

NORTH CAROLINA

IN THIS ISSUE

REGISTER



Volume 20, Issue 06
Pages 297 - 425

September 15, 2005

This issue contains documents officially filed through August 25, 2005.

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

Julian Mann III, Director
Camille Winston, Deputy Director
Molly Masich, Director of APA Services
Dana Sholes, Publications Coordinator
Linda Dupree, Editorial Assistant
Julie Brincefield, Editorial Assistant

I. IN ADDITION	
Notice of Intent to Redevelop A Brownfields Property	
Camden, LLC	298
Carlton Development, LLC	299
EMC-Public Hearing Cancellation	297
Voting Rights Letters	300 - 301

II. PROPOSED RULES	
Commerce	302 - 304
Environment and Natural Resources	
Wildlife Resources Commission	312 - 313
Health and Human Services	
Mental Health, Developmental Disabilities	
And Substance Abuse Services	304 - 306
Justice	
Criminal Justice Educ & Training Stds Comm	306 - 312
Licensing Boards	
General Contractors	313 - 317
Pharmacy	317 - 324

III. APPROVED RULES	325 -384
Environment and Natural Resources	
Marine Fisheries Commission	
Soil & Water Conservation Commission	
Health and Human Services	
Aging, Division of	
Medical Assistance	
Social Services Commission	
Insurance	
Actuarial General Provisions	
Justice	
Criminal Justice Educ. & Training Standards Commission	
Licensing Boards	
Psychology, Board of	
Social Work Certification & Licensure Board	
Speech & Language Pathologists & Audiologists	

IV. CONTESTED CASE DECISIONS	
Index to ALJ Decisions	385 - 388
Text of Selected Decisions	
04 EHR 1151	389 - 397
04 LLB 2169	398 - 403
04 OSP 2081	404 - 410
05 DHR 0159	411 - 425

For the CUMULATIVE INDEX to the NC Register go to:
<http://reports.oah.state.nc.us/cumulativeIndex.pl>

North Carolina Register is published semi-monthly for \$195 per year by the Office of Administrative Hearings, 424 North Blount Street, Raleigh, NC 27601. *North Carolina Register* (ISSN 15200604) to mail at Periodicals Rates is paid at Raleigh, NC. POSTMASTER: Send Address changes to the *North Carolina Register*, 6714 Mail Service Center, Raleigh, NC 27699-6714.

NORTH CAROLINA ADMINISTRATIVE CODE CLASSIFICATION SYSTEM

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

NCAC TITLES		TITLE 21 LICENSING BOARDS	TITLE 24 INDEPENDENT AGENCIES
1	ADMINISTRATION	1 Acupuncture	1 Housing Finance
2	AGRICULTURE & CONSUMER SERVICES	2 Architecture	2 Agricultural Finance Authority
3	AUDITOR	3 Athletic Trainer Examiners	3 Safety & Health Review Board
4	COMMERCE	4 Auctioneers	4 Reserved
5	CORRECTION	6 Barber Examiners	5 State Health Plan Purchasing Alliance Board
6	COUNCIL OF STATE	8 Certified Public Accountant Examiners	
7	CULTURAL RESOURCES	10 Chiropractic Examiners	
8	ELECTIONS	11 Employee Assistance Professionals	
9	GOVERNOR	12 General Contractors	
10A	HEALTH AND HUMAN SERVICES	14 Cosmetic Art Examiners	
11	INSURANCE	16 Dental Examiners	
12	JUSTICE	17 Dietetics/Nutrition	
13	LABOR	18 Electrical Contractors	
14A	CRIME CONTROL & PUBLIC SAFETY	19 Electrolysis	
15A	ENVIRONMENT & NATURAL RESOURCES	20 Foresters	
16	PUBLIC EDUCATION	21 Geologists	
17	REVENUE	22 Hearing Aid Dealers and Fitters	
18	SECRETARY OF STATE	25 Interpreter/Transliterator	
19A	TRANSPORTATION	26 Landscape Architects	
20	TREASURER	28 Landscape Contractors	
21*	OCCUPATIONAL LICENSING BOARDS	29 Locksmith Licensing	
22	ADMINISTRATIVE PROCEDURES (REPEALED)	30 Massage & Bodywork Therapy	
23	COMMUNITY COLLEGES	31 Marital and Family Therapy	
24*	INDEPENDENT AGENCIES	32 Medical Examiners	
25	STATE PERSONNEL	33 Midwifery Joint Committee	
26	ADMINISTRATIVE HEARINGS	34 Funeral Service	
27	NC STATE BAR	36 Nursing	
28	JUVENILE JUSTICE AND DELINQUENCY PREVENTION	37 Nursing Home Administrators	
		38 Occupational Therapists	
		40 Opticians	
		42 Optometry	
		44 Osteopathic Examination (Repealed)	
		45 Pastoral Counselors, Fee-Based Practicing	
		46 Pharmacy	
		48 Physical Therapy Examiners	
		50 Plumbing, Heating & Fire Sprinkler Contractors	
		52 Podiatry Examiners	
		53 Professional Counselors	
		54 Psychology	
		56 Professional Engineers & Land Surveyors	
		57 Real Estate Appraisal	
		58 Real Estate Commission	
		60 Refrigeration Examiners	
		61 Respiratory Care	
		62 Sanitarian Examiners	
		63 Social Work Certification	
		64 Speech & Language Pathologists & Audiologists	
		65 Therapeutic Recreation Certification	
		66 Veterinary Medical	
		68 Substance Abuse Professionals	
		69 Soil Scientists	

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

NORTH CAROLINA REGISTER
 Publication Schedule for January 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 th 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.

Note from the Codifier: This Section contains public notices that are required to be published in the Register or have been approved by the Codifier of Rules for publication.

ENVIRONMENTAL MANAGEMENT COMMISSION

NOTICE OF PUBLIC HEARING CANCELLATION

Due to current restrictions on State employee travel, the public hearing for the proposed reclassification of the Uwharrie River to Class B (Primary Recreation), which was scheduled to occur on September 15th, 2005, has been canceled. This hearing and the proposed amendment of Rule 15A NCAC 02B .0309 (Yadkin-Pee Dee River), which was designed to reflect the proposed reclassification, were noticed in pages 183-186 of the August 15th, 2005 edition of this Register.

**SUMMARY OF NOTICE OF
INTENT TO REDEVELOP A BROWNFIELDS PROPERTY
HMV Camden, LLC**

Pursuant to N.C.G.S. § 130A-310.34, HMV Camden, LLC has filed with the North Carolina Department of Environment and Natural Resources (“DENR”) a Notice of Intent to Redevelop a Brownfields Property (“Property”) in Charlotte, Mecklenburg County, North Carolina. The Property consists of 0.25 acres and is located at 1600 Camden Road. Environmental contamination exists on the Property in groundwater. HMV Camden, LLC has already constructed commercial office space and an asphalt parking lot there, and has committed itself to allow no other uses of the Property. The Notice of Intent to Redevelop a Brownfields Property includes: (1) a proposed Brownfields Agreement between DENR and HMV Camden, LLC, which in turn includes (a) a map showing the location of the Property, (b) a description of the contaminants involved and their concentrations in the media of the Property, (c) the above-stated description of the intended future use of the Property, and (d) proposed investigation and remediation; and (2) a proposed Notice of Brownfields Property prepared in accordance with G.S. 130A-310.35.

The full Notice of Intent to Redevelop a Brownfields Property may be reviewed at the Public Library of Charlotte & Mecklenburg County, 310 N. Tryon St., Charlotte, NC 28202 or at the offices of the North Carolina Brownfields Program, 401 Oberlin Rd., Suite 150, Raleigh, NC 27605 by contacting Shirley Liggins at that address, at shirley.liggins@ncmail.net, or at (919) 508-8411. DENR will provide auxiliary aids and services for persons with disabilities who wish to review the documents at the Raleigh location.

Written public comments may be submitted to DENR within 60 days after the date this Notice is published in a newspaper of general circulation serving the area in which the brownfields property is located, or in the North Carolina Register, whichever is later. Written requests for a public meeting may be submitted to DENR within 30 days after the period for written public comments begins. Thus, if HMV Camden, LLC, as it plans, publishes this Summary in the North Carolina Register after it publishes the Summary in a newspaper of general circulation serving the area in which the brownfields property is located, and if it effects publication of this Summary in the North Carolina Register on the date it expects to do so, the periods for submitting written requests for a public meeting regarding this project and for submitting written public comments will commence on September 15, 2005. All such comments and requests should be addressed as follows:

Mr. Bruce Nicholson
Brownfields Program Manager
Division of Waste Management
NC Department of Environment and Natural Resources
401 Oberlin Road, Suite 150
Raleigh, North Carolina 27605

**SUMMARY OF NOTICE OF
INTENT TO REDEVELOP A BROWNFIELDS PROPERTY
Carlton Development, LLC**

Pursuant to N.C.G.S. § 130A-310.34, Carlton Development, LLC has filed with the North Carolina Department of Environment and Natural Resources (“DENR”) a Notice of Intent to Redevelop a Brownfields Property (“Property”) in Charlotte, Mecklenburg County, North Carolina. The Property, which is the site of a former Conbraco Industries, Inc. consists of 6.42 acres and is located at 701 Matthews-Mint Hill Parkway. Environmental contamination exists on the Property in groundwater. Carlton Development, LLC has committed itself to redevelopment of the Property for no uses other than retail and commercial ones, with an emphasis on medical office space. The Notice of Intent to Redevelop a Brownfields Property includes: (1) a proposed Brownfields Agreement between DENR and Carlton Development, LLC, which in turn includes (a) a map showing the location of the Property, (b) a description of the contaminants involved and their concentrations in the media of the Property, (c) the above-stated description of the intended future use of the Property, and (d) proposed investigation and remediation; and (2) a proposed Notice of Brownfields Property prepared in accordance with G.S. 130A-310.35.

The full Notice of Intent to Redevelop a Brownfields Property may be reviewed at the Charlotte - Mecklenburg Public Library, 310 North Tryon Street, Charlotte, NC 28202 by contacting Ms. Rita Rouse at that address or at (704) 336-2725; or at NC Brownfields Program, 401 Oberlin Rd., Suite 150, Raleigh, NC 27605 by contacting Shirley Liggins at that address, at shirley.liggins@ncmail.net, or at (919) 508-8411, where DENR will provide auxiliary aids and services for persons with disabilities who wish to review the documents.

Written public comments may be submitted to DENR within 60 days after the date this Notice is published in a newspaper of general circulation serving the area in which the brownfields property is located, or in the North Carolina Register, whichever is later. Written requests for a public meeting may be submitted to DENR within 30 days after the period for written public comments begins. Thus, if Carlton Development, LLC, as it plans, publishes this Summary in the North Carolina Register after it publishes the Summary in a newspaper of general circulation serving the area in which the brownfields property is located, and if it effects publication of this Summary in the North Carolina Register on the date it expects to do so, the periods for submitting written requests for a public meeting regarding this project and for submitting written public comments will commence on September 16, 2005. All such comments and requests should be addressed as follows:

Mr. Bruce Nicholson
Brownfields Program Manager
Division of Waste Management
NC Department of Environment and Natural Resources
401 Oberlin Road, Suite 150
Raleigh, North Carolina 27605

U.S. Department of Justice

Civil Rights Division

JKT:RPL:TGL:maf
DJ 166-012-3
2005-2046
2005-2293

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

August 10, 2005

David A. Holec, Esq.
City Attorney
P.O. Box 7207
Greenville, NC 27835

Dear Mr. Holec:

This refers to fourteen annexations (Ordinance Nos. 05-27 through 05-33, 05-48, and 05-57 through 05-62 (2005)) and their designation to city districts for the City of Greenville in Pitt County, North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submissions on June 14 and July 6, 2005.

The Attorney General does not interpose any objection to the specified changes. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. In addition, as authorized by Section 5, we reserve the right to reexamine this submission if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41 and 51.43).

Sincerely,

John Tanner
Chief, Voting Section

U.S. Department of Justice

Civil Rights Division

JDR:JR:TGL:par
DJ 166-012-3
2005-2180
2005-2181

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

August 18, 2005

Michael Crowell, Esq.
Tharrington Smith
P.O. Box 1151
Raleigh, NC 27602-1151

Dear Mr. Crowell:

This refers to Section 4 of Session Law 2003-346, which provides a boundary line change, for the Edgecombe County School District in Edgecombe County and the Nash-Rocky Mount School District in Edgecombe and Nash Counties, North Carolina, submitted to the Attorney General pursuant to Section 5 of the voting rights Act, 42 U.S.C. 1973c. We received your submissions on June 21, 2005.

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

Sincerely,

John Tanner
Chief, Voting Section

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 04 – DEPARTMENT OF COMMERCE

Notice is hereby given in accordance with G.S. 150B-21.2 that the Department of Commerce intends to adopt the rules cited as 04 NCAC 01N .0101-.0107.

Proposed Effective Date: January 1, 2006

Public Hearing:

Date: September 30, 2005

Time: 11:00 a.m.

Location: Department of Commerce, 4th Floor Board Room, 301 N. Wilmington Street, Raleigh, NC

Reason for Proposed Action: Permanent rules are needed to replace the existing temporary rules that were put in place to administer the loan and interest rebate program for businesses that suffered devastating losses from the 2004 hurricanes, authorized under the Hurricane Recovery Act of 2004. Permanent rules are necessary to continue to administer the program after the temporary rules expire.

Procedure by which a person can object to the agency on a proposed rule: Objections should be mailed to Karen West, Department of Commerce, 4318 MSC, 301 N. Wilmington St., 4th Floor, Raleigh, NC 27699-4318. Objections must be received by mail no later than 5:00 p.m. on November 14, 2005.

Written comments may be submitted to: Karen A West, Department of Commerce, 4301 MSC, Raleigh, NC 27699-4301, 301 N. Wilmington St., 4th Floor, Raleigh, NC, phone 919-715-5579, fax 919-715-5297, email kwest@nccommerce.com.

Comment period ends: November 14, 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**

SUBCHAPTER 01N – THE HURRICANE RECOVERY ACT OF 2005 BUSINESS RECOVERY PROGRAMS

SECTION .0100 - GENERAL INFORMATION

04 NCAC 01N .0101 SCOPE

(a) The Department of Commerce shall operate a program of assistance to businesses in order to protect jobs in designated disaster-damaged counties of North Carolina.

(b) The Department of Commerce shall make interest rebates available to business owners who received a disaster business loan from the U.S. Small Business Administration (SBA) for physical damage or economic injury to their business sustained as a result of the hurricanes of 2004.

(c) The Department of Commerce shall make direct loans available to businesses for both physical damage and economic injury suffered as a result of the hurricanes of 2004.

(d) The applicant business must be located in one of the counties covered by Session Law 2005-1, more commonly known as the Hurricane Recovery Act of 2005.

(e) The Small Business and Technology Development Center (the SBTDC) shall accept applications for interest rebates and business loans until July 30, 2005.

(f) Loan applicants must submit completed applications to the SBTDC at Business Recovery Assistance Centers (BRACs) by the final deadline to be eligible for this program.

(g) BRACs are located at all of the regional offices of the SBTDC.

Authority G.S. 143B-430(c); 143B-431(a)(1); S.L. 2005-1.

04 NCAC 01N .0102 ELIGIBILITY

(a) In order to be eligible for an interest rebate or direct loan, a business must have suffered damage, either physical loss or economic injury from the hurricanes of 2004. The damage must be quantifiable and verifiable as to its cause.

(b) In order to receive an interest rebate, the business must show evidence of having received a disaster business loan from the SBA for physical damage or economic injury to the business

sustained as a result of the hurricanes of 2004, and evidence of disbursement of funds thereunder.

(c) In order to receive a loan, the business must have been a going concern as of the date of the hurricane and as of the date of its application for assistance. The business shall submit proof of having been a going concern prior to the hurricane, and at the time of application, such as a valid business license, a business plan, and a commercial property lease. The business must also demonstrate the potential to recover from the disaster and remain a going concern with the infusion of the proposed loan funds.

Authority G.S. 143B-430(c); 143B-431(a)(1); S.L. 2005-1.

04 NCAC 01N .0103 BENEFITS UNDER THE INTEREST REBATE PROGRAM

The interest rebate program shall offer rebates equal to the interest payments projected to be made by the successful SBA business borrower for the first three years on the finalized SBA disaster business loan for damage sustained as a result of the hurricanes of 2004.

Authority G.S. 143B-430(c); 143B-431(a)(1); S.L. 2005-1.

04 NCAC 01N .0104 BENEFITS UNDER THE BUSINESS RECOVERY LOAN PROGRAM

(a) A loan shall be for a period of eight years. All payments shall be deferred for the first three years and the loan shall accrue no interest during that period. During the final five-year period, interest shall accrue at three percent and principal shall be amortized through regular monthly payments of principal and interest. There shall be no penalty for early repayment.

(b) Maximum funding under this program shall be one hundred thousand dollars (\$100,000). The minimum loan amount shall be five thousand dollars (\$5,000). Regardless of the maximum funding for which the business might otherwise qualify, funding shall not exceed the actual physical damage and economic injury sustained by the business from the hurricane(s).

(c) The Secretary of Commerce or his delegee may approve exceptions to these minimum and maximum loan amounts on a case by case basis after determining that a compelling economic need would be served, such as preservation of jobs and investment in the disaster affected counties. Collateral will be required in the case of exceptions to the specified maximum loan amount.

(d) Payments for economic losses shall be limited to documented business expenses necessary for the continued operation of the business.

Authority G.S. 143B-430(c); 143B-431(a)(1); S.L. 2005-1.

04 NCAC 01N .0105 PROCEDURES FOR INTEREST REBATE FOR SBA BORROWERS

(a) Applicants shall apply for interest rebates through the BRAC administered by the SBTDC in cooperation with the Department of Commerce.

(b) The borrower shall present to the BRAC counselor a copy of his SBA Loan Authorization and Agreement, a copy of his most

recent disbursement letter showing the outstanding balance of the loan, and a signed application for the interest rebate.

(c) The BRAC counselor shall perform a mathematical calculation to estimate the interest to be paid by the borrower over the ensuing three years.

(d) The borrower shall affirm that he is entitled to this interest rebate, that the information provided to the SBA and the SBTDC is true and correct to the best of his knowledge and that the rebate shall not be used to duplicate any benefits received under any Federal program.

(e) Upon completion of the request and supporting documents, the BRAC counselor shall forward the application to the SBTDC central office for processing. The SBTDC shall transmit approved requests for payment to the bank that shall disburse the loans.

(f) The disbursing bank shall review the documents for completeness, and shall deliver a check in the amount that has been approved, to the borrower.

(g) The bank shall send a notice with the rebate check informing the recipient that rebate proceeds are subject to Federal duplication of benefits limitations and that the State of North Carolina shall inform the SBA that the borrower has received the rebate.

Authority G.S. 143B-430(c); 143B-431(a)(1); S.L. 2005-1.

04 NCAC 01N .0106 PROCEDURES FOR THE BUSINESS RECOVERY LOAN PROGRAM

(a) Applicants shall apply for loans through the BRAC administered by the SBTDC in cooperation with the Department of Commerce.

(b) The SBTDC shall work with applicants to assist them in preparing the needed documentation to apply for a disaster assistance loan.

(c) Loan applications shall be accepted at all of the regional offices maintained by the SBTDC across North Carolina.

(d) The SBTDC shall evaluate a number of factors in approving loans. Applicants must meet the eligibility requirements set forth in 04 NCAC 01N .0102(a) and (c), must show cash flow coverage of at least 80%, must agree to quarterly business counseling, must document losses that resulted from the hurricane(s) by providing SBA loss verification forms or insurance adjuster forms and photographs, as applicable, must provide such other documents as are requested by the SBTDC for evaluation of the application, and must provide loan guarantees from parties that own more than 20% of the applicant. The SBTDC will consider additional factors in approving loans, such as a responsible credit history evidenced by credit reports showing repayment on previous loans.

(e) Upon receipt of a completed application, a loan decision shall be made by the senior management team of the SBTDC within three business days. If approved, the decision shall be transmitted to the disbursing bank. The bank shall disburse the loan after the bank receives the properly executed note and loan package.

(f) Should the SBA approve a loan upon reconsideration, the borrower shall repay the principal amount of the loan provided

by the State of North Carolina pursuant to the rules in this Subchapter.

Authority G.S. 143B-430(c); 143B-431(a)(1); S.L. 2005-1.

04 NCAC 01N .0107 APPEAL

An applicant may appeal a funding decision under this Subchapter to the Office of the Assistant Secretary for Business Development and Trade, NC Department of Commerce. The Assistant Secretary shall convene a three-person committee to include himself, the Director of the Commerce Finance Division and the Director of Business Retention and Expansion. Upon a full and complete review of the facts in each case, the committee shall make a recommendation to the Secretary of Commerce, who shall issue a decision.

Authority G.S. 143B-430(c); 143B-431(a)(1); S.L. 2005-1.

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Commission for MH/DD/SAS intends to amend the rule cited as 10A NCAC 28F .0101.

Proposed Effective Date: January 1, 2006

Instructions on How to Demand a Public Hearing: (must be requested in writing within 15 days of notice): A person may demand a public hearing on the proposed rule by submitting a request in writing to Cindy Kornegay, 3018 Mail Service Center, Raleigh, NC 27699-3018 by September 30, 2005.

Reason for Proposed Action: The proposed amendment realigns counties into a comprehensive three region model. The intent is to have a region/catchments area for each state facility that does not split LMEs across facility regions. The model also distributes the population demographics in an equitable way for each facility and minimizes geographical/logistical issues for individuals who need to access the services of state operated facilities.

Procedure by which a person can object to the agency on a proposed rule: The objection, reasons for the objection and the clearly identified portion of the rule to which the objection pertains, may be submitted in writing to Cindy Kornegay, 3018 Mail Service Center, Raleigh, NC 27699-3018.

Written comments may be submitted to: Cindy Kornegay, 3018 Mail Service Center, Raleigh, NC 27699-3018, phone 919-715-2780, fax 919-733-1221, email cindy.kornegay@ncmail.net.

Comment period ends: November 14, 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)
[X] None

CHAPTER 28 – MENTAL HEALTH:STATE OPERATED FACILITIES AND SERVICES

SUBCHAPTER 28F – ADMISSION AND DISCHARGE

SECTION .0100 – ADMISSIONS

10A NCAC 28F .0101 REGIONS FOR DIVISION INSTITUTIONAL ADMISSIONS

(a) Except as otherwise provided in rules codified in this Chapter and Chapters 26 through 29 of this Title and except for cross-regional admissions approved by the Division Director, a person seeking admission to a regional institution of the Division shall be admitted only to the institution which serves the region of the state which includes the person's "county of residence" as defined in G.S. 122C-3.

(b) For state operated facilities, the regions of the state and the counties which constitute the regions shall be as follows:

- (1) Western Region: Broughton Hospital, Black Mountain Center, Julian F. Keith Alcohol and Drug Abuse Treatment Center (ADATC), and J. Iverson Riddle Developmental Center shall serve Alleghany, Alexander, Ashe, Avery, Buncombe, Burke, Cabarrus, Caldwell, Catawba, Cherokee, Clay, Cleveland, Davidson, Gaston, Graham, Haywood, Henderson, Iredell, Jackson, Lincoln, Macon, Madison, McDowell, Mecklenburg, Mitchell, Polk, Rowan, Rutherford, Stanly, Surry, Swain, Transylvania, Union, Watauga, Wilkes, Yadkin, Yancey;
(2) Central Region: Dorothea Dix Hospital, John Umstead Hospital, Murdoch Center, R. J. Blackley ADATC, Whitaker School, Wright School shall serve Alamance, Anson, Caswell, Chatham, Davie, Durham, Forsyth, Franklin, Granville, Guilford, Halifax, Harnett, Hoke, Lee, Montgomery, Moore, Orange, Person,

Randolph, Richmond, Rockingham, Stokes, Vance, Wake, Warren; and

- (3) Eastern Region: Cherry Hospital, Caswell Center, O'Berry Center, North Carolina Special Care Center, Walter B. Jones ADATC shall serve Beaufort, Bertie, Bladen, Brunswick, Camden, Carteret, Chowan, Columbus, Craven, Cumberland, Currituck, Dare, Duplin, Edgecombe, Gates, Greene, Hertford, Hyde, Johnston, Jones, Lenoir, Martin, Nash, New Hanover, Northampton, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Pitt, Robeson, Sampson, Scotland, Tyrrell, Washington, Wayne, Wilson.

(b) The regions of the state and the counties which constitute the regions shall be as follows for the psychiatric hospitals:

- (1) ~~Western Region. Broughton Hospital shall serve Alexander, Alleghany, Ashe, Avery, Buncombe, Burke, Cabarrus, Caldwell, Catawba, Cherokee, Clay, Cleveland, Davie, Gaston, Graham, Haywood, Henderson, Iredell, Jackson, Lincoln, Macon, Madison, McDowell, Mecklenburg, Mitchell, Polk, Rowan, Rutherford, Stanly, Swain, Transylvania, Union, Watauga, Wilkes, Yancey.~~
- (2) ~~North Central Region. John Umstead Hospital shall serve Alamance, Caswell, Chatham, Durham, Forsyth, Franklin, Granville, Guilford, Orange, Person, Rockingham, Stokes, Surry, Vance, Warren, Yadkin.~~
- (3) ~~South Central Region. Dorothea Dix Hospital shall serve Anson, Bladen, Columbus, Cumberland, Davidson, Harnett, Hoke, Johnston, Lee, Montgomery, Moore, Randolph, Richmond, Robeson, Scotland, Wake.~~
- (4) ~~Eastern Region. Cherry Hospital shall serve Beaufort, Bertie, Brunswick, Camden, Carteret, Chowan, Craven, Currituck, Dare, Duplin, Edgecombe, Gates, Greene, Halifax, Hertford, Hyde, Jones, Lenoir, Martin, Nash, New Hanover, Northampton, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Pitt, Sampson, Tyrrell, Washington, Wayne, Wilson.~~

(c) The regions of the state and the counties which constitute the regions shall be as follows for the mental retardation centers:

- (1) ~~Western Region:~~
 (A) ~~Western Carolina Center shall serve Alexander, Alleghany, Ashe, Avery, Burke, Cabarrus, Caldwell, Catawba, Cleveland, Davie, Gaston, Iredell, Lincoln, McDowell, Mecklenburg, Polk, Rowan, Rutherford, Stanly, Union, Watauga, Wilkes. In addition,~~

~~Western Carolina Center shall serve clients from the counties normally served by Black Mountain Center as specified in (c) (1) (B) of this Rule if the client has severe behavioral or medical disorders.~~

- (B) ~~Black Mountain Center shall serve Buncombe, Cherokee, Clay, Graham, Haywood, Henderson, Jackson, Macon, Madison, Mitchell, Swain, Transylvania, Yancey. In addition, Black Mountain Center shall serve clients from the counties normally served by Western Carolina Center as specified in (c) (1) (A) of this Rule if the client is in the geriatric age range.~~

- (2) ~~North Central Region. Murdoch Center shall serve Alamance, Caswell, Chatham, Durham, Forsyth, Franklin, Granville, Guilford, Orange, Person, Rockingham, Stokes, Surry, Vance, Warren, Yadkin.~~

- (3) ~~South Central Region. O'Berry Center shall serve Anson, Bladen, Columbus, Cumberland, Davidson, Harnett, Hoke, Johnston, Lee, Montgomery, Moore, Randolph, Richmond, Robeson, Scotland, Wake, Wayne.~~

- (4) ~~Eastern Region. Caswell Center shall serve Beaufort, Bertie, Brunswick, Camden, Carteret, Chowan, Craven, Currituck, Dare, Duplin, Edgecombe, Gates, Greene, Halifax, Hertford, Hyde, Jones, Lenoir, Martin, Nash, New Hanover, Northampton, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Pitt, Sampson, Tyrrell, Washington, Wilson.~~

(d) The regions of the State and the counties which constitute the regions shall be as follows for the alcohol and drug abuse treatment centers:

- (1) ~~Western Region. The Alcohol and Drug Abuse Treatment Center at Black Mountain shall serve Alleghany, Ashe, Avery, Alexander, Buncombe, Burke, Cabarrus, Caldwell, Catawba, Cherokee, Clay, Cleveland, Davidson, Davie, Gaston, Graham, Haywood, Henderson, Iredell, Jackson, Lincoln, Macon, Madison, McDowell, Mecklenburg, Mitchell, Polk, Rowan, Rutherford, Stanly, Swain, Transylvania, Union, Watauga, Wilkes, Yancey.~~

- (2) ~~North Central Region. The Alcohol and Drug Abuse Treatment Center at Butner shall serve Alamance, Anson, Caswell, Chatham, Durham, Forsyth, Franklin, Granville, Guilford, Harnett, Hoke, Johnston, Lee, Montgomery, Moore, Orange, Person, Randolph, Richmond, Rockingham, Stokes, Surry, Vance, Wake, Warren, Yadkin.~~

- (3) ~~Eastern Region. The Walter B. Jones Alcohol and Drug Abuse Treatment Center at~~

~~Greenville shall serve Beaufort, Bertie, Bladen, Brunswick, Camden, Carteret, Chowan, Columbus, Craven, Cumberland, Currituck, Dare, Duplin, Edgecombe, Gates, Greene, Halifax, Hertford, Hyde, Jones, Lenoir, Martin, Nash, New Hanover, Northampton, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Pitt, Robeson, Sampson, Scotland, Tyrrell, Washington, Wayne, Wilson.~~

Authority G.S. 122C-3; 122C-112; 143B-147.

TITLE 12 – DEPARTMENT OF JUSTICE

Notice is hereby given in accordance with G.S. 150B-21.2 that the Criminal Justice Education and Training Standards Commission intends to amend the rules cited as 12 NCAC 09A .0204-.0205; 09B .0227, .0404; 09C .0308; 09E .0108; 09G .0408, .0412, .0415.

Proposed Effective Date: February 1, 2006

Public Hearing:

Date: November 17, 2005

Time: 1:00 p.m.

Location: Department of Corrections Office of Staff Development and Training, 2211 Schieffelin Road, Apex, NC

Reason for Proposed Action:

12 NCAC 09A .0204-.0205 – Clarifies that the Commission may suspend, revoke, or deny certification to an officer who has performed activities or duties for which certification by the Commission is required without having first obtained the appropriate certification.

12 NCAC 09B .0227 – Changes hourly requirement for three topics within the Specialized Driver Instruction Training course. Total hours remain the same.

12 NCAC 09B .0404 – Adds requirements that students in a Specialized Physical Fitness Instructor Training Course may not miss more than 10% of class in order to receive successful course completion.

12 NCAC 09C .0308 – Requires every officer who operates a speed measurement instrument for enforcement purposes to first be certified by the Commission to operate the instrument.

12 NCAC 09E .0108 – Changes requirements for completing annual in-service training from a "12 month period" to a "calendar year." Clarifies annual in-service training requirements for an officer who transfers to a different agency during the current calendar year or a subsequent calendar year.

12 NCAC 09G .0408 – Requires Department of Correction School Directors to ensure instructors are monitored and evaluated during each course presentation.

12 NCAC 09G .0412 – Deletes the topic of "physical fitness" and replaces it with "employee wellness." Also add the following topics: professional ethics and personal and professional conduct.

12 NCAC 09G .0415 – Changes topic names in the Department of Correction Firearms Instructor Training course.

Procedure by which a person can object to the agency on a proposed rule: The objection, reasons for the objection, and the clearly identified portion of the rule to which the objection pertains, must be submitted in writing to Teresa Marrella, Department of Justice, Criminal Justice Standards Division, 114 W. Edenton Street, Raleigh, NC 27602.

Written comments may be submitted to: Teresa Marrella, Department of Justice, 114 W. Edenton Street, Raleigh, NC 27602, phone 919-716-6475, fax 919-716-6752 or email tmarrella@ncdoj.com.

Comment period ends: November 17, 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 09 - CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS

SUBCHAPTER 09A - CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION

SECTION .0200 - ENFORCEMENT OF RULES

12 NCAC 09A .0204 SUSPENSION: REVOCATION: OR DENIAL OF CERTIFICATION

(a) The Commission shall revoke the certification of a criminal justice officer when the Commission finds that the officer has committed or been convicted of:

- (1) a felony offense; or
- (2) a criminal offense for which the authorized punishment included imprisonment for more than two years.

(b) The Commission may suspend, revoke, or deny the certification of a criminal justice officer when the Commission finds that the applicant for certification or the certified officer:

- (1) has not enrolled in and satisfactorily completed the required basic training course in its entirety within prescribed time periods relevant or applicable to a specified position or job title;
- (2) fails to meet or maintain one or more of the minimum employment standards required by 12 NCAC 09B .0100 for the category of the officer's certification or fails to meet or maintain one or more of the minimum training standards required by 12 NCAC 09B .0200 or 12 NCAC 09B .0400 for the category of the officer's certification;
- (3) has committed or been convicted of:
 - (A) a criminal offense or unlawful act defined in 12 NCAC 09A .0103 as a Class B misdemeanor; or
 - (B) four or more criminal offenses or unlawful acts defined in 12 NCAC 09A .0103 as a Class A misdemeanor, each of which occurred after the date of initial certification;
- (4) has been discharged by a criminal justice agency for commission or conviction of:
 - (A) a motor vehicle offense requiring the revocation of the officer's driver's license; or
 - (B) any other offense involving moral turpitude;
- (5) has been discharged by a criminal justice agency because the officer lacks the mental or physical capabilities to properly fulfill the responsibilities of a criminal justice officer;
- (6) has knowingly made a material misrepresentation of any information required for certification or accreditation;
- (7) has knowingly and willfully, by any means of false pretense, deception, defraudation, misrepresentation or cheating whatsoever, obtained or attempted to obtain credit, training or certification from the Commission;
- (8) has knowingly and willfully, by ~~an~~ any means of false pretense, deception, defraudation, misrepresentation or cheating whatsoever, aided another person in obtaining or attempting to obtain credit, training or certification from the Commission;
- (9) has failed to make either of the notifications as required by 12 NCAC 09B .0101(8);
- (10) has been removed from office by decree of the Superior Court in accord with the provisions of G.S. 128-16 or has been removed from office by sentence of the court in accord with the provisions of G.S. 14-230;

- (11) fails to satisfactorily complete the minimum in-service training requirements as prescribed in 12 NCAC 09E;
- (12) has refused to submit to an applicant or lateral transferee drug screen as required by these Rules;
- (13) has produced a positive result on a drug screen reported to the Commission as specified in 12 NCAC 09C .0310, where the positive result cannot be explained to the Commission's ~~satisfaction~~; or satisfaction;
- (14) has been denied certification or had such justice officer certification suspended or revoked by the North Carolina Sheriffs' Education and Training Standards ~~Commission~~; Commission; or has performed activities or duties for which certification by the Commission is required without having first obtained the appropriate certification;
- (15) has performed activities or duties for which certification by the Commission is required without having first obtained the appropriate certification.

(c) Following suspension, revocation, or denial of the person's certification, the person may not remain employed or appointed as a criminal justice officer and the person may not exercise any authority of a criminal justice officer during a period for which the person's certification is suspended, revoked, or denied.

Authority G.S. 17C-6; 17C-10.

12 NCAC 09A .0205 PERIOD OF SUSPENSION; REVOCATION; OR DENIAL

(a) When the Commission revokes or denies the certification of a criminal justice officer, the period of the sanction shall be permanent where the cause of sanction is:

- (1) commission or conviction of a felony offense; or
- (2) commission or conviction of a criminal offense for which authorized punishment included imprisonment for more than two years; or
- (3) the second suspension of an officer's certification for any of the causes requiring a five-year period of suspension.

(b) When the Commission suspends or denies the certification of a criminal justice officer, the period of sanction shall be not less than five years; however, the Commission may either reduce or suspend the period of sanction under Paragraph (b) of this Rule or substitute a period of probation in lieu of suspension of certification following an administrative hearing, where the cause of sanction is:

- (1) commission or conviction of a criminal offense other than those listed in Paragraph (a) of this Rule; or
- (2) refusal to submit to the applicant or lateral transferee drug screen required by these Rules; or
- (3) production of a positive result on a drug screen reported to the Commission under 12 NCAC

- (4) 09C .0310, where the positive result cannot be explained to the Commission's satisfaction; or
- (5) material misrepresentation of any information required for certification or accreditation; or
- (6) obtaining, attempting to obtain, aiding another person to obtain, or aiding another person to attempt to obtain credit, training or certification by any means of false pretense, deception, defraudation, misrepresentation or cheating; or
- (7) failure to make either of the notifications as required by 12 NCAC 09B .0101(8); or
- (8) removal from office under the provisions of G.S. 128-16 or the provisions of G.S. 14-230; or
- (8) performing activities or duties for which certification by the Commission is required without having first obtained the appropriate certification.

(c) When the Commission suspends or denies the certification of a criminal justice officer, the period of sanction shall be for an indefinite period, but continuing so long as the stated deficiency, infraction, or impairment continues to exist, where the cause of sanction is:

- (1) failure to meet or satisfy relevant basic training requirements; or
- (2) failure to meet or maintain the minimum standards of employment; or
- (3) discharge from a criminal justice agency for impairment of physical or mental capabilities; or
- (4) failure to meet or satisfy the in-service training requirements as prescribed in 12 NCAC 09E.

Authority G.S. 17C-6; 17C-10.

SUBCHAPTER 09B - STANDARDS FOR CRIMINAL JUSTICE EMPLOYMENT; EDUCATION; AND TRAINING

SECTION .0200 – MINIMUM STANDARDS FOR CRIMINAL JUSTICE SCHOOLS AND CRIMINAL JUSTICE TRAINING PROGRAMS OR COURSES OF INSTRUCTION

12 NCAC 09B .0227 SPECIALIZED DRIVER INSTRUCTOR TRAINING

- (a) The instructor training course required for specialized driver instructor certification shall consist of a minimum of 35 hours of instruction presented during a continuous period of not more than one week.
- (b) Each specialized driver instructor training course shall be designed to provide the trainee with the skills and knowledge to perform the function of a criminal justice driver instructor in a Basic Law Enforcement Training Course.
- (c) Each applicant for specialized driver instructor training shall:

- (1) have completed the criminal justice general instructor training course;
 - (2) present a written endorsement by a certified school director indicating the student will be utilized to instruct driving in Basic Law Enforcement Training Courses;
 - (3) possess a valid operator driver's license;
 - (4) maintain a safe driving record where no more than four points have been assigned against the driving record within the past three years; and
 - (5) possess a valid CPR Certification that included cognitive and skills testing.
- (d) Each specialized driver instructor training course shall include as a minimum the following identified topic areas and minimum instructional hours for each area:
- (1) Orientation 1 Hour
 - (2) Lesson Plan Review (BLET) 4 Hours
 - (3) Gen Mech Knowledge ~~2 Hours~~ 1 Hour
 - (4) Before/Operation Inspection 1 Hour
 - (5) Laws of Natural Force & Operating Characteristics 4 Hours ~~2 Hours~~
 - (6) Driver Pract/Pre-Test ~~16 Hours~~ 19 Hours
 - (7) Fundamentals of Professional Liability for Trainers 4 Hours
 - (8) Course Review/State Exam 3 Hours

(e) The "Specialized Driver Instructor Training Manual" as published by the North Carolina Justice Academy shall be used as the basic curriculum for delivery of specialized driver instructor training courses. Copies of this publication may be inspected at the agency:

Criminal Justice Standards Division
 North Carolina Department of Justice
 114 West Edenton Street
 Old Education Building
 Post Office Drawer 149
 Raleigh, North Carolina 27602

and may be obtained at no cost to the student from the Academy at the following address:

North Carolina Justice Academy
 Post Office Box 99
 Salemburg, North Carolina 28385

(f) ~~Commission-accredited~~ Commission-certified schools that are ~~accredited~~ certified to offer the "Specialized Driver Instructor Training" course are: The North Carolina Justice Academy and The North Carolina State Highway Patrol.

Authority G.S. 17C-6.

SECTION .0400 - MINIMUM STANDARDS FOR COMPLETION OF TRAINING

12 NCAC 09B .0404 TRAINEE ATTENDANCE

- (a) Each trainee enrolled in a certified Basic Law Enforcement Training Course shall attend all class sessions. The school director shall monitor the trainee's regular attendance at criminal justice training courses in which the trainee is enrolled.
- (b) The school director may excuse a trainee from attendance at specific class sessions. However, in no case may excused

absences exceed five percent of the total class hours for the course offering. A trainee shall not be eligible for administration of the state comprehensive examination and shall be dismissed from the course if the cumulative total of class absences exceeds five percent regardless of the prior completion of make-up work.

(c) If the school director grants an excused absence from a class session, he shall schedule make-up work and ensure the satisfactory completion of such work during the current course presentation. The school director shall schedule instructors and reimburse those instructors for the purpose of completion of the make up work. Absences which occur during the last forty hours of the training course may be made up in a subsequent delivery; however, the school director shall notify the Standards Division prior to scheduling the make up work.

(d) A school director may terminate a trainee from course participation or may deny certification of successful course completion where the trainee is tardy to or departs early from class meetings or field exercises.

(e) Where a trainee is enrolled in a program as required in 12 NCAC 09B .0212, .0213, .0214, .0215, .0218, .0219, .0220, .0221, .0222, .0237, .0238, .0239, or .0240, and the scheduled course hours exceed the requirements of the Commission, the trainee, upon the authorization of the school director, may be deemed to have satisfactorily completed the required number of hours for attendance provided the trainee's attendance is not less than 100 percent of the instructional hours as required by the Commission.

(f) A trainee enrolled in a presentation of the "Criminal Justice Instructor Training Course" under Rule .0209 of this Subchapter shall not be absent from class attendance for more than 10 percent of the total scheduled delivery period in order to receive successful course completion.

(g) A trainee, enrolled in a presentation of the "Specialized Firearms Instructor Training" course under Rule .0226 of this Subchapter, the "Specialized Driving Instructor Training" course under Rule .0227 of this Subchapter, ~~or~~ the "Specialized Subject Control Arrest Techniques Instructor Training" course under Rule .0232 of this Subchapter, or the "Specialized Physical Fitness Instructor Training" course under Rule .0233 of this Subchapter, shall not be absent from class attendance for more than 10 percent of the total scheduled delivery period in order to receive successful course completion. Make-up work must be completed during the current course presentation for all absenteeism.

(h) A trainee, enrolled in a presentation of the "Radar Instructor Training Course" under Rule .0210 of this Subchapter, the "Time-Distance Speed Measurement Instrument Instructor Training Course" under Rule .0211 of this Subchapter, or the "Lidar Speed Measurement Instrument Instructor Training Course" under Rule .0235 of this Subchapter shall not be absent from class attendance for more than 10 percent of the total scheduled delivery period in order to receive successful course completion. Make-up work must be completed during the current course presentation for all absenteeism.

Authority G.S. 17C-2; 17C-6; 17C-10.

SUBCHAPTER 09C - ADMINISTRATION OF CRIMINAL

JUSTICE EDUCATION AND TRAINING STANDARDS

SECTION .0300 - CERTIFICATION OF CRIMINAL JUSTICE OFFICERS

12 NCAC 09C .0308 SPEED MEASUREMENT INSTRUMENT (SMI) OPERATORS CERTIFICATION PROGRAM

(a) Every person employed or appointed by the state or any political subdivision thereof as a law enforcement officer who uses a Speed Measuring Instrument for enforcement purposes shall hold certification from the Commission authorizing the officer to operate the speed measuring instrument.

~~(a)~~(b) Standards Division staff shall issue certification in one of the following categories:

- (1) radar operator ~~Speed Measurement Instrument~~ speed measurement instrument (SMI) certification or re-certification requiring successful completion of the training program as required in 12 NCAC 09B .0210, .0211, .0212, .0213, .0218, .0219, .0220, .0221, or .0222;
- (2) radar and time-distance speed measurement instrument operator certification or re-certification requiring successful completion of the training program as required in 12 NCAC 09B .0211, .0213, .0219, or .0221;
- (3) time-distance speed measurement instrument operator certification or re-certification requiring successful completion of the training program as required in 12 NCAC 09B .0211, .0213, .0214, .0219, .0221, or .0222.
- (4) lidar speed measurement instrument operator certification or re-certification requiring successful completion of the training program as required in 12 NCAC 09B .0238 or .0240.

~~(b)~~(c) Certification in either category reflects operational proficiency in the designated type(s) of approved equipment for which the trainee has been examined and tested. Such certification shall be for a three year period from the date of issue and re-certifications shall be for a three year period from the date of issue, unless sooner terminated by the Commission. The applicant shall meet the following requirements for operator certification or re-certification within 90 days of course completion and upon the presentation of documentary evidence showing that the applicant:

- (1) has successfully completed the training program as required in 12 NCAC 09B .0210, .0211, .0212, .0213, .0214, .0218, .0219, .0220, .0221, .0222, .0237, .0238, .0239, or .0240; and
- (2) has successfully completed a Commission-certified basic law enforcement training course as required in 12 NCAC 09B .0400 and is currently certified in a probationary status or holds general law enforcement certification; or

- (3) if the applicant is a sheriff, deputy sheriff, or other sworn appointee with arrest authority governed by the provisions of G.S. 17E has met and is in total compliance with the then current employment and training standards as established and made effective for such position by the North Carolina Sheriffs' Education and Training Standards Commission.

~~(e)~~(d) Certified operators shall be notified by the Commission not less than 90 days prior to expiration of certification. All applicants for re-certification shall successfully complete a Commission-approved re-certification course within 12 months from the expiration of the previous certification. If re-certification is not obtained within the 12 month period, successful completion of the appropriate operator training programs as required by 12 NCAC 09B .0409(a) shall be required to obtain operator certification. This prescribed 12 month period shall not extend the operator certification period beyond its specified expiration date. When a re-certification course is successfully completed prior to the expiration of the previous certification, the new certification shall be issued by the Criminal Justice Standards Division effective upon the receipt of the Post-delivery Report of Training Course Presentation.

~~(d)~~(e) Operator re-certification shall be issued only to officers with current law enforcement certification.

~~(e)~~(f) All certifications issued pursuant to this Rule and the standards in effect between November 1, 1981 and July 1, 1982 shall continue with full force and effect; however, said certifications shall be subject to the provisions of 12 NCAC 09C .0308(c) and (d).

Authority G.S. 17C-6.

SUBCHAPTER 09E - IN-SERVICE TRAINING PROGRAMS

SECTION .0100 - LAW ENFORCEMENT OFFICER'S IN-SERVICE TRAINING PROGRAM

12 NCAC 09E .0108 FAILURE TO COMPLETE ANNUAL IN-SERVICE TRAINING

(a) Failure to successfully complete the annual in-service training topics as specified in 12 NCAC 09E .0102 within the ~~prescribed 12 month period calendar year~~ shall result in suspension of the law enforcement officer's certification.

(b) Upon notification that a law enforcement officer who has been continuously employed with an agency during the 12 month calendar year has failed to meet the requirements for in-service training as specified in 12 NCAC 09E .0102, the officer's certification shall be suspended.

(c) No officer suspended under Paragraph (b) of this Rule shall work as a certified law enforcement officer until:

- (1) the department head or designated representative forwards to the Commission documentary evidence verifying that the officer has complied with the requirements for

reinstatement of certification as specified in this subsection; and

- (2) the department head or designated representative and the officer receive from the Commission documentation that the Commission has terminated the suspension and reissued law enforcement certification to the suspended officer.

~~(d) If an officer has separated from an agency during the 12 month calendar year and has not completed all in-service training topics, upon application for re certification the officer shall be placed on probationary status for 12 months or until the in service training requirements are met, whichever comes first.~~

(d) If an officer has separated from an agency with less than a 12 month break in law enforcement service and is later reemployed as a law enforcement officer during the same calendar year, the officer shall have completed all of the in-service training topics as specified in 12 NCAC 09E .0102 by the end of that same calendar year. Upon notification that such officer has failed to meet all the requirements for in-service training as specified in 12 NCAC 09E .0102, the law enforcement officer's certification shall be suspended.

(e) If an officer has separated from an agency with less than a 12 month break in law enforcement service and is later reemployed as a law enforcement officer during the subsequent calendar year, the officer shall have completed all of the in-service training topics as specified in 12 NCAC 09E .0102 by the end of the subsequent calendar year. Upon notification that such officer has failed to meet all the requirements for in-service training as specified in 12 NCAC 09E .0102, the law enforcement officer's certification shall be suspended.

Authority G.S. 17C-6; 17C-10.

SUBCHAPTER 09G - STANDARDS FOR CORRECTIONS EMPLOYMENT, TRAINING AND CERTIFICATION

SECTION .0400 – MINIMUM STANDARDS FOR TRAINING OF CORRECTIONAL OFFICERS, PROBATION/PAROLE OFFICERS, AND PROBATION/PAROLE OFFICERS-SURVEILLANCE

12 NCAC 09G .0408 RESPONSIBILITIES OF THE SCHOOL DIRECTOR

In planning, developing, coordinating, and delivering each Commission-approved corrections training course, the School Director shall:

- (1) formalize and schedule the course curriculum in accordance with the curriculum standards established in this Subchapter;
- (2) schedule course presentation for delivery such that each training course required for certification shall be presented on a regular basis; ~~and~~
- (3) select and schedule instructors who are certified by the ~~Commission~~. Commission; and
- (4) monitor, or designate a certified instructor to monitor, the presentations of all instructors

during each course delivery and prepare written evaluations on their performance and suitability for subsequent instructional assignments. The observations will be of sufficient duration to ensure the instructor is using the Instructional System Design model, and that the delivery is objective based, documented by and consistent with a Commission-approved lesson plan. For each topic area, the school director's evaluation shall be based upon the course delivery observations, the instructor's use of the approved lesson plan, and the results of the student evaluation of the instructor.

- (A) for probationary instructors, these evaluations shall be prepared on Commission-approved forms and forwarded to the Commission. Based on this evaluation, the School Director shall recommend approval or denial of requests for General Instructor Certification;
- (B) for all other instructors, these evaluations shall be prepared on Commission-approved forms in accordance with Commission standards as set out in this Chapter. These evaluations shall be kept on file by the school for a period of three years and shall be made available for inspection by a representative of the Commission upon request. In the event the evaluation of an instructor indicates that his or her performance was less than acceptable, the school director shall forward a copy of the evaluation to the Commission;
- (C) any designated certified instructor who is evaluating the instructional presentation of another instructor shall hold certification in the same instructional topic area as that for which the instructor is being evaluated.

Authority G.S. 17C-6.

12 NCAC 09G .0412 BASIC TRAINING FOR PROBATION/PAROLE OFFICERS

(a) The basic training course for probation/parole officers shall consist of at least 160 hours of instruction, as approved by the Commission, designed to provide the trainee with the skills and knowledge to perform those tasks essential to function as a probation/parole officer. The instructional components of this course must be listed in the "Basic Probation/Parole Officer Training Manual," and shall include controls, restraints, and defensive techniques; court processes; case processing and management; arrest procedures; basic life support; ~~physical~~

~~fitness; employee wellness; professional ethics; personal and professional conduct; and contemporary correctional theory.~~

(b) The "Basic Probation/Parole Officer Training Manual" as published by the North Carolina Department of Correction is to be applied as the basic curriculum for delivery of probation/parole officer basic training courses. Copies of this publication may be inspected at the office of the agency:

The Office of Staff Development and Training
North Carolina Department of Correction
2211 Schieffelin Road
Apex, North Carolina 27502
With mailing address:
MSC 4213

Raleigh, North Carolina 27699-4213
and may be obtained at cost from the Department of Correction.

Authority G.S. 17C-6; 17C-10.

12 NCAC 09G .0415 CORRECTIONS SPECIALIZED INSTRUCTOR TRAINING – FIREARMS

(a) The instructor training course requirement for corrections specialized firearms instructor certification shall consist of at least 80 hours of instruction presented during a continuous period of not more than two weeks.

(b) Each corrections specialized firearms instructor training course shall be designed to provide the trainee with the skills and knowledge to perform the function of a corrections firearms instructor in the "Basic Training-Correctional Officer" course, "Basic Training-Probation/Parole Officer" course, "Basic Training-Probation/Parole Officer-Intermediate" course, and in-service training courses for correctional officers, PERT teams, and probation/parole officers-intermediate.

(c) Each corrections specialized firearms instructor training course shall include the following topical areas:

- ~~(1) Overview;~~
- ~~(2) Legal Considerations for Firearms Instructors;~~
- ~~(3) Firearms Safety;~~
- ~~(4) Range Operations;~~
- ~~(5) Range Medical Emergencies;~~
- ~~(6) Revolver Operation, Use, and Maintenance;~~
- ~~(7) Advanced Revolver Training;~~
- ~~(8) Revolver Night Firing;~~
- ~~(9) Rifle Training and Qualification;~~
- ~~(10) Shotgun Training and Qualification;~~
- ~~(11) Maintenance and Repair of Rifles and Shotguns;~~
- ~~(12) Special Techniques, Training Aids, and Methods;~~
- ~~(13) Chemical Weapons;~~
- ~~(14) Situational Use of Firearms;~~
- ~~(15) Day and Night Practical Courses of Fire; and~~
- ~~(16) Administrative Matters, Testing, and Evaluation.~~
- (1) Overview;
 - (A) Course Overview
 - (B) Legal Considerations for Firearm Instructors

- (C) Department of Correction Firearms Training Courses
- (2) Firearms Safety:
- (3) Range Operations:
- (4) Medical Emergencies on the Range:
- (5) Revolver – Operation, Use and Maintenance:
 - (A) Revolver Training-Classroom
 - (B) Standard Revolver Courses of Fire-Range
 - (C) Introduction to Low/Limited Light (LLL) Fire-Classroom and Range
 - (D) Revolver Care and Maintenance
- (6) Advanced Revolver Training:
 - (A) Advanced Revolver Training – Classroom
 - (B) Advanced Revolver Courses of Fire – Range
- (7) Revolver Night Firing:
Revolver Low/Limited Light Fire – Classroom and Range
- (8) Rifle Training and Qualification:
 - (A) Rifle Training – Classroom
 - (B) Rifle Training – Range
 - (C) Rifle Qualification and Low/Limited Light Fire Familiarization Course – Range
- (9) Shotgun Training and Qualification:
 - (A) Shotgun Training – Classroom
 - (B) Shotgun Training - Range
 - (C) Shotgun Low/Limited Light Fire – Range
- (10) Maintenance and Repair of Rifles and Shotguns:
- (11) Special Techniques, Training Aids, and Methods:
Special Techniques for the Reluctant/Frightened Shooter
- (12) Chemical Weapons:
Chemical Agents, Equipment, Tactics and Storage
- (13) Situational Use of Firearms:
 - (A) The Shooting Decision
 - (B) Situational Use of Firearms
 - (C) Situational Exercises - Day
 - (D) Situational Exercises – Low/Limited Light
- (14) Administrative Matters, Testing, and Evaluation.

(d) Commission-accredited schools that are accredited to offer the "Corrections Specialized Instructor Training - Firearms" course are: The Office of Staff Development and Training of the North Carolina Department of Correction.

Authority G.S. 17C-6.

TITLE 15A – DEPARTMENT OF ENVIRONMENT & NATURAL RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Wildlife Resources Commission intends to adopt the rule cited as 15A NCAC 10F .0372 and amend the rules cited as 15A NCAC 10F .0317, .0351.

Proposed Effective Date: *January 1, 2006*

Public Hearing:

Date: *October 3, 2005*

Time: *10:00 a.m.*

Location: *WRC Centennial Campus Auditorium, WRC Bldg-1st Floor, 1571 Varsity Drive, Raleigh, NC*

Reason for Proposed Action:

15A NCAC 10F .0317 - Establish a no-wake zone in Stanly County on Lake Tillery

15A NCAC 10F .0351 – Establish a no-wake zone on the Neuse River within the city limits of New Bern

15A NCAC 10F .0372 – Establish no wake zones in Hertford county in the waters of the Chowan River & Wiccacon River

Procedure by which a person can object to the agency on a proposed rule: *Any person who wishes to object to a proposed rule may do so by writing (or emailing) the person specified in connection with a given rule within the public comment period set up for this Rule. For this Rule, the contact person is Joan Troy.*

Written comments may be submitted to: *Joan Troy, 1701 Mail Service Center, Raleigh, NC 27699-1701, email joan.troy@ncwildlife.org.*

Comment period ends: *November 14, 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 10 – WILDLIFE RESOURCES AND

WATER SAFETY

SUBCHAPTER 10F - MOTORBOATS AND WATER SAFETY

SECTION .0300 - LOCAL WATER SAFETY REGULATIONS

15A NCAC 10F .0317 STANLY COUNTY

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

- (1) Narrows Reservoir (Badin Lake);
- (2) Lake Tillery;
 - (A) Turner Beach Cove as delineated by appropriate markers.
 - (B) Mountain Creek Cove as delineated by appropriate markers.
 - (C) The Mountain View Estates Cove as delineated by appropriate markers.

