G.S. 150B-21.3A Report for 15A NCAC 12F, NATURAL AND SCENIC RIVERS PROGRAM								
Agency - Department of Environment and Natural Resources								
Comment Period - June 4, 2014 - August 10, 2014								
Date Submitted to APO - Filled in by RRC staff								
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(d1)]**	**Federal Regulation Citation**	**Public Comment Received [150B-21.3A(c)(1)]**	**Agency Determination Following Public Comment [150B-21.3A(c)(1)]**
SECTION .0200 - CRITERIA FOR CLASSIFICATION AND DESIGNATION	15A NCAC 12F .0202	CRITERIA FOR DESIGNATION	Amended Eff. August 1, 1988	Unnecessary	No		Yes	Necessary with substantive public interest
SECTION .0300 - CRITERIA FOR MANAGEMENT	15A NCAC 12F .0302	NATURAL AND SCENIC RIVERS	Eff. April 4, 1979	Unnecessary	No		Yes	Necessary with substantive public interest
	15A NCAC 12F .0303	MANAGEMENT OF NATURAL RIVER AREAS	Eff. April 4, 1979	Unnecessary	No		Yes	Necessary with substantive public interest
	15A NCAC 12F .0304	MANAGEMENT OF SCENIC RIVER AREAS	Eff. April 4, 1979	Unnecessary	No		Yes	Necessary with substantive public interest

Rule Citation	Commenter Name	Company/ Organization	Do I agree with the Agency's determination?	I would determine this rule's classification as...	Do I want to submit a written comment on this rule?	My comment type on this rule is...	Do I want to enter a comment, or submit a file?	Comment Text
15A NCAC 12F .0304	Will Hendrick	Southern Environmental Law Center	No	Necessary without substantive public interest	Yes	Another type of comment	Submit a file	
15A NCAC 12F .0303	Will Hendrick	Southern Environmental Law Center	No	Necessary without substantive public interest	Yes	Another type of comment	Submit a file	
15A NCAC 12F .0302	Will Hendrick	Southern Environmental Law Center	No	Necessary without substantive public interest	Yes	Another type of comment	Submit a file	
15A NCAC 12F .0202	Will Hendrick	Southern Environmental Law Center	No	Necessary without substantive public interest	Yes	Another type of comment	Submit a file	

SOUTHERN ENVIRONMENTAL LAW CENTER

Telephone 919-967-1450 | 601 WEST ROSEMARY STREET, SUITE 220 CHAPEL HILL, NC 27516-2356 | Facsimile 919-929-9421

August 7, 2014

Via Electronic Submission (http://rulesreview.ncdenr.gov/) and First-Class Mail

DENR Rule Comments
1601 Mail Service Center
Raleigh, NC 27699-1601

Re: Proposed Amendments to 15A N.C. Admin. Code Subchapters 12D, 12F, 12G, 12I, and 12J

Dear Sir or Madam:

The Southern Environmental Law Center submits these comments on behalf of the North Carolina Conservation Network, Pamlico-Tar River Foundation, Clean Air Carolina, Appalachian Voices, Cape Fear River Watch, Western North Carolina Alliance, Clean Water for North Carolina, Environmental Defense Fund, Neuse Riverkeeper Foundation, and North Carolina League of Conservation Voters, in response to the initial determination by the North Carolina Department of Environmental and Natural Resources (DENR) that all rules in Subchapters 12D, 12F, 12G, 12I, and 12J of Title 15A of the North Carolina Administrative Code are "unnecessary." We disagree with the agency's underlying conclusion that these rules are "obsolete, redundant, or otherwise not needed."[1]

Our comments are motivated by the fact that rules deemed "unnecessary" will expire unless they were "adopted to conform to or implement federal law."[2] Elimination of these 35 rules, which constitute more than a third of the rules administered by the Division of Parks and Recreation (DPR), would deprive both the public and DPR of useful regulatory guidance regarding the acquisition, maintenance, and operation of various components of the State Parks System.

We emphasize, and the agency has implicitly recognized, that the public has not objected to these rules. Based on the definitions of the possible labels, had the agency received any "public comment" (defined in N.C. Gen. Stat. § 150B-21.3A(a)(5) to essentially mean a written objection) regarding these rules in the past two years, it could not label them "unnecessary."[3]

---

[1] N.C. Gen. Stat. § 150B-21.3A(a)(6) (defining an "unnecessary rule").

[2] *See* N.C. Gen. Stat. § 150B-21.3A. With the exception of rules in Subchapter 12J, the rules addressed herein were adopted exclusively to implement state law.

