Raleigh, North Carolina. Copies may be obtained from Global Engineering Documents, 15 Inverness Way East, Englewood, CO 80112 at a cost of forty-one dollars (\$41.00).

(c) Operators of all public wading pools shall inspect pools daily to ensure the drain covers are in good condition and securely attached.

Authority G.S. 130A-282.

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*Notice is hereby given in accordance with G.S. 150B-21.2 that the Commission for Health Services intends to amend the rules cited as 15A NCAC 18A .2606, .2612.*

**Proposed Effective Date:** January 1, 2006

**Public Hearing:**

**Date:** September 27, 2005

**Time:** 2:00 p.m. – 3:00 p.m.

**Location:** Conference Room 1a201, Parker-Lincoln Building, 2728 Capital Blvd., Raleigh, NC

**Reason for Proposed Action:**

**15A NCAC 18A .2606** – to make the inspection form and the rule consistent with each other.

**15A NCAC 18A .2612** – to change from a broad reference to a more exact reference.

**Procedure by which a person can object to the agency on a proposed rule:**

Contact Susan Grayson, Branch Head, DENR Environmental Health Services Section, 1632 Mail Service Center, Raleigh, NC 27699-1632, email sue.grayson@ncmail.net, phone (919) 715-0926 or (919)733-2905.

**Written comments may be submitted to:** Susan Grayson, 1632 Mail Service Center, Raleigh, NC 27699-1632, email sue.grayson@ncmail.net, phone (919) 715-0926 or fax (919)715-4739.

**Comment period ends:** *September 30, 2005*

**Procedure for Subjecting a Proposed Rule to Legislative Review:**

If an objection is not resolved prior to the adoption of the rule, 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 day following the day the Commission approves the rule. 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 .2600 – THE SANITATION OF FOOD SERVICE ESTABLISHMENTS**

**15A NCAC 18A .2606 GRADING**

(a) The sanitation grading of all restaurants, food stands, drink stands and meat markets shall be based on a system of scoring wherein all establishments receiving a score of at least 90 percent shall be awarded Grade A; all establishments receiving a score of at least 80 percent and less than 90 percent shall be awarded Grade B; all establishments receiving a score of at least 70 percent and less than 80 percent shall be awarded a Grade C. Permits shall be revoked for establishments receiving a score of less than 70 percent. The Sanitation Inspection of Restaurants or other Food Handling Establishments shall be used to document points assessed for violation of the rules of this Section as follows:

- (1) Violation of Rules .2608, .2612, .2615, or .2622 of this Section related to food from approved sources, free of spoilage, adulteration or contamination shall equal no more than 5 percent.
- (2) Violation of Rules .2608, .2609, .2610, .2611, .2612, .2613, .2614, .2622, or .2632 of this Section related to potentially hazardous food temperatures or time requirements for food during storage, preparation, display, service or transportation shall equal no more than 5 percent.
- (3) Violation of Rules .2608, .2609, .2610, .2611, .2612, .2613, .2614, .2622, or .2632 of this Section related to food storage, thawing, and preparation, cooking, handling, display, service, or transportation in a manner to

- (4) prevent contamination, adulteration, or spoilage shall equal no more than 5 percent. Violation of Rule .2611 of this Section related to re-serving food shall equal no more than 5 percent.
- (5) Violation of Rule .2609 of this Section related to accurate thermometer availability shall equal no more than 3 percent.
- (6) Violation of Rule .2610 of this Section related to written notice to customers about use of clean plates for return trips to buffet shall equal no more than 1 percent.
- (7) Violation of Rule .2610 of this Section related to properly labeling or storage of dry food shall equal no more than 2 percent.
- (8) Violation of Rule .2616 of this Section related to personnel with infections or communicable diseases restricted shall equal no more than 5 percent.
- (9) Violation of Rule .2609 of this Section related to proper handwashing or good hygienic practices shall equal no more than 5 percent.
- (10) Violation of Rule .2616 of this Section related to clean clothes or hair restraints shall equal no more than 1 percent.
- (11) Violation of Rules .2618 or .2619 of this Section related to food contact surfaces cleaned or sanitized by approved methods, sanitizing solution required shall equal no more than 5 percent.
- (12) Violation of Rules .2618, or .2619 of this Section related to approved utensil-washing facilities of sufficient size, with accurate thermometers or test methods available or used shall equal no more than 3 percent.
- (13) Violation of Rules .2617, .2618, or .2622, of this Section related to food contact surfaces shall equal no more than 3 percent.
- (14) Violation of Rules .2601, .2608, .2617 or .2621 of this Section related to food service equipment NSF or equal or approved utensils shall equal no more than 2 percent.
- (15) Violation Rule .2618 of this Section related to air-drying clean equipment or utensils shall equal no more than 3 percent.
- (16) Violation of Rule .2620 of this Section related to the storage of single service utensils shall equal no more than 2 percent.
- (17) Violation of Rules .2617 or .2622 of this Section related to non-food contact surfaces clean or in good repair shall equal no more than 2 percent. .
- (18) Violation of Rules .2618 or .2623 of this Section related to source of water supply, hot or cold water under pressure, or meets water temperature requirements shall equal no more than 5 percent.

- (19) Violation of Rule .2623 of this Section related to cross connections or other potential sources of contamination shall equal no more than 5 percent.
- (20) Violation of Rules .2624, or .2625 of this Section related to lavatory or toilet facilities approved, accessible, or in good repair shall equal no more than 4 percent.
- (21) Violation of Rules .2609, .2624, or .2625 of this Section related to lavatory facilities or toilet facilities with self-closing doors, fixtures or rooms clean, mixing faucet, soap, towels, dryer, or sign shall equal no more than 2 percent.
- (22) Violation of Rules .2612, .2613, or .2626 of this Section related to wastewater discharged into approved, properly operating wastewater treatment and disposal system: other by-products disposed of properly shall equal no more than 5 percent.
- (23) Violation of Rule .2626 of this Section related to garbage cans, containerized systems properly maintained, cleaning facilities provided or contract maintained for cleaning shall equal no more than 2 percent.
- (24) Violation of Rule .2633 of this Section related to animal or pest presence shall equal no more than 4 percent.
- (25) Violation of Rule .2633 of this Section related to self-closing doors or screened windows shall equal no more than 2 percent.
- (26) Violation of Rule .2633 of this Section related to pest breeding places or rodent harborages shall equal no more than 1 percent.
- (27) Violation of Rules .2613, .2624, .2627, or .2628 of this Section related to floors, walls, or ceilings properly constructed shall equal no more than 2 percent.
- (28) Violation of Rules .2613, .2624, .2627, or .2628 of this Section related to floors, walls, or ceilings clean or in good repair shall equal no more than 1 percent.
- (29) Violation of Rule .2630 of this Section related to lighting or ventilation that meets illumination or shield requirements shall equal no more than 1 percent.
- (30) Violation of Rule .2631 of this Section related to ventilation clean or in good repair shall equal no more than 1 percent.
- (31) Violation of Rule .2633 of this Section related to storage or labeling of toxic substances shall equal no more than 5 percent.
- (32) Violation of Rules .2620, .2632, or .2633 of this Section related to ~~outside premise clean,~~ storage spaces ~~clean,~~ clean or storage above the floor shall equal no more than 1 percent.

- (33) Violation of Rule .2633 of this Section related to storage space not used for domestic purpose shall equal no more than 1 percent.
- (34) Violation of Rule .2633 of this Section related to work clothing and linen properly handled or stored and proper storage of mops, brooms and hoses shall equal no more than 1 percent.

One half of the percent value may be assessed for any rule violation in this Section based on the severity or recurring nature of the violation.

(b) The grading of restaurants, food stands, drink stands and meat markets shall be based on the standards of operation and construction as set forth in Rules .2607 through .2644 of this Section. An establishment shall receive a credit of two points on its score for each inspection if a manager or other employee responsible for operation of that establishment and who is employed full time in that particular establishment has successfully completed in the past three years a food service sanitation program approved by the Department. Request for approval of food service sanitation programs shall be submitted in writing to the Division of Environmental Health. The course shall include a minimum of 12 contact hours and provide instruction in the following subject areas:

- (1) basic food safety;
- (2) requirements for food handling personnel;
- (3) basic HACCP;
- (4) purchasing and receiving food;
- (5) food storage;
- (6) food preparation and service;
- (7) facilities and equipment;
- (8) cleaning and sanitizing;
- (9) pest management program; and
- (10) regulatory agencies and inspections.

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

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

(d) The posted grade card shall be black on a white background. All graphics, letters, and numbers for the grade card shall be approved by the State. The alphabetical and numerical sanitation score shall be 1.5 inches in height. No other public displays representing sanitation level of the establishment may be posted by the local health department, except for sanitation awards issued by the local health department. Sanitation awards shall be in a different color and size from the grade card and must be clearly labeled as an award.

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

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

*Authority G.S. 130A-248.*

**15A NCAC 18A .2612 SHELLFISH**

(a) All shellfish and crustacea meat shall be obtained from sources in compliance with 15A NCAC 18A .0100 through .0900 which may be obtained from the Department. If the source of clams, oysters, or mussels is outside the state, the shipper's name shall appear on the "Interstate Certified Shellfish Shippers List" as published monthly by the Shellfish Sanitation Branch, Food and Drug Administration. If the source of the cooked crustacea meat is within the United States, the processor's name, address, and certificate number with State abbreviation shall appear on the container. If the source of the cooked crustacea meat is outside the United States, containers must meet Federal labeling requirements, Food and Drug Administration, HHS Food Labeling requirements, 21 CFR Chapter 1, Part 101-Food Labeling.

(b) All shucked shellfish and all cooked crustacea meat shall be stored in the original container. Each original container shall be identified with the name and address of the packer or repacker, and the certification number, and the abbreviated name of the state or territory. Shucked shellfish unit containers shall be dated in accordance with 15A NCAC 18A .0600.

(c) All shellstock shall be stored in the containers in which packed at the source. Each original container shall be clearly identified with a uniform tag or label bearing the name and address of the shipper, the certificate number issued by the state or territory regulatory authority, the abbreviated name of the state, the name of the waters from which the shellfish were taken, the date of harvest, the kind and quantity of the shellstock in the container, and the name and address of the consignee.

(d) Shellstock shall be stored at temperatures and by methods in accordance with ~~15A NCAC 18A .0100 through .0900.~~ 15A NCAC 18A .0427. The re-use of single-service shipping containers and the storage of shucked shellfish in other containers are not allowed.

(e) After each container of shellstock has been emptied, the management shall remove the tag and retain it for a period of at least 90 days.

(f) With the exception of opening shellfish for immediate consumption on the premises, no shellfish shucking shall be performed unless the establishment holds a valid shellfish shucking permit.

(g) Shellstock washing facilities shall consist of a mechanical shellfish washer, or a sink or slab with catch basin, indirectly drained into a sewage collection, treatment, and disposal system. The washing shall be done in a clean area, protected from contamination. A can wash facility shall not be used for the washing of shellstock or other foods.

(h) The cooking of shellfish shall be accomplished in an area meeting the requirements of the rules of this Section.

(i) Re-use of shells for the serving of food is prohibited. It shall not be considered reuse to remove a shellfish from its shell and return it to that same shell for service to the public. Shells shall be stored in a manner to prevent flies, insects, rodents, and odors.

(j) All establishments that prepare, serve, or sell raw shellfish shall post in a conspicuous place where it may be readily observed by the public prior to consumption of shellfish, the following consumer advisory:

"Consumer Advisory  
Eating raw oysters, clams, or mussels may cause severe illness. People with the following conditions are at especially high risk: liver disease, alcoholism, diabetes, cancer, stomach or blood disorder, or weakened immune system. Ask your doctor if you are unsure of your risk. If you eat shellfish and become sick, see a doctor immediately."

(k) Cooked crustacea meat shall be held at 40° F or less.

Authority G.S. 130A-248.

**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 amend the rule cited as 16 NCAC 06C .0304.*

**Proposed Effective Date:** December 1, 2005

**Public Hearing:**

**Date:** August 16, 2005

**Time:** 1:00 p.m.

**Location:** Room 224 North, Education Building, 301 N. Wilmington St., Raleigh, NC

**Reason for Proposed Action:** Amendments are to comply with requirements of No Child Left Behind Act in accordance with guidance provided by the U.S. Dept. of Education.

**Procedure by which a person can object to the agency on a proposed rule:** Persons may submit objections regarding the proposed rules to Harry Wilson, Staff Attorney, State Board of Education, 6302 Mail Service Center, Raleigh, NC 27699-6302.

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

**Comment period ends:** September 30, 2005

**Procedure for Subjecting a Proposed Rule to Legislative Review:** If an objection is not resolved prior to the adoption of the rule, 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 day following the day the Commission approves the rule. 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 06C – PERSONNEL

SECTION .0300 – CERTIFICATION

16 NCAC 06C .0304 LICENSE PATTERNS

(a) Licenses shall indicate grade levels, content areas and specializations for which the professional shall be eligible for employment, as well as preparation and experience levels.