(b) Speed Limit Near Ramps. No person shall operate a vessel at greater than no-wake speed within 50 yards of any public boat launching ramp while on the waters of a regulated area described in Paragraph (a) of this Rule.

(c) Restricted Swimming Areas. No person operating or responsible for the operation of a vessel shall permit it to enter any marked public swimming area established with the approval of the Executive Director, or his representative, on the waters of a regulated area described in Paragraph (a) of this Rule.

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

(e) Placement and Maintenance of Markers. The Board of Commissioners of Stanly County is hereby designated a suitable agency for placement and maintenance of the markers implementing this Rule in accordance with the Uniform System.

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

15A NCAC 10F .0351 CITY OF NEW BERN

(a) Regulated Area. This Rule applies to the waters described in Paragraph (b) of this Rule, that part of the Trent River that is located within the city limits of New Bern in Craven County.

(b) Speed Limit. No person shall operate any vessel at greater than no-wake speed on the following waters: Trent River between the Trent River Railroad Bridge and the Alfred A. Cunningham Highway (old US 70) Bridge in the City of New Bern.

- (1) Trent River between the Trent River Railroad Bridge and the Alfred A. Cunningham Highway (old US 70) Bridge in the City of New Bern.
- (2) Neuse River from the eastern corner of the Hatteras Yachts, Inc. property, eastward along wnd with the southern side of the Neuse River, approximately 970 feet to a point on the western corner of Glenburnie Park, as identified by markers.

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

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

15A NCAC 10F. 0372 HERTFORD COUNTY

(a) Regulated Areas. This Rule applies to the following areas within the territorial jurisdiction of Hertford County:

- (1) Chowan River. The area along the southern shoreline of the Chowan River, extending up to 600 feet in an easterly direction, and up to 1000 feet in a westerly direction, from the shore line terminus of State Road 1401 (Tuscarora Beach Road) at the site of the property commonly known as Tuscarora Beach, extending 200 feet toward the center of the Chowan River, as indicated by buoys; and
- (2) Wiccacon River. The area along the southern shoreline of the Wiccacon River, extending up to 900 feet in a westerly and northerly direction from the existing No Wake Zone at the Harrellsville Wildlife Public Boat Ramp at the terminus of State Road 1344 (Old Ferry Road), extending out from the shoreline of the entire width of the Wiccacon River.

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

(c) Placement and Maintenance of Markers. The Town of Swansboro is designated a suitable agency for placement and maintenance of the markers implementing this Rule.

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

TITLE 21 – OCCUPATIONAL LICENSING BOARDS

CHAPTER 12 - LICENSING BOARD FOR GENERAL CONTRACTORS

Notice is hereby given in accordance with G.S. 150B-21.2 that the Licensing Board for General Contractors intends to amend the rules cited as 21 NCAC 12 .0204-.0205, .0302, .0408, .0506, .0701.

Proposed Effective Date: *January 1, 2006*

Public Hearing:

Date: *October 12, 2005*

Time: *9:00 a.m.*

Location: *3739 National Drive, Ste 200, Cumberland Building, Glenwood Place, Raleigh, NC*

Reason for Proposed Action:

21 NCAC 12 .0204 - To require an applicant for a limited license to provide the Board an audited financial statement if the applicant has been in bankruptcy within seven years prior to the filing of the application to ensure fiscal stability, and financial responsibility. To increase the amount of the bond obtainable consistent with the increased values of projects for licenses set out in G.S. 87-10 to ensure financial responsibility.

21 NCAC 12 .0205 – To allow a qualifier to qualify no more than two licenses regardless of whether such licenses are held individually or by a corporation.

21 NCAC 12 .0302 – To increase the fee charged per application package to cover increased costs.

21 NCAC 12 .0408 – To define the term "members of the personnel" set out in G.S. 87-10 and to clarify that a partner may take an examination on behalf of the partnership.

21 NCAC 12 .0506 – To increase the charge for status of licensure affidavit to cover increased costs.

21 NCAC 12 .0701 – To codify the Board's current practice of allowing the Review Committee to settle cases.

Procedure by which a person can object to the agency on a proposed rule: Persons may submit objections regarding the proposed rule changes to Mark D. Selph, North Carolina Licensing Board for General Contractors, P.O. Box 17187, Raleigh, NC 27619.

Written comments may be submitted to: Mark D. Selph, P.O. Box 17187, Raleigh, NC 27619

Comment period ends: November 14, 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) - **21 NCAC 12 .0204**
- None – **21 NCAC 12 .0205, .0302, .0408, .0506, .0701**

SECTION .0200 - LICENSING REQUIREMENTS

21 NCAC 12 .0204 ELIGIBILITY

(a) Limited License. The applicant for such a license must:

- (1) Be entitled to be admitted to the examination given by the Board in light of the requirements set out in G.S. 87-10 and Section .0400 of this Chapter;
 - (2) Be financially stable to the extent that the total current assets of the applicant or the firm or corporation he represents exceed the total current liabilities by at least seventeen thousand dollars (\$17,000.00);
 - (3) Successfully complete 70 percent of the examination given the applicant by the Board dealing with the specified contracting classification chosen by the applicant; and
 - (4) Provide to the Board an audited financial statement with a classified balance sheet as part of the application, if the applicant or any owner, principal, or qualifier is in bankruptcy, bankruptcy or has been in bankruptcy within seven years prior to the filing of the application. This requirement does not apply to shareholders of an applicant that is a publicly traded corporation.
- (b) Intermediate License. The applicant for such a license must:
- (1) Be entitled to be admitted to the examination given by the Board in light of the requirements set out in G.S. 87-10 and Section .0400 of this Chapter;
 - (2) Be financially stable to the extent that the total current assets of the applicant or the firm or corporation he represents exceed the total current liabilities by at least seventy-five thousand dollars (\$75,000.00) as reflected in an audited financial statement prepared by a certified public accountant or an independent accountant who is engaged in the public practice of accountancy; and
 - (3) Successfully complete 70 percent of the examination given the applicant by the Board dealing with the specified contracting classification chosen by the applicant.
- (c) Unlimited License. The applicant for such a license must:
- (1) Be entitled to be admitted to the examination given by the Board in light of the requirements set out in G.S. 87-10 and Section .0400 of this Chapter;
 - (2) Be financially stable to the extent that the total current assets of the applicant or the firm or corporation he represents exceed the total current liabilities by at least one hundred fifty thousand dollars (\$150,000.00) as reflected in an audited financial statement prepared by a certified public accountant or an independent accountant who is engaged in the public practice of accountancy;
 - (3) Successfully complete 70 percent of the examination given the applicant by the Board dealing with the specified contracting classification chosen by the applicant.

(d) In lieu of demonstrating the required level of working capital, an applicant may obtain a surety bond from a surety authorized to transact surety business in North Carolina pursuant to G.S. 58 Articles 7, 16, 21, or 22. The surety shall maintain a rating from A.M. Best, or its successor rating organization, of either Superior (A++ or A+) or Excellent (A or A-). The bond shall be continuous in form and shall be maintained in effect for as long as the applicant maintains a license to practice general contracting in North Carolina or until the applicant demonstrates the required level of working capital. The application form and subsequent annual license renewal forms shall require proof of a surety bond meeting the requirements of this Rule. The applicant shall maintain the bond in the amount of ~~two~~ three hundred fifty thousand dollars (~~\$250,000~~) (\$350,000) for a limited license, ~~seven hundred fifty thousand one million~~ dollars (~~\$750,000~~) (\$1,000,000) for an intermediate license, and ~~one million five hundred thousand two million~~ dollars (~~\$1,500,000~~) (\$2,000,000) for an unlimited license. The bond shall list State of North Carolina as obligee and be for the benefit of any person who is damaged by an act or omission of the applicant constituting breach of a construction contract or breach of a contract for the furnishing of labor, materials, or professional services to construction undertaken by the applicant, or by an unlawful act or omission of the applicant in the performance of a construction contract. The bond required by this Rule shall be in addition to and not in lieu of any other bond required of the applicant by law, regulation, or any party to a contract with the applicant. Should the surety cancel the bond, the surety and the applicant both shall notify the Board immediately in writing. If the applicant fails to provide written proof of financial responsibility in compliance with this Rule within 30 days of the bond's cancellation, then the applicant's license shall be suspended until written proof of compliance is provided. After a suspension of two years, the applicant shall fulfill all requirements of a new applicant for licensure. The practice of general contracting by an applicant whose license has been suspended pursuant to this Rule shall subject the applicant to additional disciplinary action by the Board.

(e) Reciprocity. If an applicant is licensed as a general contractor in another state, the Board, in its discretion, need not require the applicant to successfully complete the written examination as provided by G.S.87-15.1. However, the applicant must comply with all other requirements of these rules to be eligible to be licensed in North Carolina as a general contractor.

(f) Accounting and reporting standards. Working capital, balance sheet with current and fixed assets, current and long term liabilities, and other financial terminologies used herein shall be construed in accordance with those standards referred to as "generally accepted accounting principles" as promulgated by the Financial Accounting Standards Board, the American Institute of Certified Public Accountants, and, if applicable, through pronouncements of the Governmental Accounting Standards Board, or their predecessor organizations. An audited financial statement, an unqualified opinion, and other financial reporting terminologies used herein shall be construed in accordance with those standards referred to as "generally accepted auditing standards" as promulgated by the American

Institute of Certified Public Accountants through pronouncements of the Auditing Standards Board.

Authority G.S. 87-1; 87-10.

21 NCAC 12 .0205 FILING DEADLINE/APP SEEKING QUAL/EMP/ANOTHER

(a) Any application made pursuant to G.S. 87-10 for a new applicant seeking qualifications by employment of a person who has already passed an examination shall be completed and filed at least 30 days before any regular or special meeting of the Board. At such meeting, the Board shall consider the application. The regular meetings of the Board are in January, April, July and October of each year.

(b) The qualifier for the applicant shall be a responsible managing employee, officer or member of the personnel of the applicant, as described in G.S. 87-10 and Rule .0408(a) of this Chapter. A person may serve as a qualifier for ~~the person's own individual license and for only one additional license. no more than two licenses.~~ A person may not serve as a qualifier under this Rule if such person has not served as a qualifier for a license of the appropriate classification for more than two years prior to the filing of the application found to be in complete order. Subject to the provisions of G.S. 150B and Section .0800 of these Rules, the Board may reject the application of an applicant seeking qualification by employment of a person who has already passed an examination if such person has previously served as qualifier for a licensee which has been disciplined by the Board.

(c) The holder of a general contractors license shall notify the Board immediately in writing as to the termination date in the event the qualifying individual or individuals cease to be connected with the licensee. After such notice is filed with the Board, or the Board determines that the qualifying individual or individuals are no longer connected with the licensee, the license shall remain in full force and effect for a period of 30 days from the termination date, and then be cancelled, as provided by G.S. 87-10. Holders of a general contractors license are entitled to reexamination or replacement of the qualifying individual's credentials in accordance with G.S. 87-10, but may not engage in the practice of general contracting for any project whose cost exceeds the monetary threshold set forth in G.S. 87-1 after the license has been cancelled, until another qualifying individual has passed a required examination.

Authority G.S. 87-1; 87-10.

SECTION .0300 - APPLICATION PROCEDURE

21 NCAC 12 .0302 REQUEST

(a) A request for the required application form may be made at the address in Rule .0101 of this Chapter.

(b) The Board shall charge a fee of ~~six fifteen~~ dollars (~~\$6.00~~) (\$15.00) per application package if the package is mailed, and charge a fee of ~~five thirteen~~ dollars (~~\$5.00~~) (\$13.00) per application package if the package need not be mailed. The Board shall not charge more than the cost of publication and mailing of the application package. Should the total cost of

development, mailing and publication be less than ~~six~~ nine dollars (~~\$6.00~~), (\$9.00), the Board shall adjust the fees accordingly.

Authority G.S. 87-1; 87-10; 150B-19(5).

SECTION .0400 - EXAMINATION

21 NCAC 12 .0408 PERSON TAKING EXAMINATION

(a) Persons other than the applicant, if the applicant is an individual, may take the required examination under certain conditions. Persons associated with a firm or corporation may take the required examination on behalf of the firm or corporation under certain conditions. The conditions are described in G.S. 87-10. The term "responsible managing" as used in G.S. 87-10 to describe persons who may take an examination on behalf of an applicant means that the person shall be actively engaged in the work of the applicant a minimum of 20 hours per week or a majority of the hours operated by the applicant, whichever is less. The term "members of the personnel" as used in G.S. 87-10 to describe persons who may take an examination on behalf of an applicant means that the person shall be a responsible managing employee of the applicant and shall not be an independent contractor. A partner may take an examination on behalf of a partnership. It is the purpose of this Rule to encourage all licensees to have an experienced supervisor, knowledgeable about the type of construction being performed, actively engaged in supervision of the construction activity during as many operating hours as is possible.

(b) More than one person associated with an applicant may take the required examination. If one person associated with the applicant fails, and another passes, the license will be granted to that applicant.

Authority G.S. 87-1; 87-10.

SECTION .0500 - LICENSE

21 NCAC 12 .0506 CHARGE FOR STATUS OF LICENSURE AFFIDAVIT

The Board shall charge persons requesting an affidavit as to status of licensure a fee of ~~twenty~~ twenty-five dollars (~~\$20.00~~) (\$25.00) per affidavit. The Board may furnish copies of such affidavits free of charge to governmental entities.

Authority G.S. 87-8; 87-13; 150B-19(5).

SECTION .0700 - BOARD DISCIPLINARY PROCEDURES

21 NCAC 12 .0701 IMPROPER PRACTICE

(a) Preferring Charges. Any person who believes that any licensed general contractor is in violation of the provisions of G.S. 87-11 may prefer charges against that person or corporation by setting forth in writing those charges and swearing to their authenticity. The charges are to be filed with the Secretary-

Treasurer of the Board at the Board's address in Rule .0101 of this Chapter.

(b) Preliminary or Threshold Determination.

- (1) A charge, properly filed, shall be initially referred to the review committee.
- (2) The review committee shall be a committee made up of the following individuals:
 - (A) one member of the Board, and
 - (B) the legal counsel of the Board, and
 - (C) the Secretary-Treasurer.
- (3) The review committee shall be specifically delegated the responsibility of determining, prior to a full-scale hearing, whether or not a charge is unfounded or trivial. The decision of the review committee shall be final.
- (4) Once a charge is referred to the review committee, a written notice of and detailed explanation of the charge shall be forwarded to the person or corporation against whom the charge is made and a response is requested of the person or corporation so charged to show compliance with all lawful requirements for retention of the license. Notice of the charge and of the alleged facts or alleged conduct shall be given by first class mail to the last known address of the person or corporation.
- (5) If the respondent denies the charge brought against him, then, the review committee may direct that a field investigation be performed by an investigator retained by the Board.
- (6) After all preliminary evidence has been received by the review committee, it shall make a threshold determination of the charges brought. From the evidence, it shall recommend to the Board that:
 - (A) The charge be dismissed as unfounded or trivial;
 - (B) When the charge is admitted as true by the respondent, the Board accept the respondent's admission of guilt and order the respondent not to commit in the future the specific act or acts admitted by him to have been violated and, also, not to violate any of the acts of misconduct specified in G.S. 87-11 at any time in the future; or
 - (C) The charge, whether admitted or denied, be presented to the full Board for a hearing and determination by the Board on the merits of the charge in accordance with the substantive and procedural requirements of the provisions of Section .0800 of this Chapter and the provisions of G.S. 87-11. Prior to the matter being heard and determined by the Board, it

may be resolved by consent order approved by the review committee.

- (7) Notice of the threshold determination of the review committee shall be given to the party against whom the charges have been brought and the party preferring the charge within ten days of the review committee's decision. Though it is not forbidden to do so, the review committee shall not be required to notify the parties of the reasons of the review committee in making its threshold determination.

(c) Board Determination. The Board may choose to hold a hearing on the merits of any disputed charge. After a hearing, in accordance with the hearing requirements of Section .0800 of this Chapter, the Board shall make a determination of the charge in light of the requirements of G.S. 87- 11.

Authority G.S. 87-11; 150B-3; 150B-38.

CHAPTER 46 – PHARMACY BOARD

Notice is hereby given in accordance with G.S. 150B-21.2 that the Board of Pharmacy intends to adopt the rules cited as 21 NCAC 46 .1417, .2511 and amend the rules cited as 21 NCAC 46 .1602, .1605, .1607, .1611-.1612, .1813, .2201, .2502, .2601, .2807, .3301.

Proposed Effective Date: January 1, 2006

Public Hearing:

Date: October 17, 2005

Time: 12:00 noon

Location: Sheraton Imperial, 4700 Emperor Blvd. Durham, NC (I-40 Exit 282, Page Rd)

Reason for Proposed Action:

21 NCAC 46 .1417-to set out requirements for health care facility pharmacies providing remote medication order processing services to ensure the safe distribution of prescription drugs.

21 NCAC 46 .1602-to set out additional requirements for an applicant for licensure by reciprocity who have not practiced pharmacy within one year prior to application to ensure that the applicant can safely and properly practice pharmacy.

21 NCAC 46 .1605-to increase the charge for verification for reinstatement to cover increased costs.

21 NCAC 46 .1607-to allow the Board to charge the maximum fees to register as an out-of-state pharmacy and for annual renewal of such registration to cover increased costs.

21 NCAC 46 .1611-to increase the fee for submittal of dishonored and returned checks to cover increased costs.

21 NCAC 46 .1612-to set out additional requirements for an applicant for reinstatement of licenses to ensure that the applicant can safely and properly practice pharmacy.

21 NCAC 46 .1813-to require the prescriber, when transmitting a prescription order electronically, to clearly indicate on each

prescription order whether product selection is permitted to ensure the safe distribution of prescription drugs;

21 NCAC 46 .2201-to increase the number of hours of continuing education required to enable pharmacists to more safely and properly practice pharmacy.

21 NCAC 46 .2502-to allow pharmacist-manager to serve temporarily, to improve security in the pharmacy, to set out additional requirements for safeguarding prescription records and pharmaceuticals, and to require recordkeeping requirements identifying each pharmacist and technician responsible for compounding or dispensing each medication, all to ensure the safe distribution of prescription drugs.

21 NCAC 46 .2511-to set out a charge for status affidavits to cover the costs associated with their production.

21 NCAC 46 .2601-to prohibit applicants for device and medical equipment permits from operating from their residence to protect the safety and well-being of patients and Board staff. To set out an additional fee of \$5.00 for online renewal of registration to cover data processing costs.

21 NCAC 46 .2807-to limit this Rule to anti-neoplastic agents to ensure that the rule is clear.

21 NCAC 46 .3301-to require that a pharmacist may not supervise more than two pharmacy technicians unless the additional pharmacy technicians have passed the Pharmacy Technician Certificate Examination or other examination administered by a Board approved provider to ensure the safe filling, refilling, and distribution of prescription drugs.

Procedure by which a person can object to the agency on a proposed rule: *Persons may submit objections regarding these proposed rule changes to David R. Work, NC Board of Pharmacy, 6015 Farrington Road, Suite 201, Chapel Hill, NC 27517.*

Written comments may be submitted to: *David R. Work, NC Board of Pharmacy, 6015 Farrington Rd, Suite 201, Chapel Hill, NC 27517.*

Comment period ends: *November 14, 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 .1400 - HOSPITALS: OTHER HEALTH FACILITIES

21 NCAC 46 .1417 REMOTE MEDICATION ORDER PROCESSING SERVICES

(a) Purpose. The purpose of this Section is to set out requirements for health care facility pharmacies providing remote medication order processing services.

(b) Definition. Medication order processing does not include the dispensing of a prescription drug but includes any of the following:

- (1) receiving, interpreting, or clarifying medication orders;
- (2) data entry and transferring of medication order information;
- (3) performing drug regimen review;
- (4) interpreting clinical data;
- (5) performing therapeutic interventions, and
- (6) providing drug information concerning medication orders or drugs.

(c) Outsourcing. A pharmacy may outsource medication order processing to another pharmacy provided the pharmacies have the same owner or the pharmacy has entered into a written contract or agreement with an outsourcing company that outlines the services to be provided and the responsibilities and accountabilities of each pharmacy in compliance with federal and state laws and regulations. The pharmacy providing the remote processing of medication orders must be approved by the Board of Pharmacy.

(d) Training. A pharmacy providing remote medication order processing must ensure that all pharmacists providing such services have been trained on each pharmacy's policies and procedures relating to medication order processing. Such training shall include policies on abbreviations, administration times, automatic stop orders, substitution, and formulary compliance.

(e) Access. The pharmacies must share common electronic files or have appropriate technology to allow secure access to the pharmacy's information system and to provide the remote pharmacy with access to the information necessary or required to process a medication order.

(f) Recordkeeping. A pharmacy using remote order entry processing services is responsible for maintaining records of all orders entered into their information system including orders entered from a remote location. The system shall have the ability to audit the activities of the individuals remotely processing medication orders.

(g) Licensure. All pharmacies providing remote order processing services must be permitted by the Board. An out-of-state pharmacy providing remote order processing services must be registered with the Board as an out-of-state pharmacy. All pharmacists located in this State or employed by an out-of-state pharmacy providing remote order processing services to health care facilities in this State, shall be licensed by the Board.

(h) Policy and Procedure Manual. All pharmacies involved in remote order processing shall maintain a policy and procedure manual. Each remote pharmacy is required to maintain those portions of the policy and procedure manual that relate to that pharmacy's operations. The manual shall:

- (1) outline the responsibilities of each of the pharmacies;
- (2) include a list of the name, address, telephone numbers, and all license/registration numbers of the pharmacies involved in remote order processing; and
- (3) include policies and procedures for:
 - (A) protecting the confidentiality and integrity of patient information;
 - (B) maintenance of appropriate records to identify the name(s), initials, or identification code(s) and specific activity (ies) of each pharmacist who performed any processing;
 - (C) complying with federal and state laws and regulations;
 - (D) operating a continuous quality improvement program for pharmacy services designed to objectively and systematically monitor and evaluate the quality and appropriateness of patient care, pursue opportunities to improve patient care, and resolve identified problems; and
 - (E) annually reviewing the written policies and procedures and documenting such review.

Authority G.S. 90-85.6; 90-85.21; 90-85.21A; 90-85.26; 90-85.32; 90-85.34.

SECTION .1600 - LICENSES AND PERMITS

21 NCAC 46 .1602 LICENSE BY RECIPROCITY

- (a) An applicant for licensure without examination, must have:
- (1) Originally been licensed as a pharmacist by an examination equivalent to the North Carolina examination specified in Rule .1505(a)(1) of this Chapter;
 - (2) Achieved scores on an equivalent examination, such as the NABPLEX examination, which would qualify for licensure in this state at the time of examination; ~~and~~
 - (3) Been licensed by a state which deems licensees from this state to be equivalent to the extent that they are suitable for licensure in that state without further substantial ~~examination.~~ ~~examination;~~ and
- (b) All applicants shall submit to the Board a signed release form, completed Fingerprint Record Card, and such other form(s) required to perform a criminal history check at the time of application.

(c) The Board shall require an applicant for licensure without examination who has not practiced pharmacy within ~~the previous five years to obtain additional practical experience and continuing education, one year prior to application to obtain additional continuing education, practical pharmacy experience, successfully complete one or more parts of the Board's licensure examination, or a combination of the foregoing, as the Board deems necessary to ensure that the applicant can safely and properly practice pharmacy.~~

(d) The Board shall also restrict licenses granted pursuant to this Rule for such period of time as the Board deems necessary to ~~assure~~ ensure that the applicant can safely and properly practice pharmacy.

Authority G.S. 90-85.6; 90-85.20.

21 NCAC 46 .1605 CHARGE FOR VERIFICATION FOR REINSTATEMENT

The Board shall charge persons requesting verification for reinstatement of a pharmacy license or permit or a device and medical equipment permit a fee of ~~fifteen dollars (\$15.00)~~ twenty-five dollars (\$25.00) per verification.

Authority G.S. 90-85.6; 90-85.17; 90-85.21; 90-85.22; 150B-19(5)(e).

21 NCAC 46 .1607 OUT-OF-STATE PHARMACIES

(a) In order to protect the public health and safety and implement G.S. 90-85.21A, the following provisions apply to out-of-state pharmacies that ship, mail, or deliver in any manner a dispensed legend drug into this State.

(b) Such pharmacies shall:

- ~~(1)~~ Pay a fee of ~~two hundred fifty dollars (\$250.00) for each original registration and thereafter pay a fee of one hundred twenty five dollars (\$125.00) for annual renewal of each registration;~~
- ~~(2)~~(1) Maintain, in readily retrievable form, records of prescription drugs dispensed to North Carolina residents;
- ~~(3)~~(2) Supply all information requested by the Board in carrying out the Board's responsibilities under the statutes and rules pertaining to out-of-state pharmacies;
- ~~(4)~~(3) During the pharmacy's regular hours of operation but not less than six days per week, for a minimum of 40 hours per week, provide a toll-free telephone service to facilitate communication between patients and pharmacists at the pharmacy who have access to the patient's records. This toll-free number must be disclosed on the label affixed to each container of dispensed drugs;
- ~~(5)~~(4) Comply with all USP and FDA requirements regarding the storage, packaging, and shipping of prescription medications;
- ~~(6)~~(5) Develop and acknowledge the existence of policies governing:

- (A) normal delivery protocols and times;
- (B) the procedure to be followed if the patient's medication is not available at the out-of-state pharmacy, or if delivery will be delayed beyond the normal delivery time;
- (C) the procedure to be followed upon receipt of a prescription for an acute illness, which shall include a procedure for delivery of the medication to the patient from the out-of-state pharmacy at the earliest possible time (such as courier delivery), or an alternative that assures the patient the opportunity to obtain the medication at the earliest possible time; and
- (D) the procedure to be followed when the out-of-state pharmacy is advised that the patient's medication has not been received within the normal delivery time and that the patient is out of medication and requires interim dosage until mail prescription drugs become available;

~~(7)~~(6) Disclose the location, names, and titles, of all principal corporate officers, if incorporated, and if unincorporated, partners, or owners of the pharmacy. Disclose the names and license numbers of all pharmacists dispensing prescription legend drugs to an ultimate user in this State, the names and, if available, license or registration numbers of all supportive personnel employed by the out-of-state pharmacy who assist such pharmacists in such dispensing. A report containing this information shall be made on an annual basis and within 30 days of each change of any principal office, pharmacist-manager of any location dispensing prescription legend drugs to an ultimate user in this State, principal corporate officer if incorporated, and if unincorporated, partner or owner of the pharmacy. A new registration shall be required for a change of ownership of an established pharmacy to a successor business entity which results in a change in the controlling interest in the pharmacy;

~~(8)~~(7) Submit evidence of possession of a valid license, permit, or registration as a pharmacy in compliance with the laws of the state in which the pharmacy is located. Such evidence shall consist of one of the following:

- (A) a copy of the current license, permit, or registration certificate issued by the regulatory or licensing agency of the state in which the pharmacy is located; or

(B) a letter from the regulatory or licensing agency of the state in which the pharmacy is located certifying the pharmacy's compliance with the pharmacy laws of that state;

~~(9)~~(8) Designate a resident agent in North Carolina for service of process. Any such out-of-state pharmacy that does not so designate a resident agent shall be deemed to have appointed the Secretary of State of the State of North Carolina to be its true and lawful attorney upon whom process may be served. All legal process in any action or proceeding against such pharmacy arising from shipping, mailing or delivering prescription drugs in North Carolina shall be served on the resident agent. In addition, a copy of such service of process shall be mailed to the out-of-state pharmacy by certified mail, return receipt requested, at the address of the out-of-state pharmacy as designated on the registration form filed with the Board. Any out-of-state pharmacy which does not register in this State, shall be deemed to have consented to service of process on the Secretary of State as sufficient service.

(c) The facilities and records of an out-of-state pharmacy shall be subject to inspection by the Board; provided however, the Board may accept in lieu thereof satisfactory inspection reports by the licensing entity of the state in which the pharmacy is located.

(d) An out-of-state pharmacy shall comply with the statutes and regulations of the state in which the pharmacy is located.

(e) Any person who ships, mails, or delivers prescription drugs to North Carolina residents from more than one out-of-state pharmacy shall register each pharmacy separately.

(f) Prior to original registration, a pharmacist who is an authorized representative of the pharmacy's owner must appear personally at the Board office on the first Monday of the month, the Monday before the monthly Board meeting, or such other time as scheduled with the Board's staff. Such authorized pharmacist may represent all pharmacies having the same ownership.

(g) An out-of-state pharmacy shall report to the Board information that reasonably suggests that there is a probability that a prescription drug or device dispensed from such out-of-state pharmacy has caused or contributed to the death of any patient. The report shall be filed in writing on a form provided by the Board within 14 days of the pharmacy becoming aware of the death. The Board may not disclose the identity of any person or entity making the report, except when it is necessary to protect life or health of any person. No such report in possession of the Board shall be discoverable or admissible into evidence or otherwise used in any civil action involving private parties.

(h) The Board may, in accordance with Chapter 150B of the General Statutes, issue a letter of reprimand or suspend, restrict, revoke, or refuse to grant or renew registration to an out-of-state pharmacy if such pharmacy has:

(1) made false representations or withheld material information in connection with obtaining registration;

(2) been found guilty of or plead guilty or nolo contendere to any felony in connection with the practice of pharmacy or the distribution of drugs;

(3) made false representations in connection with the practice of pharmacy that endanger or are likely to endanger the health or safety of the public, or that defraud any person;

(4) failed to comply with this Rule;

(5) been the subject of a negligence complaint resulting from the dispensing of prescription drugs to a resident of North Carolina and based on an investigation of such complaint been found to be negligent:

(A) by the Board of Pharmacy of the state in which the pharmacy is located;

(B) by the North Carolina Board of Pharmacy if the Board of Pharmacy of the state where the pharmacy is located failed to initiate an investigation of such complaint within 45 days after referral of the complaint from the North Carolina Board of Pharmacy; or

(C) by the North Carolina Board of Pharmacy if the Board of Pharmacy of the state where the pharmacy is located initiates an investigation of such complaint within 45 days, but later advises the North Carolina Board that it will not make a determination of negligence or that it has made no determination of the issue of negligence within one year after referral of the complaint and has discontinued any active investigation or proceeding for such determination. In any disciplinary proceeding based on negligence, the standard of practice shall be that applicable in the state in which the pharmacy is located. In disciplinary proceedings pursuant to Part (h)(5)(A) of this Rule, the Board shall adopt the findings of negligence by the Board of Pharmacy of the state in which the pharmacy is located as part of the Board's final decision without producing its own evidence of negligence.

(i) An out-of-state pharmacy shall notify the Board within five days of receipt of any order or decision by a Board of Pharmacy imposing disciplinary action on the pharmacy. Notwithstanding the provisions of Paragraph (h) of this Rule, if the permit or registration in the state where the pharmacy is located is

suspended or revoked, then the pharmacy's registration in North Carolina will be immediately suspended or revoked for the same period of time.

(j) An out-of-state pharmacy registration shall expire on December 31 of each year.

(k) The fees provided for in G.S. 90-85.21A as maximum fees which the Board is entitled to charge and collect are hereby established as the fees for each original registration and for annual renewal of each registration.

Authority G.S. 90-85.6; 90-85.21A; 90-85.26; 90-85.28; 90-85.29; 90-85.30; 90-85.32.

21 NCAC 46 .1611 FEE FOR SUBMITTAL OF DISHONORED AND RETURNED CHECK

(a) Any person, firm or corporation submitting to the Board a check which is subsequently returned to the Board because of insufficient funds or because there is no account open at the bank shall be charged a ~~penalty~~ fee of ~~twenty~~ twenty-five dollars ~~(\$20.00)~~ (\$25.00) for processing the check.

(b) Until such time as the payor of the returned check pays the amount of the check and pays the prescribed ~~penalty~~ fee, the payor shall not be eligible to take an examination, review an examination, obtain a license or permit or have his license or permit renewed.

(c) Any license or permit which has been issued based on the payment of a check which is subsequently returned to the Board for reasons stated in Paragraph (a) of this Rule shall be declared invalid until such time as the payor pays the amount of the check and pays the prescribed ~~penalty~~ fee.

(d) Payment to the Board of the amount of the returned check and the prescribed ~~penalty~~ fee shall be made in the form of cash, a cashier's check, or money order.

(e) All examination, license and permit, and license and permit renewal applications provided by the Board shall contain information in a conspicuous place thereon clearly advising the applicant of the applicable ~~penalty~~ fee for returned checks.

Authority G.S. 25-3-506; 150B-19(5)e.

21 NCAC 46 .1612 REINSTATEMENT OF LICENSES AND PERMITS

(a) All licenses renewed after March 1 are subject to the maximum original fee set out in G.S. 90-85.24 for applicants for licensure. All permits renewed after March 1 are subject to the original registration fee.

(b) All applicants shall submit to the Board a signed release form, completed Fingerprint Record Card, and such other form(s) required to perform a criminal history check at the time of application.

(c) The Board shall require applicants for reinstatement pursuant to G.S. 90-85.19 of a lapsed license to obtain additional practical experience and continuing education. continuing education, practical pharmacy experience, successfully complete one or more parts of the Board's licensure examination, or a combination of the foregoing, as the Board deems necessary to ensure that the applicant can safely and properly practice pharmacy.

(d) The Board shall also restrict licenses reinstated pursuant to G.S. 90-85.19 for such period of time as the Board deems necessary to ~~assure~~ ensure that the applicant can safely and properly practice pharmacy.

Authority G.S. 90-85.19; 90-85.24.

SECTION .1800 - PRESCRIPTIONS

21 NCAC 46 .1813 TRANSMISSION OF PRESCRIPTION ORDERS

(a) Prescription orders may be transmitted by using a facsimile machine ("FAX") or by other electronic transmission from a prescriber to a pharmacy. "Electronic transmission" means transmission of the digital representation of information by way of electronic equipment.

(b) All prescription drug orders transmitted by FAX or by electronic transmission shall:

- (1) be transmitted directly to a pharmacist or certified technician in a pharmacy of the patient's choice with no intervening person altering the content of the prescription drug order;
- (2) identify the transmitter's phone number for verbal confirmation, the time and date of transmission, and the identity of the pharmacy intended to receive the transmission;
- (3) be transmitted by an authorized practitioner or his designated agent and contain either a written signature or an electronic signature unique to the practitioner;
- (4) be deemed the original prescription drug order, provided it meets all requirements of federal and state laws and regulations; and
- (5) if a refill order, contain all information required for original prescription orders except for the prescriber's signature.

(c) The prescribing practitioner may authorize his agent to transmit by FAX or by electronic transmission a prescription drug order to a pharmacist or certified technician in a pharmacy provided that the identity of the transmitting agent is included in the order.

(d) The pharmacist shall exercise professional judgment regarding the accuracy, validity, and authenticity of a prescription drug order transmitted by FAX or by electronic transmission consistent with federal and state laws and regulations.

(e) All equipment for receipt of prescription drug orders by FAX or by electronic transmission shall be maintained so as to ensure against unauthorized access.

(f) Prescriptions may be transferred by FAX or by electronic transmission if all the requirements of Rule .1806 of this Section are met.

(g) No agreement between a prescriber and a pharmacy or device and medical equipment permit holder shall require that prescription orders be transmitted by FAX or by electronic transmission from the

prescriber to only that pharmacy or device and medical equipment permit holder.

(h) If transmitted electronically, the prescriber shall individually and clearly indicate on each prescription order whether or not product selection is permitted.

Authority G.S. 90-85.6; 90-85.32.

SECTION .2200 - CONTINUING EDUCATION

21 NCAC 46 .2201 HOURS: RECORDS: PROVIDERS: CORRESPONDENCE: RECIPROCITY

(a) As a condition of license renewal, each pharmacist shall report on renewal forms the hours of continuing education obtained during the preceding year. ~~Annual accumulation of ten hours is considered satisfactory to meet the quantitative requirement of this Rule.~~ A pharmacist shall obtain at least 30 hours of continuing education every two years, with a minimum of 10 hours per year.

(b) All records, reports of accredited hours and certificates of credit shall be kept at the pharmacist's regular place of practice for verification by inspectors during regular or other visits. The Board may require submission of such documentation on a random basis. Pharmacists who do not practice regularly at one location shall produce such records within 24 hours of a request from Board authorized personnel. All records of hours and certificates of credit shall be preserved for at least three years.

(c) All continuing education shall be obtained from a provider approved by the Board. In order to receive credit, continuing education courses shall have the purpose of increasing the participant's professional competence and proficiency as a pharmacist. ~~At least five~~ 15 hours of the continuing education credits must be obtained through contact programs over a two year period, with a minimum of five hours in any calendar year. Contact programs are those programs in which there is an opportunity for live two-way communication between the presenter and attendee.

(d) Continuing education shall not serve as a barrier to reciprocity; however all licensees by reciprocity must observe the continuing education standards specified in (a), (b) and (c) of this Rule within the first renewal period after licensure in this state.

Authority G.S. 90-85.6; 90-85.17; 90-85.18.

SECTION .2500 - MISCELLANEOUS PROVISIONS

21 NCAC 46 .2502 RESPONSIBILITIES OF PHARMACIST-MANAGER

(a) The pharmacist-manager shall assure that prescription legend drugs and controlled substances are safe and secure within the pharmacy.

(b) The pharmacist-manager employed or otherwise engaged to supply pharmaceutical services may have a flexible schedule of attendance but shall be present for at least one-half the hours the pharmacy is open or 32 hours a week, whichever is less. A pharmacist employee not meeting this requirement may serve as pharmacist-manager of the permit holder temporarily for a

period not to exceed 90 days from the departure date of the previous pharmacist-manager, if the pharmacist employee is present at least 20 hours per week in the pharmacy.

(c) Whenever a change of ownership or change of pharmacist-manager occurs, the successor pharmacist-manager shall complete an inventory of all controlled substances in the pharmacy within 10 days. A written record of such inventory, signed and dated by the successor pharmacist-manager, shall be maintained in the pharmacy with other controlled substances records for a period of three years.

(d) The pharmacist-manager shall develop and implement a system of inventory record-keeping and control which will enable that pharmacist-manager to detect any shortage or discrepancy in the inventories of controlled substances at that pharmacy at the earliest practicable time.

(e) The pharmacist-manager shall maintain complete authority and control over ~~any and all keys to~~ access to the dispensing area of the pharmacy and shall be responsible for the ultimate security of the pharmacy. Only personnel authorized by the pharmacist-manager shall have access to the dispensing area of the pharmacy. ~~A~~ The dispensing area of a pharmacy shall be secured by a physical barrier to prohibit unauthorized entry if no pharmacist will be present in the pharmacy for a period of 90 minutes or more, when unattended by authorized personnel.

(f) These duties are in addition to the specific duties of pharmacist-managers at institutional pharmacies and pharmacies in health departments as set forth in the Rules in this Chapter.

(g) A person shall not serve as pharmacist-manager at more than one pharmacy at any one time except for limited service pharmacies.

(h) When a pharmacy is to be closed permanently, the pharmacist-manager shall inform the Board and the United States Drug Enforcement Administration of the closing, arrange for the proper disposition of the pharmaceuticals and return the pharmacy permit to the Board's offices within 10 days of the closing date. If possible, notice of the closing shall be given to the public by posted notice at the pharmacy at least 30 days prior to the closing date and 15 days after the closing date. Such notice shall notify the public that prescription files may be transferred to a pharmacy of the patient's or customer's choice during the 30 day period prior to the closing date. During the 30 day period prior to the closing date, the pharmacist-manager, and the pharmacy's owner (if the owner is other than the pharmacist-manager), shall transfer prescription files to another pharmacy chosen by the patient or customer, upon request. Absent specific instructions from the patient or customer, the pharmacist-manager, and the pharmacy's owner (if the owner is other than the pharmacist-manager), shall transfer prescription files to another pharmacy for maintenance of patient therapy and shall inform the public of such transfer by posted notice at the pharmacy for 15 days after the closing date, if possible. Controlled substance records shall be retained for the period of time required by law.

(i) If possible, the pharmacist-manager shall ensure that notice of the temporary closing of any pharmacy for more than 14 consecutive days is given to the public by posted notice at the pharmacy at least 30 days prior to the closing date, and 15 days after the closing date. Such notice shall notify the public that

prescription files may be transferred to a pharmacy of the patient's or customer's choice during the 30 day period prior to the closing date. During the 30 day period prior to the closing date, the pharmacist-manager, and the pharmacy's owner (if the owner is other than the pharmacist-manager), shall transfer prescription files to another pharmacy chosen by the patient or customer, upon request.

(j) The pharmacist-manager shall prepare a plan to safeguard prescription records and pharmaceuticals and minimize the interruption of pharmacy services in the event of a natural disaster such as hurricane or flood.

(k) The pharmacist-manager shall separate from the dispensing stock all drug products more than six months out of date.

(l) The pharmacist-manager shall report to the Board of Pharmacy information that reasonably suggests that there is a probability that a prescription drug or device dispensed from a location holding a permit has caused or contributed to the death of a patient or customer. This report shall be filed in writing on a form provided by the Board within 14 days of the owner representative or pharmacist-manager's becoming aware of the event. The pharmacist-manager shall retain all documents, labels, vials, supplies, substances and internal investigative reports relating to the event. All such items shall be made available to the Board upon request.

(m) The Board shall not disclose the identity of a pharmacist-manager who makes a report under Paragraph (l) of this Rule, except as required by law. All reports made under Paragraph (l) of this Rule shall not be released except as required by law.

(n) Dispensing errors which are not detected and corrected prior to the patient receiving the medication shall be documented and reported to the pharmacist-manager. Documentation shall include pertinent chronological information and appropriate forms including the identity of individual(s) responsible. These documents, including action taken as part of a quality assurance plan, shall be archived in a readily retrievable manner and open for review, copying or seizure by the Board or its designated employees within 48 hours of a request for inspection for a period of three years. These documents shall be released only to the Board or its designated employees pursuant to an investigation and shall not otherwise be released except as required by law. Upon request by the Board or its designated employees, these documents shall be transmitted by the pharmacist-manager to an office of the Board.

(o) In any Board proceeding, the Board shall consider compliance with Paragraphs (l) and (n) of this Rule as a mitigating factor and noncompliance with Paragraphs (l) and (n) of this Rule as an aggravating factor.

(p) The pharmacist-manager shall ensure that all starter doses of medication supplied to doctors' offices from the pharmacy are accompanied by written materials advising the patient that such doses of medication may be supplied by any pharmacy. Starter doses shall be limited to a 24 hour dose supply per patient.

(q) The pharmacist-manager shall develop and maintain a system of accountability identifying each pharmacist and technician responsible for compounding or dispensing each medication. Records generated pursuant to this Paragraph shall be maintained and readily retrievable for a period of three years.

Authority G.S. 90-85.6; 90-85.21; 90-85.25; 90-85.26; 90-85.32.

21 NCAC 46 .2511 CHARGE FOR STATUS AFFIDAVIT

The Board shall charge persons requesting an affidavit as to the status of any license or permit a fee of twenty-five dollars (\$25.00) per affidavit. The Board may furnish such affidavits free of charge to governmental entities.

Authority G.S. 150B-19(5).

SECTION .2600 – DEVICES

21 NCAC 46 .2601 DISPENSING AND DELIVERY

(a) Devices, as defined in G.S. 90-85.3(e), shall be dispensed only in a pharmacy as defined in G.S. 90-85.3(q) or other place registered with the Board pursuant to G.S. 90-85.22. Medical equipment, as defined in G.S. 90-85.3(11) shall be delivered only by a pharmacy as defined in G.S. 90-85.3(q) or other place registered with the Board pursuant to G.S. 90-85.22. Devices dispensed in hospitals and medical equipment delivered by hospitals are presumed to be the responsibility of the hospital pharmacy unless otherwise registered. This Rule shall apply only to entities engaged in the regular activity of delivering medical equipment.

(b) A pharmacy dispensing and delivering devices and medical equipment and not holding a device and medical equipment permit shall operate its device and medical equipment business at the same physical location as the pharmacy and through the same legal entity that holds the pharmacy permit. The pharmacist-manager shall be responsible for the dispensing and delivery of devices and medical equipment.

(c) Device and medical equipment permits will not be issued to applicants located on residential property.

(d) An additional fee of five dollars (\$5.00) will apply to online renewal of registration.

Authority G.S. 90-85.3(e), (11), (r); 90-85.6; 90-85.22.

SECTION .2800 - STERILE PHARMACEUTICALS

21 NCAC 46 .2807 ANTI-NEOPLASTIC AGENTS

The following additional requirements are necessary for those permit-holders that prepare anti-neoplastic drugs:

- (1) All anti-neoplastic drugs should be compounded in a vertical flow, Class II, biological safety cabinet, or similar appropriate preparation area. There must be strict adherence to the hood-cleaning procedures before preparing a product in the hood not classified as an anti-neoplastic agent.
- (2) Protective apparel shall be worn by personnel compounding anti-neoplastic drugs. This shall include disposable gloves and gowns with tight cuffs.
- (3) Appropriate safety and containment techniques for compounding anti-neoplastic drugs shall be

used in conjunction with the aseptic techniques required for preparing sterile parenteral products.

- (4) Disposal of anti-neoplastic waste shall comply with all applicable local, state, and federal requirements.
- (5) Written procedures for handling both major and minor spills of anti-neoplastic ~~or other hazardous~~ agents must be developed and must be included in the policy and procedural manual for the permit-holder.
- (6) Prepared doses of anti-neoplastic drugs must be dispensed, labeled with proper precautions inside and outside, and shipped in a manner to minimize the risk of accidental rupture of the primary container.

Authority G.S. 90-85.6.

**SECTION .3300 – REGISTRATION OF A
PHARMACY TECHNICIAN**

21 NCAC 46 .3301 REGISTRATION

- (a) Following initial registration with the Board, registration of a pharmacy technician shall be renewed annually and shall

expire on December 31. It shall be unlawful to work as a pharmacy technician more than 60 days after expiration of the registration without renewing the registration. A registration expired more than 60 days may be renewed upon written request and upon payment of the registration fee and a data processing fee of eleven dollars (\$11.00).

(b) The current registration of a pharmacy technician shall be readily available for inspection by agents of the Board.

(c) The training program described in G.S. 90-85.15A(b) is not required for students enrolled in a community college pharmacy technician program.

(d) Volunteer pharmacy technicians providing services at a facility which has a pharmacy permit designated as a free clinic shall complete the training program described in G.S. 90-85.15A(b) but need not register with the Board.

(e) A pharmacist may not supervise more than two pharmacy technicians unless the additional pharmacy technicians have passed the Pharmacy Technician Certificate Examination administered by the Pharmacy Technician Certification Board or other examination administered by a provider approved by the Board.

Authority G.S. 90-85.6; 90-85.15A; 150B-19(5)(e).

APPROVED RULES

*This Section includes the Register Notice citation to rules approved by the Rules Review Commission (RRC) at its meeting August 18, 2005, and reported to the Joint Legislative Administrative Procedure Oversight Committee pursuant to G.S. 150B-21.16. The full text of rules are published below when the rules have been approved by RRC in a form different from that originally noticed in the Register or when no notice was required to be published in the Register. The rules published in full text are identified by an * in the listing of approved rules. Statutory Reference: G.S. 150B-21.17.*

These rules have been entered into the North Carolina Administrative Code.

APPROVED RULE CITATION	REGISTER CITATION TO THE NOTICE OF TEXT
-------------------------------	--

10A	NCAC	05I	.0101*		19:21 NCR
10A	NCAC	05I	.0201-.0202*		19:21 NCR
10A	NCAC	05I	.0203-.0205		19:21 NCR
10A	NCAC	220	.0121		19:20 NCR
10A	NCAC	71S	.0101*		19:19 NCR
10A	NCAC	71S	.0201-.0202*		19:19 NCR
10A	NCAC	71U	.0208		19:21 NCR
11	NCAC	11F	.0701		19:21 NCR
12	NCAC	09F	.0104*		19:20 NCR
12	NCAC	09F	.0106*		19:20 NCR
15A	NCAC	03I	.0101*		19:17 NCR
15A	NCAC	03I	.0105*		19:17 NCR
15A	NCAC	03I	.0120		19:20 NCR
15A	NCAC	03J	.0103		19:20 NCR
15A	NCAC	03J	.0104*		19:17 NCR
15A	NCAC	03J	.0106*		19:17 NCR
15A	NCAC	03J	.0107*		19:20 NCR
15A	NCAC	03J	.0301*		19:17 NCR
15A	NCAC	03L	.0201*		19:17 NCR
15A	NCAC	03L	.0202		19:17 NCR
15A	NCAC	03L	.0206		19:17 NCR
15A	NCAC	03L	.0301		19:17 NCR
15A	NCAC	03M	.0503*		19:20 NCR
15A	NCAC	03M	.0515*		19:17 NCR
15A	NCAC	03M	.0517*		19:17 NCR
15A	NCAC	03O	.0202*		19:20 NCR
15A	NCAC	03O	.0205*		19:20 NCR
15A	NCAC	03O	.0501-.0502*		19:20 NCR
15A	NCAC	03O	.0503*		19:17 NCR
15A	NCAC	03Q	.0107		19:17 NCR
15A	NCAC	03R	.0103*		19:17 NCR
15A	NCAC	03R	.0107*		19:17 NCR
15A	NCAC	06E	.0103*		19:17 NCR
21	NCAC	54	.1611*		19:19 NCR
21	NCAC	54	.1701*		19:19 NCR
21	NCAC	54	.1901*		19:19 NCR
21	NCAC	63	.0210-.0211*		19:22 NCR
21	NCAC	63	.0305		19:22 NCR
21	NCAC	63	.0401*		19:22 NCR
21	NCAC	63	.0405		19:22 NCR
21	NCAC	63	.0501*		19:22 NCR
21	NCAC	64	.0216*		19:20 NCR
21	NCAC	64	.0217*		19:20 NCR

This rule is subject to the next Legislative Session. (See G.S. 150B-21.3(b1))

21 NCAC 64 .0215* 19:20 NCR

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

10A NCAC 05I .0101 PURPOSE AND DEFINITIONS

(a) As used in this Subchapter, the following definitions shall apply:

- (1) Consumer Contributions – A monetary amount voluntarily given to the service provider by the service recipient or the designated

Percent of Poverty	Suggested Percentage of the Cost of Service
100%	10%
125%	20%
150%	30%
175%	40%
200%	50%
225%	60%
250%	70%
275%	80%
300%	90%
350%	100%

(b) The purpose of consumer contributions is to extend the availability of services which are subject to consumer contributions administered by the Division of Aging and Adult Service by providing the opportunity for each service recipient to voluntarily contribute toward the cost of the service(s) received. The service provider shall retain the revenue collected from clients.

History Note: Authority G.S. 143B-181.1 (a) (10); 143B-181.1 (c); 42 U.S.C. 3001; 45 C.F.R. 1321.67; Eff. July 1, 1992; Amended Eff. September 1, 2005.

10A NCAC 05I .0201 SERVICES SUBJECT TO CONSUMER CONTRIBUTIONS

(a) Consumer contributions may be accepted for all services administered by the Division of Aging and Adult Services.

(b) The use of a Recommended Contribution Schedule is prohibited for individuals receiving:

- (1) Information and Assistance, Outreach, Benefits Counseling, Case Management Services;
- (2) Congregate Nutrition and Home Delivered Meals, Senior Companion;
- (3) Ombudsman, Elder Abuse Prevention, Legal Assistance or other consumer protection services or

representative toward the cost of the service received.

- (2) Recommended Contribution Schedule – a listing of income ranges and corresponding recommended contribution percentages for use with clients at or above the federal poverty level. The Recommended Contribution Schedule is available at <http://www.dhhs.state.nc.us/aging/arms/csupda2.htm> and is determined as follows:

- (4) Any services delivered through tribal organizations.

(c) When any of the services specified in Paragraph (a) of this Rule are provided to adults or children as part of a Protective Services Plan, these individuals shall be excluded from consumer contributions, from the beginning of the provision of services until protective services are no longer needed or for 12 months, whichever comes first. Consumer contributions shall not apply to children in foster care, children who have been approved to receive adoption assistance, persons receiving Work First assistance, or federally administered Supplemental Security Income (SSI) applicants or recipients.

History Note: Authority G.S. 143B-181.1 (a) (10); 143B-181.1 (c); 42 U.S.C. 3001; 45 C.F.R. 1321.67; Older Americans Act, Section 315(a)(3) (as amended, 2000); Eff. July 1, 1992; Amended Eff. September 1, 2005.

10A NCAC 05I .0202 INITIAL AND ANNUAL REVIEWS

(a) Upon initiation of the provision of the service(s) subject to consumer contributions and at least annually thereafter, the service providing agency shall review with each client determined eligible to receive services subject to consumer contributions the following information:

- (1) that the contribution is entirely voluntary and that there is no obligation to contribute;
- (2) that all contributions collected shall be used to expand the service(s);
- (3) that information about the client's participation in consumer contributions shall be confidential;
- (4) who should be contacted, including the telephone number, if the client has questions regarding consumer contributions;
- (5) the total cost of the service (actual or per unit); and
- (6) that services shall not be reduced or terminated for failure to contribute.

(b) The agency shall provide a copy of the Recommended Contribution Schedule from the North Carolina Division of Aging and Adult Services to a client whose income is above the Federal poverty level. The agency shall not provide the Recommended Contribution Schedule to clients whose incomes are at or below the Federal poverty level.

(c) The agency shall document in the client's file that the above information has been shared with the client or the designated representative.

History Note: Authority G.S. 143B-181.1 (a) (10); 143B-181.1 (c); 42 U.S.C. 3001; 45 C.F.R. 1321.67; Eff. July 1, 1992; Amended Eff. September 1, 2005.

10A NCAC 71S .0101 PURPOSE OF CONSUMER CONTRIBUTIONS

(a) As used in this Subchapter, the following definitions shall apply:

- (1) Consumer Contributions – A monetary amount voluntarily given to the service provider by the service recipient or the designated representative toward the cost of the service received.
- (2) Recommended Contribution Schedule – a listing of income ranges and corresponding recommended contribution percentages for use with clients whose incomes are above the Federal poverty level. The Recommended Contribution Schedule is available at <http://www.dhhs.state.nc.us/aging/arms/csupdat2.htm> and is determined as follows:

Percent of Poverty	Suggested Percentage of the Cost of Service
100%	10%
125%	20%
150%	30%
175%	40%
200%	50%
225%	60%
250%	70%
275%	80%
300%	90%
350%	100%

(b) The purpose of consumer contributions is to extend the availability of services which are subject to consumer contributions administered by the Division of Social Services by providing the opportunity for each client to voluntarily contribute toward the cost of the service(s) received. Revenue collected from clients shall be retained by the service provider.

History Note: Authority G.S. 143B-153; Eff. March 1, 1994; Amended Eff. September 1, 2005.

10A NCAC 71S .0201 SERVICES SUBJECT TO CONSUMER CONTRIBUTIONS

(a) The following services, when provided by funds administered by the Division of Social Services, shall be subject to consumer contributions:

- (1) Adult Day Care;
- (2) Adult Day Health;
- (3) Housing and Home Improvement (Renovations or Repair and Furnishings or Appliance Purchases only);
- (4) In-Home Aide Services;
- (5) Personal and Family Counseling;
- (6) Preparation and Delivery of Meals.

(b) When any of the services specified in Paragraph (a) of this Rule are provided to adults or children as part of a Protective Services Plan, these individuals shall be excluded from, consumer contributions, from the beginning of the provision of services until protective services are no longer needed or for 12 months, whichever comes first. Consumer contributions shall not apply to children in foster care, children who have been approved to receive adoption assistance, persons receiving Work First assistance, or federally administered Supplemental Security Income (SSI) applicants or recipients.

