

G.S. 150B-21.3A Report for 15A NCAC 01C, CONFORMITY WITH NORTH CAROLINA ENVIRONMENTAL POLICY ACT

Agency - Department of Environmental Quality

Comment Period - April 14, 2016 - June 29, 2016

Date Submitted to APO - April 24, 2017

Subchapter	Rule Section	Rule Citation	Rule Name	Date and Last Agency Action on the Rule	Agency Determination [150B-21.3A(c)(1)a]	Implements or Conforms to Federal Regulation [150B-21.3A(e)]	Federal Regulation Citation	Public Comment Received [150B-21.3A(c)(1)]	Agency Determination Following Public Comment [150B-21.3A(c)(1)]	RRC Determination of Public Comments [150B-21.3A(c)(2)]	RRC Final Determination of Status of Rule for Report to APO [150B-21.3A(c)(2)]	OAH Next Steps
	SECTION .0101 – GENERAL PROVISIONS	15A NCAC 01C .0101	STATEMENT OF PURPOSE, POLICY, AND SCOPE	Amended Eff. April 1, 2003	Necessary with substantive public interest	No		No	Necessary with substantive public interest	No comments with merit	Necessary with substantive public interest and must be readopted	Agency must readopt
		15A NCAC 01C .0103	DEFINITIONS	Eff. April 1, 2003	Necessary with substantive public interest	No		Yes	Necessary with substantive public interest	RRC not required to review comment(s)	Necessary with substantive public interest and must be readopted	Agency must readopt
		15A NCAC 01C .0104	AGENCY COMPLIANCE	Eff. April 1, 2003	Necessary with substantive public interest	No		No	Necessary with substantive public interest	No comments with merit	Necessary with substantive public interest and must be readopted	Agency must readopt
		15A NCAC 01C .0105	LEAD AND COOPERATING AGENCY RESPONSIBILITY	Eff. April 1, 2003	Necessary with substantive public interest	No		No	Necessary with substantive public interest	No comments with merit	Necessary with substantive public interest and must be readopted	Agency must readopt
		15A NCAC 01C .0106	SCOPING AND HEARINGS	Eff. April 1, 2003	Necessary with substantive public interest	No		No	Necessary with substantive public interest	No comments with merit	Necessary with substantive public interest and must be readopted	Agency must readopt
		15A NCAC 01C .0107	LIMITATION ON ACTIONS DURING NCEPA PROCESS	Eff. April 1, 2003	Necessary with substantive public interest	No		No	Necessary with substantive public interest	No comments with merit	Necessary with substantive public interest and must be readopted	Agency must readopt
		15A NCAC 01C .0108	EMERGENCIES	Eff. April 1, 2003	Necessary with substantive public interest	No		No	Necessary with substantive public interest	No comments with merit	Necessary with substantive public interest and must be readopted	Agency must readopt
		15A NCAC 01C .0109	NON-STATE INVOLVEMENT AND CONSULTANTS	Eff. April 1, 2003	Necessary with substantive public interest	No		No	Necessary with substantive public interest	No comments with merit	Necessary with substantive public interest and must be readopted	Agency must readopt
	SECTION .0200 - INTEGRATION WITH AGENCY ACTIVITY	15A NCAC 01C .0205	IMPLEMENTATION	Eff. April 1, 2003	Necessary with substantive public interest	No		No	Necessary with substantive public interest	No comments with merit	Necessary with substantive public interest and must be readopted	Agency must readopt
		15A NCAC 01C .0206	WHEN TO PREPARE ENVIRONMENTAL DOCUMENTS	Eff. April 1, 2003	Necessary with substantive public interest	No		No	Necessary with substantive public interest	No comments with merit	Necessary with substantive public interest and must be readopted	Agency must readopt
