The NORTH CAROLINA REGISTER

IN THIS ISSUE . . . . . .

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INFORMATION ABOUT THE NORTH CAROLINA REGISTER AND ADMINISTRATIVE CODE

NORTH CAROLINA REGISTER

The *North Carolina Register* is published twice a month and contains information relating to agency, executive, legislative and judicial actions required by or affecting Chapter 150B of the General Statutes. All proposed administrative rules and notices of public hearings filed under G.S. 150B-21.2 must be published in the Register. The Register will typically comprise approximately fifty pages per issue of legal text.

State law requires that a copy of each issue be provided free of charge to each county in the state and to various state officials and institutions.

The *North Carolina Register* is available by yearly subscription at a cost of one hundred and five dollars ($105.00) for 24 issues. Individual issues may be purchased for eight dollars ($8.00).

Requests for subscription to the North Carolina Register should be directed to the Office of Administrative Hearings, P. O. Drawer 27447, Raleigh, N. C. 27611-7447.

ADOPTION, AMENDMENT, AND REPEAL OF RULES

The following is a generalized statement of the procedures to be followed for an agency to adopt, amend, or repeal a rule. For the specific statutory authority, please consult Article 2A of Chapter 150B of the General Statutes.

Any agency intending to adopt, amend, or repeal a rule must first publish notice of the proposed action in the *North Carolina Register*. The notice must include the time and place of the public hearing (or instructions on how a member of the public may request a hearing); a statement of procedure for public comments; the text of the proposed rule or the statement of subject matter; the reason for the proposed action; a reference to the statutory authority for the action and the proposed effective date.

Unless a specific statute provides otherwise, at least 15 days must elapse following publication of the notice in the *North Carolina Register* before the agency may conduct the public hearing and at least 30 days must elapse before the agency can take action on the proposed rule. An agency may not adopt a rule that differs substantially from the proposed form published as part of the public notice, until the adopted version has been published in the *North Carolina Register* for an additional 30 day comment period.

When final action is taken, the promulgating agency must file the rule with the Rules Review Commission (RRC). After approval by RRC, the adopted rule is filed with the Office of Administrative Hearings (OAH).

A rule or amended rule generally becomes effective 5 business days after the rule is filed with the Office of Administrative Hearings for publication in the North Carolina Administrative Code (NCAC).

Proposed action on rules may be withdrawn by the promulgating agency at any time before final action is taken by the agency or before filing with OAH for publication in the NCAC.

TEMPORARY RULES

Under certain emergency conditions, agencies may issue temporary rules. Within 24 hours of submission to OAH, the Codifier of Rules must review the agency's written statement of findings of need for the temporary rule pursuant to the provisions in G.S. 150B-21.1. If the Codifier determines that the findings meet the criteria in G.S. 150B-21.1, the rule is entered into the NCAC. If the Codifier determines that the findings do not meet the criteria, the rule is returned to the agency. The agency may supplement its findings and resubmit the temporary rule for an additional review or the agency may respond that it will remain with its initial position. The Codifier, thereafter, will enter the rule into the NCAC. A temporary rule becomes effective either when the Codifier of Rules enters the rule in the Code or on the sixth business day after the agency resubmits the rule without change. The temporary rule is in effect for the period specified in the rule or 180 days, whichever is less. An agency adopting a temporary rule must begin rule-making procedures on the permanent rule at the same time the temporary rule is filed with the Codifier.

NORTH CAROLINA ADMINISTRATIVE CODE

The North Carolina Administrative Code (NCAC) is a compilation and index of the administrative rules of 25 state agencies and 38 occupational licensing boards. The NCAC comprises approximately 15,000 letter size, single spaced pages of material of which approximately 35% is changed annually. Compilation and publication of the NCAC is mandated by G.S. 150B-21.18.

The Code is divided into Titles and Chapters. Each state agency is assigned a separate title which is further broken down by chapters. Title 21 is designated for occupational licensing boards.

The NCAC is available in two formats.

(1) Single pages may be obtained at a minimum cost of two dollars and 50 cents ($2.50) for 10 pages or less, plus fifteen cents ($0.15) per each additional page.

(2) The full publication consists of 53 volumes, totaling in excess of 15,000 pages. It is supplemented monthly with replacement pages. A one year subscription to the full publication including supplements can be purchased for seven hundred and fifty dollars ($750.00). Individual volumes may also be purchased with supplement service. Renewal subscriptions for supplements to the initial publication are available.

Requests for pages of rules or volumes of the NCAC should be directed to the Office of Administrative Hearings.

CITATION TO THE NORTH CAROLINA REGISTER

The *North Carolina Register* is cited by volume, issue, page number and date. **1:1 NCR 101-201, April 1, 1986** refers to Volume 1, Issue 1, pages 101 through 201 of the *North Carolina Register* issued on April 1, 1986.

FOR INFORMATION CONTACT: Office of Administrative Hearings, ATTN: Rules Division, P.O. Drawer 27447, Raleigh, North Carolina 27611-7447, (919) 733-2678.

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NORTH CAROLINA REGISTER

Publication Schedule

(April 1994 - January 1995)

Volume and Issue Number	Issue Date	Last Day for Filing	Last Day for Electronic Filing	Earliest Date for Public Hearing *15 days from notice*	* End of Required Comment Period *30 days from notice*	Last Day to Submit to RRC	** Earliest Effective Date
9:1	04/04/94	03/11/94	03/18/94	04/19/94	05/04/94	05/20/94	07/01/94
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This table is published 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 2B .0103 and the Rules of Civil Procedure, Rule 6.

* *An agency must accept comments for at least 30 days after the proposed text is published or until the date of any public hearing, whichever is longer. See G.S. 150B-21.2(f) for adoption procedures.*

** *The "Earliest Effective Date" is computed assuming that the agency follows the publication schedule above, that the Rules Review Commission approves the rule at the next calendar month meeting after submission, and that RRC delivers the rule to the Codifier of Rules five (5) business days before the 1st business day of the next calendar month.*

Revised 03/94

CHAPTER 150B

THE ADMINISTRATIVE PROCEDURE ACT

[The following excerpt contains the statutory provisions of the Administrative Procedure Act as amended by the 1994 Regular Session of the 1993 General Assembly, effective July 17, 1994 (§150B-21.18) and January 1, 1995 (§150B-23(a)).]

Article 1.
General Provisions.

§ 150B-1. Policy and scope.

(a) Purpose. -- This Chapter establishes a uniform system of administrative rule making and adjudicatory procedures for agencies. The procedures ensure that the functions of rule making, investigation, advocacy, and adjudication are not all performed by the same person in the administrative process.

(b) Rights. -- This Chapter confers procedural rights.

(c) Full Exemptions. -- This Chapter applies to every agency except:

(1) The North Carolina National Guard in exercising its court-martial jurisdiction.

(2) The Department of Human Resources in exercising its authority over the Camp Butner reservation granted in Article 6 of Chapter 122C of the General Statutes.

(3) The Utilities Commission.

(4) The Industrial Commission.

(5) The Employment Security Commission.

(d) Exemptions From Rule Making. -- Article 2A of this Chapter does not apply to the following:

(1) The Commission.

(2) The North Carolina Low-Level Radioactive Waste Management Authority in administering the provisions of G.S. 104G-10 and G.S. 104G-11.

(3) The North Carolina Hazardous Waste Management Commission in administering the provisions of G.S. 130B-13 and G.S. 130B-14.

(4) The Department of Revenue, except that Parts 3 and 4 of Article 2A apply to the Department.

(5) The North Carolina Air Cargo Airport Authority with respect to the acquisition, construction, operation, or use, including fees or charges, of any portion of a cargo airport complex.

(e) Exemptions From Contested Case Provisions. -- The contested case provisions of this Chapter apply to all agencies and all proceedings not expressly exempted from the Chapter. The contested case provisions of this Chapter do not apply to the following:

(1) The Department of Human Resources and the Department of Environment, Health, and Natural Resources in complying with the procedural safeguards mandated by Section 680 of Part H of Public Law 99-457 as amended (Education of the Handicapped Act Amendments of 1986).

(2) Repealed by Session Laws 1993 c. 501, s. 29, effective July 23, 1993.

(3) The North Carolina Low-Level Radioactive Waste Management Authority in administering the provisions of G.S. 104G-9, 104G-10, and 104G-11.

(4) The North Carolina Hazardous Waste Management Commission in administering the provisions of G.S. 130B-11, 130B-13, and 130B-14.

(5) Hearings required pursuant to the Rehabilitation Act of 1973, (Public Law 93-122), as amended and federal regulations promulgated thereunder. G.S. 150B-51(a) is considered a contested case hearing provision that does not apply to these hearings.

(6) The Department of Revenue.

(7) The Department of Correction.

(8) The Department of Transportation, except as provided in G.S. 136-29.

(9) The Occupational Safety and Health Review Board in all actions that do not involve agricultural employers.

(10) The North Carolina Air Cargo Airport Authority with respect to the acquisition, construction, operation, or use, including fees or charges, of any portion of a cargo airport complex.

(f) Exemption From All But Judicial Review. -- No Article in this Chapter except Article 4 applies to the University of North Carolina.

§ **150B-2. Definitions.** -- As used in this

Chapter,

(01) "Administrative law judge" means a person appointed under G.S. 7A-752, 7A-753, or 7A-757.

(1) "Agency" means an agency or an officer in the executive branch of the government of this State and includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch. A local unit of government is not an agency.

(1a) "Adopt" means to take final action to create, amend, or repeal a rule.

(1b) "Codifier of Rules" means the Chief Administrative Law Judge of the Office of Administrative Hearings or a designated representative of the Chief Administrative Law Judge.

(1c) "Commission" means the Rules Review Commission.

(2) "Contested case" means an administrative proceeding pursuant to this Chapter to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty. "Contested case" does not include rulemaking, declaratory rulings, or the award or denial of a scholarship or grant.

(2a) Repealed by Session Laws 1991, c. 418, s. 3, effective October 1, 1991.

(2b) "Hearing officer" means a person or group of persons designated by an agency that is subject to Article 3A of this Chapter to preside in a contested case hearing conducted under that Article.

(3) "License" means any certificate, permit or other evidence, by whatever name called, of a right or privilege to engage in any activity, except licenses issued under Chapter 20 and Subchapter I of Chapter 105 of the General Statutes and occupational licenses.

(4) "Licensing" means any administrative action issuing, failing to issue, suspending, or revoking a license or occupational license. "Licensing" does not include controversies over whether an examination was fair or whether the applicant passed the examination.

(4a) "Occupational license" means any certificate, permit, or other evidence, by whatever name called, of a right or privilege to engage in a profession, occupation, or field of endeavor that is issued by an occupational licensing agency.

(4b) "Occupational licensing agency" means any board, commission, committee or other agency of the State of North Carolina which is established for the primary purpose of regulating the entry of persons into, and/or the conduct of persons within a particular profession, occupation or field of endeavor, and which is authorized to issue and revoke licenses. "Occupational licensing agency" does not include State agencies or departments which may as only a part of their regular function issue permits or licenses.

(5) "Party" means any person or agency named or admitted as a party or properly seeking as of right to be admitted as a party and includes the agency as appropriate. This subdivision does not permit an agency that makes a final decision, or an officer or employee of the agency, to petition for initial judicial review of that decision.

(6) "Person aggrieved" means any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision.

(7) "Person" means any natural person, partnership, corporation, body politic and any unincorporated association, organization, or society which may sue or be sued under a common name.

(8) "Residence" means domicile or principal place of business.

(8a) "Rule" means any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:

a. Statements concerning only the internal management of an agency

or group of agencies within the same principal office or department enumerated in G.S. 143-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.

b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, by an occupational licensing board, as defined by G.S. 93B-1, or by the State Board of Elections.

c. Nonbinding interpretive statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.

d. A form, the contents or substantive requirements of which are prescribed by rule or statute.

e. Statements of agency policy made in the context of another proceeding, including:

1. Declaratory rulings under G.S. 150B-4.

2. Orders establishing or fixing rates or tariffs.

f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.

g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.

h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.

i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Personnel Commission.

j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.1 and the variable component of the excise tax on motor fuel under G.S. 105-434.

(8b) "Substantial evidence" means relevant evidence a reasonable mind might accept as adequate to support a conclusion.

(9) Repealed by Session Laws 1991, c. 418 s. 3, effective October 1, 1991.

§ 150B-3. Special provisions on licensing.

(a) When an applicant or a licensee makes a timely and sufficient application for issuance or renewal of a license or occupational license, including the payment of any required license fee, the existing license or occupational license does not expire until a decision on the application is finally made by the agency, and if the application is denied or the terms of the new license or occupational license are limited, until the last day for applying for judicial review of the agency order. This subsection does not affect agency action summarily suspending a license or occupational license under subsections (b) and (c) of this section.

(b) Before the commencement of proceedings for the suspension, revocation, annulment, withdrawal, recall, cancellation, or amendment of any license other than an occupational license, the agency shall give notice to the licensee, pursuant to the provisions of G.S. 150B-23. Before the commencement of such proceedings involving an occupational license, the agency shall give notice pursuant to the provisions of G.S. 150B-38. In either case, the licensee shall be given an opportunity to show compliance with all lawful requirements for retention of the license or occupational license.

(c) If the agency finds that the public health, safety, or welfare requires emergency action and incorporates this finding in its order, summary suspension of a license or occupational license may be ordered effective on the date specified in the order or on service of the certified copy of the order at the last known address of the licensee, whichever is later, and effective during the proceedings. The proceedings shall be promptly commenced and determined.

Nothing in this subsection shall be construed as amending or repealing any special statutes, in effect prior to February 1, 1976, which provide

for the summary suspension of a license.

§ 150B-4. Declaratory rulings.

(a) On request of a person aggrieved, an agency shall issue a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency, except when the agency for good cause finds issuance of a ruling undesirable. The agency shall prescribe in its rules the circumstances in which rulings shall or shall not be issued. A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by the court. An agency may not retroactively change a declaratory ruling, but nothing in this section prevents an agency from prospectively changing a declaratory ruling. A declaratory ruling is subject to judicial review in the same manner as an order in a contested case. Failure of the agency to issue a declaratory ruling on the merits within 60 days of the request for such ruling shall constitute a denial of the request as well as a denial of the merits of the request and shall be subject to judicial review.

(b) This section does not apply to the Department of Correction.

Article 2.
Rule Making.
Repealed .

Article 2A.
Rules.
Part 1. General Provisions.

§ 150B-18. Scope and effect.

This Article applies to an agency's exercise of its authority to adopt a rule. A rule is not valid unless it is adopted in substantial compliance with this Article.

§ 150B-19. Restrictions on what can be adopted as a rule.

An agency may not adopt a rule that does one or more of the following:

(1) Implements or interprets a law unless that law or another law specifically authorizes the agency to do so.

(2) Enlarges the scope of a profession, occupation, or field of endeavor for which an occupational license is required.

(3) Imposes criminal liability or a civil penalty for an act or omission, including the violation of a rule, unless a law specifically authorizes the agency to do so or a law declares that violation of the rule is a criminal offense or is grounds for a civil penalty.

(4) Repeats the content of a law, a rule, or a federal regulation.

(5) Establishes a reasonable fee or other reasonable charge for providing a service in fulfillment of a duty unless a law specifically authorizes the agency to do so or the fee or other charge is for one of the following:

a. A service to a State, federal, or local governmental unit.

b. A copy of part or all of a State publication or other document, the cost of mailing a document, or both.

c. A transcript of a public hearing.

d. A conference, workshop, or course.

e. Data processing services.

(6) Allows the agency to waive or modify a requirement set in a rule unless a rule establishes specific guidelines the agency must follow in determining whether to waive or modify the requirement.

§ 150B-20. Petitioning an agency to adopt a rule.

(a) Petition. -- A person may petition an agency to adopt a rule by submitting to the agency a written rule-making petition requesting the adoption. A person may submit written comments with a rule-making petition. If a rule-making petition requests the agency to create or amend a rule, the person must submit the proposed text of the requested rule change and a statement of the effect of the requested rule change. Each agency must establish by rule the procedure for submitting a rule-making petition to it and the procedure the agency follows in considering a rule-making petition.

(b) Time. -- An agency must grant or deny a rule-making petition submitted to it within 30 days after the date the rule-making petition is submitted, unless the agency is a board or commission. If the agency is a board or commission, it must grant or deny a rule-making petition within 120 days after the date the rule-making petition is submitted.

(c) Action. -- If an agency denies a rule-making petition, it must send the person who submitted the petition a written statement of the reasons for denying the petition. If an agency grants a rule-making petition, it must inform the person who submitted the rule-making petition of its decision and must initiate rule-making proceedings. When an agency grants a rule-making petition requesting the creation or amendment of a rule, the notice of rule making it publishes in the North Carolina Register may state that the agency is initiating rule-making proceedings as the result of

a rule-making petition, state the name of the person who submitted the rule-making petition, set out the text of the requested rule change submitted with the rule-making petition, and state whether the agency endorses the proposed rule change.

(d) Review. -- Denial of a rule-making petition is a final agency decision and is subject to judicial review under Article 4 of this Chapter. Failure of an agency to grant or deny a rule-making petition within the time limits set in subsection (b) is a denial of the rule-making petition.

(e) Exception. -- This section does not apply to the Department of Correction.

§ 150B-21. Agency must designate rule-making coordinator.

Each agency must designate one or more rule-making coordinators to oversee the agency's rule-making functions. The coordinator must prepare notices of public hearings, coordinate access to the agency's rules, and serve as the liaison between the agency, other agencies, and the public in the rule-making process.

Part 2. Adoption of Rules.

§ 150B-21.1. Procedure for adopting a temporary rule.

(a) Adoption. -- An agency may adopt a temporary rule without prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical when it finds that adherence to the notice and hearing requirements of this Part would be contrary to the public interest and that the immediate adoption of the rule is required by one or more of the following:

(1) A serious and unforeseen threat to the public health, safety, or welfare.
(2) The effective date of a recent act of the General Assembly or the United States Congress.
(3) A recent change in federal or State budgetary policy.
(4) A federal regulation.
(5) A court order.
(6) The need for the rule to become effective the same date as the State Medical Facilities Plan approved by the Governor, if the rule addresses a matter included in the State Medical Facilities Plan.

An agency must prepare a written statement of its findings of need for a temporary rule. The statement must be signed by the head of the agency adopting the rule.

An agency must begin rule-making proceedings for a permanent rule by the day it adopts a temporary rule. An agency begins rule-making proceedings for a permanent rule by submitting to the Codifier of Rules written notice of its intent to adopt a permanent rule.

(b) Review. -- When an agency adopts a temporary rule it must submit the rule, the agency's written statement of its findings of need for the rule, and the notice of intent to adopt a permanent rule to the Codifier of Rules. Within one business day after an agency submits a temporary rule, the Codifier of Rules must review the agency's written statement of findings of need for the rule to determine whether the statement of need meets the criteria listed in subsection (a). In reviewing the statement, the Codifier of Rules may consider any information submitted by the agency or another person. If the Codifier of Rules finds that the statement meets the criteria, the Codifier of Rules must notify the head of the agency and enter the rule in the North Carolina Administrative Code.

If the Codifier of Rules finds that the statement does not meet the criteria, the Codifier of Rules must immediately notify the head of the agency. The agency may supplement its statement of need with additional findings or submit a new statement. If the agency provides additional findings or submits a new statement, the Codifier of Rules must review the additional findings or new statement within one business day after the agency submits the additional findings or new statement. If the Codifier of Rules again finds that the statement does not meet the criteria listed in subsection (a), the Codifier of Rules must immediately notify the head of the agency.

If an agency decides not to provide additional findings or submit a new statement when notified by the Codifier of Rules that the agency's findings of need for a rule do not meet the required criteria, the agency must notify the Codifier of Rules of its decision. The Codifier of Rules must then enter the rule in the North Carolina Administrative Code on the sixth business day after receiving notice of the agency's decision.

(c) Standing. -- A person aggrieved by a temporary rule adopted by an agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes. In the action, the court shall determine whether the agency's written statement of findings of need for the rule meets the criteria listed in subsection (a) and whether the rule meets the standards in G.S. 150B-21.9 that apply to review of a permanent rule. The court may not grant an **ex parte** temporary restraining order.

Filing a petition for rule making or a request for a declaratory ruling with the agency that adopted

the rule is not a prerequisite to filing an action under this subsection. A person who files an action for declaratory judgment under this subsection must serve a copy of the complaint on the agency that adopted the rule being contested, the Codifier of Rules, and the Commission.

(d) Effective Date and Expiration. -- A temporary rule becomes effective on the date specified in G.S. 150B-21.3. A temporary rule expires on the date specified in the rule or 180 days from the date the rule becomes effective, whichever comes first.

§ 150B-21.2. Procedure for adopting a permanent rule.

(a) Notice. -- Before an agency adopts a permanent rule, it must publish notice of its intent to adopt a permanent rule in the North Carolina Register and as required by any other law. The notice published in the North Carolina Register must include all of the following:

(1) Either the text of the proposed rule or a statement of the subject matter of the proposed rule making.

(2) A short explanation of the reason for the proposed action.

(3) A citation to the law that gives the agency the authority to adopt the proposed rule, if the notice includes the text of the proposed rule, or a citation to the law that gives the agency the authority to adopt a rule on the subject matter of the proposed rule making, if the notice includes only a statement of the subject matter of the proposed rule making.

(4) The proposed effective date of the proposed rule, if the notice includes the text of the proposed rule, or the proposed effective date of a rule adopted on the subject matter of the proposed rule making, if the notice includes only a statement of the subject matter of the proposed rule making.

(5) The date, time, and place of any public hearing scheduled on the proposed rule or subject matter of the proposed rule making.

(6) Instructions on how a person may demand a public hearing on a proposed rule if the notice does not schedule a public hearing on the proposed rule and subsection (c) requires the agency to hold a public hearing on the proposed rule when requested to do so.

(7) The period of time during which and the person to whom written comments may be submitted on the proposed rule or subject matter of the proposed rule making.

(8) If a fiscal note has been prepared for the proposed rule or will be prepared when a rule is proposed on the subject matter of the proposed rule making, a statement that a copy of the fiscal note can be obtained from the agency.

(b) Mailing List. -- An agency must maintain a mailing list of persons who have requested notice of rule making. When an agency publishes a rule-making notice in the North Carolina Register, it must mail a copy of the notice to each person on the mailing list who has requested notice of rule-making proceedings on the rule or the subject matter for rule making described in the notice. An agency may charge an annual fee to each person on the agency's mailing list to cover copying and mailing costs.

(c) Hearing. -- An agency must hold a public hearing on a rule it proposes to adopt in two circumstances and may hold a public hearing in other circumstances. When an agency is required to hold a public hearing on a proposed rule or decides to hold a public hearing on a proposed rule when it is not required to do so, the agency must publish in the North Carolina Register a notice of the date, time, and place of the public hearing. The hearing date of a public hearing held after the agency publishes notice of the hearing in the North Carolina Register must be at least 15 days after the date the notice is published.

An agency must hold a public hearing on a rule it proposes to adopt in the following two circumstances:

(1) The agency publishes a statement of the subject matter of the proposed rule making in the notice in the North Carolina Register.

(2) The agency publishes the text of the proposed rule in the notice in the North Carolina Register and all the following apply:

a. The notice does not schedule a public hearing on the proposed rule.

b. Within 15 days after the notice is published, the agency receives a written request for a public hearing on the proposed rule.

c. The proposed rule is not part of a rule-making proceeding the agency initiated by publishing a statement of the subject matter of proposed rule making.

d. The proposed text is not a changed version of proposed text the agency previously published in the course of rule-making proceedings but did not adopt.

(d) Text After Subject-Matter Notice. -- When an agency publishes notice of the subject matter of proposed rule making in the North Carolina Register, it must subsequently publish in the North Carolina Register the text of the rule it proposes to adopt as a result of the public hearing and of any comments received on the subject matter. An agency may not publish the proposed text of a rule for which it published a subject-matter notice before the public hearing on the subject matter.

(e) Comments. -- An agency must accept comments on the text of a proposed rule published in the North Carolina Register for at least 30 days after the text is published or until the date of any public hearing held on the proposed rule, whichever is longer. An agency must accept comments on a statement of the subject matter of proposed rule making until the public hearing on the subject matter. An agency must consider fully all written and oral comments received.

(f) Adoption. -- An agency may not adopt a rule until the time for commenting on the proposed text of the rule has elapsed and may not adopt a rule if more than 12 months have elapsed since the end of the time for commenting on the proposed text of the rule. An agency may not adopt a rule that differs substantially from the text of a proposed rule published in the North Carolina Register unless the agency publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the proposed different rule for the time set in subsection (e).

An adopted rule differs substantially from a proposed rule if it does one or more of the following:

(1) Affects the interests of persons who, based on the notice published in the North Carolina Register or the proposed text of the rule, could not reasonably have determined that the rule would affect their interests.

(2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.

(3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule.

When an agency adopts a rule, it may not take subsequent action on the rule without following the procedures in this Part.

(g) Explanation. -- An agency must issue a concise written statement explaining why the agency adopted a rule if, within 30 days after the agency adopts the rule, a person asks the agency to do so. The explanation must state the principal reasons for and against adopting the rule and must discuss why the agency rejected any arguments made or considerations urged against the adoption of the rule.

(h) Record. -- An agency must keep a record of a rule-making proceeding. The record must include all written comments received, a transcript or recording of any public hearing held on the rule, and any written explanation made by the agency for adopting the rule.

§ 150B-21.3. Effective date of rules.

(a) Temporary Rule. -- A temporary rule becomes effective on the date the Codifier of Rules enters the rule in the North Carolina Administrative Code.

(b) Permanent Rule. -- A permanent rule approved by the Commission becomes effective five business days after the Commission delivers the rule to the Codifier of Rules, unless the agency adopting the rule specifies a later effective date. If the agency specifies a later effective date, the rule becomes effective on that date.

A permanent rule that is not approved by the Commission becomes effective five business days after the agency adopting the rule delivers the rule to the Codifier of Rules, unless the agency adopting the rule specifies a later effective date. If the agency specifies a later effective date, the rule becomes effective on that date.

(c) OSHA Standard. -- A permanent rule concerning an occupational safety and health standard that is adopted by the Occupational Safety and Health Division of the Department of Labor and is identical to a federal regulation promulgated by the Secretary of the United States Department of Labor becomes effective on the date the Division delivers the rule to the Codifier of Rules, unless the Division specifies a later effective date. If the Division specifies a later effective date, the rule becomes effective on that date.

§ 150B-21.4. Fiscal notes on rules.

(a) State Funds. -- Before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would require the expenditure or distribution of funds subject to the Executive Budget Act, Article 1 of Chapter 143, it must submit the text of the proposed rule change and a fiscal note on the proposed rule change to the Director of the Budget and obtain certification from the Director that the funds that would be

required by the proposed rule change are available. The fiscal note must state the amount of funds that would be expended or distributed as a result of the proposed rule change and explain how the amount was computed. The Director of the Budget must certify a proposed rule change if funds are available to cover the expenditure or distribution required by the proposed rule change.

(b) Local Funds. -- Before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would affect the expenditures or revenues of a unit of local government, it must submit the text of the proposed rule change and a fiscal note on the proposed rule change to the Fiscal Research Division of the General Assembly, the Office of State Budget and Management, the North Carolina Association of County Commissioners, and the North Carolina League of Municipalities. The fiscal note must state the amount by which the proposed rule change would increase or decrease expenditures or revenues of a unit of local government and must explain how the amount was computed.

(c) Errors. -- An erroneous fiscal note prepared in good faith does not affect the validity of a rule.

§ 150B-21.5. Circumstances when notice and rule-making hearing not required.

(a) Amendment. -- An agency is not required to publish a notice of rule making in the North Carolina Register or hold a public hearing when it proposes to amend a rule, without changing the substance of the rule, to do one of the following:

(1) Reletter or renumber the rule or subparts of the rule.

(2) Substitute one name for another when an organization or position is renamed.

(3) Correct a citation in the rule to another rule or law when the citation has become inaccurate since the rule was adopted because of the repeal or renumbering of the cited rule or law.

(4) Change information that is readily available to the public, such as an address or a telephone number.

(5) Correct a typographical error made in entering the rule in the North Carolina Administrative Code.

(6) Change a rule in response to a request or an objection by the Commission.

(b) Repeal. -- An agency is not required to publish a notice of rule making in the North Carolina Register or hold a public hearing when it proposes to repeal a rule as a result of any of the following:

(1) The law under which the rule was adopted is repealed.

(2) The law under which the rule was adopted or the rule itself is declared unconstitutional.

(3) The rule is declared to be in excess of the agency's statutory authority.

(c) OSHA Standard. -- The Occupational Safety and Health Division of the Department of Labor is not required to publish a notice of rule making in the North Carolina Register or hold a public hearing when it proposes to adopt a rule that concerns an occupational safety and health standard and is identical to a federal regulation promulgated by the Secretary of the United States Department of Labor. The Occupational Safety and Health Division is not required to submit to the Commission for review a rule for which notice and hearing is not required under this subsection.

§ 150B-21.6. Incorporating material in a rule by reference.

An agency may incorporate the following material by reference in a rule without repeating the text of the referenced material:

(1) Another rule or part of a rule adopted by the agency.

(2) All or part of a code, standard, or regulation adopted by another agency, the federal government, or a generally recognized organization or association.

(3) Material adopted to meet a requirement of the federal government.

In incorporating material by reference, the agency must designate in the rule whether or not the incorporation includes subsequent amendments and editions of the referenced material. The agency can change this designation only by a subsequent rule-making proceeding. The agency must have copies of the incorporated material available for inspection and must specify in the rule both where copies of the material can be obtained and the cost on the date the rule is adopted of a copy of the material.

A statement in a rule that a rule incorporates material by reference in accordance with former G.S. 150B-14(b) is a statement that the rule does not include subsequent amendments and editions of the referenced material. A statement in a rule that a rule incorporates material by reference in accordance with former G.S. 150B-14(c) is a statement that the rule includes subsequent amendments and editions of the referenced material.

§ 150B-21.7. Effect of transfer of duties or termination of agency on rules.

When a law that authorizes an agency to adopt a rule is repealed and another law gives the same or

another agency substantially the same authority to adopt a rule, the rule remains in effect until the agency amends or repeals the rule. When a law that authorizes an agency to adopt a rule is repealed and another law does not give the same or another agency substantially the same authority to adopt a rule, a rule adopted under the repealed law is repealed as of the date the law is repealed.

When an executive order abolishes part or all of an agency and transfers a function of that agency to another agency, a rule concerning the transferred function remains in effect until the agency to which the function is transferred amends or repeals the rule. When an executive order abolishes part or all of an agency and does not transfer a function of that agency to another agency, a rule concerning a function abolished by the executive order is repealed as of the effective date of the executive order.

The Director of Fiscal Research of the General Assembly must notify the Codifier of Rules when a rule is repealed under this section. When notified of a rule repealed under this section, the Codifier of Rules must enter the repeal of the rule in the North Carolina Administrative Code.

Part 3. Review by Commission.

§ 150B-21.8. Review of rule by Commission.

(a) Temporary Rule. -- The Commission does not review a temporary rule.

(b) Permanent Rule. -- An agency must submit a permanent rule adopted by it to the Commission before the rule can be included in the North Carolina Administrative Code. The Commission reviews a permanent rule in accordance with the standards in G.S. 150B-21.9 and follows the procedure in this Part in its review of a permanent rule.

(c) Scope. -- When the Commission reviews an amendment to a rule, it may review the entire rule that is being amended. The procedure in G.S. 150B-21.12 applies when the Commission objects to a part of a rule that is within its scope of review but is not changed by a rule amendment.

§ 150B-21.9. Standards and timetable for review by Commission.

(a) Standards. -- The Commission must determine whether a rule meets all of the following criteria:

(1) It is within the authority delegated to the agency by the General Assembly.

(2) It is clear and unambiguous.

(3) It is reasonably necessary to fulfill a duty delegated to the agency by the General Assembly.

The Commission may determine if a rule submitted to it was adopted in accordance with Part 2 of this Article. The Commission must notify the agency that adopted the rule if it determines that a rule was not adopted in accordance with Part 2 of this Article and must return the rule to the agency. Entry of a rule in the North Carolina Administrative Code after review by the Commission is conclusive evidence that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. -- The Commission must review a rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month.

§ 150B-21.10. Commission action on permanent rule.

At the first meeting at which a permanent rule is before the Commission for review, the Commission must take one of the following actions:

(1) Approve the rule, if the Commission determines that the rule meets the standards for review.

(2) Object to the rule, if the Commission determines that the rule does not meet the standards for review.

(3) Extend the period for reviewing the rule, if the Commission determines it needs additional information on the rule to be able to decide whether the rule meets the standards for review.

In reviewing a new rule or an amendment to an existing rule, the Commission may request an agency to make technical changes to the rule and may condition its approval of the rule on the agency's making the requested technical changes.

§ 150B-21.11. Procedure when Commission approves permanent rule.

When the Commission approves a permanent rule, it must notify the agency that adopted the rule of the Commission's approval and must deliver the approved rule to the Codifier of Rules. The Commission must deliver an approved rule by the end of the month in which the Commission approved the rule, unless the agency asks the Commission to delay the delivery of the rule.

§ 150B-21.12. Procedure when Commission objects to a permanent rule.

(a) Action. -- When the Commission objects to a permanent rule, it must send the agency that adopted the rule a written statement of the objection and the reason for the objection. The agency that adopted the rule must take one of the following actions:

(1) Change the rule to satisfy the

Commission's objection and submit the revised rule to the Commission.

(2) Submit a written response to the Commission indicating that the agency has decided not to change the rule.

An agency that is not a board or commission must take one of these actions within 30 days after receiving the Commission's statement of objection. A board or commission must take one of these actions within 30 days after receiving the Commission's statement of objection or within 10 days after the board or commission's next regularly scheduled meeting, whichever comes later.

When an agency changes a rule in response to an objection by the Commission, the Commission must determine whether the change satisfies the Commission's objection. If it does, the Commission must approve the rule. If it does not, the Commission must send the agency a written statement of the Commission's continued objection and the reason for the continued objection.

A rule to which the Commission has objected remains under review by the Commission until the agency that adopted the rule decides not to satisfy the Commission's objection and makes a written request to the Commission to return the rule to the agency. When the Commission returns a rule to which it has objected, it may send to the President of the Senate and each member of the General Assembly a report of its objection to the rule.

(b) Entry in Code. -- When the Commission returns a rule to which it has objected to the agency that adopted the rule, the Commission must notify the Codifier of Rules of its action and of the basis of the Commission's objection. An agency whose rule is returned may file the rule with the Codifier of Rules. When the Codifier of Rules enters in the North Carolina Administrative Code a rule to which the Commission objected, the entry must reflect the Commission's objection and must state the standard on which the Commission based its objection.

§ 150B-21.13. Procedure when Commission extends period for review of permanent rule.