[3] In either circumstance, the agency would be required to label the rules "necessary with public interest." *See* N.C. Gen. Stat. § 150B-21.3A(a)(3).

Indeed, the agency could not apply the "unnecessary" label if a property interest was affected by, and the agency simply *anticipated* objection to, a rule.[4]

To be clear, our comments are intended to express support for these rules. As such, we are very concerned that under the rules review process, as currently designed by the legislature and codified at N.C. Gen. Stat. § 150B-21.3A, comments that *object* to a rule have an automatic effect on the rule's classification, but comments that *support* the rule do not. As the statute is written, a single objection to a rule will push it into the "necessary with substantive public interest" category that requires the rule to be re-adopted through the cumbersome rulemaking process. Meanwhile, a hundred members of the public could write letters supporting the same rule, explaining in great detail its enormous value and necessity, but those comments would not meet the statutory definition of a "public comment" since they do not object to the rule. Thus, those numerous, substantive comments would not give rise to any automatic classification that would preserve the rule without expending taxpayer dollars and agency time to shepherd it through re-adoption. Consequently, the rules review process, as it currently exists, discourages citizens from expressing support for a rule since, at best, their supportive comments would have no automatic effect, and, at worst, their comments could be taken as criticism forcing a rule to be readopted. Such a system, which discourages public participation and skews public commenting, is flawed. Thankfully, the system still provides the opportunity for the agency to revise its "initial determination" in response to supportive public comment, even if that revision is not automatic. Accordingly, we submit these comments in the hope that DENR will reconsider its decision to label these rules "unnecessary."

We note at the outset that our comments are not intended to quibble with the agency's documentation or prediction of public objection. After all, while public objection may mean there is "substantive public interest" in a rule (at least as that phrase is defined by statute), the absence of such objection does not render a rule "unnecessary." In other words, there are two distinct questions that the agency must answer before making an "initial determination" as required under N.C. Gen. Stat. § 150B-21.3A: "Is this rule necessary?" and, if so "Is there substantive public interest in this rule?" The following comments focus on, and urge the agency to change its answer to, the first question.[5]

Contrary to the agency's initial determination, we believe that these rules are, with rare exception, necessary to implement state or federal law. We encourage DENR to reconsider its initial determination, and, in recognition of the importance of these rules (and the apparent lack of public objection), classify them as "necessary without substantive public interest."[6]

---

[4] *Id.*

[5] The second question, insofar as it is informed by the presence of public comment, will be addressed by the Rules Review Commission. N.C. Gen. Stat. § 150B-21.A(c)(2) ("If a public comment relates to a rule that the agency determined to be necessary and without substantive public interest or unnecessary, the Commission shall determine whether the public comment has merit and, if so, designate the rule as necessary with substantive public interest.").

[6] *See* N.C. Gen. Stat. § 150B-21.3A(a)(4) (defining "necessary without substantive public interest").

We believe the agency understates the necessity of rules adopted to implement the various programs for which it is responsible. Remarkably, only three rules administered by DPR were determined by DENR to be "necessary without substantive public interest"—one rule defining terms used throughout Chapter 12,[7] one rule defining the "organization and purpose" of the Parks System,[8] and one rule listing components of the parks system.[9] The only other rules administered by DPR that were deemed "necessary" were those, codified in Subchapters 12B and 12C, that DENR was explicitly required by statute to adopt; the agency labelled each of these as "necessary with substantive public interest."[10]

However, even when rulemaking is not explicitly required by statute, rules are often necessary to *implement* programs created by statute.[11] Such is the case with the majority of the rules addressed below. As repeatedly explained in the following comments, the legislature sketched a general framework for each program administered by DPR and then deferred to the agency to fill in the specifics. The resulting rules reflect decades of agency expertise and are critical to achieving the legislature's vision. We therefore encourage the agency to reconsider its decision to label these rules "unnecessary." Because each body of rules is best understood in the context of the statute it seeks to implement, the following comments, like Chapter 12 itself, address each specific program administered by DPR in turn.

I. Subchapter 12D - Selection and Acquisition of Lands for Parks

The State Parks Act[12] recognizes the "unique archaelologic, geologic, biological, scenic, and recreational resources" in North Carolina and the need for preservation and management of these resources. The mission of the State Parks System is "to conserve and protect representative examples of the natural beauty, ecological features and recreational resources of statewide significance; to provide outdoor recreational opportunities in a safe and healthy environment; and to provide environmental education opportunities that promote stewardship of the state's natural heritage."[13] Few decisions are more central to this mission than the selection and

---

[7] 15A N.C. Admin. Code 12A .0105.