		15A NCAC 01C .0207	INCORPORATION BY REFERENCE	Eff. April 1, 2003	Necessary with substantive public interest	No		Yes	Necessary with substantive public interest	RRC not required to review comment(s)	Necessary with substantive public interest and must be readopted	Agency must readopt
		15A NCAC 01C .0208	INCOMPLETE OR UNAVAILABLE INFORMATION	Eff. April 1, 2003	Necessary with substantive public interest	No		No	Necessary with substantive public interest	No comments with merit	Necessary with substantive public interest and must be readopted	Agency must readopt
	SECTION .0300 - PREPARATION OF ENVIRONMENTAL DOCUMENTS	15A NCAC 01C .0304	ACTIVITIES ABOVE THE MINIMUM CRITERIA	Eff. April 1, 2003	Necessary with substantive public interest	No		No	Necessary with substantive public interest	No comments with merit	Necessary with substantive public interest and must be readopted	Agency must readopt
		15A NCAC 01C .0305	TYPES OF ACTIVITIES REQUIRING ENVIRONMENTAL DOCUMENTATION	Eff. April 1, 2003	Necessary with substantive public interest	No		No	Necessary with substantive public interest	No comments with merit	Necessary with substantive public interest and must be readopted	Agency must readopt
		15A NCAC 01C .0306	ACTIVITIES OF A SPECIAL NATURE	Eff. April 1, 2003	Necessary with substantive public interest	No		Yes	Necessary with substantive public interest	RRC not required to review comment(s)	Necessary with substantive public interest and must be readopted	Agency must readopt
	SECTION .0400 – OTHER REQUIREMENTS	15A NCAC 01C .0405	PURPOSE OF THE MINIMUM CRITERIA THRESHOLDS	Eff. April 1, 2003	Necessary with substantive public interest	No		Yes	Necessary with substantive public interest	RRC not required to review comment(s)	Necessary with substantive public interest and must be readopted	Agency must readopt
		15A NCAC 01C .0406	SAMPLING, SURVEY, MONITORING, AND RELATED RESEARCH ACTIVITIES	Eff. April 1, 2003	Necessary with substantive public interest	No		Yes	Necessary with substantive public interest	RRC not required to review comment(s)	Necessary with substantive public interest and must be readopted	Agency must readopt
		15A NCAC 01C .0407	STANDARD MAINTENANCE OR REPAIR ACTIVITIES	Eff. April 1, 2003	Necessary with substantive public interest	No		No	Necessary with substantive public interest	No comments with merit	Necessary with substantive public interest and must be readopted	Agency must readopt
		15A NCAC 01C .0408	MINOR CONSTRUCTION ACTIVITIES	Eff. April 1, 2003	Necessary with substantive public interest	No		Yes	Necessary with substantive public interest	RRC not required to review comment(s)	Necessary with substantive public interest and must be readopted	Agency must readopt
		15A NCAC 01C .0409	MANAGEMENT ACTIVITIES	Eff. April 1, 2003	Necessary with substantive public interest	No		Yes	Necessary with substantive public interest	No comments with merit	Necessary with substantive public interest and must be readopted	Agency must readopt
		15A NCAC 01C .0410	PRIVATE USE OF PUBLIC LANDS	Eff. April 1, 2003	Necessary with substantive public interest	No		No	Necessary with substantive public interest	No comments with merit	Necessary with substantive public interest and must be readopted	Agency must readopt
		15A NCAC 01C .0411	REMEDIATION ACTIVITIES	Eff. April 1, 2003	Necessary with substantive public interest	No		Yes	Necessary with substantive public interest	RRC not required to review comment(s)	Necessary with substantive public interest and must be readopted	Agency must readopt