(b) Licenses shall be of the following types:

- (1) Teacher. The license shall entitle the holder to teach in some designated area of specialization at the elementary, middle, or secondary level. There shall be four levels of preparation:
  - (A) bachelor's degree (A level);
  - (B) master's degree (G level);
  - (C) sixth-year (AG level); and
  - (D) doctorate (DG level).
 The teacher license shall further be categorized as prekindergarten B-K, elementary K-6, middle grades 6-9, secondary 9-12, special subjects K-12, or work force development.
- (2) Administrator/supervisor. The holder may serve in generalist and program administrator roles such as superintendent, assistant or associate superintendent, principal, assistant principal or curriculum-instructional specialist. There shall be three levels of preparation:
  - (A) master's degree;
  - (B) sixth-year; and
  - (C) doctorate.
 A person shall be eligible to serve as a superintendent without qualifying for or holding a license as long as the person has earned at least a bachelor's degree from a regionally accredited college or university and has a minimum of five years leadership or managerial experience that the employing local board of education considers relevant to the position of superintendent.
- (3) Student services area. The holder may provide specialized assistance to the learner, the teacher, the administrator and the education program in general. This category shall include school counseling, school social work, school psychology, audiology, speech

language pathology, and media. There shall be three levels of preparation as in the case of the administrator/supervisor, except that school psychology shall be restricted to the sixth-year or doctorate levels and school social work may be earned at the bachelor's level.

(c) The department shall base license classification on the level and degree of career development and competence. There shall be two classifications of licenses:

- (1) The ~~initial license~~, Standard Professional License I, which shall be valid for three years, shall allow the holder to begin practicing the profession on an independent ~~basis~~, basis in North Carolina. To be issued a Standard Professional License I, the individual must complete an approved teacher education program and meet the federal requirement to be designated "highly qualified."
- (2) The ~~continuing license~~, Standard Professional License II shall authorize professional school service on an ongoing basis, subject to renewal every five years.

Authority G.S. 115-12(9)a; 115C-271(a); N.C. Constitution, Article IX, s. 5.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS

CHAPTER 17 – BOARD OF DIETETICS/NUTRITION

Notice is hereby given in accordance with G.S. 150B-21.2 that the Board of Dietetics/Nutrition intends to adopt the rule cited as 21 NCAC 17 .0403.

Proposed Effective Date: February 1, 2006

Public Hearing:

Date: September 15, 2005

Time: 10:00 a.m.

Location: 1500 Sunday Drive, Suite 102, Raleigh, NC 27607

Reason for Proposed Action: To provide notice of the agency's interpretation of its statutes and rules as to the means or manner of engaging in the practice of dietetics/nutrition.

Procedure by which a person can object to the agency on a proposed rule: Any person who objects to the adoption of a permanent rule may submit written comments to the agency or to its rule-making coordinator. A person objecting to the adoption of a permanent rule may also submit written objections to the Rules Review Commission.

Written comments may be submitted to: Kim Dove, Rule-making Coordinator, 1500 Sunday Drive, Suite 102, Raleigh, NC 27607, phone (919)861-5580, email kmdove@earthlink.net.

Comment period ends: October 1, 2005

None

**Procedure for Subjecting a Proposed Rule to Legislative**

**Review:** If an objection is not resolved prior to the adoption of the rule, 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 day following the day the Commission approves the rule. 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)

**SECTION .0400 - UNLICENSED INDIVIDUALS**

**21 NCAC 17 .0403 ELECTRONIC PRACTICE**

Any person, whether residing in this state or not, who by use of electronic or other medium performs any of the acts described as the practice of dietetics/nutrition, but is not licensed pursuant to Article 25, G.S. 90 shall be deemed by the Board as being engaged in the practice of dietetics/nutrition and subject to the enforcement provisions available to the Board. Among other remedies, the Board shall report violations of this Rule to any occupational licensing board having issued an occupational license to a person who violates this rule. This Rule does not apply to persons licensed pursuant to, or exempt from licensure pursuant to, Article 25, G.S. 90.

*Authority G.S. 90-356.*

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**RULES REVIEW COMMISSION**

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*This Section contains information for the meeting of the Rules Review Commission on Thursday August 18, 2005, 10:00 a.m. at 1307 Glenwood Avenue, Assembly Room, Raleigh, NC. Anyone wishing to submit written comment on any rule before the Commission should submit those comments by Monday, August 15, 2005 to the RRC staff, the agency, and the individual Commissioners. Specific instructions and addresses may be obtained from the Rules Review Commission at 919-733-2721. Anyone wishing to address the Commission should notify the RRC staff and the agency at least 24 hours prior to the meeting.*

**RULES REVIEW COMMISSION MEMBERS**

**Appointed by Senate**

Jim R. Funderburke - 1st Vice Chair  
David Twiddy - 2nd Vice Chair  
Thomas Hilliard, III  
Robert Saunders  
Jeffrey P. Gray

**Appointed by House**

Jennie J. Hayman - Chairman  
Graham Bell  
Lee Settle  
Dana E. Simpson  
Dr. John Tart

**RULES REVIEW COMMISSION MEETING DATES**

August 18, 2005                      September 15, 2005  
October 20, 2005                      November 17, 2005  
December 15, 2005

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**AGENDA**  
**RULES REVIEW COMMISSION**  
**August 18, 2005, 10:00 A.M.**

- I. Call to Order and Opening Remarks
- II. Review of minutes of last meeting
- III. Follow-Up Matters
  - A. Child Care Commission – 10A NCAC 09 .2608 (Bryan)
  - B. Commission of Mental Health – 10A NCAC 27G .1301; .1701-.1708; .1901-.1904 (DeLuca)
  - C. Social Services Commission – 10A 71S .0101; .0201; .0202 (Bryan)
  - D. Criminal Justice Education & Training Standards Commission – 12 NCAC 09F .0104; .0106 (Bryan)
  - E. Environmental Management Commission – 15A NCAC 02H .0126; .0150-.0156; .1014-.1019 (DeLuca)
  - F. Soil & Water Conservation Commission – 15A NCAC 06E .0103 (Bryan)
- IV. Review of Rules (Log Report #224)
- V. Review of Temporary Rules (If any)
- VI. Commission Business
- VII. Next meeting: September 15, 2005

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**Commission Review/Permanent Rules**

**Log of Filings  
June 21, 2005 through July 20, 2005**

\* Approval Recommended, \*\* Objection Recommended, \*\*\* Other

**HEALTH AND HUMAN SERVICES, DEPARTMENT OF**

The rules in Chapter 5 are from the DHHS-Division of Aging and Adult Services and concern aging general provisions. The rules in Subchapter 05I concern service cost-sharing including scope of service cost-sharing (.0100); and requirements (.0200);

Purpose and Definitions Amend/*	10A NCAC 05I .0101
Requirements Amend/*	10A NCAC 05I .0201
Initial and Annual Reviews Amend/*	10A NCAC 05I .0202
Collection of Consumer Contribution Revenue Amend/*	10A NCAC 05I .0203
Termination Amend/*	10A NCAC 05I .0204
Deducting Consumer Contribution Revenues from Monthly Ser... Amend/*	10A NCAC 05I .0205

**HHS-MEDICAL ASSISTANCE**

Durable Medical Equipment Repeal/*	10A NCAC 22O .0121
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**SOCIAL SERVICES COMMISSION**

The rules in Chapter 71 are from the Social Services Commission and cover various adult and family support services. These are generally administered by the Division of Social Services within the Department of Health and Human Services. The rules in Subchapter 71U cover the Food Assistance Program. They include administration and supervision (.0100); all the program's substantive requirements transferred from the program manual (.0200); the substantive requirements to complete various forms (.0300); and electronic benefit transfer cards and fair hearings (.0400)

Additional Mandatory Verifications Repeal/*	10A NCAC 71U .0208
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**INSURANCE, DEPARTMENT OF**

The rules in Chapter 11 are from the Department of Insurance and concern financial evaluation division. The rules in Subchapter 11F are actuarial rules including general provisions (.0100); health insurance minimum reserve standards (.0200); actuarial opinion and memorandum (.0300); commissioner's reserve valuation method (.0400); new annuity valuation mortality tables (.0500); and recognition of the 2001 CSO mortality table for use in determining minimum reserve liabilities and non-forfeiture benefits (.0600).

Determining Reserve Liabilities for Credit Life Insurance... Adopt/*	11 NCAC 11F .0701
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**MARINE FISHERIES COMMISSION**

The rules in Chapter 03 are from the Marine Fisheries Commission. The rules in Subchapter 03I are general and miscellaneous rules.

Definitions Amend/*	15A NCAC 03I .0101
Leaving Devices Unattended Amend/*	15A NCAC 03I .0105
Possession or Transportation Limits Amend/*	15A NCAC 03I .0120

The rules in Subchapter 03J concern the use of nets in general (.0100) and in specific areas (.0200); the use of pots, dredges, and other fishing devices (.0300); and fishing gear (.0400).

Gill Nets, Seines, Identification, Restrictions Amend/*	15A NCAC 03J .0103
Trawl Nets Amend/*	15A NCAC 03J .0104
Channel Nets Amend/*	15A NCAC 03J .0106
Pound Net Sets Amend/*	15A NCAC 03J .0107
Pots Amend/*	15A NCAC 03J .0301

Size Limit and Culling Tolerance Amend/*	15A NCAC 03L .0201
Crab Trawling Amend/*	15A NCAC 03L .0202
Peeler Crabs Amend/*	15A NCAC 03L .0206
American Lobster (Northern Lobster) Amend/*	15A NCAC 03L .0301

The rules in Subchapter 03M cover harvesting of finfish including general rules (.0100), striped bass (.0200), mackerel (.0300), menhaden and Atlantic herring (.0400), and other finfish (.0500).

Flounder Amend/*	15A NCAC 03M .0503
Dolphin Amend/*	15A NCAC 03M .0515
Wahoo Adopt/*	15A NCAC 03M .0517

The rules in Subchapter 03O cover various licenses (.0100), leases and franchises (.0200), license appeal procedures (.0300), Standard Commercial Fishing License Eligibility Board (.0400), and licenses, leases and franchises (.0500).

Shellfish Bottom and Water Column Lease Amend/*	15A NCAC 03O .0202
Lease Renewal Amend/*	15A NCAC 03O .0205
Procedures and Requirements to Obtain Permits Amend/*	15A NCAC 03O .0501
Permit Conditions, General Amend/*	15A NCAC 03O .0502

Permit Conditions Specific  
Amend/\* 15A NCAC 03O .0503

The rules in Subchapter 03Q cover the joint and separate jurisdictions of the Marine Fisheries Commission and the Wildlife Resources Commission.

Special Rules, Joint Waters  
Amend/\* 15A NCAC 03Q .0107

The rules in Subchapter 03R specify boundaries for various areas (.0100); and fishery management areas (.0200).

Primary Nursery Areas  
Amend/\* 15A NCAC 03R .0103

Designated Pot Areas  
Amend/\* 15A NCAC 03R .0107

**LANDSCAPE ARCHITECTS, BOARD OF**

The rules in Chapter 26 are from the N. C. Board of Landscape Architects and include statutory and administrative provisions (.0100); practice of registered landscape architects (.0200); examination and licensing procedures (.0300); rules, petitions and hearings (.0400); and board disciplinary procedures (.0500).

Unprofessional Conduct  
Amend/\* 21 NCAC 26 .0209

Dishonest Practice  
Amend/\* 21 NCAC 26 .0210

Incompetence  
Amend/\*\* 21 NCAC 26 .0211

Reinstatement After Revocation  
Amend/\*\* 21 NCAC 26 .0306

**PSYCHOLOGY BOARD**

The rules in Chapter 54 are from the Board of Psychology and concern licensing.

Practice by Postdoctoral Trainees  
Adopt/\* 21 NCAC 54 .1611

Information Required  
Amend/\* 21 NCAC 54 .1701

Reciprocity  
Adopt/\* 21 NCAC 54 .1708

Types  
Amend/\* 21 NCAC 54 .1901

Licensed Psychologist  
Amend/\* 21 NCAC 54 .2009

**SOCIAL WORK CERTIFICATION AND LICENSURE BOARD**

The rules in Chapter 63 are from the NC Certification Board for Social Work and include examinations (.0300); the Cod of Ethics (.0500); and the administration of their disciplinary procedures (.0800).

Provisional Licenses  
Amend/\* 21 NCAC 63 .0210

Work Experience Amend/*	21	NCAC	63	.0211
Review of Examination by Unsuccessful Applicants Amend/*	21	NCAC	63	.0305
Continuing Education Requirements Amend/*	21	NCAC	63	.0401
Required Reporting By Licensee of Changes to Board Adopt/*	21	NCAC	63	.0405
Purpose and Scope Amend/*	21	NCAC	63	.0501

**SPEECH AND LANGUAGE PATHOLOGISTS AND AUDIOLOGISTS, BOARD OF EXAMINERS FOR**

The rules in Chapter 64 are from the Speech and Language Pathologists and Audiologists and include general provisions (.0100); interpretative rules (.0200); code of ethics (.0300); rulemaking petitions (.0400); notice of rulemaking (.0500); conduct of rulemaking hearings (.0600); declaratory rulings (.0700); contested case hearings (.0800); other matters relating to administrative hearings (.0900); and use of speech/language pathology assistants (.1000).

Standards of Practice for Audiological Evaluations Adopt/*	21	NCAC	64	.0215
Standard of Practice for Speech and Language Evaluations Adopt/*	21	NCAC	64	.0216
Benefit from Treatment Defined Adopt/*	21	NCAC	64	.0217

**COMMUNITY COLLEGES, BOARD OF**

The rules in Subchapter 02E cover educational programs including program classification (.0100); curriculum programs (.0200); adult, extension, and community service programs (.0300); industrial services (.0400); articulation (.0500); and vocational curriculum (.0600).