[8] 15A N.C. Admin. Code 12A .0101.

[9] 15A N.C. Admin. Code 12A .0104.

[10] *See* N.C. Gen. Stat. § 113-35(a) ("The Department shall make reasonable rules governing the use by the public of State parks and State lakes under its charge."). The only rules labeled "necessary with substantive public interest" were those in Subchapter 12B, governing "Parks and Recreation Areas," and in Subchapter 12C, entitled "State Lake Regulations."

[11] "A modern legislature must be able to delegate in proper instances a limited portion of its legislative powers to administrative bodies which are equipped to adapt legislation to complex conditions involving numerous details with which the Legislature cannot deal directly." *Adams v. N.C. Dep't of Natural & Econ. Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978)(quoting *N.C. Turnpike Authority v. Pine Island*, 265 N.C. 109, 114, 143 S.E.2d 319, 323 (1965) & *Carolina-Virginia Coastal Highway v. Coastal Turnpike Auth.*, 237 N.C. 52, 60, 74 S.E.2d 310, 316 (1953).

[12] N.C. Gen. Stat. § 113-44.7 *et seq.*

[13] Mike Murphy, Director, Division of State Parks, "Our Mission," *available at* http://ncparks.gov/About/agency_mission.php (last visited July 31, 2014).

acquisition of lands for preservation. State law authorizes DENR, subject to approval by the Governor and Council of State, to acquire lands "for the purpose of establishing or developing State parks."[14] The General Assembly sought "to establish methods and principles for the planned acquisition, development, and operation of State Parks"[15] by enacting the State Parks Act and empowering DENR to implement it.[16]

However, the State Parks Act says very little about the criteria by which lands proposed to be added to the State Parks System will be judged. In the "declaration of policy and purpose," the Act simply notes that the system should include "representative examples" of North Carolina's natural resources "in order to promote understanding of and pride in the natural heritage of this State."[17] The only remaining guidance in the Act is that "[a]dditions [to the State Parks System] shall be consistent with and shall address the needs of the State Parks System as described in the [State Parks System] Plan."[18] The Act requires DENR to develop that plan with "full public participation."[19] In other words, rather than dictate the criteria for selection and acquisition of lands for State parks, the General Assembly charged the agency to decide, with public input, which natural resources are worthy of inclusion in the State Parks System. This observation underscores the necessity of the rules in Subchapter 12D.

To begin, 15A N.C. Admin. Code 12D .0101 provides a mechanism for citizens of North Carolina to recommend land for acquisition and inclusion in the State Parks System. The rule informs citizens of this opportunity, dictates the necessary contents of a recommendation, and obligates the agency to respond to such recommendations.[20] No statute, and no other rule, provides this information to, or solicits this input from, the public.[21] Even if recommendations might still be accepted by DENR in the absence of the rule, allowing the rule to expire would conceal from the public the opportunity to recommend land acquisitions and deprive members of

---

[14] N.C. Gen. Stat. § 113-34.

[15] N.C. Gen. Stat. § 113-44.8(d).

[16] N.C. Gen. Stat. § 113-44.10.

[17] N.C. Gen. Stat. § 113-44.8(b).

[18] N.C. Gen. Stat. § 113-44.14(b).

[19] N.C. Gen. Stat. § 113-44.11.

[20] 15A N.C. Admin. Code 12D .0101. Insofar as the rule also includes the address to which recommendations should be mailed, it is precisely the kind of rule the legislature said would merit categorization as "necessary without significant public interest." *See* N.C. Gen. Stat. § 150B-21.3A(a)(4) (A rule that is "necessary without significant public interest" includes a rule that merely identifies information that is readily available to the public, such as an address or a telephone number.).

[21] While citizens may comment once every five years, pursuant to the State Parks Act, when DENR updates the State Parks System Plan, nothing in the Act specifically provides for citizen recommendations for land acquisition, much less mentions the way in which any such recommendation might be made or considered. *See* N.C. Gen. Stat. § 113-44.11(b) (contemplating a series of public meetings to obtain, from members of the public, "views and information on the needs of the public for recreational resources in the State Parks System" and "views and information on the manner in which these needs should be addressed").

the public of any guidance regarding what information to provide to make their recommendations successful.[22]

Relatedly, 15A N.C. Admin. Code 12D .0102 outlines the criteria DENR considers when deciding which lands to acquire for the State Parks System.[23] Although the State Parks Act requires that additions be consistent with the State Parks System Plan,[24] the System Plan does not establish criteria for land acquisition,[25] and no other rule or statute discloses these criteria. If the rule is allowed to expire, information about what kinds of land to recommend for acquisition will be kept from the public, and there will be no legal guidance on this process. We therefore urge DENR to reconsider its decision to label these rules "unnecessary" and, in light of the foregoing, recognize that they are "necessary without substantive public interest."