June 28, 2016

DENR Rule Comments
1601 Mail Service Center
Raleigh, NC 27699

Subject: Periodic Review of Existing Rules
15A NCAC 01C, Conformity with North Carolina Environmental Policy Act

Dear Sir/Madam:

Please accept these comments from the North Carolina Wildlife Resources Commission concerning the subject rules. We agree with the Department's "necessary with substantive public interest" determination for all rules in subchapter 01C. We provide comments on the following rules.

15A NCAC 01C .0103 DEFINITIONS

We disagree with the premise that a channel is considered disturbed only if the effects are permanent. Actions causing long term, but not permanent impacts, should also be included in the definition. We recommend the following edits to the definition:

- (2) "Channel Disturbance" means activities that result in long-term or permanent removal or degradation of natural stream functions, ~~permanently remove or degrade the natural functions of the stream~~ such as culverting, relocation, channelization or streambank stabilization methods including gabions, rip rap or similar hard structures.

We recommend the following changes to select definitions to improve accuracy and clarity:

- (11) "Instream Flow" means the amount of water, in terms of magnitude, duration, frequency, timing and rate of change, needed in a stream to adequately provide for downstream uses occurring within the stream channel, including some or all of the following: aquatic habitat, stream channel maintenance, sediment and wood transport, nutrient and energy cycling, aquatic organism movement, recreation, wetlands maintenance, navigation, hydropower, riparian vegetation, and water quality.

- (15) "Perennial Stream" means a channel that contains water in parts of its stream bed year round during a year of normal rainfall with the aquatic stream bed located below the water table for most of the year. Groundwater is the primary source of water for a perennial stream, but it also carries stormwater runoff. A perennial stream exhibits the typical biological, hydrological, and physical characteristics commonly associated with the continuous conveyance of water.
- (23) "Stream Enhancement" means the process of implementing stream rehabilitation practices in order to improve water quality, habitat or ecological function. These practices are typically conducted on the stream bank or in the flood prone area. Enhancement activities may also include the placement of in-stream habitat structures.

Finally, the definition of "land disturbing activity" appears to exempt agriculture and forestry. Is it the intent of subchapter 01C to not apply to these activities?

15A NCAC 01C .0207 INCORPORATION BY REFERENCE

Paragraph (b) of this rule does not provide sufficient guidance on the time that the applicant must provide incorporated-by-reference material. As written, such information can be provided on the last day of the comment period, leaving reviewers insufficient time to review and comment on the material. We recommend that incorporated-by-reference material must be available for the entire comment period.

15A NCAC 01C .0306 ACTIVITIES OF A SPECIAL NATURE

This rule lists thresholds above which environmental documentation is required. Item (1) of this rule uses the phrase "potential for significant adverse effects" but does not define the term. Is an effect significant only if more than 50% of the area is affected? Does any disturbance to certain critical habitats meet the definition of significant? Furthermore, this rule uses different terminology than rule .0405 which uses the terms "high potential" and "minimum potential" for environmental effects. We recommend that clarification be added to this rule to address these concerns.

15A NCAC 01C .0405 PURPOSE OF THE MINIMUM CRITERIA THRESHOLDS

Please refer to comments made on 15A NCAC 01C .0306 with a reference to this rule. Generally our comments are asking for consistency in language used in both rules or clarification of the terms.

15A NCAC 01C .0406 SAMPLING, SURVEY, MONITORING, AND RELATED RESEARCH ACTIVITIES

Item (2) in the list of activities should be revised. The phrase "traditional commercial fishing gear" is vague. Specific gear types, such as gill nets, trap nets, and seines, should be listed.

Also, rotenone should be removed from the list of acceptable methods because it can kill game fish and listed species because it is non-selective.

15A NCAC 01C .0408 MINOR CONSTRUCTION ACTIVITIES

Items (1)(a) and (1)(b) of this rule allow up to 4.99 acres of land disturbing activity within certain distances of waters classified as High Quality Waters, Outstanding Resource Waters, or Trout (Tr) waters without the preparation of an environmental document. Furthermore, there is no stipulation that such activities must occur outside of a riparian buffer zone or more than some minimum distance from the stream, other than a 25-foot buffer on Tr waters. Thus, it appears that 4.99 acres of disturbance can occur adjacent to HQW and ORW and within 25 feet of Tr waters. We recommend this rule be amended to include a stipulation that activities must occur at least 100 feet from ORW, HQW and Tr waters to qualify being exempt from preparing an environmental document.

Item (1)(c) allows channel disturbance and land disturbing activities associated with non-compensatory stream restoration or stream enhancement to occur without the preparation of an environmental document. We do not understand why there is a distinction between stream restoration or enhancement that is compensatory or non-compensatory. Item (1)(e) does not make such a distinction. We recommend that any stream restoration above the linear threshold be required to have an environmental document.