When the Commission extends the period for review of a permanent rule, it must notify the agency that adopted the rule of the extension and the reason for the extension. After the Commission extends the period for review of a rule, it may call a public hearing on the rule. Within 70 days after extending the period for review of a rule, the Commission must decide whether to approve the rule, object to the rule, or call a public hearing on the rule.

§ 150B-21.14. Public hearing on a rule.

The Commission may call a public hearing on a rule when it extends the period for review of the rule. At the request of an agency, the Commission may call a public hearing on a rule that is not before it for review. Calling a public hearing on a rule not already before the Commission for review places the rule before the Commission for review. When the Commission decides to call a public hearing on a rule, it must publish notice of the public hearing in the North Carolina Register.

After a public hearing on a rule, the Commission must approve the rule or object to the rule in accordance with the standards and procedures in this Part. The Commission must make its decision of whether to approve or object to the rule within 70 days after the public hearing.

§ 150B-21.15. Declaratory judgment action authorized when Commission objects to a permanent rule.

(a) Standing. -- A person aggrieved by a permanent rule entered in the North Carolina Administrative Code with an objection by the Commission based on a lack of statutory authority may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes. In the action, the court shall determine whether the agency exceeded its authority in adopting the rule.

A declaratory judgment action under this section must be filed within 90 days after the rule that is the subject of the action is entered in the Code. Filing a petition for rule making or a request for a declaratory ruling with the agency that adopted the rule is not a prerequisite to filing an action under this section. A person who files an action for declaratory judgment under this section must serve a copy of the complaint on the agency that adopted the rule being contested, the Codifier of Rules, and the Commission.

(b) Record. -- Within 10 days after a declaratory judgment action is filed under this section, the agency that adopted the rule that is the subject of the action must send to the court the original or a certified copy of the record in the Commission's review of the rule. The record consists of the rule, the Commission's letter of objection to the rule, the agency's written response to the Commission's letter, and any other relevant documents before the Commission when it decided to object to the rule.

(c) Effect. -- A rule remains in effect during the pendency of an action for declaratory judgment under this section unless the court suspends the rule after finding that the agency that adopted the rule has no substantial likelihood of prevailing in

the action.

(d) Changes. -- While a rule is the subject of a declaratory judgment action under this section, the agency that adopted the rule may submit to the Commission changes in the rule to satisfy the Commission's objection. If the Commission determines that changes submitted to it satisfy its objection, the Commission must accept the changes and file the revised rule with the Codifier of Rules. The Codifier must then enter the rule in the North Carolina Administrative Code. When the Commission determines that changes submitted to it satisfy its objection, the agency that submitted the changes must notify the court of the changes and of the Commission's action.

Part 4. Publication of Code and Register.

§ 150B-21.17. North Carolina Register.

(a) Content. -- The Codifier of Rules must publish the North Carolina Register. The North Carolina Register must be published at least two times a month and must contain the following:

(1) Notices of proposed adoptions of rules.
(2) Notices of receipt of a petition for municipal incorporation, as required by G.S. 120-165.
(3) Executive orders of the Governor.
(4) Final decision letters from the United States Attorney General concerning changes in laws that affect voting in a jurisdiction subject to § 5 of the Voting Rights Act of 1965, as required by G.S. 120-30.9H.
(5) Orders of the Tax Review Board issued under G.S. 105-241.2.
(6) Other information the Codifier determines helpful to the public.

(b) Form. -- When an agency publishes notice in the North Carolina Register of the proposed text of a new rule, the Codifier of Rules must publish the complete text of the proposed new rule. In publishing the text of a proposed new rule, the Codifier must indicate the rule is new by underlining the proposed text of the rule.

When an agency publishes notice in the North Carolina Register of the proposed text of an amendment to an existing rule, the Codifier must publish the complete text of the rule that is being amended unless the Codifier determines that publication of the complete text of the rule being amended is not necessary to enable the reader to understand the proposed amendment. In publishing the text of a proposed amendment to a rule, the Codifier must indicate deleted text with overstrikes and added text with underlines.

When an agency publishes notice in the North Carolina Register of the proposed repeal of an existing rule, the Codifier must publish the complete text of the rule the agency proposes to repeal unless the Codifier determines that publication of the complete text is impractical. In publishing the text of a rule the agency proposes to repeal, the Codifier must indicate the rule is to be repealed.

§ 150B-21.18. North Carolina Administrative Code.

The Codifier of Rules must compile all rules into a Code known as the North Carolina Administrative Code. The format and indexing of the Code must conform as nearly as practical to the format and indexing of the North Carolina General Statutes. The Codifier must publish printed copies of the Code and may publish the Code in other forms. The Codifier must keep the Code current by publishing the Code in a loose-leaf format and periodically providing new pages to be substituted for outdated pages, by publishing the Code in volumes and periodically publishing cumulative supplements, or by another means. The Codifier may authorize and license the private indexing, marketing, sales, reproduction, and distribution of the Code. The Codifier must keep superseded rules.

§ 150B-21.19. Requirements for including rule in Code.

To be acceptable for inclusion in the North Carolina Administrative Code, a rule must:

(1) Cite the law under which the rule is adopted.
(2) Be signed by the head of the agency or the rule-making coordinator for the agency that adopted the rule.
(3) Be in the physical form specified by the Codifier of Rules.
(4) Have been reviewed by the Commission, if the rule is a permanent rule.

§ 150B-21.20. Codifier's authority to revise form of rules.

(a) Authority. -- After consulting with the agency that adopted the rule, the Codifier of Rules may revise the form of a rule submitted for inclusion in the North Carolina Administrative Code within 10 business days after the rule is submitted to do one or more of the following:

(1) Rearrange the order of the rule in the Code or the order of the subsections, subdivisions, or other subparts of the rule.
(2) Provide a catch line or heading for the rule or revise the catch line or heading of the rule.
(3) Reletter or renumber the rule or the

subparts of the rule in accordance with a uniform system.

(4) Rearrange definitions and lists.

(5) Make other changes in arrangement or in form that do not change the substance of the rule and are necessary or desirable for a clear and orderly arrangement of the rule.

(b) Effect. -- Revision of a rule by the Codifier of Rules under this section does not affect the effective date of the rule or require the agency to readopt or resubmit the rule. When the Codifier of Rules revises the form of a rule, the Codifier of Rules must send the agency that adopted the rule a copy of the revised rule. The revised rule is the official rule.

§ 150B-21.21. Publication of rules of North Carolina State Bar and exempt agencies.

(a) State Bar. -- The North Carolina State Bar must submit a rule adopted or approved by it and entered in the minutes of the North Carolina Supreme Court to the Codifier of Rules for inclusion in the North Carolina Administrative Code. The State Bar must submit a rule within 15 days after it is entered in the minutes of the Supreme Court. The Codifier of Rules must compile, make available for public inspection, and publish a rule included in the North Carolina Administrative Code under this subsection in the same manner as other rules in the Code.

(b) Exempt Agencies. -- Notwithstanding G.S. 150B-1, the North Carolina Utilities Commission must submit to the Codifier of Rules those rules of the Utilities Commission that are published from time to time in the publication titled "North Carolina Utilities Laws and Regulations." The Utilities Commission must submit a rule required to be included in the Code within 15 days after it is adopted. The Codifier of Rules must publish the rules submitted by the Utilities Commission in the North Carolina Administrative Code in the same format as they are submitted.

Notwithstanding G.S. 150B-1, an agency other than the Utilities Commission that is exempted from this Article by that statute must submit a temporary or permanent rule adopted by it to the Codifier of Rules for inclusion in the North Carolina Administrative Code. One of these exempt agencies must submit a rule to the Codifier of Rules within 15 days after it adopts the rule. The Codifier of Rules must compile, make available for public inspection, and publish a rule of one of these agencies in the North Carolina Administrative Code in the same manner as other rules in the Code.

§ 150B-21.22. Effect of inclusion in Code.

Official or judicial notice can be taken of a rule in the North Carolina Administrative Code and shall be taken when appropriate. Codification of a rule in the North Carolina Administrative Code is **prima facie** evidence of compliance with this Article.

§ 150B-21.23. Rule publication manual.

The Codifier of Rules must publish a manual that sets out the form and method for publishing a notice of rule making in the North Carolina Register and for filing a rule in the North Carolina Administrative Code.

§ 150B-21.24. Free copies of Register and Code.

(a) Register. -- The Codifier of Rules must distribute copies of the North Carolina Register as soon after publication as practical, without charge, to the following:

(1) A person who receives a free copy of the North Carolina Administrative Code.

(2) Upon request, one copy to each member of the General Assembly.

(b) Code. -- The Codifier of Rules must distribute copies of the North Carolina Administrative Code as soon after publication as practical, without charge, to the following:

(1) One copy to the board of commissioners of each county, to be placed at the county clerk of court's office or at another place selected by the board of commissioners.

(2) One copy to the Commission.

(3) One copy to the Clerk of the Supreme Court and to the Clerk of the Court of Appeals of North Carolina.

(4) One copy to the Supreme Court Library and one copy to the library of the Court of Appeals.

(5) One copy to the Administrative Office of the Courts.

(6) One copy to the Governor.

(7) Five copies to the Legislative Services Commission for the use of the General Assembly.

(8) Upon request, one copy to each State official or department to whom or to which copies of the appellate division reports are furnished under G.S. 7A-343.1.

(9) Five copies to the Division of State Library of the Department of Cultural Resources pursuant to G.S. 125-11.7.

§ 150B-21.25. Paid copies of Register and

Code.

A person who is not entitled to a free copy of the North Carolina Administrative Code or North Carolina Register may obtain a copy by paying a fee set by the Codifier of Rules. The Codifier must set separate fees for the North Carolina Register and the North Carolina Administrative Code in amounts that cover publication, copying, and mailing costs. All monies received under this section must be credited to the General Fund.

Article 3.

Administrative Hearings.

§ 150B-22. Settlement; contested case.

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

§ 150B-23. Commencement; assignment of administrative law judge; hearing required; notice; intervention.

(a) A contested case shall be commenced by filing a petition with the Office of Administrative Hearings and, except as provided in Article 3A of this Chapter, shall be conducted by that Office. The party who files the petition shall serve a copy of the petition on all other parties and, if the dispute concerns a license, the person who holds the license. A party who files a petition shall file a certificate of service together with the petition. A petition shall be signed by a party or a representative of the party and, if filed by a party other than an agency, shall state facts tending to establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights and that the agency:

(1) Exceeded its authority or jurisdiction;
(2) Acted erroneously;
(3) Failed to use proper procedure;
(4) Acted arbitrarily or capriciously; or
(5) Failed to act as required by law or rule.

The parties in a contested case shall be given an opportunity for a hearing without undue delay. Any person aggrieved may commence a contested case hereunder.

A local government employee, applicant for employment, or former employee to whom Chapter 126 of the General Statutes applies may commence a contested case under this Article in the same manner as any other petitioner. ~~The case shall be conducted in the Office of Administrative Hearings in the same manner as other contested cases under this Article, except that the decision of the State Personnel Commission shall be advisory only and not binding on the local appointing authority, unless (1) the employee, applicant, or former employee has been subjected to discrimination prohibited by Article 6 of Chapter 126 of the General Statutes or (2) applicable federal standards require a binding decision.~~ The case shall be conducted in the same manner as other contested cases under this Article, except that the State Personnel Commission shall enter final decisions only in cases in which it is found that the employee, applicant, or former employee has been subjected to discrimination prohibited by Article 6 of Chapter 126 of the General Statutes or in any case where a binding decision is required by applicable federal standards. In these ~~two~~ cases, the State Personnel Commission's decision shall be ~~binding~~ binding on the local appointing authority. In all other cases, the final decision shall be made by the applicable appointing authority.

(a1) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1022, s. 1(9).

(a2) An administrative law judge assigned to a contested case may require a party to the case to file a prehearing statement. A party's prehearing statement must be served on all other parties to the contested case.

(b) The parties to a contested case shall be given a notice of hearing not less than 15 days before the hearing by the Office of Administrative Hearings. If prehearing statements have been filed in the case, the notice shall state the date, hour, and place of the hearing. If prehearing statements have not been filed in the case, the notice shall state the date, hour, place, and nature of the hearing, shall list the particular sections of the statutes and rules involved, and shall give a short and plain statement of the factual allegations.

(c) Notice shall be given personally or by certified mail. If given by certified mail, it shall be deemed to have been given on the delivery date appearing on the return receipt. If giving of notice cannot be accomplished either personally or by certified mail, notice shall then be given in the manner provided in G.S. 1A-1, Rule 4(j1).

(d) Any person may petition to become a party by filing a motion to intervene in the manner provided in G.S. 1A-1, Rule 24. In addition, any person interested in a contested case may intervene and participate in that proceeding to the extent deemed appropriate by the administrative law judge.

(e) All hearings under this Chapter shall be open to the public. Hearings shall be conducted in an impartial manner. Hearings shall be conducted according to the procedures set out in this Article, except to the extent and in the particulars that specific hearing procedures and time standards are governed by another statute.

(f) Unless another statute or a federal statute or regulation sets a time limitation for the filing of a petition in contested cases against a specified agency, the general limitation for the filing of a petition in a contested case is 60 days. The time limitation, whether established by another statute, federal statute, or federal regulation, or this section, shall commence when notice is given of the agency decision to all persons aggrieved who are known to the agency by personal delivery or by the placing of the notice in an official depository of the United States Postal Service wrapped in a wrapper addressed to the person at the latest address given by the person to the agency. The notice shall be in writing, and shall set forth the agency action, and shall inform the persons of the right, the procedure, and the time limit to file a contested case petition. When no informal settlement request has been received by the agency prior to issuance of the notice, any subsequent informal settlement request shall not suspend the time limitation for the filing of a petition for a contested case hearing.

§ 150B-23.1. Mediated settlement conferences.

(a) Purpose. -- This section authorizes a mediation program in the Office of Administrative Hearings in which the chief administrative law judge may require the parties in a contested case to attend a prehearing settlement conference conducted by a mediator. The purpose of the program is to determine whether a system of mediated settlement conferences may make the operation of the Office of Administrative Hearings more efficient, less costly, and more satisfying to the parties.

(b) Definitions. -- The following definitions apply in this section:

(1) Mediated settlement conference. -- A conference ordered by the chief administrative law judge involving the parties to a contested case and conducted by a mediator prior to a contested case hearing.

(2) Mediator. -- A neutral person who acts to encourage and facilitate a resolution of a contested case but who does not make a decision on the merits of the contested case.

(c) Conference. -- The chief administrative law judge may order a mediated settlement conference for all or any part of a contested case to which an administrative law judge is assigned to preside. All aspects of the mediated settlement conference shall be conducted in so far as possible in accordance with the rules adopted by the Supreme Court for the court-ordered mediation pilot program under G.S. 7A-38.

(d) Attendance. -- The parties to a contested case in which a mediated settlement conference is ordered, their attorneys, and other persons having authority to settle the parties' claims shall attend the settlement conference unless excused by the presiding administrative law judge.

(e) Mediator. -- The parties shall have the right to stipulate to a mediator. Upon the failure of the parties to agree within a time limit established by the presiding administrative law judge, a mediator shall be appointed by the presiding administrative law judge.

(f) Sanctions. -- Upon failure of a party or a party's attorney to attend a mediated settlement conference ordered under this section, the presiding administrative law judge may impose any sanction authorized by G.S. 150B-33(b)(8) or (10).

(g) Standards. -- Mediators authorized to conduct mediated settlement conferences under this section shall comply with the standards adopted by the Supreme Court for the court-ordered mediation pilot program under G.S. 7A-38.

(h) Immunity. -- A mediator acting pursuant to this section shall have judicial immunity in the same manner and to the same extent as a judge of the General Court of Justice.

(i) Costs. -- Costs of a mediated settlement conference shall be paid one share by the petitioner, one share by the respondent, and an equal share by any intervenor, unless otherwise apportioned by the administrative law judge.

(j) Inadmissibility of Negotiations. -- All conduct or communications made during a mediated settlement conference are presumed to be made in compromise negotiations and shall be governed by Rule 408 of the North Carolina Rules of Evidence.

(k) Right to Hearing. -- Nothing in this section restricts the right to a contested case hearing.

§ 150B-24. Venue of hearing.

(a) The hearing of a contested case shall be conducted:

(1) In the county in this State in which any person whose property or rights are the subject matter of the hearing maintains his residence;

(2) In the county where the agency maintains its principal office if the property or rights that are the subject matter of the hearing do not affect any person or if the subject matter of the hearing is the property or rights of residents of more than one county; or

(3) In any county determined by the administrative law judge in his discretion to promote the ends of justice or better serve the convenience of witnesses.

(b) Any person whose property or rights are the subject matter of the hearing waives his objection to venue by proceeding in the hearing.

§ 150B-25. Conduct of hearing; answer.

(a) If a party fails to appear in a contested case after proper service of notice, and if no adjournment or continuance is granted, the administrative law judge may proceed with the hearing in the absence of the party.

(b) Repealed by Session Laws 1991, c. 35, s. 2, effective October 1, 1991.

(c) The parties shall be given an opportunity to present arguments on issues of law and policy and an opportunity to present evidence on issues of fact.

(d) A party may cross-examine any witness, including the author of a document prepared by, on behalf of, or for use of the agency and offered in evidence. Any party may submit rebuttal evidence.

§ 150B-26. Consolidation.

When contested cases involving a common question of law or fact or multiple proceedings involving the same or related parties are pending, the Director of the Office of Administrative Hearings may order a joint hearing of any matters at issue in the cases, order the cases consolidated, or make other orders to reduce costs or delay in the proceedings.

§ 150B-27. Subpoena.

After the commencement of a contested case, subpoenas may be issued and served in accordance with G.S. 1A-1, Rule 45. In addition to the methods of service in G.S. 1A-1, Rule 45, a State law enforcement officer may serve a subpoena on behalf of an agency that is a party to the contested case by any method by which a sheriff may serve a subpoena under that Rule. Upon a motion, the administrative law judge may quash a subpoena if, upon a hearing, the administrative law judge finds that the evidence the production of which is required does not relate to a matter in issue, the subpoena does not describe with sufficient particularity the evidence the production of which is required, or for any other reason sufficient in law the subpoena may be quashed.

Witness fees shall be paid by the party requesting the subpoena to subpoenaed witnesses in accordance with G.S. 7A-314. However, State officials or employees who are subpoenaed shall not be entitled to witness fees, but they shall receive their normal salary and they shall not be required to take any annual leave for the witness days. Travel expenses of State officials or employees who are subpoenaed shall be reimbursed as provided in G.S. 138-6.

§ 150B-28. Depositions and discovery.

(a) A deposition may be used in lieu of other evidence when taken in compliance with the Rules of Civil Procedure, G.S. 1A-1. Parties in contested cases may engage in discovery pursuant to the provisions of the Rules of Civil Procedure, G.S. 1A-1.

(b) On a request for identifiable agency records, with respect to material facts involved in a contested case, except records related solely to the internal procedures of the agency or which are exempt from disclosure by law, an agency shall promptly make the records available to a party.

§ 150B-29. Rules of evidence.

(a) In all contested cases, irrelevant, immaterial and unduly repetitious evidence shall be excluded. Except as otherwise provided, the rules of evidence as applied in the trial division of the General Court of Justice shall be followed; but, when evidence is not reasonably available under the rules to show relevant facts, then the most reliable and substantial evidence available shall be admitted. On the judge's own motion, an administrative law judge may exclude evidence that is inadmissible under this section. It shall not be necessary for a party or his attorney to object at the hearing to evidence in order to preserve the right to object to its consideration by the administrative law judge in making a recommended decision, by the agency in making a final decision, or by the court on judicial review.

(b) Evidence in a contested case, including records and documents, shall be offered and made a part of the record. Factual information or evidence not made a part of the record shall not be considered in the determination of the case, except as permitted under G.S. 150B-30. Documentary

evidence may be received in the form of a copy or excerpt or may be incorporated by reference, if the materials so incorporated are available for examination by the parties. Upon timely request, a party shall be given an opportunity to compare the copy with the original if available.

§ 150B-30. Official notice.

Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the agency. The noticed fact and its source shall be stated and made known to affected parties at the earliest practicable time, and any party shall on timely request be afforded an opportunity to dispute the noticed fact through submission of evidence and argument.

§ 150B-31. Stipulations.

(a) The parties in a contested case may, by a stipulation in writing filed with the administrative law judge, agree upon any fact involved in the controversy, which stipulation shall be used as evidence at the hearing and be binding on the parties thereto. Parties should agree upon facts when practicable.

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

§ 150B-32. Designation of administrative law judge.

(a) The Director of the Office of Administrative Hearings shall assign himself or another administrative law judge to preside over a contested case.

(a1) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1022, s. 1 (15), effective July 15, 1986.

(b) On the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of an administrative law judge, the administrative law judge shall determine the matter as a part of the record in the case, and this determination shall be subject to judicial review at the conclusion of the proceeding.

(c) When an administrative law judge is disqualified or it is impracticable for him to continue the hearing, the Director shall assign another administrative law judge to continue with the case unless it is shown that substantial prejudice to any party will result, in which event a new hearing shall be held or the case dismissed without prejudice.

§ 150B-33. Powers of administrative law judge.

(a) An administrative law judge shall stay any contested case under this Article on motion of an agency which is a party to the contested case, if the agency shows by supporting affidavits that it is engaged in other litigation or administrative proceedings, by whatever name called, with or before a federal agency, and this other litigation or administrative proceedings will determine the position, in whole or in part, of the agency in the contested case. At the conclusion of the other litigation or administrative proceedings, the contested case shall proceed and be determined as expeditiously as possible.

(b) An administrative law judge may:

(1) Administer oaths and affirmations;

(2) Sign, issue, and rule on subpoenas in accordance with G.S. 150B-27 and G.S. 1A-1, Rule 45;

(3) Provide for the taking of testimony by deposition and rule on all objections to discovery in accordance with G.S. 1A-1, the Rules of Civil Procedure;

(3a) Rule on all prehearing motions that are authorized by G.S. 1A-1, the Rules of Civil Procedure;

(4) Regulate the course of the hearings, including discovery, set the time and place for continued hearings, and fix the time for filing of briefs and other documents;

(5) Direct the parties to appear and confer to consider simplification of the issues by consent of the parties;

(6) Stay the contested action by the agency pending the outcome of the case, upon such terms as he deems proper, and subject to the provisions of G.S. 1A-1, Rule 65;

(7) Determine whether the hearing shall be recorded by a stenographer or by an electronic device; and

(8) Enter an order returnable in the General Court of Justice, Superior Court Division, to show cause why the person should not be held in contempt. The Court shall have the power to impose punishment as for contempt for any act which would constitute direct or indirect contempt if the act occurred in an action pending in Superior Court.

(9) Determine that a rule as applied in a particular case is void because (1) it is not within the statutory authority of the agency, (2) is not clear and unambiguous to persons it is intended to direct, guide, or assist, or (3) is not reasonably necessary to enable the agency to fulfill

a duty delegated to it by the General Assembly.

(10) Impose the sanctions provided for in G.S. 1A-1 or Chapter 3 of Title 26 of the North Carolina Administrative Code for noncompliance with applicable procedural rules.

§ 150B-34. Recommended decision or order of administrative law judge.

(a) Except as provided in G.S. 150B-36(c), in each contested case the administrative law judge shall make a recommended decision or order that contains findings of fact and conclusions of law.

(b) Repealed by Session Laws 1991, c. 35, s. 6, effective October 1, 1991.

§ 150B-35. No ex parte communication; exceptions.

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

§ 150B-36. Final decision.

(a) Before the agency makes a final decision, it shall give each party an opportunity to file exceptions to the decision recommended by the administrative law judge, and to present written arguments to those in the agency who will make the final decision or order. If a party files in good faith a timely and sufficient affidavit of personal bias or other reason for disqualification of a member of the agency making the final decision, the agency shall determine the matter as a part of the record in the case, and the determination is subject to judicial review at the conclusion of the case.

(b) A final decision or order in a contested case shall be made by the agency in writing after review of the official record as defined in G.S. 150B-37(a) and shall include findings of fact and conclusions of law. If the agency does not adopt the administrative law judge's recommended decision as its final decision, the agency shall state in its decision or order the specific reasons why it did not adopt the administrative law judge's recommended decision. The agency may consider only the official record prepared pursuant to G.S. 150B-37 in making a final decision or order, and the final decision or order shall be supported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31. A copy of the decision or order shall be served upon each party personally or by certified mail addressed to the party at the latest address given by the party to the agency, and a copy shall be furnished to his attorney of record and the Office of Administrative Hearings.

(c) The following decisions made by administrative law judges in contested cases are final decisions:

(1) A determination that the Office of Administrative Hearings lacks jurisdiction.

(2) An order entered pursuant to the authority in G.S. 7A-759(e).

(3) An order entered pursuant to a written prehearing motion that either dismisses the contested case for failure of the petitioner to prosecute or grants the relief requested when a party does not comply with procedural requirements.

(4) An order entered pursuant to a prehearing motion to dismiss the contested case in accordance with G.S. 1A-1, Rule 12(b) when the order disposes of all issues in the contested case.

§ 150B-37. Official record.

(a) In a contested case, the Office of Administrative Hearings shall prepare an official record of the case that includes:

(1) Notices, pleadings, motions, and intermediate rulings;

(2) Questions and offers of proof, objections, and rulings thereon;

(3) Evidence presented;

(4) Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose; and

(5) Repealed by Session Laws 1987, c. 878, s. 25, effective August 14, 1987.

(6) The administrative law judge's recommended decision or order.

(b) Proceedings at which oral evidence is presented shall be recorded, but need not be transcribed unless requested by a party. Each party shall bear the cost of the transcript or part thereof or copy of said transcript or part thereof which said party requests, and said transcript or part thereof shall be added to the official record as an exhibit.

(c) The Office of Administrative Hearings shall forward a copy of the official record to the agency making the final decision and shall forward a copy of the recommended decision to each party.

Article 3A.

Other Administrative Hearings.

§ 150B-38. Scope; hearing required; notice;

venue.

(a) The provisions of this Article shall apply to the following agencies:

(1) Occupational licensing agencies;

(2) The State Banking Commission, the Commissioner of Banks, the Savings Institutions Division of the Department of Commerce, and the Credit Union Division of the Department of Commerce; and

(3) The Department of Insurance and the Commissioner of Insurance.

(b) Prior to any agency action in a contested case, the agency shall give the parties in the case an opportunity for a hearing without undue delay and notice not less than 15 days before the hearing. Notice to the parties shall include:

(1) A statement of the date, hour, place, and nature of the hearing;

(2) A reference to the particular sections of the statutes and rules involved; and

(3) A short and plain statement of the facts alleged.

(c) Notice shall be given personally or by certified mail. If given by certified mail, notice shall be deemed to have been given on the delivery date appearing on the return receipt. If notice cannot be given personally or by certified mail, then notice shall be given in the manner provided in G.S. 1A-1, Rule 4(j1).

(d) A party who has been served with a notice of hearing may file a written response with the agency. If a written response is filed, a copy of the response must be mailed to all other parties not less than 10 days before the date set for the hearing.

(e) All hearings conducted under this Article shall be open to the public. A hearing conducted by the agency shall be held in the county where the agency maintains its principal office. A hearing conducted for the agency by an administrative law judge requested under G.S. 150B-40 shall be held in a county in this State where any person whose property or rights are the subject matter of the hearing resides. If a different venue would promote the ends of justice or better serve the convenience of witnesses, the agency or the administrative law judge may designate another county. A person whose property or rights are the subject matter of the hearing waives his objection to venue if he proceeds in the hearing.

(f) Any person may petition to become a party by filing with the agency or hearing officer a motion to intervene in the manner provided by G.S. 1A-1, Rule 24. In addition, any person interested in a contested case under this Article may intervene and participate to the extent deemed appropriate by the agency hearing officer.

(g) When contested cases involving a common question of law or fact or multiple proceedings involving the same or related parties are pending before an agency, the agency may order a joint hearing of any matters at issue in the cases, order the cases consolidated, or make other orders to reduce costs or delay in the proceedings.

(h) Every agency shall adopt rules governing the conduct of hearings that are consistent with the provisions of this Article.

§ 150B-39. Depositions; discovery; subpoenas.

(a) A deposition may be used in lieu of other evidence when taken in compliance with the Rules of Civil Procedure, G.S. 1A-1. Parties in a contested case may engage in discovery pursuant to the provisions of the Rules of Civil Procedure, G.S. 1A-1.

(b) Upon a request for an identifiable agency record involving a material fact in a contested case, the agency shall promptly provide the record to a party, unless the record relates solely to the agency's internal procedures or is exempt from disclosure by law.

(c) In preparation for, or in the conduct of, a contested case subpoenas may be issued and served in accordance with G.S. 1A-1, Rule 45. Upon a motion, the agency may quash a subpoena if, upon a hearing, the agency finds that the evidence, the production of which is required, does not relate to a matter in issue, the subpoena does not describe with sufficient particularity the evidence the production of which is required, or for any other reason sufficient in law the subpoena may be quashed. Witness fees shall be paid by the party requesting the subpoena to subpoenaed witnesses in accordance with G.S. 7A-314. However, State officials or employees who are subpoenaed shall not be entitled to any witness fees, but they shall receive their normal salary and they shall not be required to take any annual leave for the witness days. Travel expenses of State officials or employees who are subpoenaed shall be reimbursed as provided in G.S. 138-6.

§ 150B-40. Conduct of hearing; presiding officer; ex parte communication.

(a) Hearings shall be conducted in a fair and impartial manner. At the hearing, the agency and the parties shall be given an opportunity to present evidence on issues of fact, examine and cross-examine witnesses, including the author of a document prepared by, on behalf of or for the use

of the agency and offered into evidence, submit rebuttal evidence, and present arguments on issues of law or policy.

If a party fails to appear in a contested case after he has been given proper notice, the agency may continue the hearing or proceed with the hearing and make its decision in the absence of the party.

(b) Except as provided under subsection (e) of this section, hearings under this Article shall be conducted by a majority of the agency. An agency shall designate one or more of its members to preside at the hearing. If a party files in good faith a timely and sufficient affidavit of the personal bias or other reason for disqualification of any member of the agency, the agency shall determine the matter as a part of the record in the case, and its determination shall be subject to judicial review at the conclusion of the proceeding. If a presiding officer is disqualified or it is impracticable for him to continue the hearing, another presiding officer shall be assigned to continue with the case, except that if assignment of a new presiding officer will cause substantial prejudice to any party, a new hearing shall be held or the case dismissed without prejudice.

(c) The presiding officer may:

(1) Administer oaths and affirmations;

(2) Sign and issue subpoenas in the name of the agency, requiring attendance and giving of testimony by witnesses and the production of books, papers, and other documentary evidence;

(3) Provide for the taking of testimony by deposition;

(4) Regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents;

(5) Direct the parties to appear and confer to consider simplification of the issues by consent of the parties; and

(6) Apply to any judge of the superior court resident in the district or presiding at a term of court in the county where a hearing is pending for an order to show cause why any person should not be held in contempt of the agency and its processes, and the court shall have the power to impose punishment as for contempt for acts which would constitute direct or indirect contempt if the acts occurred in an action pending in superior court.

(d) Unless required for disposition of an ex parte matter authorized by law, a member of an agency assigned to make a decision or to make findings of fact and conclusions of law in a contested case under this Article shall not communicate, directly or indirectly, in connection with any issue of fact or question of law, with any person or party or his representative, except on notice and opportunity for all parties to participate. This prohibition begins at the time of the notice of hearing. An agency member may communicate with other members of the agency and may have the aid and advice of the agency staff other than the staff which has been or is engaged in investigating or prosecuting functions in connection with the case under consideration or a factually-related case. This section does not apply to an agency employee or party representative with professional training in accounting, actuarial science, economics or financial analysis insofar as the case involves financial practices or conditions.

(e) When a majority of an agency is unable or elects not to hear a contested case, the agency shall apply to the Director of the Office of Administrative Hearings for the designation of an administrative law judge to preside at the hearing of a contested case under this Article. Upon receipt of the application, the Director shall, without undue delay, assign an administrative law judge to hear the case.

The provisions of this Article, rather than the provisions of Article 3, shall govern a contested case in which the agency requests an administrative law judge from the Office of Administrative Hearings.

The administrative law judge assigned to hear a contested case under this Article shall sit in place of the agency and shall have the authority of the presiding officer in a contested case under this Article. The administrative law judge shall make a proposal for decision, which shall contain proposed findings of fact and proposed conclusions of law.

An administrative law judge shall stay any contested case under this Article on motion of an agency which is a party to the contested case, if the agency shows by supporting affidavits that it is engaged in other litigation or administrative proceedings, by whatever name called, with or before a federal agency, and this other litigation or administrative proceedings will determine the position, in whole or in part, of the agency in the contested case. At the conclusion of the other litigation or administrative proceedings, the contested case shall proceed and be determined as expeditiously as possible.

The agency may make its final decision only

after the administrative law judge's proposal for decision is served on the parties, and an opportunity is given to each party to file exceptions and proposed findings of fact and to present oral and written arguments to the agency.

§ 150B-41. Evidence; stipulations; official notice.

(a) In all contested cases, irrelevant, immaterial, and unduly repetitious evidence shall be excluded. Except as otherwise provided, the rules of evidence as applied in the trial division of the General Court of Justice shall be followed; but, when evidence is not reasonably available under such rules to show relevant facts, they may be shown by the most reliable and substantial evidence available. It shall not be necessary for a party or his attorney to object to evidence at the hearing in order to preserve the right to object to its consideration by the agency in reaching its decision, or by the court of judicial review.

(b) Evidence in a contested case, including records and documents shall be offered and made a part of the record. Other factual information or evidence shall not be considered in determination of the case, except as permitted under G.S. 150B-30. Documentary evidence may be received in the form of a copy or excerpt or may be incorporated by reference, if the materials so incorporated are available for examination by the parties. Upon timely request, a party shall be given an opportunity to compare the copy with the original if available.

(c) The parties in a contested case under this Article by a stipulation in writing filed with the agency may agree upon any fact involved in the controversy, which stipulation shall be used as evidence at the hearing and be binding on the parties thereto. Parties should agree upon facts when practicable. Except as otherwise provided by law, disposition may be made of a contested case by stipulation, agreed settlement, consent order, waiver, default, or other method agreed upon by the parties.

(d) Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the agency. The noticed fact and its source shall be stated and made known to affected parties at the earliest practicable time, and any party shall on timely request be afforded an opportunity to dispute the noticed fact through submission of evidence and argument. An agency may use its experience, technical competence, and specialized knowledge in the evaluation of evidence presented to it.

§ 150B-42. Final agency decision; official record.