Human Resources Development Program Amend/*	23	NCAC	02E	.0306
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In accordance with the June 15, 2005 order of Senior Resident Superior Court Judge Donald W. Stephens, in *Environmental Management Commission v. Rules Review Commission (04 CVS 3157)*, the Rules Review Commission will consider the following set of rules, the "Stormwater Rules, " at its August 18, 2005 meeting.

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**Amendments to Address RRC Objections to Permanent Rule Language**

**15A NCAC 2H .1014 is proposed for adoption as follows:**

**.1014 STORMWATER MANAGEMENT FOR URBANIZING AREAS**

Stormwater picks up pollutants as it drains to waters of the State. When a person alters stormwater drainage, which is prevalent in urbanizing areas, the pollutants carried by stormwater to waters of the State may be concentrated or increased, resulting in water pollution. The juncture at which stormwater reaches waters of the State will either be through the terminus of a pipe, ditch or other discrete outlet; or as a diffuse sheet flow. Stormwater discharges subject to National Pollutant Discharge Elimination System (NPDES) permitting are addressed in Section 2H.0100 entitled "Wastewater Discharges to Surface Waters," which incorporates, supplements and elaborates on the federal rules for stormwater NPDES discharges. Other stormwater control requirements are mainly addressed in this section, Section 2H .1000 entitled "Stormwater Management," but may also be addressed in sections dedicated to particular water classifications or circumstances. If the rules overlap to create a conflict between requirements, the more stringent requirements in the overlap apply. Projects located in urbanizing areas, which are not subject to NPDES permitting, must obtain permits in accordance with Rules 2H.1014 through 2H.1019.

**15A NCAC 2H.1015 is added as follows:**

**.1015 URBANIZING AREA DEFINITIONS**

State definitions for stormwater are set out in G.S. 143-212 through 213 and 15A NCAC 2H.1002. Additional definitions for stormwater are set out as follows:

- (1) 1-Year, 24-Hour Storm means the surface runoff resulting from a rainfall of an intensity expected to be equaled or exceeded, on average, once in 12 months and with a duration of 24 hours.
- (2) Division means the Division of Water Quality.
- (3) Existing Development means those completed projects that are built or those projects that, at a minimum, have established a vested right under North Carolina zoning law as of the effective date of the local government ordinance this rule, or such earlier time that an affected a local government's vested rights ordinance shall specify, based on at least one of the following criteria:
  - (a) Substantial expenditure of resources (time, labor, money) based on a good faith reliance upon having received a valid local government stormwater approval to proceed with the project, or
  - (b) Having an outstanding valid building permit in compliance with G.S. 153A-344.1 or G.S. 160A-385.1, or
  - (c) Having an approved site-specific or phased development plan in compliance with G.S. 153A-344.1 or G.S. 160A-385.1
- (4) Growing Population Area means an area with High Population Growth or Growth Potential.
- (5) Growth Potential means a projected growth rate exceeding 1.3 times the state growth rate for the previous 10 years or the capacity to increase population by adjoining a High Population Growth area.
- (6) High Population Growth means either a 10-year rate of growth exceeding 1.3 times the state population growth rate for that same period or a 2-year rate of growth which exceeds fifteen percent (15%) of its previous population.
- (7) Population Density means the population of an area divided by the area's geographical measure in square miles, equal to persons per square mile. For the purposes of this definition, the population shall equal the sum of the permanent and seasonal populations as determined by the Department, or be calculated by the Department from a measure of housing unit density.
- (8) Public Entity means the United States, State of North Carolina, city, village, township, county, school district, public college or university, single purpose governmental agency; or any other governing body which is created by federal or state law.
- (9) Redevelopment means any rebuilding activity other than a rebuilding activity that;
  - (a) Results in no net increase in built-upon area, and
  - (b) Provides equal or greater stormwater control than the previous development.
- (10) Sensitive Receiving Waters means
  - (a) Waters classified as high quality, outstanding resource, shellfish, trout or nutrient sensitive waters in accordance with 15A NCAC 2B .0101(d) and (e);



- (b) Waters which are occupied by or designated as critical habitat for federally-listed aquatic animal species that are listed as threatened or endangered by the U.S. Fish and Wildlife Service or National Marine Fisheries Service under the provisions of the Endangered Species Act, 16 U.S.C. 1531-1544; or
  - (c) Waters for which the designated use, as set forth in the classification system at 15A NCAC 2B .0101(c), (d) and (e); have been determined to be impaired in accordance with the requirements of 33 U.S.C. 1313(d).
- (11) Significant Contributor of Pollutants means an entity that allows its stormwater to:
- (a) Contribute to a pollutant loading that reasonably may be expected to adversely affect the quality and uses of a water body; or
  - (b) Destabilize the physical structure of a water body such that the discharge reasonably may be expected to adversely effect the quality and uses of that water body.
- Uses of the waters shall be determined pursuant to 15A NCAC 2B .0211 - .0222 and 15A NCAC 2B .0300.
- (12) Total Maximum Daily Load (TMDL) means a written, quantitative plan and analysis for attaining and maintaining water quality standards in all seasons for a specific waterbody and pollutant.
- (13) Total Population means the permanent and seasonal populations. The permanent population and the seasonal population will be determined from the most recent data available from local, state or federal sources.

**15A NCAC 2H.1016 is added as follows:**

**.1016 URBANIZING COUNTY DESIGNATIONS**

Urbanizing county designations shall be made through an automatic federal designation process, a two-step State designation process, and a TMDL designation process. Once an urbanizing county is designated, projects within its geographical jurisdiction whether or not those projects are also located within an incorporated area, which cumulatively disturb an acre or more of land must obtain a State stormwater permit and implement the six minimum measures described in 15A NCAC 2H.1017 through 2H.1019. Projects within urbanizing counties must comply with the permit application schedule set forth in 15A NCAC 2H .1017.

- (1) Federal Designation Process.  
Counties are automatically designated as urbanizing counties if they are located in whole or in part within an Urbanized Area as determined by the most recent decennial U.S. census. The Department, within 3 months of federal verification of decennial census data, shall notify in writing all the counties identified.
- (2) State Designation Process.  
The Department shall designate additional urbanizing counties in a two-step process based on their geographical jurisdiction's potential to adversely affect water quality whether the effects constitute violations of water quality standards such as impairment of designated uses, or whether the effects constitute other types of significant water quality impacts such as adverse habitat and biological impacts. As a first step, the State will identify counties which are candidates for designation. As a second step, the State will apply criteria to the identified counties to determine whether they will be designated.
  - (a) Step One: The Department shall identify counties as candidates for designation based on population. A county shall be identified as a candidate for designation if the county municipal and non-municipal Total Population is greater than 45,000 persons.
  - (b) Step Two: From the identified counties, the Department shall designate those that contribute to a violation of a water quality standard by the introduction of stormwater to Sensitive Receiving Waters within a Growing Population Area or that provide a Significant Contribution of Pollutants, taking into account the effectiveness of the public entities' existing water quality protection programs. Effectiveness of existing water quality programs shall be determined based upon the water quality of the receiving waters and whether the waters have been determined to be supporting the uses as set forth in the classifications pursuant to 15A NCAC 2B .0101(c), (d) and (e) and the specific classification of the waters pursuant to 15A NCAC 2B .0300.
- (3) TMDL designation.  
The Department shall designate counties that contain projects that introduce pollutants through stormwater runoff that are contributing to an impairment of a water body's use, as determined in accordance with 33 U.S.C 1313 (d). The Department must determine that a county contains such a project if the project is specifically listed for urban stormwater Total Maximum Daily Load development.
- (4) State Designation Administration.
  - (a) The Department shall implement the designation process in accordance with the Department schedule for Basinwide Plans starting January 01, 2004.
  - (b) The Department shall publish a list of counties identified as candidates for urbanizing county designation. Lists shall be developed for a river basin in accordance with North Carolina's Basinwide Planning Schedule. Publication of this list may be coordinated with public notices issued through basinwide planning efforts.

- (c) The Department shall notify all counties identified as candidates for urbanizing county designation prior to the publication of the candidate list.
- (d) The Department shall accept public comment on the application of the designation criteria to the counties identified as candidates for urbanizing county designation. A public comment period of not less than 30 days shall be provided.
- (e) After review of the designation criteria and review of public comments received, the Department shall make a determination on designation for each of the candidates.
- (f) The Department shall provide written notification to each county of its designation determination. For those counties designated as an urbanizing county, the notification shall include the category under which the county was designated, the basis of the designation, the date upon which the Department will require State stormwater permits from projects within the urbanizing county's jurisdiction and the forms necessary for the urbanizing county to request delegation of the State stormwater permit program.

**15A NCAC 2H.1017 is added as follows:**

**.1017 APPLICATION SCHEDULE AND REQUIRED CONTENTS**

- (1) A project which cumulatively disturbs one acre or more of land within an urbanizing county's geographical jurisdiction must obtain a State stormwater permit prior to initiating the land disturbance. If the urbanizing county or other appropriate entity requests delegation of the State stormwater permit program, then the permit requirement may be suspended until the Department delegates the program or denies the request for delegation. This suspension of permit requirements will only occur where the state has not already begun implementing the program or where a local program sufficient to meet the state stormwater permit program requirements is already in place.
- (2) Applications for a permit must be submitted on Department forms to the Department or delegated authority.
- (3) The Department may approve delegation of the State stormwater permit program to an urbanizing county or other appropriate public entity, if the urbanizing county develops and implements a comprehensive watershed protection plan that may be used to meet the six minimum measures. Alternatively, the Department may approve delegation if the urbanizing county uses the Department's model ordinance and/or Post-Construction model practices to create a program that will implement the six minimum measures throughout the urbanizing county's jurisdiction. The Department may also approve delegation if the urbanizing county develops a program to implement the six minimum measures that either meets or exceeds the Department's model ordinance and practices. Such delegated programs may reduce the number of site-specific programs for projects by incorporating ordinances or programs that address the entire county's jurisdiction so that each project developer need not create a program.
- (4) Permit applications must demonstrate that the applicant will meet the six minimum measures as follows:
  - (a) A public education and outreach program to inform citizens of the impacts of stormwater runoff on water bodies and methods to reduce pollutants in stormwater runoff. The permit applicant may satisfy this requirement by developing an education and outreach program; by participating in a statewide education and outreach program coordinated by the Department; by participating in a delegated program, or a combination of these approaches.
  - (b) A public involvement and participation program consistent with all applicable state and local requirements.
  - (c) A program to detect and eliminate illicit discharges within the project's boundaries. The permit applicant may satisfy this requirement by developing a storm sewer system mapping process which will, at a minimum, identify stormwater outfalls and waters within the project's boundaries, along with investigating and removing illicit discharges.
  - (d) A program to reduce pollutants in any stormwater runoff which result from construction activities that arise from a land disturbance of an acre or more. Implementation and enforcement of the Sedimentation Pollution Control Act, G.S. 113A-50 et seq., by the Department or through a local program developed pursuant to G.S. 113A-54(b), in conjunction with the State's NPDES permit for construction activities, may be used to meet this minimum measure either in whole or in part.
  - (e) A program to address post-construction stormwater runoff from new development and redevelopment projects. A permit applicant may utilize the Department's model ordinance to fulfill this requirement. A permit applicant may also utilize the Department's post construction model practices to fulfill this requirement. A permit applicant may also utilize the Department's guidance on scientific and engineering standards for best management practices (BMPs) to develop an alternative program for this minimum measure where a demonstration is made that the alternative program shall provide:
    - (i) Equal or better stormwater management than the model practices;
    - (ii) Equal or better protection of the waters of the State than the model practices; and
    - (iii) Minimal potential for nuisance conditions.

- (f) A pollution prevention/good housekeeping program for the project that addresses operation and maintenance, including a training component, to prevent or reduce pollutant runoff from the project's operations.
- (5) Besides the state and local programs identified above, permit applicants or delegated programs may propose using any existing state and local programs that relate to the minimum measures, either in whole or in part.
- (6) Permit applicants may submit a more stringent program than set out in the six minimum measures.
- (7) The Department may require more stringent stormwater management measures on a case-by-case basis where it is determined that additional measures are required to protect water quality and maintain existing and anticipated uses of these waters.

