

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: Department of Natural and Cultural Resources

RULE CITATION: 07 NCAC 13F .0202

RECOMMENDED ACTION:

- Approve, but note staff's comment
- X Object, based on:
 - Lack of statutory authority
 - X Unclear or ambiguous
 - Unnecessary
 - Failure to comply with the APA
- Extend the period of review

COMMENT:

This Rule is a readoption; the agency was required to readopt by January 31, 2020 and it did so. The agency submitted this Rule to the RRC for review at its January 2020 meeting. At that time, the agency requested an extension of the period of review to address technical changes.

As reflected in the Request for Technical Changes, the Rule contains multiple terms, such as "high quality" [in Subparagraph (a)(2)] and "substantial evidence" [in Part (b)(3)(A)], that are ambiguous and therefore make the Rule unclear as written. Staff recommends objection to the Rule for the use of several ambiguous terms as identified in the Request for Technical Changes.

Amanda J. Reeder
Commission Counsel
Issued March 10, 2020

REQUEST FOR TECHNICAL CHANGE

AGENCY: Department of Natural and Cultural Resources

RULE CITATION: 07 NCAC 13F .0202

DEADLINE FOR RECEIPT: Friday, January 10, 2020

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

Please insert page numbers on each page. [See Rule 26 NCAC 02C .0108(1)(h)]

On Page 1, lines 6, 8, and 9, 11, 19, and Page 2, line 4 and line 16, you cannot use the word "should" in a Rule. That does not set a standard, but is an aspirational statement. Each place it is used within this Rule, replace the word with "may" or "shall" depending upon what you mean.

In (a)(1), line 6, define "rewarding experience"

On line 7, define "sufficient"

On line 7, is this "worthy of consideration" by the Secretary?

Line 8, why do you need "Generally"? What does it add to this sentence? If you need, define it.

I note that G.S. 143B-135.150(1) specifies that the river must be "no less than a mile." What authority are you relying upon to require 2.5 to 5 miles? Is it G.S. 143B-135.156(e)?

In (a)(2), line 10, who determines what is "necessary" here?

Line 10, define "high quality"

On line 11, identified by whom?

Line 11, define "adequate"

In (b), line 13, replace "Subsection" with "Paragraph"

In (b), so that I'm clear, you are specifying the criteria in 143B-135.148 for Class I rivers, correct? That statute says:

Amanda J. Reeder
Commission Counsel
Date submitted to agency: December 23, 2019

Class I. Natural river areas. Those free-flowing rivers or segments of rivers and adjacent lands existing in a natural condition. Those rivers or segments of rivers that are free of man-made impoundments and generally inaccessible except by trail, with the lands within the boundaries essentially primitive and the waters essentially unpolluted. These represent vestiges of primitive America.

I take it your regulated public knows what the impoundments on lines 16-18 are?

On line 18, prohibited by whom?

And since only dam construction is prohibited, does that mean the other types of things listed here, such as “diversion works” will be allowed?

What does (b)(1)(B) mean? Your regulated public may understand this, but I do not and wanted to ask.

In (b)(2)(A), line 21, are you missing a word like “accessed” between “must be” and “foot”?

On line 22, define “certain instances” and “primarily”

On line 22, you state that access “may” be by motorized watercraft. You need to state in this Rule when that may be allowed or under what circumstances it will not be allowed when on coastal waters.

In (b)(2)(B), line 24, what is a “narrow incised river valley”?

On line 25, what is “broad”?

On line 25, delete “presence, however,” and replace it with “presence”

Line 26, define “inconspicuous” Who determines whether the road is inconspicuous?

On line 26, under what circumstances “may” this be permissible?

In (b)(3)(A), line 28, define “essentially” Who determines this?

Line 29, define “substantial evidence”

Line 30, define “inconspicuous”

On line 30, within the Rule, state under what circumstances this may be permitted.

On lines 31-32, what is “in keeping with the natural river environment”?

In (b)(3)(B), line 33, what is “old field succession areas (including early stages)”?

On line 34, define “relatively unobtrusive”

On line 34, under what circumstances will this be permitted?

In (b)(3)(C), line 35, what is “enhanced”? What is “extremely well”?

Line 36, visible to whom?

On line 37, define “unique natural features”

In (c), Page 2, line 1, replace “Subsection” with “Paragraph”

And I take it that this Paragraph specifies criteria for Class II rivers, as set forth in G.S. 143B-135.148:

Class II. Scenic river areas. Those rivers or segments of rivers that are largely free of impoundments, with the lands within the boundaries largely primitive and largely undeveloped, but accessible in places by roads.

If so, then why do you need the first sentence of (c)(1), line 3? It just repeats statute.

If you need to retain it, remove the parenthesis from “or segment” And what is “largely free”?

Line 4, define “significant”

On line 5, prohibited by whom?

In (c)(2), line 6, replace “which” with “that”

On line 6, define “occasionally” and “short”

On line 7, define “conspicuous” “inconspicuous” and “well-screened”

On line 8, under what circumstances may this be permitted? The Rule needs to stat that.

What is the point of (c)(3)(A)? What are you regulating in this Part? I suggest deleting it altogether.

If you need to retain it:

On line 10, define “more amenable”

Line 11, define “active” and “intensive” and “recreational uses”

On line 11, “kept” by whom?

On line 12, what are these restraints? How are they known? And what is “degradation”?

In (c)(3)(B), line 13, define “largely free” and “structures”

Line 14, define “dispersed”

On line 15, what are “low density vacation homes”? Who determines this? Based upon what?