History Note: Authority G.S. 143B-153; Eff. March 1, 1994; Amended Eff. September 1, 2005.

10A NCAC 71S .0202 INITIAL AND ANNUAL REVIEWS

(a) Upon the initiation of the provision of the service(s) subject to consumer contributions and at least annually thereafter, the agency shall review with each client determined eligible to receive services subject to consumer contributions the following information:

- (1) that the contribution is entirely voluntary and that there is no obligation to contribute;
- (2) that all contributions collected shall be used to expand the service(s);
- (3) that information about the client's participation in consumer contributions shall be confidential;
- (4) who should be contacted, including the telephone number, if the client has questions regarding consumer contributions;
- (5) the total cost of the service (actual or per unit); and
- (6) that services shall not be reduced or terminated for failure to contribute.

(b) The agency shall provide a copy of the Recommended Contribution Schedule from the North Carolina Division of Aging and Adult Services to a client whose income is above the Federal poverty level. The agency shall not provide the Recommended Contribution Schedule to clients whose incomes are at or below the Federal poverty level.

(c) The agency shall document in the client's file that the above information has been shared with the client or the designated representative.

*History Note: Authority G.S. 143B-153;
Eff. March 1, 1994;
Amended Eff. September 1, 2005.*

TITLE 12 – DEPARTMENT OF JUSTICE

12 NCAC 09F .0104 INSTRUCTOR QUALIFICATIONS

(a) Instructors shall meet the following qualifications for approval to deliver the "Concealed Carry Handgun Training" course:

- (1) the instructor shall hold one of the following certifications:
 - (a) "Specific Instructor Certification-Firearms" issued by the Commission;
 - (b) Private Protective Services Firearms Trainer Certification; or
 - (c) "Firearms Instructor Certification" in Personal Protection, Basic Pistol, or Police Firearms issued by the National Rifle Association;
- (2) the instructor shall hold a certificate issued by the North Carolina Justice Academy showing successful completion of the course on "Laws Governing Concealed Handgun and Use of Deadly Force;"
- (3) the instructor shall be eligible to receive or possess a firearm under Federal and North Carolina State Law; and

(b) The instructor shall notify the Criminal Justice Standards Division of all court orders, domestic violence orders of protection, and criminal offenses for which the instructor is charged which would prohibit the instructor from being eligible to receive or possess a firearm under Federal and North Carolina State Law. The notifications required under this Paragraph must be in writing, must specify the nature of the offense, the court in which the case is being handled, the date of arrest, court order, domestic violence order of protection or criminal charge. The notification required under this Paragraph must be received by the Criminal Justice Standards Division within 10 days of the date of the court order, domestic violence order of protection, arrest or criminal charge.

*History Note: Authority G.S. 14-415.12;
Temporary Adoption Eff. November 1, 1995;
Eff. May 1, 1996;
Amended Eff. September 1, 2005; May 1, 2004.*

12 NCAC 09F .0106 SANCTIONS

(a) The Commission shall suspend an approved course when the Commission finds that the course has failed to meet or maintain the required standards for approval.

(b) The Commission shall deny or suspend the certification of instructor status when the Commission finds that the instructor:

- (1) has failed to meet or maintain the required course and instruction standards approved by the Commission as set forth in 12 NCAC 09F .0102;
- (2) has failed to submit modification of courses or change in instructor status;
- (3) has submitted any non-sufficient funds check;
- (4) has falsified any successful completion of an approved course;
- (5) has distributed any certificate provided by the Commission without the named permittee undertaking the approved course from that instructor;
- (6) has taught any "Concealed Carry Handgun Training Program" course or approved certification while the instructor's certification was suspended by the Commission; or
- (7) is ineligible to receive and possess a firearm under Federal or North Carolina State Law.

(c) Instructors who have lost certified status subject to 12 NCAC 09F .0106(b)(1), (2) or (3) may reapply for certification upon documentation of compliance after one year has elapsed from the date of suspension of the instructor's certification by the Commission. Instructors who have lost certified status subject to 12 NCAC 09F .0106(b)(4) or (5) may have their certification suspended or permanently revoked by the Commission.

*History Note: Authority G.S. 14-415.12; 14-415.13;
Temporary Adoption Eff. November 1, 1995;
Eff. May 1, 1996;
Amended Eff. September 1, 2005; May 1, 2004.*

TITLE 15A – DEPARTMENT OF ENVIRONMENT & NATURAL RESOURCES

15A NCAC 03I .0101 DEFINITIONS

(a) All definitions set out in G.S. 113, Subchapter IV apply to this Chapter.

(b) The following additional terms are hereby defined:

- (1) Commercial Fishing Equipment or Gear. All fishing equipment used in coastal fishing waters except:
 - (A) Seines less than 30 feet in length;
 - (B) Collapsible crab traps, a trap used for taking crabs with the largest open dimension no larger than 18 inches and that by design is collapsed at all times when in the

- water, except when it is being retrieved from or lowered to the bottom;
- (C) Spears, Hawaiian slings or similar devices which propel pointed implements by mechanical means, including elastic tubing or bands, pressurized gas or similar means;
- (D) A dip net having a handle not more than eight feet in length and a hoop or frame to which the net is attached not exceeding 60 inches along the perimeter;
- (E) Hook-and-line and bait-and-line equipment other than multiple-hook or multiple-bait trotline;
- (F) A landing net used to assist in taking fish when the initial and primary method of taking is by the use of hook and line;
- (G) Cast Nets;
- (H) Gigs or other pointed implements which are propelled by hand, whether or not the implement remains in the hand; and
- (I) Up to two minnow traps.
- (2) Fixed or stationary net. A net anchored or staked to the bottom, or some structure attached to the bottom, at both ends of the net.
- (3) Mesh Length. The diagonal distance from the inside of one knot to the outside of the other knot, when the net is stretched hand-tight.
- (4) Possess. Any actual or constructive holding whether under claim of ownership or not.
- (5) Transport. Ship, carry, or cause to be carried or moved by public or private carrier by land, sea, or air.
- (6) Use. Employ, set, operate, or permit to be operated or employed.
- (7) Purse Gill Nets. Any gill net used to encircle fish when the net is closed by the use of a purse line through rings located along the top or bottom line or elsewhere on such net.
- (8) Gill Net. A net set vertically in the water to capture fish by entanglement by the gills in its mesh as a result of net design, construction, mesh size, webbing diameter or method in which it is used.
- (9) Seine. A net set vertically in the water and pulled by hand or power to capture fish by encirclement and confining fish within itself or against another net, the shore or bank as a result of net design, construction, mesh size, webbing diameter, or method in which it is used.
- (10) Internal Coastal Waters or Internal Waters. All coastal fishing waters except the Atlantic Ocean.
- (11) Channel Net. A net used to take shrimp which is anchored or attached to the bottom at both ends or with one end anchored or attached to the bottom and the other end attached to a boat.
- (12) Dredge. A device towed by engine power consisting of a frame, tooth bar or smooth bar, and catchbag used in the harvest of oysters, clams, crabs, scallops, or conchs.
- (13) Mechanical methods for clamming. Includes dredges, hydraulic clam dredges, stick rakes and other rakes when towed by engine power, patent tongs, kicking with propellers or deflector plates with or without trawls, and any other method that utilizes mechanical means to harvest clams.
- (14) Mechanical methods for oystering. Includes dredges, patent tongs, stick rakes and other rakes when towed by engine power and any other method that utilizes mechanical means to harvest oysters.
- (15) Depuration. Purification or the removal of adulteration from live oysters, clams, and mussels by any natural or artificially controlled means.
- (16) Peeler Crab. A blue crab that has a soft shell developing under a hard shell and having a definite white, pink, or red-line or rim on the outer edge of the back fin or flipper.
- (17) Length of finfish.
- (A) Total length is determined by measuring along a straight line the distance from the tip of the snout with the mouth closed to the tip of the compressed caudal (tail) fin.
- (B) Fork length is determined by measuring along a straight line the distance from the tip of the snout with the mouth closed to the middle of the fork in the caudal (tail) fin.
- (C) Fork length for billfish is measured from the tip of the lower jaw to the middle of the fork of the caudal (tail) fin.
- (18) Licensee. Any person holding a valid license from the Department to take or deal in marine fisheries resources.
- (19) Aquaculture operation. An operation that produces artificially propagated stocks of marine or estuarine resources or obtains such stocks from authorized sources for the purpose of rearing in a controlled

- environment. A controlled environment provides and maintains throughout the rearing process one or more of the following: predator protection, food, water circulation, salinity, or temperature controls utilizing technology not found in the natural environment.
- (20) Critical habitat areas. The fragile estuarine and marine areas that support juvenile and adult populations of fish species, as well as forage species utilized in the food chain. Critical habitats include nursery areas, beds of submerged aquatic vegetation, shellfish producing areas, anadromous fish spawning and anadromous fish nursery areas, in all coastal fishing waters as determined through marine and estuarine survey sampling. Critical habitats are vital for portions, or the entire life cycle, including the early growth and development of fish species.
- (A) Beds of submerged aquatic vegetation are those habitats in public trust and estuarine waters vegetated with one or more species of submerged vegetation such as eelgrass (*Zostera marina*), shoalgrass (*Halodule wrightii*) and widgeongrass (*Ruppia maritima*). These vegetation beds occur in both subtidal and intertidal zones and may occur in isolated patches or cover extensive areas. In either case, the bed is defined by the presence of above-ground leaves or the below-ground rhizomes and propagules together with the sediment on which the plants grow. In defining beds of submerged aquatic vegetation, the Marine Fisheries Commission recognizes the Aquatic Weed Control Act of 1991 (G.S. 113A-220 et. seq.) and does not intend the submerged aquatic vegetation definition and its implementing rules to apply to or conflict with the non-development control activities authorized by that Act.
- (B) Shellfish producing habitats are those areas in which shellfish, such as clams, oysters, scallops, mussels, and whelks, whether historically or currently, reproduce and survive because of such favorable conditions as bottom type, salinity, currents, cover, and cultch. Included are those shellfish producing areas closed to shellfish harvest due to pollution.
- (C) Anadromous fish spawning areas are those areas where evidence of spawning of anadromous fish has been documented by direct observation of spawning, capture of running ripe females, or capture of eggs or early larvae.
- (D) Anadromous fish nursery areas are those areas in the riverine and estuarine systems utilized by post-larval and later juvenile anadromous fish.
- (21) Intertidal Oyster Bed. A formation, regardless of size or shape, formed of shell and live oysters of varying density.
- (22) North Carolina Trip Ticket. Multiple-part form provided by the Department to fish dealers who are required to record and report transactions on such forms.
- (23) Transaction. Act of doing business such that fish are sold, offered for sale, exchanged, bartered, distributed or landed. The point of landing shall be considered a transaction when the fisherman is the fish dealer.
- (24) Live rock. Living marine organisms or an assemblage thereof attached to a hard substrate including dead coral or rock (excluding mollusk shells). For example, such living marine organisms associated with hard bottoms, banks, reefs, and live rock may include:
- (A) Animals:
- (i) Sponges (Phylum Porifera);
- (ii) Hard and Soft Corals, Sea Anemones (Phylum Cnidaria):
- (I) Fire corals (Class Hydrozoa);
- (II) Gorgonians, whip corals, sea pansies, anemones, Solenastrea (Class Anthozoa);
- (iii) Bryozoans (Phylum Bryozoa);
- (iv) Tube Worms (Phylum Annelida):
- (I) Fan worms (Sabellidae);
- (II) Feather duster and Christmas tree worms (Serpulidae);

- | | | | | |
|------|--|---|--|---|
| | | (III) Sand castle worms (Sabellaridae). | | (29) Pound Net Set. A fish trap consisting of a holding pen, one or more enclosures, lead or leaders, and stakes or anchors used to support such trap. The lead(s), enclosures, and holding pen are not conical, nor are they supported by hoops or frames. |
| | (v) | Mussel banks (Phylum Mollusca:Gastropoda); | | |
| | (vi) | Colonial barnacles (Arthropoda: Crustacea: Megabalanus sp.). | | (30) Educational Institution. A college, university or community college accredited by a regional accrediting institution. |
| (B) | Plants: | | | |
| | (i) | Coralline algae (Division Rhodophyta); | | (31) Long Haul Operations. A seine towed between two boats. |
| | (ii) | Acetabularia sp., Udotea sp., Halimeda sp., Caulerpa sp. (Division Chlorophyta); | | (32) Swipe Net Operations. A seine towed by one boat. |
| | (iii) | Sargassum sp., Dictyopteris sp., Zonaria sp. (Division Phaeophyta). | | (33) Bunt Net. The last encircling net of a long haul or swipe net operation constructed of small mesh webbing. The bunt net is used to form a pen or pound from which the catch is dipped or bailed. |
| (25) | Coral: | | | (34) Responsible party. Person who coordinates, supervises or otherwise directs operations of a business entity, such as a corporate officer or executive level supervisor of business operations and the person responsible for use of the issued license in compliance with applicable laws and regulations. |
| | (A) | Fire corals and hydrocorals (Class Hydrozoa); | | |
| | (B) | Stony corals and black corals (Class Anthozoa, Subclass Scleractinia); | | |
| | (C) | Octocorals; Gorgonian corals (Class Anthozoa, Subclass Octocorallia): | | (35) New fish dealer. Any fish dealer making application for a fish dealer license who did not possess a valid dealer license for the previous license year in that name or ocean pier license in that name on June 30, 1999. For purposes of license issuance, adding new categories to an existing fish dealers license does not constitute a new dealer. |
| | (i) | Sea fans (Gorgonia sp.); | | |
| | (ii) | Sea whips (Leptogorgia sp. and Lophogorgia sp.); | | |
| | (iii) | Sea pansies (Renilla sp.). | | |
| (26) | Shellfish production on leases and franchises: | | | (36) Tournament Organizer. The person who coordinates, supervises or otherwise directs a recreational fishing tournament and is the holder of the Recreational Fishing Tournament License. |
| | (A) | The culture of oysters, clams, scallops, and mussels, on shellfish leases and franchises from a sublegal harvest size to a marketable size. | | (37) Holder. A person who has been lawfully issued in their name a license, permit, franchise, lease, or assignment. |
| | (B) | The transplanting (relay) of oysters, clams, scallops and mussels from designated areas closed due to pollution to shellfish leases and franchises in open waters and the natural cleansing of those shellfish. | | (38) Recreational Purpose. A fishing activity has a recreational purpose if it is not a commercial fishing operation as defined in G.S. 113-168. |
| (27) | Shellfish marketing from leases and franchises. The harvest of oysters, clams, scallops, mussels, from privately held shellfish bottoms and lawful sale of those shellfish to the public at large or to a licensed shellfish dealer. | | | (39) Recreational Possession Limit. Includes restrictions on size, quantity, season, time period, area, means, and methods where take or possession is for a recreational purpose. |
| (28) | Shellfish planting effort on leases and franchises. The process of obtaining authorized cultch materials, seed shellfish, and polluted shellfish stocks and the placement of those materials on privately held shellfish bottoms for increased shellfish production. | | | (40) Attended. Being in a vessel, in the water or on the shore immediately adjacent to the gear and immediately available to work the gear and within 100 yards of any gear in use by that person at all times. Attended does not include being in a building or structure. |
| | | | | (41) Commercial Quota. Total quantity of fish allocated for harvest taken by commercial fishing operations. |

- (42) Recreational Quota. Total quantity of fish allocated for harvest taken for a recreational purpose.
- (43) Office of the Division. Physical locations of the Division conducting license transactions in the cities of Wilmington, Washington, Morehead City, Columbia, Wanchese and Elizabeth City, North Carolina. Other businesses or entities designated by the Secretary to issue Recreational Commercial Gear Licenses are not considered Offices of the Division.
- (44) Land:
 - (A) For purposes of trip tickets, when fish reach a licensed seafood dealer, or where the fisherman is the dealer, when the fish reaches the shore or a structure connected to the shore.
 - (B) For commercial fishing operations, when fish reach the shore or a structure connected to the shore.
 - (C) For recreational fishing operations, when fish are retained in possession by the fisherman.
- (45) Master. Captain of a vessel or one who commands and has control, authority, or power over a vessel.
- (46) Regular Closed Oyster Season. May 15 through October 15, unless amended by the Fisheries Director through proclamation authority.
- (47) Assignment. Temporary transferral to another person of privileges under a license for which assignment is permitted. The person assigning the license delegates the privileges permitted under the license to be exercised by the assignee, but retains the power to revoke the assignment at any time, is still the responsible party for the license.
- (48) Transfer. Permanent transferral to another person of privileges under a license for which transfer is permitted. The person transferring the license retains no rights or interest under the license transferred.
- (49) Designee. Any person who is under the direct control of the permittee or who is employed by or under contract to the permittee for the purposes authorized by the permit.
- (50) Blue Crab Shedding. The process whereby a blue crab emerges soft from its former hard exoskeleton. A shedding operation is any operation that holds peeler crabs in a controlled environment. A controlled environment provides and maintains throughout the shedding process one or more of the following: predator protection,

food, water circulation, salinity or temperature controls utilizing proven technology not found in the natural environment. A shedding operation does not include transporting pink or red-line peeler crabs to a permitted shedding operation.

- (51) **Fyke Net.** An entrapment net supported by a series of internal or external hoops or frames, with one or more lead or leaders that guide fish to the net mouth. The net has one or more internal funnel-shaped openings with tapered ends directed inward from the mouth, through which fish enter the enclosure. The portion of the net designed to hold or trap fish is completely enclosed in mesh or webbing, except for the openings for fish passage into or out of the net (funnel area).
- (52) **Hoop Net.** An entrapment net supported by a series of internal or external hoops or frames. The net has one or more internal funnel-shaped openings with tapered ends directed inward from the mouth, through which fish enter the enclosure. The portion of the net designed to hold or trap the fish is completely enclosed in mesh or webbing, except for the openings for fish passage into or out of the net (funnel area).

History Note: Authority G.S. 113-134; 143B-289.52; Eff. January 1, 1991; Amended Eff. March 1, 1995; March 1, 1994; October 1, 1993; July 1, 1993; Recodified from 15A NCAC 03I .0001 Eff. December 17, 1996; Amended Eff. April 1, 1999; August 1, 1998; April 1, 1997; Temporary Amendment Eff. May 1, 2000; August 1, 1999; July 1, 1999; Amended Eff. August 1, 2000; Temporary Amendment Eff. August 1, 2000; Amended Eff. September 1, 2005; April 1, 2003; April 1, 2001.

15A NCAC 03I .0105 LEAVING DEVICES UNATTENDED

- (a) It is unlawful to leave stakes, anchors, nets, buoys, or floating devices in any coastal fishing waters when such devices are not being employed in fishing operations except as otherwise provided by rule or General Statute.
- (b) It is unlawful to leave pots in any coastal fishing waters for more than five consecutive days, when such pots are not being employed in fishing operations, except upon a timely and sufficient showing of hardship as defined in Subparagraph (b)(2) of this Rule or as otherwise provided by General Statute.

- (1) Agents of the Fisheries Director may tag pots with a device approved by the Fisheries Director to aid and assist in the investigation

and identification of unattended pots. Any such device attached to a pot by agents of the Fisheries Director must be removed by the individual utilizing the pot within five days of attachment in order to demonstrate that the pot is being employed in fishing operations.

(2) For the purposes of Paragraph (b) of this Rule only, a timely and sufficient showing of hardship in a commercial fishing operation shall be written notice given to the Fisheries Director that a mechanical breakdown of the owner's vessel(s) currently registered with the Division of Marine Fisheries under G.S. 113-168.6, or the death, illness or incapacity of the owner of the pot or his immediate family, as defined in G.S. 113-168, prevented or will prevent employing such pots in fishing operations more than five consecutive days. The notice, specifying the time needed because of hardship, shall be received by the Fisheries Director before any pot is left in coastal fishing waters for five consecutive days without being employed in fishing operations, and shall state, in addition to the following, the number and specific location of the pots, and the date on which the pots will be employed in fishing operations or removed from coastal fishing waters:

(A) in case of mechanical breakdown, the notice shall state the commercial fishing vessel registration number, owner's N.C. motor boat registration number of the disabled vessel, date disabled, arrangements being made to repair the vessel or a copy of the work order showing the name, address and phone number of the repair facility; or

(B) in case of the death, illness or incapacity of the owner of the pot or his immediate family, the notice shall state the name of the owner or immediate family member, the date of death, the date and nature of the illness or incapacity. The Fisheries Director may require a doctor's verification of the illness or incapacity.

(3) The Fisheries Director may, by proclamation, modify the five day requirement, if necessary due to hurricanes, severe weather or other variable conditions. Failure to employ in fishing operations or remove from coastal fishing waters all pots for which notice of hardship is received

under this Rule within 14 days of the expiration of the hardship shall be violation of this Rule.

(c) It is unlawful to set or have any fishing equipment in coastal fishing waters in violation of this Section or which contains edible species of fish unfit for human consumption.

History Note: Authority G.S. 113-134; 113-137; 113-182; 143B-289.52; Eff. January 1, 1991; Amended Eff. March 1, 1996; Recodified from 15A NCAC 03I .0005 Eff. December 17, 1996; Amended Eff. April 1, 1997; Temporary Amendment Eff. July 1, 1999; Amended Eff. September 1, 2005; August 1, 2000.

15A NCAC 03J .0104 TRAWL NETS

(a) It is unlawful to possess aboard a vessel while using a trawl in internal waters more than 500 pounds of finfish from December 1 through February 28 and 1,000 pounds of finfish from March 1 through November 30.

(b) It is unlawful to use trawl nets:

(1) In internal coastal waters, from 9:00 p.m. on Friday through 5:00 p.m. on Sunday, except that in the areas listed in Subparagraph (b)(5) of this Rule, trawling is prohibited from December 1 through February 28 from one hour after sunset on Friday to one hour before sunrise on Monday.

(2) For the taking of oysters;

(3) In Albemarle Sound and its tributaries;

(4) In the areas described in 15A NCAC 03R .0106, except that the Fisheries Director may, by proclamation, open the area designated in Item (6) of 15A NCAC 03R .0106 to peeler crab trawling;

(5) From December 1 through February 28 from one hour after sunset to one hour before sunrise in the following areas:

(A) In Pungo River, north of a line beginning on Currituck Point at a point 35° 24.5833' N-76° 32.3166' W; running southwesterly to Wades Point to a point 35° 23.3062' N-76° 34.5135' W;

(B) In Pamlico River, west of a line beginning on Wades Point at a point 35° 23.3062' N – 76° 34.5135' W; running southwesterly to Fulford Point to a point 35° 19.8667' N – 76° 35.9333' W;

(C) In Bay River, west of a line beginning on Bay Point at a point 35° 11.0858' N – 76° 31.6155' W; running southerly to Maw Point to a point 35° 09.0214' N – 76° 32.2593' W;

- (D) In Neuse River, west of a line beginning on the Minnesott side of the Neuse River Ferry at a point 34° 57.9116' N – 76° 48.2240' W; running southerly to the Cherry Branch side of the Neuse River Ferry to a point 34° 56.3658' N – 76° 48.7110' W; and
- (E) In New River, all waters upstream of the N.C. Highway 172 Bridge when opened by proclamation; and

- (6) In designated pot areas opened to the use of pots by 15A NCAC 03J .0301(a)(2) and described in 15A NCAC 03R .0107(a)(5), (a)(6), (a)(7), (a)(8) and (a)(9) within an area bound by the shoreline to the depth of six feet.

(c) Minimum mesh sizes for shrimp and crab trawls are presented in 15A NCAC 03L .0103 and .0202.

(d) The Fisheries Director may, with prior consent of the Marine Fisheries Commission, by proclamation, require bycatch reduction devices or codend modifications in trawl nets to reduce the catch of finfish that do not meet size limits or are unmarketable as individual foodfish by reason of size.

(e) It is unlawful to use shrimp trawls for recreational purposes unless the trawl is marked by attaching to the codend (tailbag), one floating buoy, any shade of hot pink in color, which shall be of solid foam or other solid buoyant material no less than five inches in diameter and no less than five inches in length. The owner shall always be identified on the buoy by using an engraved buoy or by attaching engraved metal or plastic tags to the buoy. Such identification shall include owner's last name and initials and if a vessel is used, one of the following:

- (1) Gear owner's current motor boat registration number; or
- (2) Owner's U.S. vessel documentation name.

(f) It is unlawful to use shrimp trawls for the taking of blue crabs in internal waters, except that it shall be permissible to take or possess blue crabs incidental to shrimp trawling in accordance with the following limitations:

- (1) For individuals using shrimp trawls authorized by a Recreational Commercial Gear License, 50 blue crabs, not to exceed 100 blue crabs if two or more Recreational Commercial Gear License holders are on board.
- (2) For commercial operations, crabs may be taken incidental to lawful shrimp trawl operations provided that the weight of the crabs shall not exceed:
 - (A) 50 percent of the total weight of the combined crab and shrimp catch; or
 - (B) 300 pounds, whichever is greater.

(g) The Fisheries Director may, by proclamation, close any area to trawling for specific time periods in order to secure compliance with this Rule.

History Note: Authority G.S. 113-134; 113-173; 113-182; 113-221; 143B-289.52; Eff. February 1, 1991; Amended Eff. August 1, 1998; May 1, 1997; March 1, 1994; February 1, 1992; Temporary Amendment Eff. July 1, 1999; Amended Eff. September 1, 2005; August 1, 2004; August 1, 2000.

15A NCAC 03J .0106 CHANNEL NETS

(a) It is unlawful to use a channel net:

- (1) Until the Fisheries Director specifies by proclamation, time periods and areas for the use of channel nets and other fixed nets for shrimping.
- (2) Without yellow light reflective tape on the top portion of each staff or stake and on any buoys located at either end of the net.
- (3) With any portion of the set including boats, anchors, cables, ropes or nets within 50 feet of the center line of the Intracoastal Waterway Channel.
- (4) In the middle third of any navigation channel marked by Corps of Engineers or U.S. Coast Guard.
- (5) Unless attended by the fisherman who shall be no more than 50 yards from the net at all times.

(b) It is unlawful to use or possess aboard a vessel any channel net with a corkline exceeding 40 yards.

(c) It is unlawful to leave any channel net, channel net buoy, or channel net stakes in coastal fishing waters from December 1 through March 1.

(d) It is unlawful to use floats or buoys of metallic material for marking a channel net set.

(e) From March 2 through November 30, cables used in a channel net operation shall, when not attached to the net, be connected together and any attached buoy shall be connected by non-metal line.

(f) It is unlawful to leave channel net buoys in coastal fishing waters without yellow light reflective tape on each buoy and without the owner's identification being legibly printed on each buoy. Such identification must include one of the following:

- (1) Owner's N.C. motorboat registration number; or
- (2) Owner's U.S. vessel documentation name; or
- (3) Owner's last name and initials.

(g) It is unlawful to use any channel nets, anchors, lines, or buoys in such a manner as to constitute a hazard to navigation.

(h) It is unlawful to use channel nets for the taking of blue crabs in internal waters, except that it shall be permissible to take or possess blue crabs incidental to channel net operations in accordance with the following limitations:

- (1) Crabs may be taken incidental to lawful channel net operations provided that the weight of the crabs shall not exceed:

- (A) 50 percent of the total weight of the combined crab and shrimp catch; or
- (B) 300 pounds, whichever is greater.
- (2) The Fisheries Director may, by proclamation, close any area to channel net use for specific time periods in order to secure compliance with this Paragraph.

History Note: Authority G.S. 113-134; 113-182; 143B-289.52; Eff. January 1, 1991; Amended Eff. September 1, 2005.

15A NCAC 03J .0107 POUND NET SETS

(a) All initial, renewal or transfer applications for Pound Net Set Permits, and the operation of such pound net sets, shall comply with the general rules governing all permits in 15A NCAC 03O .0500. The procedures and requirements for obtaining permits are also found in 15A NCAC 03O .0500.

(b) It is unlawful to use pound net sets in coastal fishing waters without the permittee's identification being legibly printed on a sign no less than six inches square, securely attached to the outermost stake of each end of each set. For pound net sets in the Atlantic Ocean using anchors instead of stakes, the set shall be identified with a yellow buoy, which shall be of solid foam or other solid buoyant material no less than five inches in diameter and no less than 11 inches in length. The permittee's identification shall be legibly printed on the buoy. Such identification on signs or buoys shall include the pound net set permit number and the permittee's last name and initials.

(c) It is unlawful to use pound net sets, or any part thereof, except for one location identification stake or identification buoy for pound nets used in the Atlantic Ocean at each end of proposed new locations, without first obtaining a Pound Net Set Permit from the Fisheries Director. The applicant shall indicate on a base map provided by the Division the proposed set including an inset vicinity map showing the location of the proposed set with detail sufficient to permit on-site identification and location. The applicant shall specify the type(s) of pound net set(s) requested and possess proper valid licenses and permits necessary to fish those type(s) of net. A pound net set shall be deemed a flounder pound net set when the catch consists of 50 percent or more flounder by weight of the entire landed catch, excluding blue crabs. The type "other finfish pound net set" is for sciaenid (Atlantic croaker, red drum, weakfish, spotted seatrout, spot, for example) and other finfish, except flounder, herring, or shad, taken for human consumption. Following are the type(s) of pound net fisheries that may be specified:

- (1) Flounder pound net set;
- (2) Herring/shad pound net set;
- (3) Bait pound net set;
- (4) Shrimp pound net set;
- (5) Blue crab pound net set;
- (6) Other finfish pound net set.

(d) For proposed new locations, the Fisheries Director shall issue a public notice of intent to consider issuance of a Pound

Net Set Permit allowing for public comments for 20 days, and after the comment period, may hold public meetings to take comments on the proposed pound net set. If the Director does not approve or deny the application within 90 days of receipt of a complete and verified application, the application shall be deemed denied. The applicant shall be notified of such denial in writing. For new locations, transfers and renewals, the Fisheries Director may deny the permit application if the Director determines that granting the permit will be inconsistent with one or more of the following permitting criteria, as determined by the Fisheries Director:

- (1) The application shall be in the name of an individual and shall not be granted to a corporation, partnership, organization or other entity;
- (2) The proposed pound net set, either alone or when considered cumulatively with other existing pound net sets in the area, shall not interfere with public navigation or with existing, traditional uses of the area other than navigation, and shall not violate 15A NCAC 03J.0101 and .0102;
- (3) The proposed pound net set shall not interfere with the rights of any riparian or littoral landowner, including the construction or use of piers;
- (4) The proposed pound net set shall not, by its proximate location, interfere with existing pound net sets in the area. Except in Chowan River as referenced in 15A NCAC 03J .0203, proposed new pound net set locations shall be a minimum of 1,000 yards as measured in a perpendicular direction from any point on a line following the permitted location of existing pound net sets;
- (5) The applicant has in the past complied with fisheries rules and laws and does not currently have any licenses or privileges under suspension or revocation. In addition, a history of habitual fisheries violations evidenced by eight or more convictions in ten years shall be grounds for denial of a pound net set permit;
- (6) The proposed pound net set is in the public interest; and
- (7) The applicant has in the past complied with all permit conditions, rules and laws related to pound nets.

Approval shall be conditional based upon the applicant's continuing compliance with specific conditions contained on the Pound Net Set Permit and the conditions set out in Subparagraphs (1) through (7) of this Paragraph. The final decision to approve or deny the Pound Net Set Permit application may be appealed by the applicant by filing a petition for a contested case hearing, in writing, within 60 days from the date of mailing notice of such final decision to the applicant, with the Office of Administrative Hearings.

(e) An application for renewal of an existing Pound Net Set Permit shall be filed not less than 30 days prior to the date of expiration of the existing permit, and shall not be processed unless filed by the permittee. The Fisheries Director shall review the renewal application under the criteria for issuance of a new Pound Net Set Permit, except that pound net sets approved prior to January 1, 2003 do not have to meet the 1,000 yard minimum distance requirement specified in Subparagraph (d)(4) of this Rule. The Fisheries Director may hold public meetings and may conduct such investigations necessary to determine if the permit should be renewed.

(f) A Pound Net Set Permit, whether a new or renewal permit, shall expire one year from the date of issuance. The expiration date shall be stated on the permit.

(g) Pound net sets, except herring/shad pound net sets in the Chowan River, shall be operational for a minimum period of 30 consecutive days during the permit period unless a season for the fishery for which the pound net set is permitted is ended earlier due to a quota being met. For purposes of this Rule, operational means with net attached to stakes or anchors for the lead and pound, including only a single pound in a multi-pound set, and a non-restricted opening leading into the pound such that the set is able to catch and hold fish. The permittee, including permittees of operational herring/shad pound net sets in the Chowan River, shall notify the Marine Patrol Communications Center by phone within 72 hours after the pound net set is operational. Notification shall include name of permittee, pound net set permit number, county where located, a specific location site, and how many pounds are in the set. It is unlawful to fail to notify the Marine Patrol Communications Center within 72 hours after the pound net set is operational or to make false notification when said pound net set is not operational. Failure to comply with this Paragraph shall be grounds for the Fisheries Director to revoke this and any other pound net set permits held by the permittee and for denial of any future pound net set permits.

(h) It is unlawful to transfer a pound net set permit without a completed application for transfer being submitted to the Division of Marine Fisheries not less than 45 days before the date of the transfer. Such application shall be made by the proposed new permittee in writing and shall be accompanied by a copy of the current permittee's permit and an application for a pound net set permit in the new permittee's name. The Fisheries Director may hold a public meeting and may conduct such investigations necessary to determine if the permit should be transferred. The transferred permit shall expire on the same date as the initial permit. Upon death of the permittee, the permit may be transferred to the Administrator/Executor of the estate of the permittee if transferred within six months of the Administrator/Executor's qualification in accordance with Chapter 28A of the North Carolina General Statutes. The Administrator/Executor shall provide a copy of the deceased permittee's death certificate, a copy of the certificate of administration and a list of eligible immediate family members as defined in G.S. 113-168 to the Morehead City Office of the Division of Marine Fisheries. Once transferred to the Administrator/Executor, the Administrator/Executor may transfer the permit(s) to eligible family members of the

deceased permittee. No transfer is effective until approved and processed by the Division.

(i) Every pound net set in coastal fishing waters shall have yellow light reflective tape or yellow light reflective devices on each pound. The light reflective tape or yellow light reflective devices shall be affixed to a stake of at least three inches in diameter on any outside corner of each pound, shall cover a vertical distance of not less than 12 inches, and shall be visible from all directions. In addition, every pound net set shall have a marked navigational opening of at least 25 feet in width at the end of every third pound. Such opening shall be marked with yellow light reflective tape or yellow light reflective devices on each side of the opening. The yellow light reflective tape or yellow light reflective devices shall be affixed to a stake of at least three inches in diameter, shall cover a vertical distance of not less than 12 inches, and shall be visible from all directions. If a permittee notified of a violation under this Paragraph fails or refuses to take corrective action sufficient to remedy the violation within 10 days of receiving notice of the violation, the Fisheries Director shall revoke the permit.

(j) In Core Sound, it is unlawful to use pound net sets in the pound net sets prohibited areas designated in 15A NCAC 03R .0113 except that only those pound net set permits valid within the specified area as of March 1, 1994, may be renewed or transferred subject to the requirements of this Rule.

(k) Escape Panels:

(1) The Fisheries Director may, by proclamation, require escape panels in pound net sets and may impose any or all of the following requirements or restrictions on the use of escape panels:

- (A) Specify size, number, and location.
- (B) Specify mesh length, but not more than six inches.
- (C) Specify time or season.
- (D) Specify areas.

(2) It is unlawful to use flounder pound net sets without four unobstructed escape panels in each pound. The escape panels shall be fastened to the bottom and corner ropes on each wall on the side and back of the pound opposite the heart. The escape panels shall be a minimum mesh size of five and one-half inches, hung on the diamond, and shall be at least six meshes high and eight meshes long.

(l) Pound net sets shall be subject to inspection at all times.

(m) Daily reporting may be a condition of the permit for pound net sets for fisheries under a quota.

(n) It is unlawful to fail to remove all pound net stakes and associated gear within 30 days after expiration of the permit or notice by the Fisheries Director that an existing pound net set permit has been revoked or denied.

(o) It is unlawful to abandon an existing pound net set without completely removing from the coastal waters all stakes and associated gear within 30 days.

History Note: Authority G.S. 113-134; 113-182; 113-182.1; 113-221; 143B-289.52; Eff. January 1, 1991; Amended Eff. April 1, 1999; March 1, 1996; March 1, 1994; September 1, 1991; January 1, 1991; Temporary Amendment Eff. September 1, 2000; August 1, 2000; Amended Eff. August 1, 2002; April 1, 2001; Temporary Amendment Eff. February 10, 2003; Amended Eff. September 1, 2005; August 1, 2004.

15A NCAC 03J .0301 POTS

(a) It is unlawful to use pots except during time periods and in areas specified herein:

- (1) In Coastal Fishing Waters from December 1 through May 31, except that all pots shall be removed from internal waters from January 15 through February 7. Fish pots upstream of U.S. 17 Bridge across Chowan River and upstream of a line across the mouth of Roanoke, Cashie, Middle and Eastmost Rivers to the Highway 258 Bridge are exempt from the January 15 through February 7 removal requirement. The Fisheries Director may, by proclamation, reopen various waters to the use of pots after January 19 if it is determined that such waters are free of pots.
- (2) From June 1 through November 30, north and east of the Highway 58 Bridge at Emerald Isle:
 - (A) In areas described in 15A NCAC 03R .0107(a);
 - (B) To allow for the variable spatial distribution of crustacea and finfish, the Fisheries Director may, by proclamation, specify time periods for or designate the areas described in 15A NCAC 03R .0107(b); or any part thereof, for the use of pots.
- (3) From May 1 through November 30 in the Atlantic Ocean and west and south of the Highway 58 Bridge at Emerald Isle in areas and during time periods designated by the Fisheries Director by proclamation.

(b) It is unlawful to use pots:

- (1) in any navigation channel marked by State or Federal agencies; or
- (2) in any turning basin maintained and marked by the North Carolina Ferry Division.

(c) It is unlawful to use pots in a commercial fishing operation unless each pot is marked by attaching a floating buoy which shall be of solid foam or other solid buoyant material and no less than five inches in diameter and no less than five inches in length. Buoys may be of any color except yellow or hot pink or any combination of colors that include

yellow or hot pink. The owner shall always be identified on the attached buoy by using engraved buoys or by engraved metal or plastic tags attached to the buoy. Such identification shall include one of the following:

- (1) gear owner's current motorboat registration number; or
- (2) gear owner's U.S. vessel documentation name; or
- (3) gear owner's last name and initials.

(d) Pots attached to shore or a pier shall be exempt from Subparagraphs (a)(2) and (a)(3) of this Rule.

(e) It is unlawful to use shrimp pots with mesh lengths smaller than one and one-fourth inches stretch or five-eighths inch bar.

(f) It is unlawful to use eel pots with mesh sizes smaller than one inch by one-half inch unless such pots contain an escape panel that is at least four inches square with a mesh size of 1 inch by one-half inch located in the outside panel of the upper chamber of rectangular pots and in the rear portion of cylindrical pots, except that not more than two eel pots per fishing operation with a mesh of any size may be used to take eels for bait.

(g) It is unlawful to use crab pots in coastal fishing waters unless each pot contains no less than two unobstructed escape rings that are at least 2 5/16 inches inside diameter and located in the opposite outside panels of the upper chamber of the pot. Peeler pots with a mesh size less than 1 1/2 inches shall be exempt from the escape ring requirement. The Fisheries Director may, by proclamation, exempt the escape ring requirement in order to allow the harvest of peeler crabs or mature female crabs and may impose any or all of the following restrictions:

- (1) Specify areas, and
- (2) Specify time.

(h) It is unlawful to use more than 150 pots per vessel in Newport River.

(i) It is unlawful to remove crab pots from the water or remove crabs from crab pots between one hour after sunset and one hour before sunrise.

(j) User Conflicts:

- (1) In order to address user conflicts, the Fisheries Director may by proclamation impose any or all of the following restrictions:
 - (A) Specify time period;
 - (B) Specify areas; and
 - (C) Specify means and methods.

The Fisheries Director shall hold a public meeting in the affected area before issuance of such proclamation.

- (2) Any person(s) desiring user conflict resolution may make such request in writing addressed to the Director of the Division of Marine Fisheries. Such requests shall contain the following information:

- (A) A map of the affected area including an inset vicinity map showing the location of the area

- with detail sufficient to permit on-site identification and location;
 - (B) Identification of the user conflict causing a need for user conflict resolution;
 - (C) Recommended solution for resolving user conflict; and
 - (D) Name and address of the person(s) requesting user conflict resolution.
- (3) Upon the requestor's demonstration of a user conflict to the Fisheries Director and within 90 days of the receipt of the information required in Subparagraph (j)(2) of this Rule, the Fisheries Director shall issue a public notice of intent to address a user conflict. A public meeting shall be held in the area of the user conflict. The requestor shall present his or her request at the public meeting, and other parties affected may participate.
- (4) The Fisheries Director shall deny the request or submit a proclamation that addresses the results of the public meeting to the Marine Fisheries Commission for their approval.
- (5) Proclamations issued under Subparagraph (j)(1) of this Rule shall suspend appropriate rules or portions of rules under 15A NCAC 03R .0107 as specified in the proclamation. The provisions of 15A NCAC 03I .0102 terminating suspension of a rule as of the next Marine Fisheries Commission meeting and requiring review by the Marine Fisheries Commission at the next meeting shall not apply to proclamations issued under Subparagraph (j)(1) of this Rule.

(k) It is unlawful to use pots to take crabs unless the line connecting the pot to the buoy is non-floating.

(l) It is unlawful to use pots with leads or leaders to take shrimp. For the purpose of this Rule, leads or leaders are defined as any fixed or stationary net or device used to direct fish into any gear used to capture fish. Any device with leads or leaders used to capture fish is not a pot.

History Note: Authority G. S. 113-134; 113-173; 113-182; 113-221; 143B-289.52;
Eff. January 1, 1991;
Amended Eff. August 1, 1998; May 1, 1997; March 1, 1996; March 1, 1994; October 1, 1992; September 1, 1991;
Temporary Amendment Eff. July 1, 1999;
Amended Eff. August 1, 2000;
Temporary Amendment Eff. September 1, 2000;
Amended Eff. September 1, 2005; August 1, 2004; August 1, 2002.

15A NCAC 03L .0201 SIZE LIMIT AND CULLING TOLERANCE

(a) It is unlawful to possess blue crabs less than five inches from tip of spike to tip of spike except mature females, soft and peeler crabs and from March 1 through October 31, and

male crabs to be used as peeler bait. A culling tolerance of not more than 10 percent by number in any container shall be allowed.

(b) All crabs not of legal size, except mature female and soft crabs shall be immediately returned to the waters from which taken. Peeler crabs shall be separated where taken and placed in a separate container. White-line peeler crabs shall be separated from pink and red-line peeler crabs where taken and placed in a separate container. A culling tolerance of not more than five percent by number shall be allowed for white-line peelers in the pink and red-line peeler container. Those peeler crabs not separated shall be deemed hard crabs and are not exempt from the size restrictions specified in Paragraph (a) of this Rule.

(c) The Director, may by proclamation, impose the following restrictions when the sum of the carapace widths of mature female blue crabs collected during the September cruise of the Division of Marine Fisheries Pamlico Sound Fishery Independent Trawl Survey divided by the total number of tows (adjusted catch per effort) falls below the lower 90 percent confidence limit for two consecutive years (spawner index):

- (1) It is unlawful to possess mature female blue crabs greater than 6¾ inches from tip of spike to tip of spike from September 1 through April 30. A culling tolerance of not more than five percent by number in any container shall be allowed.
- (2) It is unlawful to possess female peeler crabs greater than 5¼ inches from tip of spike to tip of spike from September 1 through April 30.

History Note: Authority G.S. 113-134; 113-182; 113-221; 143B-289.52;
Eff. January 1, 1991;
Amended Eff. April 1, 1997; July 1, 1993;
Temporary Amendment Eff. July 1, 1999;
Amended Eff. September 1, 2005; August 1, 2000.

15A NCAC 03M .0503 FLOUNDER

(a) It is unlawful to possess flounder less than 14 inches total length taken from the Atlantic Ocean in a commercial fishing operation.

(b) From October 1 through April 30, it shall be unlawful to use a trawl in the Atlantic Ocean within three miles of the ocean beach from the North Carolina/Virginia state line (36° 33.000'N) to Cape Lookout (34° 36.000'N) unless each trawl has a mesh length of 5 1/2 inches or larger diamond mesh (stretched) or 6 inches or larger square mesh (stretched) applied throughout the body, extension(s) and the cod end (tailbag) of the net except as provided in Paragraphs (g) and (h) of this Rule.

(c) License to Land Flounder from the Atlantic Ocean:

- (1) It is unlawful to land more than 100 pounds per trip of flounder taken from the Atlantic Ocean unless the owner of the vessel or in the case of Land or Sell Licenses, the responsible party, has been issued a License

to Land Flounder from the Atlantic Ocean and the vessel in use is the vessel specified on the License to Land Flounder from the Atlantic Ocean.

- (2) It is unlawful for a fish dealer to purchase or offload more than 100 pounds of flounder taken from the Atlantic Ocean by a vessel whose owner, or in the case of Land or Sell Licenses, the responsible party, has not first procured a valid North Carolina License to Land Flounder from the Atlantic Ocean and the vessel in use is the vessel specified on the License to Land Flounder from the Atlantic Ocean.
- (3) It is unlawful for any person to land flounder from the Atlantic Ocean under a License to Land Flounder from the Atlantic Ocean unless that person is the holder of the license or the master designated on the license.
- (4) It is unlawful for any individual to land flounder from the Atlantic Ocean without having ready at hand for inspection a valid License to Land Flounder from the Atlantic Ocean, except as specified in Subparagraph (c)(1) of this Rule.

(d) All fish dealer transactions in flounder landed from the Atlantic Ocean must be conducted in accordance with the Atlantic Ocean Flounder Dealer Permits in 15A NCAC 03O .0503 and related rules in 15A NCAC 03O .0500.

(e) It is unlawful to transfer flounder taken from the Atlantic Ocean from one vessel to another.

(f) Tailbag liners of any mesh size, the multiple use of two or more cod ends, or other netting material that in any way could restrict the legal size mesh shall not be used or possessed on the deck of a vessel in the Atlantic Ocean from October 1 through April 30 from the North Carolina/Virginia state line (36° 33.000' N) to Cape Lookout (34° 36.0000'N).

(g) Trawls with a cod end mesh size smaller than described in Paragraph (b) of this Rule may be used or possessed on the deck of a vessel provided not more than 100 pounds of flounder per trip from May 1 through October 31 or more than 200 pounds from November 1 through April 30 is possessed aboard or landed from that vessel.

(h) Flynets are exempt from the flounder trawl mesh requirements if they meet the following definition:

- (1) The net has large mesh in the wings that measure 8 inches to 64 inches;
- (2) The first body section (belly) of the net has 35 or more meshes that are at least 8 inches; and
- (3) The mesh decreases in size throughout the body of the net to as small as 2 inches or smaller towards the terminus of the net.

(i) Commercial Season.

- (1) The North Carolina season for landing ocean-caught flounder shall open January 1 each year. If 80 percent of the quota allocated to North Carolina in accordance

with the joint Mid-Atlantic Fishery Management Council/Atlantic States Marine Fisheries Commission Fishery Management Plan for Summer Flounder is projected to be taken, the Fisheries Director shall, by proclamation, close North Carolina ports to landing of flounder taken from the ocean.

- (2) The season for landing flounder taken in the Atlantic Ocean shall reopen November 1 if any of the quota allocated to North Carolina in accordance with the joint Mid-Atlantic Fishery Management Council/Atlantic States Marine Fisheries Commission Fishery Management Plan for Summer Flounder remains. If after reopening, 100 percent of the quota allocated to North Carolina in accordance with the joint Mid-Atlantic Fishery Management Council/Atlantic States Marine Fisheries Commission Fishery Management Plan for Summer Flounder is projected to be taken prior to the end of the calendar year, the Fisheries Director shall, by proclamation, close North Carolina ports to landing of flounder taken from the ocean.
- (3) During any closed season prior to November 1, vessels may land up to 100 pounds of flounder per trip taken from the Atlantic Ocean.

(j) The Fisheries Director may, by proclamation, establish trip limits for the taking of flounder from the Atlantic Ocean to assure that the individual state quota allocated to North Carolina in the joint Mid-Atlantic Fishery Management Council/Atlantic States Marine Fisheries Commission Fishery Management Plan for Summer Flounder is not exceeded.

(k) The Fisheries Director may, by proclamation, based on variability in environmental and local stock conditions, take any or all of the following actions in the flounder fishery:

- (1) Specify size;
- (2) Specify season;
- (3) Specify area;
- (4) Specify quantity;
- (5) Specify means/methods; and
- (6) Require submission of statistical and biological data.

(l) Possession and sale of flounder by a hatchery or flounder aquaculture operation and purchase and possession of flounder from a hatchery or flounder aquaculture operation shall be exempt from season and size limit restrictions set under Paragraph (k) of this Rule. It is unlawful to possess, sell, purchase, or transport such flounder unless they are in compliance with all conditions of the Aquaculture Operations Permit.

History Note: Authority G.S. 113-134; 113-169.5; 113-182; 113-221; 143B-289.52; Eff. January 1, 1991; Amended Eff. March 1, 1996; February 1, 1992;

Temporary Amendment Eff. November 1, 1995 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;

Temporary Amendment Eff. December 23, 1996;

Amended Eff. April 1, 1997;

Temporary Amendment Eff. June 1, 1998; August 18, 1997;

Amended Eff. April 1, 1999;

Temporary Amendment Eff. May 1, 2000; July 1, 1999;

Amended Eff. April 1, 2001; August 1, 2000;

Temporary Amendment Eff. September 1, 2004;

Temporary Amendment Expired June 12, 2005;

Amended Eff. September 1, 2005.

15A NCAC 03M .0515 DOLPHIN

(a) It is unlawful to possess more than 10 dolphin per person per day taken by hook and line for recreational purposes.

(b) It is unlawful to possess more than 60 dolphin per day per vessel regardless of the number of people on board, except headboat vessels with a valid U.S. Coast Guard Certificate of Inspection may possess 10 dolphin per paying customer.

(c) It is unlawful to take or possess more than 10 dolphin per person per day, or sell dolphin without a valid Federal Commercial Dolphin/Wahoo vessel permit and either a Standard Commercial Fishing License, a Retired Standard Commercial Fishing License, or a Land or Sell License.

History Note: Authority G.S. 113-134; 113-182; 143B-289.52;

Temporary Adoption Eff. July 1, 1999;

Temporary Adoption Eff. January 1, 2000;

Eff. April 1, 2001;

Amended Eff. September 1, 2005.

15A NCAC 03M .0517 WAHOO

(a) It is unlawful to possess more than two wahoo per person per day taken by hook and line for recreational purposes.

(b) It is unlawful to take or possess more than two wahoo per person per day, or sell wahoo without a Federal Commercial Dolphin/Wahoo permit and either a Standard Commercial Fishing License, Retired Standard Commercial Fishing License, or a Land or Sell License.

(c) It is unlawful to possess aboard or land more than 500 pounds of wahoo per trip in a commercial fishing operation.

History Note: Authority G.S. 113-134; 113-182; 143B-289.52;

Eff. September 1, 2005.

15A NCAC 03O .0202 SHELLFISH BOTTOM AND WATER COLUMN LEASE APPLICATIONS

(a) Application forms are available from the Division's office headquarters at 3441 Arendell Street, Morehead City, NC 28557 for persons desiring to apply for shellfish bottom and water column leases. Each application shall be accompanied by a map or diagram prepared at the applicant's expense including an inset vicinity map showing the location of the proposed lease with detail sufficient to permit on-site

identification and must meet the information requirements pursuant to G.S. 113-202(d).

(b) As a part of the application, the applicant shall submit a management plan for the area to be leased on a form provided by the Division which meets the following standards:

- (1) States the methods through which the applicant will cultivate and produce shellfish consistent with the minimum requirements set forth in 15A NCAC 03O .0201;
- (2) States the time intervals during which various phases of the cultivation and production plan will be achieved;
- (3) States the materials and techniques that will be utilized in management of the lease;
- (4) Forecasts the results expected to be achieved by the management activities; and
- (5) Describes the productivity of any other leases or franchises held by the applicant.

(c) The completed application, map or diagram, and management plan for the requested lease shall be accompanied by the non-refundable filing fee set forth in G.S. 113-202(d1). An incomplete application shall be returned and not considered further until re-submitted complete with all required information.

(d) Immediately after an application is deemed to have met all requirements and is accepted by the Division, the applicant shall identify the area for which a lease is requested with stakes at each corner in accordance with 15A NCAC 03O .0204(a)(1)(A). The applicant shall attach to each stake a sign, provided by the Division containing the name of the applicant, the date the application was filed, and the estimated acres.

History Note: Authority G.S. 113-134; 113-201; 113-202; 143B-289.52;

Eff. January 1, 1991;

Amended Eff. September 1, 2005; May 1, 1997; September 1, 1991.

15A NCAC 03O .0205 LEASE RENEWAL

(a) Lease renewal applications shall be provided to lessees as follows:

- (1) For shellfish bottom leases, renewal applications shall be provided in January of the year of expiration.
- (2) For water column leases, renewal applications shall be provided at least 90 days prior to expiration dates.

(b) Lease renewal applications shall be accompanied by management plans meeting the requirements of 15A NCAC 03O .0202(b). The non-refundable filing fee set forth in G.S. 113-202(j) shall accompany each renewal application for shellfish bottom leases.

(c) A survey for renewal leases shall be required at the applicant's expense when the Division determines that the area leased to the renewal applicant is inconsistent with the survey on file.

(d) When it is determined, after due notice to the lessee, and after opportunity for the lessee to be heard, that the lessee has

not complied with the requirements of this Section or that the lease as issued is inconsistent with this Section, the Secretary may decline to renew, at the end of the current terms, any shellfish bottom or water column lease. The lessee may appeal the Secretary's decision by initiating a contested case as outlined in 15A NCAC 03P .0102.

(e) Pursuant to G.S. 113-202(a)(6), the Secretary is not authorized to recommend approval of renewal of a shellfish lease in an area closed to shellfishing by reason of pollution. Shellfish leases partially closed due to pollution must be amended to exclude the area closed to shellfishing prior to renewal. For purposes of lease renewal determinations, an area shall be considered closed to shellfish harvest by reason of pollution when the area has been classified by the State Health Director as prohibited or has been closed for more than 50 percent of the days during the final four years prior to renewal except shellfish leases in areas which have been closed for more than 50 percent of the days during the final four years prior to renewal and continue to meet established production requirements by sale of shellfish through relay periods or other depuration methods shall not be considered closed due to pollution for renewal purposes.

(f) If the Secretary declines to renew a lease that has been determined to be inconsistent with the standards of this Section, the Secretary, with the agreement of the lessee, may issue a renewal lease for all or part of the area previously leased to the lessee that contains conditions necessary to conform the renewal lease to the requirements of this Section for new leases.

History Note: Authority G.S. 113-134; 113-201; 113-202; 113-202.1; 113-202.2; 143B-289.52; Eff. January 1, 1991; Amended Eff. September 1, 2005; May 1, 1997; March 1, 1995; March 1, 1994; October 1, 1992; September 1, 1991.

15A NCAC 03O .0501 PROCEDURES AND REQUIREMENTS TO OBTAIN PERMITS

(a) To obtain any Marine Fisheries permit, the following information is required for proper application from the applicant, a responsible party or person holding a power of attorney:

- (1) Full name, physical address, mailing address, date of birth, and signature of the applicant on the application. If the applicant is not appearing before a license agent or the designated Division contact, the applicant's signature on the application shall be notarized;
- (2) Current picture identification of applicant, responsible party and, when applicable, person holding a power of attorney; acceptable forms of picture identification are driver's license, current North Carolina Identification card issued by the North Carolina Division of Motor Vehicles, military identification card, resident alien

card (green card) or passport or if applying by mail, a copy thereof;

- (3) Full names and dates of birth of designees of the applicant who shall be acting under the requested permit where that type permit requires listing of designees;
- (4) Certification that the applicant and his designees do not have four or more marine or estuarine resource convictions during the previous three years;
- (5) For permit applications from business entities, the following documentation is required:
 - (A) Business Name;
 - (B) Type of Business Entity: Corporation, partnership, or sole proprietorship;
 - (C) Name, address and phone number of responsible party and other identifying information required by this Subchapter or rules related to a specific permit;
 - (D) For a corporation, current articles of incorporation and a current list of corporate officers when applying for a permit in a corporate name;
 - (E) For a partnership, if the partnership is established by a written partnership agreement, a current copy of such agreement shall be provided when applying for a permit;
 - (F) For business entities, other than corporations, copies of current assumed name statements if filed and copies of current business privilege tax certificates, if applicable.