**15A NCAC 2H.1018 is added as follows:**

**.1018 POST-CONSTRUCTION MODEL PRACTICES**

Post-Construction practices are design standards that reduce or eliminate pollutants in stormwater runoff and remain in place beyond the construction phase of development. A permit applicant or delegation applicant may develop its own comprehensive watershed plan, may use the Department's model ordinance, may design its own Post-Construction practices based on the Department's guidance on scientific and engineering standards for best management practices (BMPs) or it may incorporate this Rule's Post-Construction model practices to fulfill the Post-Construction minimum measure program requirement. If a permit applicant or delegation applicant submits an option other than the Post-Construction model practices, the program for Post-Construction must meet or exceed the model practices' ability to reduce pollutants in stormwater runoff. The Post-Construction model practices are set out as follows:

- (1) Permittees or delegated programs must require stormwater controls appropriate to a project's level of density as follows:
  - (a) Low Density. A low density project contains no more than 12 percent built-upon area if the project is within one-half mile of and draining to SA waters and no more than 24 percent built-upon area if the project is located elsewhere. Low density projects must use vegetated conveyances to the maximum extent practicable to transport stormwater runoff from the development. On-site stormwater treatment devices such as infiltration areas, bioretention areas, and level spreaders may also be used as added controls for stormwater runoff.
  - (b) High Density. A high density project exceeds the low density thresholds of 12 percent built-upon area if the project is within one-half mile of and draining to SA waters and no more than 24 percent built-upon area if the project is located elsewhere. High density projects must use structural stormwater management systems that will control and treat a treatment volume that consists of the first inch of stormwater runoff from the entire project site plus the first inch of runoff from any offsite drainage routed to the structures and that will adequately store and discharge the 1-year, 24-hour storm. The structural stormwater management system must meet the following performance standards and design criteria:
    - (i) Draw down the treatment volume no faster than 48 hours, but no slower than 120 hours.
    - (ii) Discharge the storage volume at a rate equal or less than the pre-development discharge rate for the 1-year, 24-hour storm.
    - (iii) Remove an 85% average annual amount of Total Suspended Solids.
    - (iv) Meet the General Engineering Design Criteria set out in 15A NCAC 2H .1008(c).
- (2) Permittees or delegated programs must require built-upon areas to be located at least 30 feet landward of all perennial and intermittent surface waters. For the purpose of this Rule, a surface water shall be present if the feature is shown on either the most recent version of the soil survey map prepared by the Natural Resources Conservation Service of the United States Department of Agriculture or the most recent version of the 1:24,000 scale (7.5 minute) quadrangle topographic maps prepared by the United States Geologic Survey (USGS). Relief from this requirement may be allowed when surface waters are not present in accordance with the provisions of 15A NCAC 2B .0233 (3)(a). In addition, an Exception to this requirement may be pursued in accordance with Rule 2H.1019.
- (3) Permittees or delegated local programs must require a fecal coliform reduction program that controls, to the maximum extent practicable, the sources of fecal coliform. At a minimum, the program shall include the development and implementation of an oversight program to ensure proper operation and maintenance of on-site wastewater treatment systems for domestic wastewater. For municipalities, this program may be coordinated with local county health departments.
- (4) Permittees or delegated programs must require recorded deed restrictions and protective covenants that ensure development activities will maintain the project consistent with approved plans.
- (5) Permittees or delegated programs must require an operation and maintenance plan that ensures the adequate long-term operation of the structural BMP's required by the program. The operation and maintenance plan must require the owner of each structural BMP to submit a maintenance inspection report on each structural BMP annually to the state or delegated program. A qualified professional must conduct the inspection.

- (6) Permittees or delegated programs may allow cluster development on a project-by-project basis only if the project meets all of the following criteria:
  - (a) Overall density of the project meets the low density thresholds of no more than 12 percent built-upon area for projects within one half mile of and draining to SA waters and no more than 24 percent built-upon area for all other projects.
  - (b) Built-upon areas, by design and location, minimize stormwater runoff impact to the receiving waters, minimize concentrated stormwater flow, maximize the use of sheet flow through vegetated areas, and maximize the length of flow through vegetated areas.
  - (c) Concentrated density development areas are located in upland areas and, to the maximum extent practicable, away from surface waters and drainageways.
  - (d) Undeveloped areas (areas other than built-upon areas) within the project remain in vegetated or natural state. The area in the vegetated or natural state may be conveyed to a property owners association, a local government, or a conservation organization for preservation as a park or greenway. The area in the vegetated or natural state may also be placed in a permanent conservation or farmland preservation easement. A maintenance agreement for the vegetated or natural area must be filed with the property deed.
  - (e) The project transports stormwater through vegetated conveyances to the maximum extent practicable.
- (7) For areas draining to SA waters, Regulated Entities must:
  - (a) Use BMPs that result in the highest degree of fecal coliform die off and controls to the maximum extent practicable sources of fecal coliform while still incorporating the stormwater controls required by the project's density level.
  - (b) Implement a program to control the sources of fecal coliform to the maximum extent practicable, including a pet waste management component (which may be achieved by revising an existing litter ordinance) and an on-site domestic wastewater treatment systems component to ensure proper operation and maintenance of such systems (which may be coordinated with local county health departments).
  - (c) Prohibit new points of stormwater discharge to SA waters or expansion (increase in the volume of stormwater flow through conveyances or increase in capacity of conveyances) of existing stormwater conveyance systems that drain to SA waters. Any modification or redesign of a stormwater conveyance system within the contributing drainage basin must not increase the net amount or rate of stormwater discharge through existing outfalls to SA waters. Diffuse flow of stormwater at a non-erosive velocity to a vegetated buffer or other natural area capable of providing effective infiltration of the runoff from the 1-year, 24-hour storm shall not be considered a direct point of stormwater discharge. Consideration shall be given to soil type, slope, vegetation, and existing hydrology when evaluating infiltration effectiveness.
- (8) For areas draining to Trout Waters, Regulated Entities must:
  - (a) Use BMPs that avoid a sustained increase in the receiving water temperature, while still incorporating the stormwater controls required for the project's density level.
  - (b) Allow on-site stormwater treatment devices such as infiltration areas, bioretention areas, and level spreaders as added controls.
- (9) For areas draining to Nutrient Sensitive Waters, Regulated Entities must:
  - (a) Use BMPs that reduce nutrient loading, while still incorporating the stormwater controls required for the project's density level. In areas where the Department has approved a Nutrient Sensitive Water Urban Stormwater Management Program, the provisions of that program fulfill the nutrient loading reduction requirement. Nutrient Sensitive Water Urban Stormwater Management Program requirements are found in 15A NCAC 2B .0200.
  - (b) Implement a nutrient application (both inorganic fertilizer and organic nutrients) management program to reduce nutrients entering waters of the State

**15A NCAC 2H.1019 is added as follows:**

**.1019 EXCEPTIONS**

The Department or an appropriate local authority, pursuant to Article 18 of G.S. 153A or Article 19 of G.S. 160A, may grant exceptions from the 30-foot landward location of built-upon area requirement as well as the deed restrictions and protective covenants requirement.

- (1) An exception may be granted if the application meets the following criteria:
  - (a) There are practical difficulties or unnecessary hardships that prevent compliance with the strict letter of the requirements. Practical difficulties and unnecessary hardships shall be evaluated in accordance with the following criteria:

- (i) The applicant cannot secure a reasonable return from, or use of, the applicant's property if the applicant complies with the requirements that built-upon area be located 30 feet landward of surface waters and deed restrictions and protective covenants be recorded.
- (ii) The difficulty or hardship results from application of the requirements that built-upon area be located 30 feet landward of surface waters and deed restrictions and protective covenants be recorded to the property rather than from other factors such as pre-existing deed restrictions or other hardship.
- (iii) The difficulty or hardship is due to the physical nature of the applicant's property, such as its size, shape, or topography, which is different from that of neighboring properties.
- (iv) The applicant did not cause the difficulty or hardship by knowingly or unknowingly violating the six minimum measures' requirements.
- (v) The applicant did not purchase the property after November 1, 2002 (the effective date of the temporary rule incorporating similar exceptions language), and then request an exception.
- (vi) The difficulty or hardship is unique to the applicant's property, rather than the result of conditions that are widespread. If other properties are equally subject to the hardship created in the restriction, then granting a exception would be a special privilege denied to others, and would not promote equal justice.
- (b) The exception is in harmony with the general purpose and intent of this Rule and preserves its spirit.
- (c) In granting the exception, the public safety and welfare have been assured, water quality has been protected, and substantial justice has been done. Merely proving that the exception would permit a greater profit from the property shall not be considered adequate justification for an exception. Moreover, the Division or delegated local authority shall consider whether the exception application presents the minimum possible deviation from the terms of the stormwater control requirements that will still allow reasonable use of the property.
- (2) The Department or appropriate local authority may impose conditions and safeguards, upon any exception it grants, to support the purpose, spirit and intent of the stormwater control requirements.
- (3) The Department or appropriate local authority may impose conditions and safeguards, upon any exception it grants, to protect water quality standards.
- (4) Local authorities must document the exception procedure and submit an annual report on all exception proceedings.
- (5) Appeals of the Department's exception decisions must be filed with the Office of Administrative Hearings. Appeals of a local authority's exception decisions must be made to the appropriate Board of Adjustment or other appropriate local governing body, under G.S. 160A-388 or G.S. 153A-345.
- (6) Exceptions may be granted automatically in the following instances:
  - (a) When there is a lack of practical alternatives for a road crossing, railroad crossing, bridge, airport facility, or utility crossing as long as it is located, designed, constructed, and maintained to minimize disturbance, provide maximum nutrient removal, protect against erosion and sedimentation, have the least adverse effects on aquatic life and habitat, and protect water quality to the maximum extent practicable through the use of BMPs.
  - (b) When there is a lack of practical alternatives for a stormwater management facility, stormwater management pond, or utility (such as water, sewer or gas) construction and maintenance corridor as long as it is located 15 feet landward of all perennial and intermittent surface waters and as long as it is located, designed, constructed, and maintained to minimize disturbance, provide maximum nutrient removal, protect against erosion and sedimentation, have the least adverse effects on aquatic life and habitat, and protect water quality to the maximum extent practicable through the use of BMPs.
  - (c) A lack of practical alternatives may be shown by demonstrating that, considering the potential for a reduction in size, configuration or density of the proposed activity and all alternative designs, the basic project purpose cannot be practically accomplished in a manner which would avoid or result in less adverse impact to surface waters.

*History Note: Authority G.S. 143-214.1; 143-214.7; 143-215.3(a)(1); 143-215.1;  
Adopted Eff. August 1, 2004*

**15A NCAC 2H .0126 is amended as follows:**

**.0126 STORMWATER DISCHARGES**

Stormwater picks up pollutants as it drains to waters of the State. When a person alters stormwater drainage, the pollutants carried by stormwater to waters of the State may be concentrated or increased, resulting in water pollution. The juncture at which stormwater reaches waters of the State will either be through the terminus of a pipe, ditch or other discrete outlet, or in a diffuse sheet flow

manner. Stormwater discharges subject to NPDES permitting are addressed in this section, which incorporates, supplements and elaborates on the federal rules on stormwater NPDES discharges. Other stormwater control requirements are mainly addressed in Section 2H .1000 entitled "Stormwater Management", but may also be addressed in sections dedicated to particular water classifications or circumstances. If there is an overlap, the more stringent requirements apply. Regulated Entities (REs), subject to NPDES permitting, shall receive NPDES permits for stormwater discharges to surface waters, issued in accordance this Rule, 15A NCAC 2H .0150 through 2H .0156 and United States Environmental Protection Agency (EPA) regulations 40 CFR 122.21, 122.26, and 122.28 through 122.37 which are hereby incorporated by reference including any subsequent amendments. Copies of this publication are available from the Government Institutes, Inc. 4 Research Place, Suite 200, Rockville, MD 20850-1714 for a cost of sixty-nine dollars (\$69.00) each plus six dollars (\$6.00) shipping and handling. Copies are also available at the Division of Water Quality, Archdale Building, 512 N. Salisbury Street, Raleigh, North Carolina 27604. These federal regulations can also be accessed on the world wide web at <http://www.gpo.gov/nara/cfr/index.html>

**15A NCAC 2H.0150 is added as follows:**

**.0150 DEFINITIONS**

Federal definitions for NPDES discharges are incorporated herein by reference to 40 C.F.R. 122.2 and 122.26(b). State definitions for NPDES discharges are set out in G.S. 143-212 through 213 and 15A NCAC 2H.0103. Additional definitions for NPDES stormwater discharges are set out as follows:

- (1) 1-year, 24-hour Storm means the surface runoff resulting from a 24-hour rainfall of an intensity expected to be equaled or exceeded, on average, once in 12 months and with a duration of 24 hours.
- (2) Built - Upon Area means that portion of a development project that is covered by impervious or partially impervious surface including buildings, pavement, gravel areas (e.g. roads, parking lots, paths), recreation facilities (e.g. tennis courts), etc. (Note: Wooden slatted decks and the water area of a swimming pool are considered pervious.)
- (3) Existing Development means those projects that are built or those projects that at a minimum have established a vested right under North Carolina zoning law as of the effective date of the local government ordinance, or such earlier time that an affected local government's ordinance shall specify, based on at least one of the following criteria
  - (a) Substantial expenditure of resources (time, labor, money) based on a good faith reliance upon having received a valid local government approval to proceed with the project, or
  - (b) Outstanding valid building permit in compliance with G.S. 153A-344.1 or G.S. 160A-385.1, or
  - (c) Approved site-specific or phased development plan in compliance with G.S. 153A-344.1 or G.S. 160A-385.1.
- (4) Growing Population Area means an area with High Population Growth or Growth Potential.
- (5) Growth Potential means a projected growth rate exceeding 1.3 times the state growth rate for the previous 10 years or the capacity to increase population by adjoining a High Population Growth area.
- (6) High Population Growth means either a 10-year rate of growth exceeding 1.3 times the state population growth rate for that same period or a 2-year rate of growth which exceeds fifteen percent (15%) of its previous population.
- (7) Population Density means the population of an area divided by the area's geographical measure in square miles, equal to persons per square mile. For the purposes of this definition, the population shall equal the sum of the permanent and seasonal populations as determined by the Department, or calculated by the Department from a measure of housing unit density.
- (8) Public Entity means the United States, State of North Carolina, city, village, township, county, school district, public college or university, single purpose governmental agency; or any other governing body which is created by federal or state law.
- (9) Redevelopment means any rebuilding activity other than a rebuilding activity that;
  - (a) Results in no net increase in built-upon area, and
  - (b) Provides equal or greater stormwater control than the previous development.
- (10) Regulated Entities means any public entity which must obtain a stormwater permit pursuant to the designation or petition process set out in 15A NCAC 2H.0151 or .0152.
- (11) Sensitive Receiving Waters means:
  - (a) Waters classified as high quality, outstanding resource, shellfish, trout or nutrient sensitive waters in accordance with 15A NCAC 2B .0101(d) and (e);
  - (b) Waters which are occupied by or designated as critical habitat for federally-listed aquatic animal species that are listed as threatened or endangered by the U.S. Fish and Wildlife Service or National Marine Fisheries Service under the provisions of the Endangered Species Act, 16 U.S.C. 1531-1544; or
  - (c) Waters for which the designated use, as set forth in the classification system at 15A NCAC 2B .0101(c), (d) and (e); have been determined to be impaired in accordance with the requirements of 33 U.S.C. 1313(d).
- (12) Significant Contributor of Pollutants means an MS4 or a discharge that,