(a) After compliance with the provisions of G.S. 150B-40(e), if applicable, and review of the official record, as defined in subsection (b) of this section, an agency shall make a written final decision or order in a contested case. The decision or order shall include findings of fact and conclusions of law. Findings of fact shall be based exclusively on the evidence and on matters officially noticed. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting them. A decision or order shall not be made except upon consideration of the record as a whole or such portion thereof as may be cited by any party to the proceeding and shall be supported by substantial evidence admissible under G.S. 150B-41. A copy of the decision or order shall be served upon each party personally or by certified mail addressed to the party at the latest address given by the party to the agency and a copy shall be furnished to his attorney of record.

(b) An agency shall prepare an official record of a hearing that shall include:

(1) Notices, pleadings, motions, and intermediate rulings;
(2) Questions and offers of proof, objections, and rulings thereon;
(3) Evidence presented;
(4) Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose;
(5) Proposed findings and exceptions; and
(6) Any decision, opinion, order, or report by the officer presiding at the hearing and by the agency.

(c) Proceedings at which oral evidence is presented shall be recorded, but need not be transcribed unless requested by a party. Each party shall bear the cost of the transcript or part thereof or copy of said transcript or part thereof which said party requests.

Article 4.

Judicial Review.

§ 150B-43. Right to judicial review.

Any person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this Article, unless adequate procedure for judicial review is provided by another statute, in which case the review shall be under such other statute. Nothing in this Chapter shall prevent any person from invoking any judi-

cial remedy available to him under the law to test the validity of any administrative action not made reviewable under this Article.

§ 150B-44. Right to judicial intervention when decision unreasonably delayed.

Unreasonable delay on the part of any agency or administrative law judge in taking any required action shall be justification for any person whose rights, duties, or privileges are adversely affected by such delay to seek a court order compelling action by the agency or administrative law judge. An agency that is subject to Article 3 of this Chapter and is not a board or commission has 90 days from the day it receives the official record in a contested case from the Office of Administrative Hearings to make a final decision in the case. This time limit may be extended by the parties or, for good cause shown, by the agency for an additional period of up to 90 days. An agency that is subject to Article 3 of this Chapter and is a board or commission has 90 days from the day it receives the official record in a contested case from the Office of Administrative Hearings or 90 days after its next regularly scheduled meeting, whichever is longer, to make a final decision in the case. This time limit may be extended by the parties or, for good cause shown, by the agency for an additional period of up to 90 days. If an agency subject to Article 3 of this Chapter has not made a final decision within these time limits, the agency is considered to have adopted the administrative law judge's recommended decision as the agency's final decision. Failure of an agency subject to Article 3A of this Chapter to make a final decision within 180 days of the close of the contested case hearing is justification for a person whose rights, duties, or privileges are adversely affected by the delay to seek a court order compelling action by the agency or, if the case was heard by an administrative law judge, by the administrative law judge.

§ 150B-45. Procedure for seeking review; waiver.

To obtain judicial review of a final decision under this Article, the person seeking review must file a petition in the Superior Court of Wake County or in the superior court of the county where the person resides.

The person seeking review must file the petition within 30 days after the person is served with a written copy of the decision. A person who fails to file a petition within the required time waives the right to judicial review under this Article. For good cause shown, however, the superior court may accept an untimely petition.

§ 150B-46. Contents of petition; copies served on all parties; intervention.

The petition shall explicitly state what exceptions are taken to the decision or procedure and what relief the petitioner seeks. Within 10 days after the petition is filed with the court, the party seeking the review shall serve copies of the petition by personal service or by certified mail upon all who were parties of record to the administrative proceedings. Names and addresses of such parties shall be furnished to the petitioner by the agency upon request. Any party to the administrative proceeding is a party to the review proceedings unless the party withdraws by notifying the court of the withdrawal and serving the other parties with notice of the withdrawal. Other parties to the proceeding may file a response to the petition within 30 days of service. Parties, including agencies, may state exceptions to the decision or procedure and what relief is sought in the response.

Any person aggrieved may petition to become a party by filing a motion to intervene as provided in G.S. 1A-1, Rule 24.

§ 150B-47. Records filed with clerk of superior court; contents of records; costs.

Within 30 days after receipt of the copy of the petition for review, or within such additional time as the court may allow, the agency that made the final decision in the contested case shall transmit to the reviewing court the original or a certified copy of the official record in the contested case under review together with: (i) any exceptions, proposed findings of fact, or written arguments submitted to the agency in accordance with G.S. 150B-36(a); and (ii) the agency's final decision or order. With the permission of the court, the record may be shortened by stipulation of all parties to the review proceedings. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for such additional costs as may be occasioned by the refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

§ 150B-48. Stay of decision.

At any time before or during the review proceeding, the person aggrieved may apply to the reviewing court for an order staying the operation of the administrative decision pending the outcome of the review. The court may grant or deny the stay in its discretion upon such terms as it deems proper and subject to the provisions of G.S. 1A-1, Rule 65.

§ 150B-49. New evidence.

An aggrieved person who files a petition in the superior court may apply to the court to present additional evidence. If the court is satisfied that the evidence is material to the issues, is not merely cumulative, and could not reasonably have been presented at the administrative hearing, the court may remand the case so that additional evidence can be taken. If an administrative law judge did not make a recommended decision in the case, the court shall remand the case to the agency that conducted the administrative hearing. After hearing the evidence, the agency may affirm or modify its previous findings of fact and final decision. If an administrative law judge made a recommended decision in the case, the court shall remand the case to the administrative law judge. After hearing the evidence, the administrative law judge may affirm or modify his previous findings of fact and recommended decision. The administrative law judge shall forward a copy of his decision to the agency that made the final decision, which in turn may affirm or modify its previous findings of fact and final decision. The additional evidence and any affirmation or modification of a recommended decision or final decision shall be made part of the official record.

§ 150B-50. Review by superior court without jury.

The review by a superior court of agency decisions under this Chapter shall be conducted by the court without a jury.

§ 150B-51. Scope of review.

(a) Initial Determination in Certain Cases. In reviewing a final decision in a contested case in which an administrative law judge made a recommended decision, the court shall make two initial determinations. First, the court shall determine whether the agency heard new evidence after receiving the recommended decision. If the court determines that the agency heard new evidence, the court shall reverse the decision or remand the case to the agency to enter a decision in accordance with the evidence in the official record. Second, if the agency did not adopt the recommended decision, the court shall determine whether the agency's decision states the specific reasons why the agency did not adopt the recommended decision. If the court determines that the agency did not state specific reasons why it did not adopt a recommended decision, the court shall reverse the decision or remand the case to the agency to enter the specific reasons.

(b) Standard of Review. After making the determinations, if any, required by subsection (a), the court reviewing a final decision may affirm the decision of the agency or remand the case for further proceedings. It may also reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions;
(2) In excess of the statutory authority or jurisdiction of the agency;
(3) Made upon unlawful procedure;
(4) Affected by other error of law;
(5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
(6) Arbitrary or capricious.

§ 150B-52. Appeal; stay of court's decision.

A party to a review proceeding in a superior court may appeal to the appellate division from the final judgment of the superior court as provided in G.S. 7A-27. Pending the outcome of an appeal, an appealing party may apply to the court that issued the judgment under appeal for a stay of that judgment or a stay of the administrative decision that is the subject of the appeal, as appropriate.

Article 5.

Publication of Administrative Rules.

Repealed.

TITLE 10 - DEPARTMENT OF HUMAN RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Social Services Commission intends to amend rule cited as 10 NCAC 42R .0201.

The proposed effective date of this action is December 1, 1994.

The public hearing will be conducted at 10:00 a.m. on October 4, 1994 at the Albemarle Building, Room 844, 325 North Salisbury Street, Raleigh, NC 27603-5905.

Reason for Proposed Action: To increase the maximum rate of reimbursement for the purchase of adult day care services through the State Adult Day Care Fund so that the maximum rate is consistent within the Department of Human Resources.

Comment Procedures: Comments may be presented in writing anytime before or at the public hearing or orally at the hearing. Time limits for oral remarks may be imposed by the Commission Chairman. Any person may request copies of this Rule by calling or writing to Sharnese Ransome, Division of Social Services, 325 N. Salisbury Street, Raleigh, NC 27603-5905, (919) 733-3055.

Editor's Note: This Rule was filed as a temporary rule effective July 27, 1994 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner.

CHAPTER 42 - INDIVIDUAL AND FAMILY SUPPORT

SUBCHAPTER 42R - ADULT DAY CARE - STATE FUND

SECTION .0200 - STATE ADULT DAY CARE FUND

.0201 NATURE AND PURPOSE OF STATE ADULT DAY CARE FUND

(a) The State Adult Day Care Fund is used for adult day care services provided through county departments of social services for the purpose of enabling people to remain in or return to their own homes.

(b) The fund is used to increase state financial participation in the costs of this service.

(c) ~~Maximum rates have been established by the North Carolina Social Services Commission for the purchase of adult day care services under a vendor agreement. Information regarding maximum rates is contained in policy material of the North Carolina Division of Social Services and is available in accordance with 10 NCAC 35A .0003.~~ The maximum rate for the purchase of adult day care services under a vendor agreement shall not exceed five hundred dollars ($500.00) per month, of which four hundred and fifty five dollars ($455.00) shall be for the purchase of daily care and forty five dollars ($45.00) shall be for transportation.

Statutory Authority G.S. 143B-153; 1993 S.L., c. 591, s. 2(a).

TITLE 12 - DEPARTMENT OF JUSTICE

Notice is hereby given in accordance with G.S. 150B-21.2 that the N.C. Private Protective Services Board intends to amend rules cited as 12 NCAC 7D .0202, .0205 and adopt 7D .0112.

The proposed effective date of this action is December 1, 1994.

The public hearing will be conducted at 2:00 p.m. on September 16, 1994 at the State Bureau of Investigation, Conference Room, 3320 Old Garner Road, Raleigh, N.C. 27626-0500.

Reason for Proposed Action:
12 NCAC 7D .0112 - The rule requires a licensee to file a report with the Board if a licensee or registrant discharges a firearm while engaged in the private protective services profession.
12 NCAC 7D .0202 - Sets a specific licensing fee of $50.00 for a special limited guard and patrol license.
12 NCAC 7D .0205 - Clarify language in the rule to refer to "Company" instead of "Corporate" and to specifically exempt a sole proprietorship that is owned and operated by an individual licensee.

Comment Procedures: Interested persons may present their views either orally or in writing at

the hearing. The Record of Hearing will be open for receipt of written comments through October 3, 1994. Written comments must be delivered to the Private Protective Services Board, 3320 Old Garner Road, Raleigh, N.C. 27627-0500.

CHAPTER 7 - PRIVATE PROTECTIVE SERVICES

SUBCHAPTER 7D - PRIVATE PROTECTIVE SERVICES BOARD

SECTION .0100 - ORGANIZATION AND GENERAL PROVISIONS

.0112 REPORTING REQUIREMENTS FOR THE DISCHARGE OF FIREARMS

If a licensee or registrant discharges a firearm while engaged in the private protective services business, the licensee shall notify the Board either in person or by telephone no later than the first business day following the incident. The licensee shall also file a written report to the Board within five working days of the incident. In the report, the licensee shall state the name of the individual who discharged the firearm, the type of weapon discharged, the location of the incident, the law enforcement agency investigating the incident, the events leading to the discharge of the firearm, and any bodily injuries occurring from the incident. This Rule shall not be construed to apply to a weapon that is discharged during a training course that has been approved by the Board.

Statutory Authority G.S. 74C-5.

SECTION .0200 - LICENSES: TRAINEE PERMITS

.0202 FEES FOR LICENSES AND TRAINEE PERMITS

(a) Application, license and trainee permit fees are as follows:

(1) one hundred and fifty dollars ($150.00) non-refundable application fee;

(2) two hundred dollars ($200.00) annual fee for a new or renewal license;

(3) two hundred dollars ($200.00) annual trainee permit fee;

(4) fifty dollars ($50.00) new or renewal fee for each license in addition to the basic license;

(5) twenty five dollars ($25.00) duplicate license fee;

(6) one hundred dollars ($100.00) late renewal fee in addition to the renewal fee;

(7) one hundred dollars ($100.00) temporary license fee; ~~and~~

(8) fifty dollars ($50.00) branch office license fee~~.~~ ; and

(9) fifty dollars ($50.00) special limited guard and patrol licensee fee.

(b) Fees shall be paid in the form of a check or money order made payable to the Private Protective Services Board.

Statutory Authority G.S. 74C-9.

.0205 COMPANY BUSINESS LICENSE

(a) Any firm, association, or corporation required to be licensed pursuant to G.S. 74C-2(a) shall submit an application for a ~~corporate~~ company business license on a form provided by the Board. Only a sole proprietorship which is owned and operated by an individual licensee shall be exempt from this Rule. This application for license shall call for such information as the firm, association, or corporation name; the address of its principal office within the State; any past conviction for criminal offenses of any ~~corporate~~ company director, or officer; information concerning the past revocation, suspension or denial of a business or professional license to any director, or officer; a list of all directors and officers of the firm, association, or corporation; a list of all persons, firms, associations, corporations or other entities owning ten percent or more of the outstanding shares of any class of stock; and the name and address of the qualifying agent.

(b) In addition to the items required in Paragraph (a) of this Rule, ~~a foreign~~ an out-of-state ~~corporation~~ company shall further qualify by filing with its application for a license, a copy of its certificate of authority to transact business in this state issued by the North Carolina Secretary of State in accordance with G.S. 55-131 and a consent to service of process and pleadings which shall be authenticated by its ~~corporate~~ company seal and accompanied by a duly certified copy of the resolution of the board of directors authorizing the proper officer or officers to execute said consent.

(c) After filing a completed written application with the Board, the Board shall conduct a background investigation to ascertain if the qualifying agent is in a management position. The Board shall also determine if the directors, or officers have the requisite good moral character as defined

in G.S. 74C-8(d)(2). It shall be prima facie evidence of good moral character if a director or officer has not been convicted by any local, State, federal, or military court of any crime involving the use, carrying, or possession of a firearm; conviction of any crime involving the use, possession, sale, manufacture, distribution, or transportation of a controlled substance, drug, narcotic, or alcoholic beverage; conviction of a crime involving assault or an act of violence; conviction of a crime involving breaking or entering, burglary, larceny, or any offense involving moral turpitude; or does not have a history of addiction to alcohol or a narcotic drug; provided that, for purposes of this Rule, "conviction" means and includes the entry of a plea of guilty or no contest or a verdict rendered in open court by a judge or jury.

(d) Upon satisfactory completion of the background investigation, a ~~corporate~~ company business license may be issued. This license shall be conspicuously displayed at the principle place of business within the State of North Carolina.

(e) The ~~corporate~~ company business license shall be issued only to the ~~corporation~~ business entity and shall not be construed to extend to the licensing of its officers and employees.

(f) The issuance of the ~~corporate~~ company business license is issued to the firm, association, or corporation in addition to the license issued to the qualifying agent. Therefore, the qualifying agent for the firm, association, or corporation which has been issued the ~~corporate~~ company business license shall be responsible for assuring compliance with G.S. 74C.

Statutory Authority G.S. 74C-2(a); 74C-5.

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***Notice** is hereby given in accordance with G.S. 150B-21.2 that the N.C. Alarm Systems Licensing Board intends to amend rule cited as 12 NCAC 11 .0209.*

***The** proposed effective date of this action is December 1, 1994.*

***The** public hearing will be conducted at 2:00 p.m. on September 16, 1994 at the State Bureau of Investigation, Conference Room, 3320 Old Garner Road, Raleigh, N.C. 27626-0500.*

***Reason** for Proposed Action: Clarify language in the rule to specifically exempt a sole proprietorship that is owned and operated by the licensee.*

***Comment** Procedures: Interested persons may present their views either orally or in writing at the hearing. The Record of Hearing will be open for receipt of written comments through October 3, 1994. Written comments must be delivered to the Private Protective Services Board, 3320 Old Garner Road, Raleigh, N.C. 27627-0500.*

CHAPTER 11 - N.C. ALARM SYSTEMS LICENSING BOARD

SECTION .0200 - PROVISIONS FOR LICENSEES

.0209 COMPANY BUSINESS LICENSE

(a) Any firm, association, or corporation required to be licensed pursuant to G.S. 74D-2(a) shall submit an application for a ~~corporate~~ company business license on a form provided by the Board. A sole proprietorship that is owned and operated by an individual holding a current alarm systems business license shall be exempt from this Rule. This application for license shall call for such information as the firm, association, or corporation name; the address of its principal office within the State; any past conviction for criminal offenses of any ~~corporate~~ company director or officer; information concerning the past revocation, suspension or denial of a business or professional license to any director or officer; a list of all directors and officers of the firm, association, or corporation; a list of all persons, firms, associations, corporations or other entities owning 10 percent or more of the outstanding shares of any class of stock; and the name and address of the qualifying agent.

(b) In addition to the items required in Paragraph (a) of this Rule, ~~a foreign~~ an out-of-state ~~corporation~~ company shall further qualify by filing with its application for a license, a copy of its certificate of authority to transact business in this state issued by the North Carolina Secretary of State in accordance with G.S. 55-131 and a consent to service of process and pleadings which shall be authenticated by its ~~corporate~~ company seal and accompanied by a duly certified copy of the resolution of the board of directors authorizing the proper officer or officers to execute said consent.

(c) After filing a completed written application

with the Board, the Board shall conduct a background investigation to ascertain if the qualifying agent is in a management position. The Board shall also determine if the directors or officers have the requisite good moral character as defined in G.S. 74D-6(3). It shall be prima facie evidence of good moral character if a director or officer has not been convicted by any local, State, federal, or military court of any crime involving the use, carrying, or possession of a firearm; conviction of any crime involving the use, possession, sale, manufacture, distribution, or transportation of a controlled substance, drug, narcotic, or alcoholic beverage; conviction of a crime involving assault or an act of violence; conviction of a crime involving breaking or entering, burglary, larceny, or any offense involving moral turpitude; or does not have a history of addiction to alcohol or a narcotic drug; provided that, for purposes of this Section, "conviction" means and includes the entry of a plea of guilty or no contest or a verdict rendered in open court by a judge or jury.

(d) Upon satisfactory completion of the background investigation, a ~~corporate~~ company business license may be issued. This license shall be conspicuously displayed at the principle place of business within the State of North Carolina.

(e) The ~~corporate~~ company business license shall be issued only to the corporation and shall not be construed to extend to the licensing of its directors, officers, or employees.

(f) The issuance of the ~~corporate~~ company business license is issued to the firm, association, or corporation in addition to the license issued to the qualifying agent. Therefore, the qualifying agent for the firm, association, or corporation which has been issued the ~~corporate~~ company business license shall be responsible for assuring compliance with G.S. 74D.

Statutory Authority G.S. 74D-2(a); 74D-5.

TITLE 15A - DEPARTMENT OF ENVIRONMENT, HEALTH, AND NATURAL RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that the DEHNR-DEM-Air Quality intends to adopt rules cited as 15A NCAC 2D .0955 - .0957; 2Q .0312, .0525, .0607 and amend 2D .0501, .0516, .0530; 2Q .0507, .0518.

The proposed effective dates of this action are:

15A NCAC 2D .0501, .0516, .0530; 2Q .0312, .0507, .0518, .0525, .0607 - February 1, 1995.
15A NCAC 2D .0955 - .0957 - May 1, 1995.

The public hearing will be conducted at:

7:00 p.m.
September 22, 1994
Charlotte/Mecklenburg Government Center
Conference Center-2nd Floor
600 East 4th Street
Charlotte, North Carolina

7:00 p.m.
September 29, 1994
Archdale Building
Ground Floor Hearing Room
512 N. Salisbury Street
Raleigh, North Carolina

Reason for Proposed Action:
The amendments to 15A NCAC 2D .0501 and .0516 are to clarify sulfur dioxide stack testing compliance methods, to update referenced American Standard Testing Methods, and to clarify that the general sulfur dioxide emissions standard does not apply to spodumene ore roasting.
The amendment to 15A NCAC 2D .0530 establishes an increment level for PM-10 to replace the increment level for total suspended particulate (TSP) by changing the rule to refer to the latest amendment of the federal regulation in 40 CFR 51.166.
The proposed new rules 15A NCAC 2D .0955, .0956, and .0957 will establish reasonably available control technology (RACT) for thread bonding manufacturing facilities, glass Christmas ornament manufacturing, and commercial bakeries. These rules will implement federal requirements for RACT and only apply in nonattainment and maintenance areas.
The proposed new rules 15A NCAC 2Q .0312, .0525, and .0607, and amendments to rules 15A NCAC 2Q .0507 and .0518 will establish processing schedules for permit applications to ensure timely review of the applications.

Comment Procedures: All persons interested in these matters are invited to attend the public hearings. Any person desiring to comment for more than three minutes is requested to submit a written statement for inclusion in the record of proceedings at the public hearing. The hearing record will remain open until October 31, 1994, to

receive additional written statements. Comments should be sent to and additional information concerning the hearing or the proposals may be obtained by contacting:

Mr. Thomas C. Allen
Division of Environmental Management
P.O. Box 29535
Raleigh, North Carolina 27626-0535
(919) 733-1489

***Fiscal Note:** This Rule 15A NCAC 2D .0530 affects the expenditures or revenues of local funds. A fiscal note was submitted to the Fiscal Research Division on February 23, 1994, OSBM on March 4, 1994, N.C. League of Municipalities on February 23, 1994, and N.C. Association of County Commissioners on February 23, 1994.*

CHAPTER 2 - ENVIRONMENTAL MANAGEMENT

SUBCHAPTER 2D - AIR POLLUTION CONTROL REQUIREMENTS

SECTION .0500 - EMISSION CONTROL STANDARDS

.0501 COMPLIANCE WITH EMISSION CONTROL STANDARDS

(a) Purpose and Scope. The purpose of this Rule is to assure orderly compliance with emission control standards found in this Section. This Rule shall apply to all air pollution sources, both combustion and non-combustion.

(b) In determining compliance with emission control standards, means shall be provided by the owner to allow periodic sampling and measuring of emission rates, including necessary ports, scaffolding and power to operate sampling equipment; and upon the request of the Division of Environmental Management, data on rates of emissions shall be supplied by the owner.

(c) Testing to determine compliance shall be in accordance with the following procedures, except as may be otherwise required in Rules .0524, .0525, and .0604 of this Subchapter.

(1) Method 1 of Appendix A of 40 CFR Part 60 shall be used to select a suitable site and the appropriate number of test points for the following situations:
  (A) particulate testing,
  (B) velocity and volume flow rate measurements;
  (C) testing for acid mist or other pollutants which occur in liquid droplet form,
  (D) any sampling for which velocity and volume flow rate measurements are necessary for computing final test results, and
  (E) any sampling which involves a sampling method which specifies isokinetic sampling. (Isokinetic sampling is sampling in which the velocity of the gas at the point of entry into the sampling nozzle is equal to the velocity adjacent to the nozzle.)

  Method 1 shall be applied as written with the following clarifications: Testing installations with multiple breechings can be accomplished by testing the discharge stack(s) to which the multiple breechings exhaust. If the multiple breechings are individually tested, then

  Method 1 shall be applied to each breeching individually. If test ports in a duct are located less than two diameters downstream from any disturbance (fan, elbow, change in diameter, or any other physical feature that may disturb the gas flow) or one-half diameter upstream from any disturbance, the acceptability of the test location shall be subject to the approval of the Director, or his designee.

(2) Method 2 of Appendix A of 40 CFR Part 60 shall be applied as written and used concurrently with any test method in which velocity and volume flow rate measurements are required.

(3) Sampling procedures for determining compliance with particulate emission control standards shall be in accordance with Method 5 of Appendix A of 40 CFR Part 60. Method 17 of Appendix A of 40 CFR Part 60 may be used instead of Method 5 provided that the stack gas temperature does not exceed 320° F. The minimum time per test point for particulate testing shall be two minutes and the minimum time per test run shall be one hour. The sample gas drawn during each test run shall be at least 30 cubic feet. A number of sources are known to emit organic material (oil, pitch, plasticizers, etc.) which exist as finely divided liquid

droplets at ambient conditions. These materials cannot be satisfactorily collected by means of the above Method 5. In these cases the Commission may require the use of Method 5 as proposed on August 17, 1971, in the Federal Register, Volume 36, Number 159.

(4) The procedures for determining compliance with sulfur dioxide emission control standards for fuel burning sources may be either by determining sulfur content with fuel analysis or by stack sampling. Combustion sources choosing to demonstrate compliance through stack sampling shall follow procedures described in Method 6 of Appendix A of 40 CFR Part 60. When Method 6 of Appendix A of 40 CFR Part 60 is used to determine compliance, compliance shall be determined by averaging six 20-minute samples taken over such a period of time that no more than 20 minutes elapses between any two consecutive samples. If a source chooses to demonstrate compliance by analysis of sulfur in fuel, sampling, preparation, and analysis of fuels shall be in accordance with the following American Society of Testing and Materials (ASTM) methods:

(A) coal:

(i) sampling--ASTM Method D 2234~~-82~~;

(ii) preparation--ASTM Method D 2013~~-72~~;

(iii) gross calorific value (BTU)--ASTM Method D 2015~~-85~~;

(iv) moisture content--ASTM Method D 3173~~-85~~ or D 5412;

(v) sulfur content--ASTM Method D 3177~~-84~~ or ASTM Method D 4239~~-85~~;

(B) oil:

(i) sampling--A sample shall be collected at the pipeline inlet to the fuel burning unit after sufficient fuel has been drained from the line to remove all fuel that may have been standing in the line;

(ii) heat of combustion (BTU)--ASTM Method D 240~~-85~~ or D 2015;

(iii) sulfur content--ASTM Method D 129~~-64 (reapproved 1978)~~ or D 1552.

The sulfur content and BTU content of the fuel shall be reported on a dry basis. When the test methods described in Parts (A) or (B) of this Subparagraph are used to demonstrate that the ambient air quality standards for sulfur dioxide are being protected, the sulfur content shall be determined at least once per year from a composite of at least three or 24 samples taken at equal time intervals from the fuel being burned over a three-hour or 24-hour period, respectively, whichever is the time period for which the ambient standard is most likely to be exceeded; this requirement shall not apply to sources that are only using fuel analysis in place of continuous monitoring to meet the requirements of Section .0600 of this Subchapter.

(5) Sulfuric acid manufacturing plants and spodumene ore roasting plants shall demonstrate compliance with Rules .0517 and .0527, respectively, of this Section by using Method 8 of Appendix A of 40 CFR Part 60. Compliance shall be determined by averaging emissions measured by three one-hour tests.

(6) All ~~other~~ industrial processes not covered under Subparagraph (5) of this Paragraph emitting sulfur dioxide shall demonstrate compliance by sampling procedures described in Method 6 of Appendix A of 40 CFR Part 60. Compliance shall be determined by averaging six 20-minute samples taken over such a period of time that no more than 20 minutes elapses between any two consecutive samples.

(7) Sampling procedures to demonstrate compliance with emission standards for nitrogen oxides shall be in accordance with the procedures set forth in Method 7 of Appendix A of 40 CFR Part 60.

(8) Method 9 of Appendix A of 40 CFR 60 shall be used when opacity is determined by visual observation.

(9) Notwithstanding the stated applicability to new source performance standards or primary aluminum plants, the procedures to be used to determine

fluoride emissions are:

(A) for sampling emissions from stacks, Method 13A or 13B of Appendix A of 40 CFR Part 60,

(B) for sampling emissions from roof monitors not employing stacks or pollutant collection systems, Method 14 of Appendix A of 40 CFR Part 60, and

(C) for sampling emissions from roof monitors not employing stacks but equipped with pollutant collection systems, the procedure under 40 CFR 60.8(b), except that the Director of the Division of Environmental Management shall be substituted for the administrator.

(10) Emissions of total reduced sulfur shall be measured by the test procedure described in Method 16 of Appendix A of 40 CFR Part 60 or Method 16A of Appendix A of 40 CFR Part 60.

(11) Emissions of mercury shall be measured by the test procedure described in Method 101 or 102 of Appendix B of 40 CFR Part 61.

(12) Each test (excluding fuel samples) shall consist of three repetitions or runs of the applicable test method. For the purpose of determining compliance with an applicable emission standard the average of results of all repetitions shall apply. In the event that a sample is accidentally lost or conditions occur in which one of the three runs must be discontinued because of forced shutdown, failure of an irreplaceable portion of the sample train, extreme meteorological conditions, or other circumstances, beyond the owner or operator's control, and there is no way to obtain another sample; then compliance may, upon the Director's approval be determined using the arithmetic average of the results of the two other runs.

(13) In conjunction with performing certain test methods prescribed in this Rule, the determination of the fraction of carbon dioxide, oxygen, carbon monoxide and nitrogen in the gas being sampled is necessary to determine the molecular weight of the gas being sampled. Collecting a sample for this purpose shall be done in accordance with Method 3 of Appendix A of 40 CFR Part 60:

(A) The grab sample technique may also be used with instruments such as Bacharach Fyrite (trade name) with the following restrictions:

(i) Instruments such as the Bacharach Fyrite (trade name) may only be used for the measurement of carbon dioxide.

(ii) Repeated samples shall be taken during the emission test run to account for variations in the carbon dioxide concentration. No less than four samples shall be taken during a one-hour test run, but as many as necessary shall be taken to produce a reliable average.

(iii) The total concentration of gases other than carbon dioxide, oxygen and nitrogen shall be less than one percent.

(B) For fuel burning sources, concentrations of oxygen and nitrogen may be calculated from combustion relations for various fuels.

(14) For those processes for which the allowable emission rate is determined by the production rate, provisions shall be made for controlling and measuring the production rate. The source shall be responsible for ensuring, within the limits of practicality, that the equipment or process being tested is operated at or near its maximum normal production rate or at a lesser rate if specified by the Director or his delegate. The individual conducting the emission test shall be responsible for including with his test results, data which accurately represent the production rate during the test.

(15) Emission rates for wood or fuel burning sources which are expressed in units of pounds per million BTU shall be determined by the "Oxygen Based F Factor Procedure" described in 40 CFR Part 60, Appendix A, Method 19, Section 5. Other procedures described in Method 19 may be used subject to the approval of the Director, Division of Environmental Management. To provide data of sufficient accuracy to use with the F-factor methods, an

integrated (bag) sample shall be taken for the duration of each test run. In the case of simultaneous testing of multiple ducts, there shall be a separate bag for each sampling train. The bag sample shall be analyzed with an Orsat analyzer in accordance with Method 3 of Appendix A of 40 CFR Part 60. (The number of analyses and the tolerance between analyses are specified in Method 3.) The specifications indicated in Method 3 for the construction and operation of the bag sampling apparatus shall be followed.

(16) Particulate testing on steam generators that utilize soot blowing as a routine means for cleaning heat transfer surfaces shall be conducted so that the contribution of the soot blowing is represented as follows:

(A) If the soot blowing periods are expected to represent less than 50 percent of the total particulate emissions, one of the test runs shall include a soot blowing cycle.

(B) If the soot blowing periods are expected to represent more than 50 percent of the total particulate emissions then two of the test runs shall each include a soot blowing cycle.

Under no circumstances shall all three test runs include soot blowing. The average emission rate of particulate matter is calculated by the equation:

$$E_{AVG} = E_S \frac{S(A \pm B)}{AR} + E_N \left(\frac{R - S}{R} - \frac{BS}{AR} \right)$$

E_{AVG} equals the average emission rate in pounds per million Btu for daily operating time. E_S equals the average emission rate in pounds per million Btu of sample(s) containing soot blowing. E_N equals the average emission rate in pounds per million Btu of sample(s) with no soot blowing. A equals hours of soot blowing during sample(s). B equals hours without soot blowing during sample(s) containing sootblowing. R equals average hours of operation per 24 hours. S equals average hours of soot blowing per 24 hours. If large changes in boiler load or stack flow rate occur during soot blowing, other methods of prorating the emission rate may be considered more appropriate; for these tests the Director or his designee may approve an alternate method of prorating.

(17) Emissions of volatile organic compounds shall be measured by the appropriate test procedure in Section .0900 of this Subchapter.

(18) Upon prior approval by the Director or his delegate, test procedures different from those described in this Rule may be used if they will provide equivalent or more reliable results. Furthermore, the Director or his delegate may prescribe alternate test procedures on an individual basis when he considers that the action is necessary to secure reliable test data. In the case of sources for which no test method is named, the Director or his delegate may prescribe or approve methods on an individual basis.

(d) ~~All existing sources of emission shall comply with applicable regulations and standards at the earliest possible date.~~ All new sources shall be in compliance prior to beginning operations.

(e) In addition to any control or manner of operation necessary to meet emission standards in this Section, any source of air pollution shall be operated with such control or in such manner that the source shall not cause the ambient air quality standards of Section .0400 of this Subchapter to be exceeded at any point beyond the premises on which the source is located. When controls more stringent than named in the applicable emission standards in this Section are required to prevent violation of the ambient air quality standards or are required to create an offset, the permit shall contain a condition requiring these controls.

(f) The Bubble Concept. A facility with multiple emission sources or multiple facilities within the same area may choose to meet the total emission limitation for a given pollutant through a different mix of controls than that required by the rules in this Section or Section .0900 of this Subchapter.

(1) In order for this mix of alternative controls to be permitted the Director shall determine that the following conditions are met:

(A) Sources to which Rules .0524, .0525, .0530, and .0531 of this Section, the federal New Source Performance Standards (NSPS), the federal National Emission Standards for

Hazardous Air Pollutants (NESHAPS), regulations established pursuant to Section 111 (d) of the federal Clean Air Act, or state or federal Prevention of Significant Deterioration (PSD) requirements apply, will have emissions no larger than if there were not an alternative mix of controls;

(B) The facility (or facilities) is located in an attainment area or an unclassified area or in an area that has been demonstrated to be attainment by the statutory deadlines (with reasonable further progress toward attainment) for those pollutants being considered;

(C) All of the emission sources affected by the alternative mix are in compliance with applicable regulations or are in compliance with established compliance agreements; and

(D) The review of an application for the proposed mix of alternative controls and the enforcement of any resulting permit will not require expenditures on the part of the State in excess of five times that which would otherwise be required.

(2) The owner(s) or operator(s) of the facility (facilities) shall demonstrate to the satisfaction of the Director that the alternative mix of controls is equivalent in total allowed emissions, reliability, enforceability, and environmental impact to the aggregate of the otherwise applicable individual emission standards; and

(A) that the alternative mix approach does not interfere with attainment and maintenance of ambient air quality standards and does not interfere with the PSD program; this demonstration shall include modeled calculations of the amount, if any, of PSD increment consumed or created;

(B) that the alternative mix approach conforms with reasonable further progress requirements in any nonattainment area;

(C) that the emissions under the alternative mix approach are in fact quantifiable, and trades among them are even;

(D) that the pollutants controlled under the alternative mix approach are of the same criteria pollutant categories, except that emissions of some criteria pollutants used in alternative emission control strategies are subject to the limitations as defined in 44 FR 71784 (December 11, 1979), Subdivision D.1.c.ii. The Federal Register referenced in this Part is hereby incorporated by reference and does not include subsequent amendments or editions.