Finally, item (1)(e) should be revised to clarify the amount of mitigation. As written, land disturbing activities that impact 500 linear feet or more of perennial streams do not require preparation of an environmental document “if stream restoration or stream enhancement is performed.” The rule does not specify how much restoration or enhancement must occur; thus it is possible that a project that impacts 1000 feet yet only restores 10 feet would not require an environmental document. We recommend that the rule stipulate that the amount of restoration or enhancement equal the amount of impact.

Item (2)(b) exempts expansions of water treatment plants if less than 1 million gallons per day (MGD). As written, it doesn't preclude a series of 1 MGD expansions. The item should specify a number of expansions and a time period.

Item (2)(h) does not require preparation of an environmental document for construction, repair or removal of dams less than 25 feet in height and having less than 50 acre-feet of effective storage capacity. We generally support the removal of small dams. However, construction of additional dams further degrades stream functionality and riverine ecosystems. Therefore, we recommend the preparation of an environmental document for construction of any dam greater than 15 feet in height or more than 25 acre-feet of storage capacity.

15A NCAC 01C .0409 MANAGEMENT ACTIVITIES

This rule lists management activities that do not require the filing of environmental documents. Item (12) allows for control of aquatic weeds up to 2 acres or 25 percent of surface area,

whichever is less. The 2-acre threshold is quite low and limits the ability to control newly discovered infestations. We recommend increasing the threshold to 20 acres.

Item (12) also includes a number of exceptions to the acreage limit, including Primary Nursery Areas, but does not include waters containing listed species. We recommend adding “waters containing a species listed as endangered, threatened or special concern.”

15A NCAC 01C .0411 REMEDIATION ACTIVITIES

The term “contamination” is not defined. We suggest that it should only refer to chemical contaminants, not to the accumulation of sediment itself from natural events.

Thank you for the opportunity to comment on these rules. If you have any questions concerning these comments, please contact Mr. David Cox (david.cox@ncwildlife.org).

Sincerely,



Shannon L. Deaton
Habitat Conservation Division

15A NCAC 01C, CONFORMITY WITH NORTH CAROLINA ENVIRONMENTAL POLICY ACT

15A NCAC 01C .0103- DEFINITIONS

Commenter Name: Shannon Deaton
Company/Organization: NC Wildlife Resources Commission
Email: shannon.deaton@ncwildlife.org

Do I agree with the Agency's determination? Yes
I would determine this rule's classification as: undefined
Do I want to submit a written comment on this rule? Yes
My comment type on this rule is: Another type of comment
Do I want to enter a comment, or submit a file? Submit a file

We disagree with the premise that a channel is considered disturbed only if the effects are permanent. Actions causing long term, but not permanent impacts, should also be included in the definition. We recommend the following edits to the definition:

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(23) "Stream Enhancement" means the process of implementing stream rehabilitation practices in order to improve water quality, habitat or ecological function. These practices are typically conducted on the stream bank or in the flood prone area. Enhancement activities may also include the placement of in-stream habitat structures.

Finally, the definition of "land disturbing activity" appears to exempt agriculture and forestry. Is it the intent of subchapter 01C to not apply to these activities?

Agency Response:

We will consider this comment during the readoption process.

15A NCAC 01C .0207- INCORPORATION BY REFERENCE

Commenter Name: Shannon Deaton

Company/Organization: NC Wildlife Resources Commission

Email: shannon.deaton@ncwildlife.org

Do I agree with the Agency's determination? Yes

I would determine this rule's classification as: undefined

Do I want to submit a written comment on this rule? Yes

My comment type on this rule is: Another type of comment

Do I want to enter a comment, or submit a file? Submit a file

Paragraph (b) of this rule does not provide sufficient guidance on the time that the applicant must provide incorporated-by-reference material. As written, such information can be provided on the last day of the comment period, leaving reviewers insufficient time to review and comment on the material. We recommend that incorporated-by-reference material must be available for the entire comment period.

Agency Response:

We will consider this comment during the readoption process.