- (a) Contributes to a pollutant loading that may reasonably be expected to adversely affect the quality and uses of a water body; or
- (b) Destabilizes the physical structure of a water body such that the discharge may reasonably be expected to adversely effect the quality and uses of that water body.
- (c) Uses of the waters shall be determined pursuant to 15A NCAC 2B .0211 - .0222 and 15A NCAC 2B .0300.
- (13) Total Maximum Daily Load (TMDL) means a written, quantitative plan and analysis for attaining and maintaining water quality standards in all seasons for a specific waterbody and pollutant.
- (14) Total Population means the permanent and seasonal populations. The permanent population and the seasonal population will be determined from the most recent data available from local, state or federal sources.

**15A NCAC 2H.0151 is added as follows:**

**.0151 PUBLIC ENTITY DESIGNATIONS**

Public Entity Designations shall be made through an automatic federal designation process, a two-step State designation process, and a TMDL MS4 designation process. Once a public entity is designated, it becomes a regulated entity (RE) which must obtain a stormwater permit. REs shall comply with the permit application schedule set forth in Rule .0153.

- (1) Federal Designation Process.  
In accordance with 40 CFR 122.32, all Small MS4s are automatically designated if they are located in whole or in part within an Urbanized Area as determined by the most recent decennial U.S. census. The Department, within 3 months of federal verification of decennial census data, shall notify in writing all the public entities identified.
- (2) State Designation Process.

The Department shall designate additional dischargers or MS4's in a two-step process based on their potential to adversely affect water quality whether the effects constitute violations of water quality standards such as impairment of designated uses, or whether the effects constitute other types of significant water quality impacts such as adverse habitat and biological impacts. As a first step, the State will identify public entities which are candidates for designation. As a second step, the State will apply criteria to the identified public entities to determine whether their discharges or MS4's will be designated.

- (a) Step One: The Department shall identify public entities as candidates for designation based on population and geographical nexus to an MS4.
  - (i) Municipalities. A municipality shall be identified as a candidate for designation if its total population is greater than 10,000 and its population density is at least 1,000 people per square mile.
  - (ii) Counties. A county shall be identified as a candidate for designation if the county municipal and non-municipal total population is greater than 45,000 persons.
  - (iii) Other public entities. A public entity shall be identified as a candidate for designation if it is a municipality located within a designated county or is an owner/operator of a MS4.
- (b) Step Two: Designation of identified public entities. From the identified public entities, the Department shall designate those dischargers or MS4's that contribute to a violation of a water quality standard by discharging or potentially discharging stormwater to Sensitive Receiving Waters within a Growing Population Area or that provide a Significant Contribution of Pollutants, taking into account the effectiveness of the public entities' existing water quality protection programs. Effectiveness of existing water quality programs shall be determined based upon the water quality of the receiving waters and whether the waters have been determined to be supporting the uses as set forth in the classifications pursuant to 15A NCAC 2B .0101(c), (d) and (e) and the specific classification of the waters pursuant to 15A NCAC 2B .0300.
- (3) TMDL MS4 designation.  
Total Maximum Daily Load (TMDL) MS4s. TMDL MS4s include public entities discharging pollutants that are contributing to the impairment of a water body's use, as determined in accordance with 33 U.S.C 1313 (d). TMDL MS4s shall be designated if the MS4 is specifically listed by name for urban stormwater Total Maximum Daily Load development.
- (4) State Designation Administration.
  - (a) The Department shall implement the designation process in accordance with the Department schedule for Basinwide Plans starting January 01, 2004.
  - (b) The Department shall publish a list of public entities identified as candidates for designation. Lists shall be developed for a river basin in accordance with North Carolina's Basinwide Planning Schedule. Publication of this list may be coordinated with public notices issued through basinwide planning efforts.
  - (c) The Department shall notify all public entities identified as candidates for designation prior to the publication of the candidate list.

- (d) The Department shall accept public comment on the application of the designation criteria to the public entities identified as candidates for designation. A public comment period of not less than 30 days shall be provided.
- (e) After review of the designation criteria and review of public comments received, the Department shall make a determination on designation for each of the candidates.
- (f) The Department shall provide written notification to each public entity of its designation determination. For those entities designated as a Regulated Entity, the notification shall include the category under which the public entity was designated, the basis of the designation and the date on which the NPDES stormwater permit application must be submitted to the Department.

**15A NCAC 2H.0152 is added as follows:**

**.0152 PETITIONS**

(a) Types of Petitions. A petition may be submitted to the Department to require a NPDES stormwater permit for a discharge or a MS4 as follows:

- (1) Connected Discharge Petition: Any operator of a permitted MS4 may submit a petition to the Department to require a separate NPDES stormwater permit for any connecting discharge.
- (2) Adverse Impact Petition: Any person may submit a petition to the Department to require a NPDES stormwater permit for any discharge or MS4 that contributes to a violation of a water quality standard, is a Significant Contributor of Pollutants or is a TMDL contributor of pollutants.

(b) Petition Evaluation. Petitions will be evaluated based on the following criteria. If the petition meets the criteria, then the Department will require a NPDES stormwater permit.

- (1) A Connected Discharge Petition must show that the discharge flows or will flow into a permitted MS4.
- (2) An Adverse Impact Petition must show that the discharge or MS4 is a contributor to a violation of a water quality standard as described in Step Two of the State's Designation Process; a Significant Contributor of Pollutants; or a TMDL contributor of pollutants because the discharge or MS4 is specifically listed for urban stormwater TMDL development. Petitions may demonstrate that a discharge or MS4 is such a contributor by providing the Department the information outlined below:
  - (A) Monitoring data which includes, at a minimum, representative sampling of the stormwater discharge or MS4 subject to the petition and information describing how the sampling may be considered representative. However, the petitioner must notify the discharger or MS4 which is the subject of the petition prior to conducting monitoring activities.
  - (B) Technical scientific literature supporting any sampling methods.
  - (C) Technical study information on land uses in the drainage area and the characteristics of stormwater runoff from these land uses.
  - (D) A map delineating the drainage area of the petitioned entity, the location of sampling stations, the location of the stormwater outfalls in the adjacent area of the sampling locations and general features such as, surface waters, major roads and political boundaries to appropriately locate the area of concern for the reviewers.
  - (E) For stormwater discharges to impaired waters: documentation that the receiving waters are impaired or degraded and monitoring data that demonstrates that the discharge or MS4 contributes pollutants for which the waters are impaired or degraded.
  - (F) For stormwater discharges to non-impaired waters: monitoring data that demonstrates that the petitioned entity is a significant contributor of pollutants to the receiving waters.
- (3) If the petition makes the required showing, the Department shall review the effectiveness of any existing water quality protection programs which may offset the need to obtain a NPDES stormwater permit. The Department shall consider the water quality of the receiving waters and whether the waters have been determined to be supporting the uses as set forth in the classifications pursuant to 15A NCAC 2B.0101(c), (d) and (e) and the specific classification of the waters pursuant to 15A NCAC 2B.0300 when determining the effectiveness of existing programs

(a) Petition Administration. The Department shall process petitions in the following manner:

- (1) The Department shall only accept petitions submitted on Department forms.
- (2) A separate petition must be filed for each discharge or MS4.
- (3) The Department shall only evaluate complete petitions. The Department shall make a determination on the completeness of the petition within 90 days of receipt of a petition application or it shall be deemed complete. If the Department requests additional information, then the petitioner may submit additional information and the Department will review, within 90 days of receipt of the additional information, whether the information completes the petition.



- (4) The Petitioner shall provide a copy of the petition and a copy of any subsequent additional information submitted to the Department to the persons in control of the discharge or the chief administrative officer of the MS4 within 48 hours of each submittal.
- (5) On a case-by-case basis, the Department may request additional information necessary to evaluate the petition.
- (6) The Department shall post all petitions on the Division web site and maintain copies available for inspection at the Division's office. The Department shall accept public comments for at least 30 days from the date of posting.
- (7) The Department may hold a public hearing on any petition as part of its case-by-case need for additional information. The Department shall hold a public hearing on the petition if it receives a written request for a public hearing within the public comment period and the Department determines that there is a significant public interest in holding such hearing. The Department's determination to hold a hearing shall be no less than 15 days from the close of the public comment period. The Department shall set the hearing within 45 days of the close of the initial public comment period and shall accept additional public comment through the date of the hearing.
- (8) Information on the discharge or MS4 shall be accepted until the end of the public comment period and shall be considered in making the final determination on the petition.
- (9) New petitions for the same discharge or MS4 received during the public comment period shall be considered as comments on the original petition. New petitions for the same discharge or MS4 received after the public comment period ends and before the final determination is made shall be considered incomplete and placed on administrative hold pending a final determination on the original petition.
  - (A) If the Department determines that a discharger or MS4 needs to obtain a NPDES stormwater permit, any petitions for that discharge or MS4 that were placed on administrative hold shall be considered in the development of the NPDES stormwater permit.
  - (B) If the Department determines that a discharger or MS4 need not obtain a NPDES stormwater permit, new petitions for that discharge or MS4 must present new information or demonstrate that conditions have changed substantially in order to be considered. If new information is not provided, the petition shall be returned as substantially incomplete.
- (10) The Department shall evaluate petitions within 180 days of the date they are determined or deemed to be complete. If the Department's determination is that the discharger or MS4 shall be permitted, then the Department shall notify the discharger or MS4 within 30 days of the requirement to obtain a permit. The discharger or MS4 must submit its application for a NPDES stormwater permit within 18 months of the date of notification.

**15A NCAC 2H.0153 is added as follows:**

**.0153 APPLICATION SCHEDULE AND REQUIRED CONTENTS**

- (a) Regulated Entities must submit applications on Department forms.
- (b) Regulated Entities must apply within 18 months of notification by the Department of automatic federal designation, State designation or State determination that the Regulated Entity needs a NPDES stormwater permit through the petition process. However, an earlier deadline exists for the following Regulated Entities as follows:
  - (1) 1990 decennial U.S. Census Regulated Entities must apply by March 10, 2003.
  - (2) Regulated municipally-operated industrial activities existing and in operation as of March 10, 2003 must apply by March 10, 2003.
  - (3) Regulated municipally-operated industrial facilities proposed to operate after March 10, 2003 must apply within a minimum of 6 months prior to the start-up date for the facility.
- (c) Regulated Entities that do not own or operate a MS4, shall be permitted in accordance with 15A NCAC 2H .1014
- (d) Regulated Entities must include a program to implement the six minimum measures set out in 40 CFR 122.26 which is designed to reduce discharge of pollutants to the maximum extent practicable. Public entities may develop and implement comprehensive watershed protection plans that may be used to meet part, or all, of the requirements of this section. The program must incorporate the six minimum measures as follows:
  - (1) A public education and outreach program on the impacts of stormwater discharges on water bodies to inform citizens of how to reduce pollutants in stormwater runoff. The Regulated Entity may satisfy this requirement by developing a local education and outreach program; by participating in a statewide education and outreach program coordinated by the Department; or a combination of those approaches.
  - (2) A public involvement and participation program consistent with all applicable state and local requirements.
  - (3) A program to detect and eliminate illicit discharges within the jurisdiction or control of the Regulated Entity. The Regulated Entity may satisfy this requirement by developing a storm sewer system mapping process which will, at a minimum, identify stormwater outfalls and waters within the jurisdiction or control of the Regulated Entity, along with investigating illicit discharges and removing illicit discharges.
  - (4) A program to reduce pollutants in any stormwater runoff to a MS4 or discharge which result from construction activities that arise from a land disturbance of an acre or more. Implementation and enforcement of the

Sedimentation Pollution Control Act, G.S. 113A-50 et seq., by the Department or through a local program developed pursuant to G.S. 113A-54(b), in conjunction with the State's NPDES permit for construction activities, may be used to meet this minimum measure either in whole or in part.