(6) Additional information as required for specific permits.

(b) A permittee shall hold a valid Standard or Retired Standard Commercial Fishing License in order to hold a:

- (1) Pound Net Permit;
- (2) Permit to Waive the Requirement to Use Turtle Excluder Devices in the Atlantic Ocean.

(c) A permittee and his designees shall hold a valid Standard or Retired Standard Commercial Fishing License with a Shellfish Endorsement or a Shellfish License in order to hold a:

- (1) Permit to Transplant (Prohibited) Polluted Shellfish;
- (2) Permit to Transplant Oysters from Seed Management Areas;
- (3) Permit to Use Mechanical Methods for Oysters or Clams on Shellfish Leases or Franchises;

- (4) Permit to Harvest Rangia Clams from Prohibited (Polluted) Areas;
- (5) Depuration Permit.
- (d) A permittee shall hold a valid:
 - (1) Fish Dealer License in the proper category in order to hold Dealer Permits for Monitoring Fisheries Under a Quota/Allocation for that category; and
 - (2) Standard Commercial Fishing License with a Shellfish Endorsement, Retired Standard Commercial Fishing License with a Shellfish Endorsement or a Shellfish License in order to harvest clams or oysters for depuration.
- (e) Aquaculture Operations/Collection Permits:
 - (1) A permittee shall hold a valid Aquaculture Operation Permit issued by the Fisheries Director to hold an Aquaculture Collection Permit.
 - (2) The permittee or designees shall hold appropriate licenses from the Division of Marine Fisheries for the species harvested and the gear used under the Aquaculture Collection Permit.
- (f) Applications submitted without complete and required information shall be considered incomplete and shall not be processed until all required information has been submitted. Incomplete applications shall be returned to the applicant with deficiency in the application so noted.
- (g) A permit shall be issued only after the application has been deemed complete by the Division of Marine Fisheries and the applicant certifies to fully abide by the permit general and specific conditions established under 15A NCAC 03J .0107, 03K .0103, 03K .0104, 03K .0107, 03K .0206, 03K .0303, 03K .0401, 03O .0502, and 03O .0503 as applicable to the requested permit.
- (h) The Fisheries Director, or his agent may evaluate the following in determining whether to issue, modify or renew a permit:
 - (1) Potential threats to public health or marine and estuarine resources regulated by the Marine Fisheries Commission;
 - (2) Applicant's demonstration of a valid justification for the permit and a showing of responsibility as determined by the Fisheries Director;
 - (3) Applicant's history of habitual fisheries violations evidenced by eight or more violations in 10 years.
- (i) The applicant shall be notified in writing of the denial or modification of any permit request and the reasons therefor. The applicant may submit further information, or reasons why the permit should not be denied or modified.
- (j) Permits shall be valid from the date of issuance through the expiration date printed on the permit. Unless otherwise established by rule, the Fisheries Director may establish the issuance timeframe for specific types and categories of permits based on season, calendar year, or other period based

- upon the nature of the activity permitted, the duration of the activity, compliance with federal or state fishery management plans or implementing rules, conflicts with other fisheries or gear usage, or seasons for the species involved. The expiration date shall be specified on the permit.
- (k) To renew a permit, the permittee shall file a certification that the information in the original application is still currently correct, or a statement of all changes in the original application and any additional information required by the Division of Marine Fisheries.
- (l) For initial or renewal permits, processing time for permits may be up to 30 days unless otherwise specified in this Chapter.
- (m) It is unlawful for a permit holder to fail to notify the Division of Marine Fisheries within 30 days of a change of name or address.
- (n) It is unlawful for a permit holder to fail to notify the Division of Marine Fisheries of a change of designee prior to use of the permit by that designee.
- (o) Permit applications shall be available at all Division Offices.
- (p) Any permit which is valid at time of adoption of this Rule shall be valid until the expiration date stated on the permit.

History Note: Authority G.S. 113-134; 113-169.1; 113-169.3; 113-182; 113-210; 143B-289.52; Temporary Adoption Eff. September 1, 2000; May 1, 2000; Eff. April 1, 2001; Temporary Amendment Eff. October 1, 2001; Amended Eff. September 1, 2005; April 1, 2003; August 1, 2002.

15A NCAC 03O .0502 PERMIT CONDITIONS; GENERAL

The following conditions apply to all permits issued by the Fisheries Director:

- (1) it is unlawful to operate under the permit except in areas, at times, and under conditions specified on the permit;
- (2) it is unlawful to operate under a permit without having the permit or copy thereof in possession of the permittee or his or her designees at all times of operation and the permit or copy thereof shall be ready at hand for inspection, except for Pound Net Permits;
- (3) it is unlawful to operate under a permit without having a current picture identification in possession and ready at hand for inspection;
- (4) it is unlawful to refuse to allow inspection and sampling of a permitted activity by an agent of the Division;
- (5) it is unlawful to fail to provide complete and accurate information requested by the Division in connection with the permitted activity;

- (6) it is unlawful to hold a permit issued by the Fisheries Director when not eligible to hold any license required as a condition for that permit as stated in 15A NCAC 03O .0501;
- (7) it is unlawful to fail to provide reports within the timeframe required by the specific permit conditions;
- (8) it is unlawful to fail to keep such records and accounts as required by the rules in this Chapter for determination of conservation policy, equitable and efficient administration and enforcement, or promotion of commercial or recreational fisheries;
- (9) it is unlawful to assign or transfer permits issued by the Fisheries Director, except for Pound Net Permits as authorized by 15A NCAC 03J .0107(h);
- (10) the Fisheries Director, or his agent, may, by conditions of the permit, specify any or all of the following for the permitted purposes:
 - (a) species;
 - (b) quantity or size;
 - (c) time period;
 - (e) location;
 - (d) means and methods;
 - (f) disposition of resources;
 - (g) marking requirements; or
 - (h) harvest conditions.
- (11) unless specifically stated as a condition on the permit, all statutes, rules and proclamations shall apply to the permittee and his or her designees.
- (12) as a condition of accepting the permit from the Fisheries Director, the permittee agrees to abide by all conditions of the permit and agrees that if specific conditions of the permit, as identified on the permit, are violated or if false information was provided in the application for initial issuance, renewal or transfer, the permit may be suspended or revoked by the Fisheries Director.

History Note: Authority G.S. 113-134; 113-169.1; 113-182; 113-210; 143B-289.52; Temporary Adoption Eff. May 1, 2000; Eff. April 1, 2001; Amended Eff. September 1, 2005.

15A NCAC 03O .0503 PERMIT CONDITIONS; SPECIFIC

- (a) Horseshoe Crab Biomedical Use Permit:
 - (1) It is unlawful to use horseshoe crabs for biomedical purposes without first obtaining a permit.
 - (2) It is unlawful for persons who have been issued a Horseshoe Crab Biomedical Use

Permit to fail to submit a report on the use of horseshoe crabs to the Division of Marine Fisheries due on February 1 of each year. Such reports shall be filed on forms provided by the Division and shall include a monthly account of the number of crabs harvested, statement of percent mortality up to the point of release, and a certification that harvested horseshoe crabs are solely used by the biomedical facility and not for other purposes.

- (3) It is unlawful for persons who have been issued a Horseshoe Crab Biomedical Use Permit to fail to comply with the Atlantic States Marine Fisheries Commission Horseshoe Crab Fisheries Management Plan monitoring and tagging requirements for horseshoe crabs. Copies of this plan are available from the Atlantic States Marine Fisheries Commission, 1444 Eye Street, NW, 6th Floor, Washington, DC 20005, (202) 289-6400, or the Division of Marine Fisheries' Morehead City Office.
- (b) Dealers Permits for Monitoring Fisheries under a Quota/Allocation:
 - (1) During the commercial season opened by proclamation or rule for the fishery for which a Dealers Permit for Monitoring Fisheries under a Quota/Allocation permit is issued, it is unlawful for fish dealers issued such permit to fail to:
 - (A) Fax or send via electronic mail by noon daily, on forms provided by the Division, the previous day's landings for the permitted fishery to the dealer contact designated on the permit. Landings for Fridays or Saturdays shall be submitted on the following Monday. If the dealer is unable to fax or electronic mail the required information, the permittee shall call in the previous day's landings to the dealer contact designated on the permit but shall maintain a log furnished by the Division;
 - (B) Submit the required log to the Division upon request or no later than five days after the close of the season for the fishery permitted;
 - (C) Maintain faxes and other related documentation in accordance with 15A NCAC 03I .0114;
 - (D) Contact the dealer contact daily regardless of whether or not a transaction for the fishery for which a dealer is permitted occurred;

- (E) Record the permanent dealer identification number on the bill of lading or receipt for each transaction or shipment from the permitted fishery.
- (2) Striped Bass Dealer Permit:
 - (A) It is unlawful for a fish dealer to possess, buy, sell or offer for sale striped bass taken from the following areas without first obtaining a Striped Bass Dealer Permit validated for the applicable harvest area:
 - (i) Atlantic Ocean;
 - (ii) Albemarle Sound Management Area as designated in 15A NCAC 03R .0201; and
 - (iii) The joint and coastal fishing waters of the Central/Southern Management Area as designated in 15A NCAC 03R .0201.
 - (B) No permittee shall possess, buy, sell or offer for sale striped bass taken from the harvest areas opened by proclamation without having a North Carolina Division of Marine Fisheries issued valid tag for the applicable area affixed through the mouth and gill cover, or, in the case of striped bass imported from other states, a similar tag that is issued for striped bass in the state of origin. North Carolina Division of Marine Fisheries striped bass tags shall not be bought, sold, offered for sale, or transferred. Tags shall be obtained at the North Carolina Division of Marine Fisheries Offices. The Division of Marine Fisheries shall specify the quantity of tags to be issued based on historical striped bass landings. It is unlawful for the permittee to fail to surrender unused tags to the Division upon request.
- (3) Albemarle Sound Management Area for River Herring Dealer Permit: It is unlawful to possess, buy, sell or offer for sale river herring taken from the following area without first obtaining an Albemarle Sound Management Area for River Herring Dealer Permit: Albemarle Sound Management Area for River Herring is defined in 15A NCAC 03J .0209.
- (4) Atlantic Ocean Flounder Dealer Permit:
 - (A) It is unlawful for a Fish Dealer to allow vessels holding a valid License to Land Flounder from the Atlantic Ocean to land more than 100 pounds of flounder from a single transaction at their licensed location during the open season without first obtaining an Atlantic Ocean Flounder Dealer Permit. The licensed location shall be specified on the Atlantic Ocean Flounder Dealer Permit and only one location per permit shall be allowed.
 - (B) It is unlawful for a Fish Dealer to possess, buy, sell, or offer for sale more than 100 pounds of flounder from a single transaction from the Atlantic Ocean without first obtaining an Atlantic Ocean Flounder Dealer Permit.
- (c) Blue Crab Shedding Permit: It is unlawful to possess more than 50 blue crabs in a shedding operation without first obtaining a Blue Crab Shedding Permit from the Division of Marine Fisheries.
- (d) Permit to Waive the Requirement to Use Turtle Excluder Devices in the Atlantic Ocean:
 - (1) It is unlawful to trawl for shrimp in the Atlantic Ocean without Turtle Excluder Devices installed in trawls within one nautical mile of the shore from Browns Inlet (34° 35.7000' N latitude) to Rich's Inlet (34° 17.6000' N latitude) without a valid Permit to Waive the Requirement to Use Turtle Excluder Devices in the Atlantic Ocean when allowed by proclamation from April 1 through November 30.
 - (2) It is unlawful to tow for more than 55 minutes from April 1 through October 31 and 75 minutes from November 1 through November 30 in this area when working under this permit. Tow time begins when the doors enter the water and ends when the doors exit the water.
 - (3) It is unlawful to fail to empty the contents of each net at the end of each tow.
 - (4) It is unlawful to refuse to take observers upon request by the Division of Marine Fisheries or the National Marine Fisheries Service.
 - (5) It is unlawful to fail to report any sea turtle captured. Reports shall be made within 24 hours of the capture to the Marine Patrol Communications Center by phone. All turtles taken incidental to trawling shall be handled and resuscitated in accordance with requirements specified in 50 CFR 223.206,

copies of which are available via the Internet at www.nmfs.gov and at the Division of Marine Fisheries, 127 Cardinal Drive Extension, Wilmington, North Carolina 28405.

(e) Pound Net Set Permits. Rules setting forth specific conditions for pound net sets are set forth in 15A NCAC 03J .0107.

(f) Aquaculture Operations/Collection Permits:

(1) It is unlawful to conduct aquaculture operations utilizing marine and estuarine resources without first securing an Aquaculture Operation Permit from the Fisheries Director.

(2) It is unlawful:

(A) To take marine and estuarine resources from coastal fishing waters for aquaculture purposes without first obtaining an Aquaculture Collection Permit from the Fisheries Director.

(B) To sell, or use for any purpose not related to North Carolina aquaculture, marine and estuarine resources taken under an Aquaculture Collection Permit.

(C) To fail to submit to the Fisheries Director an annual report due on December 1 of each year on the form provided by the Division the amount and disposition of marine and estuarine resources collected under authority of this permit.

(3) Lawfully permitted shellfish relaying activities authorized by 15A NCAC 03K .0103 and .0104 are exempt from requirements to have an Aquaculture Operation or Collection Permit issued by the Fisheries Director.

(4) Aquaculture Operations/Collection Permits shall be issued or renewed on a calendar year basis.

(5) It is unlawful to fail to provide the Division of Marine Fisheries with a listing of all designees who shall be acting under an Aquaculture Collection Permit at the time of application.

(g) Scientific or Educational Collection Permit:

(1) It is unlawful for individuals or agencies seeking exemptions from license, rule, proclamation or statutory requirements to collect for scientific or educational purposes as approved by the Division of Marine Fisheries any marine and estuarine species without first securing a Scientific or Educational Collection Permit.

(2) It is unlawful for persons who have been issued a Scientific or Educational Collection

Permit to fail to submit a report on collections to the Division of Marine Fisheries due on December 1 of each year unless otherwise specified on the permit. Such reports shall be filed on forms provided by the Division. Scientific or Educational Collection Permits shall be issued on a calendar year basis.

(3) It is unlawful to sell marine and estuarine species taken under a Scientific or Educational Collection Permit:

(A) without the required license(s) for such sale;

(B) to anyone other than a licensed North Carolina fish dealer; and

(C) without authorization stated on the permit for such sale.

(4) It is unlawful to fail to provide the Division of Marine Fisheries a listing of all designees who shall be acting under Scientific or Educational Collection Permits at the time of application.

(5) The permittee or designees utilizing the permit shall call or fax the Division of Marine Fisheries Communications Center not later than 24 hours prior to use of the permit, specifying activities and location.

(h) Under Dock Oyster Culture Permit:

(1) It is unlawful to cultivate oysters in containers under docks for personal consumption without first obtaining an Under Dock Oyster Culture Permit.

(2) An Under Dock Oyster Culture Permit shall only be issued in accordance with provisions set forth in G.S. 113-210(c).

(3) The applicant shall provide certification of completion of mandated training as required by G.S. 113-210(j).

(4) Action by an Under Dock Oyster Culture Permit holder to encroach on or usurp the legal rights of the public to access public trust resources in coastal fishing waters shall result in permit revocation.

History Note: Authority G.S. 113-134; 113-169.1; 113-169.3; 113-182; 113-210; 143B-289.52; Temporary Adoption Eff. September 1, 2000; August 1, 2000; May 1, 2000; Eff. April 1, 2001; Amended Eff. September 1, 2005; October 1, 2004; August 1, 2004; August 1, 2002.

15A NCAC 03R .0103 PRIMARY NURSERY AREAS

The primary nursery areas referenced in 15A NCAC 03N .0104 are delineated in the following coastal water areas:

(1) In the Roanoke Sound Area:

(a) Shallowbag Bay:

- (i) Dough Creek - northeast of a line beginning on the west shore at a point 35° 54.5396' N - 75° 39.9681' W; running northeasterly to the east shore to a point 35° 54.4615' N - 75° 40.1598' W; and west of a line that crosses a canal on the east side of Dough Creek beginning on the north shore at a point 35° 54.7103' N - 75° 40.0951' W; running southerly to the south shore to a point 35° 54.6847' N - 75° 40.0882' W;
 - (ii) Scarborough Creek - south of a line beginning on the west shore at a point 35° 53.9801' N - 75° 39.5985' W; running northeasterly to the east shore to a point 35° 54.0372' N - 75° 39.5558' W.
 - (b) Broad Creek - all waters north of a line beginning on the west shore at a point 35° 51.9287' N - 75° 38.3377' W; running northeasterly to the east shore to a point 35° 52.0115' N - 75° 38.1792' W; and west and south of a line beginning on the north shore at a point 35° 53.3655' N - 75° 38.0254' W; running southeasterly to the south shore to a point 35° 53.3474' N - 75° 37.9430' W.
- (2) In the Northern Pamlico Sound Area:
- (a) Long Shoal River:
 - (i) Long Shoal River - northwest of a line beginning on the north shore at a point 35° 38.0175' N - 75° 52.9270' W; running southwesterly to the south shore to a point 35° 37.8369' N - 75° 53.1060' W;
 - (ii) Deep Creek - southeast of a line beginning on the north shore at a point 35° 37.7346' N - 75° 52.1383' W; running southwesterly to the south shore to a point 35° 37.6673' N - 75° 52.2997' W;
 - (iii) Broad Creek - west of a line beginning on the
 - (iv) Muddy Creek - east of a line beginning on the north shore at a point 35° 36.4566' N - 75° 52.1460' W; running southerly to the south shore to a point 35° 36.2828' N - 75° 52.1640' W;
 - (v) Pains Bay - north of a line beginning on the west shore at a point 35° 35.4517' N - 75° 49.1414' W; running easterly to the east shore to a point 35° 35.4261' N - 75° 48.8029' W;
 - (vi) Otter Creek - southwest of a line beginning on the west shore at a point 35° 33.2597' N - 75° 55.2129' W; running easterly to the east shore to a point 35° 33.1995' N - 75° 54.8949' W;
 - (vii) Clark Creek - northeast of a line beginning on the north shore at a point 35° 35.7776' N - 75° 51.4652' W; running southeasterly to the south shore to a point 35° 35.7128' N - 75° 51.4188' W;
 - (b) Far Creek - west of a line beginning on the north shore at a point 35° 30.9782' N - 75° 57.7611' W; running southerly to Gibbs Point to a point 35° 30.1375' N - 75° 57.8108' W;
 - (c) Middletown Creek - west of a line beginning on the north shore at a point 35° 28.4868' N - 75° 59.8186' W; running southwesterly to the south shore to a point 35° 28.1919' N - 76° 00.0216' W;
 - (d) Wysocking Bay:
 - (i) Lone Tree Creek - east of a line beginning on the north shore at a point 35° 25.6048' N - 76° 02.3577' W; running southeasterly to the south shore to a

- | | | | |
|-------|---|-------|--|
| | point 35° 25.1189' N - 76° 02.0499' W; | | 23.1640' N - 76° 14.9892' W; |
| (ii) | Wysocking Bay - north of a line beginning on the west shore at a point 35° 25.7793' N - 76° 03.5773' W; running northeasterly to the east shore to a point 35° 25.9585' N - 76° 02.9055' W; | (ii) | Rattlesnake Creek - west of a line beginning on the north shore at a point 35° 22.9453' N - 76° 15.2748' W, running southerly to the south shore to a point 35° 22.8638' N - 76° 15.3461' W; |
| (iii) | Douglas Bay - northwest of a line beginning on Mackey Point at a point 35° 25.2627' N - 76° 03.1702' W; running southwesterly to the south shore to a point 35° 24.8225' N - 76° 03.6353' W; | (iii) | Buck Creek - north of a line beginning on the west shore at a point 35° 21.5220' N - 76° 13.8865' W; running southeasterly to the east shore to a point 35° 21.3593' N - 76° 13.7039' W; |
| (iv) | Tributaries west of Brown Island - west of a line beginning on Brown Island at a point 35° 24.3606' N - 76° 04.4557' W; running southerly to the north shore of Brown Island to a point 35° 24.2081' N - 76° 04.4622' W; and northwest of a line beginning on the south shore of Brown Island at a point 35° 23.8255' N - 76° 04.4761' W; running southwesterly to a point 35° 23.6543' N - 76° 04.8630' W; | (iv) | Laurel Creek - east of a line beginning on the north shore at a point 35° 20.6693' N - 76° 13.3177' W; running southerly to the south shore to a point 35° 20.6082' N - 76° 13.3305' W; |
| (e) | East Bluff Bay - Harbor Creek east of a line beginning on the north shore at a point 35° 21.5762' N - 76° 07.8755' W; running southerly to a point 35° 21.4640' N - 76° 07.8750' W; running easterly to the south shore to a point 35° 21.4332' N - 76° 07.7211' W; | (v) | Old Haulover - west of a line beginning on the north shore at a point 35° 22.0186' N - 76° 15.6736' W; running southerly to the south shore to a point 35° 21.9708' N - 76° 15.6825' W; |
| (f) | Cunning Harbor tributaries - north of a line beginning on the west shore at a point 35° 20.7567' N - 76° 12.6379' W; running easterly to the east shore to a point 35° 20.7281' N - 76° 12.2292' W; | (h) | Swanquarter Bay: |
| (g) | Juniper Bay: | (i) | Upper Swanquarter Bay - north of a line beginning on the west shore at a point 35° 23.5651' N - 76° 20.6715' W; running easterly to the east shore to a point 35° 23.6988' N - 76° 20.0025' W; |
| | (i) Upper Juniper Bay - north of a line beginning on the west shore at a point 35° 23.1687' N - 76° 15.1921' W; running easterly to the east shore to a point 35° | (ii) | Oyster Creek - east of a line beginning on the north shore at a point 35° 23.1214' N - 76° 19.0026' W; running southeasterly to the south shore to a point 35° 23.0117' N - 76° 18.9591' W; |
| | | (iii) | Caffee Bay: |
| | | (A) | Unnamed tributary - north of a line beginning on the west shore at a point 35° |

- (j) Spencer Bay:
 - (i) Germantown Bay:
 - (A) Ditch Creek - northwest of a line beginning on the north shore at a point 35° 24.1874' N - 76° 27.8527' W; running southwesterly to the south shore to a point 35° 24.0937' N - 76° 27.9348' W;
 - (B) Jenette Creek - northwest of a line beginning on the north shore at a point 35° 24.5054' N - 76° 27.6258' W; running southwesterly to the south shore to a point 35° 24.4642' N - 76° 27.6659' W;
 - (C) Headwaters of Germantown Bay - north of a line beginning on the west shore at a point 35° 24.8345' N - 76° 27.2605' W; running southeasterly to the east shore to a point 35° 24.6210' N - 76° 26.9221' W;
 - (D) Swan Creek - southeast of a line beginning on the north shore at a point 35° 24.4783' N - 76° 27.1513' W; running southwesterly to the south shore to a point 35° 24.3899' N - 76° 27.2809' W;
 - (ii) Unnamed tributary - west of a line beginning on the north shore at a point 35° 22.9741' N - 76° 28.3469' W; running southerly to the south shore to a point 35° 22.8158' N - 76° 28.3280' W;
 - (iii) Unnamed tributary - west of a line beginning on the north shore at a point 35° 23.1375' N - 76° 28.5681' W; running southerly to the south shore to a point 35° 23.0209' N - 76° 28.5060' W;
 - (iv) Unnamed tributary - southwest of a line beginning on the north shore at a point 35° 23.3775' N - 76° 28.7332' W; running southeasterly to the south shore to a point 35° 23.3297' N - 76° 28.5608' W;
 - (v) Unnamed tributaries - northwest of a line beginning on the north shore at a point 35° 23.7207' N - 76° 28.6590' W; running southwesterly to the south shore to a point 35° 23.4738' N - 76° 28.7763' W;
 - (vi) Upper Spencer Bay - northwest of a line beginning on the north shore at a point 35° 24.3129' N - 76° 28.5300' W; running southwesterly to the south shore to a point 35° 23.9681' N - 76° 28.7671' W;
 - (vii) Spencer Creek - east of a line beginning on the north shore at a point 35° 23.9990' N - 76° 27.3702' W; running southerly to the south shore to a point 35° 23.8598' N - 76° 27.4037' W;
 - (k) Long Creek - north of a line beginning on the west shore at a point 35° 22.4678' N - 76° 28.7868' W; running southeasterly to the east shore to a point 35° 22.3810' N - 76° 28.7064' W;
 - (l) Willow Creek - east of a line beginning on the north shore at a point 35° 23.1370' N - 76° 29.8829' W; running southeasterly to the

- | | |
|---|---|
| <p>(m) south shore to a point 35° 22.9353' N - 76° 29.7215' W;
Abels Bay - north and east of a line beginning on the west shore at a point 35° 24.1072' N - 76° 30.3848' W; running southeasterly to the east shore to a point 35° 23.9898' N - 76° 30.1178' W; thence running southerly to the south shore to a point 35° 23.6947' N - 76° 30.1900' W;</p> <p>(n) Crooked Creek - north of a line beginning on the west shore at a point 35° 24.4138' N - 76° 32.2124' W; running easterly to the east shore to a point 35° 24.3842' N - 76° 32.0419' W.</p> <p>(3) In the Pungo River Area:
(a) Fortescue Creek:
(i) Headwaters of Fortescue Creek - southeast of a line beginning on the south shore at a point 35° 25.5379' N - 76° 30.6923' W; running easterly to the north shore to a point 35° 25.5008' N - 76° 30.5537' W;
(ii) Warner Creek - north of a line beginning on the west shore at a point 35° 26.2778' N - 76° 31.5463' W; running easterly to the east shore to a point 35° 26.3215' N - 76° 31.4522' W;
(iii) Island Creek - north of a line beginning on the west shore at a point 35° 26.1342' N - 76° 32.3883' W; running easterly to the east shore to a point 35° 26.1203' N - 76° 32.2603' W;
(iv) Dixon Creek - south of a line beginning on the west shore at a point 35° 25.5766' N - 76° 31.8489' W; running easterly to the east shore to a point 35° 25.5865' N - 76° 31.6960' W;
(v) Pasture Creek - north of a line beginning on the west shore at a point 35° 25.9437' N - 76° 31.8468' W; running southwesterly to the east shore to a point</p> | <p>(vi) 35° 25.9918' N - 76° 31.7224' W;
Cox, Snell, and Seer Creeks - northeast of a line beginning on the west shore at a point 35° 26.0496' N - 76° 31.2087' W; running southeasterly to the east shore to a point 35° 25.8497' N - 76° 30.8828' W;</p> <p>(vii) Unnamed tributary on the north side of Fortescue Creek - northeast of a line beginning on the west shore at a point 35° 25.7722' N - 76° 30.7825' W; running southeasterly to the east shore to a point 35° 25.7374' N - 76° 30.7102' W;</p> <p>(viii) Runway Creek - northeast of a line beginning on the west shore at a point 35° 25.6547' N - 76° 30.6637' W; running easterly to the east shore to a point 35° 25.6113' N - 76° 30.5714' W;</p> <p>(b) Slade Creek:
(i) Upper Slade Creek - south of a line beginning on the north shore at a point 35° 27.9168' N - 76° 30.5189' W; running westerly to the south shore to a point 35° 27.9532' N - 76° 30.7140' W;
(ii) Jarvis Creek - northeast of a line beginning on the west shore at a point 35° 28.2450' N - 76° 30.8921' W; running southeasterly to the east shore to a point 35° 28.2240' N - 76° 30.8200' W;
(iii) Jones Creek - south of a line beginning on the west shore at a point 35° 28.0077' N - 76° 30.9337' W; running southeasterly to the east shore to a point 35° 27.9430' N - 76° 30.8938' W;
(iv) Becky Creek - north of a line beginning on the west shore at a point 35° 28.6081' N - 76° 31.6886'</p> |
|---|---|

- W; running northeasterly to the east shore to a point 35° 28.6297' N - 76° 31.6073' W;
 - (v) Neal Creek - north of a line beginning on the west shore at a point 35° 28.7797' N - 76° 31.8657' W; running northeasterly to the east shore to a point 35° 28.8084' N - 76° 31.7727' W;
 - (vi) Wood Creek - north of a line beginning on the west shore at a point 35° 28.5788' N - 76° 32.4163' W; running northeasterly to the east shore to a point 35° 28.6464' N - 76° 32.3339' W;
 - (vii) Spellman Creek - north of a line beginning on the east shore at a point 35° 28.2233' N - 76° 32.6827' W; running southwesterly to the west shore to a point 35° 28.2567' N - 76° 32.6533' W;
 - (viii) Speer Creek - east of a line beginning on the north shore at a point 35° 27.9680' N - 76° 32.3593' W; running southerly to the south shore to a point 35° 27.9216' N - 76° 32.3862' W;
 - (ix) Church Creek and Speer Gut - east of a line beginning on the north shore at a point 35° 27.5910' N - 76° 32.7412' W; running southwesterly to the south shore to a point 35° 27.5282' N - 76° 32.8227' W;
 - (x) Allison and Foreman Creek - south of a line beginning on Parmalee Point at a point 35° 27.2812' N - 76° 33.0634' W; running southwesterly to the west shore to a point 35° 27.2418' N - 76° 33.1451' W;
 - (c) Flax Pond - west of a line beginning the north shore at a point 35° 32.0297' N - 76° 33.0389' W; running southwesterly to the south shore to a point 35° 31.9212' N - 76° 33.2061' W;
- (d) Battalina and Tooleys creeks - northwest of a line beginning on the north shore at a point 35° 32.3914' N - 76° 36.1548' W; running southwesterly to the south shore to a point 35° 32.0627' N - 76° 36.3769' W;
- (4) In the Pamlico River Area:
 - (a) North Creek:
 - (i) North Creek - north of a line beginning on the west shore at a point 35° 25.6764' N - 76° 39.9970' W; running northeasterly to the east shore to a point 35° 25.5870' N - 76° 40.0806' W;
 - (ii) East Fork:
 - (A) Northeast of a line beginning on the west shore at a point 35° 25.8000' N - 76° 39.2679' W; running southeasterly to the east shore to a point 35° 25.6914' N - 76° 39.1374' W;
 - (B) Unnamed tributary of East Fork - northwest of a line beginning on the north shore at a point 35° 25.6950' N - 76° 39.4337' W; running southwesterly to the south shore to a point 35° 25.6445' N - 76° 39.4698' W;
 - (iii) Frying Pan Creek - east of a line beginning on the north shore at a point 35° 24.9881' N - 76° 39.5948' W; running southwesterly to Chambers Point to a point 35° 24.8508' N - 76° 39.6811' W;
 - (iv) Little East Creek - west of a line beginning on the north shore at a point 35°

- 25.1463' N - 76° 40.3490'
W; running southwesterly
to Cousin Point to a point
35° 25.0075' N - 76°
40.4159' W;
- (b) Goose Creek:
- (i) Hatter Creek - west of a
line beginning on the
north shore at a point 35°
19.9593' N - 76° 37.5992'
W; running southerly to
the south shore to a point
35° 19.9000' N - 76°
37.5904' W;
- (ii) Upper Spring Creek:
- (A) Headwaters of
Upper Spring
Creek - east of a
line beginning on
the north shore at
a point 35°
16.3636' N - 76°
36.0568' W;
running
southeasterly to
the south shore to
a point 35°
16.1857' N - 76°
36.0111' W;
- (B) Unnamed
tributary - north
of a line
beginning on the
west shore at a
point 35°
16.8386' N - 76°
36.4447' W;
running easterly
to the east shore
to a point 35°
16.8222' N - 76°
36.3811' W;
- (iii) Eastham Creek:
- (A) Slade Landing
Creek - south of a
line beginning on
the west shore at
a point 35°
17.5450' N - 76°
35.9677' W;
running
southeasterly to
the east shore to a
point 35°
17.4845' N - 76°
35.8946' W;
- (B) Mallard Creek -
north of a line
- beginning on the
west shore at a
point 35°
17.8230' N - 76°
36.1314' W;
running
southeasterly to
the east shore to a
point 35°
17.7927' N - 76°
36.0330' W;
- (iv) Mud Gut - northeast of a
line beginning on the
north shore at a point 35°
17.8754' N - 76° 36.7704'
W; running southeasterly
to the south shore to a
point 35° 17.8166' N - 76°
36.7468' W;
- (v) Wilkerson Creek - east of
a line beginning on the
north shore at a point 35°
18.4096' N - 76° 36.7479'
W; running southwesterly
to the south shore to a
point 35° 18.3542' N - 76°
36.7741' W;
- (vi) Dixon Creek - east of a
line beginning on the
north shore at a point 35°
18.8893' N - 76° 36.5973'
W; running southerly to
the south shore to a point
35° 18.5887' N - 76°
36.7142' W;
- (c) Oyster Creek; Middle Prong:
- (i) Oyster Creek:
- (A) West of a line,
beginning on the
north shore at a
point 35°
19.4780' N - 76°
34.0131' W;
running southerly
to the south shore
to a point 35°
19.3796' N - 76°
34.0021' W;
- (B) Duck Creek -
south of a line
beginning on the
west shore at a
point 35°
19.0959' N - 76°
33.2998' W;
running
northeasterly to
the east shore to a

- 13.2646' N - 76° 33.1996' W;
 - (iii) Lambert Creek - west of a line beginning on the north shore at a point 35° 13.8980' N - 76° 34.3078' W; running southeasterly to the south shore to a point 35° 13.8354' N - 76° 34.2665' W;
 - (iv) Headwaters of Jones Bay, (west of the IWW) - west of a line beginning on the north shore at a point 35° 14.4684' N - 76° 35.4307' W; running southerly to the south shore to a point 35° 14.3947' N - 76° 35.4205' W;
 - (v) Bills Creek - north of a line beginning on the west shore at a point 35° 14.4162' N - 76° 34.8566' W; running northerly to the east shore to a point 35° 14.4391' N - 76° 34.7248' W;
 - (vi) Doll Creek - north of a line beginning on the west shore at a point 35° 14.3320' N - 76° 34.2935' W; running southeasterly to the east shore to a point 35° 14.2710' N - 76° 34.0406' W;
 - (vii) Drum Creek - north of a line beginning on the west shore at a point 35° 14.1764' N - 76° 33.2632' W; running easterly to the east shore to a point 35° 14.1620' N - 76° 33.0614' W.
- (6) In the Bay River Area:
- (a) Mason Creek - southeast of a line beginning on the north shore at a point 35° 08.2531' N - 76° 41.4897' W; running southwesterly to the west shore to a point 35° 08.1720' N - 76° 41.6340' W;
 - (b) Moore Creek - southeast of a line beginning on the north shore at a point 35° 08.9671' N - 76° 40.2017' W; running southeasterly to the south shore to a point 35° 08.8629' N - 76° 40.1598' W;
 - (c) Small tributaries from Bell Point to Ball Creek:
 - (i) Tributary west of Bell Point - south of a line beginning on the west shore at a point 35° 09.9536' N - 76° 39.3977' W; running northeasterly to the east shore to a point 35° 09.9970' N - 76° 39.3420' W;
 - (ii) Little Pasture Creek - south of a line beginning on the west shore at a point 35° 09.8944' N - 76° 39.1483'; running southeasterly to the east shore to a point 35° 09.8417' N - 76° 39.1130' W;
 - (iii) Rice Creek - south of a line beginning on the west shore at a point 35° 09.7616' N - 76° 38.9686' W; running southeasterly to the east shore to a point 35° 09.7378' N - 76° 38.8833' W;
 - (d) Ball and Cabin creeks - south of a line beginning on the west shore at a point 35° 09.6479' N - 76° 37.9973' W; running southeasterly to the east shore to a point 35° 09.5589' N - 76° 37.5879' W;
 - (e) Bonner Bay:
 - (i) Riggs Creek - west of a line beginning on the north shore at a point 35° 09.4050' N - 76° 36.2205' W; running southeasterly to the south shore to a point 35° 09.2298' N - 76° 36.0949' W;
 - (ii) Spring Creek - west of a line beginning on the north shore at a point 35° 08.5149' N - 76° 36.0799' W; running southerly to the south shore to a point 35° 08.3575' N - 76° 36.0713' W;
 - (iii) Bryan and Ives creeks - south of a line beginning on the west shore at a point 35° 08.3632' N - 76° 35.8653' W; running northeasterly to the east shore to a point 35° 08.4109' N - 76° 35.7075' W;

- (iv) Dipping Vat Creek - east of a line beginning on the north shore at a point 35° 09.2734' N - 76° 34.3363' W; running southerly to the south shore to a point 35° 09.1212' N - 76° 34.3667' W;
 - (v) Long Creek - east of a line beginning on the west shore at a point 35° 08.1404' N - 76° 34.5741' W; running northeasterly to the east shore to a point 35° 08.2078' N - 76° 34.4819' W;
 - (vi) Cow Gallus Creek - west of a line beginning on the north shore at a point 35° 08.5125' N - 76° 34.6417' W; running southerly to the south shore to a point 35° 08.4083' N - 76° 34.6131' W;
- (f) Rock Hole Bay - northeast of a line beginning on the west shore at a point 35° 11.6478' N - 76° 32.5840' W; running southeasterly to the east shore to a point 35° 11.2664' N - 76° 32.2160' W;
 - (g) Dump Creek - north of a line beginning on the west shore at a point 35° 11.7105' N - 76° 33.4228' W; running easterly to the east shore to a point 35° 11.7174' N - 76° 33.1807' W;
 - (h) Tributaries east of IWW at Gales Creek:
 - (i) Raccoon Creek - east of a line beginning on the north shore at a point 35° 12.9169' N - 76° 35.4930' W; running southeasterly to the south shore to a point 35° 12.6515' N - 76° 35.3368' W;
 - (ii) Ditch Creek - east of a line beginning on the north shore at a point 35° 12.4460' N - 76° 35.0707' W; running southeasterly to the south shore to a point 35° 12.3495' N - 76° 34.9917' W;
 - (i) Tributaries west of IWW at Gales Creek:
 - (i) Jumpover Creek - west of a line beginning on the
- (ii) Gales Creek - west of a line beginning on the north shore at a point 35° 12.9653' N - 76° 35.6600' W; running southerly to the south shore to a point 35° 12.8032' N - 76° 35.6366' W;
 - (iii) Whealton and Tar creeks - west of a line beginning on the north shore at a point 35° 12.7334' N - 76° 35.5430' W; running southeasterly to the south shore to a point 35° 12.4413' N - 76° 35.3594' W;
 - (j) Chadwick and No Jacket creeks - north of a line beginning on the west shore at a point 35° 11.9511' N - 76° 35.8899' W; running northeasterly to the east shore to a point 35° 12.0599' N - 76° 35.3973' W;
 - (k) Bear Creek - west of a line beginning on the north shore at a point 35° 11.7526' N - 76° 36.2721' W; running southwesterly to the south shore to a point 35° 11.5781' N - 76° 36.3366' W;
 - (l) Little Bear Creek - north of a line beginning on the west shore at a point 35° 11.1000' N - 76° 36.3060' W; running northeasterly to the east shore to a point 35° 11.2742' N - 76° 35.9822' W;
 - (m) Tributaries to Bay River from Petty Point to Sanders Point:
 - (i) Oyster Creek - north of a line beginning on the west shore at a point 35° 10.7971' N - 76° 36.7399' W; running northeasterly to the east shore to a point 35° 10.9493' N - 76° 36.4878' W;
 - (ii) Potter Creek - north of a line beginning on the west shore at a point 35° 10.7259' N - 76° 37.0764' W; running northeasterly to the east shore to a point

- point 35° 05.6278' N - 76° 36.5067' W;
- (iv) All tributaries on the north shore of Broad Creek - north of a line beginning on the west shore of the western most tributary at a point 35° 05.5350' N - 76° 37.4058' W; running easterly to a point 35° 05.4752' N - 76° 36.9672' W; running to a point 35° 05.4868' N - 76° 36.9163' W; north of a line beginning on the west shore of the eastern most tributary at 35° 05.4415' N - 76° 36.7869' W, running northeasterly to a point 35° 05.4664' N - 76° 36.7540' W;
 - (v) Brown Creek - northwest of a line beginning on the west shore at a point 35° 05.5310' N - 76° 37.8132' W; running northeasterly to the east shore to a point 35° 05.5737' N - 76° 37.6908' W;
 - (vi) Broad Creek including Gideon Creek - west of a line beginning on the north shore at a point 35° 05.5310' N - 76° 37.8132' W; running southerly to the south shore to a point 35° 05.3212' N - 76° 37.8398' W;
 - (vii) Tar Creek - south of a line beginning on the west shore at a point 35° 05.2604' N - 76° 37.5093' W; running easterly to the east shore to a point 35° 05.2728' N - 76° 37.6251' W;
 - (viii) Tributary east of Tar Creek - south of a line beginning on the west shore at a point 35° 05.3047' N - 76° 37.0316' W; running easterly to the east shore to a point 35° 05.2674' N - 76° 36.8086' W;
 - (ix) Tributary east of Tar Creek - south of a line beginning on the west shore at a point 35° 05.2674' N - 76° 36.8086' W; running easterly to the east shore to a point 35° 05.2445' N - 76° 36.5416' W;
 - (x) Parris Creek - south of a line beginning on the west shore at a point 35° 05.2445' N - 76° 36.5416' W; running southeasterly to the east shore to a point 35° 05.2031' N - 76° 36.4573' W;
 - (xi) Mill Creek - south of a line beginning on the west shore at a point 35° 05.4439' N - 76° 36.0260' W; running northeasterly to the east shore to a point 35° 05.4721' N - 76° 35.8835' W;
 - (xii) Cedar Creek - south of a line beginning on the west shore at a point 35° 05.3711' N - 76° 35.6556' W; running southeasterly to the east shore to a point 35° 05.2867' N - 76° 35.5348' W;
 - (c) Orchard and Old House creeks - north of a line beginning on the west shore at a point 35° 03.3302' N - 76° 38.4478' W; running northeasterly to the east shore to a point 35° 03.6712' N - 76° 37.9040' W;
 - (d) Pierce Creek - north of a line beginning on the west shore at a point 35° 02.5030' N - 76° 40.0536' W; running northeasterly to the east shore to a point 35° 02.5264' - 76° 39.9901' W;
 - (e) Whittaker Creek - north of a line beginning on the west shore at a point 35° 01.7186' N - 76° 41.1309' W; running easterly to the east shore to a point 35° 01.6702' N - 76° 40.9036' W;
 - (f) Oriental:
 - (i) Smith and Morris creeks - north of a line beginning on the west shore at a point 35° 02.1553' N - 76° 42.2931' W; running southeasterly to the east shore to a point 35°

- 02.1097' N - 76° 42.1806' W;
- (ii) Unnamed tributary west of Dewey Point - north of a line beginning on the west shore at a point 35° 01.3704' N - 76° 42.4906' W; running northeasterly to the east shore to a point 35° 01.3530' N - 76° 42.4323' W;
- (iii) Unnamed tributary on the south shore of Greens Creek - south of a line beginning on the west shore at a point 35° 01.4340' N - 76° 42.7920' W; running southeasterly to the east shore to a point 35° 01.4040' N - 76° 42.7320' W;
- (iv) Unnamed tributary on the south shore of Greens Creek - south of a line beginning on the west shore at a point 35° 01.3680' N - 76° 42.4920' W; running southeasterly to the east shore to a point 35° 01.3560' N - 76° 42.4320' W;
- (v) Greens Creek - west of a line beginning on the north shore at a point 35° 01.5985' N - 76° 42.9959' W; running southeasterly to the south shore to a point 35° 01.4759' N - 76° 42.9570' W;
- (vi) Kershaw Creek - north of a line beginning on the west shore at a point 35° 01.5985' N - 76° 42.9959' W; running easterly to the east shore to a point 35° 01.6077' N - 76° 42.8459' W;
- (vii) Shop Gut Creek - west of a line beginning on the north shore at a point 35° 01.2720' N - 76° 42.1500' W; running southerly to the south shore to a point 35° 01.1700' N - 76° 42.1380' W.
- (g) Dawson Creek:
 - (i) Unnamed eastern tributary of Dawson Creek - east of a line beginning on the north shore at a point 35° 00.2064' N - 76° 45.2652' W; running southeasterly to the south shore to a point 35° 00.1790' N - 76° 45.2289' W;
 - (ii) Unnamed tributary of Dawson Creek (at mouth) - east of a line beginning on the north shore at a point 34° 59.6620' N - 76° 45.1156' W; running southerly to the south shore to a point 34° 59.6326' N - 76° 45.1177' W;
- (h) Beard Creek tributary - southeast of a line beginning on the north shore at a point 35° 00.3176' N - 76° 51.9098' W; running southwesterly to the southwest shore to a point 35° 00.1884' N - 76° 51.9850' W.
- (8) In the Neuse River Area South Shore:
 - (a) Clubfoot Creek - south of a line beginning on the west shore at a point 34° 52.4621' N - 76° 45.9256' W; running easterly to the east shore to a point 34° 52.4661' N - 76° 45.7567' W;
 - (i) Mitchell Creek - west of a line beginning on the north shore at a point 34° 54.4176' N - 76° 45.7680' W; running southerly to the south shore to a point 34° 54.2610' N - 76° 45.8277' W;
 - (ii) Gulden Creek - east of a line beginning on the north shore at a point 34° 54.1760' N - 76° 45.4438' W; running southerly to the south shore to a point 34° 54.0719' N - 76° 45.4888' W;
 - (b) Adams Creek:
 - (i) Godfrey Creek - south of a line beginning on the west shore at a point 34° 57.3104' N - 76° 41.1292' W; running easterly to the east shore to a point 34° 57.2655' N - 76° 41.1187' W;
 - (ii) Delamar Creek - south of a line beginning on the west shore at a point 34°

- | | | | |
|--------|---|------|---|
| | 57.0475' N - 76° 40.7230' W; running southeasterly to the east shore to a point 34° 57.0313' N - 76° 40.7015' W; | | northwest shore at a point 34° 56.9187' N - 76° 39.5559' W; running southeasterly to the southeast shore to a point 34° 56.8421' N - 76° 39.5155' W; |
| (iii) | Kellum Creek - west of a line beginning on the north shore at a point 34° 55.5240' N - 76° 39.8072' W; running southeasterly to the south shore to a point 34° 55.4356' N - 76° 39.8201' W; | (x) | Sandy Huss Creek - northeast of a line beginning on the west shore at a point 34° 57.2348' N - 76° 39.8457' W; running southeasterly to the east shore to a point 34° 57.1638' N - 76° 39.7169' W; |
| (iv) | Kearney Creek and unnamed tributary - west of a line beginning on the north shore of the north creek at a point 34° 55.1847' N - 76° 39.9686' W; running southerly to the south shore to a point 34° 54.9661' N - 76° 40.0091' W; | (c) | Garbacon Creek - south of a line beginning on the west shore at a point 34° 59.0044' N - 76° 38.5758' W; running easterly to the east shore to a point 34° 59.0006' N - 76° 38.4845' W; |
| (v) | Isaac Creek - south of a line beginning on the west shore at a point 34° 54.2457' N - 76° 40.1010' W; running easterly to the east shore to a point 34° 54.2630' N - 76° 40.0088' W; | (d) | South River: |
| (vi) | Back Creek - southeast of a line beginning on the northeast shore at a point 34° 54.6598' N - 76° 39.5257' W; running southwesterly to the southwest shore to a point 34° 54.5366' N - 76° 39.7075' W; | (i) | Big Creek - southwest of a line beginning on the northwest shore at a point 34° 56.9502' N - 76° 35.3498' W; running southeasterly to the southeast shore to a point 34° 56.8346' N - 76° 35.2091' W; |
| (vii) | Cedar Creek - southeast of a line beginning on the west shore at a point 34° 55.7759' N - 76° 38.6070' W; running easterly to the east shore to a point 34° 55.7751' N - 76° 38.4965' W; | (ii) | Horton Bay - north of a line beginning on the west shore at a point 34° 59.1936' N - 76° 34.7657' W; running easterly to the east shore to a point 34° 59.2023' N - 76° 34.4586' W; |
| (viii) | Jonaquin Creek - northeast of a line beginning on the west shore at a point 34° 56.1192' N - 76° 38.4997' W; running easterly to the east shore to a point 34° 56.1172' N - 76° 38.4584' W; | (e) | Brown Creek - south of a line beginning on the west shore at a point 34° 59.8887' N - 76° 33.5707' W; running easterly to the east shore to a point 34° 59.9440' N - 76° 33.4180' W; |
| (ix) | Dumpling Creek - east of a line beginning on the | (f) | Turnagain Bay: |
| | | (i) | Abraham Bay - west of a line beginning on the north shore at a point 35° 00.1780' N - 76° 30.7564' W; running southerly to the south shore to a point 34° 59.8338' N - 76° 30.7128' W; |
| | | (ii) | Broad Creek and Persons Creek - southwest of a line beginning at a point on the |

- north shore 34° 59.1974' N - 76° 30.4118' W; running southeasterly to the south shore to a point 34° 58.9738' N - 76° 30.1168' W;
- (iii) Mulberry Point Creek - east of a line beginning on the north shore at a point 35° 00.4736' N - 76° 29.7538' W; running southerly to the south shore to a point 35° 00.3942' N - 76° 29.7082' W;
- (iv) Tump Creek - east of a line beginning on the north shore at a point 35° 00.2035' N - 76° 29.5947' W; running southerly to the south shore to a point 35° 00.0500' N - 76° 29.4897' W;
- (v) Tributary south of Tump Creek - east of a line beginning on the north shore at a point 34° 59.7784' N - 76° 29.3548' W; running southerly to the south shore to a point 34° 59.6830' N - 76° 29.3303' W;
- (vi) Deep Gut - northeast of a line beginning on the north shore at a point 34° 59.6134' N - 76° 29.0376' W; running southeasterly to the south shore to a point 34° 59.4799' N - 76° 28.9362' W;
- (vii) Big Gut - east of a line beginning on the north shore at a point 34° 59.0816' N - 76° 28.7076' W; running southerly to the south shore to a point 34° 58.9300' N - 76° 28.7383' W.
- (9) West Bay; Long Bay Area:
- (a) Fur Creek and Henrys Creek - southwest of a line beginning on the northwest shore at a point 34° 56.5580' N - 76° 27.7065' W; running southeasterly to the southeast shore to a point 34° 56.3830' N - 76° 27.4563' W;
- (b) Cadduggen Creek - south of a line beginning on the west shore at a point 34° 56.5767' N - 76° 23.8711' W; running easterly to the east shore to a point 34° 56.2890' N - 76° 23.6626' W.
- (10) Core Sound Area:
- (a) Cedar Island Bay - northwest of a line beginning on the northeast shore at a point 34° 59.7770' N - 76° 17.3837' W; running southwesterly to the southwest shore to a point 34° 59.0100' N - 76° 17.9339' W;
- (b) Lewis Creek - north of a line beginning on the west shore at a point 34° 56.8736' N - 76° 16.8740' W; running easterly to the east shore to a point 34° 56.9455' N - 76° 16.8234' W;
- (c) Thorofare Bay:
- (i) Merkle Hammock Creek - southwest of a line beginning on the northwest shore at a point 34° 55.4796' N - 76° 21.4463' W; running southeasterly to the southeast shore to a point 34° 55.3915' N - 76° 21.1682' W;
- (ii) Barry Bay - west of a line beginning on the north shore at a point 34° 54.6450' N - 76° 20.6127' W; running southerly to the south shore to a point 34° 54.4386' N - 76° 20.4912' W;
- (d) Nelson Bay:
- (i) Willis Creek and Fulchers Creek - west of a line beginning on the north shore of Willis Creek at a point 34° 51.1006' N - 76° 24.5996' W; running southerly to the south shore of Fulchers Creek to a point 34° 50.2861' N - 76° 24.8708' W;
- (ii) Lewis Creek - west of a line beginning on the north shore at a point 34° 51.9362' N - 76° 24.6322' W; running southerly to the south shore to a point 34° 51.7323' N - 76° 24.6487' W;
- (e) Cedar Creek between Sea Level and Atlantic - west of a line

- beginning on the north shore at a point 34° 52.0126' N - 76° 22.7046' W; running southerly to the south shore to a point 34° 51.9902' N - 76° 22.7190' W;
- (f) Oyster Creek, northwest of the Highway 70 bridge;
- (g) Jarretts Bay Area:
- (i) Smyrna Creek - northwest of the Highway 70 bridge;
- (ii) Ditch Cove and adjacent tributary - east of a line beginning on the north shore at a point 34° 48.0167' N - 76° 28.4674' W; running southerly to the south shore to a point 34° 47.6143' N - 76° 28.6473' W;
- (iii) Broad Creek - northwest of a line beginning on the west shore at a point 34° 47.7820' N - 76° 29.2724' W; running northeasterly to the east shore to a point 34° 47.9766' N - 76° 28.9729' W;
- (iv) Howland Creek - northwest of a line beginning on the northeast shore at a point 34° 47.5129' N - 76° 29.6217' W; running southwesterly to the southwest shore to a point 34° 47.3372' N - 76° 29.8607' W;
- (v) Great Creek - southeast of a line beginning on the northeast shore at a point 34° 47.4279' N - 76° 28.9565' W; running southwesterly to the southwest shore to a point 34° 47.1515' N - 76° 29.2077' W;
- (vi) Williston Creek - northwest of the Highway 70 bridge;
- (vii) Wade Creek - west of a line beginning on the north shore at a point 34° 46.3022' N - 76° 30.5443' W; running southerly to the south shore to a point 34° 46.2250' N - 76° 30.3864' W;
- (viii) Jump Run - north of a line beginning on the west shore at a point 34° 45.5385' N - 76° 30.3974' W; running easterly to the east shore to a point 34° 45.5468' N - 76° 30.3485' W;
- (ix) Middens Creek - west of a line beginning on the north shore at a point 34° 45.5046' N - 76° 30.9710' W; running southerly to the south shore to a point 34° 45.4093' N - 76° 30.9584' W;
- (x) Tusk Creek - northwest of a line beginning on the northwest shore at a point 34° 44.8049' N - 76° 30.6248' W; running southerly to the south shore to a point 34° 44.6074' N - 76° 30.7553' W;
- (xi) Creek west of Bells Island - west of a line beginning on the north shore at a point 34° 43.9531' N - 76° 30.4144' W; running southerly to the south shore to a point 34° 43.7825' N - 76° 30.3543' W.
- (11) Straits, North River, Newport River Area:
- (a) Straits:
- (i) Sleepy Creek - north of a line beginning on the west shore at a point 34° 43.3925' N - 76° 31.4912' W; running easterly to the east shore to a point 34° 43.3651' N - 76° 31.3250' W;
- (ii) Whitehurst Creek - north of a line beginning on the west shore at a point 34° 43.5118' N - 76° 33.3392' W; running northeasterly to the east shore to a point 34° 43.5561' N - 76° 33.1869' W;
- (b) North River, north of Highway 70 bridge:
- (i) Ward Creek - north of Highway 70 bridge:
- (A) North Leopard Creek - southeast of a line beginning on the