The demonstrations of equivalence shall be performed with at least the same level of detail as The North Carolina State Implementation plan for Air Quality demonstration of attainment for the area in question. Moreover, if the facility involves another facility in the alternative strategy, it shall complete a modeling demonstration to ensure that air quality is protected. Demonstrations of equivalency shall also take into account differences in the level of reliability of the control measures or other uncertainties.

(3) The emission rate limitations or control techniques of each source within the facility (facilities) subjected to the alternative mix of controls shall be specified in the facility's (facilities') permits(s).

(4) Compliance schedules and enforcement actions shall not be affected because an application for an alternative mix of controls is being prepared or is being reviewed.

(5) The Director may waive or reduce requirements in this Paragraph up to the extent allowed by the Emissions Trading Policy Statement published in the Federal Register of April 7, 1982, pages 15076-15086, provided that the analysis required by Paragraph (g) of this Rule shall support any waiver or reduction of requirements. The Federal Register referenced in this Paragraph is hereby incorporated by reference and does not include subsequent amendments or editions.

(g) In a permit application for an alternative mix of controls under Paragraph (f) of this Rule, the owner or operator of the facility shall demonstrate to the satisfaction of the Director that the proposal is equivalent to the existing requirements of the

SIP in total allowed emissions, enforceability, reliability, and environmental impact. The Director shall provide for public notice with an opportunity for a request for public hearing following the procedures under 15A NCAC 2Q .0300 or .0500, as applicable. If and when a permit containing these conditions is issued, it will become a part of the state implementation plan (SIP) as an appendix available for inspection at the department's regional offices. Until the U.S. Environmental Protection Agency (EPA) approves the SIP revision embodying the permit containing an alternative mix of controls, the facility shall continue to meet the otherwise applicable existing SIP requirements. The revision will be approved by EPA on the basis of the revision's consistency with EPA's "Policy for Alternative Emission Reduction Options Within State Implementation Plans" as promulgated in the Federal Register of December 11, 1989, pages 71780-71788, and subsequent rulings.

(h) The referenced ASTM test methods in this Rule are hereby incorporated by reference and include subsequent amendments and editions. Copies of referenced ASTM test methods or Federal Registers may be obtained from the Division of Environmental Management, P.O. Box 29535, Raleigh, North Carolina 27626-0535 at a cost of ten cents ($0.10) per page.

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

.0516 SULFUR DIOXIDE EMISSIONS FROM COMBUSTION SOURCES

(a) Emission of sulfur dioxide from any source of combustion that is discharged from any vent, stack, or chimney shall not exceed 2.3 pounds of sulfur dioxide per million BTU input. Sulfur dioxide formed by the combustion of sulfur in fuels, wastes, ores, and other substances shall be included when determining compliance with this standard. Sulfur dioxide formed or reduced as a result of treating flue gases with sulfur trioxide or other materials shall also be accounted for when determining compliance with this standard.

(b) A source subject to an emission standard for sulfur dioxide in ~~Regulation~~ Rule .0524, ~~or~~ .0525, or .0527 of this Section shall meet that standard.

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

.0530 PREVENTION OF SIGNIFICANT DETERIORATION

(a) The purpose of the Rule is to implement a program for the prevention of significant deterioration of air quality as required by 40 CFR 51.166 as amended ~~October 17, 1988~~ June 3, 1993.

(b) For the purposes of this Rule the definitions contained in 40 CFR 51.166(b) and 40 CFR 51.301 shall apply. The reasonable period specified in 40 CFR 51.166(b)(3)(ii) shall be seven years. The limitation specified in 40 CFR 51.166(b)(15)(ii) shall not apply.

(c) All areas of the State shall be classified as Class II except that the following areas are Class I:

(1) Great Smoky Mountains National Park;
(2) Joyce Kilmer Slickrock National Wilderness Area;
(3) Linville Gorge National Wilderness Area;
(4) Shining Rock National Wilderness Area;
(5) Swanquarter National Wilderness Area.

(d) Redesignations of areas to Class I or II may be submitted as state proposals to the Administrator of the Environmental Protection Agency (EPA), if the requirements of 40 CFR 51.166(g)(2) are met. Areas may be proposed to be redesignated as Class III, if the requirements of 40 CFR 51.166(g)(3) are met. Redesignations may not, however, be proposed which would violate the restrictions of 40 CFR 51.166(e). Lands within the boundaries of Indian Reservations may be redesignated only by the appropriate Indian Governing Body.

(e) In areas designated as Class I, II, or III, increases in pollutant concentration over the baseline concentration shall be limited to the values set forth in 40 CFR 51.166(c). However, concentration of the pollutant shall not exceed standards set forth in 40 CFR 51.166(d).

(f) Concentrations attributable to the conditions described in 40 CFR 51.166(f)(1) shall be excluded in determining compliance with a maximum allowable increase. However, the exclusions referred to in 40 CFR 51.166(f)(1)(i) or (ii) shall be limited to five years as described in 40 CFR 51.166(f)(2).

(g) Major stationary sources and major modifications shall comply with the requirements contained in 40 CFR 51.166(i) and by extension in 40 CFR 51.166(j) through (o). The transition provisions allowed by 40 CFR 52.21 (i)(11)(i) and (ii) and (m)(1)(vii) and (viii) are hereby adopted under this Rule. The minimum requirements described in the portions of 40 CFR 51.166

referenced in this Paragraph are hereby adopted as the requirements to be used under this Rule, except as otherwise provided in this Rule. Wherever the language of the portions of 40 CFR 51.166 referenced in this Paragraph speaks of the "plan," the requirements described therein shall apply to the source to which they pertain, except as otherwise provided in this Rule. Whenever the portions of 40 CFR 51.166 referenced in this Paragraph provide that the State plan may exempt or not apply certain requirements in certain circumstances, those exemptions and provisions of nonapplicability are also hereby adopted under this Rule. However, this provision shall not be interpreted so as to limit information that may be requested from the owner or operator by the Director as specified in 40 CFR 51.166(n)(2).

(h) 15A NCAC 2Q .0102 and .0302 are not applicable to any source to which this Rule applies. The owner or operator of the sources to which this Rule applies shall apply for and receive a permit as required in 15A NCAC 2Q .0300 or .0500.

(i) When a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980, on the capacity of the source or modification to emit a pollutant, such as a restriction on hours of operation, then the provisions of this Rule shall apply to the source or modification as though construction had not yet begun on the source or modification.

(j) Volatile organic compounds exempted from coverage in Subparagraph (c)(5) of Rule .0531 of this Section shall also be exempted when calculating source applicability and control requirements under this Rule.

(k) The degree of emission limitation required for control of any air pollutant under this Rule shall not be affected in any manner by:

(1) that amount of a stack height, not in existence before December 31, 1970, that exceeds good engineering practice; or

(2) any other dispersion technique not implemented before then.

(l) A substitution or modification of a model as provided for in 40 CFR 51.166(l) shall be subject to public comment procedures in accordance with the requirements of 40 CFR 51.166(q).

(m) Permits may be issued on the basis of innovative control technology as set forth in 40 CFR 51.166(s)(1) if the requirements of 40 CFR 51.166(s)(2) have been met, subject to the condition of 40 CFR 51.166(s)(3), and with the allowance set forth in 40 CFR 51.166(s)(4).

(n) If a source to which this Rule applies impacts an area designated Class I by requirements of 40 CFR 51.166(e), notice to EPA will be provided as set forth in 40 CFR 51.166(p)(1). If the Federal Land Manager presents a demonstration described in 40 CFR 51.166(p)(3) during the public comment period or public hearing to the Director and if the Director concurs with this demonstration, the permit application shall be denied. Permits may be issued on the basis that the requirements for variances as set forth in 40 CFR 51.166(p)(4), (p)(5) and (p)(7), or (p)(6) and (p)(7) have been satisfied.

(o) A permit application subject to this Rule shall be processed in accordance with the procedures and requirements of 40 CFR 51.166(q). Within 30 days of receipt of the application, applicants will be notified if the application is complete as to initial information submitted. Notwithstanding this determination, the 90-day period provided for the Commission to act by G.S. 143-215.108(b) shall be considered to begin at the end of the period allowed for public comment, at the end of any public hearing held on the application, or when the applicant supplies information requested by the Director in answer to comments received during the comment period or at any public hearing, whichever is later. The Director shall notify the Administrator of EPA of any application considered approved by expiration of the 90 days; this notification shall be made within 10 working days of the date of expiration. If no permit action has been taken when 70 days of the 90-day period have expired, the Commission shall relinquish its prevention of significant deterioration (PSD) authority to EPA for that permit. The Commission shall notify by letter the EPA Regional Administrator and the applicant when 70 days have expired. EPA will then have responsibility for satisfying unmet PSD requirements, including permit issuance with appropriate conditions. The permit applicant must secure from the Commission, a permit revised (if necessary) to contain conditions at least as stringent as those in the EPA permit, before beginning construction. Commencement of construction before full PSD approval is obtained constitutes a violation of this Rule.

(p) Approval of an application with regard to the requirements of this Rule shall not relieve the owner or operator of the responsibility to comply fully with applicable provisions of other rules of this Chapter and any other requirements under

local, state, or federal law.

(q) When a source or modification subject to this Rule may affect the visibility of a Class I area named in Paragraph (c) of this Rule, the following procedures shall apply:

(1) The Director shall provide written notification to all affected Federal Land Managers within 30 days of receiving the permit application or within 30 days of receiving advance notification of an application. The notification shall be at least 30 days prior to the publication of notice for public comment on the application. The notification shall include a copy of all information relevant to the permit application including an analysis provided by the source of the potential impact of the proposed source on visibility.

(2) The Director shall consider any analysis concerning visibility impairment performed by the Federal Land Manager if the analysis is received within 30 days of notification. If the Director finds that the analysis of the Federal Land Manager fails to demonstrate to his satisfaction that an adverse impact on visibility will result in the Class I area, the Director shall provide in the notice of public hearing on the application, an explanation of his decision or notice as to where the explanation can be obtained.

(3) The Director may require monitoring of visibility in or around any Class I area by the proposed new source or modification when the visibility impact analysis indicates possible visibility impairment.

(r) Revisions of the North Carolina State Implementation Plan for Air Quality shall comply with the requirements contained in 40 CFR 51.166(a)(2).

(s) The version of the Code of Federal Regulations incorporated in this Rule is that as of ~~January 1, 1989,~~ June 3, 1993, and does not include any subsequent amendments or editions to the referenced material.

Statutory Authority G.S. 143-215.3(a)(1); 143-215.107(a)(3); 143-215.107(a)(5); 143-215.107(a)(7); 143-215.108(b); 150B-21.6.

SECTION .0900 - VOLATILE ORGANIC COMPOUNDS

.0955 THREAD BONDING MANUFACTURING

(a) For the purpose of this Rule, the following definitions apply:

(1) "Capture hoods" means any device designed to remove emissions from the solution bath tray areas during the manufacturing process.

(2) "Curing" means exposing coated threads to high temperatures in an oven until the nylon solution mixture hardens (vaporizing the solvents) and bonds to the threads.

(3) "Day tanks" means holding tanks that contain nylon solution mixture ready for use.

(4) "Drying ovens" means any apparatus through which the coated threads are conveyed while curing.

(5) "Enclose" means to construct an area within the plant that has a separate ventilation system and is maintained at a slightly negative pressure.

(6) "Fugitive emissions" means emissions that cannot be collected and routed to a control system.

(7) "Nylon thread coating process" means a process in which threads are coated with a nylon solution and oven cured.

(8) "Permanent label" means a label that cannot be easily removed or defaced.

(9) "Polyester solution mixture" means a mixture of polyester and solvents which is used for thread coating.

(10) "Storing means reserving material supply for future use.

(11) "Thread bonding manufacturing" means coating single or multi-strand threads with plastic (nylon or polyester solution mixture) to impart properties such as additional strength and durability, water resistance, and moth repellency.

(12) "Transporting" means moving material supply from one place to another.

(b) This Rule applies in accordance with Rule .0902(b) of this Section to any thread bonding manufacturing facility with total uncontrolled exhaust emissions from nylon thread coating process collection hoods and drying ovens of volatile organic compounds (VOC) equal to or greater than 100 tons per year.

(c) Annual VOC emissions from each nylon thread coating process shall be determined by multiplying the hourly amount of VOC consumed by the total scheduled operating hours per year.

(d) Emissions from each nylon thread coating process subject to this Rule shall be reduced:

(1) by at least 95 percent by weight, or

(2) by installing a thermal incinerator with a temperature of at least 1600° F and a residence time of at least 0.75 seconds.

(e) The owner or operator of any thread bonding manufacturing facility shall:

(1) enclose the nylon thread coating process area of the plant to prevent fugitive emissions from entering other plant areas;

(2) store all VOC containing materials in covered tanks or containers;

(3) ensure that equipment used for transporting or storing VOC containing material does not leak and that all lids and seals used by such equipment are kept in the closed position at all times except when in actual use;

(4) not cause or allow VOC containing material to be splashed, spilled, or discarded in sewers;

(5) hold only enough nylon solution mixture in the day tanks to accommodate daily process times measured in hours; and

(6) place permanent and conspicuous labels on all equipment affected by Subparagraphs (4) through (5) of this Paragraph summarizing handling procedures described in Subparagraphs (4) through (5) of this Paragraph for VOC contaminated materials at the nylon thread coating process.

(f) The owner or operator of a thread bonding manufacturing facility shall notify the director within 30 days after the calculated annual emissions of VOC from nylon thread coating processes equal or exceed 100 tons per year. The owner or operator shall submit within six months after such calculation a permit application including a schedule to bring the facility into compliance with this Rule.

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

.0956 GLASS CHRISTMAS ORNAMENT MANUFACTURING

(a) For the purpose of this Rule, the following definitions apply:

(1) "Coating" means the application of a layer of material, either by dipping or spraying, in a relatively unbroken film onto glass Christmas ornaments.

(2) "Curing ovens" means any apparatus through which the coated glass Christmas ornaments are conveyed while drying.

(3) "Glass Christmas ornament" means any glass ornament that is coated with decorative exterior and is traditionally hung on Christmas trees.

(4) "Glass Christmas ornament manufacturing facility" means a facility that coats glass Christmas ornaments through the process of interior coating or exterior coating that uses either mechanical or hand-dipping methods, drying (curing), cutting, and packaging operations.

(5) "Mechanical coating lines" means equipment that facilitates mechanized dipping or spraying of a coating onto glass Christmas ornaments in which the neck of each ornament is held mechanically during the coating operation.

(6) "Solvent-borne coating" means a coating that uses organic solvents as an ingredient.

(b) This Rule applies in accordance with Rule .0902(b) of this Section to any curing ovens servicing the mechanical coating lines in the coating of glass Christmas ornaments at glass Christmas tree ornament manufacturing facilities with potential volatile organic compound (VOC) emissions of 100 tons per year or more.

(c) This Rule does not apply to glass Christmas ornament manufacturing facilities that do not use solvent-borne coating materials.

(d) Emissions of VOC from each curing oven shall be reduced by at least 95 percent by weight.

(e) Emissions of VOC from all curing ovens servicing the mechanical coating lines at the glass Christmas ornament manufacturing facility shall not exceed 33.9 pounds of VOC per hour.

(f) If the owner or operator of a facility subject to this Rule chooses to use low VOC content, solvent-borne coatings to reduce emissions, the emission reduction from the use of these coatings shall be equivalent to that achieved using add-on controls.

(g) The owner or operator of a Christmas tree ornament manufacturing facility shall notify the director within 30 days after the calculated annual emissions of VOC from the facility equal or exceed 100 tons per year. The owner or operator shall submit within six months after such

calculation a permit application including a schedule to bring the facility into compliance with this Rule.

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

.0957 COMMERCIAL BAKERIES

(a) For the purpose of this Rule, the following definitions apply:

(1) "Baking" means the process by which dough is changed to bread in an oven as a result of temperature and time.

(2) "Commercial Bakery" means an establishment where bread and baked goods are produced.

(3) "Oven" means a heated chamber or compartment where the baking process takes place.

(b) This Rule applies in accordance with Rule .0902(b) of this Section to any baking oven at a commercial bakery with potential volatile organic compound (VOC) emissions greater than 175 pounds of VOC per day. Daily volatile organic compound emissions shall be determined according to the calculation procedures in Paragraph (d) of this Rule.

(c) Emissions of VOC from each baking oven subject to this Rule shall be reduced by at least 90 percent by weight.

(d) Daily volatile organic compound emissions from each commercial baking oven shall be determined according to the following: 0.00314 times the daily production rate (pounds of bread per day).

(e) The owner or operator of a commercial bakery shall notify the Director within 30 days after the calculated emissions of VOC from a baking oven equal or exceed 175 pounds per day. The owner or operator shall submit within six months after such calculation a permit application including a schedule to bring the facility into compliance with this Rule.

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

SUBCHAPTER 2Q - AIR QUALITY PERMIT PROCEDURES

SECTION .0300 - CONSTRUCTION AND OPERATION PERMITS

.0312 APPLICATION PROCESSING SCHEDULE

(a) The Division shall adhere to the following schedule for processing applications for permits, permit modifications, and permit renewals:

(1) for permit applications, except for prevention of significant deterioration under 15A NCAC 2D .0530, new source review under 15A NCAC 2D .0531, case-by-case maximum achievable control technology under 15A NCAC 2D .1109, or a request for synthetic minor facility status before one year after EPA approves Section .0500 of this Subchapter, which shall take at least six months:

(A) The Division shall send written acknowledgement of receipt of the permit application to the applicant within 10 days of receipt of the application.

(B) The Division shall review all permit applications within 45 days of receipt of the application to determine whether the application is complete or incomplete for processing purposes. The Division shall notify the applicant by letter:

(i) stating that the application as submitted is complete and specifying the completeness date,

(ii) stating that the application is incomplete, requesting additional information and specifying the deadline date by which the requested information is to be received by the Division, or

(iii) stating that the application is incomplete and requesting that the applicant rewrite and resubmit the application.

If the Division does not notify the applicant by letter dated within 45 days of receipt of the application that the application is incomplete, the application shall be deemed complete. A completeness determination shall not prevent the Director from requesting additional information at a later date when such information is considered necessary to properly evaluate the source, its air pollution abatement equipment, or the facility. If the applicant has not provided the requested additional information by the deadline specified in the letter requesting additional information, the

Director may return the application to the applicant as incomplete. The applicant may request a time extension for submittal of the requested additional information.

(C) If the draft permit is not required to go to public notice or to public hearing, the Director shall issue or deny the permit within 90 days of receipt of a complete application or 10 days after receipt of requested additional information, whichever is later.

(D) If the draft permit is required to go to public notice with a request for opportunity for public hearing under Rule .0306(a) of this Section, the Director shall:

(i) send the draft permit to public notice within 90 days after receipt of a complete application; and

(ii) take final action on the permit within 30 days after the close of the public comment period.

(E) If the draft permit is required to go to public hearing as a result of a request for public hearing under Rule .0307(e) of this Section, the Director shall:

(i) send the draft permit to public hearing within 45 days after approving the request for the public hearing; and

(ii) take final action on the permit within 30 days after the close of the public hearing.

(2) for permit applications for prevention of significant deterioration under 15A NCAC 2D .0530 or new source review under 15A NCAC 2D .0531, the processing schedules are set out in those Rules.

(3) for case-by-case maximum achievable control technology under 15A NCAC 2D .1109:

(A) The Division shall send written acknowledgement of receipt of the permit application to the applicant within 10 days of receipt of the application.

(B) The Division shall review all permit applications within 45 days of receipt of the application to determine whether the application is complete or incomplete for processing purposes. The Division shall notify the applicant by letter:

(i) stating that the application as submitted is complete and specifying the completeness date,

(ii) stating that the application is incomplete, requesting additional information and specifying the deadline date by which the requested information is to be received by the Division, or

(iii) stating that the application is incomplete and that the applicant rewrite and resubmit the application.

If the Division does not notify the applicant by letter dated within 45 days of receipt of the application that the application is incomplete, the application shall be deemed complete. A completeness determination shall not prevent the Director from requesting additional information at a later date when such information is considered necessary to properly evaluate the source, its air pollution abatement equipment, or the facility. If the applicant has not provided the requested additional information by the deadline specified in the letter requesting additional information, the Director may return the application to the applicant as incomplete. The applicant may request a time extension for submittal of the requested additional information.

(C) The Director shall:

(i) send the draft permit to public notice within 120 days after receipt of a complete application or 10 days after receipt of requested additional information, whichever is later; and

(ii) take final action on the permit within 30 days after the close of the public comment period.

(D) If the draft permit is required to go to public hearing as a result of a request for public hearing under Rule .0307(e) of this Section, the Director shall:

(i) send the draft permit to public hearing within 45 days after approving the request for the public hearing; and

(ii) take final action on the permit within 30 days after the close of the public hearing.

(b) The days that fall between the sending out a letter requesting additional information and receiving that additional information shall not be counted in the schedules under Paragraph (a) of this Rule.

(c) The Director may return at any time applications containing insufficient information to complete the review.

Statutory Authority G.S. 143-215.3(a)(1); 143-215.108.

SECTION .0500 - TITLE V PROCEDURE

.0507 APPLICATION

(a) Except for:

(1) minor permit modifications covered under Rule .0515 of this Section,

(2) significant modifications covered under Rule .0516(c) of this Section, or

(3) permit applications submitted under Rule .0506 of this Section,

the owner or operator of a source shall have one year from the date of beginning of operation of the source to file a complete application for a permit or permit revision. However, the owner or operator of the source shall not begin construction or operation until he has obtained a construction and operation permit pursuant to Rule .0501(c) or (d) and Rule .0504 of this Section.

(b) The application shall include all the information described in 40 CFR 70.5(c), including a list of insignificant activities exempted because of size or production rate under Rule .0102(b)(2) of this Subchapter, but not including insignificant activities exempted because of category under Rule .0102(b)(1) of this Subchapter. The application form shall be certified by a responsible official for truth, accuracy, and completeness. In the application submitted pursuant to this Rule, the applicant may attach copies of applications submitted pursuant to Section .0400 of this Subchapter or 15A NCAC 2D .0530 or .0531, provided the information in those applications contains information required in this Section and is current, valid, and complete.

(c) Application for a permit, permit revision, or permit renewal shall be made in accordance with Rule .0104 of this Subchapter on official forms of the Division and shall include plans and specifications giving all necessary data and information as required by the application form. Whenever the information provided on these forms does not describe the source or its air pollution abatement equipment to the extent necessary to evaluate the application, the Director may request that the applicant provide any other information that the Director considers necessary to evaluate the source and its air pollution abatement equipment.

(d) Along with filing a complete application form, the applicant shall also file the following:

(1) for a new facility or an expansion of existing facility, a consistency determination in accordance with G.S. 143-215.108(f) that:

(A) bears the date of receipt entered by the clerk of the local government, or

(B) consists of a letter from the local government indicating that all zoning or subdivision ordinances are met by the facility;

(2) for a new facility or modification of an existing facility, a written description of current and projected plans to reduce the emissions of air contaminants by source reduction and recycling in accordance with G.S. 143-215.108(g); the description shall include:

(A) for an existing facility, a summary of activities related to source reduction and recycling and a quantification of air emissions reduced and material recycled during the previous year and a summary of plans for further source reduction and recycling; or

(B) for a new facility, a summary of activities related to and plans for source reduction and recycling; and

(3) if required by the Director, information showing that:

(A) The applicant is financially qualified to carry out the permitted activities, or

(B) The applicant has substantially complied with the air quality and emissions standards applicable to any activity in which the applicant has previously been engaged, and has been in substantial compliance with federal and state environmental laws and rules.

(e) The applicant shall submit copies of the application package as follows:

(1) for sources subject to the requirements of 15A NCAC 2D .0530, .0531, or

.1200, six copies plus one additional copy for each affected state that the Director has to notify;

(2) for sources not subject to the requirements of 15A NCAC 2D .0530, .0531, or .1200, four copies plus one additional copy for each affected state that the Director has to notify.

The Director may at any time during the application process request additional copies of the complete application package from the applicant.

~~(f) The Division shall review all applications within 60 days of receipt of the application to determine whether the application is complete or incomplete and so notify the applicant. The notification shall be a letter:~~

~~(1) stating that the application is deemed complete;~~

~~(2) stating that the application is incomplete and requesting additional information; or~~

~~(3) stating that the application is incomplete and that the applicant needs to rewrite the application and resubmit it.~~

~~If the Division does not notify the applicant by letter dated within 60 days of receipt of the application that the application is incomplete, the application shall be deemed complete. A completeness determination shall not prevent the Director from requesting additional information at a later date when such information is considered necessary to properly evaluate the source or its air pollution abatement equipment. A completeness determination shall not be necessary for minor modifications under Rule .0514 of this Section.~~

~~(g)~~(f) Any applicant who fails to submit any relevant facts or who has submitted incorrect information in a permit application shall, upon becoming aware of such failure or incorrect submittal, submit, as soon as possible, such supplementary facts or corrected information. In addition, an applicant shall provide additional information as necessary to address any requirements that become applicable to the source after the date he filed a complete application but prior to release of a draft permit.

~~(h)~~(g) The applicant shall submit the same number of copies of additional information as required for the application package.

~~(i)~~(h) The submittal of a complete permit application shall not affect the requirement that any facility have a preconstruction permit under 15A NCAC 2D .0530, .0531, or .0532 or under Section .0400 of this Subchapter.

~~(j)~~(i) The Director shall give priority to permit applications containing early reduction demonstrations under Section 112(j)(5) of the federal Clean Air Act. The Director shall take final action on such permit applications as soon as practicable after receipt of the complete permit application.

~~(k)~~(j) With the exceptions specified in Rule .0203 (i) of this Subchapter, a non-refundable permit application processing fee shall accompany each application. The permit application processing fees are defined in Section .0200 of this Subchapter. Each permit or renewal application is incomplete until the permit application processing fee is received.

~~(l)~~(k) The applicant shall retain for the duration of the permit term one complete copy of the application package and any information submitted in support of the application package.

Statutory Authority G.S. 143-215.3(a)(1); 143-215.107(a)(10); 143-215.108.

.0518 FINAL ACTION

(a) The Director may:

(1) issue a permit, permit revision, or a renewal containing the conditions necessary to carry out the purposes of G.S. 143, Article 21B and the federal Clean Air Act; or

(2) rescind a permit upon request by the permittee; or

(3) deny a permit application when necessary to carry out the purposes of G.S. Chapter 143, Article 21B and the federal Clean Air Act.

(b) The Director may not issue a final permit or permit revision, except administrative permit amendments covered under Rule .0514 of this Section, until EPA's 45-day review period has expired or until EPA has notified the Director that EPA will not object to issuance of the permit or permit revision, whichever occurs first. The Director shall issue the permit or permit revision within five days of receipt of notification from EPA that it will not object to issuance or of the expiration of EPA's 45-day review period, whichever occurs first.

(c) If EPA objects to a proposed permit, the Director shall respond to EPA's objection within 90 days after receipt of EPA's objection. The Director shall not issue a permit under this Section over EPA's objection.

(d) If EPA does not object in writing to the issuance of a permit, any person may petition EPA to make such objections by following the

procedures and meeting the requirements under 40 CFR 70.8(d).

(e) No permit shall be issued, revised, or renewed under this Section unless all the procedures set out in this Section have been followed and all the requirements of this Section have been met. Default issuance of a permit, permit revision, or permit renewal by the Director is prohibited.

~~(f) Final action shall be taken within 18 months of a submittal of a completed application, subject to adjudication, except for applications submitted under Rule .0506 or .0515 of this Section.~~

~~(g)~~(f) Thirty days after issuing a permit, including a permit issued pursuant to Rule .0509 of this Section, that is not challenged by the applicant, the Director shall notice the issuance of the final permit. The notice shall be issued in a newspaper of general circulation in the area where the facility is located. The notice shall include the name and address of the facility and permit number.

Statutory Authority G.S. 143-215.3(a)(1); 143-215.107(a)(10); 143-215.108.

.0525 APPLICATION PROCESSING SCHEDULE

(a) Except for permit applications submitted under Rule .0506 of this Subchapter, the Division shall adhere to the following schedule in processing applications for permits, significant permit modifications, and permit renewal:

(1) The Division shall send written acknowledgement of receipt of the application to the applicant within 10 days of receipt of the application.

(2) The Division shall review all permit applications within 60 days of receipt of the application to determine whether the application is complete or incomplete. The Division shall notify the applicant by letter:

(A) stating that the application as submitted is complete and specifying the completeness date,

(B) stating that the application is incomplete, requesting additional information and specifying the deadline date by which the requested information is to be received by the Division, or

(C) stating that the application is incomplete and requesting that the applicant rewrite and resubmit the application.

If the Division does not notify the applicant by letter dated within 60 days of receipt of the application that the application is incomplete, the application shall be deemed complete. A completeness determination shall not prevent the Director from requesting additional information at a later date when such information is considered necessary to properly evaluate the source, its air pollution abatement equipment, or the facility. If the applicant has not provided the requested additional information by the deadline specified in the letter requesting additional information, the Director may return the application to the applicant as incomplete. The applicant may request a time extension for submittal of the requested additional information. A completeness determination shall not be necessary for minor modifications under Rule .0514 of this Section.

(3) The Director shall send the public notice for public comment on the draft permit to affected states, to EPA, and to persons on the mailing list within 270 days after receipt of a complete application or 10 days after receipt of requested additional information, whichever is later.

(4) If a public hearing is requested and approved by the Director for a draft permit, it shall be held within 45 days of the Director's decision to hold a public hearing.

(5) The Director shall send the proposed permit to EPA:

(A) within 30 days after the close of the public comment period if there is no public hearing on the draft permit; or

(B) within 45 days after the close of the public hearing if there is a public hearing on the draft permit.

(6) If EPA does not object to the proposed permit, the Director shall issue the permit within five days after:

(A) expiration of EPA 45-day review period; or

(B) receipt of notice from EPA that it will not object to issuance,

whichever comes first.

(7) If EPA objects to the proposed permit,

the Director shall respond to EPA's objection within 90 days after receipt of EPA's objections.

(b) The Director may return at any time applications containing insufficient information to complete the review.

Statutory Authority G.S. 143-215.3(a)(1); 143-215.107(a)(10); 143-215.108.

SECTION .0600 - TRANSPORTATION FACILITY PROCEDURES

.0607 APPLICATION PROCESSING SCHEDULE

(a) The Division shall adhere to the following schedule in processing applications for transportation source permits:

(1) The Division shall send written acknowledgement of receipt of the permit application to the applicant within 10 days of receipt of the application.

(2) The Division shall review all permit applications within 30 days of receipt of the application to determine whether the application is complete or incomplete for processing purposes. The Division shall notify the applicant by letter:

(A) stating that the application as submitted is complete and specifying the completeness date,

(B) stating that the application is incomplete, requesting additional information and specifying the deadline date by which the requested information is to be received by the Division, or

(C) stating that the application is incomplete and requesting that the applicant rewrite and resubmit the application.

If the Division does not notify the applicant by letter dated within 30 days of receipt of the application that the application is incomplete, the application shall be deemed complete. A completeness determination shall not prevent the Director from requesting additional information at a later date when such information is considered necessary to properly evaluate the source, its air pollution abatement equipment, or the facility. If the applicant has not provided the requested additional information by the deadline specified in the letter requesting additional information, the Director may return the application to the applicant as incomplete. The applicant may request a time extension for submittal of the requested additional information.

(3) The Director shall send the draft permit to public notice within 60 days after receipt of a complete application or 10 days after receipt of requested additional information, whichever is later.

(4) If the draft permit is not required to go to public hearing, the Director shall take final action on the permit within 30 days after the close of the public comment period.

(5) If the draft permit is required to go to public hearing as a result of a request for public hearing under Rule .0604(e) of this Section, the Director shall:

(A) send the draft permit to public hearing within 45 days after approving the request for the public hearing, and

(B) take final action on the permit within 30 days after the close of the public hearing.

(b) The days that fall between the sending out a letter requesting additional information and receiving that additional information shall not be counted in the schedules under Paragraph (a) of this Rule.

(c) The Director may return at any time applications containing insufficient information to complete the review.

Statutory Authority G.S. 143-215.3(a)(1); 143-215.108; 143-215.109.

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***N**otice is hereby given in accordance with G.S. 150B-21.2 that the Marine Fisheries Commission intends to adopt rules cited as 15A NCAC 3O .0301 - .0310.*

***T**he proposed effective date of this action is January 1, 1995.*

***T**he public hearings will be conducted at 7:00 p.m. on the following dates and locations:*

November 1, 1994
NC AQUARIUM,
Manteo, North Carolina

November 2, 1994
Pitt Community College,
Highway 11S,
Room 153, Fulford Building,
Greenville, North Carolina

November 7, 1994
Joslyn Hall,
Carteret Community College,
3505 Arendell Street,
Morehead City, North Carolina

November 9, 1994
Archdale Building,
512 North Salisbury Street,
Raleigh, North Carolina

November 10, 1994
University of North Carolina,
Morton Hall,
Randall Street, Lot G,
Wilmington, North Carolina

ALL PUBLIC HEARINGS WILL BEGIN AT 7:00 p.m.

BUSINESS SESSION

The Marine Fisheries Commission will conduct a Business Session on December 2 - 3, 1994, at the MDS Center, 422 Raleigh Road, Smithfield, North Carolina beginning at 9:00 a.m. on the morning of December 2, 1994, to decide on these proposed rules.

Reason for Proposed Action:
***15A NCAC 3O .0301** - APPEALS PANEL MEMBERS AND CHAIR; allows for designees in place of Chair of Marine Fisheries Commission and Director of the Division of Marine Fisheries. Requires appointment of such designees within specified timeframe. Sets up procedures for attendance and requires quorum.*
***15A NCAC 3O .0302** - APPEALS PANEL MEETINGS; schedules meetings for set dates. Outlines methods of presentations for petitioners.*
***15A NCAC 3O .0303** - APPEAL PETITION AND OTHER EVIDENCE; outlines criteria for contents in petitions, where to submit petitions, time limit for Division of Marine Fisheries to make recommendation and time limit for responding to such recommendation.*
***15A NCAC 3O .0304** - CONSIDERATION OF APPEAL PETITIONS; outlines timeframe for considering petitions, information to be considered in the petition, and how to settle votes that are tied.*
***15A NCAC 3O .0305** - EMERGENCY LICENSES; outlines criteria for issuance of 30 days emergency license.*
***15A NCAC 3O .0306** - HARDSHIP LICENSES; outlines criteria for issuance of a hardship license.*
***15A NCAC 3O .0307** - APPEALS PANEL FINAL DECISION; outlines procedures for issuance or denials of an approved emergency or hardship license.*
***15A NCAC 3O .0308** - OFFICIAL RECORD; outlines what shall be the official record of the decision.*
***15A NCAC 3O .0309** - REASONS FOR REVOCATION; sets forth reasons for revoking emergency or hardship licenses.*
***15A NCAC 3O .0310** - TEMPORARY EMERGENCY VESSEL CRAB LICENSE; outlines procedures and reasons for issuance of emergency vessel crab licenses.*

Comment Procedures: Comments and statements, both written and oral, may be presented at the hearings. Written comments are encouraged and may be submitted to the Marine Fisheries Commission, P.O. Box 769, Morehead City, NC 28557. These written and oral comments must be received no later than 10:00 a.m., December 1, 1994. Oral presentation lengths may be limited depending on the number of people that wish to speak at the public hearings.