- (5) A program to address post-construction stormwater runoff from new development and redevelopment projects that cumulatively disturb one acre or more, including projects less than one acre that are part of a larger common plan of development or sale, that enter a Regulated Entity's discharge. A Regulated Entity may utilize the Department's model ordinance to fulfill this requirement. A Regulated Entity may also utilize the Department's post construction model practices to fulfill this requirement. A Regulated Entity may also utilize the Department's guidance on scientific and engineering standards for best management practices (BMPs) to develop an alternative program for this minimum measure where a demonstration is made that the alternative program shall provide:
    - (A) Equal or better stormwater management than the model practices;
    - (B) Equal or better protection of the waters of the State than the model practices; and
    - (C) Minimal potential for nuisance conditions.
  - (6) A pollution prevention/good housekeeping program for Regulated Entities that addresses operation and maintenance, including a training component, to prevent or reduce pollutant runoff from the Regulated Entity's operations.
- (e) Besides the state and local programs identified above, Regulated Entities may propose using any existing state and local programs that relate to the minimum measures to meet, either in whole or in part, the requirements of the minimum measures.
  - (f) The six minimum measures must extend through the jurisdictional area, including any extraterritorial jurisdictional area under General Statute G.S. 160A-360, that drains to the MS4. Likewise, the six minimum measures must extend through the area of control of any discharger required to obtain a permit through the petition process.
  - (g) Regulated Entities may implement a more stringent program than set out in the six minimum measures.
  - (h) The Department may require more stringent stormwater management measures on a case-by-case basis where it is determined that additional measures are required to protect water quality and maintain existing and anticipated uses of these waters.
  - (i) The Department may waive the permit requirement pursuant to 40 CFR 122.32(d) or 40 CFR 122.32(e).

**15A NCAC 2H.0154 is added as follows:**

**.0154 IMPLEMENTATION SCHEDULE**

- (a) The public education and outreach minimum measure shall be implemented no later than 12 months from date of permit issuance.
- (b) The post-construction minimum measure must be implemented no later than 24 months from date of permit issuance. A development or redevelopment approval issued by a local authority between the effective date of its NPDES permit and the adoption of its post-construction program will not need to incorporate post-construction requirements but will need to include a sunset date no longer than 12 months from the date of approval which shall cause the approval to expire unless the work authorized by the approval has substantially commenced. An example of substantially commenced for a subdivision is the completion of clearing, grubbing, and rough grading in public access areas such as dedicated right of ways.
- (c) The Department shall include permit conditions that establish schedules for implementation of each minimum measure of the Regulated Entity's stormwater management program based on the submitted application so that the Regulated Entity fully implements its permitted program within five years from permit issuance.

**15A NCAC 2H.0155 is added as follows:**

**.0155 POST-CONSTRUCTION MODEL PRACTICES**

Post-Construction practices are design standards that reduce or eliminate pollutants in stormwater runoff and remain in place beyond the construction phase of development. A Regulated Entity may develop its own comprehensive watershed plan, may use the Department's model ordinance, may design its own Post-Construction practices based on the Department's guidance on scientific and engineering standards for best management practices (BMPs) or it may incorporate this Rule's Post-Construction model practices to fulfill the Post-Construction minimum measure program requirement. If a Regulated Entity chooses an option other than the Post-Construction model practices, the Regulated Entity's program for Post-Construction must meet or exceed the model practices' ability to reduce pollutants in stormwater runoff. The Post-Construction model practices are set out as follows:

- (1) Regulated Entities must require stormwater controls appropriate to a project's level of density as follows:
  - (a) Low Density. A low density project contains no more than 12 percent built-upon area if the project is within one-half mile of and draining to SA waters and no more than 24 percent built-upon area if the project is located elsewhere. Low density projects must use vegetated conveyances to the maximum extent practicable to transport stormwater runoff from the development. On-site stormwater treatment devices such as infiltration areas, bioretention areas, and level spreaders may also be used as added controls for stormwater runoff.

- (b) High Density. A high density project exceeds the low density thresholds of 12 percent built-upon area if the project is within one-half mile of and draining to SA waters and no more than 24 percent built-upon area if the project is located elsewhere. High density projects must use structural stormwater management systems that will control and treat a treatment volume that consists of the first inch of stormwater runoff from the entire project site plus the first inch of runoff from any offsite drainage routed to the structures and that will adequately store and discharge the 1-year, 24-hour storm. The structural stormwater management system must meet the following performance standards and design criteria:
  - (i) Draw down the treatment volume no faster than 48 hours, but no slower than 120 hours.
  - (ii) Discharge the storage volume at a rate equal or less than the pre-development discharge rate for the 1-year, 24-hour storm.
  - (iii) Remove an 85% average annual amount of Total Suspended Solids.
  - (iv) Meet the General Engineering Design Criteria set out in 15A NCAC 2H .1008(c).
- (2) Regulated Entities must require built-upon areas to be located at least 30 feet landward of all perennial and intermittent surface waters. For the purpose of this Rule, a surface water shall be present if the feature is shown on either the most recent version of the soil survey map prepared by the Natural Resources Conservation Service of the United States Department of Agriculture or the most recent version of the 1:24,000 scale (7.5 minute) quadrangle topographic maps prepared by the United States Geologic Survey (USGS). Relief from this requirement may be allowed when surface waters are not present in accordance with the provisions of 15A NCAC 2B .0233 (3)(a). In addition, an Exception to this requirement may be pursued in accordance with Rule 2H.0156.
- (3) Regulated Entities must require a fecal coliform reduction program that controls, to the maximum extent practicable, the sources of fecal coliform. At a minimum, the program shall include the development and implementation of an oversight program to ensure proper operation and maintenance of on-site wastewater treatment systems for domestic wastewater. For municipalities, this program may be coordinated with local county health departments.
- (4) Regulated Entities must require recorded deed restrictions and protective covenants that ensure development activities will maintain the project consistent with approved plans.
- (5) Regulated Entities must require an operation and maintenance plan that ensures the adequate long-term operation of the structural BMP's required by the program. The operation and maintenance plan must require the owner of each structural BMP to submit a maintenance inspection report on each structural BMP annually to the local program. A qualified professional must conduct the inspection.
- (6) Regulated Entities may allow cluster development on a project-by-project basis only if the project meets all of the following criteria:
  - (a) Overall density of the project meets the low density thresholds of no more than 12 percent built-upon area for projects within one half mile of and draining to SA waters and no more than 24 percent built-upon area for all other projects.
  - (b) Built-upon areas, by design and location, minimize stormwater runoff impact to the receiving waters, minimize concentrated stormwater flow, maximize the use of sheet flow through vegetated areas, and maximize the length of flow through vegetated areas.
  - (c) Concentrated density development areas are located in upland areas and, to the maximum extent practicable, away from surface waters and drainageways.
  - (d) Undeveloped areas (areas other than built-upon areas) within the project remain in vegetated or natural state. The area in the vegetated or natural state may be conveyed to a property owners association, a local government, or a conservation organization for preservation as a park or greenway. The area in the vegetated or natural state may also be placed in a permanent conservation or farmland preservation easement. A maintenance agreement for the vegetated or natural area must be filed with the property deed.
  - (e) The project transports stormwater through vegetated conveyances to the maximum extent practicable.
- (7) For areas draining to SA waters, Regulated Entities must:
  - (a) Use BMPs that result in the highest degree of fecal coliform die off and controls to the maximum extent practicable sources of fecal coliform while still incorporating the stormwater controls required by the project's density level.
  - (b) Implement a program to control the sources of fecal coliform to the maximum extent practicable, including a pet waste management component (which may be achieved by revising an existing litter ordinance) and an on-site domestic wastewater treatment systems component to ensure proper operation and maintenance of such systems (which may be coordinated with local county health departments).
  - (c) Prohibit new points of stormwater discharge to SA waters or expansion (increase in the volume of stormwater flow through conveyances or increase in capacity of conveyances) of existing stormwater conveyance systems that drain to SA waters. Any modification or redesign of a stormwater conveyance system within the contributing drainage basin must not increase the net amount or rate of stormwater discharge through existing outfalls to SA waters. Diffuse flow of stormwater at a non-erosive velocity to a

- vegetated buffer or other natural area capable of providing effective infiltration of the runoff from the 1-year, 24-hour storm shall not be considered a direct point of stormwater discharge. Consideration shall be given to soil type, slope, vegetation, and existing hydrology when evaluating infiltration effectiveness.
- (8) For areas draining to Trout Waters, Regulated Entities must:
    - (a) Use BMPs that avoid a sustained increase in the receiving water temperature, while still incorporating the stormwater controls required for the project's density level.
    - (b) Allow on-site stormwater treatment devices such as infiltration areas, bioretention areas, and level spreaders as added controls.
  - (9) For areas draining to Nutrient Sensitive Waters, Regulated Entities must:
    - (a) Use BMPs that reduce nutrient loading, while still incorporating the stormwater controls required for the project's density level. In areas where the Department has approved a Nutrient Sensitive Water Urban Stormwater Management Program, the provisions of that program fulfill the nutrient loading reduction requirement. Nutrient Sensitive Water Urban Stormwater Management Program requirements are found in 15A NCAC 2B .0200.
    - (b) Implement a nutrient application (both inorganic fertilizer and organic nutrients) management program to reduce nutrients entering waters of the State.

**15A NCAC 2H.0156 is added as follows:**

**.0156 EXCEPTIONS**

The Department or an appropriate local authority, pursuant to Article 18 of G.S. 153A or Article 19 of G.S. 160A, may grant exceptions from the 30-foot landward location of built-upon area requirement as well as the deed restrictions and protective covenants requirement.

- (1) An exception may be granted if the application meets the following criteria:
  - (a) There are practical difficulties or unnecessary hardships that prevent compliance with the strict letter of the requirements. Practical difficulties and unnecessary hardships shall be evaluated in accordance with the following criteria:
    - (i) The applicant cannot secure a reasonable return from, or use of, the applicant's property if the applicant complies with the requirements that built-upon area be located 30 feet landward of surface waters and deed restrictions and protective covenants be recorded.
    - (ii) The difficulty or hardship results from application of the requirements that built-upon area be located 30 feet landward of surface waters and deed restrictions and protective covenants be recorded to the property rather than from other factors such as pre-existing deed restrictions or other hardship.
    - (iii) The difficulty or hardship is due to the physical nature of the applicant's property, such as its size, shape, or topography, which is different from that of neighboring properties.
    - (iv) The applicant did not cause the difficulty or hardship by knowingly or unknowingly violating the six minimum measures' requirements.
    - (v) The applicant did not purchase the property after November 1, 2002 (the effective date of the temporary rule incorporating similar exceptions language), and then request an exception.
    - (vi) The difficulty or hardship is unique to the applicant's property, rather than the result of conditions that are widespread. If other properties are equally subject to the hardship created in the restriction, then granting an exception would be a special privilege denied to others, and would not promote equal justice.
  - (b) The exception is in harmony with the general purpose and intent of this Rule and preserves its spirit.
  - (c) In granting the exception, the public safety and welfare have been assured, water quality has been protected, and substantial justice has been done. Merely proving that the exception would permit a greater profit from the property shall not be considered adequate justification for an exception. Moreover, the Division or delegated local authority shall consider whether the exception application presents the minimum possible deviation from the terms of the stormwater control requirements that will still allow reasonable use of the property.
- (2) The Department or appropriate local authority may impose conditions and safeguards, upon any exception it grants, to support the purpose, spirit and intent of the stormwater control requirements.
- (3) The Department or appropriate local authority may impose conditions and safeguards, upon any exception it grants, to protect water quality standards.
- (4) Local authorities must document the exception procedure and submit an annual report on all exception proceedings.

- (5) Appeals of the Department's exception decisions must be filed with the Office of Administrative Hearings. Appeals of a local authority's exception decisions must be made to the appropriate Board of Adjustment or other appropriate local governing body, under G.S. 160A-388 or G.S. 153A-345.
- (6) Exceptions may be granted automatically in the following instances:
  - (a) When there is a lack of practical alternatives for a road crossing, railroad crossing, bridge, airport facility, or utility crossing as long as it is located, designed, constructed, and maintained to minimize disturbance, provide maximum nutrient removal, protect against erosion and sedimentation, have the least adverse effects on aquatic life and habitat, and protect water quality to the maximum extent practicable through the use of BMPs.
  - (b) When there is a lack of practical alternatives for a stormwater management facility, stormwater management pond, or utility (such as water, sewer or gas) construction and maintenance corridor as long as it is located 15 feet landward of all perennial and intermittent surface waters and as long as it is located, designed, constructed, and maintained to minimize disturbance, provide maximum nutrient removal, protect against erosion and sedimentation, have the least adverse effects on aquatic life and habitat, and protect water quality to the maximum extent practicable through the use of BMPs.
  - (c) A lack of practical alternatives may be shown by demonstrating that, considering the potential for a reduction in size, configuration or density of the proposed activity and all alternative designs, the basic project purpose cannot be practically accomplished in a manner which would avoid or result in less adverse impact to surface waters.

*History Note: Authority G.S. 143-214.1; 143-214.7; 143-215.1; 143-215.3(a)(1);  
Eff. November 1, 1986;  
Amended Eff. August 3, 1992;  
Temporary Amendment Eff. November 1, 2002  
Amended Eff. August 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>.*

**OFFICE OF ADMINISTRATIVE HEARINGS**

**Chief Administrative Law Judge**  
JULIAN MANN, III

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

**ADMINISTRATIVE LAW JUDGES**

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

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

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
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A list of Child Support Decisions may be obtained by accessing the OAH Website: [www.ncoah.com/decisions](http://www.ncoah.com/decisions).