- (d) Goose Creek - north of a line beginning on the west shore at a point 34° 41.8183' N - 77° 00.7208' W; running easterly to the east shore to a point 34° 41.8600' N - 77° 00.5108' W;
 - (e) Archer Creek - west of a line beginning on the north shore at a point 34° 40.4721' N - 77° 00.7577' W; running southerly to the south shore to a point 34° 40.3521' N - 77° 00.8008' W;
 - (f) White Oak River - northwest of a line beginning on the northeast shore at a point 34° 45.6730' N - 77° 07.5960' W; running southwesterly to the southwest shore to a point 34° 45.2890' N - 77° 07.7500' W;
 - (i) Pettiford Creek - east of a line beginning on the north shore at a point 34° 42.8670' N - 77° 05.3990' W; running southerly to the south shore to a point 34° 42.6310' N - 77° 05.3180' W.
 - (ii) Holland Mill Creek - west of a line beginning on the north shore at a point 34° 43.8390' N - 77° 08.0090' W; running southeasterly to the south shore to a point 34° 43.4800' N - 77° 07.7650' W.
 - (g) Hawkins Creek - west of a line beginning on the north shore at a point 34° 41.1210' N - 77° 07.5720' W; running southerly to the south shore to a point 34° 41.0460' N - 77° 07.5930' W;
 - (h) Queen's Creek - north of state road number 1509 bridge:
 - (i) Dick's Creek - west of a line beginning on the north shore at a point 34° 39.9790' N - 77° 09.3470' W; running southeasterly to the south shore to a point 34° 39.9350' N - 77° 09.3280' W;
 - (ii) Parrot Swamp - west of a line beginning on the north shore at a point 34° 40.6170' N - 77° 09.7820' W; running southeasterly to the south shore to a point 34° 40.3660' N - 77° 09.5980' W;
- (iii) Hall's Creek - east of a line beginning on the north shore at a point 34° 41.0740' N - 77° 09.8640' W; running easterly to the south shore to a point 34° 41.0300' N - 77° 09.6740' W;
 - (i) Bear Creek - west of a line beginning at Willis Landing at a point 34° 38.7090' N - 77° 12.6860' W; running southeasterly to the south shore to a point 34° 38.4740' N - 77° 12.3810' W.
- (13) New River Area:
- (a) Salliers Bay area - all waters north and northwest of the IWW beginning at a point on the shoreline 34° 37.0788' N - 77° 12.5350' W; running easterly to a point near Beacon "58" at a point 34° 37.9670' N - 77° 12.3060' W; running along the IWW near Cedar Point to a point 34° 33.1860' N - 77° 20.4370' W; running northerly to a point on the shoreline 34° 33.1063' N - 77° 20.4679' W; following the shoreline to the point of origin; including Howard Bay, Mile Hammock Bay, Salliers Bay, and Freeman Creek;
 - (b) New River Inlet area (including Hellgate Creek and Ward's Channel) - all waters south of the IWW from a point on the shoreline 34° 33.0486' N - 77° 18.6295' W running northwesterly to a point near Beacon "65" 34° 33.0550' N - 77° 18.6380' W; running along the IWW to a point near Beacon "15" 34° 31.0630' N - 77° 22.2630' W; running southerly to a point on the shoreline 34° 30.9212' N - 77° 22.2257' W; following the shoreline across New River Inlet at the COLREGS demarcation line back to the point of origin excluding the marked New River Inlet Channel;
 - (c) New River:
 - (i) Trap's Bay - northeast of a line beginning on the west shore at a point 34° 34.0910' N - 77° 21.0010' W; running southeasterly to the east shore to a point

- | | | | |
|-------|---|--------|---|
| | 34° 33.8260' N - 77° 20.4060' W; | | 34.1300' N - 77° 23.5600' W; |
| (ii) | Courthouse Bay: | (v) | Snead's Creek - northwest of a line beginning on the west shore at a point 34° 35.2850' N - 77° 23.5500' W; running northerly to the east shore to a point 34° 35.3440' N - 77° 23.4860' W; |
| | (A) Tributary of Courthouse Bay - southeast of a line beginning on Harvey's Point at a point 34° 35.0050' N - 77° 22.3910' W; running northeasterly to the east shore to a point 34° 35.0830' N - 77° 22.1890' W; | (vi) | Everette Creek - south of a line beginning on the west shore at a point 34° 34.2570' N - 77° 24.8480' W; running easterly to the east shore to a point 34° 34.2380' N - 77° 24.6970' W; |
| | (B) Tributary of Courthouse Bay - northwest of a line beginning on the west shore at a point 34° 35.0970' N - 77° 22.6010' W; running northeasterly to the east shore to a point 34° 35.1630' N - 77° 22.5030' W; | (vii) | Stone's Creek - southwest of a line beginning on the northwest shore at a point 34° 36.6170' N - 77° 26.8670' W; running southeasterly to the southeast shore to a point 34° 36.5670' N - 77° 26.8500' W; |
| | (C) Rufus Creek - east of a line beginning at a point on the north shore 34° 34.4630' N - 77° 21.6410' W; running southerly to a point near Wilken's Bluff 34° 34.3140' N - 77° 21.6620' W; | (viii) | Muddy Creek - north of a line beginning on the west shore 34° 36.8670' N - 77° 26.6340' W; running easterly to the east shore to a point 34° 36.8670' N - 77° 26.6170' W; |
| (iii) | Wheeler Creek - south of a line beginning on the west shore at a point 34° 34.0570' N - 77° 23.3640' W; running easterly to a point near Poverty Point 34° 34.1060' N - 77° 23.2440' W; | (ix) | Mill Creek - north of a line beginning on the west shore at a point 34° 37.2350' N - 77° 25.7000' W; running easterly to the east shore to a point 34° 37.2360' N - 77° 25.6890' W; |
| (iv) | Fannie Creek - south of a line beginning on the west shore at a point 34° 34.1470' N - 77° 23.6390' W; running easterly to the east shore to a point 34° | (x) | Whitehurst Creek - west of a line beginning on the north shore at a point 34° 38.0780' N - 77° 22.6110' W; running easterly to the south shore to a point 34° 38.0720' N - 77° 22.6000' W; |
| | | (xi) | Town Creek - west of a line beginning on the north shore at a point 34° 39.6060' N - 77° 23.0690' W; running southerly to the south shore to a point 34° 39.5950' N - 77° 23.0830' W; |

- (xii) Lewis Creek - southwest of a line beginning on the northwest shore at a point 34° 40.9330' N - 77° 24.5290' W; running southeasterly to the southeast shore to a point 34° 40.9190' N - 77° 24.5040' W;
 - (xiii) Northeast Creek - east of a line beginning at the mouth of Scale's Creek at a point 34° 43.7350' N - 77° 24.1190' W; running southeasterly to the south shore to a point 34° 43.3950' N - 77° 23.5450' W;
 - (xiv) Southwest Creek - southwest of a line beginning on the north shore at a point 34° 41.8500' N - 77° 25.6460' W; running southeasterly to the south shore to a point 34° 41.5540' N - 77° 25.2250' W;
 - (xv) Upper New River - north of a line beginning on the west shore at a point 34° 42.9770' N - 77° 25.9070' W; running easterly through a point near Beacon "53" to a point 34° 43.2600' N - 77° 25.3800' W; to the east shore to a point 34° 43.4260' N - 77° 25.0700' W;
- (d) Chadwick Bay - all waters bounded by a line beginning on Roses Point at a point 34° 32.2240' N - 77° 22.2880' W; running easterly to a point near Marker "6" at 34° 32.4180' N - 77° 21.6080' W; then following the IWW to a point near Marker "14" at 34° 31.3220' N - 77° 22.1520' W; following the shoreline of Chadwick Bay back to the point of origin:
- (i) Fullard Creek (including Charles Creek) - northwest of a line beginning on the north shore at a point 34° 32.2210' N - 77° 22.8080' W; running southeasterly to the south shore to a point 34° 32.0340' N - 77° 22.7160' W;
 - (ii) Bump's Creek - north of a line beginning on the west shore at a point 34° 32.3430' N - 77° 22.4570' W; running northeasterly to the east shore to a point 34° 32.4400' N - 77° 22.3830' W.
- (14) Stump Sound Area: Stump Sound - all waters north of the IWW from a point on the shoreline 34° 31.1228' N - 77° 22.3181' W; running southerly to a point across the IWW from Beacon "15" 34° 31.1040' N - 77° 22.2960' W; running along the IWW to a point near Marker "78" 34° 25.4050' N - 77° 34.2120' W; running northerly to a point on the shoreline 34° 24.5183' N - 77° 34.9833' W; running along the shoreline to the point of origin; except 100 feet north of the IWW from a point across from Beacon "49" 34° 28.1330' N - 77° 30.5170' W to a point near Marker "78" 34° 25.4050' N - 77° 34.2120' W. All waters south of IWW from a point on the shoreline 34° 31.0550' N - 77° 22.2574' W; running northerly to a point near Beacon "15" at 34° 31.0630' N - 77° 22.2630' W; running along the IWW to a point across the IWW from Marker "78" 34° 25.3110' N - 77° 34.1710' W; running southeasterly to a point on the shoreline 34° 23.9817' N - 77° 35.0367' W; running along the shoreline to the point of origin; except 100 feet on the south side of the IWW from a point near Beacon "49" 34° 28.082' N - 77° 30.4600' W at Morris Landing to a point across the IWW from Marker "78" 34° 25.3110' N - 77° 34.1710' W and except the dredged canals at Old Settler's Beach and the dredged channel from the IWW north of Marker "57" to the Old Settler's Beach Canals.
- (15) Topsail Sound Area:
- (a) Virginia Creek - all waters northwest of a line beginning on the southwest shore near the mouth at a point 34° 24.8030' N - 77° 35.5960' W; running northeasterly to a point 34° 25.0333' N - 77° 35.3167' W; running easterly to intersect the nursery area line near Becky's Creek at a point 34° 25.4050' N - 77° 34.2120' W, with the exception of the natural channel as marked by the North Carolina Division of Marine Fisheries;
 - (b) Old Topsail Creek - all waters northwest of a line beginning on

- the northeast shore at a point 34° 21.7740' N - 77° 40.3870' W; running southwesterly to the southwest shore to a point 34° 21.4930' N - 77° 40.6900' " W, with the exception of the dredged channel as marked by the North Carolina Division of Marine Fisheries;
- (c) Topsail Sound - all waters enclosed within a line starting near Beacon "BC" at a point 34° 24.6110' N - 77° 35.7050' W; then bounded on the northeast and southeast by Bank's Channel, on the southwest by Marker "98" channel and on the northeast by the IWW; then back to the point of origin;
- (d) Mallard Bay Area - all waters northwest of the IWW beginning at a point on the shoreline 34° 24.0278' N - 77° 36.8498' W; running southerly to a point 34° 24.0167' N - 77° 36.7333' W near Beacon "93"; running to a point 34° 23.8167' N - 77° 36.9667' W; running southwesterly along the marsh line to a point on the shoreline 34° 22.6168' N - 77° 38.8580' W near Beacon "96"; running along the shoreline to the point of origin.
- (16) Middle Sound Area:
- (a) Howard Channel and Long Point Channel area - all waters southeast of the IWW beginning at a point on the shoreline 34° 20.4514' N - 77° 40.0183' W; running along the shorelines of Topsail Inlet Channel and Marker # 98 Channel to a point near Beacon "98" 34° 21.5670' N - 77° 40.4580' W; to running along the IWW to a point on the north side of the Figure 8 Island Marina Channel to a point 34° 16.5120' N - 77° 45.4870' W; following the shoreline of Figure 8 Island Marina Channel to a point 34° 16.2628' N - 77° 44.7855' W; following the shoreline across Rich Inlet at the COLREGS demarkation line to the point of origin. [with the exception of Howard Channel from the IWW to New Topsail Inlet, Green Channel from Marker "105" to Rich's Inlet, Butler's Creek (Utley's Channel) from the IWW to Nixon's Channel, and Nixon's Channel from IWW to Rich's Inlet;]
- (b) Futch Creek - northwest of a line beginning on the north shore at Baldeagle Point at a point 34° 17.9900' N - 77° 44.4930' W; running southerly to Porter's Neck to a point 34° 18.1170' N - 77° 44.3760' W;
- (c) Page's Creek - northwest of a line beginning on the north shore at a point 34° 16.7420' N - 77° 46.6940' W; running southwesterly to the south shore to a point 34° 16.6910' N - 77° 46.8510' W;
- (d) All waters bounded on the north by the Figure Eight Island Causeway, on the east by Mason's Channel, on the south by Mason's Inlet Channel and on the west by the Intracoastal Waterway, with the exception of Mason's Channel.
- (17) Greenville Sound Area:
- (a) Shell Island area - all waters bounded on the north by Mason's Inlet Channel, on the west by the IWW, on the south by Old Moores Inlet Channel and on the east by Wrightsville Beach.
- (b) Howe Creek (Moore's Creek) - northwest of a line beginning on the north shore at a point 34° 14.9060' N - 77° 47.2180' W; running southwesterly to the south shore to a point 34° 14.8470' N - 77° 47.3810' W;
- (c) Bradley Creek - all waters west of a line beginning on the north side of the Highway 17, 74 and 76 bridge at a point 34° 12.9700' N - 77° 50.0260' W running southerly to the south side of the Bridge at a point 34° 12.8620' N - 77° 50.0550' W;
- (d) Wrightsville Beach area - all waters in an area enclosed by a line beginning across the IWW from the mouth of Bradley Creek at a point 34° 12.3530' N - 77° 49.1250' W; running easterly to a point (near the Borrow Pit) 34° 12.3820' N - 77° 48.6610' W; then bounded by Bank's Channel on the east, Shinn Creek on the south and the IWW on the west, back to point of origin.
- (18) Masonboro Sound Area:
- (a) Masonboro-Myrtle Grove Sound area (west side) -all waters west

- and northwest of the IWW beginning at a point on the shoreline 34° 12.7423' N - 77° 49.8391' W; running southeasterly to a point at the mouth of Bradley Creek at a point 34° 12.4130' N - 77° 49.2110' W; running along the west side of the IWW to a point opposite Beacon "161" at 34° 03.5590' N - 77° 53.4550' W; running westerly to a point on the shoreline 34° 03.5715' N - 77° 53.4979' W; running along the shoreline back to the point of origin.
- (b) Masonboro-Myrtle Grove Sound area (east side) - all waters south and southeast of a line beginning on the north end of Masonboro Island at a point 34° 10.9130' N - 77° 48.9550' W; running northwesterly to a point near the intersection of Shinn Creek and the IWW 34° 11.3840' N - 77° 49.5240' W; running along the east side of the IWW to a point near Marker "161" 34° 03.5270' N - 77° 53.3550' W; running southerly to a point on the shoreline 34° 03.3917' N - 77° 53.0423' W; running along the shoreline across Carolina Beach Inlet at the COLREGS demarcation line back to the point of origin (with the exception of Old Masonboro Channel and Carolina Beach Inlet Channel).
- (19) Cape Fear River Area:
- (a) Cape Fear River - all waters north of a line beginning on the west shore at a point 34° 10.4410' N - 77° 57.7400' W; running easterly through Beacon "59" to the east shore to a point 34° 10.4050' N - 77° 57.1310' W; with the exception of the maintained channel, and all waters north of a line beginning on the west shore at a point 34° 04.6040' N - 77° 56.4780' W; running easterly through Beacon "41" to the east shore to a point 34° 04.7920' N - 77° 55.4740' W; with the exception of 300 yards east and west of the main shipping channel up to Beacon "59" (mouth of Brunswick River);
- (b) The Basin (Ft. Fisher area) - east of a line beginning on the north shore at a point 33° 57.2950' N - 77° 56.1450' W; running southeasterly to the south shore to a point 33° 57.1120' N - 77° 56.2060' W;
- (c) Walden Creek - all waters northwest of a line beginning on the north side of county road No. 1528 bridge at a point 33° 58.2950' N - 77° 59.0280' W running southerly to the south side of the bridge at a point 33° 58.2250' N - 77° 59.0440' W ;
- (d) Baldhead Island Creeks:
- (i) Baldhead Creek - southeast of a line beginning on the north shore at a point 33° 51.7680' N - 77° 59.1700' W; running westerly to the south shore to a point 33° 51.7590' N - 77° 59.1850' W;
- (ii) Cape Creek - southeast of a line beginning on the north shore at a point 33° 51.9740' N - 77° 58.3090' W; running southwesterly to the south shore to a point 33° 51.9480' N - 77° 58.3480' W;
- (iii) Bluff Island Creek (East Beach Creek) - south of a line beginning on the west shore at a point 33° 52.6740' N - 77° 58.1530' W; running easterly to the east shore to a point 33° 52.6850' N - 77° 58.0780' W;
- (iv) Deep Creek - south of a line on the west shore at a point 33° 52.6850' N - 77° 58.0780' W; running northeasterly to the east shore to a point 33° 52.7690' N - 77° 58.0110' W;
- (e) Dutchman Creek - north of a line beginning on the west shore at a point 33° 55.1560' N - 78° 02.7260' W; running southeasterly to the east shore to a point 33° 55.1130' N - 78° 02.5990' W;
- (f) Denis Creek - west of a line beginning on the north shore at a point 33° 55.0410' N - 78° 03.5180' W; running southerly to the south shore to a point 33° 55.0120' N - 78° 03.5110' W;

- (g) Piney Point Creek - west of a line beginning on the north shore at a point 33° 54.6310' N - 78° 03.5020' W; running southerly to the south shore to a point 33° 54.6040' N - 78° 03.5010' W;
 - (h) Molasses, Coward and Smokehouse creeks - all waters bounded by the IWW and the Elizabeth River on the north and east, the Oak Island Coast Guard canal on the east, Oak Island on the south and the CP and L Discharge canal on the west;
 - (i) Oak Island area - all waters north of the IWW from a point on the shoreline 33° 55.2827' N - 78° 03.7681' W; running southerly to a point across the IWW from Marker # 9 33° 55.2610' N - 78° 03.7630' W; running along the IWW to a point near Beacon "18" 33° 55.7410' N - 78° 10.2760' W; running northerly to a point on the shoreline 33° 55.7718' N - 78° 10.2744' W; running along the shoreline back to the point of origin; all waters south of the IWW from a point near Marker "9" 33° 55.2060' N - 78° 03.7580' W; running along the IWW to a point across the IWW from Beacon "18" 33° 55.7199' N - 78° 10.2764' W; running southerly to a point on the shoreline 33° 55.6898' N - 78° 10.2775' W; running along the shoreline back to the point of origin.
- (20) Lockwoods Folly Inlet Area:
- (a) Davis Creek and Davis Canal - east of a line beginning on the north shore at a point 33° 55.2280' N - 78° 10.8610' W; running southerly to the south shore to a point 33° 55.1970' N - 78° 10.8390' W;
 - (b) Lockwoods Folly River - north of a line beginning on the west shore at a point 33° 56.3880' N - 78° 13.2360' W; running easterly to the east shore to a point 33° 56.6560' N - 78° 12.8350' W;
 - (c) Spring Creek (Galloway Flats area) - all waters northwest of a line beginning on the north shore at a point 33° 55.7350' N - 78° 13.7090' W; running southwesterly to the south shore to a point 33° 55.5590' N - 78° 13.7960' W.
- (21) Shallotte Inlet Area:
- (a) Shallotte River - north of a line beginning on Bill Holden's Landing at a point 33° 55.8840' N - 78° 22.0710' W; running northeasterly to Gibbins Point to a point 33° 56.3190' N - 78° 21.8740' W;
 - (b) Shallotte River (Ocean Flats)-excluding Gibbs Creek, the area enclosed by a line beginning at Long Point 33° 54.6210' N - 78° 21.7960' W; then bounded on the south by the IWW, the west by Shallotte River, the north by Gibb's Creek and the east by the shoreline of the Shallotte River back to the point of origin;
 - (c) Shallotte Creek (Little Shallotte River) - east of a line beginning on Shell Landing at a point 33° 55.7390' N - 78° 21.6410' W; running southerly to Boone's Neck Point to a point 33° 55.5990' N - 78° 21.5480' W;
 - (d) Saucepan Creek - northwest of a line beginning on the west shore at a point 33° 54.7007' N - 78° 23.4183' W; running northerly to the east shore (mouth of Old Mill Creek) to a point 33° 54.9140' N - 78° 23.4370' W;
 - (e) Old Channel area - all waters south of the IWW from a point near Beacon "83" 33° 54.2890' N - 78° 23.1930' W; running along the IWW to a point near Ocean Isle Beach bridge 33° 53.7270' N - 78° 26.3760' W; running southerly to a point on the shoreline 33° 53.7082' N - 78° 26.3732' W; running southerly along the shoreline to a point on the shoreline 33° 53.3827' N - 78° 26.2118' W; running along the shoreline to the point of origin; except the dredged finger canals at Ocean Isle Beach located on the south side of the IWW between the Ocean Isle Beach Bridge and IWW Marker "89".
- (22) Little River Inlet Area:
- (a) Gause Landing area - all waters north of the IWW from a point on the shoreline 33° 53.9053' N - 78° 25.6064' W; running southerly to a point near Beacon "90" 33° 53.8790' N - 78° 25.5950' W; then following the IWW to a point at

the intersection of the IWW and the South Carolina line; 33° 52.0003'N – 78° 33.5633'W; running northerly along the South Carolina line to a point on the shoreline 33° 52.0290' N – 78° 33.5893' W; running along the shoreline to the point of origin.

- (b) Eastern Channel Area – all waters bounded on the east and south by Eastern Channel, on the west by Jink's Creek and on the north by the IWW;
- (c) The Big Narrows Area:
 - (i) Big Teague Creek - west of a line beginning on the north shore at a point 33° 52.8260' N - 78° 30.0110' W; running southerly to the south shore to a point 33° 52.8040' N - 78° 29.9940' W;
 - (ii) Little Teague Creek - west of a line beginning on the north shore at a point 33° 52.9280' N - 78° 30.1500' W; running southeasterly to the south shore to a point 33° 52.9130' N - 78° 30.1220' W;
 - (iii) Big Norge Creek - south of a line beginning on the west shore at a point 33° 52.8550' N - 78° 30.6190' W; running easterly to the east shore to a point 33° 52.8620' N - 78° 30.5900' W;
- (d) Mad Inlet area - all waters south of the IWW from a point on the shoreline 33° 52.3121' N – 78° 30.4990' W; running northerly to a point near the Sunset Beach bridge 33° 52.8450' N - 78° 30.6510' W; then following the IWW to a point at the intersection of the IWW and the South Carolina line 33° 51.9888'N – 78° 33.5458' W; running southeasterly along the South Carolina line to a point on the shoreline; running along the shoreline across Mad Inlet at the COLREGS demarcation line to the point of origin; with the exception of Bonaparte Creek;
- (e) Calabash River - all waters east of a line beginning at a point on the north side of state road No. 1164 bridge at a point 33° 53.3850' N –

78° 32.9710' W running southerly to the south side of the bridge at a point 33° 53.3580' N – 78° 32.9750' W.

History Note: Authority G.S. 113-134; 113-182; 143B-289.52; Eff. January 1, 1991; Amended Eff. March 1, 1996; September 1, 1991; Recodified from 15A NCAC 03R .0003 Eff. December 17, 1996; Amended Eff. September 1, 2005; August 1, 2004; May 1, 1997.

15A NCAC 03R .0107 DESIGNATED POT AREAS

(a) The pot areas referenced in 15A NCAC 03J .0301(a)(2)(A) are delineated in the following coastal fishing waters:

- (1) In Albemarle and Currituck sounds and tributaries.
- (2) In Roanoke Sound and tributaries.
- (3) In Croatan Sound and tributaries.
- (4) In Pamlico Sound and tributaries, except areas further described in Subparagraphs (a)(5), (a)(7), and (a)(8) of this Rule. Pots shall not be set within the following area described by lines:
 - (A) Striking Bay - beginning on shore at a point 35° 23.7003' N - 76° 26.6951' W; running southeasterly to shore at a point 35° 23.3580' N - 76° 26.3777' W; running easterly along shore to Long Point to a point 35° 23.3380' N - 76° 26.2540' W; running southeasterly to Drum Point to a point 35° 22.4830' N - 76° 25.1930' W; running southerly along shore to Point of Narrows to a point 35° 21.9240' N - 76° 25.4080' W; running northwesterly near Marker "2" to a point 35° 22.4166' N - 76° 26.4833' W; running westerly to a point 35° 22.3833' N - 76° 27.0000' W; running northerly to Short Point to a point 35° 23.3831' N - 76° 26.9922' W; running northerly along shore to a point 35° 23.5000' N - 76° 26.9666' W; running northeasterly to the beginning point.
- (5) In the Pamlico River and its tributaries west of a line beginning on Willow Point at a point 35° 22.3741' N - 76° 28.6905' W; running southerly to Pamlico Point to a point 35° 18.5882' N - 76° 28.9625' W; pots may be used within an area bound by the shoreline to the depth of six feet, except

areas listed in Paragraph (b) of this Rule that may be opened to the use of pots by proclamation and except pots shall not be set within the following areas described by lines:

- (A) Lupton Point - beginning on Lupton Point at a point 35° 25.6012' N - 76° 31.9641' W; running northwesterly to a point 35° 25.7333' N - 76° 32.1500' W; running southerly along the six foot depth to a point 35° 25.2833' N - 76° 32.3000' W; running northeasterly to shore to a point 35° 25.3389' N - 76° 31.9592' W; running northerly along shore to the beginning point.
- (B) Green Point - beginning on shore at a point 35° 26.6478' N - 76° 33.5008' W; running westerly to a point 35° 26.5833' N - 76° 33.8333' W; running southeasterly along the six foot depth to a point 35° 26.0833' N - 76° 33.2167' W; running northerly to shore to a point 35° 26.4216' N - 76° 33.2856' W; running northwesterly along the shore to the beginning point.
- (C) July Point - beginning on shore at a point 35° 27.3667' N - 76° 33.3500' W; running northeasterly to a point 35° 27.5166' N - 76° 33.3000' W; running westerly along the six foot depth to a point 35° 27.3000' N - 76° 33.8833' W; running easterly to the beginning point.
- (D) Manley Point - beginning on shore at a point 35° 28.0171' N - 76° 33.3144' W; running northwesterly to a point 35° 28.1500' N - 76° 33.7167' W; running southeasterly along the six foot depth to a point 35° 27.6667' N - 76° 33.2000' W; running northwesterly to the beginning point.
- (E) Durants Point - beginning on shore east of Durants Point at a point 35° 30.4660' N - 76° 33.4513' W; running northwesterly to a point 35° 30.7666' N - 76° 33.6500' W; running easterly along the six foot depth to a point 35° 30.8347' N - 76° 32.6529' W; running southwestly to shore to a point 35° 30.4400' N - 76° 32.7897' W; running westerly along shore to the beginning point.
- (F) Lower Dowry Point - beginning on shore west of Lower Dowry Creek at a point 35° 32.4334' N - 76° 35.6647' W; running southwestly to a point 35° 32.2333' N - 76° 35.8500' W; running easterly along the six foot depth to a point 35° 32.1166' N - 76° 35.1166' W; running northerly to shore to a point 35° 32.4740' N - 76° 35.1017' W; running westerly along shore to the Inland/Coastal line on the east shore of Lower Dowry Creek; running westerly along the Inland/Coastal line to the west shore of Lower Dowry Creek; running westerly along shore to the beginning point.
- (G) Schrams Beach - beginning on shore at a point 35° 27.2222' N - 76° 36.4662' W; running northeasterly to a point 35° 27.2988' N - 76° 36.2600' W; running southerly along the six foot depth to a point 35° 26.9000' N - 76° 36.1500' W; running northwesterly to shore to a point 35° 27.0418' N - 76° 36.3767' W; running northerly along shore to the beginning point.
- (H) Grassy Point - beginning on shore at a point 35° 25.8333' N - 76° 35.6167' W; running northeasterly to a point 35° 25.9846' N - 76° 35.4654' W; running southerly along the six foot depth to a point 35° 25.7333' N - 76° 34.7667' W; running westerly to shore to a point 35° 25.6787' N - 76° 35.4654' W; running northwesterly along shore to the beginning point.
- (I) Long Point - beginning on shore at a point 35° 22.4833' N - 76° 43.4167' W; running northwesterly to a point 35° 22.6500' N - 76° 43.4333' W; running easterly along the six foot depth to a point 35° 22.7333' N - 76° 42.7333' W; running to shore to a point 35° 22.4000' N - 76° 43.0833' W; running westerly along shore to the beginning point.
- (J) Pamlico River Mainstream Channel - beginning at a point 250 yards north of Marker "7" at a point 35° 27.2953' N - 76° 55.1351' W; running westerly to a point near Marker "8" at a point 35° 27.4217'

N - 76° 56.0917' W; running westerly along the north side of the marked channel to a point 100 yards north of Marker "9" at a point 35° 27.7472' N - 76° 57.5392' W; running westerly along the north side of the marked channel to a point near Marker "16", north of Whichard's Beach at a point 35° 30.4750' N - 77° 01.2217' W; running southwesterly across the channel to a point 35° 30.4373' N - 77° 01.2614' W; running southeasterly along the south side of the marked channel at a distance of 100 yards from the north side of the marked channel to a point near Marker "7" at a point 35° 27.1722' N - 76° 55.1380' W; running northerly to the beginning point.

(K) Chocowinity Bay Channel - beginning at a point near the Wildlife Resources Commission (WRC) red marker in Chocowinity Bay at a point 35° 29.5501' N - 77° 01.4335' W; running easterly to the south side of the marked navigation channel in Pamlico River, at a point 35° 29.0408' N - 76° 59.5437' W; running southeasterly to a point 35° 28.9236' N - 76° 59.3109' W; running westerly to the WRC green buoy in Chocowinity Bay at a point 35° 29.5004' N - 77° 01.4339' W; running northerly to the beginning point.

(L) Whichards Beach Channel - beginning on shore at a point 35° 30.2364' N - 77° 01.3679' W; running easterly to the south side of the marked navigation channel in Pamlico River at a point 35° 30.1952' N - 77° 01.0252' W; running southeasterly to a point 35° 30.1373' N - 77° 00.9685' W; running westerly to shore at a point 35° 30.2002' N - 77° 01.4518' W, running northeasterly to the beginning point.

(M) Broad Creek Channel - beginning near Marker "3" in Broad Creek at a point 35° 29.0733' N - 76° 57.2417' W; running southwesterly near Marker "1" at a point 35° 28.8591' N - 76° 57.3823' W; running southerly to the marked navigation channel in Pamlico River at a point 35° 27.8083' N -

76° 57.6250' W; running southeasterly to a point 35° 27.7344' N - 76° 57.4822' W; running northerly to the six foot depth at a point 35° 28.5779' N - 76° 57.2924' W; running northerly to the six foot depth at a point 35° 28.7781' N - 76° 57.3508' W; running northerly along the six foot depth to a point near Marker "4" at a point 35° 29.0933' N - 76° 57.1967' W; running southwesterly to the beginning point.

(N) Blounts Bay - from June 1 through September 15, on the south side of Pamlico River beginning near Marker "7" at a point 35° 27.1722' N - 76° 55.1381' W; running westerly and along the south side of the marked navigation channel to a point near Marker "9" at a point 35° 27.7070' N - 76° 57.5739' W; running northwesterly along the south side of the marked channel to the intersection of the Chocowinity Bay Channel at a point 35° 28.9236' N - 76° 59.3109' W; running westerly along the south side of the Chocowinity Bay Channel to a point 35° 29.0206' N - 76° 59.6678' W; running southerly to the eight foot depth at a point 35° 28.6667' N - 76° 59.6667' W; running southeasterly along the eight foot depth to a point 35° 27.0833' N - 76° 55.1667' W; running northerly to the beginning point.

(6) In the Pamlico River and its tributaries west of a line beginning on Willow Point at a point 35° 22.3741' N - 76° 28.6905' W; running southerly to Pamlico Point to a point 35° 18.5882' N - 76° 28.9625' W; pots may be used within an area bound by the shoreline to the depth of six feet, except areas listed in Paragraph (b) of this Rule that may be opened to the use of pots by proclamation and except; pots may be set within the following areas described by lines:

(A) Durants Point - beginning on Durants Point at a point 35° 30.5197' N - 76° 35.1521' W; running northwesterly to a point 35° 31.1333' N - 76° 35.5833' W; running northeasterly 200 yards south of Marker "10" to a point 35° 31.2032' N - 76° 35.5558' W;

- running easterly parallel to the marked navigation channel at a distance of 200 yards to a point southwest of Marker "12" to a point 35° 31.1492' N - 76° 33.8997' W; running southeasterly to shore to a point 35° 30.4660' N - 76° 33.4513' W; running westerly along shore to the beginning point.
- (B) South shore, upper Pungo River - beginning on shore west of Durants Point at a point 35° 30.4400' N - 76° 32.7897' W; running northeasterly to a point southeast of Marker "14" to a point 35° 31.0833' N - 76° 32.5667' W; running easterly parallel to the marked navigation channel at a distance of 200 yards to the shore south of Wilkerson Creek to a point 35° 33.0493' N - 76° 27.2752' W; running southerly and westerly along the shoreline and following the Inland/Coastal lines of Horse Island, Tarklin, Scranton, and Smith Creeks to the beginning point.
- (C) North shore, upper Pungo River - beginning on shore east of Lower Dowry Creek at a point 35° 32.4740' N - 76° 35.1017' W; running southerly to a point 35° 31.5167' N - 76° 35.1000' W; running easterly parallel to the marked navigation channel at a distance of 200 yards to the north shore of Wilkerson Creek to a point 35° 33.2339' N - 76° 27.5449' W; running northwesterly along the shoreline to the east end of the US 264 bridge; running westerly along the bridge and following the Inland/Coastal line to the western shore; running southerly and westerly along the shoreline and following the Inland/Coastal lines of Crooked Creek and Upper Dowry Creek to the beginning point.
- (D) Tooleys Point - beginning at the "Breakwater" 200 yards northeast of Beacon "6", at a point 35° 31.7833' N - 76° 36.8500' W; running southeasterly to a point 200 yards from Marker "4" at a point 35° 31.5167' N - 76° 36.3500' W; running easterly to a point 35° 31.4667' N - 76° 35.9833' W; running northerly near Beacon "1" to a point 35° 32.1100' N - 76° 35.9817' W; running northeasterly to shore to a point 35° 32.4334' N - 76° 35.6647' W; running westerly and along the shoreline of Battalina and Tooley Creeks; running along the river shore to the "Breakwater" to a point 35° 31.9908' N - 76° 36.6105' W; running southwestwesterly along the "Breakwater" to the beginning point.
- (E) Pungo Creek - beginning on Windmill Point at a point 35° 30.7444' N - 76° 38.2869' W; running northeasterly to a point 200 yards west of Marker "3" to a point 35° 31.3500' N - 76° 36.6167' W; running northwesterly to the "Breakwater" to a point 35° 31.6296' N - 76° 37.1201' W; running westerly along the "Breakwater" to shore to a point 35° 31.5653' N - 76° 37.3832' W; running westerly along shore and into Pungo Creek following the shoreline and the Inland/Coastal lines of Vale, Scott, and Smith creeks to the north end of the NC 92 bridge over Pungo Creek; running southerly along the bridge and following the Inland/Coastal line to the southern shore; running easterly along shore to the beginning point.
- (F) Upper Pamlico - in coastal fishing waters west of a line beginning on the north shore of Gum Point at a point 35° 25.1699' N - 76° 45.5251' W; running southwestwesterly to a point on the south shore of Pamlico River to a point 35° 23.4453' N - 76° 46.4346' W, except as described in Part (a)(5)(J) through (N) of this Rule.
- (G) North Side Pamlico - beginning on the north shore of Gum Point at a point 35° 25.1699' N - 76° 45.5251' W; running southwestwesterly 500 yards from shore to a point 35° 24.9339' N - 76° 45.6495' W; running easterly parallel to the shoreline at a distance of 500 yards near Adams Point to a point 35° 23.3949' N - 76° 35.8089' W; running northerly to shore at a point 35° 23.1754' N - 76° 35.9619'

- W; running westerly along shore to the beginning point.
- (H) South Creek - in coastal fishing waters of South Creek and tributaries west of a line beginning on Hickory Point at a point 35° 21.7385' N - 76° 41.5907' W; running southerly to Fork Point to a point 35° 20.7534' N - 76° 41.7870' W.
- (7) In Bay River west of a line beginning on Bay Point at a point 35° 11.0750' N - 76° 31.6080' W; running southerly to Maw Point to a point 35° 09.0407' N - 76° 32.2348' W; pots may be used within an area bound by the shoreline to the depth of six feet, except areas listed in Paragraph (b) of this Rule that may be opened to the use of pots by proclamation, and pots shall not be set within the following areas described by lines:
- (A) Vandemere - beginning on the west shore of Vandemere Creek at a point 35° 11.2280' N - 76° 39.6046' W; running southeasterly to the east shore to a point 35° 11.0920' N - 76° 39.3240' W; running southerly to a point 35° 10.9390' N - 76° 39.4426' W; running southwesterly to a point 35° 10.8567' N - 76° 39.6212' W; running northwesterly to shore west of Vandemere Creek to a point 35° 10.8983' N - 76° 39.7307' W; running northerly along shore to the beginning point.
- (B) Moore Bay - beginning on shore west of Bell Point at a point 35° 09.6712' N - 76° 39.9651' W; running northwesterly to a point 35° 09.7331' N - 76° 40.0928' W; running southerly along the six foot depth to a point 35° 09.0045' N - 76° 40.3141' W; running southeasterly to the north shore of Moore Creek to a point 35° 08.9640' N - 76° 40.2000' W; running northerly along shore to the beginning point.
- (8) In the Neuse River and Point of Marsh area south and west of a line beginning on Maw Point at a point 35° 09.0407' N - 76° 32.2348' W; running southeasterly near the Maw Point Shoal Marker "2" to a point 35° 08.1250' N - 76° 30.8532' W; running southeasterly near the Neuse River Entrance Marker "NR" to a point 35° 06.6212' N - 76° 28.5383' W; running southeasterly to a point 35° 04.7670' N - 76° 25.7920' W; running southwesterly to shore to a point 35° 03.9387' N - 76° 27.0466' W; pots may be used in coastal fishing waters bound by the shoreline to the depth of six feet, except areas listed in Paragraph (b) of this Rule that may be opened to the use of pots by proclamation and except pots shall not be set within the following areas described by lines:
- (A) Oriental - in that area including Greens Creek and tributaries downstream of the bridge on State Secondary Road 1308, and Whittaker Creek north of a line beginning on the west shore at the Whittaker Creek primary nursery area (PNA) line; running easterly along the Whittaker Creek PNA line to the east shore; running southerly to a point 35° 01.3833' N - 76° 40.9500' W; running westerly following the six foot depth to a point 35° 01.1666' N - 76° 41.8833' W; running southerly across the channel to a point 35° 01.1339' N - 76° 41.9589' W; running westerly to Windmill Point to the south shore of the Shop Gut Creek PNA line; running northerly along the Shop Gut Creek PNA line to the north shore of the Shop Gut Creek PNA line.
- (B) Greens Creek - more than 75 yards from shore in the area beginning on the south shore of Greens Creek primary nursery area (PNA) line; following the PNA lines of Greens Creek and Kershaw Creek to the east shore of Kershaw Creek; running easterly along the shore of Greens Creek, and running along the shore of Smith Creek and its tributaries to the bridge on State Secondary Road 1308; running southwesterly along the bridge to the south shore of Greens Creek; running westerly along the shore to the beginning point.
- (C) Dawson Creek - beginning on the west shore at a point 34° 59.5920' N - 76° 45.4620' W; running easterly along the bridge on State Secondary Road 1302 to shore at a point 34° 59.5800' N - 76° 45.4140' W; running northerly and easterly along the shore to the primary nursery area (PNA) line of

the southeastern tributary; running northerly along the PNA line to shore; running northerly along shore to the PNA line of the unnamed northeastern tributary; running northwesterly along the PNA line to shore; running northwesterly along shore to the Inland/Coastal line on Tarklin Creek; running westerly along the Inland/Coastal line to shore; running southwesterly along shore to the Inland/Coastal line on Dawson Creek; running southerly along the Inland/Coastal line to the shore; running easterly and then southerly along shore to the beginning point.

- (D) Wilkerson Point - beginning on the west side of the Minnesott Beach Yacht Basin Channel at a point 34° 58.2682' N - 76° 49.1903' W; running southerly to a point 34° 58.1403' N - 76° 49.2253' W; running easterly along the six foot depth to a point 34° 58.4000' N - 76° 46.5667' W; running northerly to shore to a point 34° 58.5333' N - 76° 46.6333' W; running westerly along shore to the beginning point.
- (E) Beard Creek - beginning on shore west of Beard Creek at a point 35° 00.1902' N - 76° 52.2176' W; running southerly to a point 34° 59.8883' N - 76° 52.3594' W; running easterly along the six foot depth to a point 34° 59.4167' N - 76° 51.2333' W; running northeasterly to shore to a point 34° 59.5989' N - 76° 51.0781' W; running westerly along shore to the Beard Creek tributary primary nursery area (PNA) line; running northeasterly along the PNA line to the Inland/Coastal line in Beards Creek; running westerly along the Inland/Coastal line to the western shore; running southerly along shore to the beginning point.
- (F) Clubfoot Creek - more than 50 yards from shore in the area south of a line beginning at a point 34° 54.9327' N - 76° 45.6506' W on the west shore; running northerly to a point 34° 55.1501' N - 76° 45.6221' W; running northeasterly to a point 34° 55.1812' N - 76° 45.5172' W near Marker "5"; running

northeasterly to a point 34° 55.2994' N - 76° 45.1180' W on the east shore and north of line beginning at a point on the west shore 34° 54.5424' N - 76° 45.7252' W; running easterly to a point 34° 54.4853' N - 76° 45.4022' W on the east shore.

- (9) In the Neuse River and Point of Marsh area south and west of a line beginning on Maw Point at a point 35° 09.0407' N - 76° 32.2348' W; running southeasterly near the Maw Point Shoal Marker "2" to a point 35° 08.1250' N - 76° 30.8532' W; running southeasterly near the Neuse River Entrance Marker "NR" to a point 35° 06.6212' N - 76° 28.5383' W; running southeasterly to a point 35° 04.7670' N - 76° 25.7920' W; running southwesterly to shore to a point 35° 03.9387' N - 76° 27.0466' W; pots may be used in coastal fishing waters bound by the shoreline to the depth of six feet, except areas listed in Paragraph (b) of this Rule that may be opened to the use of pots by proclamation and except pots may be set in coastal fishing waters west of a line beginning on shore west of Beards Creek at a point 35° 00.1902' N - 76° 52.2176' W; running southwesterly to shore west of Slocum Creek to a point 34° 57.0333' N - 76° 53.7252' W.
- (10) In the West Bay and Long Bay area south and west of a line beginning on shore at a point 35° 03.9387' N - 76° 27.0466' W; running northeasterly to a point 35° 04.7670' N - 76° 25.7920' W; running southeasterly to the eastern shore of West Bay to a point 35° 02.1203' N - 76° 21.8122' W; areas described by lines:
 - (A) Raccoon Island, northern shore - beginning at the western point at a point 35° 04.3696' N - 76° 26.1815' W; running southeasterly along the north shore to a point 35° 03.9814' N - 76° 25.5862' W; running easterly 150 yards to a point 35° 03.9777' N - 76° 25.4910' W; running northwesterly at a distance of 150 yards from shore to a point 35° 04.4417' N - 76° 26.2150' W; running easterly to the beginning point.
 - (B) Raccoon Island, southern shore - beginning at the western point at a point 35° 04.3696' N - 76° 26.1815' W; running southeasterly along the south shore to a point 35° 03.9814' N - 76° 25.5862' W;

- running easterly 50 yards to a point 35° 03.9800' N - 76° 25.5513' W; running westerly at a distance of 50 yards from shore to a point 35° 04.3955' N - 76° 26.1934' W; running easterly to the beginning point.
- (C) West Bay: Point of the Narrows - beginning on shore at a point 35° 03.5421' N - 76° 26.3909' W; running northeasterly to a point 35° 03.5980' N - 76° 26.3894' W; running southeasterly parallel to shore at a distance of 100 yards to a point 35° 02.4740' N - 76° 26.1280' W; running northwesterly to shore to a point 35° 02.5440' N - 76° 26.1486' W; running northerly along shore to the beginning point.
- (D) West Bay: Point of Island Bay, Dowdy Bay - beginning on shore at a point 35° 01.5271' N - 76° 26.2836' W; running southeasterly to a point 35° 01.4684' N - 76° 26.2450' W; running southeasterly parallel to shore at a distance of 100 yards to a point 35° 00.0701' N - 76° 25.4414' W; running southerly to a point 35° 00.0620' N - 76° 25.5074' W on Dowdy Point; running westerly and northerly along shore to the beginning point.
- (E) West Bay - beginning on Dowdy Point at a point 35° 00.0620' N - 76° 25.5074' W; running easterly to a point 35° 00.1000' N - 76° 25.2000' W; running southerly to a point 34° 58.7500' N - 76° 24.7000' W; running westerly to Jack's Bay Point to a point 34° 58.6886' N - 76° 25.3683' W; running northerly along shore to the beginning point.
- (F) Long Bay: Jack's Bay, Stump Bay - beginning on Jack's Bay Point at a point 34° 58.6886' N - 76° 25.3683' W; running southwesterly to a point 34° 57.6500' N - 76° 25.8500' W; running westerly to shore to a point 34° 57.2089' N - 76° 27.2292' W; running northerly along shore to the boundary of the military restricted area (having its center at a point 34° 58.8000' N - 76° 26.2000' W) in Jack's Bay to a point 34° 58.4208' N - 76° 25.9417' W; running northeasterly along the boundary of the military restricted area to a point 34° 58.7746' N - 76° 25.6733' W; running easterly along shore to the beginning point.
- (G) Long Bay - beginning on the east point of the southern shore of Stump Bay at a point 34° 57.2089' N - 76° 27.2292' W; running southeasterly to Swimming Point to a point 34° 56.7619' N - 76° 26.3838' W; running southerly along shore to the head of Long Bay; running northerly along the west shore to the beginning point.
- (H) Long Bay: Owens Bay - beginning on Swimming Point at a point 34° 56.7619' N - 76° 26.3838' W; running northwesterly to a point 34° 56.8470' N - 76° 26.5363' W; running northeasterly parallel to shore at a distance of 300 yards to a point 34° 57.9394' N - 76° 24.1326' W; running southwesterly to Long Bay Point at a point 34° 57.7863' N - 76° 24.1837' W; running southwesterly along shore to the beginning point.
- (I) West Thorofare Bay, Merkle Bay - beginning on Long Bay Point at a point 34° 57.7863' N - 76° 24.1837' W; running northeasterly near Marker "8WB" to a point 34° 58.4600' N - 76° 23.9600' W; running easterly to Tump Point to a point 34° 58.7000' N - 76° 22.8166' W; running southerly along the shore of Merkle Bay and West Thorofare Bay back to the beginning point.
- (J) West Bay, North Bay - beginning on the eastern shore of West Bay at a point 35° 02.1203' N - 76° 21.8122' W; running northwesterly to a point 35° 02.5412' N - 76° 22.4445' W; running southwesterly near Marker "5WB" to a point 35° 02.0798' N - 76° 22.8729' W; running southerly to a point 35° 00.5666' N - 76° 21.8333' W; running southerly to Deep Bend Point to a point 34° 58.5923' N - 76° 21.7325' W; running easterly and northerly along shore to the beginning point.
- (11) Core Sound, Back Sound and the Straits and their tributaries.
- (12) North River:

- (A) Goose Bay - beginning on shore west of South Leopard Creek at a point 34° 45.4517' N – 76° 35.1767' W; running northerly to a point 34° 45.6409' N – 76° 35.2503' W; running southwesterly to a point 34° 45.3333' N – 76° 35.7500' W; running southerly to a point 34° 43.4667' N – 76° 35.2333' W; running easterly to shore at a point 34° 43.5833' N – 76° 34.9167' W; running northerly along shore to the beginning point.
 - (B) Ward Creek - coastal fishing waters north and east of a line beginning on the north shore at a point 34° 46.2667' N – 76° 35.4933' W; running southerly to south shore to a point 34° 45.4517' N – 76° 35.1767' W.
 - (C) Upper North River - coastal fishing waters north of a line beginning on the west shore at a point 34° 46.0383' N – 76° 37.0633' W; running easterly to shore to a point 34° 46.2667' N – 76° 35.4933' W.
 - (D) Newby Creek, Gibbs Creek - beginning on Marsh Hen Point at a point 34° 45.2004' N – 76° 37.0639' W; running southwesterly to a point 34° 44.5833' N – 76° 36.6000' W; running southeasterly to shore near Holland's Rocks to a point 34° 43.6667' N – 76° 37.3333' W; running northerly along shore to the beginning point.
 - (E) North River Marshes - beginning near Marker "6" at a point 34° 43.4833' N – 76° 37.3500' W; running northeasterly to a point 34° 44.1333' N – 76° 36.8667' W; running southeasterly to a point 34° 43.8000' N – 76° 36.1333' W; running southeasterly to a point 34° 43.5000' N – 76° 35.7833' W; running southerly near Marker "56" to a point 34° 42.2391' N – 76° 35.8498' W; running westerly to a point 34° 42.2333' N – 76° 36.7167' W; running northerly to a point 34° 42.7500' N – 76° 36.9667' W; running northerly to a point 34° 43.2333' N – 76° 36.9667' W; running northwesterly to the beginning point.
- (13) Newport River:
- (A) Lower portion - beginning on shore east of Penn Point at a point 34° 45.4397' N – 76° 43.0638' W; running northeasterly to shore east of Oyster Creek to a point 34° 46.5480' N – 76° 41.9910' W; running easterly along shore to a point on the western shore of Core Creek to a point 34° 47.0816' N – 76° 41.2605' W; running easterly to the eastern shore at a point 34° 46.9867' N – 76° 41.0437' W; running southerly along shore to Gallant Point to a point 34° 43.9911' N – 76° 40.2762' W; running westerly near Marker "2" to a point 34° 44.0031' N – 76° 40.5038' W; running southeasterly near Marker "4" to a point 34° 43.7064' N – 76° 40.1627' W; running southerly to the west side of Gallant's Channel at the drawbridge to a point 34° 43.3500' N – 76° 40.1833' W; running westerly along the US 70 and the US 70 bridge to its terminus at the State Port Terminal; running westerly and northerly along the western shore of Newport River and its tributaries to the beginning point.
 - (B) Upper portion - the coastal fishing waters west of a line beginning on shore east of Harlowe Creek at a point 34° 46.5730' N – 76° 42.6350' W; running southerly to shore east of Penn Point to a point 34° 45.6970' N - 76° 43.5180' W.
- (14) Bogue Sound:
- (A) South of the IWW - beginning on the south shore at the NC 58 bridge at a point 34° 40.0585' N – 77° 03.8005' W; running northerly along the bridge to the south side of the IWW channel to a point 34° 40.4464' N – 77° 03.9155' W; running easterly along the south side of the IWW channel to the Atlantic Beach bridge to a point 34° 43.0320' N – 76° 44.1300' W; running easterly to the northeastern shore of Tar Landing Bay to a point 34° 42.5000' N – 76° 42.2000' W; running easterly along shore to a point 34° 42.1990' N - 76° 41.3873' W; running southeasterly to a point 34° 42.1631' N - 76° 41.3491' W; running southeasterly and westerly along shore to the beginning point.