Editor's Note: These Rulse were filed as temporary rules effective August 9, 1994 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner.

CHAPTER 3 - MARINE FISHERIES

SUBCHAPTER 3O - LICENSES, LEASES, AND FRANCHISES

SECTION .0300 - LICENSE APPEAL PROCEDURES

.0301 APPEALS PANEL MEMBERS AND CHAIR

(a) If the Chairman of the Marine Fisheries Commission and the Director of the Division of Marine Fisheries do not intend to serve as members of the Appeals Panel, they may each name a

designee and an alternative designee. All designees and alternate designees shall be named within five days of the effective date of these Rules.

(b) A designee who is unable to attend a meeting of the Appeals Panel shall notify his or her alternate at least 24 hours before the meeting.

(c) The Chair of the Appeals Panel (Chair) shall be the Chairman of the Marine Fisheries Commission or any member of the Appeals Panel designated as Chair by the Chairman of the Marine Fisheries Commission.

(d) Requests to vary from the time limits of these Rules shall be determined on a case-by-case basis by the Chair.

(e) The Appeals Panel shall not act upon a petition without a quorum. Two or more members of the Appeals Panel constitute a quorum.

Statutory Authority G.S. 113-134; 113-153.1; 1993 (Regular Session 1994), c. 576, s. 3; 143B-289.4.

.0302 APPEALS PANEL MEETINGS

The Appeals Panel will hold regular meetings and quarterly meetings.

(1) The Appeals Panel shall conduct its regular meetings on the first and third Friday of each month unless the Marine Fisheries Commission is scheduled to meet on those dates. Regular meetings may be conducted by telephone conference call or in such other manner as the Chair decides. The Chair may cancel meetings or call additional meetings as required. Persons who wish to attend a telephone conference call meeting must make written request with the Fisheries Director at least 10 working days prior to the meeting.

(2) The Appeals Panel shall conduct its quarterly meetings in conjunction with the quarterly meetings of the Marine Fisheries Commission. The first Appeals Panel quarterly meeting shall be in conjunction with the next Marine Fisheries Commission meeting occurring at least 30 days after the effective date of these Rules.

(3) Oral presentations of arguments and evidence may be considered by the Appeals Panel in rendering its decision in accordance with the following provisions:

(a) Answers, by persons other than legal counsel, to questions asked by Appeals Panel members during regular meetings and quarterly meetings shall be evidence;

(b) Oral arguments will only be heard at the quarterly Appeals Panel Meetings. Oral arguments shall not exceed 15 minutes per party. The time provided for argument may be shortened if the Chair determines a shorter time is necessary to dispose of all other matters on the Panel's agenda;

(c) Information presented in an oral argument is not evidence and shall not be included in the official record; and

(d) The Division of Marine Fisheries shall make tape recordings of all oral arguments and presentations.

Statutory Authority G.S. 113-134; 113-153.1; 1993 (Regular Session, 1994), c. 576, s. 3; 143B-289.4.

.0303 APPEAL PETITION AND OTHER EVIDENCE

(a) Under the Statutes authorizing issuance of special licenses in cases of emergencies or hardships, the most important criterion is the demonstration of emergency or hardship. The Appeals Panel must and will deny petitions which fail to demonstrate emergency or hardship consistent with the provisions of 15A NCAC 3O .0305 and .0306.

(b) The contents of an appeal petition are as follows:

(1) Petitions that do not contain the following items will be returned to the petitioner without being processed:

(A) A completed Appeals License Application;

(B) A statement of the license(s) being requested;

(C) Where a vessel license is requested, a copy of the registration/documentation information which identifies the vessel;

(D) The petitioner's notarized signature; and

(E) Where petitioners are not residents of North Carolina, certification from the fisheries agency of their resident state or jurisdiction showing, for the time period beginning July 1, 1991 to the present, all licenses held and any violations or convictions entered against them, or the lack thereof.

(2) In addition, a petition shall include:

(A) A statement of emergency or hardship

consistent with the standards in these Rules;

(B) A list of license suspensions and revocations, and convictions of fisheries offenses in any state or jurisdiction during the past three years;

(C) The reason(s) for failure to obtain the license(s) before July 1, 1994;

(D) A list of commercial fishing license(s), from any state or jurisdiction, held by the petitioner since July 1, 1991, with identifying license number and issuing agency; and

(E) Request for oral argument, if desired.

(3) A petition may be accompanied by:

(A) Evidence demonstrating the extent to which the petitioner relies on commercial fishing as a livelihood, such as tax records, sales records, trip tickets, and similar information;

(B) Sworn affidavits by others verifying or supporting the information in the petition;

(C) Exhibits and any other evidence to be offered in support of the appeal; and

(D) A statement waiving the opportunity to reply to the Division of Marine Fisheries recommendation.

(c) Requests for oral arguments can only be made in the appeal petition.

(d) Petitions, evidence, and supporting information can only be filed with the Division of Marine Fisheries at its offices in Morehead City or by mailing to Post Office Box 769, Morehead City, North Carolina 28557-0769. The petition will not be processed until the petitioner provides an original and four copies of the petition and supporting information.

(e) The Division of Marine Fisheries will submit its recommendation and any other relevant information on each appeal to the Appeals Panel within 10 working days of the receipt of a complete petition. On the same day the recommendation is sent to the Appeals Panel, the Division of Marine Fisheries shall serve a copy of its recommendation on the petitioner by depositing it in first class mail, hand delivery, or facsimile delivery.

(f) Any reply to the Division of Marine Fisheries recommendation must be filed with the Division of Marine Fisheries within 10 days after the recommendation is served. The petition will not be processed until the petitioner provides an original and four copies of the reply and supporting information.

Statutory Authority G.S. 113-134; 113-153.1; 1993 (Regular Session 1994), c. 576, s. 3; 143B-289.4.

.0304 CONSIDERATION OF APPEAL PETITIONS

(a) Petitions received by the Fisheries Director 15 working days before an Appeals Panel meeting shall be determined no later than the next meeting if the petitioner waived the opportunity to reply to the Division of Marine Fisheries recommendation in the petition. All other petitions shall be determined no later than the first Appeals Panel meeting occurring at least 10 days after the reply to the Division of Marine Fisheries recommendation is due to be filed.

(b) When a petitioner requests oral argument, the petition shall be decided at the next quarterly Appeals Panel meeting occurring at least 15 working days after the petition is submitted. When a petitioner requests oral argument and an opportunity to reply to the Division of Marine Fisheries recommendation, the petition shall be decided at the next quarterly Appeals Panel meeting occurring at least 10 days after the reply is due to be filed.

(c) In deciding appeal petitions, the Appeals Panel will consider only information presented in accordance with these Rules and the status report by the Division of Marine Fisheries on the number of licenses issued in each category.

(d) When the vote of the Appeals Panel is tied, the petition shall be decided at the next meeting of the Appeals Panel. Final decision on a petition may only be deferred once under this provision.

Statutory Authority G.S. 113-134; 113-153.1; 1993 (Regular Session 1994), c. 576, s. 3; 143B-289.4.

.0305 EMERGENCY LICENSES

A 30-day emergency license may be issued upon a showing that death, illness, or incapacity of a licensee would make it impossible to continue the fishery operation unless an emergency license is issued to the petitioner.

(1) Upon request by a petitioner, the Chair may suspend or shorten any procedures that would prevent the petition from being considered at the next Appeals Panel meeting occurring not less than three days after the request is made.

(2) An emergency license may not be renewed.

(3) An emergency license does not qualify the licensee to be issued a renewal license pursuant to Section 3 (c) of Chapter 576 of the 1993 (Regular Session 1994) Session Laws.

Statutory Authority G.S. 113-134; 113-153.1; 1993 (Regular Session 1994), c. 576, s. 3; 143B-289.4.

.0306 HARDSHIP LICENSES

The following criteria will be applied in approving or denying petitions based on hardship:

(1) A petition will be denied unless it demonstrates at least one of the following circumstances:

(a) For each license applied for, the petitioner has held that license or an equivalent commercial fishing license from another state or jurisdiction in two out of the past three years; and petitioner can demonstrate extenuating or extraordinary circumstances which prevented him or her from obtaining the North Carolina commercial fishing license for 1993-1994;

(b) It can be demonstrated that petitioner did not obtain a 1993-1994 license because petitioner was on active military duty outside the state and that for two out of the three years previous to going on active military duty, petitioner held the license being applied for;

(c) The petitioner has become 16 years of age since June 30, 1994; has a history of commercial fishing with their parent or guardian; and holds a Shellfish or Crab License;

(d) An immediate member of the petitioner's family, who holds a current license, has died, is incapacitated, or is retiring from the commercial fishery; the petitioner needs the license to continue in that fishery operation; and the family member will surrender the license upon approval of the petition; or

(e) The petitioner can demonstrate facts similar in hardship to the preceding situations.

(2) Hardship and emergency licenses are issued solely to the petitioner based upon individual demonstration of need. A petition may be denied if the petitioner is unable to demonstrate a substantial effect on his livelihood in the event the license is denied.

(3) The petitioner has a history of fishing law violations which would cause petitioner to be ineligible for a license in North Carolina or has a history of substantial noncompliance with federal or state laws, regulations, or rules for the protection of marine and estuarine resources in any state or jurisdiction.

(4) The holder of a current and valid hardship license on June 30 of the license year has the same eligibility to renew the license as persons not subject to the moratorium.

Statutory Authority G.S. 113-134; 113-153.1; 1993 (Regular Session 1994), c. 576, s. 3; 143B-289.4.

.0307 APPEALS PANEL FINAL DECISION

(a) An approval of a petition shall be a final decision that will be entered the same day it is approved by the Appeals Panel. Licenses approved under these Rules shall be issued upon payment of the required fee, subject to any conditions imposed by the Appeals Panel. Licenses issued under these Rules shall be specially denoted as emergency or hardship licenses and shall state the revocation provisions of these Rules and any other conditions imposed by the Appeals Panel.

(b) If a license is approved under 15A NCAC 3O .0306(1)(d), it will only be issued upon the surrender of a license by the currently licensed family member.

(c) Emergency licenses will only be issued by the Division of Marine Fisheries at its Morehead City Office.

(d) Denials of licenses shall be issued within 10 working days of the decision by the Appeals Panel.

(e) The Appeals Panel shall issue a written order setting forth the basis for each approval or denial of a petition. For a hardship license petition, the order shall set forth the grounds for the decision as listed in 15A NCAC 3O .0306(1)(a)-(e). When the basis for the approval is 15A NCAC 3O .0306(1)(e), the order shall state the specific grounds demonstrating hardship.

(f) An Appeals Panel denial becomes final either upon petitioner's filing for judicial review under G.S. 150B-43 et seq. or 30 days after the decision is issued, whichever occurs first.

Statutory Authority G.S. 113-134; 113-153.1; 1993 (Regular Session 1994), c. 576, s. 3; 143B-289.4.

.0308 OFFICIAL RECORD

The official record of an Appeals Panel decision for judicial review shall consist of the following:

(1) The petition and any other items submitted by the petitioner;

(2) The Division of Marine Fisheries recommendation, and any supporting information;

(3) The Division of Marine Fisheries status report on license totals;

(4) The petitioner's response, if any, to the Division of Marine Fisheries recommendation; and

(5) The Appeals Panel final decision.

Statutory Authority G.S. 113-134; 113-153.1; 1993 (Regular Session 1994), c. 576, s. 3; 143B-289.4.

.0309 REASONS FOR REVOCATION

The Appeals Panel shall revoke an emergency or hardship license for either of the following reasons:

(1) Material information submitted by the petitioner and relied upon by the Appeals Panel is determined to be false; or

(2) Any attempt is made to transfer such license.

Statutory Authority G.S. 113-134; 113-153.1; 1993 (Regular Session 1994), c. 576, s. 3; 143B-289.4.

.0310 TEMPORARY EMERGENCY VESSEL CRAB LICENSES

(a) Vessel crab licenses may be transferred by the Fisheries Director, for a period not to exceed 30 days, upon a showing of death, illness, or incapacity.

(b) A temporary emergency vessel crab license does not qualify the licensee to be issued a renewal license pursuant to Section 3 (c) of Chapter 576 of the 1993 (Regular Session 1994) Session Laws.

Statutory Authority G.S. 113-134; 113-153.1; 1993 (Regular Session 1994), c. 576, s. 3; 143B-289.4.

* * * * * * * * * * * * * * * * * * *

Notice is hereby given in accordance with G.S. 150B-21.2 that the EHNR - Coastal Management intends to amend rules cited as 15A NCAC 7H .0104, .0309; 7J .0403 and .0404.

The proposed effective date of this action is February 1, 1995.

The public hearing will be conducted at 4:00 p.m. on September 22, 1994 at the Coast Line Convention Center, 501 Nutt Street, Wilmington, NC.

Reason for Proposed Action:

15A NCAC 7H .0104 and .0309 *- The current rules limit the ability of land owners to reconfigure the proposed development on lots that have been "grandfathered" from subsequent rule changes.*

15A NCAC 7J .0403 and .0404 *- The current rules limit the eligibility of a CAMA permit applicant to receive a time extension beyond the three-year term of the permit.*

Comment Procedures: All persons interested in this matter are invited to attend the public hearing. The Coastal Resources Commission will receive mailed written comments postmarked no later than October 3, 1994. Any person desiring to present lengthy comments is requested to submit a written statement for inclusion in the record of proceedings at the public hearing. Additional information concerning the hearing or the proposals may be obtained by contacting Dedra Blackwell, Div. of Coastal Management, PO Box 27687, Raleigh, NC 27611-7687, (919) 733-2293.

CHAPTER 7 - COASTAL MANAGEMENT

SUBCHAPTER 7H - STATE GUIDELINES FOR AREAS OF ENVIRONMENTAL CONCERN

SECTION .0100 - INTRODUCTION AND GENERAL COMMENTS

.0104 DEVELOPMENT INITIATED PRIOR TO EFFECTIVE DATE OF REVISIONS

(a) The following Rules shall be used to determine whether the revisions to guidelines for development in areas of environmental concern (hereinafter referred to as revisions), with an effective date of June 1, 1979, shall apply to a proposed development.

(1) In the case of a development for which a CAMA permit was required prior to June 1, 1979, the revisions shall not be applicable if a complete and sufficient application for a CAMA permit was

filed and accepted before June 1, 1979. However if the application should lapse or be denied, thereby requiring a new application after June 1, 1979, or if the application is modified or renewed after June 1, 1979, the revisions shall be made applicable.

(2) In the case of a development for which no CAMA permit was required prior to July 15, 1979, the revisions shall not be applicable if all legally required permits have been applied for and accepted in accordance with the applicable rules of the agency responsible for the permit. However, if the application should lapse or be denied, thereby requiring a new application after July 15, 1979, or if the application is modified or renewed after July 15, 1979, the revisions shall be applicable.

(3) In those cases where a CAMA major permit was issued before June 1, 1979, for a major development which included platted lots, the new standards shall apply to such platted lots only to the maximum extent possible without effectively prohibiting the intended use of those lots. In order for this Rule to apply, the following conditions must be met:

(A) the lot on which the proposed development is to be located shall have been accurately shown on the major development permit application and the boundaries must not have been significantly altered.

(B) the lot on which the proposed development is to be located shall have been suitable for the intended use according to the AEC guidelines in effect at the time the major permit was issued.

(C) a minor development permit must be applied for and received according to the normal minor permit process before development can begin.

(D) this Rule shall apply only to development for which a permit application is submitted prior to expiration of the major development permit issued before June 1, 1979.

(4) In those cases where any necessary local approval was issued for a proposed subdivision development prior to July 15, 1979, the Division of Coastal Management advised the developer in writing where to locate the ocean setback line for the proposed subdivision, and the proposed subdivision development was recorded in the county registry prior to July 15, 1979, with the ocean setback determined by the Division of Coastal Management, any new standards regarding oceanfront setbacks shall apply to the platted lots within the proposed subdivision only to the maximum extent possible without effectively prohibiting the intended use of those lots. In order for this Rule to apply, the following conditions must be met:

(A) the lot(s) on which the proposed development is to be located shall have been accurately shown on an approved local plat and the boundaries must not have been significantly altered;

(B) the lot(s) on which the proposed development is to be located shall have been suitable for the intended use according to the AEC guidelines in effect at the time the plat was approved; and

(C) a minor development permit(s) must be applied for and received according to the normal minor permit process before development can begin.

(b) The oceanfront setback provisions specifically applicable to large structures, as set forth by Rule .0306(a)(4) of this Subchapter, shall apply only to development applications received on or after November 1, 1983. Further, Rule .0306(a)(4) of this Subchapter shall only apply to the maximum extent possible without effectively prohibiting the intended use of the property in the following situations:

(1) the completion of projects that had received valid CAMA permits prior to November 1, 1983, provided that permit renewals, modification and transfer requests for these projects made pursuant to 15A NCAC 7J .0404, .0405 and .0406 and 15A NCAC 7E .0105 shall be considered under the setback rules applicable at the time of original permit issuance, and no renewals or extensions of pre-existing permits shall be made beyond the expiration period unless either there has been substantial progress on construction or no material change in the physical conditions at the

project site (as is provided by 15A NCAC 7J .0403); and

(2) the completion of projects that were outside of CAMA permit jurisdiction prior to November 1, 1983, provided that all other required state and local permits had been applied for in accordance with the rules of the agencies responsible for such permits and that the developer has materially changed his or her position in good faith reliance on such development approvals. In all instances, such development must be consistent with all other provisions of this Subchapter.

(c) In the case of subdivisions or projects which have received either all required final or preliminary local approvals or a CAMA major development permit prior to May 27, 1988, and have therein met all applicable CAMA setback requirements as of May 27, 1988, the updated oceanfront erosion rates approved by the Commission on July 29, 1988, and effective on November 1, 1988, shall only apply to the maximum extent feasible. For these previously approved lots and projects, the erosion rate existing as of May 27, 1988, shall be applied in determining minimum oceanfront setbacks for purposes of subsequent approved construction or development prior to the next erosion rate update.

(d) Reconfiguration of lots and projects that have a grandfather status under Paragraphs (b) and (c) of this Rule will be allowed provided that the following conditions are met:

(1) Development is setback from the first line of stable natural vegetation a distance no less than that required by the applicable exceptions, and

(2) Reconfiguration will not result in an increase in the number of buildable lots within the Ocean Hazard AEC or have other adverse environmental consequences.

Statutory Authority G.S. 113A-107; 113A-113; 113A-124.

SECTION .0300 - OCEAN HAZARD AREAS

.0309 USE STANDARDS FOR OCEAN HAZARD AREAS: EXCEPTIONS

(a) The following types of development may be permitted seaward of the oceanfront setback requirements of Rule .0306(a) of the Subchapter if all other provisions of this Subchapter and other state and local regulations are met:

(1) campgrounds that do not involve substantial permanent structures;

(2) parking areas with clay, packed sand or similar surfaces;

(3) outdoor tennis courts;

(4) elevated decks not exceeding a footprint of 500 square feet;

(5) beach accessways consistent with Rule .0308(c) of this Subchapter;

(6) unenclosed, uninhabitable gazebos with a footprint of 200 square feet or less;

(7) uninhabitable, single-story storage sheds with a footprint of 200 square feet or less;

(8) temporary amusement stands; and

(9) swimming pools.

In all cases, this development shall only be permitted if it is landward of the vegetation line; involves no significant alteration or removal of primary or frontal dunes or the dune vegetation; has overwalks to protect any existing dunes; is not essential to the continued existence or use of an associated principal development; is not required to satisfy minimum requirements of local zoning, subdivision or health regulations; and meets all other non-setback requirements of this Subchapter.

(b) Where strict application of the oceanfront setback requirements of Rule .0306(a) of this Subchapter would preclude placement of permanent substantial structures on lots existing as of June 1, 1979, single family residential structures may be permitted seaward of the applicable setback line in ocean erodible areas, but not inlet hazard areas, if each of the following conditions are met:

(1) The development is set back from the ocean the maximum feasible distance possible on the existing lot and the development is designed to minimize encroachment into the setback area;

(2) The development is at least 60 feet landward of the vegetation line;

(3) The development is not located on or in front of a frontal dune, but is entirely behind the landward toe of the frontal dune;

(4) The development incorporates each of the following design standards, which are in addition to those required by Rule .0308(d) of this Subchapter.

(A) All pilings have a tip penetration that extends to at least four feet below mean sea level;

(B) The footprint of the structure be no

more than 1,000 square feet or 10 percent of the lot size, whichever is greater.

(5) All other provisions of this Subchapter and other state and local regulations are met. If the development is to be serviced by an on-site waste disposal system, a copy of a valid permit for such a system must be submitted as part of the CAMA permit application.

(c) Reconfiguration of lots and projects that have a grandfather status under Paragraph (b) of this Rule will be allowed provided that the following conditions are met:

(1) Development is setback from the first line of stable natural vegetation a distance no less than that required by the applicable exception;

(2) Reconfiguration will not result in an increase in the number of buildable lots within the Ocean Hazard AEC or have other adverse environmental consequences; and

(3) Development on lots qualifying for the exception in Paragraph (b) of this Rule must meet the requirements of Paragraphs (1) through (5) of that Paragraph.

For the purposes of this Rule, an existing lot is a lot or tract of land which, as of June 1, 1979, is specifically described in a recorded plat and which cannot be enlarged by combining the lot or tract of land with a contiguous lot(s) or tract(s) of land under the same ownership. The footprint is defined as the greatest exterior dimensions of the structure, including covered stairways, when extended to ground level.

Statutory Authority G.S. 113A-107(a); 113A-107(b); 113A-113(b)(6)a.; 113A-113(b)(6)b.; 113A-113(b)(6)d.; 113A-124.

SUBCHAPTER 7J - PROCEDURES FOR HANDLING MAJOR DEVELOPMENT PERMITS: VARIANCE REQUESTS: APPEALS FROM MINOR DEVELOPMENT PERMIT DECISIONS: AND DECLARATORY RULINGS

SECTION .0400 - FINAL APPROVAL AND ENFORCEMENT

.0403 DEVELOPMENT PERIOD/ COMMENCEMENT/CONTINUATION

(a) ~~All development initiated pursuant to a CAMA and/or dredge and fill permit shall be completed by December 31 of the third year following the year of permit issuance.~~ New CAMA and dredge and fill permits shall expire on December 31 of the third year following the year of permit issuance.

~~(b) Commencement of Development in Ocean Hazard AEC. No work shall begin until the oceanfront setback requirement can be established. When the possessor of an approved permit or a ruling of exception is ready to begin construction, he shall arrange a meeting with the appropriate Local Permit Officer or Field Consultant at the site to determine the oceanfront setback. This setback determination shall replace the one done at the time the permit was processed and approved and construction must begin within a period of 60 days from the date of that meeting. In the case of a major shoreline change within that period a new setback determination will be required before construction begins. Upon completion of the measurement, the Local Permit Officer or Field Consultant will issue a written statement to the permittee certifying the same.~~

(b) Development After Permit Expiration Illegal. Any development done shall be considered unpermitted and shall constitute a violation of G.S. 113A-118 or G.S. 113-229. Any development to be done after permit expiration shall require either a new permit, or, renewal of the original permit according to 15A NCAC 7J .0404 with the exception of Paragraph (e) of this Rule.

~~(c) Work done After Expiration Illegal. Any work done pursuant to an expired permit shall be considered unpermitted work and shall constitute a violation of G.S. 113A-118 and/or G.S. 113-229.~~

(c) Commencement of Development in Ocean Hazard AEC. No development shall begin until the oceanfront setback requirement can be established. When the possessor of a permit or a ruling of exception is ready to begin construction, he shall arrange a meeting with the appropriate permitting authority at the site to determine the oceanfront setback. This setback determination shall replace the one done at the time the permit was processed and approved and construction must begin within a period of 60 days from the date of that meeting. In the case of a major shoreline change within that period a new setback determination will be required before construction begins. Upon completion of the measurement, the permitting authority will issue a written statement to the permittee certifying the same.

(d) Continuation of Development in the Ocean

Hazard AEC. Once ~~work~~ development has begun under proper authorization, development in the Ocean Hazard AEC may continue beyond the authorized development period if, in the opinion of the ~~Local Permit Officer or Field Consultant as appropriate,~~ permitting authority, substantial progress has been made and is continuing according to customary and usual building standards and schedules. In most cases, substantial progress begins with the placement of foundation pilings.

~~(c) Permit Expiration. Where no development is initiated during the authorized development period, the permit shall expire at the conclusion of that period. Any subsequent development activity shall require a new permit.~~

(c) Any permit that has been suspended pursuant to G.S. 113A-121.1 as a result of a contested case petition or by order of superior court for a period longer than six months shall be extended at the applicant's written request for a period equivalent to the period of permit suspension, but not to exceed the development period authorized under Paragraph (a) of this Rule.

(d) An applicant may voluntarily suspend development under an active permit that is the subject of judicial review by filing a written notice with the Department once the review has started. An applicant shall obtain an extension of said permit if the permitting authority finds:

(1) That the applicant notified the permitting authority in writing of the voluntary suspension;

(2) The period during which the permit had been subject to judicial review is greater than six months;

(3) The applicant filed a written request for an extension of the development period once the judicial review had been completed; and

(4) The applicant undertook no development after filing the notice of suspension.

The period of permit extension shall be equivalent to the length of the judicial review proceeding, but not to exceed the development period authorized under Paragraph (a) of this Rule.

Statutory Authority G.S. 113A-118.

.0404 DEVELOPMENT PERIOD EXTENSION

(a) ~~The Department, in the case of a major development and/or dredge and fill permit, or the local permit officer, in the case of a minor development permit, may extend the authorized development period for a period not to exceed one year for initial development or ten years for maintenance and repairs upon receipt of a signed and dated request from the applicant containing the following:~~ Where no development has been initiated during the development period, the permitting authority shall extend the authorized development period for no more than two years upon receipt of a signed and dated request from the applicant containing the following:

(1) a statement of the intention of the applicant to complete the work within a reasonable time;

(2) a statement of the reasons why the project will not be completed before the expiration of the ~~original~~ current permit; ~~and~~

(3) a statement that there has been no change of plans since the issuance of the original ~~permit.~~ permit other than changes that would have the effect of reducing the scope of the project, or, previously approved permit modifications;

(4) notice of any change in ownership of the property to be developed and a request for transfer of the permit if appropriate; and

(5) a statement that the project is in compliance with all conditions of the current permit.

Where substantial development, either within or outside the AEC, has begun and is continuing on a permitted project, the permitting authority shall grant as many two year extensions as necessary to complete the initial development. Renewals for maintenance and repairs of previously approved projects may be granted for periods not to exceed 10 years.

(b) When an extension request has not met the criteria of Paragraph (a) of this Rule, the ~~The~~ Department may circulate ~~major development and dredge and fill extension requests~~ the request to the commenting state agencies along with a copy of the original permit application. Commenting agencies will be given three weeks in which to comment on the extension request. Upon the expiration of the commenting period the Department will notify the applicant promptly of its actions on the extension request. ~~An extension request may be denied upon making findings as required in G.S. 113A-120 and/or G.S. 113-229(e). Changes in circumstances and/or in development standards will be considered by the~~

~~Department in making a decision on an extension request.~~

(c) ~~A minor development~~ Notwithstanding Paragraphs (a) and (b) of this Rule, an extension request may be denied on making findings as required in either G.S. 113A-120 or G.S. 113-229(e). Changes in circumstances ~~and/or~~ or in development standards will be considered and applied to the maximum extent practical by the ~~local permit officer~~ permitting authority in making a decision on an extension request.

(d) The applicant for a major development extension request must submit, with the request, a check or money order payable to the Department in the sum of fifty dollars ($50.00).

(e) Modifications to extended permits may be considered pursuant to 15A NCAC 7J .0405.

Statutory Authority G.S. 113A-119; 113A-124(c)(5).

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***Notice** is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Wildlife Resources Commission intends to amend rules cited as 15A NCAC 10B .0106; 10F .0310 - .0311, .0323, .0365.*

***The** proposed effective date of this action is December 1, 1994.*

***The** public hearing will be conducted at 10:00 a.m. on September 19, 1994 at the Archdale Building, Room 332, 3rd Floor, 512 N. Salisbury St., Raleigh, NC 27604-1188.*

***Reason** for Proposed Action:*

***15A NCAC 10B .0106** - To allow deer taken during depredation to be donated to charitable organizations.*

***15A NCAC 10F .0310** - To establish a restricted swimming area on a designated body of water.*

***15A NCAC 10F .0311, .0323, .0365** - To establish a restricted speed zone on a designated body of water.*

***Comment** Procedures: Interested persons may present their views either orally or in writing at the hearing. In addition, the record of hearing will be open for receipt of written comments from September 2, 1994 to October 3, 1994. Such written comments must be delivered or mailed to the N.C. Wildlife Resources Commission, 512 N. Salisbury Street, Raleigh, NC 27604-1188.*

CHAPTER 10 - WILDLIFE RESOURCES AND WATER SAFETY

SUBCHAPTER 10B - HUNTING AND TRAPPING

SECTION .0100 - GENERAL REGULATIONS

.0106 WILDLIFE TAKEN FOR DEPREDATIONS OR ACCIDENTALLY

(a) Depredation Permit

(1) Endangered or Threatened Species. No permit shall be issued to take any endangered or threatened species of wildlife listed under 15A NCAC 10I by reason of depredations to property. An individual may take an endangered or threatened species in immediate defense of his own life or of the lives of others without a permit. Any endangered or threatened species which may constitute a demonstrable but nonimmediate threat to human safety shall be reported to a federal or state wildlife enforcement officer, who, upon verification of the report, may take or remove the specimen as provided by 15A NCAC 10I .0002.

(2) Other Wildlife Species. Except as provided in Subparagraph (1) of this Paragraph, the executive director of the Wildlife Resources Commission may, upon application of a landholder and after such investigation of the circumstances as he may require, issue a permit to such landholder to take any species of wildlife which is or has been damaging or destroying his property provided there is evidence of substantial property damage. No permit may be issued for the taking of any migratory birds and other federally protected animals unless a corresponding valid U.S. Fish and Wildlife Service depredation permit has been issued. The permit shall name the species allowed to be taken and, in the discretion of the Executive Director, may contain limitations as to age, sex or any other condi-

tion within the species so named. The permit may be used only by the landholder, except that, upon written request of the landholder and when it is conclusively determined on the basis of information submitted by him that he is incapable of accomplishing the necessary control without help, the names of additional persons may be entered upon the permit by the Executive Director as authorized users.

(3) Taking Without a Permit. Except as provided in Subparagraph (1) of this Paragraph, a landholder may take wildlife except migratory birds and other federally protected animals upon his own land without a permit during closed season on the species involved only when such wildlife is in the act of damaging or destroying the property of such landholder.

(b) Term of Permit. Each depredation permit issued by the Executive Director shall have entered thereon a date or time of expiration after which date or time the same shall become invalid for any purpose, except as evidence of lawful possession of any wildlife that may be retained thereunder.

(c) Manner of Taking

(1) Taking Without a Permit. Wildlife taken without a permit while committing depredations to property may, during the open season on the species, be taken by the landholder by any lawful method. During the closed season such depredating wildlife may be taken without a permit only by the use of firearms.

(2) Taking With a Permit. Wildlife taken under a depredation permit may be taken only by the method or methods specifically authorized by the permit. The only methods that may be authorized in taking game species, other than foxes, is by the use of firearms and live traps. The permit may authorize the taking of foxes, furbearing animals, and nongame animals or birds by the use of firearms or traps, including steel traps. When trapping is authorized, in order to limit the taking to the intended purpose, the permit may specify a reasonable distance from the property sought to be protected, according to the particular circumstances, within which the traps must be set. The Executive Director may also state in a permit authorizing trapping whether or not bait may be used and the type of bait, if any, that is authorized. In addition to any trapping restrictions that may be contained in the permit the method of trapping must be in accordance with the requirements and restrictions imposed by G.S. 113-291.6. No depredation permit shall authorize the use of poisons or pesticides in taking wildlife except in accordance with the provisions of the North Carolina Pesticide Law of 1971, the Structural Pest Control Act of 1955, and Article 22A of Chapter 113 of the General Statutes of North Carolina. No depredation permit shall authorize the taking of wildlife by any method by any landholder upon the lands of another.

(3) Intentional Wounding. It is unlawful for any landholder, with or without a depredation permit, intentionally to wound a wild animal in a manner so as not to cause its immediate death as suddenly and humanely as the circumstances permit.

(d) Disposition of Wildlife Taken

(1) Generally. Except as provided by the succeeding Subparagraphs of this Paragraph, any wildlife killed accidentally, without a permit while committing depredations, or under a depredation permit, shall be buried or otherwise disposed of in a safe and sanitary manner on the property of the landholder in whose name the permit is issued or who kills such wildlife while committing depredations.

(2) Deer. Any landholder who kills a deer under a currently valid depredation permit for deer must report such kill within 24 hours and before the deer is butchered for consumption to a wildlife enforcement officer, who upon determining that the kill was lawfully made within the scope of the permit and if so requested by the permittee, shall provide the permittee a written authorization for his own private use or the use by a charitable organization of the edible portions of the carcass. The nonedible portions of the carcass, including head, hide, feet, and antlers, shall be disposed of as specified in

Subparagraph (1) of this Paragraph or turned over to a wildlife enforcement officer for disposition. When a deer is accidentally killed on a road or highway by reason of collision with a motor vehicle, the law enforcement officer who investigates the accident shall, upon request of the operator of the vehicle, provide such operator a written permit authorizing him to possess and transport the carcass of such deer for his personal and lawful use, including delivery of such carcass to a second person for his private use or the use by a charitable organization upon endorsement of such permit to such person or organization by name and when no money or other consideration of value is received for such delivery or endorsement.

(3) Fox. Any fox killed accidentally by a dog or dogs, motor vehicle, or otherwise shall be disposed of as provided by Subparagraph (1) of this Paragraph. Any fox killed under a depredation permit may be disposed of in the same manner or, upon compliance with the fur tagging requirements of 15A NCAC 10B .0400, the carcass or pelt thereof may be sold to a licensed fur dealer. Any live fox taken under a depredation permit may be sold to a licensed controlled hunting preserve for fox in accordance with G.S. 113-273(g).