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1 – Combined Cases

STATE OF NORTH CAROLINA  
COUNTY OF HENDERSON

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
03 DHR 1253

THOMAS REITER, a minor, by his mother and legal guardian, Kathryn Reiter,  
Petitioner,  
v.  
N. C. DEPARTMENT OF HEALTH AND HUMAN SERVICES,  
Respondent.

DECISION UPON REMAND

This cause coming on before the undersigned administrative law judge following remand from Wake County Superior Court, pursuant to which mandate the Office of Administrative Hearings was directed to hear and consider evidence on a specific issue and enter a ruling, and having conducted the hearing required by the Wake County Superior Court, the undersigned Judge makes the following findings of fact and enters its Decision in favor of Petitioner and against Respondent as further set forth below.

Procedural History

1. On July 18, 2003, Petitioner Thomas Reiter (“Petitioner”) filed his Petition for a Contested Case Hearing (“Petition”). Petitioner alleged that he was a Medicaid-eligible child and that Respondent N.C. Department of Health and Human Services (“DHHS” or “Respondent”) was denying him medically-necessary mental health services.

2. On November 4, 2003, Respondent filed a motion to dismiss, contending that Petitioner had not complained of any adverse action by DHHS. On January 13, 2003, the undersigned denied the motion to dismiss.

3. On March 2, 2004, Petitioner filed a Motion for Summary Judgment (“Motion”). The Motion was supported by affidavits from Petitioner’s mother, Kathryn Reiter, and from Petitioner’s treating physician, Dr. Patrick L. Lillard, M.D. These affidavits stated that Respondent was not providing certain services that were medically necessary to Petitioner, namely community-based crisis intervention and stabilization services to be available twenty-four hours a day, seven days a week, and trained in-home crisis response team for transportation to a crisis stabilization center.

4. On March 15, 2004, Respondent filed a Response to Petitioner’s Motion for Summary Judgment (“Response”). The Response was supported by an affidavit from Louise Yelton. The Response and Ms. Yelton’s affidavit conceded that services Dr. Lillard had stated were medically necessary for Petitioner were not available. Respondent did not offer any evidence rebutting Dr. Lillard’s affidavit that such services were medically necessary for Petitioner.

5. On March 26, 2004, finding that there was no dispute of material facts, the undersigned entered an Order Allowing Petitioner’s Motion for Summary Judgment. That order recited the following facts:

- a. Petitioner is a Medicaid-eligible child who is 15 years old.
- b. Petitioner’s treating psychiatrist, Patrick L. Lillard, M.D., is a qualified psychiatrist who began treating Petitioner on May 7, 2001. Dr. Lillard has had 23 subsequent contacts with Petitioner, the last one occurring on January 22, 2004.
- c. Dr. Lillard has diagnosed Petitioner with Bipolar Disorder, Attention Deficit Hyperactivity Disorder, Post Traumatic Stress Disorder, Central Auditory Processing Disorder, and possible Asperger’s form of Pervasive Developmental Disorder.



- d. Relevant to this case, Dr. Lillard has prescribed as medically necessary services the following: community-based crisis intervention and stabilization services to be available twenty-four hours a day, seven days a week, and a trained, in-home crisis response team for transportation to a crisis stabilization center.
- e. Currently, the only crisis intervention and stabilization services available to Petitioner are hot-line telephone counseling services and the option of calling the police to transport Petitioner to a hospital in accordance with North Carolina hospital commitment procedures.
- f. According to Dr. Lillard, crisis intervention and stabilization services are of the utmost importance because, *inter alia*, they act to prevent Petitioner from hurting himself or others when he becomes aggressive. The telephone hotline service and crisis services included contact with a mental health worker on call through Mountain Laurel, and transport to the hospital for evaluation for further care and treatment, which can include involuntary commitment.
- g. Respondent is the single state agency responsible for administration of the federal Medicaid program in North Carolina and supervising administration of the plan by local political subdivisions. As such, this court has jurisdiction over this Medicaid appeal.

6. Accordingly, the undersigned ordered DHHS to ensure the immediate availability of a trained, in-home mental health crisis intervention team, available whenever and wherever Petitioner was in a mental health crisis. The order also required the team to be trained in appropriate intervention techniques and required DHHS to ensure that a trained team would be available to provide Petitioner transportation to a crisis stabilization center.

7. Michael Mosely, Director of the North Carolina Division of Mental Health, Developmental Disabilities and Substance Abuse Services, a division of DHHS, was designated as the agency decision-maker to review the order and render a final agency decision on behalf of DHHS. On July 6, 2004, Respondent's Final Agency Determination was issued. Respondent rejected the finding of fact set out above under paragraph 5(e) relating to the crisis intervention services available to Petitioner. Respondent took judicial notice of the fact that it is the single state agency responsible for administration of the federal Medicaid program in North Carolina.

8. Respondent concluded that there were disputes of fact and law as to (a) whether the requested services for Petitioner are medically necessary, (b) whether the law obligates DHHS to provide those services, and (c) whether DHHS has denied Petitioner those services.

9. Petitioner filed a timely Petition for Judicial Review on August 4, 2004, and filed an Amended Petition for Judicial Review on August 10, 2004.

10. On January 4, 2005, the Wake County Superior Court, Judge Howard Manning presiding, entered an order granting in part Petitioner's Motion for reversal of Respondent's Final Agency Decision and remanding in part for evidentiary hearing. The Superior Court's order stated that the undersigned's findings numbered above as 5(a) – 5(d) were undisputed. Accordingly, the Superior Court entered summary judgment for Petitioner that services sought are medically necessary for Petitioner.

11. The Superior Court remanded the matter to the undersigned administrative law judge "for further hearing, taking of evidence, and ruling on the narrow issue of whether the services being offered or provided by Respondent to Petitioner are adequate to meet the Medicaid service definition of crisis intervention and stabilization and transportation as further prescribed by the treating physician."

#### **Evidentiary Hearing**

12. On April 15, 2005, the undersigned ALJ presided over an evidentiary hearing pursuant to the Superior Court's remand order. Respondent presented testimony from Jonathan McDuffie, Petitioner's clinical case manager. Mr. McDuffie testified that the current crisis plan in effect for Petitioner provides that if he had an acute crisis outside of business hours, the only resource available is for the person concerned (for instance, Petitioner's mother) to call a "hot line" staffed by individuals who are not mental health care professionals. These individuals could then refer the caller to a mental health care professional who can have a phone consultation with the caller. If that does not stabilize Petitioner, the only recourse is to have law enforcement manage the crisis. Mr. McDuffie testified that law enforcement officers were not authorized to transport Petitioner anywhere unless there was an involuntary commitment petition filed. Mr. McDuffie stated that Petitioner needed to have access to a mobile crisis unit that could perform a face-to-face assessment of Petitioner and could treat Petitioner when he was in crisis. Mr. McDuffie testified that Respondent was not

making such a mobile crisis care team available to Petitioner. The services described by Mr. McDuffie are not different in any important respect from those available to Petitioner at the time of the summary judgment hearing, as outlined in Ms. Yealton's affidavit.

13. Mr. McDuffie further testified that there are three types of services that are necessary for Petitioner and not currently available to him under the Medicaid plan being administered by DHHS: a mobile crisis unit, a "Level 2" specialized therapeutic foster care service, and a facility-based crisis unit. He testified that those services were at the heart of Dr. Lillard's prescription for crisis stabilization and intervention services for Petitioner.

14. In conclusion, Mr. McDuffie testified that the plan available to Petitioner for crisis care was "a very tenuous plan at best."

15. Respondent presented testimony from Mr. Vincent Newton, the Director of Community and Consumer Relations for Western Highlands Network. Mr. Newton testified as to Respondent's efforts to provide crisis care services in Petitioner's community. Mr. Newton testified as to crisis care services that were being offered or being developed for other counties in western North Carolina. Respondent did not offer any testimony or other evidence explaining why these services are not already available to Petitioner. Mr. Newton testified that a facility called the Balsam Center is not yet ready to offer crisis stabilization services for adolescents. (In the affidavit submitted by Respondent in March of 2004, Ms. Yelton stated that the Balsam Center expected to offer such services by July of 2004.)

16. Mr. Newton testified that it is traumatic for a mental health patient to be transported by police car.

17. Petitioner presented the testimony of his treating physician, Dr. Lillard. Dr. Lillard testified that he had been treating Petitioner since May of 2001 and that during that time he had seen Petitioner approximately three dozen times. He explained that Petitioner's mental health disorder blends into a constellation of behaviors that result in Petitioner having difficulty tolerating frustration, which in turn can escalate into behavior that is threatening and potentially violent.

18. As a result, Dr. Lillard testified, Petitioner needs high quality crisis stabilization services involving a facility with a staff trained to de-escalate and stabilize the behavior. This would include a face-to-face assessment and the availability of being seen by a psychiatrist within a reasonable time thereafter, along with transport to a facility where stabilization and a psychiatric evaluation could be carried out. He testified that transport in a law enforcement vehicle was unacceptable. Dr. Lillard testified that in his experience working with mental health patients in crisis, it was not necessary to call for police assistance where a trained mobile unit was available.

19. Dr. Lillard stated that having Petitioner taken by police car to a hospital for involuntary commitment was contraindicated for his condition.

20. Dr. Lillard testified that the plans Mr. Newton described for crisis care would not meet Petitioner's medical needs. He testified that he believed the staffing resources already existed in Petitioner's community to provide him with the crisis care services that are medically necessary to him.

21. With the consent of Respondent, Petitioner presented the testimony of Carmen Hooker Odom, Secretary of DHHS, via excerpts from her deposition testimony. Secretary Odom testified that crisis stabilization and intervention services are core and essential mental health care services and were a fundamental part of DHHS's mental health reform efforts. The Secretary agreed that a crisis intervention team as described by Dr. Lillard was an appropriate service. She conceded that DHHS was not providing crisis intervention services in every community, although she was not informed as to what services were or were not available in Petitioner's community. The Secretary also conceded that the available services as described in Ms. Yelton's March 9, 2004 affidavit did not provide the type of care a crisis stabilization team would provide and did not appear to comport with services Dr. Lillard deemed medically necessary for Petitioner. Secretary Odom testified that the services prescribed by Dr. Lillard as medically necessary for Petitioner were essentially the same as the new Medicaid service definition of crisis stabilization and intervention services that DHHS expected to implement.

**FINDINGS OF FACT**

22. Based on the testimony and evidence received on April 15, 2005, the undersigned finds that the services being offered or provided by Respondent to Petitioner are not adequate to meet the Medicaid service definition of crisis intervention and stabilization.

23. The undersigned further finds that the services being offered or provided by Respondent to Petitioner are not adequate to meet the services that Petitioner's treating physician has found to be medically necessary for his care.

24. Petitioner was fifteen years old at the time his Petition was filed. He is now more than 17. The undersigned finds that the lack of an adequate crisis plan for Petitioner places him at risk of being restrained and transported by law enforcement for his own physical safety and the safety of others, an event which would be damaging to him from a mental health standpoint. During the two years that this case has been pending, DHHS has not had a crisis plan in place that would avert this. Petitioner's treating physician has stated that a trained mobile crisis unit and facility-based crisis stabilization are medically necessary to Petitioner. A mobile crisis unit would be trained to stabilize a crisis situation if possible, and safely transport Petitioner to a crisis care facility if necessary. The undersigned finds that DHHS has offered no evidence as to why these services are not currently offered to Petitioner.

25. The undersigned's prior findings of fact, recited above in paragraphs 5(a) – 5(d) & 5(f), were deemed proven by Petitioner in the Superior Court's January 5, 2005 order, and are incorporated into this order.

**CONCLUSIONS OF LAW**

1. As a matter of law, the undersigned concludes that Respondent DHHS is the single state agency responsible for the administration of the federal Medicaid program in North Carolina. Respondent is charged under federal and state law with supervising the implementation of the state's Medicaid plan by local subdivisions such as the ones providing services to Petitioner.

2. As a matter of law, the undersigned concludes that Petitioner is being denied medically-necessary services for crisis intervention and stabilization.

THEREFORE, IT IS ORDERED that Respondent ensure the immediate availability to Petitioner of (a) a crisis response team trained to (i) attempt to stabilize him whenever and wherever he is in crisis, (ii) assess and attend to Petitioner, and (iii) ensure that Petitioner's aggressive or violent behaviors are addressed in a manner safe to Petitioner and others, (b) a trained response unit that is able to provide Petitioner safe and appropriate transportation to a crisis stabilization center, and (c) facility-based crisis stabilization care that includes assessment by a trained psychiatrist within a reasonable time following the beginning of the crisis.

IT IS FURTHER ORDERED that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with North Carolina General Statute 150B-36(b).

**NOTICE**

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

The agency is required by G.S. 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.

The agency that will make the final decision in this contested case is the North Carolina Department of Health and Human Services

This the 24<sup>th</sup> day of June 2005.