- (B) North of the IWW - beginning on the north shore at the NC 58 bridge at a point 34° 40.7780' N - 77° 04.0010' W; running southerly along the bridge to the north side of the IWW channel to a point 34° 40.4640' N - 77° 03.9090' W; running easterly along the north side of the IWW channel to the Atlantic Beach bridge to a point 34° 43.0620' N - 76° 44.1240' W; running northerly along the bridge to shore to a point 34° 43.2780' N - 76° 44.0700' W; running westerly along shore to the beginning point.
- (15) Designated primary nursery areas in all coastal fishing waters which are listed in 15A NCAC 03R .0103, except Burton Creek off Lower Broad Creek in Pamlico County.
- (b) The pot areas referenced in 15A NCAC 03J .0301(a)(2)(B) to be opened by proclamation are delineated in the following coastal fishing waters:
- (1) Wysocking Bay:
- (A) Lone Tree Creek - beginning on shore at a point 35° 25.9705' N - 76° 02.7799' W; running easterly along the shoreline to the primary nursery area (PNA) line on the north shore of Lone Tree Creek; running southeasterly along the PNA line to the south shore; running southwestly to a point 35° 24.7666' N - 76° 02.5333' W; running northwestly to a point 35° 25.7000' N - 76° 03.2666' W; running northeasterly to the beginning point.
- (B) Mt. Pleasant Bay - beginning on shore west of Green Point at a point 35° 24.6160' N - 76° 03.9690' W; running easterly to a point 35° 24.4500' N - 76° 03.2000' W; running southerly to a point 35° 23.2833' N - 76° 03.5333' W; running southwestly to shore to a point 35° 23.1166' N - 76° 04.2000' W; running westerly and northerly along shore to the primary nursery area (PNA) line on the western shore of Hickory Creek Bay; running northeasterly along the PNA line to Browns Island; running along the eastern shore of Browns Island to the PNA line on the south shore of Old Hill Bay; running northerly along the PNA line to shore; running northeasterly along shore to the beginning point.
- (2) Juniper Bay - beginning on shore at a point 35° 21.7957' N - 76° 14.3545' W; running southeasterly along shore to the primary nursery area (PNA) line on the western shore of Buck Creek; running southeasterly along the PNA line to the eastern shore; running southeasterly along shore to the PNA line on the north shore of Laurel Creek; running southerly to the south shore; running southerly along shore to Juniper Bay Point to a point 35° 20.4420' N - 76° 13.2680' W; running westerly to a point 35° 20.2500' N - 76° 14.7500' W; running northerly near Marker "3" to a point 35° 21.5360' N - 76° 14.8040' W; running northeasterly to the beginning point.
- (3) Swanquarter Bay - beginning in Caffee Bay on the north shore at a point 35° 21.9928' N - 76° 17.6720' W; running southerly to the south shore at a point 35° 21.5240' N - 76° 17.8130' W; running westerly along shore to Drum Point to a point 35° 21.5920' N - 76° 18.3560' W; running westerly to a point 35° 21.2833' N - 76° 19.0500' W; running northwestly to a point 35° 21.8500' N - 76° 19.4500' W; running easterly to Sandy Point to a point 35° 22.1080' N - 76° 18.7440' W; running easterly along shore and following the PNA line of the northern tributary in Caffee Bay to the beginning point.
- (4) Deep Cove - beginning on the north shore at a point 35° 21.5784' N - 76° 22.7505' W; running easterly along shore to a point 35° 21.5002' N - 76° 22.1112' W; running southerly to shore to a point 35° 20.6851' N - 76° 22.0524' W; running westerly along shore to a point 35° 20.5390' N - 76° 22.7790' W; running northerly to the beginning point.
- (5) Rose Bay - beginning on shore south of Swan Point at a point 35° 23.9650' N - 76° 23.5530' W; running southeasterly along shore to a point 35° 23.5060' N - 76° 23.2090' W; running westerly to a point 35° 23.3166' N - 76° 24.0666' W; running northwestly to a point 35° 24.0500' N - 76° 24.5500' W; running easterly to the beginning point.
- (6) Spencer Bay - beginning on Roos Point at a point 35° 22.3590' N - 76° 28.1850' W; running northeasterly to a point 35° 22.9500' N - 76° 27.2166' W; running northwestly to a point 35° 23.4166' N - 76° 27.9500' W; running southwestly to shore to a point 35° 23.0209' N - 76° 28.5060' W; running southeasterly along shore and the primary nursery area line of the unnamed western

- tributary of Spencer Bay to the beginning point.
- (7) Pamlico River:
- (A) Lee Creek - beginning on shore at a point 35° 22.8779' N - 76° 45.7149' W; running northerly to a point 35° 23.1011' N - 76° 45.7371' W; running easterly along the six foot depth to a point 35° 22.9450' N - 76° 44.8403' W; running southwesterly to shore to a point 35° 22.7667' N - 76° 45.2333' W; running westerly along shore to the beginning point.
- (B) Huddy Gut - beginning on shore at a point 35° 22.5000' N - 76° 44.4500' W; running northerly to a point 35° 22.7166' N - 76° 44.5000' W; running easterly along the six foot depth to a point 35° 22.7170' N - 76° 43.9500' W; running southwesterly to shore to a point 35° 22.4657' N - 76° 44.0536' W; running westerly along shore to the beginning point.
- (C) Indian Island - beginning on shore at the west end of Indian Island at a point 35° 21.6240' N - 76° 39.4090' W; running westerly to a point 35° 21.7667' N - 76° 40.2667' W; running easterly along the six foot depth to a point 35° 21.6107' N - 76° 38.2202' W; running westerly to the east end of Indian Island to a point 35° 21.6100' N - 76° 38.6290' W; running westerly along the northern shore to the beginning point.
- (D) Old Field Point, Goose Creek - beginning on shore at a point 35° 20.2297' N - 76° 37.3456' W; running southeasterly to a point 35° 20.1500' N - 76° 37.1000' W; running southerly along the six foot depth to a point 35° 19.9031' N - 76° 37.2308' W; running westerly to shore to a point 35° 19.9812' N - 76° 37.4917' W; running northerly along shore to the beginning point.
- (8) Big Porpoise Bay - beginning on the north shore at a point 35° 16.0028' N - 76° 29.1708' W; running southerly to Sage Point at a point 35° 15.5930' N - 76° 29.1270' W; running easterly to a point 35° 15.4660' N - 76° 28.6000' W; running northerly to shore to a point 35° 15.8120' N - 76° 28.4270' W; running westerly along shore to the beginning point.
- (9) Middle Bay - beginning on Middle Bay Point at a point 35° 14.8310' N - 76° 28.7500' W; running southerly to Sow Island Point at a point 35° 13.2876' N - 76° 29.5585' W; running westerly along shore to Big Fishing Point at a point 35° 14.0285' N - 76° 29.9336' W; running northerly to Oyster Creek Point at a point 35° 14.6042' N - 76° 29.8544' W; running easterly along shore to the beginning point.
- (10) Jones Bay - beginning on Sow Island Point at a point 35° 13.1811' N - 76° 29.6096' W; running southerly near Marker "3" to a point 35° 12.0250' N - 76° 29.9660' W; running northwesterly to a point 35° 12.8000' N - 76° 30.9666' W; running southwesterly to shore at the east shore of the Little Drum Creek primary nursery area (PNA) line; running westerly along the PNA line to the west shore of the Little Eve Creek PNA; running westerly along shore to a point 35° 12.6000' N - 76° 32.0166' W; running northeasterly to a point 35° 12.8666' N - 76° 31.7500' W; running northwesterly to a point 35° 13.1833' N - 76° 32.1166' W; running northerly to a point 35° 13.6500' N - 76° 31.9000' W; running southeasterly to a point 35° 13.1500' N - 76° 30.8000' W; running northerly to shore at a point 35° 13.4886' N - 76° 30.7785' W; running easterly along shore to the beginning point.
- (11) Bay Point - beginning on Boar Point at a point 35° 12.1450' N - 76° 31.1150' W; running easterly near Marker "5" to a point 35° 12.0250' N - 76° 29.9660' W; running southerly to a point 35° 10.9333' N - 76° 30.1666' W; running westerly to Bay Point to a point 35° 11.0750' N - 76° 31.6080' W; running northerly along shore to the beginning point.
- (12) Bay River:
- (A) Rockhole Bay - beginning on the western shore of Dump Creek at a point 35° 11.6708' N - 76° 33.4359' W; running southerly to a point 35° 11.3833' N - 76° 33.3166' W; running southeasterly along the six foot depth to a point 35° 10.8333' N - 76° 32.1333' W; running northerly to shore at a point 35° 11.1250' N - 76° 32.1340' W; running northwesterly along shore to the southeast shore of the Rockhole Bay PNA line; running northwesterly along the PNA line to the western shore; running westerly along shore to the east shore of PNA line in Dump Creek;

- running southwesterly along the PNA line to the western shore; running southerly along shore to the beginning point.
- (B) Hogpen Creek - beginning on shore north of Bonner Bay at a point 35° 10.4174' N - 76° 34.7041' W; running northerly to a point 35° 10.7500' N - 76° 34.7333' W; running easterly along the six foot depth to a point southwest of Marker "3" to a point 35° 10.8137' N - 76° 33.5120' W; running southwesterly to shore to a point 35° 10.3195' N - 76° 34.0876' W; running westerly along shore to the beginning point.
- (C) Fisherman Bay - beginning on the western shore of Fisherman Bay at a point 35° 09.2345' N - 76° 33.0199' W; running northwesterly to a point 35° 09.9892' N - 76° 33.2213' W; running easterly along the six foot depth to a point southwest and near Marker "1" to a point 35° 09.7951' N - 76° 32.0099' W; running southwesterly to shore to a point 35° 09.2668' N - 76° 32.3668' W; running westerly along shore to the beginning point.
- (13) Neuse River:
- (A) Swan Creek - beginning at a point on shore south of Maw Bay at a point 35° 08.5760' N - 76° 32.6320' W; running southerly along shore to a point north of Swan Creek to a point 35° 07.3182' N - 76° 33.4620' W; running southeasterly to the six foot depth to a point 35° 07.2524' N - 76° 33.2078' W; running northeasterly along the six foot depth to a point 35° 08.3214' N - 76° 31.9971' W; running westerly to the beginning point.
- (B) Broad Creek - beginning on Tonney Hill Point at a point 35° 05.5505' N - 76° 35.7249' W; running southeasterly along shore and following the primary nursery area line of Cedar Creek; running southerly along shore to a point north of Gum Thicket Creek to a point 35° 04.6741' N - 76° 35.7051' W; running southeasterly to a point 35° 04.5786' N - 76° 35.4808' W; running northerly near Marker "1" to a point 35° 05.4809' N - 76° 34.9734' W; running westerly along the six foot depth near Marker "3" to a point 35° 05.6400' N - 76° 35.6433' W; running southwesterly to the beginning point.
- (C) Gum Thicket Shoal - beginning on shore west of Gum Thicket Creek at a point 35° 04.2169' N - 76° 36.2119' W; running southwesterly along shore to a point 35° 04.0634' N - 76° 36.6548' W; running southerly to a point 35° 03.6833' N - 76° 36.7166' W; running easterly along the six foot depth to a point 35° 03.9166' N - 76° 35.8000' W; running northwesterly to the beginning point.
- (D) Orchard Creek - beginning on the eastern shore at and running southwesterly along the Orchard and Old House Creeks primary nursery area line to Cackle Point; running easterly to a point 35° 03.3000' N - 76° 37.8833' W; running northerly to the beginning point.
- (E) Dawson Creek - beginning on the eastern shore of Dawson Creek at a point 34° 59.5800' N - 76° 45.4140' W; running westerly along the bridge to the western shore to a point 34° 59.5920' N - 76° 45.4620' W; running southwesterly along shore to a point 34° 59.0667' N - 76° 45.9000' W; running southeasterly to a point 34° 58.7833' N - 76° 45.6500' W; running northerly along the six foot depth to a point 34° 59.3666' N - 76° 45.3166' W; running northwesterly near Marker "4" to a point 34° 59.4430' N - 76° 45.4521' W; running northerly to the beginning point.
- (F) Pine Cliff Recreation Area - beginning on shore at a point 34° 56.4333' N - 76° 49.5833' W; running easterly along shore to a point 34° 56.3422' N - 76° 49.1158' W; running northeasterly near Marker "2" to a point 34° 56.7650' N - 76° 48.5778' W; running northerly to a point 34° 56.8333' N - 76° 48.6000' W; running southwesterly along the six foot depth to a point 34° 56.6067' N - 76° 49.6190' W; running southerly to the beginning point.

History Note: Authority G.S. 113-134; 113-182; 113-221; 143B-289.52; Eff. January 1, 1991; Amended Eff. March 1, 1996; March 1, 1994; July 1, 1993; September 1, 1991; Recodified from 15A NCAC 03R .0007 Eff. December 17, 1996; Amended Eff. September 1, 2005; May 1, 1997; April 1, 1997.

15A NCAC 06E .0103 ALLOCATION GUIDELINES AND PROCEDURES

(a) The Commission shall allocate the cost share funds to the districts in the designated program areas. To receive fund allocations, each district designated eligible by the Commission shall submit an annual strategy plan to the Commission at the beginning of each fiscal year. Funds may be allocated to each district for any or all of the following purposes: cost share payments, cost share incentive payments, technical assistance, or administrative assistance. Use of funds for technical and administrative assistance must follow the guidelines set forth in Rule .0106 of this Subchapter.

(b) Funds shall be allocated to the districts at the beginning of the fiscal year and whenever the Commission determines that sufficient funds are available to justify a reallocation. Districts shall be allocated monies based on the identified level of agriculture-related nonpoint source pollution problems, the respective district's BMP installation goals as demonstrated in the district annual strategy plan, and the district's record of performance to affect BMP installation by cooperating farmers. The allocation method used for disbursement of funds is based on the relative position of each respective district for those parameters approved by the Commission pursuant to Paragraph (g) of this Rule. Each district is assigned points for each parameter, and the points are totaled and proportioned to the total dollars available under the current program year funding according to the following formula:

- (1) Sum of Parameter Points = Total Points
- (2) $\frac{\text{Percentage Total Points Each District} \times \text{Total Dollars Available}}{\text{Total Dollars Available}} = \text{Dollars Available to Each District}$
- (3) The minimum allocated to a particular district shall be twenty thousand dollars (\$20,000) per program year, unless the district requests less than twenty thousand dollars (\$20,000).
- (4) If a district requests less than the dollars available to that district in Subparagraph (b)(2) of this Rule, then the excess funds beyond those requested by the district shall be allocated to the districts who did not receive their full requested allocation using the same methodology described in Subparagraph (b)(2) of this Rule.

(c) 95 percent of the total program funding shall be allocated to the district accounts in the initial allocation. The Division shall retain five percent of the total funding in a contingency fund to be used to respond to an emergency or natural disaster.

If the funds are not needed to respond to an emergency, then the contingency fund shall be allocated at the March meeting of the Commission.

(d) The Commission may recall funds allocated to a district during a fiscal year that have not been encumbered to an agreement at any time if it determines the recalled funds are needed to respond to an emergency or natural disaster.

(e) At any time a district may submit a revised strategy plan and apply to the Commission for additional funds.

(f) CPO's that encumber funds under the current year must be submitted to the Division by 5:00 p.m. on the first Wednesday in June.

(g) Districts shall be allocated funds based on their respective data for each of the following parameters:

- (1) Percentage of total acres of agricultural land in North Carolina that are in the respective district (including cropland, hayland, pasture land, and orchards/vineyards) as reported in the most recent edition of the North Carolina Agricultural Statistics. The actual percentage shall be normalized to a 1-100 scale. (20%)
- (2) Percentage of total number of animal units in North Carolina that are in the respective district as reported in the most recent edition of the North Carolina Agricultural Statistics and converted to animal units using the conversion factors approved by the USDA-Natural Resources Conservation Service. The actual percentage shall be normalized to a 1-100 scale. (20%)
- (3) Relative rank of the number of miles of stream identified as less than fully supporting due to agricultural nonpoint source pollution as reported in the state's 303(d) list, 305(b) report, and basin plan. (20%)
- (4) Relative rank of the percentage of the county draining to waters classified as Primary Nursery Areas, Outstanding Resource Waters, High Quality Waters, Trout, Shellfishing, and Critical Water Supply on the current schedule of Water Quality Standards and Classifications. (10%)
- (5) The percentage of cost share funds allocated to a district that are encumbered to contracts in the best three of the most recent four completed program years as reported on the NC Agriculture Cost Share Program Database. (10%)
- (6) Percentage of program funds encumbered to contracts that are actually expended for installed BMPs in the best three of the most recent four-year period for which the allowed time for implementing contracted BMPs has expired as reported on the NC

- Agriculture Cost Share Program Database. (10%)
- (7) Relative rank of the average erosion rate for agricultural land in the county as reported in the National Resources Inventory, unless the State Conservationist of the Natural Resources Conservation Service specifies that another information source would be more current and accurate. (10%)

History Note: Authority G.S. 139-4; 139-8; 143-215.74; 143B-294; Eff. May 1, 1987; Recodified from 15A NCAC 06E .0003 Eff. December 20, 1996; Amended Eff. April 1, 1997; Temporary Amendment Eff. May 1, 2001; Amended Eff. September 1, 2005; August 1, 2002.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS

CHAPTER 54 – NORTH CAROLINA PSYCHOLOGY BOARD

21 NCAC 54 .1611 PRACTICE BY POSTDOCTORAL TRAINEES

An individual pursuing postdoctoral training or experience in psychology shall be exempt from licensure pursuant to G.S. 90-270.4(d) if the following criteria are met:

- (1) the postdoctoral training or experience in psychology meets all the criteria set forth in 21 NCAC 54 .2009(i); and
- (2) the individual has completed all doctoral degree requirements for a program in psychology from an institution of higher education as defined in G.S. 90-270.2(5). Evidence of completion of all degree requirements shall be in the form of either an official transcript showing the date on which the degree was conferred; or a letter from the registrar, dean of graduate school, or director of graduate studies verifying that all substantive and administrative requirements for the doctoral degree have been met without exception, and stating the date on which the doctoral degree will be awarded.

History Note: Authority G.S. 90-270.4(d); 90-270.9; Eff. September 1, 2005.

21 NCAC 54 .1701 INFORMATION REQUIRED

(a) Except as provided in Rule .1707 of this Section, the information required for each applicant for licensure shall consist of:

- (1) typed, or legibly printed, notarized application form, supervision contract form, and application fee;
- (2) official college transcript(s) sent directly to the Board by any training institution(s) from which the applicant received a graduate degree;
- (3) completed information forms from present and past supervisors;
- (4) three completed reference forms from professionals who are familiar with the applicant's current work, one of which is from a doctoral level psychologist;
- (5) verification and report on the status of licensure, including dates of licensure and any disciplinary action which is pending or has been taken, sent directly to the Board from any other regulatory agency in North Carolina and any other jurisdiction in which the applicant has applied for a license, is currently licensed, or previously has been licensed, if applicable;
- (6) official report of any previous score obtained on the Examination for Professional Practice in Psychology sent directly to the Board from the Association of State and Provincial Psychology Boards, if applicable; and
- (7) additional documentation regarding educational credentials described in 21 NCAC 54 .1802 and 21 NCAC 54 .1803, if applicable.

(b) An application shall contain all required materials to be complete. An incomplete application shall be active for three months from the date on which the application is received in the Board office. At the end of such time, if still incomplete, the application shall be void, the applicant shall be deemed to have discontinued the application process, and the applicant shall totally reapply.

(c) To be considered to have made application pursuant to G.S. 90-270.5(a), the information specified in Paragraph (a)(1) of this Rule shall be filed in the Board office within 30 days of offering to practice or undertaking the practice of psychology in North Carolina.

History Note: Authority G.S. 90-270.4(h); 90-270.5(a); 90-270.9; 90-270.11(a), (b); 90-270.13(a) (b); 90-270.15; Eff. September 1, 1982; Amended Eff. September 1, 2005; January 1, 1996; November 1, 1991; March 1, 1989; June 1, 1988.

21 NCAC 54 .1901 TYPES

(a) **Qualifying Examinations.** National and state examinations shall be administered. The examinations shall be taken only for licensure purposes. The applicant shall comply with deadlines and procedures established by the examination contractor and testing vendor when approved to take a computer administered examination.

(1) National Examination. The national examination is the Examination for Professional Practice in Psychology (EPPP) which is developed by the Association of State and Provincial Psychology Boards (ASPPB). The EPPP assesses the applicant's knowledge of the subject matter of psychology and his or her understanding of professional and ethical problems in the practice of psychology. The passing point for licensed psychologist shall be a scaled score of 500, and the passing point for licensed psychological associate shall be a scaled score of 440. This examination shall not be required for an applicant who has previously taken the EPPP and whose score met the North Carolina passing point which was established for that particular administration date of the examination unless the Board determines pursuant to G.S. 90-270.15 that an individual shall be required to take and pass a current form of the EPPP. Further, this examination shall not be required for an applicant who documents meeting requirements for licensure specified in Rule .1707 of this Chapter.

(2) State Examination. The Board-developed state examination assesses the applicant's knowledge of the North Carolina Psychology Practice Act, selected rules of the Board covering such topics as education and supervision, and other legal requirements. The passing point for all licensees shall be set at 78% of the total scored items on the examination.

(b) Oral Examination. Upon proof that an applicant or licensee has engaged in any of the prohibited actions specified in G.S. 90-270.15(a), the Board may administer a state oral examination which assesses knowledge of the North Carolina Psychology Practice Act, selected rules of the Board covering such topics as education and supervision, and other legal requirements.

(c) Special Administrations. Candidates with documented impairments or disabilities which meet compliance requirements of the Americans with Disabilities Act of 1990 (ADA) shall be administered the EPPP and State Examination under conditions that shall minimize the effect of the impairments or disabilities on their performance. In general, those lifestyle accommodations which an individual uses to compensate for impairments or disabilities, and which have become accepted practice for the individual in his or her graduate program or since the onset of the applicant's impairment of disability, shall be considered as the most appropriate accommodation for testing. Special test administrations shall be as comparable as possible to a standard administration.

History Note: Authority G.S. 90-270.9; 90-270.11; 90-270.15(b); Eff. September 1, 1982; Amended Eff. September 1, 2005; April 1, 2001; October 1, 1996; March 1, 1989; January 1, 1986; July 1, 1985; August 1, 1984.

CHAPTER 63 – SOCIAL WORK CERTIFICATION

21 NCAC 63 .0210 PROVISIONAL LICENSES

- (a) The Board shall issue a provisional license to any person who meets the requirements in G.S. 90B-7(f).
- (b) Applications and forms shall be obtained from and returned to the Board Office.
- (c) The Board shall assess an application fee of one hundred dollars (\$100.00) for processing each application.
- (d) Prior to practicing clinical social work, applicants must demonstrate in writing that, in the event of a clinical emergency they have immediate access to a licensed mental health professional who has agreed to provide to them emergency clinical consultation to assure that standards of clinical social work practice are maintained. Provisionally-licensed clinical social workers shall immediately notify the Board in writing of any change in such access.
- (e) Each provisional licensee must be supervised as set forth in G.S. 90B-7(f), and, shall receive on-going appropriate supervision, as defined in .0211(a)(2) of this Chapter, until the provisional licensee is licensed as a Licensed Clinical Social Worker.
- (f) All provisional licensees shall submit reports of their clinical social work experience and supervision on the appropriate Board form(s) every six months for review and evaluation by the Board.
- (g) To prevent a lapse in licensure, provisional licensees who desire to become Licensed Clinical Social Workers shall complete the application process for the Licensed Clinical Social Worker classification and submit the application fee of one hundred dollars (\$100.00) early enough to allow 30 days for administrative processing and Board action prior to the expiration of the provisional license.

History Note: Authority G.S. 90B-6; 90B-7; Eff. August 1, 1993; Temporary Amendment Eff. October 1, 1999; Amended Eff. September 1, 2005; April 1, 2001.

21 NCAC 63 .0211 WORK EXPERIENCE

- (a) For the Licensed Clinical Social Worker credential:
 - (1) Two years of post-MSW clinical social work experience shall mean 3,000 clock hours of work or employment for a fee or salary while engaged in the practice of clinical social work. The 3,000 hours shall be accumulated over a period of time not less than two years nor more than six years, with no more than 1500 hours accumulated in

any one year. Practicum or internship experience gained as part of any educational program shall not be included.

(2) Appropriate supervision shall mean supervision in person by an MSW who is also a Licensed Clinical Social Worker of an applicant during the applicant's two years of post-MSW clinical social work experience. The Provisional Licensed Clinical Social Worker's (P-LCSW) clinical social work supervisor shall have an additional two years of clinical social work experience post LCSW licensure.

(3) Appropriate supervision shall be that which is provided on a regular basis throughout the applicant's two years of experience with at least one hour of supervision during every 30 hours of experience. A minimum of 100 hours of supervision is required. Individual supervision is defined as one on one, in person, supervision by an MSW who is also an LCSW where the supervisor reviews and discusses clinical social work cases and provides evaluative comments and direction to the P-LCSW. Group supervision shall mean supervision provided by an MSW who is also an LCSW in a group setting, during which the supervisor reviews and discusses clinical social work cases and provides feedback and direction to each P-LCSW in the group. A maximum of 25 hours of group supervision may be applied toward meeting the supervision requirements for the LCSW.

(b) For the Certified Social Work Manager credential:

(1) Two years of post social work degree experience shall mean 3,000 clock hours of employment for a salary while engaged in administrative social work duties including, policy and budgetary development and implementation, supervision and management, program evaluation, planning, and staff development. Such duties shall be carried out in an administrative setting where social work or other mental health services are delivered. The 3,000 hours shall be accumulated over a period of time not less than two years nor more than six years, with no more than 1500 hours accumulated in any one year. Practicum or internship experience gained as part of any educational program shall not be included.

(2) Appropriate supervision shall mean supervision in person by a social work administrator certified by the Board on at least one level who has a minimum of five years of administrative experience in a social work or mental health setting.

Appropriate supervision shall be that which is provided on a regular basis throughout the applicant's two years of administrative social work experience. A minimum of 100 hours of supervision is required. A maximum of 50 hours of group supervision may be applied toward meeting the supervision requirements for the CSWM.

History Note: Authority G. S. 90B-6; 90B-7; Temporary Adoption Eff. October 1, 1999; Eff. July 1, 2000; Amended Eff. September 1, 2005.

21 NCAC 63 .0401 CONTINUING EDUCATION REQUIREMENTS

(a) Continuing education for certification or licensure renewal is required to maintain professional knowledge and technical competency. Renewal of certification or licensure requires 40 hours of continuing education credits approved by the Board within each two year renewal cycle. However, if a certification or licensure is for less than a full two-year period, then 30 hours of continuing education credits are required. One unit of credit is equal to one contact hour. One academic course semester-hour of credit is equal to 15 clock hours. Credit for auditing an academic course shall be for actual clock hours attended during which instruction was given. The following activities are approved for continuing education:

- (1) academic social work courses taken for credit or audit;
- (2) agency-based staff development, seminars, institutes, workshops, mini courses or conferences oriented to social work practice, values, skills and knowledge;
- (3) cross-disciplinary offerings from medicine, law and the behavioral/social sciences or other disciplines, if such offerings are related to social work practice, values, skills and knowledge;
- (4) self-directed learning projects with prior approval by the Board. Approval shall be based on the applicability of the learning project to the social worker's field of specialization and shall have stated learning objectives. The maximum continuing education credit granted for such projects is 20 clock hours per renewal period. Credit shall not be granted for:
 - (A) identical programs completed within the same renewal period;
 - (B) job orientation;
 - (C) on the job training; or
 - (D) supervision and case consultation;
- (5) study groups focusing on social work practice if the following can be documented:
 - (A) study topic;
 - (B) study material;
 - (C) facilitator; and

(D) date and hours of attendance.
(b) During each renewal period all certified and licensed social workers shall engage in a minimum of four hours of continuing education focused on ethics related to social work practice and ethical decision-making.

History Note: Authority G.S. 90B-6; 90B-9; Eff. August 1, 1987; Amended Eff. September 1, 1993; Temporary Amendment Eff. October 1, 1999; Amended Eff. September 1, 2005; April 1, 2001.

21 NCAC 63 .0501 PURPOSE AND SCOPE

(a) Ethical principles affecting the practice of social work are rooted in the basic values of society and the social work profession. The principal objective of the profession of social work is to enhance the dignity and well-being of each individual who seeks its services. It does so through the use of social work theory and intervention methods including case management, advocacy, community organization, administration, and psychotherapy.
(b) The primary goal of the rules in this Section is to set forth principles to guide social workers' conduct in their profession. Violation of these Rules may be considered gross unprofessional conduct and may constitute dishonest practice or incompetence in the practice of social work. Such violations may result in disciplinary action by the Board.
(c) The Rules in this Section serve as a standard for social workers in their various professional roles, relationships and responsibilities. Social workers shall consider all the principles in the Rules in this Section that bear upon any situation in which ethical judgment is to be exercised, and shall select a course of action consistent with the Rules in this Section.
(d) Upon approval of certification or licensure, each applicant shall review the rules in this Section and return a signed statement to the Board agreeing to abide by these Rules.

History Note: Authority G.S. 90B-6; 90B-11; Eff. August 1, 1987; Amended Eff. March 1, 1994; Temporary Amendment Eff. October 1, 1999; Amended Eff. September 1, 2005; July 1, 2000.

CHAPTER 64 - BOARD OF EXAMINERS OF SPEECH AND LANGUAGE PATHOLOGISTS AND AUDIOLOGISTS

21 NCAC 64 .0215 STANDARD OF PRACTICE FOR AUDIOLOGICAL EVALUATIONS

The Board of Examiners for Speech and Language Pathologists and Audiologists interprets the words "reasonable degree of professional skill and care in the delivery of

professional services" used in G.S. 90-301(5) to require the following actions to be performed before beginning treatment:

- (1) Obtain a history of patient's hearing complaints;
- (2) Examine the patient's ear canal;
- (3) Recommend and document referral to a physician if there is any ear canal obstruction other than cerumen, or if there is a sore, discharge, or history of sudden hearing loss, dizziness or balance problem; and
- (4) Test the patient's hearing with properly calibrated equipment in an environment that meets current ANSI standards, except when performed for screening purposes.

History Note: Authority G.S. 90-304(a)(3); Eff. Pending Legislative Review.

21 NCAC 64 .0216 STANDARD OF PRACTICE FOR SPEECH AND LANGUAGE PATHOLOGISTS

(a) The Board of Examiners for Speech and Language Pathologists and Audiologists interprets the words "reasonable degree of professional skill and care in the delivery of professional services" used in G.S. 90-301(5) to require the following actions to be performed prior to commencing treatment:

- (1) Obtain a history of the patient's speech or language problem;
- (2) Evaluate the patient;
- (3) Identify the patient's problem and its possible causes;
- (4) Establish the goals of the therapy treatment;
- (5) Identify and select appropriate treatments;
- (6) Make a disclosure to the patient or custodian if the treatment being recommended is known by the provider to be experimental;

(b) The Licensee shall periodically evaluate and document the patient's progress towards the treatment goals and recommend referral to other disciplines or recommend discontinuance of therapy where there has been no documented progress.

History Note: Authority G.S. 90-304(a)(3); Eff. September 1, 2005.

21 NCAC 64 .0217 BENEFIT FROM TREATMENT DEFINED

The Board of Examiners for Speech and Language Pathologists and Audiologists interprets the words "benefit from treatment" used in G.S. 90-301A to mean make progress toward remediation of the condition being treated.

History Note: Authority G.S. 90-304(a)(3); Eff. September 1, 2005.

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>
<u>ALCOHOL AND BEVERAGE COMMISSION</u>				
Richard S Blazak, Park View Lounge v. ABC	96 ABC 0053	Gray	07/06/05	
ABC Comm. & City of Asheville v. Elijah Ulysses Jones T/A Jones Convenience Store	98 ABC 0962	Gray	07/12/05	
ABC Comm v. Rudean Robinson Harris T/A Rudean's Diner & Lounge 3	03 ABC 1214	Conner	06/28/05	
ABC Comm v. Desperado's Inc T/A Desperado's	04 ABC 1192	Wade	07/20/05	
Cameron's One Stop, Sank Cameron v. ALE Agent B Haynes, Ann H. Johnson, Permit Comm Mgr	05 ABC 0799	Elkins	07/28/05	
<u>BOARD OF LICENSING OF GEOLOGISTS</u>				
James W King, PG v Board of Licensing of Geologists	05 BOG 0149	Morrison	08/10/05	
<u>ACUTIONEERS LICENSING BOARD</u>				
Robert H. Rankin, Jr., NCAL #6727 v. Auctioneers Licensing Board	04 CFA 1497	Mann	05/13/05	
<u>COMMERCE, DEPARTMENT OF</u>				
Land-of-Sky Regional Council v. Dept of Commerce, Div of Emp. & Trning	96 COM 1921	Gray	07/05/05	
<u>CRIME VICTIMS COMPENSATION</u>				
Dwight D Hoover Sr. v. Victims Compensation Commission	04 CPS 0988	Conner	07/07/05	
Myrtle Perry v. Crime Victims Compensation Commission	04 CPS 1190	Chess	06/21/05	
Marion A Liles v Dept. of Crime Control & Public Safety, Victims Compensation Service Division	05 CPS 0150	DeLuca	07/29/05	
Cecelia Reid v DCCPS, Div of Vic Comp Svcs, Crime Vic Comp Comm	05 CPS 0220	Lassiter	08/08/05	
Rhonda Lynnette Rhodes v. Crime Victims Compensation Program	05 CPS 0484	Gray	06/23/05	
Jamaal O Staten v. Crime Victims Compensation Commission	05 CPS 0711	Elkins	07/28/05	
<u>BOARD OF ELECTIONS</u>				
Republican Governors Association & Holly Lynn Koerber v. State Board of Elections	04 BOE 2051	Morrison	06/30/05	20:02 NCR 100
<u>HEALTH AND HUMAN SERVICES</u>				
MedVisit, Inc. v. Div. of Medical Assistance (DHR)	94 DHR 0012	Gray	07/12/05	
Patsy Norris v. Department of Human Resources	94 DHR 0895	Gray	07/06/05	
Small World DC II, Trena McDaniel v DHHS, Div of Child Dev.	00 DHR 2202 ²	Gray	08/08/05	
Trena S McDaniel & Small World DC II v. DHHS, Div of Child Dev.	01 DHR 0321 ²	Gray	08/08/05	
Richard McKinley Whited v. DHHS	02 DHR 0024	Gray	08/04/05	
Jeffrey D. Cannon v. DHHS, Walter B Jones ADOACT	03 DHR 0488	Conner	06/29/05	
Aundria Shante Edwards v DHHS, Division of Facility Services	03 DHR 0806	Gray	08/10/05	
Thomas Reiter, a minor, by his mother & legal guardian, Kathryn Reiter	03 DHR 1253	Gray	06/27/05	20:03 NCR 144
Louise Li Lai Fong v. DHHS, Division of Facility Services	03 DHR 1714	Wade	06/27/05	
Lenwood E Hargrove, Wilma Hargrove v. Div. of Medical Assistance	03 DHR 1737	Conner	07/27/05	
Geana E. Anderson v. DHHS, Division of Facility Services	03 DHR 2063	Gray	06/24/05	
Mecca L Stewart v DHHS, Division of Facility Services	04 DHR 0213	Elkins	08/15/05	

CONTESTED CASE DECISIONS

Otis D. Wyche, Jr., v. DHHS, Div. of Facility Services	04 DHR 0294	Chess	05/16/05
North Brook Rest Home, Inc v. DHHS, Adult Licensure Section	04 DHR 0407	Conner	07/26/05
Priscilla Thomas d/b/a Thomas, Priscilla Small Day Care Home-ID#4605036 v. DHHS, Division of Child Development	04 DHR 0539 ¹	Mann	06/03/05
Jamie Lynn Hensley v. DHHS, Div. of Facility Services	04 DHR 0917	Wade	05/16/05
Aaron Anderson v. DHHS, Div. of Medical Assistance (DMA)	04 DHR 0929	Gray	08/10/05
Patricia A. Reece v. DHHS, Division of Facility Services	04 DHR 1062	Mann	07/27/05
Mario Flores v. DHHS, Division of Facility Services	04 DHR 1110	Mann	08/01/05
Charleese K Garrison, mother of Jasmine C Garrison v. DHHS, Division of Medical Assistance	04 DHR 1168	Gray	08/03/05
Priscilla Thomas d/b/a Thomas, Priscilla Small Day Care Home-ID#4605036 v. DHHS, Division of Child Development	04 DHR 1413 ¹	Mann	06/03/05
Wake Forest University Health Sciences (Lessor) and Huntersville Dialysis Center of Wake Forest University d/b/a Huntersville Dialysis Center (Lessee) v. DHHS, Div. of Facility Services, CON Section and Bio-Medical Applications of NC, Inc. and Total Renal Care of North Carolina, LLC	04 DHR 1406	Conner	05/18/05
Dawn Allison v. Div. of Medical Assistance	04 DHR 1444	Mann	05/27/05
Gaile Thomas v. DHHS, Division of Facility Services	04 DHR 0110	Lassiter	06/21/05
Dorothy S Coleman v DHHS	04 DHR 2247	Elkins	07/28/05
LaKenya S. Perry v Division of Child Development	05 DHR 0112	Gray	08/24/05
Aaron Anderson v DHHS, Division of Medical Assistance	05 DHR 0159	Gray	08/10/05
Keith's Kids, Inc, Keith Richardson v DHHS, Div. of Facility Services	05 DHR 0196	Wade	08/31/05
Tara Sue Clark-Grubb v. Guilford County Dept. of Social Services, Laura Blackwell, Tonya Dupree Freeman, Stacy Taylor-Greene	05 DHR 0243	Conner	06/10/05
Vicky Richardson v DHHS	05 DHR 0262	Wade	08/10/05
Teresa Sharon Pyles v. Mecklenburg Co. DSS, Kuralt Centre	05 DHR 0264	Wade	06/20/05
Belinda Darnell Hawkins v. DHHS, Div of Facility Services	05 DHR 0265	Elkins	06/09/05
LaQuasha K Massey v. DHHS, Division of Social Services	05 DHR 0294	Lassiter	07/11/05
Wade R Kearney II v. DHHS, Office of Emer Medical Services	05 DHR 0325	Lassiter	07/25/05
Cherry Bruce Kearney, Operator 7 th Heaven Day Care v. DHHS, Division of Facility Services	05 DHR 0382	Wade	06/20/05
DSS, Deloise Bryant v Halifax County Adoption Agency	05 DHR 0388	Lassiter	07/14/05
Janet Stovall v DHHS	05 DHR 0403	Chess	08/08/05
Tammy Trejo v. Office of Administrative Hearings	05 DHR 0452	Gray	06/15/05
Maria Shante Holley v DHHS, DFS	05 DHR 0461	Wade	07/18/05
Albert Ansah Amoatey v. DHHS	05 DHR 0459	Mann	07/20/05
Erdem Narter v. DHHS, Division of Facility Services	05 DHR 0463	Mann	06/16/05
Eric & Carolyn Blue v DHHS	05 DHR 0476	Chess	08/23/05
Jerry Lemar Pettus v Off. Of Emergency Medical Services	05 DHR 0496	Mann	07/19/05
Veronica M Black v. DHHS, Division of Facility Services	05 DHR 0533	Gray	08/10/05
D'Jetta D Miley for Jordana Correa v. Wake Co. Dept. of Human Services	05 DHR 0570	Lassiter	06/02/05
William Henry Lane v. DHHS, Div. of Medical Assistance	05 DHR 0571	Chess	05/31/05
Stephanie Marie Mabe v DHHS	05 DHR 0590	Elkins	08/11/05
Denise Warren v Cumberland Co. Department of Social Services	05 DHR 0630	Morrison	08/19/05
PJ's Child Care Learning Center #2 v DHHS, Div of Child Development	05 DHR 0633	Lassiter	08/10/05
Candace L Wood/ Caitlyn A Wood v. OPC Men Hlth Area Prog	05 DHR 0649	Conner	08/01/05
Candace L Wood/Waylon S Keeter v. OPC Men Hlth Area Prog	05 DHR 0650	Conner	08/01/05
Candace L Wood/Caitlyn A Wood v Alamance Caswell MHDDSA	05 DHR 0651	Conner	07/12/05
Candace L Wood/Caitlyn A Wood v Alamance Caswell MHDDSA	05 DHR 0652	Conner	07/12/05
Rose McRae v. DHHS, Division of Health Services	05 DHR 0662	Elkins	07/18/05
Walter G Dunston v. DHHS, Division of Facility Services	05 DHR 0688	Elkins	07/11/05
Pinebrook Residential Facility #1 v DHHS, DFS, Adult Care Licensure Sec.	05 DHR 0704	Conner	07/26/05
Cheryl Delk v John Umstead Hospital	05 DHR 0716	Elkins	08/11/05
Barbara Munch v. DHHS	05 DHR 0725	Morrison	07/22/05
Gwendolyn Bain v. Hoke Co Dept of Social Svcs, Ms Christin Basil	05 DHR 0749	Lassiter	07/22/05
Amy Hallisey, Pharmacist, Target Pharmacy-Lawndale, Greensboro v. DHHS Accounts Receivable, Division of Medical Assistance	05 DHR 0762	Elkins	08/11/05
Lindsey L Shumacher v DHHS, John Umstead Hospital	05 DHR 0772	Elkins	08/11/05
Amanda M Walters v. DHHS	05 DHR 0779	Elkins	07/28/05
Aralyn F Pressley v DHHS, Div. of Facility Services	05 DHR 0800	Morrison	08/17/05
Tamesha Taft v. DHHS	05 DHR 0836	Gray	08/04/05
Linda M Currie v. Medicaid	05 DHR 0854	Gray	07/07/05
Geneva Walton v DHHS, Division of Facility Services	05 DHR 0861	Chess	07/21/05
Claire Diggs v. Moore County, Program Integrity Unit	05 DHR 0915	Gray	08/10/05
Francesca L Camp v Nurse Aide I & Health Care Registry	05 DHR 0919	Lassiter	07/27/05
Benny Brown v. DHHS, Division of Facility Services	05 DHR 0949	Elkins	07/28/05
Clarissa Bailey v DHHS	05 DHR 0961	Conner	08/30/05
LaYvonne Diaz Evans v DHHS, Division of Facility Services	05 DHR 0994	Lassiter	08/16/05

A list of Child Support Decisions may be obtained by accessing the OAH Website: www.ncoah.com/decisions.

DEPARTMENT OF JUSTICE

Andrew Arnold Powell, Jr. v. Crim Just Educ & Trng Stds Comm.	01 DOJ 1771	Chess	07/19/05
Carlos Orellana v. Private Protective Services Board	04 DOJ 0813	Conner	08/01/05
David Upchurch v. Criminal Justice Education and Training Stds. Comm.	04 DOJ 1157	Lassiter	05/13/05
Phillip William Engle v Sheriffs' Education and Training Stds. Comm.	04 DOJ 1283	Mann	06/28/05
Edward Keith Royal v. Criminal Justice Education & Training Stds. Comm.	04 DOJ 2194	Gray	06/28/05
Tabitha Ann Boyland v. Sheriffs' Educ. & Training Standards Comm.	05 DOJ 0156	Elkins	07/08/05

CONTESTED CASE DECISIONS

Ralph Robert Hines, II v. Criminal Justice Educ. & Training Standards Comm.	05 DOS 0482	Elkins	08/24/05	
Teddy Lynn Warren v. Criminal Justice Education & Training Stds. Comm.	05 DOJ 0505	Conner	06/23/05	
Amanda Gayle Talbert v. Criminal Justice Educ. and Training Stds. Comm.	05 DOJ 0648	Lassiter	06/15/05	
Amanda Gale Hughes v. Sheriff's Educ. Trng Stds. Comm.	05 DOJ 0666	Wade	07/18/05	
Jeremy Westbrook v. Alarm Systems Licensing Board	05 DOJ 0693	Lassiter	07/19/05	
Robert Baxter Wilkerson III v. Private Protective Services Board	05 DOJ 1074	Bryan	08/22/05	
<u>DEPARTMENT OF STATE TREASURER</u>				
Roy Kevin Tripp v. Dept of St Treasurer, St Retirement Agency	04 DST 1422	Conner	07/27/05	
George L Brown v Dept of St. Treasurer, Retirement Systems Division	05 DST 0147	Morrison	07/22/05	
<u>ENVIRONMENT AND NATURAL RESOURCES</u>				
Webster Environmental, Inc v. DENR, Asbestos Hazard Mgmt Branch	94 EHR 0225	Gray	07/06/05	
Webster Environmental, Inc v. DENR, Asbestos Hazard Mgmt Branch	94 EHR 0774	Gray	07/06/05	
JFG, Inc, Mr. Wayne Pierce, Pres. v. Onslow Co Health Dept & DEH&NR, Division of Environmental Health	95 EHR 0110	Gray	07/06/05	
Southwinds Homeowners Association v. DEHNR, Div. of Env. Health	95 EHR 0271	Gray	07/06/05	
Sandy Mitchell/E Ward Norris v. Mecklenburg Co Hlth Dept and DEHNR	95 EHR 0306	Gray	07/06/05	
Ralph K & Carolyn Emery v. Montgomery Co Health & Env. Section	95 EHR 0317	Gray	07/06/05	
Deerfield Shores Utility Co v. Carteret Co Environmental Health Dept.	95 EHR 0354	Gray	07/05/05	
Ron Launder v. Vance Co. Health Department	95 EHR 0515	Gray	07/05/05	
Tall Pines Plantation Property Owners Assoc. Inc. v. DENR	01 EHR 1638	Gray	08/17/05	
Heater Utilities, Inc v. NCDENR, Division of Water Quality	02 EHR 0009	Gray	07/06/05	
Tera B Slaughter v DENR	02 EHR 1286	Conner	08/01/05	
John & Elizabeth Kaylor v. DENR	03 EHR 0046	Conner	06/29/05	
Federal Land & Timer Corp v. DENR	03 EHR 1718	Gray	07/28/05	
AJ Lancaster Jr v DENR	04 EHR 1151	Conner	08/08/05	20:06 NCR 389
Robert L. Grissett v. DENR	04 EHR 1237	Chess	05/16/05	
Ellen Darrigrand & Charles Darrigrand v. DENR, Div/Coastal Mgmt	04 EHR 1469	Mann	06/30/05	20:05 NCR 270
Glenda Daniel v. Halifax Co Health Dept, Env Health Division	04 EHR 1583	Conner	07/27/05	
Matthew and Kathy Johnson v. DENR	04 EHR 2163	Conner	06/01/05	
Affordable Appliance, Jack Steale v. DENR	04 EHR 2164	Conner	05/31/05	
Robert W Hudson v. Division of Marine Fisheries	05 EHR 0886	Morrison	07/05/05	
Daniel J Smith v State of NC Environmental Health	05 EHR 0925	Lassiter	08/08/05	
John C Gallop, Jane Gallop Newbern v. DENR/Div of Coastal Mgmt	05 EHR 0941	Gray	07/29/05	
<u>LOCKSMITH LICENSING BOARD</u>				
Glenn E White v Locksmith Licensing Board	04 LLB 2169	Mann	08/17/04	20:06 NCR 398
<u>OFFICE OF STATE PERSONNEL</u>				
Vicki B Tamer v. Department of Public Instruction	03 OSP 0243	Gray	08/15/05	
Eddie Ray Creech v. Department of Corrections	03 OSP 0831	Wade	05/17/05	
Kathy Sledge v. Department of Corrections	03 OSP 1092	Conner	06/27/05	
James A Ray v. UNC at Greensboro, Facility Services	04 OSP 0751	Elkins	06/28/05	
Willie Steve Tellado v Dept. of Transportation	04 OSP 0858	Wade	07/18/05	
Loretta G Hooks v. Department of Corrections	04 OSP 1266	Wade	07/11/05	
Wayne Pettit v Department of Correction	04 OSP 1458	Gray	08/04/05	
Daisy L. Smith v. Cumberland Co Mental Health Center	04 OSP 1558	Elkins	07/28/05	20:05 NCR 291
Shelli Henderson Rice v. ESC of NC	04 OSP 1574	Gray	06/27/05	
V Wayne Johnson v Department of Transportation	04 OSP 1716	Elkins	07/06/05	
Beverly R Lee v. Employment Security Commission of NC	04 OSP 1742	Conner	08/03/05	
Robert D Jones v Hendsen County Dept. of Public Health	04 OSP 2081	Gray	08/01/05	20:06 NCR 404
Regina C Gaither v. Forsyth Co Department of Social Services	05 OSP 0047	Conner	06/27/05	
Thomas Freeman, Jr. v. DHHS/Murdoch Center	05 OSP 0071	Wade	08/15/05	
Thomas A Horton v. Dept. of Crime Control and Public Safety	05 OSP 0389	Lassiter	06/02/05	
Anthony Bruce Allen v Department of Transportation	05 OSP 0418	Chess	06/09/05	
Derek H. Babson v. Department of Transportation	05 OSP 0515	Chess	05/31/05	
Mary K French Fornes v DOC Eastern Correctional Institution	05 OSP 0584	Gray	07/08/05	
James R Campbell v Forsyth Co Department of Social Services	05 OSP 0587	Elkins	08/26/05	
Gloria Woodard v. Lyndo Tippet, Secretary, NC DOT	05 OSP 0588	Lassiter	06/24/05	
Deborah Faye Murray v NW Peidmont Council of Governments	05 OSP 0802	Chess	07/13/05	
Milton W. Nobles v. DHHS/Dorothea Dix Hospital	05 OSP 0815	Gray	06/15/05	
Sandra Thomas v Department of Correction	05 OSP 0824	Wade	07/21/05	
Stacy D Bazemore v NCSU CVM-VTH	05 OSP 0874	Gray	08/01/05	
<u>SECRETARY OF STATE</u>				
Monica A Chitwood v. Dept. of Secretary of State	05 SOS 0237	Conner	06/17/05	
Janice W. Craver v. Dept. of Secretary of State	05 SOS 0286	Conner	06/06/05	
Barbara Jane Kelly v Secretary of State	05 SOS 0310	Elkins	08/22/05	
Richard C Capps v. Dept of Secretary of State	05 SOS 0560	Gray	07/14/05	
<u>UNC HOSPITALS</u>				
Amanda Mathis Miller v. UNC Hospitals	05 UNC 0247	Lassiter	06/02/05	
Darian C. Jones Ph.D v. UNC Hospitals	05 UNC 0315	Lassiter	06/02/05	
Tereasa King v. UNC Hospitals	05 UNC 0376	Lassiter	06/02/05	
Ellen Griffith v. UNC Hospitals	05 UNC 0585	Conner	07/26/05	
Dawn B & John A Gladden v. UNC Hospitals via Dept. of Revenue	05 UNC 0608	Conner	07/26/05	
Joyce Porter v UNC Hospitals	05 UNC 0623	Elkins	08/11/05	

CONTESTED CASE DECISIONS

Martin T Myers v UNC Hospitals	05 UNC 0632	Elkins	08/11/05
Bettie Brame v UNC Hospitals	05 UNC 0638	Conner	08/01/05
Joyce Daugherty v. UNC Hospitals	05 UNC 0663	Elkins	08/11/05
Margarida Goulart v UNC Hospitals	05 UNC 0683	Conner	07/26/05
Tashuia Williams v UNC Hospitals	05 UNC 0684	Conner	07/26/05
De'Juana Middleton v UNC Chapel Hill Hospital	05 UNC 0701	Conner	07/26/05
Dawn R Dickerson v UNC Hospitals	05 UNC 1028	Elkins	08/11/05

1 – Combined Cases
2 – Combined Cases

STATE OF NORTH CAROLINA

COUNTY OF NASH

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
04 EHR 1151

A. J. LANCASTER, JR.)
)
 Petitioner,)
)
 v.)
)
 N.C. DEPARTMENT OF ENVIRONMENT AND)
 NATURAL RESOURCES)
)
)
 Respondent.)

DECISION

The above entitled matter was heard before the Honorable James L. Conner, II, Administrative Law Judge, on June 16, 2005 in Nashville, North Carolina

APPEARANCES

The Petitioner, A. J. Lancaster, Jr., was represented by Lars P. Simonsen of Pritchett & Burch, PLLC.

The Respondent, North Carolina Department of Environment and Natural Resources, Division of Waste Management, was represented by Kelly L. Sandling, Assistant Attorney General.

ISSUE

Whether Petitioner has met his burden of proof by establishing that Respondent acted erroneously or otherwise violated N.C. Gen. Stat. § 150B-23 when Respondent assessed Petitioner a civil penalty and investigative costs in the total amount of \$15,562.38 for violation of 15A NCAC 2L .0115(f) for failure to submit a Comprehensive Site Assessment (CSA) report?

TESTIFYING WITNESSES

For Petitioner:

1. A. J. Lancaster, Jr.

For Respondent:

1. Sean Boyles
2. Keith Edwards
3. Rob Krebs

EXHIBITS RECEIVED INTO EVIDENCE

For Respondent:

1. August 30, 1989 Environmental Science Report
2. December 27, 1990 Petroleum Underground Storage Tank Annual Fee
3. January 10, 1990 Petroleum Underground Storage Tank Annual Fee
4. February 15, 1991 Groundwater Sampling Lab Results
5. February 15, 1991 Pollution Incident/UST Leak Reporting Form
6. January 28, 1992 Petroleum Underground Storage Tank Annual Fee

7. December 28, 1993 Petroleum Underground Storage Tank Annual Fee
8. January 19, 1994 Site Investigation Report for Permanent Closure
9. January 27, 1994 Underground Storage Tank Closure Report
10. July 5, 1994 Notice of Regulatory Requirements
11. April 10, 1996 Record of Communication
12. May 17, 1996 Notice of Violation
13. June 24, 1996 Comprehensive Site Assessment
14. 15A NCAC 2L .0103(e)
15. November 20, 1996 Recommendation for Enforcement Action
16. December 2, 1996 Letter from Petitioner
17. January 22, 1997 Incomplete Comprehensive Site Assessment Letter
18. April 4, 1997 Groundwater Sample Survey
19. May 6, 1997 Supply Well Survey
20. May 8, 1997 Supply Well Survey for James Pendergrass's Residence
21. November 10, 1997 Recommendation for Enforcement Action
22. November 10, 1997 Notice of Violation
23. February 20, 1998 Notice of Violation
24. August 13, 1998 Final Report of Analyses
25. August 22, 2003 Notice of Violation
26. March 23, 2004 Recommendation for Enforcement Action
27. April 28, 2004 Enforcement Case Cover Memo, Checklist & Assessment Factors
28. Exhibit Not Introduced Into Evidence
29. Exhibit Not Introduced Into Evidence
30. June 21, 2004 Incident Penalty Matrix
31. June 21, 2004 Assessment of Civil Penalty and Return Receipt
32. September 29, 2004 Risk, Rank and Abatement Form
33. January 18, 2005 UST RRA Scoring
34. July 11, 1991 Last Will and Testament of AJ Lancaster
35. January 22, 1993 Receipt and Release

36. January 22, 1993 Receipt and Release
37. January 22, 1993 Receipt and Release
38. Exhibit Not Introduced Into Evidence
39. Exhibit Not Introduced Into Evidence
40. Exhibit Not Introduced Into Evidence
41. March 5, 1992 90 Day Inventory
42. August 23, 1993 Annual Account
43. August 16, 1994 Final Account
44. Exhibit Not Introduced Into Evidence

For Petitioner:

- 1a. July 11, 1991 Last Will and Testament of AJ Lancaster
1. December 16, 1991 Letters Testamentary
2. December 16, 1991 Order Authorizing Issuance of Letters
3. January 10, 1992 Affidavit of Publication
4. August 16, 1994 Affidavit of Notice to Creditors
5. January 14, 1994 IRS Estate Tax Closing Letter
6. October 6, 1997 Trust Fund Application
7. March 3, 1998 Response to Request for Eligibility Determination to Trust Fund
8. Exhibit Not Introduced Into Evidence
9. July 27, 2000 Recommended Decision
10. March 6, 2001 Letter from Francis W. Crawley
11. June 4, 2002 Settlement Agreement
12. Exhibit Not Introduced Into Evidence
13. Exhibit Not Introduced Into Evidence
14. Exhibit Not Introduced Into Evidence
15. Exhibit Not Introduced Into Evidence
16. Exhibit Not Introduced Into Evidence
17. February 15, 1991 Confirmation of Release Letter
18. April 29, 1991 Memo to Lancaster File

19. Exhibit Not Introduced Into Evidence
20. October 17, 1997 Memorandum - Eligibility Determination for State Trust Fund Coverage
21. Exhibit Not Introduced Into Evidence
22. Exhibit Not Introduced Into Evidence
23. Exhibit Not Introduced Into Evidence
24. Exhibit Not Introduced Into Evidence
25. Exhibit Not Introduced Into Evidence
26. Exhibit Not Introduced Into Evidence
27. March 31, 2000 Principles of Enforcement
28. North Carolina Department of Environment and Natural Resources -- Enforcement Assessment 2000

Based upon careful consideration of the applicable law, testimony and evidence received during the contested case hearing as well as the entire record of this proceeding, the undersigned makes the following:

FINDINGS OF FACT

The Respondent presented its case first to the Honorable James L. Conner, II. The first witness was Sean Boyles. Mr. Boyles testified to the following:

1. Petitioner was the owner of five underground storage tank systems (hereafter "UST's") formerly located at A. J. Lancaster Store, Intersection of SR 1321 and SR 1324, Castalia, Nash County, North Carolina 27816 (hereafter the "site"). (Resp. Exhs. 6-8 and 13)

2. In September 1989, the Nash County Division of Health Services sampled an on-site water supply well located at the site. The site was owned at that time by Petitioner's father, AJ Lancaster, Sr. Mr. Lancaster was informed in September 1989 that his water contained high levels of benzene and that this water was highly contaminated and should not be used for drinking, cooking or bathing/showering. A lab report attached to the letter indicated that the benzene level in the sample from the water supply well located on-site was 2,644.1 ug/l and the Methyl Tert-Butyl Ether ("MTBE") level was 51.5 ug/l. (Resp. Ex. 1)

3. At the end of January 1991, the water supply well located at the site was tested for a second time. The lab results indicated that the level of MTBE was 370 ug/l. (Resp. Ex. 4)

4. Based on these sampling events, on February 15, 1991, the Groundwater Section of the Division of Environmental Management was informed of the contamination located in the water supply well. At this time, the Groundwater Section prepared a Pollution Incident/UST Leak Reporting Form and opened an incident file to track the discovered release of a petroleum product. (Resp. Ex. 5)

5. Petitioner's father, A. J. Lancaster, Sr. died on November 27, 1991.

6. Mr. Lancaster, Sr. died with a will and pursuant to the provisions of the will, left all of his real property to the Petitioner in fee simple subject to the imposition of liens. Mr. Lancaster, Sr. imposed upon the real property upon which this site is located liens in favor of his three daughters in the amount of one hundred thousand dollars (\$100,000) each. The will was signed, dated and executed on July 11, 1991. (Resp. Ex. 34) Petitioner was appointed as Executor under his father's will. (T p. 222)

7. From January 11, 1993 through December 28, 1993, Petitioner signed copies of Petroleum UST Tank Annual Fee Forms as "owner" of the USTs at the site. (Resp. Exhs. 6-7)

8. Also, during this same time period, the real property subject to the liens under Lancaster, Sr.'s will was transferred to Petitioner by virtue of a Receipt and Release dated January 22, 1993. (Resp. Exhs. 35-37)

9. On or about December 30, 1993, the five USTs at the site were removed. A tank closure report was filed with the Raleigh Regional Office of the Groundwater Section on February 1, 1994. (Resp. Ex. 8) The tank closure report confirmed that four of the five tanks were leaking. The four USTs that were leaking were the 3,000 gallon tank containing gasoline, the 4,000 gallon tank containing gasoline, the 6,000 gallon tank containing gasoline and the 6,000 gallon tank containing diesel fuel. The closure report indicated contamination as high as 46,000 parts per million (ppm) of total petroleum hydrocarbons (TPH) in the soil beneath tank number 2. The sample taken from tank number 2 was analyzed by EPA Method 5030 for gasoline. (*Id.*) EPA Method 5030 analyzes “total petroleum hydrocarbon” or TPH. The North Carolina Division of Environmental Management’s Regulatory Limit for gasoline analyzed by EPA Method 5030 for TPH is 10.0 ppm. The UST Closure Report stated that “an SSE was performed for the subject site. Final Clean-up Levels have been projected to be 60 ppm for gasoline TPH (5030) and at 240 ppm for diesel TPH (3550).” Petitioner’s consultant also recommended in the report that “based on the analytical results and the proximity of wells, a CSA should be undertaken to determine the extent of contamination present.” Petitioner signed this closure report that was submitted to the State as “owner.” (*Id.*)

10. Sean Boyles, hydrogeologist, testified that a Site Investigation Report for Permanent Closure or Change-in-Service of UST indicated that for at least three of the tanks there was a notable odor or visible soil contamination when the USTs were removed from the site. (Resp. Ex. 9) Mr. Boyles also testified that Petitioner signed the Site Investigation Report form as “owner.” (T p. 39)

11. On July 5, 1994 Respondent issued a Notice of Regulatory Requirements (NORR) directing Petitioner to do a site check to determine if there is any free product at the site and to submit a CSA report. The NORR was received by Petitioner by certified mail on July 13, 1994. (Resp. Ex. 10)

12. On April 10, 1996, Petitioner contacted Mr. Boyles and inquired as to what actions were required of him for this site. Mr. Boyles testified pursuant to a Record of Communication that he had with the Petitioner that he informed Petitioner that a CSA was required to be submitted pursuant to the closure report indicating soil contamination. (Resp. Ex. 11)

13. On May 17, 1996, Respondent issued a Notice of Violation (NOV) directing Petitioner to submit a CSA by June 17, 1996. The NOV was received by Petitioner by certified mail on June 14, 1996. (Resp. Ex. 12) The NOV stated that “[o]n February 1, 1994 this office received laboratory data in a closure report which confirmed petroleum hydrocarbon contamination of up to 46,000 parts per million in the soil beneath a UST you owned and operated....In accordance with 15A NCAC 2N .0706 and 15A NCAC 2L .0106, you must immediately submit a CSA.”