(4) Furbearing Animals. The carcass or pelt of any furbearing animal killed during the open season for taking such furbearing animal either accidentally or for control of depredations to property, whether with or without a permit, may be sold to a licensed fur dealer provided that the person offering such carcass or pelt for sale has a valid hunting or trapping license, provided further that, bobcats and otters may only be sold upon compliance with any required fur tagging requirement set forth in 15A NCAC 10B .0400.

(5) Nongame Animals and Birds. Nongame animals or birds killed accidentally or for control of depredations may be disposed of as provided by Subparagraph (1) of this Paragraph or in any other safe and sanitary manner.

(e) Reporting Requirements. The killing and method of disposition of every game animal and game bird, every furbearing animal, and every nongame animal or nongame bird for which there is no open season, when killed for committing depredations to property, either with or without a permit, shall be reported to the Wildlife Resources Commission within 24 hours following the time of such killing, except that when the carcass or pelt of a fox, killed under a depredation permit, or of a furbearing animal, killed with or without a permit, is lawfully sold to a licensed fur dealer in this State the fur dealer is required to report the source of acquisition and no report is required of the seller.

Statutory Authority G.S. 113-134; 113-273; 113-274; 113-291.4; 113-291.6; 113-300.1; 113-300.2.

SUBCHAPTER 10F - MOTORBOATS AND WATER SAFETY

SECTION .0300 - LOCAL WATER SAFETY REGULATIONS

.0310 DARE COUNTY

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

(1) Manteo. Doughs Creek adjacent to Shallowbag Bay and all canals situated within the territorial limits of the Town of Manteo.

(2) Hatteras. The waters of Hatteras Harbor and Muddy Creek bounded on the north and south by the high-water mark, on the west by a straight line between channel markers number 20 and 17, and on the east by the mouth of Muddy Creek at Sandy Bay.

(3) Mann's Harbor. The waters of Ferry Dock Road Canal.

(4) Nags Head:

(A) Those waters contained within the canals of Old Nags Head Cove Development;

(B) The Roanoke Sound inlets at Pond Island on either side of Marina Drive extending north from US 64-264.

(5) Wanchese:

(A) The waters of Wanchese Harbor;

(B) The Canal from its beginning where it connects with the Roanoke Sound south of the dead end road SR 1141

extending northwest roughly parallel to SR 1141 and SR 1142, then westward roughly parallel to NC 345, and finally curving to the southwest roughly parallel to the C.B. Daniels Road to its end.

(6) Stumpy Point Canal. That portion of Stumpy Point Canal beginning at the Wildlife Resources Commission boating access area and extending inland for a distance of 3,600 feet.

(7) Stumpy Point Basin. That portion of the Stumpy Point Basin, at the head of the Stumpy Point Bay, which is next to Highway 264 in the dock area and designated by the appropriate markers.

(8) Town of Southern Shores. The waters contained in the canals and lagoons within the territorial limits of the Town of Southern Shores.

(9) Colington Harbour. The waters contained in the canals of Colington Harbour.

(10) Kitty Hawk. Those waters contained in the canals of Kitty Hawk Landing Subdivision.

(11) Washington Baum Bridge. Those waters of the Roanoke Sound from marker 24B north of the bridge to marker 24A south of the bridge, and 50 yards east of the navigation span west to the shore as designated by the appropriate markers.

(12) Colington Island. The waters contained in an area beginning at the bath house and recreation center on the western shore of Colington Island, running 600 feet in a northerly direction and extending 300 feet into Albemarle Sound as marked.

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

(c) Restricted Swimming Area. No person operating or responsible for the operation of any vessel, surfboard, water skis, or jet skis shall permit the same to enter any marked swimming area described in Subparagraph (12) of Paragraph (a) of this Rule.

(d) ~~(c)~~ Placement and Maintenance of Markers. Subject to the approval of the United States Coast Guard and the United States Army Corps of Engineers, the following agencies are designated suitable agencies for placement and maintenance of markers implementing this Rule as to the regulated areas listed in the several Subparagraphs of Paragraph (a) of this Rule:

(1) the Board of Commissioners of the Town of Manteo as to the areas indicated in Subparagraph (1);

(2) the Board of Commissioners of Dare County as to the areas indicated in Subparagraphs (2) through (7), (9) and (11);

(3) the Board of Commissioners of the Town of Southern Shores as to the areas indicated in Subparagraph (8);

(4) the Board of Commissioners of the Town of Kitty Hawk as to the areas indicated in Subparagraph (a)(10).

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

.0311 GRANVILLE: VANCE AND WARREN COUNTIES

(a) Definitions. In addition to the definitions set forth in Paragraph (b) of Rule .0301 of this Section, the following definitions shall apply in this Rule:

(1) Corps. Corps of Engineers, United States Army;

(2) Reservoir. John H. Kerr Reservoir in Granville, Vance and Warren Counties.

(b) Speed Limit Near Ramps. No person shall operate a vessel at greater than no-wake speed within 50 yards of any concrete boat launching ramp located on the reservoir in said counties.

(c) Speed Limit in Mooring Areas. No person shall operate a vessel at greater than no-wake speed while within a designated mooring area established by or with the approval of the Corps on the waters of the reservoir in said counties.

(d) Restricted Swimming Areas. No person operating or responsible for the operation of a vessel shall permit it to enter any designated swimming area established by or with the approval of the Corps on the waters of the reservoir in said counties.

(e) Speed Limit at Kimball Point. No person shall operate a vessel at greater than no-wake speed within 50 yards of the shoreline in the northernmost cove of the Kimball Point Recreation Area in the reservoir, such recreation area being at the western end of SR 1204 in Warren County.

(f) Speed Limit at Lower Mill Creek. No person shall operate a vessel at greater than no-wake speed beginning at a point on the eastern side of Lower Mill Creek where it intersects the North Carolina - Virginia state line, running across

the creek with said state line and then running in a southerly direction on both the east and west sides of the creek to the head waters and including all waters of the creek south of the state line.

(g) ~~(f)~~ Placement and Maintenance of Markers. The Corps is designated a suitable agency for placement and maintenance of markers implementing this Rule. The perimeters of designated swimming areas must be marked with float lines which, in conjunction with the shoreline, form completely enclosed areas. In addition, supplementary standards as set forth in Rule .0301(g)(2) to (7) and (9) of this Section shall apply.

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

.0323 BURKE COUNTY

(a) Regulated Areas. This Rule applies only to the following lakes or portions of lakes which lie within the boundaries of Burke County:

(1) Lake Hickory;

(2) Lake James;

(3) Lake Rhodhiss.

(b) Speed Limit. No person shall operate a vessel at greater than no-wake speed within 50 yards of any designated and marked public boat launching ramp, bridge, marina, boat storage structure, boat service area, dock or pier while on the regulated areas described in Paragraph (a) of this Rule or within 50 yards of any designated and marked private boat launching ramp, bridge, marina, boat storage structure, boat service area, dock or pier around the Holiday Shores Subdivision on Lake James or within 50 yards of the Lake James Campground, or within 50 yards of the community docks at Laurel Pointe subdivision.

(c) Speed Limit in Mooring Areas. No person shall operate a vessel at greater than no-wake speed while within a marked mooring area established with the approval of the Executive Director, or his representative, on the regulated areas described in Paragraph (a) of this Rule.

(d) 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 regulated areas described in Paragraph (a) of this Rule.

(e) Placement and Maintenance of Markers. The Board of Commissioners of Burke County is designated a suitable agency for placement and maintenance of the markers implementing this Rule, subject to the approval of the United States Coast Guard and the United States Army Corps of Engineers, if applicable. With regard to marking the regulated areas described in Paragraph (a) of this Rule, all of the supplementary standards listed in Rule .0301(g) of this Section shall apply.

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

.0365 TYRRELL COUNTY

(a) Regulated Area. This Rule applies to the following waters in Tyrrell County:

(1) That portion of the Scuppernong River from 300 yards west of the Highway 64 bridge to 100 yards east of the Highway 64 bridge as designated by the appropriate markers.

(2) That portion of the Scuppernong River from the Columbia Boat Ramp extending 200 feet into the river as designated by the appropriate markers.

(b) Speed Limit. It is unlawful to operate a vessel at greater than no-wake speed in the regulated areas described in Paragraph (a) of this Rule.

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

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

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***Notice** is hereby given in accordance with G.S. 150B-21.2 that the EHNR - Commission for Health Services intends to amend rule cited as 15A NCAC 19A .0502.*

***The** proposed effective date of this action is January 1, 1995.*

***The** public hearing will be conducted at 1:30 p.m. on October 20, 1994 at the Groundfloor Hearing Room, Archdale Building, 512 N. Salisbury Street, Raleigh, NC.*

***Reason** for Proposed Action: To change the administration fee that physician's who administer state-supplied childhood vaccines may charge for their services. This change is necessary because of new federal regulations regarding the distribu-*

tion and administration of federally-purchased vaccines. The current rules allow physician's to charge no more than $15.00 for one dose of state-supplied vaccine and $5.00 for each additional dose, up to a maximum of $25.00. the Health Care Financing Administration (HCFA) has set the new rate for North Carolina at $13.15 per dose of vaccine administered. This rule change will have no fiscal impact on state or local government. The new administration fee must be in place by October 1, 1994.

Comment Procedures: All persons interested in these matters are invited to attend the public hearing. Written comments may be presented at the public hearing or submitted to Grady L. Balentine, Department of Justice, PO Box 629, Raleigh, NC 27602-0629. All written comments must be received by November 2, 1994. Persons who wish to speak at the hearing should contact Mr. Balentine at (919) 733-4618. Persons who call in advance of the hearing will be given priority on the speaker's list. Oral presentation lengths may be limited depending on the number of people that wish to speak at the public hearing. Only persons who have made comments at a public hearing or who have submitted written comments will be allowed to speak at the Commission meeting. Comments made at the Commission meeting must either clarify previous comments or proposed changes from staff pursuant to comments made during the public hearing process.

IT IS VERY IMPORTANT THAT ALL INTERESTED AND POTENTIALLY AFFECTED PERSONS, GROUPS, BUSINESSES, ASSOCIATIONS, INSTITUTIONS OR AGENCIES MAKE THEIR VIEWS AND OPINIONS KNOWN TO THE COMMISSION FOR HEALTH SERVICES THROUGH THE PUBLIC HEARING AND COMMENT PROCESS, WHETHER THEY SUPPORT OR OPPOSE ANY OR ALL PROVISIONS OF THE PROPOSED RULES. THE COMMISSION MAY MAKE CHANGES TO THE RULES AT THE COMMISSION MEETING IF THE CHANGES COMPLY WITH G.S. 150B-21.2(f).

Editor's Note:** **This Rule was filed as a temporary amendment effective October 1, 1994 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner.

CHAPTER 19 - HEALTH: EPIDEMIOLOGY

SUBCHAPTER 19A - COMMUNICABLE DISEASE CONTROL

SECTION .0500 - PURCHASE AND DISTRIBUTION OF VACCINE

.0502 VACCINE FOR PROVIDERS OTHER THAN LOCAL HEALTH DEPARTMENTS

(a) The Department of Environment, Health, and Natural Resources provides vaccines required by law free of charge to the following providers for administration to individuals who need vaccines to meet the requirement of G.S. 130A-152, 130-155.1 and 15A NCAC 19A .0401:

(1) Community, migrant, and rural health centers;

(2) Colleges and universities for students; and

(3) Physicians and other health care providers.

(b) Upon request of the Department, required vaccines may be distributed by local health departments operating as agents of the State to providers listed in Subparagraphs (a)(1), (2) and (3) of this Rule.

(c) Providers authorized in Paragraph (a) of this Rule shall be eligible to receive free vaccines from the Department only if they sign an agreement with the Department. This agreement will be prepared by the Immunization Branch and will require the provider to:

~~(1) Charge no more than fifteen dollars ($15.00) for one dose of vaccine and five dollars ($5.00) for each additional dose, up to a maximum of twenty five dollars ($25.00) as a reasonable fee for administration of vaccines given at a single visit;~~

(1) Charge no more than thirteen dollars and fifteen cents ($13.15) for one dose of vaccine, up to a maximum of twenty six dollars and thirty cents ($26.30) as a reasonable fee for administration of vaccines given at a single visit;

(2) Provide all vaccines needed during a visit unless a specific contraindication exists to one or more of the vaccines;

(3) Charge no office fee in addition to an administration fee for an immunization-only visit;

(4) Agree not to charge an administration fee to an individual who states that they are unable to pay;

(5) Impose no condition as a prerequisite to

receiving vaccine;

(6) Report in writing or electronically the name and social security number of the person to whom vaccine was administered, the date of administration, the type and dose of vaccine(s) administered and the provider number of the physician or clinic administering the vaccine to the Immunization Branch, at least monthly by the fifth day of each month;

(7) Report adverse vaccine reactions through the Vaccine Adverse Event Reporting System (VAERS);

(8) Obtain a signed Important Information Statement (IIS), Vaccine Information Pamphlet (VIP), or a separate signature card or log sheet that contains a declarative statement specified by the Branch for each dose of vaccine administered; retain the signed portion for a period of 10 years following the end of the calendar year in which the form was signed, or for 10 years following the recipient's age of majority, whichever is longer; upon request, furnish copies of the signed portion to the local health department or the Department; keep a record of the vaccine manufacturer, lot number, and date of administration for each dose of vaccine administered;

(9) Allow periodic inspection of their vaccine supplies and records by the Immunization Branch; and

(10) Comply with the rules of this Section.

(d) A provider who fails to submit timely and accurate reports, as required in Paragraph (c) of this Rule, twice in any 12 month period shall have their eligibility to receive state vaccine suspended for a period of one year. A provider who fails to comply with any of the other requirements of this Rule may have their eligibility suspended by the Department for a period determined by the Department and may be subject to an action brought pursuant to G.S. 130A-27. All suspensions of eligibility shall be in accordance with G.S. 130A-23.

Statutory Authority G.S. 130A-152; 130A-155.1; 130A-433; S.L. 1986, c. 1008, s. 2; S.L. 1987, c. 215, s. 7.

TITLE 21 - OCCUPATIONAL LICENSING BOARDS

CHAPTER 4 - COMMISSION FOR AUCTIONEERS

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Auctioneers Commission intends to amend rules cited as 21 NCAC 4B .0103 - .0104, .0201 - .0202, .0301, .0401 - .0405, .0501 - .0502, .0601 - .0603; adopt 4B .0604 - .0605 and .0701 .

The proposed effective date of this action is December 1, 1994.

The public hearing will be conducted at 2:00 p.m. on September 20, 1994 at the N.C. Auctioneers Commission Offices, 3509 Haworth Drive, Suite 306, Raleigh, NC 27609.

Reason for Proposed Action: The Auctioneers Commission has proposed this action as a result of numerous statutory revisions made in the Auctioneers Law (G.S. 85B) in January and July 1993; to further clarify previously amended rules; and to make various technical changes.

Comment Procedures: Interested persons may present oral or written comments at the Rule-Making Hearing. In addition, the record of hearing will be open for receipt of written comments from September 1, 1994 through October 3, 1994. Written comments not presented at the hearing should be directed to Wayne Woodard. The proposed rules are available for public inspection and copies may be obtained at the Commission's Offices at: 3509 Haworth Dr., Ste. 306, Raleigh, NC 27609.

SUBCHAPTER 4B - AUCTIONEER LICENSING BOARD

SECTION .0100 - ORGANIZATION AND GENERAL PROVISIONS

.0103 DEFINITIONS

Whenever used in this Chapter:

~~(1) "Auction Firm" shall mean any sole proprietorship, partnership or corporation which in the regular course of business promotes auctions, employs auctioneers to conduct auctions in its facilities, or uses or allows the use of its facilities for auctions. This definition applies whether~~

~~or not an owner or officer of that business acts as an auctioneer.~~

(1) ~~(2)~~ "Auctioneers Law" or "licensing law" shall refer to Chapter 85B, General Statutes of North Carolina;

(2) ~~(3)~~ "Board" shall mean the North Carolina Auctioneers Commission;

~~(4) "Executive Director" shall refer to the secretary-treasurer of the Board;~~

(3) "Minimum Bid" as used in auctions shall mean minimum opening bids.

Statutory Authority G.S. 85B-1; 85B-3(f).

.0104 ADMINISTRATIVE LAW PROCEDURES

(a) Contested Cases. Administrative hearings in contested cases conducted by the Board or an administrative law judge (as authorized in G.S. 150B-40) shall be governed by:

(1) procedures set out in Article 3A of G.S. Chapter 150B;

(2) insofar as relevant, the Rules of Civil Procedure as contained in G.S. 1A-1;

(3) insofar as relevant, the General Rules of Practice for the Superior and District Courts as authorized by G.S. 7A-34 and found in the Rules Volume of the North Carolina General Statutes.

The rules of Civil Procedure and the General Rules of Practice for the Superior and District Courts are hereby adopted by reference for contested cases for which the Board has authority to adopt rules under G.S. 150B-38(h). Such adoptions by reference shall automatically include any later amendments and editions of the adopted matter as authorized by G.S. 150B-14(c).

(b) Declaratory Rulings. In addition to the procedures set out in G.S. ~~150B-17~~ 150B-4, petitions for declaratory rulings shall be submitted to the Board and shall contain:

(1) petitioner's name, address and telephone number;

(2) the statute, rule, or both to which the request relates;

(3) all facts and information which are relevant to the request;

(4) a concise statement of the manner in which petitioner has been aggrieved;

(5) a draft of the declaratory ruling sought by petitioner, if a specified outcome is sought by petitioner;

(6) practices likely to be affected by the declaratory ruling;

(7) a list or description of persons likely to be affected by the declaratory ruling; and

(8) a statement as to whether the petitioner desires to present oral argument, not to exceed 30 minutes, to the Board prior to its decision.

The Board shall ordinarily refuse to issue a declaratory ruling when:

(A) the petition does not comply with this subdivision;

(B) the Board has previously issued a declaratory ruling on substantially similar facts;

(C) the Board has previously issued a final agency decision in a contested case on substantially similar facts;

(D) the facts underlying the request for a declaratory ruling were specifically considered at the time of the adoption of the rule in question; or

(E) the subject matter of the request is involved in pending litigation.

(c) Petitions For Rule-Making. In addition to the procedures set out in G.S. ~~150B-16~~ 150B-18, petitions for rule-making shall be submitted to the Board and shall contain:

(1) petitioner's name, address and telephone number;

(2) a draft of the proposed rule or rule change;

(3) the reason for its proposal;

(4) the effect of the proposal on existing rules or decisions;

(5) data supporting the proposal;

(6) practices likely to be affected by the proposal; and a list or description of persons likely to be affected by the proposal~~.~~; and

(7) a list or description of persons likely to be affected by the proposal.

Statutory Authority G.S. 85B-3(f); 85B-8; 150B-4; 150B-14(a)(1),(c); 150B-18; 150B-38(h).

SECTION .0200 - APPLICATION FOR LICENSE

.0201 APPLICATION FORMS

(a) Auctioneer. Each applicant for an auctioneer license shall complete an application form provided by the Board. This form shall be submitted to the ~~executive director~~ Executive Director and shall be accompanied by:

(1) one recent ~~head and shoulders photograph of the applicant of~~

~~acceptable quality~~ passport-type photograph for identification~~, two inches by two inches in size~~;

(2) statements of the results of a local criminal history records search by the clerk of superior court (or equivalent official in other states) in each county where the applicant has resided ~~or~~ and maintained a business within the immediate preceding 60 months (five years);

(3) the proper fees, as required by 21 NCAC 4B .0202;

(4) documentation of required schooling or experience, as follows:

(A) Applicants who base their application upon their successful completion of an approved school of auctioneering must submit a photostatic copy of their diploma or certificate of successful completion. Applicants who base their application upon their successful completion of an approved school of auctioneering must have successfully completed this school within the previous five years, or if completed more than five years before, the applicant must submit documentation verifying the applicant's active lawful participation in auctions within the two years preceding the date of application.

(B) Applicants who base their application upon their successful completion of an apprenticeship must submit a log which was maintained and completed during the apprenticeship period which details the exact hours and dates on which they obtained apprenticeship experience, with each entry being verified and signed by their supervising auctioneer. A minimum of 100 hours of experience during the apprenticeship two-year period must be obtained. Not less than 25 of the total hours accumulated must be attributable to bid calling and not less than 50 hours must be attributable to working as a ring man, drafting and negotiating contracts, appraising merchandise, advertising, clerking and cashiering, with not less than five hours of accumulated experience documented for each category. An apprentice who applies for an auctioneer license under this subsection must submit his application and supporting documentation and obtain a passing score on the auctioneer exam prior to the expiration of his apprentice auctioneer license.

(5) Non-resident applicants must also submit a properly completed "Designation of Agent for Service of Process Form" with notarized signature and notarial seal affixed.

(b) Non-Resident Reciprocal Auctioneer. Each non-resident applicant for auctioneer license, who applies for a North Carolina license pursuant to G.S. 85B-5 shall complete an application form provided by the Board. This form shall be submitted to the Executive Director and shall be accompanied by:

(1) one recent passport-type photograph ~~head and shoulders photograph of acceptable quality~~ for identification~~, two inches by two inches in size~~;

(2) statements of the results of a local criminal history records search by the clerk of superior court (or equivalent official) in each county where the applicant has resided ~~or~~ and maintained a business within the immediate preceding 60 months (five years);

(3) the proper fees, as required by 21 NCAC 4B .0202;

(4) a statement of good standing from the licensing board or Commission of each and every jurisdiction where the applicant holds ~~or has held~~ an auctioneer, apprentice auctioneer or auction firm license; and

(5) a properly completed "Designation of Agent for Service of Process Form" with notarized signature and notarial seal affixed.

(c) Apprentice Auctioneer. Each applicant for an apprentice auctioneer license shall complete an application form provided by the Board. This form shall be submitted to the ~~executive director~~ Executive Director and shall be accompanied by:

(1) one recent passport-type ~~head and shoulders~~ photograph ~~of the applicant of acceptable quality~~ for identification~~, two inches by two inches in size~~;

(2) statements of the results of a local criminal history records search by the clerk of superior court (or equivalent official) in each county where the appli-

cant has resided ~~or~~ and maintained a business within the immediate preceding 60 months (five years);

(3) the proper fees, as required by 21 NCAC 4B .0202;

(4) the signature, as designated on the application form, of the licensed auctioneer who will be supervising the apprentice auctioneer; ~~and~~

(5) a written statement of the proposed supervisors background and experience in the auction profession to include the number and types of auctions conducted or participated in annually; and

(6) ~~(5)~~ if applicant is a non-resident, a properly completed "Designation of Agent for Service of Process Form" with notarized signature and notarial seal affixed.

(d) Auction Firms. Each applicant for an auction firm license shall complete an application form provided by the Board. This form shall be submitted to the ~~executive director~~ Executive Director and shall be accompanied by:

(1) statements of the results of a local criminal history records search by the clerk of superior court (or equivalent official) in each county where any principal and designated person of the auction firm has resided ~~or~~ and maintained a business within the immediate preceding 60 months (five years);

(2) the proper fees, as required by 21 NCAC 4B .0202;

(3) a certified copy of any applicable Articles of Incorporation, Partnership Agreement, and/or Assumed Name Certificate;

(4) a statement of good standing from the licensing board or Commission of each jurisdiction where the applicant firm and any principal and designated person of such firm holds an auctioneer license of any type; and

(5) if applicant firm is a non-resident, a properly completed "Designation of Agent for Service of Process Form" (one each for the auction firm and for each principal and designated person of the firm) with notarized signature and notarial seal affixed and, if a corporation, appropriate corporate seal and corporate secretary's signature affixed.

Statutory Authority G.S. 85B-3(f); 85B-4; 85B-4(d); 85B-5.

.0202 FILING AND FEES

(a) Properly completed applications must be filed (received, not postmarked) in the Board office on or before the filing date established by the Board for a scheduled examination and must be accompanied by all required documents.

(b) License fees are as follows:

(1) New auctioneer license for an applicant who did not serve an apprenticeship ~~$100.00~~ 125.00
This includes a $75.00 annual license fee; ~~and a~~ $25.00 application fee; and $25.00 examination fee.

(2) New auctioneer license for an apprentice auctioneer $ ~~75.00~~ 100.00
This ~~is~~ includes a $75.00 annual license fee~~.~~ ; and $ 25.00 examination fee.

(3) Renewal of auctioneer license $ 75.00

(4) New apprentice auctioneer license $ 50.00
This includes a $25.00 license fee and a $25.00 application fee.

(5) Renewal of apprentice auctioneer license $ 25.00

(6) New auction firm license (no examination) $ ~~75.00~~ 100.00
This ~~is~~ includes a $75.00 annual license fee~~.~~ ;and $25.00 application fee.

(7) New auction firm license (examination) $125.00
This includes a $75.00 annual license fee; $25.00 application fee; and $25.00 examination fee.

(8) ~~(7)~~ Renewal of an auction firm license $ 75.00

(9) Application and processing fee for conversion of non-resident reciprocal license to in-state license $ 25.00

(10) Reinstatement of lapsed license fee $ 25.00

(c) Fees shall be paid in the form of a cashier's check, certified check or money order made payable to the North Carolina Auctioneer Licensing Board. Checks drawn on escrow or trust accounts are not accepted. However, personal checks may be accepted for payment of renewal fees.

Statutory Authority G.S. 85B-4.1; 85B-6.

SECTION .0300 - EXAMINATIONS

.0301 SUBJECT MATTER

(a) The auctioneer license examination shall test the applicant's knowledge of the following required subjects:

(1) a practical and working knowledge of the auction business including fundamentals of auctioneering, contract drawing, bid calling, basic mathematical computations and percentages, advertising, and settlement statements;

(2) the provisions of the licensing law; and

(3) the ~~rules~~ Rules and regulations of the Board.

(b) The auction firm license examinations shall test the applicants knowledge of the following:

(1) the provisions of the licensing law; and

(2) the Rules and regulations of the Board.

Statutory Authority G.S. 85B-4(d)(g).

SECTION .0400 - LICENSING

.0401 LICENSE NUMBER: DISPLAY OF LICENSE AND POCKET CARD

(a) When being licensed each individual or firm shall be issued a license number which remains solely his. Should that number be retired for any reason (such as death, failure to continue in the auction business, failure to renew his license, or any other reason) that number will not be reissued to any other individual or firm.

(b) A pocket card will be issued by the ~~executive director~~ Executive Director giving the auctioneer, ~~or~~ apprentice auctioneer's or auction firm's name, license number and date of expiration. The pocket card must be carried by the licensee, and in the case of auction firms the designated person(s), at all times when auctioneering activities are being conducted and shall be available for inspection by the Executive ~~director~~ Director or ~~a designee~~ designated agent of the Board. An auction firm shall display its license in a prominent place upon its premises, so as to be visible for inspection by patrons of the firm.

Statutory Authority G.S. 85B-3(f); 85B-4.

.0402 LICENSE RENEWAL

(a) Any licensee desiring the renewal of a license which is in good standing shall apply for same and shall submit the required ~~fee~~ fees and such records or documentation requested by the Executive Director to verify the licensee's compliance with G.S. 85B and the rules promulgated in this Chapter. All licenses expire on June 30 each year.

(b) Applications for renewal of licenses will only be processed by the Board upon receipt of the required fee and any records, documents, or information, requested pursuant to Paragraph (a) of this Rule.

(c) ~~(b)~~ Any person or entity who engages in any auctioneering activities governed by the auctioneers law while ~~his~~ the license is lapsed will be subject to the penalties prescribed in the law.

(d) ~~(c)~~ Licenses lapsed or suspended in excess of 24 months shall not be renewable. Persons or firms whose license has been lapsed or suspended in excess of 24 months and who desire to be licensed shall apply for a new license and shall meet all the requirements then existing.

Statutory Authority G.S. 85B-3(f); 85B-4.

.0403 APPRENTICE AUCTIONEER LICENSE

(a) An apprentice auctioneer's license is valid only while he is associated with and supervised by a licensed auctioneer assigned by the Board. In order to be assigned by the Board as a supervisor, the Board must receive a written notice, signed by the prospective supervisor and the apprentice, requesting that the licensed auctioneer be assigned as a supervisor for the apprentice. Upon receipt of such a request, the Board shall ~~make~~ evaluate the requested assignment; ~~however,~~ and such requested assignment may be denied by the Board ~~for good cause shown~~ if the prospective supervisor fails to possess a minimum of five years of active experience in the auctioneering profession or an equivalent combination of training and experience. Upon termination of the association between the supervisor and the apprentice, the supervisor shall immediately notify the Board in writing, showing the date and cause of termination.

(b) The supervising auctioneer must be on the premises of the sale location at any and all times that an apprentice auctioneer is engaged in bid calling. Additionally, the supervising auctioneer shall be responsible for supervising the apprentice on a regular basis and ensuring that the apprentice auctioneer conforms with the auctioneer law and ~~rules~~ Rules promulgated by the Board.

(c) Any licensed auctioneer who undertakes the sponsorship of an apprentice auctioneer shall ensure that the apprentice receives proper training, supervision, and guidance in the following:

(1) A practical and working knowledge of the auction business including

fundamentals of auctioneering, contract drafting, bid calling, basic mathematical computations, advertising, and settlement statements;

(2) The provisions of the licensing law;

(3) The ~~rules~~ Rules and regulations of the Board; and

(4) The preparation and maintenance of written agreements, record books, and other sales records as required by law.

(d) Apprentices are prohibited from conducting or contracting to conduct any auction without the prior express written consent of the sponsor. No sponsor shall authorize an apprentice to conduct or contract to conduct an auction, ~~or~~ to act as principal auctioneer or handle any funds related to an auction unless the sponsor has determined that the apprentice has received adequate training to do so. An apprentice auctioneer may work under only one licensed auctioneer at any given time.

(e) The sponsor shall be responsible for ensuring that the apprentice complies with all of the laws, ~~rules~~ Rules and regulations as they apply to any auction related transaction approved by the sponsor.

(f) An apprentice auctioneer is also required to notify the Board, in writing, immediately upon termination of his association with his supervising auctioneer, at which time his license will be immediately held in an inactive status. ~~An apprentice auctioneer may work under only one licensed auctioneer at any given time.~~ If an apprentice auctioneer's supervising auctioneer's license has been suspended, revoked, or placed on probation the apprentice auctioneer's license will be immediately held in an inactive status. Once in ~~this~~ an inactive status, an apprentice auctioneer shall not conduct or contract to conduct any auction. An apprentice auctioneer may only remain in this inactive status for a maximum of 90 days. If the apprentice auctioneer retains another sponsor approved by the Board within this 90 day period, the apprentice auctioneer's license will not be deemed to have lapsed under 21 NCAC 4B .0402(d).

Statutory Authority G.S. 85B-3(f); 85B-4.

.0404 GROUNDS FOR LICENSE DENIAL OR DISCIPLINE

(a) The Board may deny, suspend, or revoke a license, or issue a letter of reprimand to a licensee, upon any of the following grounds:

(1) violation of any provision of G.S. Chapter 85B;

(2) violation of any provision of the ~~rules~~ Rules under 21 NCAC, Subchapter 4B;

(3) a check given to the Board in payment of required fees which is returned unpaid;

(4) allowing an unlicensed ~~bid caller~~ person (auctioneer) to ~~cry~~ call a bid at a sale;

(5) ~~crying~~ calling a bid at an unlicensed auction firm sale;

(6) failure to properly, completely and fully complete an application or making any false statement or giving any false information in connection with an application for a license, renewal or reinstatement of a license or any investigation by the Board or the Board's designee;

(7) been adjudicated mentally incompetent by a court;

(8) committed a crime the circumstances of which substantially relate to the auctioneering profession;

(9) violated any federal or state statute or rule which relates to the auctioneering profession;

(10) practiced the profession for which the holder has a license while the holder's ability to practice was impaired by alcohol or other drugs or physical or mental disability or disease;

(11) been incompetent in practice. A licensee has been incompetent in practice if the licensee engaged in conduct which evidences a lack of ability, fitness or knowledge to apply principles or skills of the auctioneering profession;

(12) engaged in unprofessional conduct. In this Paragraph "unprofessional conduct" means the violation of any standard of professional behavior which through professional experience has become established in the auctioneering profession;

(13) obtained or attempted to obtain compensation by fraud or deceit;

(14) violated any order of the Auctioneer Licensing Board;

(15) failure to possess truth, honesty and integrity sufficient to be entitled to the high regard and confidence of the public; or

(16) failure to properly make the disclosures required by 21 NCAC 4B .0405.

(b) When applying the requirements of Rule

.0404(a) to auction firms and/or their applications, the requirements shall apply to the firm, the applicant for the license, and all the principals, ~~and~~ officers and designated person of the firm.

Statutory Authority G.S. 85B-8(a)(1); 85B-3(f).

.0405 INVOLVEMENT IN COURT ACTION OR ADMINISTRATIVE HEARING

(a) All auctioneers, apprentice auctioneers and auction firms, including their principals, ~~and~~ designated person(s), and officers, are under a continuing duty to report to the Board any and all criminal arrests for, charges of or convictions of a misdemeanor that has as an essential element dishonesty, deceit, fraud or misrepresentation, or ~~a~~ any arrests, charges or convictions of any felony. Convictions include findings of guilt, guilty pleas, and pleas of nolo contendere. The Board must receive notice of any such arrest, charge or criminal conviction within 30 days of ~~its~~ the occurrence of any or all of these events.

(b) All auctioneers, apprentice auctioneers and auction firms, including their principals, ~~and~~ designated person(s), and officers, are under a continuing duty to report to the Board any and all civil suits involving them that are based upon any allegation of gross negligence, dishonesty, fraud, misrepresentation or incompetency, or that in any way involve and auction sale or a transaction related to an auction matter or auctioneering. The Board must receive notice of any such civil suit within 30 days of the date the complaint in the suit is served on the defendant in the action, or the date a pleading containing one or more of these allegations is served on a party.

(c) All auctioneers, apprentice auctioneers and auction firms, including their principals, ~~and~~ designated person(s) and, officers, are under a continuing duty to report to the Board any and all administrative proceedings which are commenced against them which involve any potential revocation or suspension of, or other disciplinary action against, any auction license or auctioneer license that they hold in another state. The Board must receive notice of any such administrative proceeding within 30 days of the date the auctioneer, apprentice auctioneer or auction firm, including its principals and officers, is notified of the administrative proceeding.

Statutory Authority G.S. 85B-3(f); 85B-4.

SECTION .0500 - SCHOOLS OF AUCTIONEERING

.0501 APPLICATION FOR COURSE APPROVAL

(a) Schools of auctioneering seeking approval of their course shall file an application with the Board on the official school stationery. The application shall include the following information:

(1) name, mailing address and telephone number of the school;

(2) name, mailing address and telephone number of the school owner, manager and any other person responsible for conducting the overall operation of the school;

(3) physical location, including street address, of the place where classes will be conducted; and

(4) a list of all subjects to be taught and the number of hours of instruction devoted to each subject.;

(5) lesson outlines and accompanying handouts for each subject to be taught; and

(6) verification for each prospective instructor showing compliance with the standards set out in 21 NCAC 4B .0502(d).