\_\_\_\_\_  
Beecher R. Gray  
Administrative Law Judge

STATE OF NORTH CAROLINA  
COUNTY OF BUNCOMBE

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
04 DOJ 1283

PHILLIP WILLIAM ENGLE )  
Petitioner )  
v. )  
NORTH CAROLINA SHERIFFS' EDUCATION )  
AND TRAINING STANDARDS COMMISSION )  
Respondent )

PROPOSAL FOR DECISION

On March 8, 2005, Chief Administrative Law Judge Julian Mann, III heard this contested case in the Buncombe County Courthouse, Asheville, North Carolina.

APPEARANCES

Petitioner: Sarah Patterson Bryson, Roberts & Stevens P.A.  
Attorneys at Law

Respondent: John J. Aldridge, III, Special Deputy Attorney General

ISSUES

Did Petitioner knowingly make a material misrepresentation of information required for certification as a justice officer and is the Petitioner convicted of a combination of four or more Class A and B misdemeanors?

Based upon a preponderance of the admissible evidence, the undersigned makes the following:

FINDINGS OF FACT

1. The Petitioner, Phillip William Engle, is a resident of Buncombe County, North Carolina, and is presently employed by the Buncombe County Sheriff's Department as a Detention Officer (hereinafter "Petitioner").
2. The Respondent is the North Carolina Sheriffs' Education and Training Standards Commission (hereinafter "Commission").
3. Petitioner appeals from a Notification of Probable Cause to Deny Justice Officer's Certification from the Probable Cause Committee of the Commission.
4. The finding of probable cause for justice officer's certification by the Probable Cause Committee of the Commission was based upon three provisions of Chapter 10B of Title 12 of the North Carolina Administrative Code 12 NCAC 10B .0204 (c)(1), (2) and 12 NCAC 10B .0204(d)(6).
5. The basis of the finding of probable cause by the Probable Cause Committee of the Commission was the purported omission of a complete criminal history record from the June 20, 1998, Weaverville Police Department Report of Appointment/Application for Certification, July 31, 1997, Fletcher Police Department Report of Appointment/Application for Certification, May 9, 1997, Fletcher Police Department Personal History Statement and November 10, 1997, Buncombe County Sheriff's Office Personal History Statement by Petitioner.
6. The Commission alleges that Petitioner failed to include in his criminal history record misdemeanor convictions of Petitioner for worthless checks in 1985 and 1986 and a misdemeanor charge of Assault on a Female in 1985.

7. In 1984 and 1985 when Petitioner was purportedly charged with misdemeanor offenses of issuing worthless checks, Petitioner was 17 and 18 years of age, enlisted in the United States Marine Corp and stationed or in training at various bases and on ships. During that same time period, Petitioner was separated from his wife in place or from their marital relationship.

8. The only evidence of convictions of the Petitioner for worthless checks are a computer printout from the Onslow County Office of the Clerk of Court and a certified copy of a Criminal Records Check from the Onslow County Office of the Clerk of Court. Criminal records in Onslow County are destroyed after seven years and no records exist regarding any charges filed against the Petitioner in Onslow County in 1984, 1985 or 1986.

9. At the time Petitioner completed the applications and personal history statements for the Town of Weaverville, the Town of Fletcher and for Buncombe County Sheriff's Department in 1997 and 1998, he did not recall the alleged worthless check charges which arose in Onslow County in 1984 and 1985. Because of the Commission's failure to produce copies of the Onslow County criminal records and the passage of approximately 20 years of time, Petitioner did not knowingly make a material misrepresentation nor knowingly and designedly attempt to obtain certification by omitting that information from his application and/or personal history statement as to the worthless check charges. After Buncombe County Sheriff's Department performed a criminal records check throughout all of the State of North Carolina for a recent application, Petitioner recalled having insufficient funds in his bank account in 1984 and 1985.

10. Petitioner recalls that his superior officer in the United States Marine Corps contacted him about the checks and that he appeared before a magistrate in Onslow County and made restitution for the checks, but he does not recall a plea of guilty on any of the worthless check charges.

11. On January 14, 2004, Steven R. Hyer, Certification Specialist with the Commission, prepared a report to Mike McLaughlin, Field Investigator with the Commission regarding the review of Petitioner's certification files. That report included eight individual charges of worthless checks attributed to Petitioner in 1984 and 1985 and the charge of Assault on a Female, dismissed by the complainant in 1985. That report included inaccurate information with regard to the amounts of the worthless check charges, including a mistake with two decimal points to the detriment of the Petitioner. One check was reported to be in the amount of \$246, but was actually a check in the amount of \$2.46 and another check in the amount of \$2,509, was actually reported as a check in the amount of \$25.09. Further, that report concludes that "(u)nless we can establish sufficient evidence in support of the assault charge, this applicant may be certifiable."

12. In a report dated January 28, 2004, from Mike McLaughlan to Steven Hyer regarding the Phillip Engle investigation summary, Mr. McLaughlin reported that he spoke with a representative of the Onslow County Clerk of Court's Office who stated that they did not have any records on file for Phillip Engle as those records are destroyed seven years after disposition and could only provide a computer printout of the charges with the judgment. He further stated that he had been unable to find any additional information regarding the charges against Philip Engle.

13. Buncombe County criminal history record checks submitted in furtherance of the Buncombe County and Madison County applications, dated July 21, 2003 and August 20, 2003, again reflected no criminal record of the Petitioner for Buncombe County. However, when Ms. Buckner completed a statewide criminal history record check of the Petitioner through the Administrative Office of the Courts, this record purportedly indicated that the Petitioner had eight charges and convictions for simple worthless checks in Onslow County, North Carolina. This statewide criminal history record check also recorded that the Petitioner had previously been charged in Onslow County with the criminal offense of Assault on a Female, where the complainant was the Petitioner's wife, Teresa Engle, and that this charge was voluntarily dismissed.

14. One of the Administrative Code provisions on which the Probable Cause Committee of the Commission relied to find that the Petitioner's certification should be revoked is 12 NCAC 10B .0204(d)(6), which allows revocation of a certification where the applicant or certified officer has committed or been convicted of any combination of four or more crimes or unlawful acts, as further defined in that Administrative Code provision.

15. At the time the purported worthless check charges were disposed of in 1984 and 1985, the authority of the magistrate in state court in North Carolina was limited by N. C. Gen. Stat. sec. 7A-273 to hearing and enter judgments as to worthless check cases when the amount of the check was \$500 or less and the warrant did not charge a fourth or subsequent violation of the worthless check statute, being G.S. 14-107.

16. In reviewing the list of purported worthless check charges, there were eight alleged charges, all with alleged guilty pleas entered before a magistrate. Based upon the limitation of authority given to the magistrate by the statute, the eight charges could not be found to constitute eight separate entries of guilty but could only constitute three or fewer entries of guilty by the magistrate.

17. The course orientation information provided by the Commission as Exhibit 1 includes on page 11, the "Certification Prerequisites for Law Enforcement Officers." That information provides that an applicant is only ineligible for certification as a law enforcement officer if the officer has committed or been convicted of four or more crimes or unlawful acts for which the punishment could have been imprisonment for less than six months and the last conviction date occurred more than two years prior to the date of application for certification. This was the information furnished to Petitioner at the time of his enrollment in the course for basic law enforcement.

18. At the time of the entries of guilty for the worthless check charges in 1985 and 1986, the maximum time for imprisonment was not more than thirty days. In addition, the "last conviction" when Petitioner purportedly entered a guilty plea, occurred on April 30, 1986, substantially more than two years prior to the date of the first application Petitioner made for certification to the Town of Fletcher in his Personal History Statement of May 9, 1997, and Application for Certification on July 31, 1997.

19. When Petitioner applied for certification to the Buncombe County Sheriff's Department in 1997, the Sheriff's Standard Division for the Commission did not hold up the certification to request information from Onslow County; provided, however, the Sheriff's Standards Division did hold up certification to review records of the Petitioner's residence in Virginia. No criminal records for the Petitioner were found in Virginia.

20. At the time of applications for certification and at the times of making personal history statements to the Town of Fletcher, Town of Weaverville and Buncombe County Sheriff's Department, Petitioner made full disclosure of all of his addresses, including addresses in Onslow County, North Carolina.

21. Criminal record checks performed by the Office of the Clerk of Court for Buncombe County from 1987 to November 10, 1997, from 1993 to July 21, 2003 and from 1993 to August 20, 2003 all showed that no criminal records were found for the Petitioner.

22. Petitioner was appointed by the Commission to the office of Deputy Sheriff for the Buncombe County Sheriff's Department on November 25, 1997.

23. Petitioner was appointed by the Commission as a part-time Deputy Sheriff and a full-time Detention Officer for the Buncombe County Sheriff's Department on August 20, 2003 and August 25, 2003, respectively.

24. Petitioner was appointed by the Commission as a part-time Deputy Sheriff for Madison County Sheriff's Department on July 30, 2003.

25. Petitioner's supervisors, including Captain Matayabas, Lt. Honeycutt and Sgt. Rayment, testified that Petitioner has performed successfully his duties in the Buncombe County Sheriff's Department and did not know of any instance where he falsified any reports he had made in his positions with the Buncombe County Sheriff's Department and were satisfied with his job performance. (*See also*, Petitioner's Exhibits 1, 2, & 3).

26. The Petitioner has received a GED in 1983 and a high school diploma in 1984. He is currently working on his associate's degree and has a grade point average of 3.89. He acknowledged receiving the course orientation block of instruction in basic law enforcement training. Since 1997, while serving as a law enforcement officer, Petitioner has served numerous criminal summons and warrants on individuals for worthless checks.

27. The Petitioner testified to the circumstances surrounding the Assault on a Female Charge, as referenced in 85 CR 16108. Petitioner's wife, Teresa, falsely accused him of assaulting her. The Petitioner acknowledged that he was charged with Assault on a Female on or about September 14, 1985. Upon learning of this criminal charge against him, Petitioner reported this charge to his commanding officer. The Petitioner remembered that, subsequent to being charged with this offense, he went with his wife to court on or about September 24, 1985 and, once in court, his wife went into a closed room with an assistant district attorney. Petitioner waited outside. After his wife had finished her meeting with the assistant district attorney, the Petitioner recalled that a representative from the district attorney's office came out and informed him that the charge had been dismissed. He reported this disposition to his commanding officer. The Petitioner stated that he was angry at his wife for bringing this Assault on a Female Charge against him.

28. The Petitioner remains married to Teresa Lynn Engle and they have one daughter. They have one grandson who is 20 months old. The Petitioner works off duty in a security position at Engle's Grocery Store.

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

**CONCLUSIONS OF LAW**

1. The parties properly are before the undersigned Administrative Law Judge and jurisdiction and venue are proper.
2. The Petitioner did not knowingly make a material misrepresentation of information required for certification by failing to disclose the purported eight worthless check charges and convictions from Onslow County but did fail to report his charge of Assault on a Female, from his 1997 Fletcher Police Department Report of Appointment and Personal History Statement forms; his 1997 Personal History Statement form for the Buncombe County Sheriff's Office; and his 1998 Weaverville Police Department Report of Appointment form, in violation of 12 NCAC 10B .0204(c)(1).
3. The Respondent has failed to carry its burden of proof by the preponderance of the evidence that Petitioner was convicted of eight worthless check offenses pursuant to N.C.G.S. § 14-107, or that the fourth and subsequent worthless check convictions constituted a Class B misdemeanor as defined in 12 NCAC 10B .0103(10)(b). At the time the worthless check charges were allegedly disposed of in 1984 and 1985, the authority of the magistrate in the state court in North Carolina was limited by N. C. Gen. Stat. sec. 7A-273 to hearing and enter judgments as to worthless check cases when the amount of the check was \$500 or less and the warrant did not charge a fourth or subsequent violation of the worthless check statute, being N. C. Gen. Stat. sec. 14-107.
4. One of the Administrative Code provisions on which the Probable Cause Committee of the Commission relied to find that the Petitioner's certification should be revoked is 12 NCAC 10B .0204(d)(6), which allows revocation of a certification only where the applicant or certified officer has committed or been convicted of any combination of four or more crimes or unlawful acts, as further defined in that Administrative Code provision.
5. The Respondent's proposed revocation of the Petitioner's Justice Officer Certification is supported by the preponderance of the evidence by his failure to disclose a charge of Assault on a Female which all the evidence demonstrates was a spurious charge and subsequently dismissed. Petitioner, based upon the evidence and by observation of the undersigned, has had a commendable history in law enforcement. His law enforcement certification position supports his family. Petitioner is a man committed to his faith and to his community. The consequences of the penalty for failing to disclose this spurious charge do not in the undersigned's estimation adversely reflect on his honesty or integrity and the undersigned urges Respondent to mitigate any adverse penalty against Petitioner.

**PROPOSAL FOR DECISION**

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned proposes that Respondent enter a lesser sanction than denial, revocation, or lengthy suspension for making a knowing material misrepresentation of information required for certification by failing to disclose an Assault on a Female charge from his previous police department and sheriff's office certification forms.

**NOTICE**

The Agency making the Final Decision in this contested case is required to give each party an opportunity to file Exceptions to this Proposal for Decision, to submit Proposed Findings of Fact and to present oral and written arguments to the Agency. N.C.G.S. § 150B-40(e).

The Agency that will make the Final Decision in this contested case is the North Carolina Sheriffs' Education and Training Standards Commission.

This 28<sup>th</sup> day of June, 2005.

\_\_\_\_\_  
Julian Mann, III  
Chief Administrative Law Judge