15A NCAC 01C .0306- ACTIVITIES OF A SPECIAL NATURE

Commenter Name: Shannon Deaton

Company/Organization: NC Wildlife Resources Commission

Email: shannon.deaton@ncwildlife.org

Do I agree with the Agency's determination? Yes

I would determine this rule's classification as: undefined

Do I want to submit a written comment on this rule? Yes

My comment type on this rule is: Another type of comment

Do I want to enter a comment, or submit a file? Submit a file

This rule lists thresholds above which environmental documentation is required. Item (1) of this rule uses the phrase “potential for significant adverse effects” but does not define the term. Is an effect significant only if more than 50% of the area is affected? Does any disturbance to certain critical habitats meet the definition of significant? Furthermore, this rule uses different terminology than rule .0405 which uses the terms “high potential” and “minimum potential” for environmental effects. We recommend that clarification be added to this rule to address these concerns.

Agency Response:

We will consider this comment during the readoption process.

15A NCAC 01C .0405- PURPOSE OF THE MINIMUM CRITERIA THRESHOLDS

Commenter Name: Shannon Deaton

Company/Organization: NC Wildlife Resources Commission

Email: shannon.deaton@ncwildlife.org

Do I agree with the Agency's determination? Yes

I would determine this rule's classification as: undefined

Do I want to submit a written comment on this rule? Yes

My comment type on this rule is: Another type of comment

Do I want to enter a comment, or submit a file? Submit a file

Please refer to comments made on 15A NCAC 01C .0306 with a reference to this rule. Generally our comments are asking for consistency in language used in both rules or clarification of the terms.

Agency Response:

We will consider this comment during the readoption process.

15A NCAC 01C .0406 – SAMPLING, SURVEY, MONITORING, AND RELATED RESEARCH ACTIVITIES

Commenter Name: Shannon Deaton

Company/Organization: NC Wildlife Resources Commission

Email: shannon.deaton@ncwildlife.org

Do I agree with the Agency's determination? Yes

I would determine this rule's classification as: undefined

Do I want to submit a written comment on this rule? Yes

My comment type on this rule is: Another type of comment

Do I want to enter a comment, or submit a file? Submit a file

Item (2) in the list of activities should be revised. The phrase “traditional commercial fishing gear” is vague. Specific gear types, such as gill nets, trap nets, and seines, should be listed. Also, rotenone should be removed from the list of acceptable methods because it can kill game fish and listed species because it is non-selective.

Agency Response:

We will consider this comment during the readoption process.

15A NCAC 01C .0408 – MINOR CONSTRUCTION ACTIVITIES

Commenter Name: Shannon Deaton

Company/Organization: NC Wildlife Resources Commission

Email: shannon.deaton@ncwildlife.org

Do I agree with the Agency's determination? Yes

I would determine this rule's classification as: undefined

Do I want to submit a written comment on this rule? Yes

My comment type on this rule is: Another type of comment

Do I want to enter a comment, or submit a file? Submit a file

Items (1)(a) and (1)(b) of this rule allow up to 4.99 acres of land disturbing activity within certain distances of waters classified as High Quality Waters, Outstanding Resource Waters, or Trout (Tr) waters without the preparation of an environmental document. Furthermore, there is no stipulation that such activities must occur outside of a riparian buffer zone or more than some minimum distance from the stream, other than a 25-foot buffer on Tr waters. Thus, it appears that 4.99 acres of disturbance can occur adjacent to HQW and ORW and within 25 feet of Tr waters. We recommend this rule be amended to include a stipulation that activities must occur at least 100 feet from ORW, HQW and Tr waters to qualify being exempt from preparing an environmental document.

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Finally, item (1)(e) should be revised to clarify the amount of mitigation. As written, land disturbing activities that impact 500 linear feet or more of perennial streams do not require preparation of an environmental document "if stream restoration or stream enhancement is performed." The rule does not specify how much restoration or enhancement must occur; thus it is possible that a project that impacts 1000 feet yet only restores 10 feet would not require an environmental document. We recommend that the rule stipulate that the amount of restoration or enhancement equal the amount of impact.

Item (2)(b) exempts expansions of water treatment plants if less than 1 million gallons per day (MGD). As written, it doesn't preclude a series of 1 MGD expansions. The item should specify a number of expansions and a time period.