(b) The school shall notify the Board within 30 days of any change in the information required in Paragraph (a) of this Rule and this requirement shall continue as long as the school remains approved by the Board.

Statutory Authority G.S. 85B-3(f); 85B-4(d).

.0502 REQUIREMENTS FOR APPROVAL/ MINIMUM STANDARDS

(a) In order to be accepted as an approved school, and in order to remain approved, the course curriculum must contain classroom instruction in the following subjects for the minimum number of hours shown:

~~(1) Sixteen hours - Bid calling, voice control, proper breathing techniques, and use and sequence of numbers;~~

~~(2) Eight hours - Antiques and furniture;~~

~~(3) Eight hours - Farm equipment;~~

~~(4) Four hours - Auctioneers Law, Rules and Regulations, and Auctioneering Ethics;~~

~~(5) Six hours - Advertising, Drawing Sale Bills, Drawing Contracts;~~

~~(6) Eight hours - Accounting, Bookkeeping Procedures, Final Settlement Statements;~~

~~(7) Six hours - Real Estate at Auction;~~
~~(8) Three hours - Automobile Auctions;~~
~~(9) Three hours - Cattle and Livestock;~~
~~(10) Six hours - Estate and Bankruptcy Sales;~~
~~(11) One hour - Hygiene and Personal Appearance;~~
~~(12) Three hours - Tobacco Auctions;~~
~~(13) Two hours - Art, Rugs, Jewelry, etc.;~~
~~(14) Three hours - Liquidations;~~
~~(15) Three hours - Review, Testing, etc., at the end of the course.~~

(1) Essential Core Curriculum (Minimum 50 hours)
16 Hours - Bid calling, Voice Control, Proper Breathing Techniques, and Use and Sequence of Numbers;
4 Hours - Advertising
8 Hours - Auctioneers Law and Rules and Regulations
2 Hours - Uniform Commercial Code and Bulk Transfers
2 Hours - Drafting and Negotiating Contracts
2 Hours - Closing Statements and Settlements
8 Hours - Accounting and Mathematics
1 Hour - Auctioneering Ethics
2 Hours - Handling Sale Proceeds and Escrow Accounts
2 Hours - Auction Preparation and Setup
3 Hours - Review and Testing (End of Course).

(2) Supplemental Instruction Areas (Minimum 30 hours)

Antiques	Art, Rugs, Jewelry
Real Estate	Body Language
Tobacco	Farm Machinery
Environmental Issues	Heavy Equipment
Computers	Automobiles
Firearms	Cattle and Livestock
Foreclosure & Bankruptcy Sales	
Public Speaking	Estate Sales
Hygiene & Personal Appearance	
Appraising	Ring Work
Sales Tax Requirements	Consignment Auctions

Minimum hours are not required in individual supplemental subjects, however, all topics must be addressed in the school.

(b) Students attending an approved course must attend and successfully complete a minimum of 80 hours of classroom instruction according to the list of subjects and minimum hours of instruction in each subject specified in Paragraph ~~.0502~~(a) of this Rule. An hour of creditable instruction is defined as 50 minutes of classroom instruction or practical exercise accompanied by a 10 minute break.

(c) Each course offered must include instruction by a minimum of five different instructors, at least three of whom must be professional auctioneers. Regardless of the total number of hours taught by any given instructor, no more than 20 hours of an individual's instruction may be counted to satisfy the requirements of Paragraph ~~.0502~~(a) of this Rule.

(d) All persons who instruct in an approved school must have a minimum of five years training or experience, or a combination thereof, in the particular field in which they are instructing. Additionally, an instructor may not be utilized by a school if he has committed any act or violation specified in 21 NCAC 4B .0404, unless such instruction is specifically approved by the Board in writing.

(e) The school shall provide or make available suitable facilities, equipment, materials and supplies necessary for the course, specifically including:

(1) a comfortable, well-lighted and ventilated classroom with a seating capacity sufficient to accommodate all students; and

(2) audio-visual equipment and other instructional devices and aids necessary and beneficial to the delivery of effective training.

Statutory Authority G.S. 85B-3(f); 85B-4(d).

SECTION .0600 - GENERAL AUCTIONEERING

.0601 CHANGE OF ADDRESS OR BUSINESS NAME OR OWNERSHIP

(a) All licensees shall notify the Board in writing of each change or addition of residence or business address (including mailing address) ~~or~~ and change of trade name, assumed name, or combination of names the licensee conducts business related to auctions. ~~within ten days of such change.~~

(b) In the case of a corporate licensee, said licensee shall immediately notify the Executive Director of any change in the directors or officers of the corporation and such new director(s) or officer(s) shall comply with the provisions of Subparagraphs (d)(1), (4) and (5) in Rule .0201 of this Subchapter. If the new directors or officers have a 51% or greater controlling interest in the corporation, the firm license shall be retired and

the firm must apply for a new license.

(c) In the case of a partnership license, said licensee shall immediately notify the Executive Director of any change in partners and such new partners shall comply with the provisions of Subparagraphs (d)(1), (4) and (5) in Rule .0201 of this Subchapter.

(d) In the case of an auction firm license, the licensee shall immediately notify the Executive Director of any change in designated person(s) and such designated persons shall comply with the provisions of Subparagraphs (d)(1), (4) and (5) in Rule .0201 of this Subchapter.

(e) Any change in address, business name or ownership required by these Rules must be reported within 10 days of the occurrence of such change.

Statutory Authority G.S. 85B-3(f).

.0602 ADVERTISING

(a) In all advertisements relating to an auction, the auctioneer's, apprentice auctioneer's or auction firm's name and license number shall be clearly given. If an auctioneer is working for or in conjunction with an auction firm, such relationships must be disclosed and both license numbers shall be clearly given. A general advertisement which does not concern a specific sale(s) and which does not list sale dates, times or locations, generally referred to as trolling or holding advertisements, is not subject to any identification requirement. A licensee may advertise under a name, assumed name, trade name, or combination of names, only if proper written notice has been previously filed with the Board. The licensee shall also notify the Board of all certificates filed with any county register of deeds in compliance with G.S. 66-68.

(b) Any licensee who advertises an "Estate Sale" must specifically disclose, in all advertisement materials, whether it is the estate of a living or deceased person. Before conducting an auction as an "estate sale", the majority of items in the sale must come from the estate of the living or deceased person(s). Other items not related to or in an estate may be sold with an estate if specifically disclosed at or before the time of the auction.

(c) It shall be a violation of these Rules to advertise an item, either real or personal, as "absolute" or "without reserve" if the item is subject to confirmation, minimum bid, or any other condition of sale. Before advertising an auction as absolute or without reserve, the majority of items in the sale must be sold absolute or without reserve. Items that are not absolute may be included in the auction provided they are specifically designated as such in all announcements or advertisements.

(d) It shall be a violation of these Rules to advertise any auction using such descriptive words as "Urgent", "Emergency", "Distress" or any other word which connotates liquidation of assets or that the buyers will, for some extraordinary reason, be in a position to reap some unusual bargain without specifically disclosing, in the written advertisement, the reason that the sale is "urgent", the nature of the "emergency" or the cause of the "distress", etc.

(e) It shall be a violation of these Rules to:

(1) Reference the U.C.C. or any other uniform act or federal or state law in any advertisement unless such act or law is required, by law, to be referenced;

(2) Reference or mention any federal, state or local agency or commission unless specifically required by law to do so or unless prior written approval is received from such agency; or

(3) ~~Advertise for sale items which the auctioneer does not actually plan to offer for sale at the advertised auction~~ Otherwise connote that the auction is under the auspices of, at the direction of or required by federal or state law or act or a federal, state or local agency or commission and that the buyers will, for some legal or governmental reason, be in a position to reap some unusual bargain.

(f) It shall be a violation of these Rules to advertise for sale items which the auctioneer/firm does not actually plan to offer for sale at the advertised auction.

(g) ~~(f)~~ It shall be a violation of these Rules for an auctioneer or auction firm to permit its name or license number to appear on any advertisement for an auction without reviewing the contents of the advertisement prior to its publication to ascertain its compliance with applicable law and ~~rules~~ Rules.

Statutory Authority G.S. 85B-1; 85B-3(f); 85B-8(a)(4).

.0603 SALE PROCEEDS, ACCOUNTING AND ESCROW ACCOUNTS

(a) Each payment made payable to the auctioneer/firm in which any portion belongs to others, and which are not disbursed to the seller on auc-

tion day, must be deposited in an escrow account for the benefit of the owner or seller of such property within three business days after receipt of same.

(b) Any licensee who disburses any funds on auction day shall prepare a receipt or settlement statement in compliance with G.S. 85B-7.1(a) and maintain records in compliance with G.S. 85B-7.1(b).

(c) ~~(b)~~ Every auctioneer/firm that does not disburse all funds to the seller on auction day shall establish and maintain a separate bank account designated as "Custodial Account for Sellers Proceeds" or some similar identifying designation, to disclose that the depositor is acting as a fiduciary and that the funds in the account are trust funds.

(d) ~~(c)~~ Such custodial accounts for sellers proceeds must be established and maintained in banks or savings and loan associations located in the State of North Carolina whose deposits are insured by the Federal Deposit Insurance Corporation, or comparable state recognized insurance agency or program.

(e) ~~(d)~~ The Custodial Account for Sellers shall be drawn on only for payment of:

(1) the net proceeds to the seller, or to any person that the auctioneer/firm knows is entitled to payment;

(2) to pay lawful charges against the property which the auctioneer/firm shall in its capacity as agent, be required to pay; and

(3) to obtain any sums due the auctioneer/firm as compensation for its services.

(f) ~~(e)~~ In the event of a dispute between the seller and buyer of goods or property or between the licensee and any person in whose name trust or escrow funds are held, the licensee shall retain said monies in his trust or escrow account until he has obtained a written release from the parties consenting to its disposition or until disbursement is ordered by a court of competent jurisdiction.

(g) ~~(f)~~ Each auctioneer/firm shall keep such accounts and records as will disclose at all times the handling of funds in such Custodial Accounts for Sellers Proceeds. Accounts and records must at all times disclose the names of buyers and the amount of purchase and payment from each, also, the names of the sellers and the amount due and payable to each from funds in the Custodial Account for Sellers Proceeds. All records and accounts related to an individual seller shall be delivered to the seller within 14 days of settlement.

(h) ~~(g)~~ All trust or escrow account records and records of disbursement shall be available for inspection by the Commission or its ~~duly authorized representative~~ designated agent, without advance notice, and copies shall be provided to the Commission upon request.

Statutory Authority G.S. 85B-3(f); 85B-7.1; 85B-8(a).

.0604 CONTRACTS

All written agreements for auctions and registration, sales and accounting records will be maintained at the site during the conduct of the auction and, upon request, will be made available to the Commission or its designated agent.

Statutory Authority G.S. 85B-7.

.0605 BIDDING

No auctioneer/firm shall bid on items in a sale he is conducting or procure such a bid without the intent to purchase the item. In any auction where the auctioneer/firm bids on items in a sale being conducted by such auctioneer/firm or such auctioneer/firm procures such a bid, the auctioneer shall announce such bidding in advance of the sale.

Statutory Authority G.S. 25-2-328(4); 85B-3(f).

SECTION .0700 - RECOVERY FUND

.0701 APPLICATIONS

All verified applications will be served upon the Commission in accordance with the procedures set forth in G.S. 1A-1, Rule 4(J).

Statutory Authority G.S. 85B-4.2.

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CHAPTER 40 - BOARD OF OPTICIANS

Notice is hereby given in accordance with G.S. 150B-21.2 that the State Board of Opticians intends to amend repeal rules cited as 21 NCAC 40 .0314 and .0319.

The proposed effective date of this action is December 1, 1994.

The public hearing will be conducted at 9:00 a.m. on October 17, 1994 at the Auditorium of NC

Medical Society Bldg., 222 N. Person Street, Raleigh, NC 27601.

Reason for Proposed Action:
21 NCAC 40 .0314 - To change apprenticeship training program.
21 NCAC 40 .0319 - To establish procedures for examination applicants from other states.

Comment Procedures: Interested persons may present statements, orally and in writing, at the public hearing or in writing prior to the hearing by mail or hand delivery addressed to NC State Board of Opticians, 222 N. Person St., Suite 102, PO Box 25336, Raleigh, NC 27611-5336.

SECTION .0300 - QUALIFICATIONS: APPLICATIONS: AND LICENSING

.0314 APPRENTICESHIP AND INTERNSHIP REQUIREMENTS: REGISTRATION

(a) Each apprentice or intern entering the apprenticeship or internship shall register with the Board and be issued a certificate of registration. Registration of the apprenticeship automatically expires on the first day of July of each year, and, in order for the apprenticeship to continue, registration must be renewed each succeeding July 1 until the apprenticeship is completed. If the apprenticeship or internship is to be supervised by an ophthalmologist or optometrist, the supervisor shall provide a statement in which he agrees to abide by the same requirements as would an optician providing the same training.

(b) Part-time work or work as an optical salesman or consultant shall not apply toward completion of apprenticeship or internship.

(c) An applicant, through apprenticeship or internship, shall have received his training by working full time, defined as a minimum of 35 hours per week, under the supervision of a licensed optician, ophthalmologist, or optometrist following a curriculum approved by the Board.

(d) The curriculum for the apprentice shall include an optical curriculum certification program, in a North Carolina community college, and the satisfactory completion of the program shall be required. The lecture and laboratory time spent in a community college in this program shall be credited as part of the apprenticeship period and of its minimum of 35 hours per week.

(e) ~~(d)~~ No more than two persons, whether apprentices or interns or a combination, may be trained by an optician, ophthalmologist, or optometrist at the same time.

(f) ~~(e)~~ An apprentice or intern shall be credited with training time only from the date of registration with the Board as an apprentice or intern. The apprenticeship or internship may not be interrupted for more than 12 months at the time.

(g) ~~(f)~~ When registering to serve a six month internship, the applicant must have completed the three and one-half years of apprenticeship as required by G.S. 90-240(a)(2) and (3) or have completed the course of training required by G.S. 90-240(a)(1).

~~(g) The Board shall make available to apprentices a list of Board approved training courses which the Board recommends that apprentices take as being of assistance to them in preparation for the examination for licensure.~~

Statutory Authority G.S. 90-239; 90-240; 90-243; 90-249.

.0319 APPLICANTS FROM OTHER STATES

(a) An ~~out of state~~ applicant seeking licensure in North Carolina under G.S. 90-241(a) shall tender an application ~~prepared by him~~ to the Board ~~and in connection with same shall furnish~~ accompanied by affidavits from two persons with whom ~~he~~ the applicant worked as an optician for the previous four years. In addition, ~~he~~ the applicant shall furnish ~~written statements~~ affidavits from two ~~qualified~~ licensed refractionists, either ophthalmologists or optometrists, ~~under oath~~ that ~~he~~ the applicant has satisfactorily filled ~~his~~ the refractionists' prescriptions for both spectacle lenses and contact lenses and practiced the profession of opticianry for four years in ~~that~~ another state immediately prior to the application. ~~Any application filed by an applicant seeking licensure pursuant to G.S. 90-241(a) must be filed with the Board within 90 days after establishment of residence in North Carolina.~~

(b) An ~~out of state~~ applicant under G.S. 90-241(a) shall be required to take the contact lens portion of the examination administered by the ~~Board,~~ Board unless ~~such~~ the applicant ~~documents that he or she~~ has passed a contact lens examination, substantially similar to the contact lens portion of the examination administered by the Board, administered by the licensing authority in the state in which ~~he or she~~ the applicant is licensed, or a national contact lens examination approved by the Board.

(c) An applicant seeking admission to an examination under G.S. 90-241(b) shall tender an

application to the Board accompanied by affidavits from two persons who are licensed, certified or otherwise authorized by another state to engage in the practice of opticianry and under whom or with whom the applicant worked in the other state. The application and the affidavits shall describe the tasks performed by the applicant in the other state and the dates the tasks were performed.

(d) An application under G.S. 90-241(a) and (b) must be filed with the Board not more than 90 days following the termination of the applicant's out-of-state opticianry work for which the applicant claims credit.

Statutory Authority G.S. 90-237; 90-239; 90-241; 90-249.

TITLE 25 - OFFICE OF STATE PERSONNEL

Notice is hereby given in accordance with G.S. 150B-21.2 that the State Personnel Commission intends to amend rule cited as 25 NCAC 11 .2005.

The proposed effective date of this action is December 1, 1994.

The public hearing will be conducted at 9:00 a.m. on October 13, 1994 at the Community Colleges Board Room, Caswell Building, 200 West Jones Street, Room 179, Raleigh, North Carolina 27603.

Reason for Proposed Action: To clarify the amount of time spent in the trainee progression to the first six months and to correct an unintentional omission of the word "not".

Comment Procedures: Interested persons may present statements either orally or in writing at the Public Hearing or in writing prior to the hearing by mail addressed to: Patsy Smith Morgan, 116 W. Jones Street, Raleigh, North Carolina 27603.

CHAPTER 1 - OFFICE OF STATE PERSONNEL

SUBCHAPTER 1I - SERVICE TO LOCAL GOVERNMENT

SECTION .2000 - APPOINTMENT AND SEPARATION

.2005 SEPARATION

Separation occurs when an employee leaves the payroll for reasons indicated in this Rule or because of death. Employees who have acquired permanent status will not be subject to involuntary separation or suspension except for cause or reduction-in-force.

(1) Resignation or Retirement. An employee may terminate his services with the agency by submitting a resignation or request for retirement to the appointing authority. It is expected that an employee will give at least two weeks notice prior to his last day of work.

(2) Dismissal. Dismissal is involuntary separation for cause, and shall be made in accordance with the provisions of the Policy on Suspension and Dismissal.

(3) Reduction-in-Force. For reasons of curtailment of work, reorganization, or lack of funds the appointing authority may separate employees. Retention of employees in classes affected shall be based on systematic consideration of type of appointment, length of service, and relative efficiency. No permanent employee shall be separated while there are emergency, intermittent, temporary, probationary, or trainee employees in their first six months of the trainee progression serving in the same or related class, unless the permanent employee is not willing to transfer to the position held by the non-permanent employee, or the permanent employee does not have the knowledge and skills required to perform the work of the alternate position within a reasonable period of orientation and training given any new employee. A permanent employee who was separated by reduction-in-force may be reinstated at any time in the future that suitable employment becomes available. The employer may choose to offer employment with a probationary appointment. The employee must meet the current minimum education and experience standard for the class to which he is being appointed.

(4) Voluntary Resignation Without Notice. Any employee voluntarily terminates employment by failing to report to work without giving written or verbal notice to the employing agency. Such a failure shall be deemed to be a voluntary

resignation from employment without notice when the employee is absent without approved leave for a period of at least three consecutive, scheduled workdays. Separation pursuant to this policy should not occur until the employing agency has undertaken reasonable efforts, to locate the employee and determine when or if the employee is intending to return to work. This provision also applies when the employee is absent for at least three consecutive, scheduled workdays, has been instructed verbally or in writing of a specific manner of reporting by management, and does not report in to the appropriate supervisory personnel on a regular basis satisfactory to the employing agency. Such separations as described in this Subparagraph are voluntary separations from agency employment and create no right of grievance or appeal pursuant to the State Personnel Act (G.S. Chapter 126).

(5) Separation Due to Unavailability When Leave is Exhausted. An employee may be separated on the basis of unavailability when the employee becomes or remains unavailable for work after all applicable leave credits and benefits have been exhausted and agency management does not grant a leave without pay for reasons deemed sufficient by the agency. Such reasons include but are not limited to, lack of suitable temporary assistance, criticality of the position, budgetary constraints, etc. Such a separation is an involuntary separation, and not a disciplinary dismissal as described in G.S. 126-35, and may be grieved or appealed. Prior to separation the employing agency shall meet with or at least notify the employee in writing, of the proposed separation, the efforts undertaken to avoid separation and why the efforts were unsuccessful. The employee shall have the opportunity in this meeting or in writing to propose alternative methods of accommodation. If the proposed accommodations are not possible, the agency must notify the employee of that fact and the proposed date of separation. If the proposed accommodations or alternative accommodations are being reviewed, the agency must notify the employee that such accommodations are under review and give the employee a projected date for a decision on this. Involuntary separation pursuant to this policy may be grieved or appealed. The employing agency must also give the employee a letter of separation stating the specific reasons for the separation and setting forth the employee's right of appeal. The burden of proof on the agency in the event of a grievance is not just cause as that term exists in G.S. 126-35. Rather, the agency's burden is to prove that the employee was unavailable and that the agency considered the employee's proposed accommodations for his unavailability and was unable to make the proposed accommodations or other reasonable accommodations. Agencies should make efforts to place an employee so separated pursuant to this policy when the employee becomes available, if the employee desires, consistent with other employment priorities and rights. However, there is no mandatory requirement placed on an agency to secure an employee, separated under this policy, a position in any agency.

Statutory Authority G.S. 126-4.

The Rules Review Commission (RRC) objected to the following rules in accordance with G.S. 143B-30.2(c). State agencies are required to respond to RRC as provided in G.S. 143B-30.2(d).

COMMERCE

Energy

4 NCAC 12C .0007- Institutional Conservation Program	*RRC Objection*	*06/16/94*
Rule Returned to Agency		*07/14/94*
Agency Filed Rule for Codification Over RRC Objection	***Eff.***	***08/16/94***

CRIME CONTROL AND PUBLIC SAFETY

State Highway Patrol

14A NCAC 9H .0305 - Rotation, Zone, Contract, and Deviation from System	*RRC Objection*	*07/14/94*
Agency Revised Rule	*Obj. Removed*	*07/14/94*

ENVIRONMENT, HEALTH, AND NATURAL RESOURCES

Departmental Rules

15A NCAC 1J .0303 - Filing of Required Supplemental Information	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*
15A NCAC 1J .0701 - Public Necessity: Health: Safety and Welfare	*RRC Objection*	*06/16/94*
Agency Revised Rule	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*07/14/94*
15A NCAC 1L .0302 - General Provisions	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*
15A NCAC 1L .0602 - Public Health Need	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*

Environmental Health

15A NCAC 18A .2610 - Storage: Handling: and Display of Food	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*
15A NCAC 18A .2645 - Requirements for Limited Food Service Establishments	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*
15A NCAC 18C .0202 - Removal of Dissolved Matter and Suspended Matter	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*
15A NCAC 18C .0203 - Public Well Water Supplies	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*
15A NCAC 18C .0402 - Water Supply Wells	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*
15A NCAC 18C .0403 - Surface Water Facilities	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*
15A NCAC 18C .0404 - Water Treatment Facilities	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*
15A NCAC 18C .0405 - Storage of Finished Water	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*

15A NCAC 18C .0710 - Other Water Treatment Plants	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*
15A NCAC 18C .0711 - Alternative Filtration Treatment Technologies	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*
15A NCAC 18C .0714 - Pilot Plant Studies	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*
15A NCAC 18C .0802 - Capacities: Determining Peak Demand	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*
15A NCAC 18C .0803 - Capacities: Determining Total Volume	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*
15A NCAC 18C .0805 - Capacities: Elevated Storage	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*
15A NCAC 18C .1002 - Disinfection of Wells	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*
15A NCAC 18C .1004 - Disinfection of Filters	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*
15A NCAC 18C .1102 - Authorized Persons Within Watershed Area	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*
15A NCAC 18C .1209 - Untreated Domestic Sewage or Industrial Wastes	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*
15A NCAC 18C .1406 - Control of Treatment Process	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*
15A NCAC 18C .1511 - Concentration of Iron	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*
15A NCAC 18C .1512 - Concentration of Manganese	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*
15A NCAC 18C .1533 - Total Trihalomethanes Sampling/Analysis: < 10,000	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*

Environmental Management

15A NCAC 2D .0101 - Definitions	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*
15A NCAC 2D .0932 - Gasoline Truck Tanks and Vapor Collection Systems	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*

Wildlife Resources and Water Safety

15A NCAC 10D .0002 - General Regulations Regarding Use	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*
15A NCAC 10H .0101 - License to Operate	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*
15A NCAC 10I .0001 - Definitions and Procedures	*RRC Objection*	*08/18/94*

HUMAN RESOURCES

Childrens Services

10 NCAC 41I .0306 - When Abuse, Neglect or Dependency is Found	*RRC Objection*	*07/14/94*
Agency Revised Rule	*Obj. Removed*	*07/14/94*
10 NCAC 41J .0501 - When to Complete a Risk Assessment	*RRC Objection*	*07/14/94*
Agency Revised Rule	*Obj. Removed*	*07/14/94*

Facility Services

10 NCAC 3D .0913 - Permit	*RRC Objection*	*07/14/94*
Agency Revised Rule	*Obj. Removed*	*07/14/94*
10 NCAC 3E .0201 - Building Code Requirements	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*
10 NCAC 3E .0206 - Elements and Equipment	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*
10 NCAC 3R .4206 - Accessibility	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*
10 NCAC 3U .0713 - Staff/Child Ratios for Medium and Large Centers	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*

Mental Health, Developmental Disabilities and Substance Abuse Services

10 NCAC 45G .0139 - Security Requirements Generally	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*

Mental Health: General

10 NCAC 14C .1148 - Thomas S. Community Services	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*

Mental Health: MR Centers

10 NCAC 16A .0402 - Explanation of Terms	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*
10 NCAC 16A .0403 - Designation Procedures	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*

INDEPENDENT AGENCIES

State Health Plan Purchasing Alliance Board

24 NCAC 5 .0302 - Designation Process	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*

INSURANCE

Multiple Employer Welfare Arrangements

11 NCAC 18 .0019 - "Qualified Actuary"; Maximum Net Retention Filing	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*
11 NCAC 18 .0021 - Certification of Reserves Filing	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*

JUSTICE

Criminal Information

12 NCAC 4E .0402 - Certification and Recertification of DCI Operators	*RRC Objection*	*07/14/94*
Agency Revised Rule	*Obj. Removed*	*07/14/94*

Criminal Justice Education and Training Standards

12 NCAC 9B .0203 - Admission of Trainees	*RRC Objection*	*07/14/94*
Agency Revised Rule	*Obj. Removed*	*07/14/94*

12 NCAC 9B .0208 - Basic Training -- Probation/Parole Officers	*RRC Objection*	*07/14/94*

Private Protective Services

12 NCAC 7D .1101 - Definitions	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*
12 NCAC 7D .1104 - Training and Supervision Required in Level Three	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*

LICENSING BOARDS AND COMMISSIONS

Acupuncture Licensing Board

21 NCAC 1 .0102 - Req./Waiver/Qualifications/Licensure Detailed/G.S. 90-455	*RRC Objection*	*07/14/94*
Agency Revised Rule	*Obj. Removed*	*07/14/94*

Board of Nursing

21 NCAC 36 .0211 - Examination	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*
21 NCAC 36 .0218 - Licensure Without Examination (By Endorsement)	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*

Professional Counselors

21 NCAC 53 .0103 - Purpose of Organization	*RRC Objection*	*06/16/94*
Agency Repealed Rule	*Obj. Removed*	*06/16/94*
21 NCAC 53 .0104 - Organization of the Board	*RRC Objection*	*06/16/94*
Agency Repealed Rule	*Obj. Removed*	*06/16/94*
21 NCAC 53 .0201 - Supervision	*RRC Objection*	*06/16/94*
Agency Repealed Rule	*Obj. Removed*	*06/16/94*
21 NCAC 53 .0303 - Work Experiences	*RRC Objection*	*06/16/94*
Agency Repealed Rule	*Obj. Removed*	*06/16/94*
21 NCAC 53 .0305 - Exemption from Academic Qualification		
Rule Withdrawn by Agency		*06/16/94*
21 NCAC 53 .0503 - Renewal Fee	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*

Therapeutic Recreation Certification

21 NCAC 65 .0004 - Academic - TRS Examination	*RRC Objection*	*08/18/94*

REVENUE

Sales and Use Tax

17 NCAC 7B .2608 - Plumbing: Heating: Air Cond/Elec Contractors: Purchases	*RRC Objection*	*05/19/94*
Rule Returned to Agency		*06/16/94*
17 NCAC 7B .2609 - Plumbing: Heating: Air Cond/Elec Contractors: Sales	*RRC Objection*	*05/19/94*
Rule Returned to Agency		*06/16/94*
17 NCAC 7B .5462 - White Goods Disposal Tax Report Form: E-500W	*RRC Objection*	*05/19/94*
Rule Returned to Agency		*06/16/94*
17 NCAC 7B .5464 - Ice Certificate Form: E-599Y	*RRC Objection*	*05/19/94*
Rule Returned to Agency		*06/16/94*

TRANSPORTATION

Division of Motor Vehicles

19A NCAC 3B .0703 - Requirements for Third Party Testers	*RRC Objection*	*07/14/94*
Agency Revised Rule	*Obj. Removed*	*07/14/94*
19A NCAC 3I .0307 - Courses of Instruction	*RRC Objection*	*06/16/94*
Agency Revised Rule	*Obj. Removed*	*06/16/94*
19A NCAC 3I .0501 - Requirements		
Rule Withdrawn by Agency		*06/16/94*
Agency Re-Submits Rule	*RRC Objection*	*07/14/94*
Agency Revised Rule	*Obj. Removed*	*07/14/94*
19A NCAC 3J .0501 - Requirements	*RRC Objection*	*07/14/94*
Agency Revised Rule	*Obj. Removed*	*07/14/94*

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.

AGENCY	CASE NUMBER	ALJ	DATE OF DECISION	PUBLISHED DECISION REGISTER CITATION
ADMINISTRATION				
North Carolina Council for Women				
Family Violence Prevention Services v. N.C. Council for Women	94 DOA 0242	West	04/13/94	
ALCOHOLIC BEVERAGE CONTROL COMMISSION				
Alcoholic Beverage Control Comm. v. Entertainment Group, Inc.	93 ABC 0719	Gray	03/02/94	
Rayvon Stewart v. Alcoholic Beverage Control Commission	93 ABC 0793	Nesnow	04/11/94	
Alcoholic Beverage Control Comm. v. Branchland, Inc.	93 ABC 0892	Morgan	06/03/94	
Alcoholic Beverage Control Comm. v. Peggy Sutton Walters	93 ABC 0906	Mann	03/18/94	
Russell Bernard Speller d/b/a Cat's Disco v. Alcoholic Bev Ctl Comm.	93 ABC 0937	Morrison	03/07/94	
Alcoholic Beverage Control Comm. v. Branchland, Inc.	93 ABC 0993	Morgan	06/03/94	
Edward Ogunjobi, Club Piccadilli v. Alcoholic Beverage Control Comm.	93 ABC 1024	West	03/03/94	
Robert Kovalaske, Nick Pikoulas, Joseph Marshburn, Evangelos Pikoulas, d/b/a Our Mom's BBQ v. Alcoholic Beverage Control Commission	93 ABC 1029	Gray	03/04/94	
Christine George Williams v. Alcoholic Beverage Control Comm.	93 ABC 1057	Becton	04/21/94	
Lynn Ann Garfagna v. Alcoholic Beverage Control Commission	93 ABC 1481	Gray	07/19/94	
Alcoholic Beverage Control Comm. v. Raleigh Limits, Inc.	93 ABC 1485	Mann	03/11/94	
Alcoholic Beverage Control Comm. v. COLAP Enterprises, Inc.	94 ABC 0060	Nesnow	06/07/94	
Alcoholic Beverage Control Comm. v. Mitch's Tavern, Inc.	94 ABC 0064	Gray	07/26/94	
Alcoholic Beverage Control Comm. v. Ms. Lucy Jarrell Powell	94 ABC 0070	Morgan	06/06/94	
Alcoholic Beverage Control Comm. v. Daphne Ann Harrell	94 ABC 0115	Nesnow	07/18/94	
Mr. & Mrs. Josh Bullock Jr. v. Alcoholic Beverage Control Comm.	94 ABC 0124	Morgan	06/06/94	
Jerome Crawford v. Alcoholic Beverage Control Commission	94 ABC 0125	Morgan	06/06/94	
Lawrence Mungin v. Alcoholic Beverage Control Commission	94 ABC 0149	Chess	08/08/94	
Alonza Mitchell v. Alcoholic Beverage Control Commission	94 ABC 0257	Morrison	07/28/94	9:11 NCR 870
Roy Dale Cagle v. Alcoholic Beverage Control Commission	94 ABC 0260	West	07/13/94	
COMMERCE				
Savings Institutions Division				
James E. Byers, et al v. Savings Institutions	93 COM 1622	Chess	03/01/94	
CORRECTION				
Division of Prisons				
Gene Strader v. Department of Correction	94 DOC 0252	Morrison	03/21/94	
CRIME CONTROL AND PUBLIC SAFETY				
Joseph Guernsey & Parents, Robert Guernsey & Dolores Guernsey v. Pitt County Hospital Eastern Radiologists	94 CPS 0413	Gray	07/11/94	
Crime Victims Compensation Commission				
Mae H. McMillan v. Crime Victims Compensation Commission	92 CPS 1328	Morgan	08/11/94	
James Hugh Baynes v. Crime Victims Compensation Commission	93 CPS 0801	West	03/28/94	9:2 NCR 114
Ross T. Bond v. Victims Compensation Commission	93 CPS 1104	West	04/21/94	
James A. Canady v. Crime Victims Compensation Commission	93 CPS 1108	Gray	03/28/94	
Virginia Roof v. Department of Crime Control & Public Safety	93 CPS 1347	Nesnow	03/24/94	
Karen C. Tilghman v. Crime Victims Compensation Commission	93 CPS 1608	Reilly	05/17/94	9:6 NCR 407