14. On June 25, 1996, Petitioner submitted a handwritten CSA to the Department. The report states that Petitioner was the owner of the site from December 1991 through the present. (Resp. Ex. 13) Mr. Boyles testified that the CSA submitted by the Petitioner did not meet the requirements of 15A NCAC 2L .0115(f). Mr. Boyles stated that the CSA report was deficient in that it did not have any information about the groundwater, the depth of the groundwater or the groundwater flow direction. *Id.* Moreover, pursuant to 15A NCAC 2L .0103(e), which states that “[w]ork that is within the scope of the practice of geology and engineering, performed pursuant to the requirements of this Subchapter, which involves site assessment, the interpretation of subsurface geologic conditions, preparation of conceptual corrective action plans or any work requiring detailed technical knowledge of site conditions which is submitted to the Director, shall be performed by persons, firms or professional corporations who are duly licensed to offer geological or engineering services by the appropriate occupational licensing board.” (Resp. Ex. 14) Mr. Boyles stated that this rule covers CSA reports and that to his knowledge, Petitioner was not a licensed geologist or professional engineer. (T pp. 45-47)

15. On November 20, 1996, Respondent issued a Recommendation for Enforcement Action directing Petitioner to submit the complete CSA report. The Recommendation for Enforcement Action was received by Petitioner by certified mail on December 2, 1996. (Resp. Ex. 15)

16. On December 2, 1996, Petitioner mailed a letter to the Department requesting that the Department provide him with a detailed description of requirements for a CSA and how the CSA he submitted to the Department was incomplete. (Resp. Ex. 16)

17. On January 22, 1997, the Department sent Petitioner an Incomplete Comprehensive Site Assessment letter detailing how the CSA report Petitioner had submitted on June 24, 1996 was incomplete. The letter was received by Petitioner by certified mail on February 3, 1997. (Resp. Ex. 17)

18. Mr. Boyles testified that in April and May of 1997, respectively, monitoring and supply wells located at the site indicated that groundwater was contaminated with petroleum above state groundwater quality standards. (Resp. Exhs. 18-19) Mr. Boyles testified that a supply well is a well that is used to supply drinking water for people. (T p. 54)

19. On November 10, 1997, Respondent issued a NOV directing Petitioner to submit a complete CSA to the Department. The NOV was received by Petitioner by certified mail on November 17, 1997. (Resp. Ex. 22)

20. On February 20, 1998, Respondent issued another NOV directing Petitioner to submit a complete CSA to the Department. It also notified Petitioner of the new risk-based rules that were going into effect and to inform Petitioner what the risk ranking was for his site. The letter informed Petitioner that his site was a high-risk site and that the Petitioner would still have to submit a CSA to the Department. (Resp. Ex. 23) (T pp. 62-63)

21. On cross-examination, Mr. Boyles stated that on February 15, 1991, the Department mailed Petitioner's father a letter confirming a release at the site. The letter informed Petitioner's father that results of the sampling of his well indicated that MTBE was found in the water and directed him to determine if the USTs at the site were the source of contamination. (Pet. Ex. 17) (T pp. 90-91)

22. Mr. Boyles also testified on cross-examination concerning a memo in reference to the Lancaster file. (Pet. Ex. 18) The memo stated that Mr. Lancaster, Sr. called someone from the Department on April 29, 1991 requesting that his well be sampled. (T p. 92)

23. Mr. Boyles also testified that according to the file, no other letters from the Department were sent to the Petitioner's father concerning the discovery of contamination on site other than Petitioner's Ex. 17 and that no enforcement action was taken by the Department against Petitioner's father relating to the discovery of contamination prior to his death on November 27, 1991. (T pp. 94-95)

24. Keith Edwards was the second witness for the Respondent. Mr. Edwards testified that on August 22, 2003, the Respondent issued a NOV directing the Petitioner to submit a CSA report. The NOV was received by Petitioner by certified mail on August 30, 2003. (Resp. Ex. 25) (T p. 142)

25. On March 23, 2004, Respondent issued a Recommendation for Enforcement Action for failure to submit a CSA report in accordance with 15A NCAC 2L .0115(f). The Recommendation for Enforcement Action was received by Petitioner by certified mail on March 31, 2004. (Resp. Ex. 26)

26. On June 21, 2004, Respondent assessed a civil penalty against Petitioner in the amount of \$14,950.00 for violation of 15A NCAC 2L .0115(f) for failing to submit a Comprehensive Site Assessment report from August 30, 2003 through at least June 16, 2004. Respondent also assessed investigative costs in the amount of \$612.38 for a total civil penalty of \$15,562.38.

27. When assessing the civil penalty, Division of Waste Management (DWM) UST Corrective Action Branch Head Robert B. Krebs considered the facts mandated by N.C. Gen. Stat. § 143B-282.1. (Resp. Exhs. 30-31)

28. Mr. Krebs testified as to the ranking for Petitioner's site. The ranking comes from the underground storage tank database, that is compiled from all the regional data and lists out the highest ranking sites in the state for both commercial and non-commercial sites. The Petitioner's site has a point score of 1370 and appears in the database as the tenth highest ranked site in the state. (Resp. Ex. 33) (T pp. 158-59)

29. On cross-examination, Mr. Krebs testified that the purpose of enforcement is to try to achieve compliance with underground storage tank regulations and that it is a last resort in trying to achieve compliance. (T p. 181) He also agreed that the Department has published documents which guide the employees on how to carry out enforcement. (Pet. Ex. 27) (T p.183)

30. Mr. Krebs testified that the "no" answer circled on the Pollution Incident UST Leak Reporting Form prepared in February 1991 as to whether the USTs located on the site were "in use" was not defined as whether the store "is operating and selling gas." He stated that "in use" for purposes of UST ownership is whether the UST contains a regulatory substance regardless of whether the store is operating or not. (Resp. Ex. 5) (T pp. 200-02)

31. The witness in the Petitioner's presentation of the evidence was the Petitioner, A. J.

Lancaster, Jr. The Petitioner testified that after his father died on November 27, 1991, he was appointed as the Executor of the estate on December 16, 1991 under the Last Will and Testament of A. J. Lancaster, Sr. (Pet. Ex. 1a) (T p. 222-23)

32. Prior to Petitioner's father's death, his father owned and operated the Lancaster Store, which included the USTs which caused the release. (T p. 224) Petitioner testified that he never operated the store himself and never owned or operated the USTs which were formerly located at the site. (T p. 225-27) Petitioner denied that his father ever told him about the 1989 and 1991 releases which occurred at this site. (T p. 228)

33. Petitioner stated that at the time of his father's death in 1991, Peggy Pridgen and her husband were operating the store. Petitioner stated that Ms. Pridgen and her husband continued operating the store until the USTs were removed in 1993. (T pp. 235-36)

34. Petitioner testified that he had Power of Attorney for his father from about June or July of 1990 or 1991 until he died on November 27, 1991. (T p. 236)

35. Petitioner testified that in early 1993, he received a letter from the Department detailing upgrading requirements for the USTs at the site. Petitioner inquired about the price for upgrading and because of the price, declined to do the upgrades and instead decided to close the tanks. (T pp. 237-38) Petitioner testified that when he closed the tanks, he was acting in his capacity as executor of the estate. (T p. 238) Petitioner hired a consulting firm, Environmental Aspects, Inc., to do the closure for the USTs at the site. (T p. 239)

36. Petitioner testified that he had problems with the consulting firm during the closure of the tanks. He testified that after the consultant dug up the tanks, the dirt was put back in the hole. The Department sent letters to both the Petitioner and consultant asking that the dirt be removed. The soil that was put in the tank holes was ultimately removed and stockpiled on the Petitioner's farm. (T pp. 240-41)

37. Petitioner stated that he did not learn about the 1989 and 1991 discoveries of contamination at his father's store until years after his father died and after the USTs were closed at the site. (T pp. 249-50)

38. Petitioner testified that his father's estate did not close until August 16, 1994 and that any actions he took with respect to the site were committed in his capacity as Executor up until the estate closed in 1994. (T pp. 250-254) Petitioner admitted, however, on cross-examination that he signed the Petroleum Underground Storage Tank Annual Fee as "owner" on December 11, 1993, prior to the estate's closing on August 16, 1994. (T pp. 254-55) He stated that he did not know why he signed the Petroleum Underground Storage Tank Annual Fee form as "owner" on December 11, 1993, when just eleven months previously on January 28, 1992, he had signed the Petroleum Underground Storage Tank Annual Fee form as "executor." (Resp. Ex. 6) (T p. 256) Petitioner also did not deny that he signed the UST Closure Report as "owner" on February 1, 1994. (Resp. Ex. 8) (T p. 257)

39. Petitioner admitted that each of his three sisters signed a "Receipt and Release" on January 22, 1993 which discharged liens imposed on the property on which this site was located. (Resp. Exhs. 35-37)

40. Petitioner stated that he paid tank fees for the tanks located on the site out of the estate in 1992 for the year 1993. Petitioner was referred to Respondent's Exhibit 42, the Annual Account, and asked to locate where on the disbursements and cash receipts list that the estate paid out its funds any of the tank fees that were paid on tanks located at the site. The annual accounting was from the time period of March 5, 1992 to June 30, 1993. Petitioner could not locate on the Annual Account where the estate had paid the tank fees. (Resp. Ex. 42) (T pp. 261-62) Petitioner was then referred to the Final Accounting for Petitioner's father's estate which covered the period from June 10, 1993 until August 10, 1994. (Resp. Ex. 43) When asked to show where on the disbursements schedule that the estate had paid for the UST closure which occurred on February 1994, Petitioner was unable to do so. (T p. 264-66) Petitioner stated on cross-examination that he had an agreement with his sisters that the site on which the tanks were located was still part of the estate. (T p. 264-65) When asked why the tank closure was not listed as a disbursement on the final accounting, Petitioner stated that he did not pay for the tank closure out of the checking account for the estate and that instead, he paid for it out of his personal account. (T pp. 265-66)

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, I make the following Conclusions of Law:

1. This matter is properly before the Office of Administrative Hearings and the Office

of Administrative Hearings has jurisdiction of the subject matter and the parties herein.

2. All parties have been correctly designated, and there is no question as to misjoinder or nonjoinder.

3. The burden of proof is upon the Petitioner to show that the Respondent either acted erroneously or otherwise violated N.C. Gen. Stat. § 150B-23 when Respondent assessed a civil penalty against Petitioner for failure to submit a Comprehensive Site Assessment report in violation of 15A NCAC 2L .0115(f).

4. Petitioner is a “person” within the meaning of N.C. Gen. Stat. § 143-215.6A pursuant to N.C. Gen. Stat. § 143-212(4).

5. Respondent is a State agency established pursuant to N.C. Gen. Stat. § 143B-275 *et seq.* and vested with the statutory authority to enforce the State’s environmental pollution laws, including laws enacted to regulate underground storage tank systems and to protect the groundwater quality of the State.

6. The UST rules at 15A NCAC 2N and 2L have been adopted by the Environmental Management Commission pursuant to N.C. Gen. Stat. § 143-215.3(a)(15).

7. Pursuant to N.C. Gen. Stat. § 143-215.94A(9) and 15A NCAC 2N .0203 as incorporating 40 CFR § 280.12, owner means any person who owns a UST system for storage, use or dispensing of regulating substances.

8. Respondent has the discretion and authority to assess a civil penalty against Petitioner in this matter pursuant to N.C. Gen. Stat. § 143-215.6A, which provides (as of the date of violation and assessment) that a civil penalty of not more than ten thousand dollars (\$10,000) per violation may be assessed against any person who fails to act in accordance with the applicable law and regulations. Each day that a violation continues may be considered a separate violation.

9. Respondent has the authority to assess enforcement costs against Petitioner in this matter pursuant to N.C. Gen. Stat. § 143-215.3(a)(9) and N.C. Gen. Stat. § 143B-282.1(b)(8).

10. Pursuant to N.C. Gen. Stat. § 28A-15-2(b), the title to real property of a decedent devised under a valid probated will becomes vested in the devisees and shall relate back to the decedent’s death, subject to the provisions of G.S. 31-39.

11. The real property, which included the tanks associated with this site, vested in the Petitioner as of December 16, 1991, the date of probate of the Petitioner’s father’s will.

12. Because Petitioner is an owner within the meaning of the North Carolina UST statutes and regulations for UST(s) located at the site, Petitioner must comply with, among other laws and regulations, the Comprehensive Site Assessment report requirements of 15A NCAC 2L .0115(f).

13. The Petitioner violated 15A NCAC 2L .0115(f) by failing to submit a Comprehensive Site Assessment report from August 30, 2003 through at least June 16, 2004 in accordance with the procedures and requirements of the cited rule.

14. Respondent has provided sufficient evidence of contamination at the site and Petitioner is under a legal duty to complete a CSA since he was the owner of the USTs at the site.

15. Petitioner would be absolved of liability for contamination occurring at the site prior to 1991 under the innocent landowner exception pursuant to 15A NCAC 2L .0101(b) since evidence presented at trial by Petitioner indicated he had no knowledge of releases occurring in 1989 and 1991.

16. Petitioner’s liability as an owner of the USTs under 15A NCAC 2N .0203 exists since the tanks were in operation when his ownership began in 1991 and continued in operation until the tanks were removed in 1993 and the tanks held a regulated substance.

17. In determining the amount of the civil penalty, Respondent properly considered the factors set forth in N.C. Gen. Stat. § 143B-282.1 as required by N.C. Gen. Stat. § 143-215.6A.

18. The assessment of civil penalties was unnecessarily harsh, given that Mr. Lancaster's claim of being an innocent landowner had some merit, that he did make efforts to comply, and that he never operated the USTs. The Incident Penalty Matrix (R. Exh. 30) should be modified to show: \$3001 for degree and extent of harm (instead of \$9000); \$750 for cost to rectify harm (no change); \$1000 for willfulness (instead of \$2000); \$1000 for violation history (instead of \$2000); and \$1200 for duration and gravity of the violation (no change). This yields a total penalty of \$6951.

19. In assessing this civil penalty, Respondent did not otherwise act or exercise its discretion erroneously or otherwise violate N.C. Gen. Stat. § 150B-23.

DECISION

20. Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby recommended that the Respondent's civil penalty assessment as set forth in its letter dated June 17, 2004, be upheld as the final agency decision in this contested case, except that the \$14,950.00 civil penalty assessed by the Department, including \$612.38 for investigative costs, for a total penalty of \$15,562.38 is reduced to \$6,951.00 for the civil penalty, and \$612.38 in investigative costs, for a total reduced civil penalty of \$7,563.38.

ORDER

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, Post Office Drawer 27447, Raleigh, North Carolina, 27611-7447, in accordance with N.C. Gen. Stat. § 150B-36(b).

NOTICE

The North Carolina Environmental Management Commission will make the final decision in this contested case.

The Commission is required to give each party an opportunity to file exceptions to the decision and to present written arguments to those in the Commission who will make the final decision. N.C. Gen. Stat. § 150-36(a). The Commission is required by N.C. Gen. Stat. § 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.

In accordance with N.C. Gen. Stat. § 150B-36 the Commission shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence. For each finding of fact not adopted by the Commission, the Commission shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the Commission in not adopting the finding of fact. For each new finding of fact made by the Commission that is not contained in the Administrative Law Judge's decision, the Commission shall set forth separately and in detail the evidence in the record relied upon by the Commission in making the finding of fact.

This the 8th day of August 2005.

James L. Conner, II
Administrative Law Judge

STATE OF NORTH CAROLINA

COUNTY OF CARTERET

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
04 LLB 2169

GLENN E. WHITE)
Petitioner,)
)
v.)
)
NORTH CAROLINA LOCKSMITH)
LICENSING BOARD)
Respondent.)

**PROPOSAL FOR
DECISION**

This contested case was heard before Julian Mann, III, Chief Administrative Law Judge, on the June 20, 2005 in the Craven County Courthouse, New Bern, North Carolina.

APPEARANCES

Petitioner: Glenn E. White, pro se
601 Ferry Road
Havelock, North Carolina 28532
(Steven E. Lacy, Attorney at Law
New Bern, N.C. – withdrawn as Counsel for
Petitioner)

Respondent: P. Bly Hall
Associate Attorney General
NC Department of Justice
9001 Mail Service Center
Raleigh, North Carolina 27699-9001

STIPULATIONS

Stipulations as found in the Order on Final Pre-Trial Conference were accepted and filed by the undersigned at the beginning of the contested case hearing. Part of the stipulations contained therein are expressly set out in the contested case decision.

ISSUE

Should Petitioner’s application for licensure as a locksmith be denied due to Petitioner’s conviction for Misdemeanor Conspiracy to Sell Marijuana on February 19, 2003.

EXHIBITS:

For Petitioner: None
For Respondent: Exhibits Nos. 1, 2, 3, 4, 5 & 6

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

FINDINGS OF FACT

1. Respondent is an occupational licensing board created by Chapter 74F of the General Statutes (specifically by N.C. Gen. Stat. § 74F-5), which is empowered to administer and enforce the provisions of the Chapter 74F, to adopt rules to carry out the provisions of that Chapter, to determine the qualifications and fitness of applicants for licensure, and to issue or deny licenses to perform locksmith services in this State (N.C. Gen. Stat. § 74F-6). (Stip 3. A)
2. Petitioner Glenn E. White is a resident of Havelock, North Carolina. (Stip. 3. B)
3. Petitioner applied to be licensed as a locksmith by application dated November 14, 2003, under a “grandfather clause” (S.L.2001-369, as amended by S.L.2002-63) that exempts any person from the examination requirement of N.C. Gen. Stat. § 74F-7 who was actively engaged as a locksmith for at least two consecutive years before January 1, 2003, and who applies for a license by January 1, 2004. (Stip 3.C)
4. Petitioner’s application reflects that he is over 18 years of age and that he was actively engaged as a locksmith for more than two consecutive years before January 1, 2003. (Stip. 3.D)
5. Petitioner has paid the required license fee. (Stip 3. E)
6. On or about September 20, 2002, Petitioner was arrested and charged with felonious conspiracy to commit the felony of possession with intent to sell and deliver marijuana. (Stip 3.F)
7. On or about February 19, 2003, Petitioner pled guilty to misdemeanor conspiracy. (Stip 3.G)
8. Petitioner received a sentence of 30 days that was suspended, and Petitioner was placed on probation for 24 months. (Stip. 3.H)
9. Petitioner’s application was preliminarily denied by the Board’s Standards Committee due to Petitioner’s conviction for misdemeanor conspiracy to commit the felony of possession with intent to sell and delivery marijuana. (Stip. 3. I)
10. Petitioner was informed of the Standards Committee’s determination and of Petitioner’s right to request a hearing by letter to Petitioner from Laura Busse, Standards Committee Chair, dated June 16, 2004. (Stip 3. J)
11. Petitioner timely requested a hearing. (Stip. 3. K)
12. Anna Bridgers is the Associate Director of the Respondent Board. Ms. Bridgers testified to the existence of the Standards Committee of the Respondent Board. When an applicant for licensure applies and there is an indication on the application of a criminal charge, the Standards Committee reviews the file. A criminal background check, which has been ordered by the Board, is also reviewed. Four members of the Board constitute the Standards Committee. After making this review, the Committee decides whether the crime is of a nature to deny license or is of a nature which would not interfere with licensure.
13. The Respondent Board followed the above procedures in the Petitioner’s case before the Standards Committee. After the Standards Committee made its determination for denial, Respondent through Laura Beusse, Chair of the Standards Committee, issued a letter to the Petitioner dated June 16, 2004. This letter is quoted in full below.

Dear Mr. White:

After careful review of your application and criminal history report for Locksmith’s License, the NCLLB Standards Committee regrets that, in accordance with Rule No. 21 NCAC 29 .0402, we cannot issue you a license at this time. A copy of the rule is enclosed for your review.

You are entitled to a hearing to contest this rejection. You must notify the Board of your intention to contest within thirty (30) days from the date of this notice.

Sincerely,
(signed) Laura Busse
Chair, Standards Committee (Resp. Exh. #5)

14. The Petitioner by way of correspondence from his attorney requested a hearing concerning the denial. (Resp. Exh. #6)

15. Greg Wright has practiced locksmithing for over 20 years and is a member of the Respondent Board and its Standards Committee. Mr. Wright was a member of the Standards Committee at the time of review of the Petitioner's application.

16. A locksmith must be found to be of good moral character because of the nature of locksmithing because locksmiths have access to locked residences, automobiles and commercial establishments. According to the testimony of Mr. Wright, charges involving drugs would not have any more weight than other criminal charges or convictions.

17. Donna Louise Fuller is a licensed locksmith in Havelock, North Carolina. Mrs. Fuller has known the Petitioner for approximately 12 years. Petitioner was first employed by Mrs. Fuller and her husband as an apprentice under a business entitled, "Coastal Locks." Petitioner remained in their employment for approximately four years. Petitioner then left employment with Mrs. Fuller and her husband and moved to Atlanta, Georgia to continue his work as a locksmith. Petitioner returned from Atlanta and at some point was re-employed by Mrs. Fuller and her husband. For as long as Petitioner was in their employment he was considered by Mrs. Fuller as conducting himself professionally. Mrs. Fuller was aware of the criminal charges against the Petitioner before he returned from Atlanta. Mrs. Fuller believed that in spite of the fact that Petitioner, in her opinion, had done something wrong, he would never compromise a customer. Mrs. Fuller described the Petitioner's character as good, and she trusts him. Mrs. Fuller indicated that she would hire the Petitioner again.

18. Jerry Lee Chance testified on behalf of the Petitioner. Mr. Chance operates a locksmith business by the name of Chance Locksmithing in Maysville, North Carolina. Mr. Chance has known the Petitioner for approximately four years. Mr. Chance consulted with the Petitioner on high security automotive problems, because of the Petitioner's training and experience in that specialty area. Mr. Chance described the Petitioner as a good person and always willing to help. The Petitioner was knowledgeable and trustworthy. The Petitioner had expertise in BMW and Mercedes security. Mr. Chance did not handle high security automobile issues because it required different kinds and types of equipment. Mr. Chance believed that Petitioner's nature of "bending over backwards" to help people could have contributed to the conduct that led him into trouble with the law. Mr. Chance also testified that the Petitioner did not have the financial means to exonerate himself in the criminal law system.

19. The Petitioner has been practicing locksmithing in excess of ten years. He tries to treat his customers well and considers himself an honest person. Petitioner supports himself and his family through his occupation as a locksmith. The Petitioner learned the high security locksmith specialization while working as a locksmith in Atlanta, Georgia. The Petitioner returned from Atlanta to work for the ABC Locksmith. He eventually intended to take over this business after the principal retired, but this did not work out, and he left this employment. He contracted his services thereafter with Coastal Locks and others, including A-1 Locksmith in New Bern. Petitioner is no longer in the employment of A-1 Locksmith because there was not enough work to support three locksmiths. Presently, Petitioner is subbing out his services as needed in the region, specializing in automotive security but will also do commercial and residential locksmithing as well. At the time of the criminal charges in 2002, Petitioner was working for ABC Lock and Key. Petitioner did not leave ABC Lock and Key because of the charges. The principal did not have any problem with Petitioner remaining in his employment while these charges were pending.

20. Petitioner is currently paying child support in the approximate amount of \$427.00 per month and has been previously in arrearages in the payment of child support. Presently, there are no pending arrearages in the payment of child support.

21. Petitioner presently resides in Havelock, North Carolina. Petitioner has resided at his current address for approximately two years.

22. Petitioner has achieved a degree of specialization in automotive security and has lectured for the North Carolina Locksmith Association. Petitioner has also been invited to lecture at upcoming events for different locksmith associations in Florida and in Texas. Petitioner also has been invited to lecture on his specialty by Lockmasters, a national organization.

23. In rebuttal, Mr. Wright testified to the Petitioner's appearance before the Standards Committee and indicated "that things did not add up." When asked specifically to specify what "did not add up," Mr. Wright was not able to identify anything specifically in the record. Although, Mr. Wright indicated there was some question in his mind about Petitioner's truthfulness before the Standards Committee, he, again, was not able to identify anything specifically for the record.

Based upon the foregoing Stipulations and Findings of Fact, the undersigned makes the following

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction of this contested case pursuant to Chapters 74F and 150B, Article 3A, of the North Carolina General Statutes.

2. The burden of proof in this contested case was placed upon the Respondent Board.

3. Petitioner applied for licensure and paid all of the application fees to be grandfathered as a locksmith pursuant to Session Laws 2001-367 and as amended in 2002-63. Respondent conceded that the Petitioner, except for the pending allegations, was eligible for licensure.

4. The Respondent Board is subject to the provisions of Article 3A of the North Carolina Administrative Code, Chapter 150B of the North Carolina General Statutes. The requirements of 150B-38(b)(3) as to Notice was not given by the Respondent. No Notice of Hearing was issued as required under G.S.150B-38 and no official notice of allegations were given in the pleading required by G.S. 150B-38 to the Petitioner. This defect was conceded by Respondent but the Petitioner elected to proceed with the hearing notwithstanding this non-compliance. Petitioner seemed to be aware of the general allegations against him. Placing the burden of proof on the Respondent makes it difficult for the undersigned to determine exactly what is required to be established and proved by the Respondent with particularity because of the absence of specific allegations, the complexity of the applicable statute, and the associated regulations in the Administrative Code.

5. Petitioner has in his record a conviction by plea of Misdemeanor Conspiracy that was accepted by the presiding judge. Petitioner received a 30 day suspended sentence and was placed on probation for 24 months.

6. Petitioner has satisfied all of the requirements of probation.

The Respondent's Standards Committee, without specific reference to the regulations and statute set out below, denied Petitioner's application for licensure.

8. 21 NCAC 29.0402(d)(4) and (c)(1-4) are quoted as follows:

Category IV – Misdemeanors which do not result in physical or emotional harm to others. Three or more Category IV convictions (committed as separate incidents) shall be reclassified as a Category III offense. Category IV offenses include but are not limited to: ... (b) Possession of a controlled substance (misdemeanor); (c) The Board shall determine if the conviction is directly related to the duties and responsibilities of a locksmith. The Board shall consider the following factors: (1) the nature and seriousness of the crime; (2) the relationship of the crime to the purposes for requiring a license as a locksmith; (3) the extent to which a license might offer an opportunity to engage in further criminal activity of same types; and (4) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of a license locksmith.

9. The Respondent has failed to carry its burden of proof that the Board considered (c)(1-4). No allegation of how the Petitioner's conviction related to these categories was averred nor did the Respondent carry its burden of proof. Therefore, the Respondent has failed to carry its burden of proof under this provision of the Administrative Code.

10. No allegation was averred as to how Petitioner's conviction related to the criteria in 21 NCAC 29. 0402(f) and (g), nor did Respondent carry its burden of proof required under this regulation.

11. 21 NCAC 29 . 0402(d)(h)(4) is quoted as follows:

An applicant with a category IV conviction shall have at least three years since the applicant has completed all aspects of his or her sentence received as a result of the last Category IV conviction to be eligible for licensure. A licensed locksmith convicted of a Category IV offense may be subject to immediate license revocation and reinstatement upon the same standards listed in the Rule for applicant.

The Respondent failed to carry its burden of proof as to the Petitioner's failure, if any, under the terms of this administrative rule to be eligible for denial of a license.

12. The provisions G.S. 74F-8(c) is quoted as follows:

If an applicant's criminal history record check reveals one or more convictions listed under subdivision (a)(2) of this section, the conviction shall not automatically bar licensure. The Board shall consider all of the following factors regarding the conviction:

- (1) The level of seriousness of the crime.
- (2) The date of the crime.
- (3) The age of the person at the time of the conviction.
- (4) The circumstances surrounding the commission of the crime, if known.
- (5) The nexus between the criminal conduct of the person and the job duties of the position to be filled.
- (6) The person's prison, jail, probation, parole, rehabilitation and employment records since the date the crime was committed.
- (7) The subsequent commission by the person of a crime listed in Subdivision (a)(2) of this section.

The Board is further required under this section of law to determine the applicant's criminal history and what disqualifies the applicant for licensure. The Respondent has neither averred nor carried is burdened of proof under this statutory requirement.

13. The preponderance of the evidence demonstrates that Petitioner has good moral character as testified to by the witnesses present and by observation of the undersigned, the Petitioner's testimony, and witness demeanor. The record is devoid of proof as to what exactly occurred in the underlying criminal transaction. The testimony of Mr. Wright who participated in the Standards Committee's review is lacking as to the nexus between the Petitioner's crime of misdemeanor conviction and what it was the Standards Committee believed that Petitioner lacked under the statutes and regulations that they would deny his application.

14. The Respondent failed to carry its burden of proof by the preponderance of the evidence and failed to make a recital of charges against the Petitioner as required by statute. The preponderance of the evidence establishes that this Petitioner has good moral character and is someone that has proficiency and is recognized nationally in his specialization (itself an indicator of professionalism) and leads the undersigned to conclude that this Petitioner is eligible for licensure as a locksmith.

PROPOSAL FOR DECISION

Based upon the foregoing Stipulations, Findings of Fact and Conclusions of Law, the undersigned Proposes to the Respondent that the Petitioner's application for a locksmith licensure be approved.

ORDER

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6714, in accordance with North Carolina General Statute 150B-36(b)

NOTICE

The decision of the Administrative Law Judge in this contested case will be reviewed by the agency making the final decision according to the standards found in G.S. 150B-40(e) and 150B-42. The agency making the final decision is required to give each party an opportunity to file exceptions to the Proposal For Decision of the Administrative Law Judge and to present written argument to those in the agency who will make the final decision. G.S. 150B-40(e).

The agency that will make the final decision in this contested case is the North Carolina Locksmith Licensing Board

This the 17th day of August, 2005.

Julian Mann, III
Chief Administrative Law Judge

CONTESTED CASE DECISIONS

STATE OF NORTH CAROLINA
COUNTY OF HENDERSON

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
04 OSP 2081

ROBERT D. JONES,)
)
 Petitioner,)
)
 v.)
)
 HENDERSON COUNTY DEPARTMENT OF PUBLIC)
 HEALTH,)
)
 Respondent.)

DECISION

On June 17, 2005 and June 20, 2005, Administrative Law Judge Beecher R. Gray heard this contested case in Catawba County and Henderson County, North Carolina. At the outset of the hearing, Petitioner’s counsel gave oral notice of voluntary dismissal of all issues in this appeal other than a just cause determination. After Respondent filed a proposed decision, Petitioner filed, on July 22, 2005, objections to the proposal. Both filings were considered in determining the final draft of this decision.

APPEARANCES

For Petitioner: Thomas D. Roberts, Esq.
20 Battery Park Avenue, #305
Asheville, NC 28801-2879

For Respondent: Sharon B. Alexander, Esq.
240 Third Avenue West
Hendersonville, NC 28739

EXHIBITS

For Respondent: I through 25
For Petitioner: A; D through M

WITNESSES

For Petitioner: Tommy Staton, Kim Kapler and Robert D. Jones, Petitioner.
For Respondent: Brenda Miller, Jan Prichard, Sandra Guffey and Tom Bridges.

ISSUES

1. Did Respondents terminate Petitioner for just cause within the intent and meaning of N.C.G.S. Sec.126-35?
2. Did Respondents terminate Petitioner in retaliation for Petitioner’s protected activity?

FINDINGS OF FACT

Based upon careful consideration of the witnesses’ sworn testimony at hearing, the stipulations of the parties, and the exhibits admitted into evidence; having weighed the evidence and assessed the credibility of the witnesses, based upon each witnesses’ demeanor, interest, bias, prejudice, and remembrance of the facts; and having determined whether the testimony of each witness is reasonable and consistent with all other believable evidence in the case, the undersigned finds as follows:

1. At all times relevant to the proceedings herein, Petitioner was a local government employee of the Henderson County Department of Public Health (Health Department). Petitioner was an animal control officer and was hired as a “project employee” to fill a position to work a second shift for the Animal Control Division of the Health Department.

2. At all times during Petitioner’s employment, all animal control duties for Henderson County were assigned to the Health Department.

3. Pursuant to N.C.G.S. Sec.126-5(a)(2)(c), Petitioner was subject to the State Personnel Act.

4. From June 16, 2001, to and through October 18, 2004, Petitioner was an employee of the Animal Control Division of the Health Department.

5. Throughout his entire tenure of employment with the Health Department, Petitioner was supervised by Brenda Miller.

6. On September 20, 2004, Petitioner was placed on administrative leave with pay, pending investigation of reports that he had entered Brenda Miller’s office without authorization and reviewed private information kept in that office.

7. During the times relevant to the issues in this matter, Brenda Miller reported directly to Robert Smith until September 2003 and thereafter to Tom Bridges, who was, throughout Petitioner’s employment with the Health Department, Director of the Health Department.

8. As of February 1, 2005, the Animal Control Division is no longer a part of the Health Department but is a separate department of Henderson County. The Health Department no longer employs any animal control officers and has no authority or responsibility for any aspect of animal control in Henderson County.

9. In July of 2003, Brenda Miller began to notice troubling behavior on Petitioner’s part. This behavior was a change from past behavior and included frequent tardiness, slurring of speech and a “spacey” demeanor. In addition, Brenda Miller noted that Petitioner’s handwriting had become illegible.

10. During this time period, Petitioner had a broken finger on his dominant left hand. Petitioner previously never had been counseled or disciplined for tardiness.

11. During his entire tenure of employment with the Health Department, Petitioner worked a second shift with the Animal Control Division. Petitioner’s hours generally were from 1:00 p.m. until 9:00 p.m. All other personnel within the Animal Control Division, including Brenda Miller, ended their work day at 4:30 p.m. Petitioner generally worked alone after 4:30 p.m. although from time to time other officers worked late or came to the shelter at night.

12. Since Petitioner operated a county vehicle and worked a second shift during part of which he worked alone and unsupervised, Brenda Miller approached her supervisor, Robert Smith, for guidance. Robert Smith and Brenda Miller then discussed this matter with Tom Bridges who gave his consent to take these concerns to Jan Prichard, Director of Human Resources for Henderson County. Jan Prichard, upon inquiry, believed that there was reasonable suspicion to support a drug screening of Petitioner.

13. On August 1, 2003, Petitioner consented to a drug screen upon request, and the screening was performed. The results of this screening were negative and were communicated to Jan Prichard. Jan Prichard, in turn, telephoned what she believed to be a private line into Brenda Miller’s office and received an answering machine. Mrs. Prichard, believing that this was an answering machine assessable only by Brenda Miller, left a message containing the results of the drug screening and suggesting that Petitioner could be called back in to work his regular shift that day. In fact, the number which Mrs. Prichard dialed was the general number into the Animal Control Division, and the message was heard by another employee of the Animal Control Division.

14. On September 18, 2003, Petitioner filed a grievance in response to the drug screening and the way in which the results were communicated. (Resp. Exh. No. 1) A major issue raised by Petitioner in this grievance was that unfounded and unfair speculations should be removed from the record. Petitioner also objected to the fact that the drug screen was administered by Jan Prichard without any meaningful investigation, without reasonable suspicion, without corroborating witnesses and in contravention of Henderson County policy. He further objected to Jan Prichard’s violation of his confidentiality in communicating the results over a public telephone line and believed that Jan Prichard’s subsequent actions had negatively affected his relationship with his supervisor, Brenda Miller.

15. Pursuant to Henderson County Policy, responsibility to respond to this grievance was assigned to Brenda Miller as Petitioner's primary supervisor. On September 23, 2003, Brenda Miller responded by delivering to Petitioner a written response pertaining to this grievance. (Resp. Exh. No. 2) Petitioner advised Brenda Miller that he had not intended to complain about her and that he did not intend to even open up or read her response. Henderson County Policy required Petitioner to file a written request for further review within ten days from receipt of this response, and Petitioner did not do so. Instead, Petitioner began calling Tom Bridges sometime in November 2003 inquiring as to the status of his grievance.

16. After September 23, 2003, both Brenda Miller and Jan Prichard believed that the subject of this grievance had been resolved and they thought no more of this grievance.

17. In August 2003, Petitioner told Ann Owen, a co-worker, that people who knew him should be very afraid of him at that time. In September 2003, Petitioner told Linda McMullen, another co-worker that if people did not leave him alone "Waco would seem like nothing". Both of these employees felt threatened and later filed written threat reports with Brenda Miller. (Resp. Exh. Nos. 3 and 4) Both of these reports were filed on September 18, 2003, the same day that Petitioner filed his first grievance.

18. Throughout the fall and winter of 2003-2004, Petitioner continued to resist Brenda Miller's supervision and question instructions. On February 11, 2004, Petitioner received a written warning regarding his failure to comply with the policy regarding dress during work hours. (Resp. Exh. No. 8). The dress issue had been discussed at a staff meeting on December 18, 2003, and Petitioner had been given a copy of the minutes from this meeting. (Resp. Exh. Nos. 5, 6, and 7) Brenda Miller testified at this hearing that Petitioner generally did what she instructed him to do.

19. As a result of Petitioner's continued expressions of concern about the work load he was required to carry, Brenda Miller began to keep notes for herself regarding Petitioner's activities during the summer of 2004. These notes were kept in a composition book in Brenda Miller's private office. (Resp. Exh. No. 10) Ms. Miller always placed this notebook inside her desk or on top of her desk under other documents, or sometimes on top of her computer tower, and was careful never to leave it out in plain view in her office.

20. In 2003, Ms. Miller received a program proposal regarding a possible re-organization of the Animal Control Division. This proposal anticipated the creation of a new position, which would have been filled by a particular employee of the Animal Control Division, Tom Johnson, and included information with regard to the salary for this position. This written proposal was kept in Tom Johnson's personnel file, which was in a locked file cabinet located in Ms. Miller's personal office. Petitioner testified that this proposal was common knowledge and that he never had seen the document.

21. During the spring and summer of 2004, Petitioner's behavior seemed to improve, and Tom Bridges began to consider and discussed with Brenda Miller the possibility of promoting Petitioner to the position of lead officer within the Animal Control Division. Mr. Bridges and Ms. Miller agreed to give this matter a little more time before making this decision.

22. On or about Friday, September 3, 2004, Petitioner went into Ms. Miller's private office, as he and other animal control officers did from time to time, located the composition book containing Ms. Miller's private notes, and read those notes.

23. Petitioner testified that this composition book was similar in appearance to other books used by animal control officers in their regular duties. However, the notes made in this composition book did not resemble any information that would be contained in these other composition books, and Petitioner testified that he knew these notes were related to him and his activities.

24. Petitioner, on or about September 8, 2004, told Sandra Guffey, a co-worker, about the existence of this book, which he referred to as a log and accurately repeated to Ms. Guffey the gist of the information contained in this log. Petitioner further implied that he had made copies of this log. During a subsequent conversation between Ms. Guffey and Petitioner with respect to this log, Petitioner told Ms. Guffey that the log was missing. Linda McMullen, a co-worker, entered the room during this conversation, and Petitioner also gave her information regarding this log.

25. Petitioner testified that he had not made any copies of the information in this book.

26. At some point prior to September 8, 2004, Petitioner repeated to Sandra Guffey information regarding the program proposal which had been filed in the locked file cabinet in Brenda Miller's office. Petitioner gave accurate information regarding the substance of this proposal, including the amount of salary suggested. Petitioner told Sandra Guffey that he had seen this proposal among papers on Brenda Miller's desk.

27. On September 17, 2004, Brenda Miller came into work and noticed a bent paper clip in the floor of her office. She recalled on another occasion discovering a paper clip sticking out of a lock in her file cabinet. There is no direct evidence that Petitioner entered Brenda Miller's file cabinet without permission. There is indirect evidence that Petitioner at least had access to the private program proposal and that he repeated its contents, including salary amounts, to Sandra Guffey.

28. On September 17, 2004, Sandra Guffey reported to Brenda Miller the information conveyed by Petitioner with regard to the log being kept and missing and the information regarding the program proposal.

29. Upon receiving information that somebody had been in her office, Brenda Miller consulted Tom Bridges and Jan Prichard. They all then consulted with the Henderson County Attorney, Angela Beeker. Upon advice from counsel, Tom Bridges determined that they should engage in an investigation of this incident and instructed Brenda Miller and Jan Prichard to interview each employee of the Animal Control Division separately.

30. Petitioner was interviewed by Jan Prichard and Brenda Miller on September 20, 2004. At that time, Petitioner stated that he did not have any knowledge of anyone being in Ms. Miller's office and looking at any of her private papers. He repeated this statement more than one time and adamantly stated that he did not go into Brenda Miller's office and look at any personal papers nor did he have any knowledge of anything of this nature occurring. At the end of this interview, Petitioner was placed on administrative leave with pay for the duration of the investigation.

31. Petitioner testified that he did not tell Ms. Prichard and Ms. Miller that he had seen the log because he did not understand the significance of "private papers" or "personal papers".

32. The interviews of each of the other employees of the Animal Control Division subsequently were conducted by Ms. Miller and Ms. Prichard according to a uniform script with the questions not directed toward gathering information about any particular employee. Each employee was asked if he or she had any knowledge of anyone going into Brenda Miller's office without authorization and going through any of Mrs. Miller's personal papers. Several employees commented that Petitioner was a consistent problem and that they would not be surprised to learn that he had done so. Most of the employees described their observations of Petitioner's erratic behavior and expressed their opinion that Petitioner acted out sufficiently to justify discipline. Sandra Guffey and Linda McMullen both confirmed that Petitioner had told them that he had seen both the logbook and the program proposal. Most of the employees indicated that they were not comfortable interacting with Petitioner, primarily because Petitioner always tape recorded everything. All employees acknowledged that they had some need on occasion to go into Ms. Miller's office.

33. In the course of these interviews, Brenda Miller discovered that Petitioner had carried at least one 8-inch knife on his person at all times while undertaking his duties for the Animal Control Division. This was described as a butterfly knife, having a 4 inch blade with a 4 inch handle, which Petitioner kept in his boot. During these interviews, Ms. Miller and Mr. Prichard also were advised that some of Petitioner's co-workers were concerned about their safety in his presence. Ex-animal control officer Tommy Staton and officer Mark Jacobs testified at the hearing that they had carried pocket knives while working for Respondent and were never disciplined for that but neither testified that they carried 8 inch butterfly knives in their boots or that they informed management that they were carrying pocket knives.

34. On October 6, 2004, Tom Bridges determined that a pre-dismissal conference should be scheduled for Petitioner. This conference was scheduled for Monday, October 11, 2004, and Petitioner was given due notice of this hearing. (Resp. Exh. No. 13) Petitioner also was given notice that he was not allowed to tape record the conference and that no attorney would be present for either party.

35. Petitioner was given due notice of four failures in personal conduct which were considered significant. These failures were as follows:

- 1) Entering your supervisor's office without authorization for the purpose of reviewing personal papers and property;
- 2) Sharing confidential information obtained from your supervisor's office with other employees;
- 3) Carrying personal equipment in violation of the policy of Animal Control without approval from your supervisor, which equipment would also be considered a deadly weapon, potentially putting the safety of yourself and others in your work environment in jeopardy. Specifically, this equipment has been identified as an 8-inch butterfly knife; and

- 4) Creating a hostile work environment for co-workers.

(Resp. Exh. No. 13)

36. Petitioner appeared for the pre-dismissal conference on October 11, 2004. Also present at this conference were Tom Bridges, Director of the Health Department, Brenda Miller, and Jan Prichard. When Petitioner appeared, he had his left arm in a sling because he had undergone surgery the previous week. A Henderson County Deputy Sheriff was in attendance to search Petitioner. When the Deputy attempted to search Petitioner's left arm, Petitioner reacted as if he were in pain, and this part of Petitioner's body was not searched. Petitioner, in fact, had secreted a tape recorder in his sling for the purpose of taping this conference contrary to the instructions he had been given.

37. During the pre-trial conference, Petitioner was asked to provide help to Tom Bridges to understand Petitioner's view of the events that had occurred. Petitioner was specifically asked if he was ever in Brenda Miller's office looking through personal papers. In response to at least three direct questions in this regard, Petitioner responded in the negative and specifically said that he had never seen a log that Ms. Miller was keeping regarding his activities. Petitioner also denied that he had ever told anybody that he had seen such a log. When Petitioner was asked if he had any comments as to the four issues that had been raised, he said that two were accusatory, one was an allegation, and the other one was known for some time. Petitioner claimed that Brenda Miller had known that he carried a knife throughout the entire duration of his employment with the Animal Control Division.

38. Following the pre-dismissal conference, Tom Bridges considered the hand-written notes made by each employee of the Animal Control as well as the information shared during the pre-dismissal conference. Mr. Bridges determined that Petitioner's employment with the Health Department should be terminated for failure of personal conduct, specifically as follows:

- 1) Entering your supervisor's office without authorization for the purpose of reviewing confidential papers and property;
- 2) Sharing confidential information obtained from your supervisor's office with other employees;
- 3) Carrying personal equipment in violation of the policy of Animal Control without approval from your supervisor, which equipment would also be considered a deadly weapon, potentially putting the safety of yourself and others in your work environment in jeopardy. Specifically, this equipment has been identified as an 8-inch butterfly knife; and
- 4) Creating a hostile work environment for co-workers.

Petitioner was given due notice of his termination by letter dated October 18, 2004, from Tom Bridges to Petitioner. (Resp. Exh. No. 17)

39. On November 16, 2004, Petitioner filed a Petition for a Contested Case Hearing with the Office of Administrative Hearings, alleging that:

- a) Respondents had discharged him without just cause;
- b) Respondents had suspended him without just cause; and
- c) Respondents' actions were in retaliation for protected activities.

40. At the hearing of this matter, Petitioner admitted that he had, in fact, found the logbook in which Brenda Miller had taken notes to herself regarding Petitioner's activities. Petitioner claimed that he found this logbook on top of Brenda Miller's computer where it was in relative open view. Petitioner further admitted that he had gone back on at least two subsequent occasions after initially finding this book for the purpose of reading the book. On the third occasion, Petitioner found the logbook was missing. This book contained personnel information that was being kept by Petitioner's supervisor for the purpose of her making decisions regarding the operations of the Animal Control Division, for which she had responsibility. This was private information not intended to be available to the public and was placed in a position where it was not readily available to the public or to Petitioner. Petitioner admitted at the hearing that he had spoken with both Sandra Guffey and Linda McMullen regarding the logbook and the information that he had read in this book. He had at least two conversations with Sandra Guffey regarding this book and told her on the second conversation that the book was missing. Petitioner admitted that he told Sandra Guffey that there was information contained in this book pertaining to her. Petitioner admitted that he carried at least two knives on his person at all times during his employment with

the Health Department. This was in direct violation of Henderson County ordinance and Henderson County policy, both of which were explained to Petitioner. Several of Petitioner's co-workers described erratic behavior on his part, such as mumbling under his breath and, on at least one occasion, slamming his fist into the wall. Two co-workers filed workplace violence threat reports in response to such behavior on Petitioner's part. Petitioner's constant criticism of his co-workers, his taping of all conversations and his erratic behavior created a hostile work environment within the Animal Control Division.

CONCLUSIONS OF LAW

BASED UPON THE FOREGOING FINDINGS OF FACT, the undersigned concludes as follows:

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to Chapters 126 and 150B of the North Carolina General Statutes.

2. Pursuant to N.C.G.S. Sec.126-5(a)(2)(d), as a Henderson County Health Department employee, Petitioner was subject to and governed by the provisions of the State Personnel Act, N.C.G.S. Sec.126.1 *et. seq.* at all times relevant unto the issues herein.

3. Since Chapter 126 of the North Carolina General Statutes governs this case, Respondent Health Department could not terminate or suspend Petitioner from employment without just cause, under N.C.G.S. Sec.126-35.

4. Respondent has the burden of proof by a preponderance of the evidence that it had just cause to terminate Petitioner's employment. N.C.G.S. Sec.126-35 does not define just cause. However, 25 N.C.A.C. 11.2301(b) provides as follows: "There are two bases for the discipline or dismissal of employees under the statutory standard of 'just cause' as set out in Sec.126-35. These two basis are: (1) Discipline or dismissal imposed on the basis of unsatisfactory job performance, including grossly efficient job performance; and (2) Discipline or dismissal imposed on the basis of unacceptable personal conduct."

In addition, 25 N.C.A.C. 2304 provides that unacceptable personal conduct is: "(1) conduct for which no reasonable person should expect to receive prior warning; or (4) the willful violation of known or written work rules."

5. A preponderance of the evidence established that Petitioner was terminated for a combination of actions on his part, all of which would be considered unacceptable personal conduct. These acts include his admitted entry into his supervisor's office with subsequent reading of personnel information accumulated by his supervisor, and sharing this information with co-workers. No reasonable person would expect to receive a prior warning that such conduct was unacceptable. Additionally, Petitioner's carrying a prohibited type of knife would also qualify both as conduct for which no reasonable person should expect to receive a prior warning and a willful violation of known work rules for the Animal Control Division of Respondent. Petitioner's constant criticism of his co-workers, his taping of all conversations and his erratic behavior created a hostile work environment within the Animal Control Division.

6. Based upon a preponderance of the evidence Respondents terminated Petitioner for just cause.

DECISION

BASED UPON THE FOREGOING Findings of Fact and Conclusions of Law, the undersigned determines that the Petitioner was terminated for just cause within the intent and meaning of N.C.G.S. Sec.126-35. Respondent's decision to terminate Petitioner is supported by the evidence and is affirmed.

NOTICE

Since this matter involves a local government employee subject to Chapter 126 pursuant to North Carolina General Statute § 126-5(a)(2), the decision of the State Personnel Commission, absent a finding of discrimination, shall be advisory to the local appointing authority which shall render a Final Agency Decision. Further requirements of rights, notices and time lines to the Parties shall be forthcoming from the State Personnel Commission and/or the local appointing authority as the circumstances and stage of the process may dictate.

The agency in this contested case is required to give each party an opportunity to file exceptions to this Decision issued by the undersigned and to present written arguments to the Commission pursuant to N.C.G.S. §150B-36.

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.

This the 29th day of July 2005.

Beecher R. Gray
Administrative Law Judge

CONTESTED CASE DECISIONS

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
05 DHR 0159

AARON ANDERSON,)
)
 Petitioner,)
)
 v.)
)
 N.C. DEPARTMENT OF HEALTH AND HUMAN)
 SERVICES, DIVISION OF MEDICAL ASSISTANCE)
 (DMA),)
)
 Respondent.)

DECISION

Two consolidated contested cases were heard by Beecher Gray, Administrative Law Judge (ALJ), on May 11 through 13, 2005 in Charlotte, Mecklenburg County, North Carolina. At the conclusion of the hearing on May 13, 2005, the undersigned decided from the bench for Petitioner in this matter and directed Counsel for Petitioner to file a Proposed Decision thirty days after receipt of a complete transcript of the proceedings. Petitioner filed the Proposed Decision July 25, 2005. Respondent filed a Proposed Decision in 04 DHR 0929 on July 25, 2005.

APPEARANCES

For Petitioners: Pauline F. Laubinger, Special Counsel
North Carolina Governor’s Advocacy Council for Persons with Disabilities
1339 Mail Service Center
Raleigh, NC 27699-1339

For Respondent: Emery Milliken, Assistant Attorney General
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629

WITNESSES

For Petitioners: Aaron “Ari” Anderson
Stephanie H. Goldberg
William S. Ashe, Jr., M.D.
Jo Newman Holbrook
Sherri Winstead
Diane Jackson-Szymczyk
Keith W. Sellick

For Respondent: Nora Poisella
Douglas G. Kelling, Jr., M.D.
Audra Renzi Troy
Amy McKenna

EXHIBITS

For Petitioners: 1 through 26, 28 through 33, 35 through 56

For Respondent: 4 through 11, 15 through 24, 28 through 31

PROCEDURAL HISTORY

The Petition for a Contested Case Hearing in the matter docketed as 05-DHR-0159 was filed through counsel to contest a decision reached by Medical Review of North Carolina, Inc. [hereinafter MRNC], under contract with the Division of Medical Assistance [hereinafter "DMA"], North Carolina Department of Health and Human Services, that Aaron Anderson [hereinafter "Aaron"], Petitioner, would not be authorized to continue receiving outpatient specialized therapy services, specifically physical therapy [hereinafter "PT"] at three sessions per week, under Medicaid.

MRNC reached its decision to reduce Aaron's PT services to two sessions per week, with the goal of further tapering, on January 26, 2005. A Petition for a Contested Case Hearing was filed on January 28, 2005. An earlier Petition had been filed on June 1, 2004, to appeal MRNC's decision on April 8, 2004, to terminate Aaron's occupational therapy [hereinafter "OT"]. Petitioner filed a Motion to Consolidate the two contested cases on January 28, 2005, and the two cases were consolidated on March 29, 2005, by Order of the Honorable Julian Mann III, Chief Administrative Law Judge.

Based upon the record proper, the applicable law, and the evidence presented at the Hearing in this case, the undersigned Administrative Law Judge makes the following written Findings of Fact and Conclusions of Law to reiterate and supplement the reasons stated on the record on May 13, 2005. The Decision of the undersigned Administrative Law Judge is that the determination of MRNC that Aaron Anderson would not be authorized to receive physical therapy services at a rate of three sessions per week be REVERSED and that Aaron Anderson continue these services at the level he received them prior to the MRNC determination on January 26, 2005. Petitioner met his burden of showing medical necessity for PT services at that level.

FINDINGS OF FACT

1. Aaron Ariel Anderson, nicknamed "Ari", was born on July 7, 1982. He resides at 6307 Old Corral Street in Charlotte, North Carolina, with his mother, Stephanie H. Goldberg. (Transcript I, pages 17-18 and 31.)

2. Aaron is an individual with Spinal Muscular Atrophy [hereinafter "SMA"]. SMA is a genetic disease which may occur in children whose parents both carry the recessive gene for the disease. Children with SMA are hypotonic (have low or no muscle tone and are unable to make voluntary muscle movements). The inability to make voluntary muscle movement includes the lack of a cough reflex and an ineffectual clearance of airway secretions. These secretions pool in the lungs, where they may become infected and cause death from respiratory illness. Aaron has SMA Type I, the most severe classification of the disease. Patients with SMA Type I typically do not live beyond age two. (Transcript I, pages 73-74, 78, 90-92 and 150.)

3. Aaron was in the courtroom each of the three days on which his cases were heard. He required frequent suctioning of his pulmonary/respiratory system by one of his nurses, Sherri Winstead. Ms. Winstead was a witness and attended the entire hearing with Aaron. Aaron's need for suctioning increased during his testimony due to the exertion of speaking through his Passey Muire valve. The severity of his SMA causes Aaron to require suctioning through his nose and mouth as well as through the trach or tracheostomy tube in his throat. Most people are suctioned only through the trach. (Transcript I, pages 20 and 159-160.)

4. The Passey Muire is a clear covering device that fits over the end of the trach and enables Aaron to breathe through his trach and to speak. It is removable when Aaron is up on his feet for physical therapy so that he gets more air through his trach. (Transcript I, pages 46 and 174-175.) Aaron had had physical therapy on May 10, 2005, the day before he testified. (Transcript I, page 35.)

5. Sherri Winstead is a licensed practical nurse who received her nursing degree from Central Piedmont Community College in Charlotte. Ms. Winstead has been one of Aaron's nurses for five years. She transfers Aaron from bed to chair, bathes and dresses him, gives him breathing treatments, administers his medication, and cares for his trach and gastrostomy or G-tube. Ms. Winstead also attended classes with Aaron when he was in public school. (Transcript I, pages 153 and 155.)

6. Aaron, who was twenty two years old when the consolidated cases on PT and OT were heard, uses a wheelchair for mobility. He operates his electric wheelchair independently through the use of fiber optic controls, and he demonstrated the process in the courtroom. Aaron is able to move the head rest and tilt the chair to relieve some of the pressure in his lungs and on various parts of his body. He repositions himself to relieve pressure at least four to five times an hour. (Transcript I, pages 22-23 and 182.)