Item (2)(h) does not require preparation of an environmental document for construction, repair or removal of dams less than 25 feet in height and having less than 50 acre-feet of effective storage capacity. We generally support the removal of small dams. However, construction of additional dams further degrades stream functionality and riverine ecosystems. Therefore, we recommend the preparation of an environmental document for construction of any dam greater than 15 feet in height or more than 25 acre-feet of storage capacity.

Agency Response:

We will consider this comment during the readoption process.

15A NCAC 01C .0409 - MANAGEMENT ACTIVITIES

Commenter Name: Shannon Deaton

Company/Organization: NC Wildlife Resources Commission

Email: shannon.deaton@ncwildlife.org

Do I agree with the Agency's determination? Yes

I would determine this rule's classification as: undefined

Do I want to submit a written comment on this rule? Yes

My comment type on this rule is: Another type of comment

Do I want to enter a comment, or submit a file? Submit a file

This rule lists management activities that do not require the filing of environmental documents. Item (12) allows for control of aquatic weeds up to 2 acres or 25 percent of surface area, whichever is less. The 2-acre threshold is quite low and limits the ability to control newly discovered infestations. We recommend increasing the threshold to 20 acres.

Item (12) also includes a number of exceptions to the acreage limit, including Primary Nursery Areas, but does not include waters containing listed species. We recommend adding "waters containing a species listed as endangered, threatened or special concern."

Agency Response:

We will consider this comment during the readoption process.

15A NCAC 01C .0409 - MANAGEMENT ACTIVITIES

Commenter Name: Tom Gerow

Company/Organization: North Carolina Forest Service

Email: tom.a.gerow@ncagr.gov

Do I agree with the Agency's determination? Yes

I would determine this rule's classification as: undefined

Do I want to submit a written comment on this rule? Yes

My comment type on this rule is: Another type of comment

Do I want to enter a comment, or submit a file? Enter a comment

My Comment Text: 15A-NCAC-01C-.0409:

Item (7), (8), (9): need to change the NCAC codification of the FPGs to reflect changes made April 1, 2014. Remove any need for a Plan to be prepared by US Forest Service or NC Division of Forest Resources. With the re-organization of Forest Resources from DENR into the Dept of Ag in 2011, the agency was re-named to "North Carolina Forest Service." The N.C. Forest Service is now required to charge fees for developing forest management plans. The US Forest Service does not develop forest management plans for any entity outside of the federally-owned National Forest System. Forest management activities are legally allowed to occur with or without a plan in NC, and the FPG standards do not require that a plan exist. A re-wording is suggested here to replace the current text in Items 7, 8, and 9 in their entirety with 1 new combined statement:

"Harvesting of forest products, reforestation, prescribed burning, control of invasive plants, forest road construction or maintenance, managing vegetation in woodlands, and undertaking other silvicultural practices; so long as those practices implement the appropriate Forestry Best Management Practices and comply with the standards set forth in the Forest Practices Guidelines Related to Water Quality as codified in 02 NCAC 60C .0100-.0209; as well as any other applicable state or federal water quality standards."

Item (10) and (11): remove the threshold of 100 acres being treated. All pesticides must, by federal law, be applied by licensed applicators and those applications must adhere to the specifications of the product's label; regardless of the number of acres being treated.

Item (15): may be deleted if the newly combined statement for 7-8-9 is used, as suggested above.

Item (16): replace the word "Plowing" with the word "Installing". Some firelines can be installed by other means besides plowing. Some firelines may be installed with dozer blades, soil discs, or vegetation mulching heads.

Agency Response:

We will consider this comment during the reoption process.

15A NCAC 01C .0411 - REMEDIATION ACTIVITIES

Commenter Name: Shannon Deaton
Company/Organization: NC Wildlife Resources Commission
Email: shannon.deaton@ncwildlife.org

Do I agree with the Agency's determination? Yes
I would determine this rule's classification as: undefined
Do I want to submit a written comment on this rule? Yes
My comment type on this rule is: Another type of comment
Do I want to enter a comment, or submit a file? Submit a file

The term “contamination” is not defined. We suggest that it should only refer to chemical contaminants, not to the accumulation of sediment itself from natural events.

Agency Response:

We will consider this comment during the readoption process.