Amanda J. Reeder
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Date submitted to agency: December 23, 2019

Line 15, define “small”

On line 16, “limited” by whom?

On lines 16-17, define “relatively short stretches”? Relative to what? Determined by whom?

On line 17, delete “Indigenous construction materials are preferred.” This does not impose a requirement and as such, is not rule language. Delete it.

On line 18, who will determine if this is permissible and based upon what? That information needs to be set forth in the Rule.

On line 18, define “without a substantially adverse effect”

In (c)(3)(C), insert the citation to this Act. If you mean the “Sedimentation Pollution Control Act of 1973” then please use the correct name and the citation is G.S. 113A-50 et. seq.

In (c)(3)(D), line 22, define “occasional”

And on line 22, “may” be permitted when? You must give the circumstances when this will be allowed within the Rule.

I am only asking – this Rule does not address recreational river areas, which are also addressed by G.S. 143B-135.148. Is this intentional? (I note that this designation was added by SL 1989-752, which became effective after this Rule was last amended.)

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

1 07 NCAC 13F .0202 is readopted as published in 34:07 NCR 547 as follows:

2
3 **07 NCAC 13F .0202 CRITERIA FOR DESIGNATION**

4 (a) In addition to the criteria listed in G.S. 143B-135.150, the following criteria for a river to qualify as either natural or
5 scenic shall apply to this Subchapter:

6 (1) A river segment should be long enough to provide a rewarding experience and to encompass a
7 sufficient portion of those features and processes that make the segment worthy of consideration.
8 Generally, in urban areas, any segment included in the rivers system should be at least two and one-
9 half miles long. In non-urban areas, a segment should be at least five miles in length.

10 (2) Boundaries. The natural features and forces necessary for the maintenance of a high quality riverine
11 resource must be identified, and boundaries should be established to provide for adequate protection
12 of these features.

13 (b) In addition to the criterion set out in Subsection (a) of this Rule, a river shall meet the following criteria for
14 designation as a natural river:

15 (1) Water Flow

16 (A) The river (or segment) must be free from impoundments including dams, diversion works,
17 artificial constrictions of the river, rock rip-rap, concrete blocks, retaining walls, rock filled
18 gabions, or pilings. Future dam construction within the river (or segment) shall be prohibited.

19 (B) The infiltration capacity should approximate that of an undisturbed watershed.

20 (2) Public Access

21 (A) Public access shall be limited to trails and must be by foot or non-powered water craft, except
22 in certain instances, primarily on coastal waters, where access may be by motorized watercraft.

23 (B) Motorized vehicles shall not be visible from the river and no roads or other provisions for
24 overland motorized travel are permitted within a narrow incised river valley, or if the river valley is
25 broad, within one-fourth mile of, and parallel to, the river bank. The presence, however, of
26 inconspicuous roads leading to the river area may be permissible.

27 (3) Environmental Quality

28 (A) Natural rivers and adjacent land areas present natural features and processes essentially
29 undisturbed by man. Shorelines are free of habitation and other substantial evidence of man's
30 intrusion, except that inconspicuous dwellings may be permitted. Watersheds are natural-like
31 in appearance and all conservation methods employed must be in keeping with the natural
32 river environment.

33 (B) Abandoned pasture, old field succession areas (including early stages), old burns, and
34 relatively unobtrusive forest management activity areas can be permitted.

35 (C) Natural river area designation is enhanced by the existence of climax species or extremely
36 well developed vegetational communities, visible indigenous animal species, high water
37 quality, and unique natural features.

1 (c) In addition to the criteria set out in Subsection (a) of this Rule, a river shall meet the following criteria for
2 designation as a scenic river:

- 3 (1) Water Flow. The river (or segment) shall be largely free of impoundments. If an impoundment is
4 present, water should not have the characteristics of impoundment for any significant distance. Future
5 dam construction within the segment shall be prohibited.
- 6 (2) Public access to scenic rivers may be by roads which occasionally bridge the river. Short stretches of
7 conspicuous or longer stretches of inconspicuous and well-screened roads or railroads paralleling the
8 river area may be permitted.
- 9 (3) Environmental Quality
- 10 (A) Scenic river areas are more amenable to multiple use than natural river areas. They are more
11 suited for active and intensive recreational uses. However, these uses must be kept within the
12 restraints imposed by the ability of the resources to support use without degradation.
- 13 (B) Scenic river shorelines and adjacent lands shall be largely free of structures. Forested
14 landscapes mixed with dispersed agricultural uses and rural dwellings or settlements,
15 including low density vacation homes, are characteristic of scenic river areas. Small
16 communities or any concentration of habitation should be limited to relatively short
17 stretches. Indigenous construction materials are preferred. Farming, timber harvest, and
18 similar resource use is permissible if accomplished without a substantially adverse effect on
19 natural appearance.
- 20 (C) Acceptable erosion control devices, in accordance with the Sedimentation and Pollution
21 Control Act, must be installed.
- 22 (D) Occasional utility easements, perpendicular to the river course, may be permitted.

23
24 *History Note:* Authority G.S. 143B-135.142; 143B-135.150; 143B-135.156;
25 Eff. April 4, 1979;
26 Amended Eff. August 1, 1988; January 1, 1985; October 1, 1984;
27 Transferred from 15A NCAC 12F .0202 Eff. April 1, ~~2017~~. 2017;
28 Readopted Eff. February 1, 2020.