7. Petitioner's Exhibits 29-33 show the van in which Aaron generally travels and in which he rode to and from the OAH hearing. Because of his disabilities, Aaron is unable to drive the van. After the ramp in the rear of the van is lowered, Aaron independently drives his wheelchair up the ramp. An automatic floor lock secures the wheelchair for travel. Aaron drives his wheelchair out of the van after someone releases the lock for the chair. (Transcript I, pages 19-21.)

8. On May 7, 2005, Aaron graduated from Queens University of Charlotte with a bachelor's degree in biology. (Transcript I, page 23.) While at Queens, he received the Piedmont Natural Gas Scholarship; Petitioner's Exhibit 6 is a picture of Aaron at the award ceremony. Aaron was also inducted into Phi Tri Beta, and he worked with the homeless and also with rape victims. (Transcript I, pages 23-24). Prior to attending Queens, Aaron received an Associate's degree in science from Central Piedmont Community College. (Transcript I, pages 26-27).

9. Petitioner's Exhibits 4-5 and 24-25 show the items Aaron has in his home for use in his studies. Aaron uses eye-gaze technology to operate a computer. He reads and studies for class by using a reading stand and having a nurse turn pages. (Transcript I, pages 47 and 181.)

10. Aaron graduated from public high school. Petitioner's Exhibit 2 is his senior exit project, a book entitled Can I? Aaron wrote the book about life with SMA; the title poses the question of whether children with disabilities, including SMA, can have a normal life. Aaron believes that they can, as long as they have appropriate services, including PT and OT. (Transcript I, pages 28 and 44.)

11. Stephanie Helene Goldberg, Aaron's mother, testified from her personal experiences as a parent and also from her work as a nurse in clinical care management. She works with pediatric patients and does complex discharge planning. Ms. Goldberg has worked with SMA patients, including those with SMA Type I. Petitioner's Exhibit 38 is an article Ms. Goldberg wrote, entitled "Mission: Impossible Cases." Two of the three cases described in the article are ones that Ms. Goldberg personally has worked with in her nursing career. The third case in the article details her personal experience with Aaron's disability. Ms. Goldberg was tendered as an expert in nursing, specializing in the field of nursing for persons with SMA. The tender was accepted by the court. (Transcript I, pages 63-64, 66-68 and 70.)

12. Ms. Goldberg knew that Aaron had a disability within the first month of his life. He was not eating well, and in retrospect Ms. Goldberg remembered weaker fetal movements than she had experienced in her previous pregnancy with her daughter. (Transcript I, page 62.)

13. During his second month of life, Aaron's doctors placed him in the "failure to thrive" category of development. (Transcript I, page 62.) At three to four months of age, Aaron was referred to a neurologist at Chicago Children's Hospital. Between four and six months of age, Aaron underwent a battery of tests to rule out various diagnoses. (Transcript I, page 65.)

14. At six months of age, Aaron was diagnosed with Spinal Muscular Atrophy, Type I, also known as Werdnig-Hoffman Disease. (Transcript I, page 65.)

15. Not long after the SMA diagnosis, Aaron began receiving experimental treatment from the Red Cross in Tulsa, Oklahoma. The treatment was discontinued when Aaron began to see a pulmonologist who helped the family "put it all together" with regard to addressing nutrition, therapy and respiration issues to benefit Aaron. (Transcript I, page 123.)

16. At age one and a half, Aaron had his G-tube inserted into his stomach. The tube allows Aaron to receive nutrition, as he takes no food by mouth. (Transcript I, page 48.) The testimony showed that Aaron continues to use his G-tube to receive nourishment.

17. At age two, Aaron underwent a tracheostomy to assist in his respiration. (Transcript I, page 46.) The testimony showed that the trach remains in place.

18. Despite the continuous medical care he received as a baby and young child, Aaron suffered from repeated episodes of pneumonia and was in the hospital for months at a time, including a period of 13 months when he had double pneumonia. Aaron was eventually admitted to Intensive Care, where he experienced more than twenty instances of respiratory arrest, and also had cardiac arrest. Because Aaron was treated with a variety of antibiotics, he is resistant to many of these drugs. Bacteria can colonize. Staph aureus and pseudomonas have been cultured in Aaron's airways, and it continues to be imperative that any infections are caught early. Because of the resistance to antibiotics, great care is exercised regarding when to use antibiotics for Aaron because the bacteria can develop even more resistance to the drugs. (Transcript I, pages 71 and 95.)

19. During the first four years of Aaron's life, Ms. Goldberg networked with other families living with SMA. Through these networking opportunities, Ms. Goldberg learned of a program at Louisiana State University [hereinafter "LSU"] where children with respiratory diseases were receiving PT with a Reciprocating Gait Orthosis [hereinafter "RGO"]. Ms. Goldberg contacted LSU and spoke with the orthotist and physical therapist there by telephone. (Transcript I, page 122.)

20. Ms. Goldberg educated herself on SMA and knew that respiratory complications and pneumonias are the cause of death for most persons with SMA. (Transcript I, page 69.) Ms. Goldberg was familiar with the *Merck Manual* as authoritative. However, the *Manual* indicates that there is no specific treatment for SMA and does not mention PT. Ms. Goldberg's research provided her with more detailed and specific information about SMA and the use of physical therapy as a possible treatment. (Transcript I, pages 143-144.) Trying the RGO with PT was indeed a treatment of last resort, but for Aaron, it was successful. (Transcript I, page 126.)

21. The RGO was brought to the courtroom and explained. It is a full body brace that is fitted to the individual who will be using it. Petitioner's Exhibit 1 is a video that documented the process of getting Aaron into his RGO, stretching him, positioning him upright, and supervising and assisting with his walking. The video was filmed in Aaron's home. The video demonstrated how the RGO is fitted onto Aaron's body and legs and how Aaron uses it as part of his PT with the assistance of his physical therapist and a nurse.

22. The physical therapist from the LSU program came to Aaron's hospital room to measure him for his first RGO. However, Aaron was not eligible for the RGO due to the large number of contractures he had (a shortening of a muscle tendon, due to lack of use of the muscle, leading to deformity and pain). Contractures are very painful. Aaron's contractures affected his hips and legs. To lessen the contractures and prepare for the RGO, a physical therapist worked with Aaron once or twice daily over a six-month period. Afterward, an RGO was made for Aaron. Aaron continuously has had and used an RGO since he was fitted for and received his first one. (Transcript I, pages 124-126.)

23. At approximately age three, Aaron stood in his RGO for the first time in the Intensive Care Unit. (Transcript I, page 126.) Within a month of beginning therapy with the RGO, Aaron began to show improvement in respiration and in draining his lungs. He no longer required intravenous antibiotics, and he was weaned from the ventilator. (Transcript I, pages 126-127.)

24. Since the time that Ms. Goldberg brought Aaron home from the hospital at age four, he has not required hospitalization for respiratory illness. Ms. Goldberg attributes this lack of hospitalization to "daily, aggressive, non-stop care... in ...physical therapy, occupational therapy, the best of nutrition, and the best of lung pulmonary toileting." Ms. Winstead additionally credits the lack of hospitalization to Aaron's cooperation and work ethic in his therapies. (Transcript I, pages 69, 138 and 185.)

25. Aaron has returned to the hospital one time, for scoliosis surgery, since he started using the RGO. Aaron had rods placed in his back to prevent further curvature of the spine. Such continued curvature would have reduced the ability of Aaron's lungs to expand in his chest cavity, and would have prevented him from using the RGO. (Transcript I, pages 69 and 81.)

26. Since Aaron was about twelve years old, his primary care physician has been Dr. William S. Ashe, Jr. Dr. Ashe is a physician at Asthma and Allergy Specialists in Charlotte, NC. He treats children with a variety of respiratory illnesses, including SMA. (Transcript I, pages 39, 82-83, and 85.)

27. Dr. Ashe received his medical degree from the Medical University of South Carolina and completed his pediatric residency at the Medical College of Virginia in Richmond. He completed his residency in pediatric pulmonology at the University of North Carolina at Chapel Hill. Pediatric pulmonology concentrates on the respiratory tract and its diseases in children. (Transcript I, page 85.)

28. Petitioner's Exhibit 40 shows Dr. Ashe's Board certification by The American Board of Pediatrics. He is Board certified in pediatrics and in the subspecialty of pediatric pulmonology. Dr. Ashe was tendered as an expert in pediatric pulmonology with additional expertise in SMA. The court accepted the tender. (Transcript I, pages 85-86 and 91.)

29. Dr. Ashe sees Aaron every four to six months for a check-up; Aaron's last appointment before the OAH hearing was February 3, 2005. Dr. Ashe believes that frequent check-ups are important for Aaron, given how quickly an infection can accelerate and compromise his respiration. (Transcript I, page 83.)

30. Dr. Ashe has prescribed a variety of treatments for Aaron. One is the use of a nebulizer, a machine that pushes Albuterol into Aaron's lungs. Albuterol dilates Aaron's bronchial tubes and loosens lung secretions. Aaron receives this treatment twice daily, and more as needed. (Transcript I, page 159.)

31. Another treatment Dr. Ashe has prescribed is the use of an ABI vest. Aaron wears the vest while in bed. Hooked up to the accompanying machine, the vest inflates and shakes Aaron to loosen the secretions in his lungs. Aaron receives a nebulizer treatment during the ABI process to further loosen the secretions in his lungs. Aaron is suctioned at ten minute intervals during the thirty minute treatment. Aaron uses the ABI vest once daily and more as needed. (Transcript I, pages 165-166 and Petitioner's Exhibits 21 and 22.)

32. Dr. Ashe has also ordered that Aaron use an oxygen concentrator, shown in Petitioner's Exhibit 26. The concentrator hooks up to Aaron's ventilator, which he wears while asleep. Dr. Ashe prescribed oxygen at 45 percent during the night in order to maintain Aaron's oxygen saturation levels overnight and to prevent morning headaches. (Transcript I, page 171.)

33. Dr. Ashe prescribes PT for Aaron for several reasons. First, physical therapy is needed to combat weakness and to strengthen the thoracic cage in order to prevent recurrent pulmonary infections. Second, physical therapy improves Aaron's head control and thereby aids in his respiratory function; he is better able to clear secretions from his throat and avoid aspiration. Dr. Ashe also prescribes PT because Aaron is resistant to many antibiotics and it would be difficult to treat Aaron should he require hospitalization. (Transcript I, pages 92, 95-97, 207 and 211.)

34. Diane Jackson-Szymczyk, Aaron's physical therapist for seven years, is employed by Carolinas Medical Center Home Care Division. Ms. Jackson-Szymczyk earned her degree in physical therapy at the Medical University of South Carolina. She has worked with several patients with SMA. Her work with Aaron has been unique because he is so involved in the decisions about his treatment program. Ms. Jackson-Szymczyk was tendered as an expert in physical therapy, including treatment of persons with SMA. The court accepted the tender. (Transcript I, pages 192, 194 and 198-199.)

35. Ms. Jackson-Szymczyk characterizes Aaron's PT as aggressive treatment, because Aaron's medical team works to "push the envelope" and provide all the benefit they can. Ms. Jackson-Szymczyk makes recommendations to Dr. Ashe as to the frequency required for physical therapy, and she believes that the required frequency is three times per week. In fact, she would prefer to see Aaron five to six times per week. (Transcript I, pages 199-200, 221 and 234.)

36. In addition to the reasons Dr. Ashe recommends physical therapy, Ms. Jackson-Szymczyk stated that Aaron benefits from weight-bearing during standing to prevent osteoporosis. Standing also aids in Aaron's circulation. (Transcript I, pages 207-208.)

37. In planning Aaron's PT, Ms. Jackson-Szymczyk does not work directly from the American Physical Therapy Association's *Guide to Physical Therapy Practice* relied on by DMA. Instead, Ms. Jackson-Szymczyk looks at Aaron as an individual and plans his treatment according to his needs and goals. Ms. Jackson-Szymczyk does not consider Aaron to fall into the 80 percent of patients who require PT for only 6-50 sessions. Because of the nature of SMA, Aaron's physical therapy is used to prevent hospitalization and aid in respiration, goals that cannot be met in 6-50 sessions. (Transcript I, pages 219-221.) In other words, Aaron falls into the 20 percent of persons receiving physical therapy who do not fit the usual pattern.

38. The first step in Aaron's physical PT session, as shown in Petitioner's Exhibit 1, is to stretch him. Ms. Jackson-Szymczyk massages Aaron's hamstrings and flexors to relax the muscles and stretch Aaron as much as possible. Aaron does independent sitting exercises to work his upper trunk and rolling exercises to work on rotary movement.

39. The next step is to put Aaron into the RGO, a process shown in Petitioner's Exhibits 1 and 9. Ms. Jackson-Szymczyk places Aaron into the RGO with assistance. As shown in Petitioner's Exhibit 1, putting Aaron into the RGO and then getting him upright is not something that one person can do.

40. Ms. Winstead is unable to place Aaron into the RGO or walk him because she is not trained as a physical therapist. Ms. Winstead does not know what muscles are being used and how to place him properly in the brace so as to avoid injury. (Transcript I, pages 177-178 and 204.)

41. The upper portion of the RGO goes around Aaron's torso. A strap goes across his chest to help pull him into the brace; a second strap goes across his upper pelvis to support him. Another strap goes across each of Aaron's thighs. The RGO has knee pads to hold Aaron's knees in place. Locks on either side of the brace hold his legs at full extension. Aaron wears a shoe with a lift on his right foot when he walks in his RGO because his legs are different lengths. A strap attached to the back of the RGO enables Ms. Jackson-Szymczyk to hold onto the RGO while Aaron ambulates. (Transcript I, pages 202-203.) Aaron is shown standing upright in his RGO with Ms. Jackson-Szymczyk behind him in Petitioner's Exhibit 12.

42. After Aaron is correctly positioned in his RGO, Ms. Jackson-Szymczyk and Ms. Winstead or another nurse lift Aaron off the bed and onto a mat. Ms. Jackson-Szymczyk then repeats the stretching exercises done before Aaron was in the RGO. (Transcript I, pages 204 and 214-215.)

43. Aaron is then lifted, again by Ms. Jackson-Szymczyk and a nurse, to a standing position, and his hands are placed on his walker. As shown in Petitioner's Exhibits 1, 10 and 11, Ms. Jackson-Szymczyk helps Aaron get his standing balance and establish his head control. Once Aaron is stabilized, Ms. Jackson-Szymczyk can let go of the RGO. Aaron can shift his weight from side to side and slide forward and backwards. His head control, however, is tenuous; if Aaron moves too far in one direction, he loses head control and/or balance, and Ms. Jackson-Szymczyk must catch him. Her training enables Ms. Jackson-Szymczyk to assess what Aaron needs. (Transcript I, pages 55, 205-206 and 214-215.)

44. It is imperative that a nurse be in front of him while Aaron is in the RGO, as Aaron cannot speak while he ambulates. He must signal with his eyebrows if he needs suctioning or other nursing care. (Transcript I, page 175.)

45. After the walking is completed, Ms. Jackson-Szymczyk and a nurse transition Aaron to his bed or the floor mat and take him out of the RGO. Aaron is then assisted into an armless chair with his feet on blocks of some type. While sitting in the chair, Aaron works on head control. (Transcript I, pages 209 and 214-215 and Petitioner's Exhibits 13 and 14.)

46. Ms. Jackson-Szymczyk helps Aaron gain head control, after which she releases his head. Aaron does not have any head bracing but must use his own muscles. While seated, Aaron is able to shift laterally and to move his trunk forward and backward. He nods his head, makes rotary movements, and tilts his head laterally. If Aaron loses head control, Ms. Jackson-Szymczyk catches his head and helps him regain balance. (Transcript I, page 209.)

47. During these exercises, Ms. Winstead sometimes throws popcorn at Aaron or touches him. Ms. Winstead does this to see whether he will lose head control when a distraction occurs. When Ms. Winstead began working with Aaron, the room had to be completely silent or he would lose head control. The approach of a nurse to wipe his mouth would also cause Aaron to lose control of his head. Now Aaron will either maintain head control or will recover if he briefly loses control. (Transcript I, pages 180 and 210.) The fact that Aaron can ignore distractions is progress in head control.

48. When Ms. Jackson-Szymczyk began working with Aaron, he could maintain head control while sitting for only one to two minutes. At the time of the hearing, he was able to sit and maintain head control for up to 25 minutes. (Transcript I, page 210.) Obviously, this increase in head control shows that Aaron is progressing rather than simply maintaining in the area of head control.

49. Ms. Jackson-Szymczyk testified that Aaron's controlling his neck and using his muscles to do so would be helpful to his swallowing, vocalizations, and breathing. Being upright and in control would help Aaron ventilate better as he "needs all the oxygen we can get in there." (Transcript I, page 211.)

50. Part of Ms. Jackson-Szymczyk's job is to generate recertification requests to submit to MRNC/DMA so that Medicaid will pay for Aaron's physical therapy. Recertification occurs every 90 days. Ms. Jackson-Szymczyk is also responsible for responding to questions about Aaron's physical therapy. She generates documents known as Admission Note Reports. (Transcript I, pages 235 and 248.)

51. Nearly two years before the OAH hearing on physical therapy, Aaron also had been in danger of losing his PT services. On April 10, 2003 and June 9, 2003, MRNC, under contract to DMA, determined that Aaron no longer was eligible to receive three authorized physical therapy sessions per week but instead would be approved for only one. Both of MRNC's decisions were appealed to DMA. (Petitioner's Exhibit 7.)

52. An informal hearing/reconsideration review was held in Raleigh, North Carolina on June 25, 2003. The Hearing Officer found that the medical necessity of three physical therapy sessions per week had been demonstrated. (Petitioner's Exhibit 7). Not until the events leading to the filing of the current Petition were any other decisions made by MRNC that Aaron could not be authorized to receive physical therapy at the level deemed medically necessary in the Notice of Decision dated June 27, 2003.

53. Participants on behalf of Aaron Anderson at the informal hearing in June of 2003 who also were witnesses at the OAH hearing in May of 2005 were Aaron, Stephanie Goldberg (known as Stephanie Anderson in 2003), Sherri Winstead, Jo Holbrook, and Diane Jackson-Szymczyk. Dr. Ashe participated by phone in 2003 and in person at the OAH hearing in 2005.

54. At the OAH hearing, the only person who testified for Respondent and who also was present at the hearing at DMA in 2003 was Nora Poisella. Ms. Poisella recalled that the 2003 hearing focused on the connection between the PT and respiration. She

also recalled an informal conversation after the hearing regarding the need for complete information but did not know whether the information provided in 2003 was complete with regard to Ari's use of an RGO. The physical therapist representing MRNC who was present at the DMA hearing in 2003 was not the same person who reduced Ari's PT services in 2005 or who served as the review consultant in 2005. (Transcript II, pages 98-103). Attachment B, as well as other attachments, to the Petitioner's Exhibit 7 substantiates that the information on the RGO was provided prior to the DMA hearing in 2003.

55. Petitioner's Exhibit 7, attachment C, is a letter Aaron wrote on June 21, 2003, in support of his authorization request for physical therapy. The letter details Aaron's experience with physical therapy and the respiratory benefits he has received as a result of that therapy. Aaron asserted in 2003 that physical therapy is what has saved him "from the personal horror of not being able to breathe." Aaron believed in 2003 that his "one hope to thrive and live as normal of a life as possible is through getting up in a standing brace three times a week." Aaron still believes that physical therapy is necessary to his survival and so testified at the OAH hearing. (Transcript I, pages 32 and 34-36.)

56. Petitioner's Exhibit 7, attachment B, is a letter Aaron's mother wrote on June 8, 2003, in support of Aaron's authorization request for physical therapy. The letter details her discovery of the RGO physical therapy program at Louisiana State University and its appropriateness for persons with SMA Type I. Aaron's pulmonologist recommended that Aaron try the RGO therapy since the family had exhausted all other treatment options. In 2003, Ms. Goldberg received information from MRNC about DMA's authorization policies and use of guidelines stating that 80 percent of physical therapy clients will meet their expected goals and outcomes in 6-50 visits. Ms. Goldberg's letter disputed that Aaron would fit into that category. Her opinion was unchanged in 2005. (Transcript I, pages 131-133.)

57. At the DMA hearing in 2003, Ms. Winstead stated that although Ms. Jackson-Szymczyk had tried to teach her to brace and stand Aaron, she was unable to do so. Ms. Winstead confirmed that the person assisting her in getting Aaron into the RGO must be a skilled physical therapist. Petitioner's Exhibit 7, attachment H, is a letter Ms. Winstead wrote on June 21, 2003, in support of Aaron's authorization request for physical therapy. The letter details the process of placing Aaron into the RGO and standing him upright. Ms. Winstead stated that a nurse, such as herself, must be present during the PT sessions in order to assess Aaron's breathing. The Passey Muire must be removed to allow Aaron to breathe more easily; he is therefore unable to speak during physical therapy. The physical therapist must walk behind Aaron while he is in the RGO, and therefore cannot assess his breathing or monitor his need for suctioning. Ms. Winstead's opinion of Aaron's need for PT and the necessity of a trained physical therapist being present was unchanged when she testified in 2005. (Transcript I, pages 172-176.)

58. Dr. Ashe was the only physician who participated in the DMA hearing in 2003. At no time was Aaron contacted or seen by the physician consultant for DMA. The Notice of Decision, Petitioner's Exhibit 7, documents that DMA refused to disclose the name of the physician it had consulted. Dr. Ashe testified in 2003 and reiterated in 2005 that because of physical therapy (specifically, standing in the RGO), Aaron's condition had not deteriorated and he had not required hospitalization.

59. Petitioner's Exhibit 7, attachment J, is a letter that Dr. Ashe wrote on April 14, 2003, in support of Aaron's authorization request for physical therapy. In the letter, Dr. Ashe indicated his belief that three sessions per week of physical therapy are "absolutely imperative" for Aaron's health. Dr. Ashe's opinion in 2005 was unchanged. (Transcript I, pages 39, 41, 102 and 104.)

60. Jo Newman Holbrook, a registered nurse, met Aaron's mother in nursing school and became one of Aaron's nurses for two or three years. She often was present during Aaron's PT sessions, where she was responsible for assessing Aaron's respiration and suctioning him as needed. She was unable to stand Aaron or to walk him by herself. Petitioner's Exhibit 7, attachment G, is a letter she wrote on June 9, 2003, in support of Aaron's authorization request for PT. In the letter, Ms. Holbrook stated her belief that cutting Aaron's physical therapy is a death sentence for him. Ms. Holbrook's opinion, based on her experience with Aaron and her knowledge of SMA, had not changed from the informal hearing in 2003 up to the time she testified at the OAH hearing in 2005. (Transcript I, pages 145-152.)

61. Ms. Jackson-Szymczyk said at the informal hearing in 2003 that it is imperative that Aaron stand up in order to drain his lungs. His health did not improve until he began standing during physical therapy. Although Aaron has not made rapid progress, he has improved. Petitioner's Exhibit 7, attachment I, is a letter Ms. Jackson-Szymczyk wrote on April 25, 2003, in support of Aaron's authorization request for physical therapy. The letter detailed the structure of the physical therapy, as well as the need for the therapy and the consequences of discontinuing therapy. Ms. Jackson-Szymczyk confirmed in the OAH hearing in 2005 that her professional opinion of the medical necessity of Aaron's physical therapy at the level of at least three sessions per week had not changed since the 2003 hearing. (Transcript I, pages 229-230.)

62. Ms. Jackson-Szymczyk submitted the 2003 Notice of Decision of the DMA Hearing Officer (Petitioner's Exhibit 7) with each of her authorization requests following the hearing. (Transcript I, page 262.)

63. These submissions were made because Ms. Jackson-Szymczyk understood that had DMA been aware of the connection between the physical therapy and Aaron's pulmonary function, the sessions of physical therapy would not have been decreased in 2003. In fact, it was the understanding of Aaron's mother and of Ms. Jackson-Szymczyk, based on conversations with one or more DMA representatives after the informal hearing was concluded on June 23, 2003, that this information would be helpful for future reviews when Aaron's physical therapy needs were reassessed. (Transcript I, pages 136-137).

64. Petitioner's Exhibits 44-48 and 50-55 are each captioned at the top as "Admission Note Report" for Carolinas Healthcare System. These were documents that Ms. Jackson-Szymczyk kept in her work as a physical therapist and were part of the requirements of her job. (Transcript I, page 235.)

65. All of the Carolinas Healthcare System documents referred to previously were admitted into evidence and were part of the testimony of Ms. Jackson-Szymczyk. All illustrate that she repeatedly submitted information that reiterated the medical necessity of physical therapy for Aaron Anderson. They also substantiate that Dr. Ashe repeatedly provided information.

66. Petitioner's Exhibit 45 is an Admission Note Report with the subject listed as "MEDICAID COMMUNICATION" that Ms. Jackson-Szymczyk submitted on August 11, 2004, in response to a request for additional information. This note addressed how many times per week Aaron receives physical therapy, what is done in each session, and the benefits he receives from using the RGO. Included in the extensive information provided by Ms. Jackson-Szymczyk was the following statement: "THE PURPOSE OF SKILLED PHYSICAL THERAPY IS NOT ONLY TO FACILITATE AARON'S RESPIRATORY TOILET BUT ALSO TO PREVENT LOSS OF THE ACTIVE MUSCLE CONTROL WHICH WILL ALSO FACILITATE HIS RESPIRATORY TOILET." (Transcript I, page 249; Petitioner's Exhibit 45, paragraph 3.)

67. Ms. Jackson-Szymczyk already had submitted the same basic information on numerous occasions. If asked to submit information on Aaron's physical therapy at the time of the OAH hearing in May of 2005, Ms. Jackson-Szymczyk testified that she would include an identical statement of the purpose of Aaron's physical therapy. (Transcript I, pages 248-249.)

68. Petitioner's Exhibit 46 is a Recertification Summary that Ms. Jackson-Szymczyk submitted to DMA on September 18, 2004. It covered the period of July 20 to September 18, 2004. Ms. Jackson-Szymczyk detailed Aaron's physical therapy treatment, his progress, and changes in his treatment. One change was the addition of a special mat on the seat of Aaron's wheelchair to help relieve pressure sores. Another change was the purchase of a new floor mat and the addition of extra cushioning to the mat. The Recertification Form was submitted to Dr. Ashe for his signature. (Transcript I, pages 250-251.)

69. Petitioner's Exhibit 47 is an Admission Note Report dated August 31, 2004, with a request by Ms. Jackson Szymczyk for further authorization of PT services for Aaron Anderson at the rate of three sessions per week. A letter from Dr. Ashe was attached to the request, stating that physical therapy at the rate of three sessions per week is "absolutely mandatory" for Aaron and would prolong his life. Ms. Jackson-Szymczyk sent the letter to Amy McKenna. (Transcript I, pages 252-253.)

70. On September 29, 2004, Ms. Jackson-Szymczyk documented a phone call with Ms. Goldberg, Aaron's mother. The call was about MRNC's again asking for additional information (oxygen saturation levels and suctioning statistics) and requiring the information before further therapy visits would be authorized. (Transcript I, pages 253-254 and Petitioner's Exhibit 47.)

71. In response to MRNC's request, Aaron's team of therapists and nurses began to keep records on his oxygen saturation levels and on the amount of suctioning he required before and after physical therapy. Aaron required more suctioning on physical therapy days than on days without physical therapy. He also needed more suctioning after PT than before the session. Aaron's secretions are normally thick and sticky, but after he walked in the RGO, the secretions became clear and thin. Thick and sticky secretions are a sign of infection; thin, clear secretions show no infection and are easier to remove from the respiratory tract. (Transcript I, pages 80, 168-169 and 253-254)

72. Petitioner's Exhibit 48 recounted a specific instance of Aaron's being placed in the RGO when he had a low grade temperature and tightness in his chest and how afterward, he was able to loosen a large plug of mucous that could be suctioned. Aaron's oxygen saturation rate increased over the hour after PT was completed, and Aaron's temperature resolved. This additional information for Medicaid was dated October 4, 2004, and noted that again Dr. Ashe was providing a letter.

73. Petitioner's Exhibit 49 is the letter that Dr. Ashe wrote to DMA on October 4, 2004, in response to the request for information about oxygen saturation levels. Dr. Ashe again detailed the need for physical therapy at the level of three times per week and the reasons for it. Among them were that walking and being upright enabled Aaron "to remove huge plugs from his lungs, which he does develop due to his restrictive lung disease and neuromuscular weakness."

74. Ms. Winstead testified that Aaron's nurses monitor his oxygen saturation levels through the use of a pulse oximeter. The saturation levels are measured once an hour throughout the night, every morning before and after Aaron gets out of bed, and before and after physical therapy. If Aaron is sick, the oximeter is used almost constantly. The measurements show that Aaron has a higher level of oxygen saturation in his blood after he has ambulated in the RGO than he does prior to the PT. (Transcript I, pages 170-171.)

75. Ms. Jackson-Szymczyk stated that the greatest benefit Aaron received from the use of the RGO was the change documented in his respiratory status. Ms. Jackson-Szymczyk noted that Aaron's treatment team had been keeping documentation on his oxygen saturation levels and suctioning statistics as requested. (Transcript I, pages 255-256.)

76. Petitioner's Exhibit 50 is yet more additional information that Ms. Jackson-Szymczyk submitted on October 25, 2004. This information was in the same format as that previously submitted, as requests had continued about Aaron's oxygen saturation and suctioning statistics. Aaron was suctioned an average of 18 times daily on days when he did not have physical therapy and an average of 26 times daily on days when he did have physical therapy.

77. Ms. Jackson-Szymczyk also calculated a four-day sample of this information. Aaron was suctioned 104 times over four days when he had physical therapy, and 72 times over four days when he did not have physical therapy. Based on these statistics, Ms. Jackson-Szymczyk continued to support Aaron's request for three physical therapy sessions per week. She also agreed with Dr. Ashe's statements that Aaron needed physical therapy a minimum of three times per week. (Petitioner's Exhibit 50 and Transcript I, pages 257-259.)

78. Petitioner's Exhibit 51 is a Recertification Summary that Ms. Jackson-Szymczyk submitted on November 10, 2004, covering the period of November 18, 2004 through January 16, 2005. Aaron's treatment team was continuing to keep the requested documentation on suctioning and oxygen saturation levels. Ms. Jackson-Szymczyk stated in the summary that on the third consecutive day Aaron was without physical therapy, his oxygen saturation levels declined. She further stated that at the time, reduction in Aaron's physical therapy frequency could not be considered. Ms. Jackson-Szymczyk testified that, during this time when DMA was considering a reduction in Aaron's physical therapy services, no one from DMA contacted her to observe her work with Aaron. (Transcript I, pages 260-262.)

79. Petitioner's Exhibit 52 is further documentation of Aaron's oxygen saturation and suctioning statistics that Ms. Jackson-Szymczyk submitted on November 30, 2004. Ms. Jackson-Szymczyk testified that she would not have submitted this additional information absent a request. The data showed that Aaron was suctioned 389 times over a period of 26 non-physical therapy days. He was suctioned 319 times over a period of 14 physical therapy days. Aaron continued to have higher oxygen saturation levels after physical therapy than before. Ms. Jackson-Szymczyk testified that her opinion as to the necessity of three physical therapy sessions per week for Aaron did not change at any time during the submission of this information. (Transcript I, pages 265-267.)

80. Ms. Jackson-Szymczyk again submitted Aaron's oxygen saturation and suctioning statistics on December 16, 2004. (Petitioner's Exhibit 53.) Aaron continued to require more suctioning on physical therapy days than on non-physical therapy days, and he had higher oxygen saturation levels after PT than before each therapy session. (Transcript I, page 269.)

81. Petitioner's Exhibit 54 is an Admission Note Report that Ms. Jackson-Szymczyk submitted to DMA on January 4, 2005, to address Medicaid's classification of Aaron's physical therapy as maintenance. This Report echoed Ms. Jackson-Szymczyk's previous communications about Aaron's oxygen saturation and suctioning statistics and her opinion that PT for Aaron was not and cannot be considered maintenance. (Transcript I, pages 270-272.)

82. Petitioner's Exhibit 37 was the letter dated January 26, 2005, from Audra Renzi (who was Audra Renzi Troy at the time of the OAH hearing) to Aaron Anderson, informing him of DMA's decision to authorize reduced physical therapy services for the period beginning on January 17, 2005 and ending on March 17, 2005. Services were authorized for a reduced rate of two times per week during the period in question "as the beginning of a plan to taper the frequency of PT intervention." The letter specifically stated that "no significant gains in motor or pulmonary function" had occurred and that the PT services were a "maintenance intervention, at best."

83. Petitioner's Exhibit 55 is a Recertification Summary that Ms. Jackson-Szymczyk submitted to DMA on March 15, 2005, to cover the period from January 17 through March 17, 2005. Because an appeal was ongoing, Ms. Jackson-Szymczyk was required to continue to file for recertification in order to serve Aaron three times weekly while the appeal was pending. Her opinion as to Aaron's need for physical therapy did not change during this time. (Transcript I, pages 272-273.)

84. Dr. Ashe testified as a treating physician of Aaron and an expert in the field of pediatric pulmonology that if Aaron's physical therapy were reduced to less than three times per week, Aaron would begin to struggle with more respiratory infections. Dr. Ashe stated that three times per week is the minimum amount of PT required. Due to the nature of SMA as a progressive neurodegenerative disease, any function lost by Ari during a period of reduction in physical therapy services could not be regained. Ms. Jackson-Szymczyk noted that after missing only one or two treatments of PT with the RGO, Aaron showed a loss of head control and stability. (Transcript I, pages 98-99, 114 and 225-226.)

85. Dr. Ashe further testified that walking in the RGO is the best PT regime for Aaron because it challenges his total balance and postural musculature unlike a tilt table. He stated that many muscles work together to keep the body upright and that for Aaron, being in an orthotic device that would put him upright "would create much more of a positive impact on his overall chest mechanics." (Transcript I, pages 115-116).

86. Ms. Jackson-Szymczyk agreed with Dr. Ashe that equipment, such as a tilt table, would not be as effective as the use of an RGO for Aaron's physical therapy. A tilt table is a flat, firm surface with a pad on it; the patient is strapped to the table and it is tilted in a see-saw fashion. Ms. Jackson-Szymczyk discounted the effectiveness of a tilt table for Aaron because the tilt table would not allow him to bear weight, to shift side to side, or to work on his head control. Further, Aaron would have to be strapped so tightly to the table that he would receive no respiratory benefit. Ms. Jackson-Szymczyk concluded that Aaron would lose strength and head control if he were using a tilt table. (Transcript I, pages 244-247.)

87. Aaron stands only during his PT sessions. A nurse transfers Aaron from his bed to his wheelchair without standing him; instead, a ceiling lift, shown in Petitioner's Exhibits 19 and 20, is used. A canvas sling is placed underneath Aaron so that he can be lowered into his wheelchair. If Aaron is to be given a shower, he is lowered into his shower chair, pictured in Petitioner's Exhibit 28, rather than into the wheelchair. (Transcript I, pages 139 and 155-157.)

88. Neither Dr. Ashe nor Ms. Jackson-Szymczyk foresees the possibility of discharging Aaron from PT services or reducing the services. Persons with SMA typically require ongoing physical therapy. Aaron's disease is one that is life-long, and therefore his physical therapy goals for respiration and the improvement of his pulmonary toilet will be life-long goals. (Transcript I, pages 109 and 227-228.)

89. Ms. Jackson-Szymczyk has relayed her opinion that PT cannot be reduced or eliminated to MRNC/DMA in her multiple requests for therapy authorization and in her refusal to consider a maintenance plan for Aaron. She wrote as follows in Petitioner's Exhibit 51: "As a licensed physical therapist, I cannot ethically and professionally place Aaron on a maintenance program. This would create a situation going against medical doctor orders and placing Aaron at risk for respiratory distress, respiratory complications, and morbidity." (Transcript I, page 263.)

90. Amy McKenna, a witness for Respondent, is a Physical Therapy Review Associate with MRNC. Her job is to review physical therapy requests to determine whether the services are medically necessary. Ms. McKenna testified that she is required to use the DMA coverage policy in her reviews, and to apply her experience as a physical therapist to that policy. She was tendered as an expert in physical therapy and a specialist in utilization review for DMA's physical therapy program. The court accepted the tender. (Transcript III, pages 75-76 and 84-85.)

91. According to Ms. McKenna, DMA is the agency which determines how much therapy will be approved for Medicaid coverage. DMA contracts with MRNC to review requests for therapy services and to interpret Medicaid policy in relation to those requests. (Transcript II, pages 86 and 90-91.)

92. Ms. McKenna uses the *Physical Therapy Guide to Physical Therapist Practice* to review requests for therapy services. A review associate will look in the *Guide* for the patient's impairment(s), and find the expected number of visits for that impairment. Respondent's Exhibit 25 is a copy of the *Guide* pages that Ms. McKenna used in reviewing Aaron's therapy requests. (Transcript III, pages 85-87.)

93. Spinal Muscular Atrophy is not specifically listed in the *Guide*. Ms. McKenna used sections of the *Guide* which reflect the impairments associated with SMA, such as impaired muscle performance. (Transcript III, pages 87-88.)

94. Ms. McKenna did not use the *Guide* as her first reference in reviewing Aaron's therapy request. Instead, she based the review on her knowledge and clinical experience. Ms. McKenna referred to the *Guide* and the expected number of visits when she questioned the medical necessity of the therapy. Ms. McKenna has used an RGO with some of her physical therapy patients. However, she has never worked with a person with SMA. (Transcript III, pages 89 and 125-126.)

95. Ms. McKenna reviewed Aaron's therapy request for January 17 through March 17, 2005. Her review began with the technical components of the information Aaron's provider sent her, such as the doctor's order, the therapy goals, and the progress summary. Ms. McKenna then reviewed the clinical content and whether it supports the need for therapy. In addition to the new information sent to MRNC by Aaron's provider for the requested authorization period, Ms. McKenna reviewed Aaron's entire MRNC file, dating back to October 2002. This file did not include information on Aaron's hospitalization at age three, nor did it document the change in his health after beginning physical therapy with the RGO. Ms. McKenna spoke with Aaron once by telephone but never met him prior to the OAH hearing and thus never observed any of his physical therapy sessions. (Transcript III, pages 90-93, 95 and 109.) Ms. McKenna started work at MRNC in February of 2004 (Transcript III, page 75) and thus had no personal knowledge of the DMA hearing held in June of 2003 that determined three sessions per week of PT to be a medical necessity for Aaron.

96. Ms. McKenna did not find Aaron's ability to ambulate for short distances in the RGO to be functional progress. Ms. McKenna defines functional as something that can be used in a client's day-to-day life. Since Aaron will never be able to walk down the street, or down the hall to the bathroom, Ms. McKenna does not consider this to be functional progress. (Transcript III, pages 97-98.)

97. Ms. McKenna reviewed information pertaining to Aaron's inability to use the RGO in June of 2004, due to the skin breakdown the RGO had caused him. Ms. McKenna requested additional information about Aaron's pulmonary status as a result of this inability to use the RGO. (Transcript III, pages 100-101.)

98. After reviewing Aaron's file and physical therapy goals, Ms. McKenna did not believe that physical therapy at the frequency of three times per week was medically necessary. Ms. McKenna called Dr. Douglas Kelling to review Aaron's therapy request. After discussing the case by phone, Ms. McKenna sent a summary form to Dr. Kelling, which he signed. The summary is Respondent's Exhibit 14. (Transcript II, pages 205-206; Transcript III, page 95.)

99. Dr. Douglas Kelling contracts with MRNC as a physician consultant. He reviews cases for MRNC to determine the appropriateness of a client's hospital admission and treatment, and the appropriate standard of care for a patient. Dr. Kelling is in private practice and treats patients with a variety of chronic pulmonary diseases. He also teaches in Pulmonary Disease Division at Duke University Medical Center. Dr. Kelling is Board certified in internal medicine and pulmonary disease. Unlike Dr. Ashe, Dr. Kelling has no Board certification in pediatrics or in the subspecialty of pediatric pulmonology. Dr. Kelling was tendered as an expert in medicine, and specifically in pulmonology. The court accepted the tender. (Transcript II, pages 131, 134-136 and 140-141.)

100. Neither Dr. Kelling nor any other physician from DMA has ever seen, contacted, examined, or spoken with Aaron. Dr. Kelling has never treated a patient with SMA. Dr. Kelling testified that, physiologically, there are only a certain number of ways that the lungs can respond to disease and that he applied his knowledge and experience with respiratory diseases to Aaron's case. (Transcript I, page 42 and Transcript II, pages 136-139 and 192.)

101. Unlike Dr. Ashe and the other witnesses for Petitioner, Dr. Kelling was not aware of many parts of Aaron's medical history. Dr. Kelling knew that Aaron had been in the hospital many times before age four, but he did not know that Aaron had suffered from numerous episodes of respiratory arrest and an episode of cardiac arrest. Dr. Kelling also was not familiar with information about the therapy Ms. Goldberg discovered at LSU nor was he aware that Aaron's hospitalizations ended once he began standing in the RGO. Dr. Kelling also did not know that Aaron had become resistant to antibiotics at a young age. (Transcript II, pages 196-197 and 215.) He was not present in the courtroom when Petitioner's Exhibit 1, showing Aaron in the RGO during PT was presented.

102. During his consultations, Dr. Kelling looks for realistic, reasonable, objective goals. If these realistic goals are present, Dr. Kelling looks for achievement or improvement towards the goals. (Transcript II, pages 141-142.)

103. Aaron's Physical Therapy Goal Number One is to facilitate pulmonary toilet and prevent respiratory complications due to benefit from upright positioning and active movement allowed by the RGO. Dr. Kelling does not believe that standing or walking in the RGO would be sufficient to dislodge the mucus in Aaron's lungs. Dr. Kelling further testified that standing or walking in the RGO is not necessary for pulmonary toilet, as standing would cause gravity to pull the mucus down, rather than out of Aaron's lungs. (Transcript II, pages 153 and 155-156.) What Dr. Kelling believed, however, was contrary to the expert testimony of Dr. Ashe, to what actually happened and to what was extensively documented when Aaron had PT and walked in the RGO.

104. The testimony of Aaron's entire care team, his family, and Aaron himself, along with the data collected by these people, contradict Dr. Kelling's testimony. The overwhelming weight of the testimony, particularly by Dr. Ashe and by Ms. Jackson-Szymczyk, regarding the RGO was contrary to Dr. Kelling's opinions.

105. Dr. Kelling testified that sitting up would be sufficient to move Aaron's internal organs down into his diaphragm and that simply sitting up would create more room inside the chest for the lungs to inflate. Dr. Kelling testified that standing would not lower the internal organs more than sitting would and thus would make no difference to respiration. (Transcript II, pages 159-160.)

106. The testimony of Aaron's entire care team, his family, and Aaron himself, along with the data collected by these people, show that sitting up has not been sufficient for Aaron's pulmonary toilet. Dr. Kelling was testifying to what he believed to be true, but Dr. Ashe was testifying to what he knew from years of working with Aaron. Ms. Jackson-Szymczyk was testifying to what she had personally observed during about seven years of working with Aaron as his physical therapist.

107. Dr. Kelling testified that hemoglobin, the protein to which oxygen bonds in the bloodstream, changes its structure based upon how much oxygen is present in the blood. Once a certain amount of oxygen is present in the blood, no more can adhere to the hemoglobin; therefore, an increase in oxygen intake does not necessarily mean more oxygen is being carried throughout the body. Dr. Kelling testified that an increase in oxygen saturation levels over 88 or 90 percent is a negligible increase. (Transcript II, pages 168-171.)

108. The testimony of Aaron's entire care team, his family, and Aaron himself, along with the data collected by these people, show that Aaron's health has improved from physical therapy with the RGO, and that the increase in oxygen saturation levels is not, in fact, negligible. Dr. Ashe testified to what he considered significant about the data. (Transcript I, pages 105-106.)

109. Although Dr. Kelling testified that he does not believe Aaron's physical therapy goals are realistic and appropriate goals for Aaron and that PT is not medically necessary at the frequency of three times per week. (Transcript II, pages 182-183 and 186), the testimony of Aaron's entire care team, his family, and Aaron himself, along with the data collected by these people, show that Aaron's goals are realistic and that physical therapy at the frequency of three times per week is medically necessary.

110. Dr. Kelling testified that the number of times Aaron requires suctioning with and without physical therapy is not an objective measure of his pulmonary toilet. Instead, Dr. Kelling would like to see the actual amount of secretions that were suctioned. (Transcript II, pages 189-190.)

111. The testimony of Aaron's entire care team shows that no one from MRNC or DMA asked for measurements of the amount of secretions suctioned. The requested information, even after Dr. Kelling became involved in the case, was only to record the number of times Aaron required suctioning on physical therapy days. If the volume of secretions was significant, then all anyone had to do was ask for measurement to occur.

112. In the consultation summary that Ms. McKenna prepared after her conversation with Dr. Kelling, she wrote as follows: "There is a documented period of time when the patient was unable to work on standing tasks because the braces were causing skin breakdown. During this period of time, the 3 time per week frequency was not maintained and no pneumonia resulted nor was a hospitalization required, complications which are reported to be potential consequences of reducing the PT frequency." (Respondent's Exhibit 14, page 2, paragraph 2.)

113. Ms. Jackson-Szymczyk testified that the missed therapy sessions were not consecutive. Aaron was unable to use the RGO on June 1, 3, and 8, 2004. On June 9, Aaron ambulated in the RGO despite the skin breakdown because his treating team, including his physical therapist, considered getting Aaron into the RGO critical for his respiration. Aaron was unable to use the RGO from June 10 through 15, 2004, as the orthotist was fitting the RGO with extra padding and the RGO was out of Aaron's home. The process of adding the padding to the RGO was expedited due to Aaron's need for physical therapy to aid in respiration. (Transcript I, pages 241-243.)

114. Even Respondent's expert, Dr. Kelling, supported the position of Petitioners. He testified that he would not expect to see respiratory distress when PT was interrupted for such a short time and when the missed PT sessions were not consecutive. (Transcript II, page 229.)

115. Based upon the information she received and the consultation with Dr. Kelling, Ms. McKenna concluded that PT was not necessary to prevent Aaron from having respiratory complications. Ms. McKenna did not see a significant decline in Aaron's pulmonary function during the time that he could not use the RGO, and therefore determined that physical therapy at the rate of three times per week was not medically necessary. Despite her decision, Ms. McKenna authorized a shortened, four week period of physical therapy and requested more information be gathered during this time. Ms. McKenna testified that she did not specify the measurements to be used; she only asked for an objective measurement of Aaron's pulmonary function with the physical therapy. (Transcript III, pages 103-104 and 106-107.)

116. Based upon all of this information, Ms. McKenna did not believe that Aaron's therapy fit into DMA's policy and definition of medical necessity. (Transcript III, page 111.)

117. The Medicaid policy dictates that maintenance physical therapy is not covered by Medicaid. Maintenance is defined as a series of services related to the maintenance of current function, rather than improvement. Ms. McKenna determined that Aaron's physical therapy was for maintenance purposes and therefore did not meet the requirements of the Medicaid policy. (Transcript II, page 92 and Transcript III, pages 113-114.)

118. The testimony of Aaron's entire care team, his family, and Aaron himself, refutes the idea that Aaron's therapy is strictly for maintenance. Although Aaron will never be able to walk independently and never has had that ability, his treatment team has seen improvements. Dr. Ashe testified that, with the nature of Aaron's disease, prevention of a loss is a gain. Ms. Jackson-Szymczyk testified that although Aaron does not make rapid progress, his health has improved because of his physical therapy. (Transcript I, pages 112 and 230.)

119. Further, Ms. McKenna's own testimony refutes the idea that Aaron's therapy is strictly for maintenance. She testified that, as a licensed physical therapist, she would set up a maintenance program that the client's family members and caregivers could do in order to maintain status. However, Aaron's caregivers all testified that a physical therapist is required to do Aaron's PT. Ms. Goldberg indicated that she cannot be trained to carry out the therapy because of safety reasons in not realizing whether an exercise was being done correctly. Further, she would not have known that Aaron's pressure sore was caused by the RGO. Ms. Winstead testified that she still is unable to stand and brace Aaron. Ms. Jackson-Szymczyk testified that other physical therapists have been unable to learn the techniques for placing Aaron in the RGO. Further, the person working with Aaron must assess his condition and adapt the therapy session to his condition each day; Ms. Jackson-Szymczyk believes that this ongoing assessment and response to it require the skills of a licensed physical therapist. (Transcript I, pages 128, 172 and 230; Transcript III, pages 114-115.)

120. Dr. Kelling defines "medical necessity" as "interventions necessary to prevent complications. . . [i]t could be a medicine, it could be physical therapy, it could be walking, but any intervention that one is doing that will prevent a complication. In this case the complication would be pneumonia leading to respiratory failure leading to a respirator, and complications thereof." (Transcript II, page 230.)

121. Although Dr. Kelling testified that he does not believe physical therapy is medically necessary at the rate of three times per week, his definition of medical necessity supports the continuation of the PT at the level that has been proven effective for Aaron. The testimony of Aaron's entire care team, his family, and Aaron himself, plus the extensive data and documentation, show that the PT does prevent and has for years prevented complications that normally befall persons with SMA. The physical therapy at the level of three sessions per week is medically necessary under Dr. Kelling's definition.

122. Petitioner's Exhibit 8 is a letter that Aaron wrote on April 15, 2005, in support of his request for authorization of physical therapy services. Aaron cannot remember a time when he did not have breathing difficulty because of his SMA. He is able to breathe easier after using the RGO. Aaron also strives to maintain head control while he is using the RGO. The letter details Aaron's continuing experiences with PT and the respiratory benefits he receives from it. Aaron expressed his belief that physical therapy has allowed him to live far beyond the normal prognosis for someone with SMA Type I. (Transcript I, pages 50-51 and 53-54.)

123. Medicaid Policy 10A became effective on July 1, 2004, and was thus controlling at the time physical therapy services for Aaron Anderson were denied at the frequency of three times per week. Respondent's Exhibit 29.

124. Policy 10A, section 3.0, included in Respondent's Exhibit 29, dictates that "[a]ll services must be medically necessary." Subsection 3.1 deals with Physical Therapy and states:

Medicaid accepts the medical necessity criteria for beginning, continuing and terminating treatment as published by the American Physical Therapy Association in their most recent edition of *Physical Therapy: Guide to Physical Therapist Practice, Part Two: Preferred Practice Patterns*.

125. Respondent's Exhibit 25 included relevant parts of the *Guide*. Part 4C of the *Guide* addresses physical therapy treatment for Impaired Muscle Performance. Under the heading "Expected Range of Number of Visits Per Episode of Care" is the following language:

It is anticipated that 80% of patients/clients who are classified into this pattern will achieve the anticipated goals and expected outcomes within 6 to 30 visits during a single continuous episode of care. Frequency of visits and duration of the episode of care should be determined by the physical therapist to maximize effectiveness of care and efficiency of service delivery. (Emphasis in original)

Part 4C of the *Guide* includes a heading of “Factors That May Require New Episode of Care or That May Modify Frequency of Visits/Duration of Episode.” Among the factors are “[c]hronicity or severity of the current condition” and “[p]robability of prolonged impairment, functional limitation, or disability.” In fact, a number of the factors apply to Aaron’s condition resulting from his SMA and would support further authorization of PT at an unreduced level.

126. Part 5E of the *Guide* addresses physical therapy treatment for Impaired Muscle Function and Sensory Integrity Associated with Progressive Disorders of the Central Nervous System. Under the headings “Expected Range of Number of Visits Per Episode of Care” and “Factors That May Require New Episode of Care or That May Modify Frequency of Visits/Duration of Care” is that same language included in Part 4C.

127. Part 6C of the *Guide* addresses physical therapy treatment for Impaired Ventilation, Respiration/Gas Exchange, and Aerobic Capacity/Endurance Associated With Airway Clearance Dysfunction. Under the headings “Expected Range of Number of Visits Per Episode of Care” and “Factors That May Require New Episode of Care or That May Modify Frequency of Visits/Duration of Care” is that same language included in Part 4C.

128. The Findings of Fact and the specific sections of the *Guide* cited in the preceding paragraphs lead to the conclusion that Aaron requires more PT sessions than those anticipated in the *Guide*. Werdnig-Hoffman Disease or SMA Type I is a chronic and severe disease, neurodegenerative in character. Moreover, it is a disability for which no cure exists; it is irreversible and persons are at risk for death from respiratory complications.

129. It is further significant that the *Guide* language reinforces the appropriateness of the physical therapist’s determining how frequent visits need to be and how long a period of time PT is needed for the person in question. In addition, it seems that the *Guide* gives the therapist this authority acknowledging that the therapist is the person with the unique qualifications to determine the effectiveness of the care that is being given and to maximize the efficiency of the care being given. The long-time physical therapist for Aaron, Diane Jackson-Szymczyk, testified that although the large majority of persons approved for PT will need no more visits than the *Guide* anticipates, Aaron Anderson is in the category of persons for whom PT should not end even when the maximum number of visits for 80 percent of recipients would end.

130. Medicaid Policy 10A, Subsection 3.1.1, also a part of Respondent’s Exhibit 29, states:

Maintenance is defined in the *Guide to Physical Therapy Practice*, second edition, Part 1, Chapter 1, under the heading “Episode of Care, Maintenance or Prevention” as “. . . a series of occasional clinical and educational and administrative services related to maintenance of current function.”

CONCLUSIONS OF LAW

1. All parties properly are before the Office of Administrative Hearings, which has jurisdiction over this contested case pursuant to Chapter 150B, the Administrative Procedure Act, of the North Carolina General Statutes.

2. The Medicaid statute and regulatory scheme create a presumption in favor of the medical judgment of the attending physician in determining the medical necessity of treatment. *Weaver v. Reagan*, 866 F.2d 194, 200 (8th Cir. 1989). Deference is appropriately given to a long-time treating physician who has had multiple contacts with the person in question, who has Board certification that is directly applicable to the issues in the case, and who is certified as an expert. In this case, deference must be given to the testimony and opinions expressed by Dr. Ashe. This deference does not diminish the considerable qualifications and expertise of Dr. Kelling, but Dr. Kelling testified from a position of no direct experience with Aaron Anderson. He was not familiar with the RGO program that was started with Aaron when Aaron was a young child and thus Dr. Ashe must be given deference in his opinion that for Aaron Anderson, physical therapy at the rate of at least three sessions per week is medically necessary.

3. Similar deference should be given to a treating physical therapist who has been providing direct services for a number of years. Ms. Jackson-Szymczyk was more credible than Ms. Troy because Ms. Troy never had seen Aaron Anderson and had no direct experience with his unique needs. Although Ms. Troy has impressive credentials in her area of expertise, Ms. Jackson-

Szymczyk was articulate, knowledgeable, and experienced with Aaron. She knew that he could suffer respiratory issues if his therapy was interrupted in June of 2004, and she made commendable efforts to be sure that he was in the RGO even when he had a pressure sore and she also intervened to have an orthotist add padding to the RGO in as short a time as possible. All things considered, Ms. Jackson-Szymczyk was the more credible physical therapist.

4. Petitioner fully met his burden of showing by a fair preponderance of the evidence that physical therapy at the level of three sessions per week was a medical necessity for him and that MRNC was in error in determining that it was not. Further, Petitioner proved that his physical therapy was not maintenance as MRNC had concluded. Occasional services to maintain current function would not suffice for Aaron Anderson as he would not maintain current function with occasional services and as any function lost would likely not be recovered.

5. The evidence established to a reasonable degree of medical certainty that physical therapy for Aaron Anderson at three sessions per week is medically necessary and that Aaron Anderson meets all relevant standards. Reduction of his PT would be life-threatening.

DECISION

That the Division of Medical Assistance of the North Carolina Department of Health and Human Services adopt the decision of the undersigned Administrative Law Judge announced on the record at the conclusion of the hearing in this matter on May 13, 2005, also adopt the Findings of Fact and Conclusions of Law set forth in the preceding paragraphs, and enter a Final Decision that Respondent's reduction of physical therapy sessions from the rate of three per week to two sessions with a goal of tapering PT services further for Aaron Anderson, Petitioner, be REVERSED as not supported by the evidence, and that Aaron Anderson continue receiving three PT sessions weekly.

ORDER

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6714, in accordance with North Carolina General Statute 150B-36(b).

NOTICE

The 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 10th day of August 2005.

Beecher Gray
Administrative Law Judge