AGENCY	CASE NUMBER	ALJ	DATE OF DECISION	PUBLISHED DECISION REGISTER CITATION
Rosemary Taylor v. Crime Victims Compensation Commission	93 CPS 1626	Nesnow	05/25/94	
Violet E. Kline v. Crime Victims Compensation Commission	93 CPS 1670	Morgan	06/13/94	
James Benton v. Crime Victims Compensation Commission	94 CPS 0034	Chess	06/14/94	
Percy Clark v. Crime Victims Compensation Commission	94 CPS 0127	Reilly	04/19/94	
J. Richard Spencer v. Crime Victims Compensation Commission	94 CPS 0157	Chess	06/14/94	
Albert H. Walker v. Crime Victims Compensation Commission	94 CPS 0229	Reilly	08/11/94	
Barbara Henderson v. Crime Victims Compensation Commission	94 CPS 0259	Morrison	04/07/94	
Shirley Handsome v. Crime Victims Compensation Commission	94 CPS 0286	Gray	04/28/94	
Georgeann Young v. Crime Victims Compensation Commission	94 CPS 0292	Reilly	04/18/94	
Lawrence L. Tyson v. Crime Victims Compensation Commission	94 CPS 0368	Gray	04/26/94	
Lyman L. Chapman v. Crime Victims Compensation Commission	94 CPS 0415	Chess	06/02/94	
Douglas and Virginia Wilson v. Crime Victims Compensation Comm.	94 CPS 0417	Reilly	06/07/94	
Michelle L. Wilcox v. Crime Victims Compensation Commission	94 CPS 0467	Reilly	06/07/94	
Michael G. Low v. Crime Victims Compensation Commission	94 CPS 0524	Morrison	06/13/94	
Hazel Jarvis v. Victims Compensation Commission	94 CPS 0664	Chess	07/29/94	
Mary E. Haskins v. Crime Victims Compensation Commission	94 CPS 1406	Gray	03/17/94	
ENVIRONMENT, HEALTH, AND NATURAL RESOURCES				
Bobby Stallings v. Environment, Health, and Natural Resources	90 EHR 0612	Morgan	08/11/94	
William P. Shaver, R. McKinnon Morrison III, Jill Ray, Dr. Wesley C. Ray, Douglas W. Furr, Catherine H. Furr & Caldwell Creek Farm, Inc. v. EHNR-State of North Carolina	93 EHR 0452	Morgan	08/11/94	
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Linda D. Williams v. Agricultural and Technical State University	93 OSP 0089	Chess	03/23/94	
Juanita D. Murphy v. Agricultural and Technical State University	93 OSP 0708	Morrison	03/16/94	
Thomas M. Simpson v. Agricultural and Technical State University	93 OSP 1393	Gray	03/24/94	
Pricella M. Curtis v. A&T State University Curriculum & Instruction	94 OSP 0748	Gray	08/17/94	
Department of Agriculture				
Donald H. Crawford v. Department of Agriculture	94 OSP 0108	Reilly	05/23/94	
Catawba County				
Sandra J. Cunningham v. Catawba County	93 OSP 1097	Reilly	04/29/94	9:4 NCR 292
North Carolina Central University				
Ha-Yilyah Ha-She'B v. NCCU	93 OSP 0875	Becton	04/13/94	9:3 NCR 211
Cherry Hospital				
Charles F. Fields v. Cherry Hospital	94 OSP 0498	Morrison	06/15/94	
Department of Commerce				
Ruth Daniel-Perry v. Department of Commerce	93 OSP 0725	Chess	03/04/94	9:1 NCR 63
Department of Correction				
Leland K. Williams v. Department of Correction	91 OSP 1287	Chess	02/22/94	
Elroy Lewis v. North Central Area - Dept of Correction, Robert Lewis	92 OSP 1770	Becton	05/24/94	9:6 NCR 395
Steven R. Kellison v. Department of Correction	93 OSP 0283	Chess	06/15/94	
Bert Esworthy v. Department of Correction	93 OSP 0711	Chess	04/21/94	
Merron Burrus v. Department of Correction	93 OSP 1145	West	06/01/94	
Lewis Alsbrook v. Department of Correction, Morrison Youth Institution	93 OSP 1739	West	07/20/94	
Junius C. Page v. Dept. of Correction, Secy. Franklin Freeman	93 OSP 1794	Mann	07/08/94	
Richard Hopkins v. Department of Correction	94 OSP 0041	Chess	06/16/94	
Alfred B. Hunt v. Department of Correction	94 OSP 0243	Reilly	04/20/94	
Charles Horne v. Equal Emp. Opportunity Officer & Dept. of Correction	94 OSP 0244	Nesnow	06/16/94	
Adrian E. Graham v. Intensive Probation/Parole	94 OSP 0261	Morrison	04/26/94	
Eastern Correctional Institution				
Roy A. Keel & Zebedee Taylor v. Eastern Correctional Institution	94 OSP 0160[*]	Nesnow	07/20/94	
Roy A. Keel & Zebedee Taylor v. Eastern Correctional Institution	94 OSP 0256[*]	Nesnow	07/20/94	
Guilford Correctional Center				
Ann R. Williams v. Guilford Correctional Center #4440	94 OSP 0428	West	06/22/94	

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Cosmetic Art Examiners				
Mary Quaintance v. N.C. State Board of Cosmetic Art Examiners	94 OSP 0372	Chess	06/14/94	
Department of Crime Control and Public Safety				
Don R. Massenburg v. Department of Crime Control & Public Safety	90 OSP 0239	Chess	04/28/94	
Fred L. Kearney v. Department of Crime Control & Public Safety	91 OSP 0401	West	03/18/94	
Sylvia Nance v. Department of Crime Control & Public Safety	92 OSP 1463	Reilly	03/21/94	
Lewis G. Baker v. Crime Control & Public Safety, Office Adj. General	94 OSP 0572	Mann	07/12/94	
Durham County Health Department				
Lylla Denell Stockton v. Durham County Health Department	93 OSP 1780	Gray	05/25/94	
Elizabeth City State University				
James Charles Knox v. Elizabeth City State University	94 OSP 0207	Gray	06/17/94	
Employment Security Commission of North Carolina				
Rejeanne B. LeFrancois v. Employment Security Commission of N.C.	93 OSP 1069	West	04/08/94	
Department of Environment, Health, and Natural Resources				
Division of Marine Fisheries				
William D. Nicely v. Environment, Health, & Natural Resources	92 OSP 1454	Becton	05/04/94	9:5 NCR 333
Fayetteville State University				
Roscoe L. Williams v. Fayetteville State University	93 OSP 0487	West	06/22/94	
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Inez Latta v. Department of Human Resources	93 OSP 0830	Becton	03/28/94	
Charla S. Davis v. Department of Human Resources	93 OSP 1762	Gray	03/03/94	
Rose Mary Taylor v. Department of Human Resources, Murdoch Center	93 OSP 0047	Gray	05/06/94	
David R. Rodgers v. Jimmy Summerville, Stonewall Jackson School	94 OSP 0087	Chess	03/16/94	
Craven County Department of Social Services				
Shirley A. Holland v. Craven Cty. Dept./Social Services & Craven Cty.	93 OSP 1606	Gray	07/01/94	
Nettie Jane Godwin (Lawhorn) v. Craven Cty. DSS & Craven Cty.	93 OSP 1607	Gray	07/18/94	9:9 NCR 655
Violet P. Kelly v. Craven Cty. Dept. of Social Services & Craven Cty.	93 OSP 1805	Reilly	07/05/94	
Durham County Department of Social Services				
Belinda F. Jones v. Daniel Hudgins, Durham Cty Dept of Social Svcs	93 OSP 0728	Chess	04/11/94	
Haywood County Department of Social Services				
Dorothy Morrow v. Haywood County Department of Social Services	94 OSP 0186	West	06/17/94	
Pamlico County Department of Social Services				
Mrs. Dietra C. Jones v. Pamlico Department of Social Services	94 OSP 0251	Chess	08/09/94	
Lee County Health Department				
James Shackleton v. Lee County Health Department	94 OSP 0344	Gray	08/17/94	
Mental Health/Mental Retardation				
Yvonne G. Johnson v. Blue Ridge Mental Health	93 OSP 1604	Becton	03/18/94	

AGENCY	CASE NUMBER	ALJ	DATE OF DECISION	PUBLISHED DECISION REGISTER CITATION
Wake County Mental Health, Developmental Disabilities, and Substance Abuse Services				
Julia Morgan Brannon v. Wake County MH/DD/SAS	94 OSP 0214	Reilly	04/14/94	
N.C. State University				
Laura K. Reynolds v. N.C. State University - Dept. of Public Safety	92 OSP 0828	Morgan	05/26/94	
Department of Transportation				
Phyllis W. Newnam v. Department of Transportation	92 OSP 1799	Morgan	08/11/94	
Glenn I. Hodge Jr. v. Samuel Hunt, Sec'y. Dept. of Transportation	93 OSP 0297[1]	Morrison	03/10/94	9:1 NCR 60
Glenn I. Hodge Jr. v. Samuel Hunt, Sec'y. Dept. of Transportation	93 OSP 0500[1]	Morrison	03/10/94	9:1 NCR 60
Betsy Johnston Powell v. Department of Transportation	93 OSP 0550	Morrison	03/28/94	
Arnold Craig v. Samuel Hunt, Secretary Department of Transportation	93 OSP 0586	Nesnow	07/11/94	
Susan H. Cole v. Department of Transportation, Div. of Motor Vehicles	93 OSP 0908	Morrison	07/15/94	
Clyde Lem Hairston v. Department of Transportation	93 OSP 0944	Chess	02/28/94	
Darrell H. Wise v. Department of Transportation	93 OSP 1353	Gray	07/26/94	
Henry C. Puegh v. Department of Transportation	93 OSP 1710	Nesnow	05/24/94	
Kenneth Ray Harvey v. Department of Transportation	94 OSP 0423	Morrison	08/17/94	
Michael Bryant v. Department of Transportation	94 OSP 0728	Chess	08/15/94	
University of North Carolina at Chapel Hill				
Eric W. Browning v. UNC-Chapel Hill	93 OSP 0925	Morrison	05/03/94	9:5 NCR 342
UNC Hospitals				
Barry Alonzo Nichols v. UNC Hospitals Central Dist. Sect.	94 OSP 0509	Morrison	06/15/94	
Wake County School System				
Lula Mae Freeman v. Wake County School System	94 OSP 0576	Morrison	06/28/94	
The Whitaker School				
Dwayne R. Cooke v. The Whitaker School	94 OSP 0328	Chess	06/02/94	
STATE TREASURER				
Retirement Systems Division				
Molly Wiebenson v. Bd./Trustees/Teachers' & State Employees' Ret. Sys.	92 DST 0015	Morgan	05/26/94	9:6 NCR 403
Judith A. Dorman v. Bd./Trustees/Teachers' & State Employees' Ret. Sys.	92 DST 0223	Morgan	08/11/94	
Nathan Fields v. Bd./Trustees/Teachers' & State Employees' Ret. Sys.	93 DST 0161	Morrison	05/18/94	
John C. Russell v. Bd./Trustees/Teachers' & State Employees' Ret. Sys.	93 DST 0164	West	03/07/94	
Robert A. Slade v. Bd./Trustees/N.C. Local Govtl. Emp. Ret. System	93 DST 0785	Becton	03/18/94	9:1 NCR 68
Connie B. Grant v. Bd./Trustees/Teachers' & State Employees' Ret. Sys.	93 DST 0883	Chess	06/15/94	
James E. Walker, Ind. & Admin for the Estate of Sarah S. Walker v. Bd./ Trustees/N.C. Local Govt. Emp. Ret. System	93 DST 1054	Becton	05/31/94	9:7 NCR 490
Elizabeth M. Dudley v. Bd./Trustees/Teachers' & State Emps' Ret. Sys.	93 DST 1474	Nesnow	03/28/94	
Kenneth A. Glenn v. Bd./Trustees/Teachers' & St Employees' Ret. Sys.	93 DST 1612	Morrison	05/18/94	
Joseph Fulton v. Bd./Trustees/Teachers' & State Employees' Ret. Sys.	93 DST 1731	Becton	05/25/94	
Deborah W. Stewart v. Bd./Trustees/Teachers' & State Employees' Ret. Sys. and Anthony L. Hope & Derrick L. Hope	94 DST 0045	Nesnow	07/25/94	9:10 NCR 768
UNIVERSITY OF NORTH CAROLINA				
Nixon Omolodun v. UNC Physicians and Associates	94 UNC 0295	Chess	06/27/94	

STATE OF NORTH CAROLINA	IN THE OFFICE OF ADMINISTRATIVE HEARINGS
COUNTY OF ONSLOW	93 EDC 0742

ANNICE GRANVILLE PHILLIP J. GRANVILLE, Petitioner,	)	
v.	)	FINAL DECISION
ONSLOW COUNTY BOARD OF EDUCATION, Respondent,	)	

This contested case was heard in Jacksonville, Onslow County, North Carolina, beginning on the 10th day of May, 1994, and continuing through May 12, 1994. The record closed with the completion of the transcript which was filed in the Office of Administrative Hearings on June 15, 1994.

APPEARANCES

For Petitioners: Mrs. Annice Granville
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Petitioners - pro se

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Attorney for Respondent

WITNESSES

For Petitioners: Stephen Hooper
Annice Granville

For Respondent: Carolyn King
David Garner-McGraw
Linda Sutherland
Opal Amos
Lynn Mills
Tracey Amey
Elaine Justice
Thomasine Kennedy

EXHIBITS

For Petitioners: Petitioners' Exhibits # P2, 3, 5, 13, 15, 16, 17 and 18b.
Respondent's Exhibits # R28, 39, 41, 43, 51 and 52.

For Respondent: Respondent's Exhibits # R1, 1a, 1b, 1d, 2, 2a, 4, 6, 8, 10, 11, 16, 17, 18, 20, 21, 22, 23, 27, 29, 31, 32, 34, 35, 36, 37, 37a, 38, 40, 42, 43, 45, 47, 48, 50, 56, 57, 60, 61 and 67.

ISSUES

1. Was the educational program proposed by Respondent for Sean Granville for 1993-94 inappropriate within the meaning of state and federal special education laws?

2. Was the educational program provided to Sean Granville by Grace Baptist School for 1993-94 appropriate and in substantial compliance with the requirements of state and federal special education laws?

3. Are Petitioners entitled to reimbursement for the cost of Sean's education placement at Grace Baptist School for the 1993-94 school year?

4. Are Petitioners entitled to prospective placement and costs at Grace Baptist School for the 1994-95 school year?

STIPULATIONS

On May 10, 1994, the parties filed a Prehearing Order which contained, inter alia, the following Stipulations:

> [3.] In addition to the other stipulations contained herein, the parties hereto stipulate and agree with respect to the following undisputed facts: Sean Granville is a sixth grade student eligible for enrollment in respondent school district. During the 1993-94 school year Sean has been enrolled in Grace Baptist School in Onslow County. During the 1992-93 school year Sean was enrolled as a fifth grade student at Northwoods Elementary School in the Onslow County Public School System. Sean has been identified as a student with a learning disability and a speech impairment.
>
> 12 & 13. The Petitioners and Respondent contend that the contested issues to be tried by the Administrative Law Judge are as follows:
>
> a. Was the educational program proposed by Respondent for Sean Granville for 1993-1994 inappropriate within the meaning of state and federal special education laws?
>
> b. Is the educational program provided to Sean Granville by Grace Baptist School for 1993-1994 appropriate and in substantial compliance with the requirements of state and federal special educational laws?
>
> c. Are Petitioners entitled to reimbursement for the cost of Sean's educational placement at Grace Baptist School for the 1993-94 school year?
>
> d. Are Petitioners entitled to prospective placement and costs at Grace Baptist School for the 1994-1995 school year?

Based upon the Stipulations of the parties and by the greater weight of the evidence admitted at the hearing, the Chief Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Annice Granville and Phillip Granville (Petitioners) are citizens and residents of Onslow County, North Carolina, and are the parents of their minor child, Sean Granville (hereinafter Sean). Sean was born on February 12, 1982, and currently is twelve years old.

2. Respondent is the local education agency responsible for providing a free, appropriate public education to Sean.

3. During the 1987-88 school year, Sean's kindergarten year, Sean was referred, identified and placed as a student with special needs based upon a speech impairment. Sean was provided with speech therapy services pursuant to an Individualized Education Plan (IEP).

4. Respondent informed Petitioner of her notice and appeal rights as regards Sean's IEP and Petitioner acknowledged receipt of the Parental rights and Appeals Procedure on November 17, 1987.

5. During the 1988-89 school year, Sean's first grade year, he was recommended by his teachers for further testing because of academic difficulties.

6. In the spring of 1989, after completion of testing, Sean was identified and placed as a student with learning disabilities in the area of written language, based on discrepancies between his IQ and his written expression and reading skills. Sean was mainstreamed or placed in the regular classroom for most of the school day, with special services provided through "pull-out" from the classroom and consultation with the regular classroom teacher provided by the exceptional children's teachers. Sean was removed from the regular classroom less than 21% of the day. His "placement" on the continuum of special educational services was, therefore, "regular class" placement.

7. Sean's IEP for the period from March 16, 1989, through March 15, 1990, addressed both Sean's speech deficiency and his learning disability.

8. Respondent again informed Petitioner of her notice and appeal rights as regards Sean's placement and she acknowledged receipt of the Handbook of Parents Rights on March 16, 1989.

9. Sean's IEP was reviewed on or about March 14, 1990, during his second grade year. The IEP maintained his placement as a regular student; i.e., receiving services outside the regular education environment for less than twenty-one percent (21%) of the day. The goals in the revised IEP addressed Sean's needs in the areas of reading recognition, comprehension and word attack skills.

10. During Sean's third grade year (1990-91), Petitioners placed him at the St. Francis of Assisi School, a private parochial school. Respondent continued to provide exceptional children's services to Sean in the areas of speech and language and learning disabilities.

11. Respondent reviewed Sean's services on or about March 8, 1991. The resultant IEP addressed both Sean's speech deficiency and his learning disability.

12. Sean enrolled at Respondent's Northwoods Elementary School for the 1991-92 school year, his fourth grade year. Respondent continued to provide Sean exceptional children's services through a regular classroom placement, i.e., less than twenty-one percent (21%) of the day.

13. Respondent reviewed Sean's IEP again in March of 1992 and recommended continuation of services on a regular basis, noting that "student is able to be successful in regular educational settings. . .." The IEP stated short-term objectives including improvement of reading comprehension, spelling, handwriting, and speech. The IEP also contained testing modifications.

14. Sean made satisfactory academic progress and benefitted educationally from special education services under the IEP. His final grade period for 1992-1993 (fifth grade) showed: Reading - B; Language - B; Spelling - C; handwriting - C; Social Studies - C; Mathematics - C; Science - B; and Health - B. Special education services were rendered in a competent manner with coordination between the regular classroom and special education teachers.

15. Respondent completed the next annual review of Sean's IEP on or about March 19, 1993. Instructional objectives in the IEP for the period from March 19, 1993, to March 18, 1994, included writing a four-sentence paragraph, story writing, legible handwriting, spelling at eighty percent (80%) accuracy, improvement of reading comprehension, vocabulary enhancement, and a continuation of speech therapy. The revised IEP contained expanded testing modifications including answers to be recorded by the test proctor, extended time for completion of multi-part tests, and testing in a separate room.

16. During the period Sean attended schools operated by Respondent, and was receiving exceptional children services, his diagnostic tests, including end of course testing and California Achievement tests, indicated an overall pattern of progress in Sean's identified areas of exceptionality.

17. During the Spring of 1993, Respondent called a meeting of Sean's teachers and other school personnel with expertise in learning disabilities to discuss with Petitioner her concerns about Sean's progress.

18. At the Spring 1993 meeting Respondent recommended that Sean undergo additional testing including evaluation for potential neurological deficits. Petitioner initially declined to grant permission for this additional testing.

19. On or about May 14, 1993, Petitioner agreed to an evaluation to assess Sean's level of educational performance and his preferred learning styles. Petitioner later indicated that she was agreeable to a psychological evaluation of Sean. Respondent subsequently paid for an evaluation by Dr. Greg Walton, a private psychologist. Dr. Walton's evaluation found that Sean had a significant deficit in his written language abilities, apparently arising from an attention/concentration deficit as well as a finding of intellectual strengths. Sean's verbal and full scale scores placed him in the average range with performance scale at the high average range (WISC - III). Results from the Bender Motor Gestalt test indicate Sean has a visual-motor deficit. The administration of the Woodcock-Johnson Psychoeducational test indicated that Sean has a significant visual-perceptual-motor deficit.

20. On July 14, 1993, Petitioner filed a petition for a contested case hearing concerning Sean's educational placement.

21. Based upon the information obtained through the additional educational and psychological evaluations completed during the summer of 1993, Respondent revised Sean's placement in a proposed IEP for the 1993-94 school year. Respondent reviewed the proposed IEP with Petitioner in an August 20, 1993, meeting.

22. The proposed IEP included specific goals in the area of reading, visual perception/compensation skills, fine motor skills, written expression, and speech. Respondent also notified Petitioners that Sean might qualify for services in mathematics. The proposed IEP included specific strategies intended to remediate Sean's learning disability, including blocking, key words location techniques, color coding and fading, use of a computer, mnemonics, and other strategies.

23. Sean would have attended Northwoods Middle School had he enrolled in Respondent's school system for the 1993-94 school year. Northwoods Middle School operates an inclusion program for many of its exceptional students through which special education services are provided in the regular classroom. The proposed IEP would have placed Sean in this inclusion program. Respondent explained the inclusion program to Petitioner at the August 20, 1993, meeting.

24. Petitioners unilaterally elected not to enroll Sean at Northwoods Middle School for the 1993-94 school year and instead enrolled him at Grace Baptist School, a private parochial school.

25. Respondent agreed to provide speech therapy to Sean during the 1993-94 school year and to bear the costs of transporting Sean to and from speech therapy.

26. Respondent also agreed to bear the expense of a neuropsychological evaluation of Sean.

27. Sean was evaluated by Dr. Stephen Hooper on February 7, 1994. Dr. Hooper holds a PhD in School Psychology with a specialization in Child Clinical and Neuropsychology. He is an Assistant Professor of Psychiatry at the University of North Carolina and is Director of Psychology at the Center for Development and Learning at the UNC Medical School. Dr. Hooper also is Director of Child Adolescent Neuropsychology Consultation Services at the medical school. Dr. Hooper has accumulated extensive experience in evaluating children with suspected learning disabilities over the past seven years at UNC.

28. Dr. Hooper summarized his evaluation of Sean, in part, as follows:

> [S]ignificant deficits were present in his attention and memory abilities. Sean demonstrated pervasive attentional difficulties and his short-term memory abilities were disproportionately low when compared to his demonstrated level of intellectual functioning. When these findings are used in tandem with his most recent psychoeducational and speech/language evaluations, which documented specific learning difficulties in the academic areas of reading, writing, and arithmetic, and a moderate phonological processing disorder, respectively, Sean clearly presents as an individual in need of special educational services and he will remain at risk for ongoing learning difficulties. Further, his social and emotional development also has been affected, in part, by his ongoing learning struggles, and this area of development should be monitored carefully as well.
>
> (Dr. Hooper's evaluation as to Sean's disabilities are found as a fact.)

29. Dr. Hooper testified that because of Sean's disability: "There needs to be some curricular modifications for this youngster, regardless of where he may find himself schoolwise." The undersigned finds as a fact that curricular modifications are necessary to provide Sean with an appropriate education.

30. Dr. Hooper's report included a series of specific recommendations for Sean. The key findings are summarized as follows:

a. A trial of stimulant medication to be monitored daily by Sean's school/teacher in conjunction with a school psychologist;

b. Special education services to address Sean's reading, writing, and arithmetic needs, with related services for speech/language impairments;

c. Consultation with an occupational therapist, access to a computer and assistance in gaining word processing skills; and

d. The use of specific instructional strategies, including an increase in the personal relevance and meaningfulness of Sean's school work, "staging" his writing tasks, employing alternative testing methods that take advantage of Sean's strengths in recognition memory, routine repetition of materials, and the use of recall strategies including mnemonics, chunking, verbal mediation and verbal rehearsal.

31. Because of indications that Sean's difficulty in school was affecting his social and emotional development, Dr. Hooper also advised that his teachers avoid potential embarrassment in the classroom setting.

32. Dr. Hooper's opinion was that Sean should be taught by a teacher who was both sensitive to his learning disability and trained to address learning disabilities.

33. Dr. Hooper testified and the undersigned finds as a fact that the IEP proposed by Respondent for the 1993-94 school year contained provisions that addressed Sean's learning disabilities and contained many of Dr. Hooper's recommended strategies.

34. After Respondent received Dr. Hooper's report, it issued a May 3, 1994, letter to Petitioner that proposed to supplement Sean's IEP with additional instructional strategies identified by Dr. Hooper.

35. Dr. Hooper's opinion after reviewing several of Sean's most recent IEPs was that these IEPs were appropriate.

36. The curriculum at Grace Baptist School is based on materials provided by the Accelerated Christian Education (ACE) program. The curriculum is based on workbooks called "paces," which students complete on their own schedule and initiative. Students are required to repeat a "pace" until they are able to score 80 percent or higher on an examination at the end of the "pace".

37. Linda Sutherland is Sean's elementary teacher at Grace Baptist School.

38. While the ACE program is individualized in the sense that students work at different levels, the ACE curriculum as taught at Grace Baptist School does not vary from student to student.

39. Sean, in the opinion of Ms. Sutherland, is progressing commendably in the structure of education at Grace Baptist School and Sean appears to be comfortable in this educational surrounding. Ms. Sutherland and Sean appear to have a good student-teacher relationship.

40. Mrs. Sutherland testified, and the undersigned finds as a fact, that she lacks any specialized training in learning disabilities or programs for exceptional children and that no teacher at Grace Baptist is certified to teach exceptional children.

41. Grace Baptist School did not utilize any diagnostic tests other than ACE "paces" in determining the appropriate curriculum for Sean.

42. Ms. Sutherland did not believe that Sean required special education services and that she had not adopted suggestions from Dr. Hooper's report to modify Sean's curriculum or her teaching strategies.

43. While the evidence indicated that the curriculum at Grace Baptist School may be appropriate for many students, this school does not have the ability to provide technical expertise or specialized strategies to students with learning disabilities. The curriculum at Grace Baptist School is not readily adaptable to address learning disabilities such as those of Sean and none of the faculty at Grace Baptist School has any special training in teaching students with learning disabilities or other exceptionalities. Grace Baptist School has not modified its curriculum to address Sean's specific learning disability.

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 over the person and subject matter of this contested case pursuant to Chapters 115C and 150B of the North Carolina General Statutes.

2. As a result of Sean's specific learning disability as diagnosed by Dr. Hooper and as defined in Section 1509H of the North Carolina Procedures Governing Programs and Services for Children with Special Needs, Sean is a child with "special needs" entitled to special education and related services pursuant to the Individual's With Disabilities Education Act, 20 U.S.C. 1401, et seq., N.C. Gen. Stat. 106, et seq., and the North Carolina Procedures Governing Programs and Services for Children with Special Needs.

3. Respondent has complied with all procedural requirements of the state and federal special education laws. Sean's latest IEP was devised based upon the testing and evaluation of two experts.

4. The individualized educational program (IEP), proposed by Respondent for Sean for the 1993-94 school year was appropriate within the meaning of state and federal special education laws. The proposed IEP contained teaching goals, teaching strategies, curricular modification and other features appropriate to address Sean's learning disability. Sean would have benefitted from remaining in the Respondent's school system to act upon the recommendations of the experts who evaluated Sean.

5. The educational program provided to Sean by Grace Baptist School for the 1993-94 school year was not appropriate in light of his learning disability (there was no special education program) and this educational program is not in substantial compliance with the requirements of state and federal educational laws as applied to public institutions.**

6. Petitioners are not entitled to reimbursement for the cost of Sean's educational placement at Grace Baptist School for the 1993-94 school year because: (a) Respondents made available an educational plan and opportunities at Northwoods Middle School that would have provided Sean with a free and appropriate public education in the least (appropriate) restrictive environment; and (b) the program in which Sean was enrolled for the 1993-94 academic year was not appropriate to meet his special education needs.

7. Petitioners are not entitled to prospective placement and costs at Grace Baptist School for the 1994-95 school year for the reasons set forth in item 6 above and because Grace Baptist School is unable to offer expertise or services appropriate to address Sean's learning disability.

Based upon the foregoing Stipulations, Findings of Fact and Conclusions of Law, the undersigned makes the following:

FINAL DECISION

Petitioner's requests for reimbursement from Respondent for the cost of Sean Granville's educational placement at Grace Baptist School for the 1993-94 school year and for prospective costs for tuition at Grace Baptist School for the 1994-95 school year are denied.

NOTICE

In order to appeal this Decision, the person seeking review must file a written notice of appeal with the North Carolina Superintendent of Public Instruction. The written notice of appeal must be filed within thirty (30) days after the person is served with a copy of this Decision. G.S. 115C-116(h) and (i).

This the 1st day of August, 1994.

Julian Mann, III
Chief Administrative Law Judge

**There is no specific finding or conclusion of law as to whether Sean is benefitting from his parochial school education. The evidence was not sufficient to make a finding. However, it is unnecessary to make such a determination once it is concluded that this parochial school's special education program is nonexistent.

STATE OF NORTH CAROLINA	IN THE OFFICE OF ADMINISTRATIVE HEARINGS
COUNTY OF NEW HANOVER	94 ABC 0257
ALONZA MITCHELL Petitioner, v. ALCOHOLIC BEVERAGE CONTROL COMMISSION Respondent.	RECOMMENDED DECISION

The above-entitled matter was heard before Fred G. Morrison, Jr., Senior Administrative Law Judge, on June 16, 1994, in New Hanover County, North Carolina.

This hearing was initiated at the request of the Petitioner after the Respondent disapproved his application for ABC permits at his establishment known as Club New World located at 2000 Saw Mill Road, Leland, North Carolina.

APPEARANCES

FOR THE PETITIONER:

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ISSUE

Whether the Petitioner's application for ABC permits was properly denied?

FINDINGS OF FACT

From official documents in the file, sworn testimony of the witnesses and other competent and admissible evidence, it is found as a fact that:

1. Sometime prior to January 14, 1994, the Petitioner filed an application for ABC permits for on premise malt beverage, unfortified wine, fortified wine, and mixed beverages at the location known as Club New World, 2000 Saw Mill Road, Leland, North Carolina.

2. By *Notice of Rejection* from the Respondent dated February 2, 1994, the Petitioner was advised that the requested ABC permits were denied for the following reasons:

a. Local government objections to location G.S. 18B-901(b);
b. Location not a suitable place to hold ABC permits due to reputation of the location G.S. 18B-901(c).

3. Petitioner filed a timely petition for a contested case hearing alleging that the agency:

a. Deprived him of property rights;
b. Otherwise substantially prejudiced his rights; and based on these facts the agency has exceeded its authority or jurisdiction;
c. Acted erroneously;
d. Failed to use proper procedure;
e. Acted arbitrarily or capriciously; or
f. Failed to act as required by law or rule.

4. ALE agent, Mark Senter, objected to the location because of a previous order of revocation dated January 14, 1994 and because of potential crowd control problems. He felt the limited number of deputy sheriffs on duty at those times the club would be open might be inadequate due to the number of patrons regularly in attendance.

5. The Petitioner was in no way involved in the matter that resulted in the previous order of revocation and is and has no relationship with the owner and prior operator of the club except as lessee. Further, there is no evidence that the club's crowd control, its security and law enforcement coverage in the community is less than adequate.

6. By *Local Government Opinion Form*, Mike Speck, ABC Officer, objected to the issuance of permits. The form alleged that Mitchell's earlier application for permits for *Club Flavors*, located at 5307 Market Street, Wilmington, N.C. was denied on April 7, 1992. It alleged that this denial resulted in a permit revocation which rendered Mr. Mitchell ineligible to apply or secure an ABC permit for at least 3 years.

7. The April 7, 1992 denial resulted in the revocation of the temporary permits issued pending Commission decision. The applicant never possessed the permanent permits for which he applied. As a matter of course, any application that is denied results in the revocation of its temporary permits and whether such revocation initiates the three year ineligibility is at best subject to varying interpretation.

8. The *Local Government Opinion Form* alleged pending charges against the applicant for falsifying information on the *Club New World* application. It was alleged that the falsification consisted of improperly spelling his name and his failure to mention the *Club Flavors* revocation. The applicant denied the accusations of filing a false application, stating that he used the spelling of his name he has been accustomed to and used since high school and explained that his negative response to the question "Whether you had any permit previously revoked within three years?", was the result of his discussion with both the regional and state ABC offices and his resultant understanding that the question referred to a revocation of a permanent permit, which he never possessed.

9. The *Local Government Opinion Form* alleged pending charges against the applicant for possession of spirituous liquors upon the premises where possession or consumption was not authorized by ABC Law. The applicant denies illegal possession of spirituous liquors and there was no showing convincing this trier of fact that such illegal possession took place.

10. The form also reflected Officer Speck's objection to the location based upon past reputation. There was no elaboration by the Respondent on the reputation of *Club New World* other than the reference to the January 14, 1994, revocation discussed hereinabove. At that time the club was under different ownership and no similar violation of ABC laws was introduced. The Petitioner testified as to the good reputation of the club.

11. Alonza Mitchell is a suitable person to hold an ABC permit.

12. The location of 2000 Saw Mill Road, Leland, North Carolina is suitable.

13. There are no statutory reasons why ABC permits should not be allowed at Club New World.

CONCLUSIONS OF LAW

1. The North Carolina Alcoholic Beverage Control Commission has the authority to determine the qualifications of an applicant and the suitability of a location for the issuance of ABC permits, and to issue or deny issuance of permits according to the ABC law.

2. Alonza Mitchell is a suitable person to hold a permit, and Club New World is a suitable location for a permit.

3. The Petitioner's application for ABC permits was improperly denied.

RECOMMENDED DECISION

I hereby recommend that the Respondent's decision to disapprove Petitioner's application be reversed, and the permits be issued to Alonza Mitchell.

ORDER

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, P.O. Drawer 27447, Raleigh, N.C. 27611-7447, 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 recommended 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 Alcoholic Beverage Control Commission.

This the 27th of July, 1994.

Fred G. Morrison Jr.
Senior Administrative Law Judge

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

TITLE/MAJOR DIVISIONS OF THE NORTH CAROLINA ADMINISTRATIVE CODE

TITLE	DEPARTMENT	LICENSING BOARDS	CHAPTER
1	Administration	Acupuncture	1
2	Agriculture	Architecture	2
3	Auditor	Auctioneers	4
4	Commerce	Barber Examiners	6
5	Correction	Certified Public Accountant Examiners	8
6	Council of State	Chiropractic Examiners	10
7	Cultural Resources	General Contractors	12
8	Elections	Cosmetic Art Examiners	14
9	Governor	Dental Examiners	16
10	Human Resources	Dietetics/Nutrition	17
11	Insurance	Electrical Contractors	18
12	Justice	Electrolysis	19
13	Labor	Foresters	20
14A	Crime Control & Public Safety	Geologists	21
15A	Environment, Health, and Natural Resources	Hearing Aid Dealers and Fitters	22
		Landscape Architects	26
16	Public Education	Landscape Contractors	28
17	Revenue	Marital and Family Therapy	31
18	Secretary of State	Medical Examiners	32
19A	Transportation	Midwifery Joint Committee	33
20	Treasurer	Mortuary Science	34
*21	Occupational Licensing Boards	Nursing	36
22	Administrative Procedures	Nursing Home Administrators	37
23	Community Colleges	Occupational Therapists	38
24	Independent Agencies	Opticians	40
25	State Personnel	Optometry	42
26	Administrative Hearings	Osteopathic Examination & Reg. (Repealed)	44
		Pharmacy	46
		Physical Therapy Examiners	48
		Plumbing, Heating & Fire Sprinkler Contractors	50
		Podiatry Examiners	52
		Professional Counselors	53
		Practicing Psychologists	54
		Professional Engineers & Land Surveyors	56
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		Refrigeration Examiners	60
		Sanitarian Examiners	62
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Note: Title 21 contains the chapters of the various occupational licensing boards.

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