Of course, the selection and acquisition of park lands is only part of the equation; the State must also manage the resources acquired. The legislature authorized the agency to provide regulatory guidance regarding the management of natural resources under DPR's control. If DPR is to continue managing these resources, rules guiding that management are not "unnecessary." Moreover, if in fact DPR has received no adverse public comments, these rules may – and should – be deemed "necessary without substantive public interest" during the rules review process.

II. Subchapter 12F - Natural and Scenic Rivers Program

The natural resources managed by DPR are not limited to State parks and lakes. The natural and scenic rivers system, which is also managed by DPR, [26] is a direct outgrowth of the Natural and Scenic Rivers Act of 1971.[27] When passing the Act, the General Assembly recognized that "certain rivers of North Carolina" possess "values of great present and future

---

[22] *See* N.C. Gen. Stat. § 113-35(a) (noting, among the reasons for establishing a State Parks System, that "[t]he heritage of a people should be preserved and managed by the people for their use and for the use of their visitors and descendants").

[23] The rule requires equal consideration of the "statewide significance of the site"; "scenic beauty of the site"; "outdoor recreational potential of the site"; unsatisfied recreation demands"; "the extent to which the various regions of the state are presently served"; "the goal of a balanced system including state parks, state recreation areas, state trails, state natural and scenic rivers, and state nature preserve"; and "the need for preservation of the site." 15A N.C. Admin. Code 12D .0102.

[24] N.C. Gen. Stat. § 113-44.14(b). Other statutes provide, at best, ambiguous guidance. *See, e.g.*, N.C. Gen. Stat. § 113-40 (stating that donations may be accepted if the Department thinks the donated land "desirable for State parks); *id.* § 113-34.1 (stating that lands may be purchased for conservation without inclusion in the System if DENR finds they are important "for conservation purposes").

[25] The 2012 State Parks System Plan notes that the Division, when considering past acquisitions as part of the New Parks for a New Century, assessed sites based on certain factors. However, this historical observation does not establish or require that these criteria will always be considered when assessing potential acquisitions.

[26] *See* N.C. Gen. Stat. § 113A-36(a) (granting DENR the authority "to administer and control the North Carolina natural and scenic rivers system); *id.* § 113-44.9 (defining the State Parks System to include State rivers).

[27] *See* N.C. Gen. Stat. § 113A-30 *et seq.*

benefit to the people" and thus merited preservation "in their natural and scenic condition.[28] DENR is empowered to implement the Natural and Scenic Rivers Act by adopting rules.[29] Each of the four rules adopted pursuant to this authority provides important guidance that either supplements statutory direction or speaks to issues not addressed by legislation and is therefore necessary.

First, the rule codified in 15A N.C. Admin. Code 12F .0202 states the criteria for inclusion in the natural and scenic rivers system. This rule explicitly supplements criteria stated in N.C. Gen. Stat. § 113A-35, and demonstrates agency recognition of the need for regulations to elaborate on the skeletal framework provided the legislature.[30] The expiration of this rule would entirely eliminate certain criteria from consideration by the State. For instance, the State would no longer be required to consider the "environmental quality" of the waters proposed for designation as "natural" or "scenic" rivers.[31]

The provisions of the rule related to "environmental quality" provide important guidance about, *inter alia*, the desirable natural state of the shoreline adjacent to these river segments.[32] Without this rule, the only statutory guidance on this subject must be wrested from the undefined phrases "essentially primitive" and "largely primitive and largely undeveloped."[33] In contrast, the rule clarifies the acceptable degree of habitation, development, and "evidence of man's intrusion" that may be visible from a river worthy of "natural" or "scenic" designation.

Even where the Natural and Scenic Rivers Act states a criterion for consideration, the rules provide important clarity. For instance, the Act simply requires that, to be eligible for designation, a river segment "must be no less than one mile."[34] The rule states, however, that "a river segment should be long enough to provide a rewarding experience and to encompass a sufficient portion of those features and processes that make the segment worthy of consideration"; accordingly, the rule provides that, in urban areas, designated river segments should generally be "at least two and one-half miles long" while, in rural areas, "a segment should be at least five miles in length.[35]

With respect to the "boundaries" of natural and scenic rivers, the legislature expressly recognized the value of agency input, stating that boundaries should be "the visual horizon *or such distance from each shoreline as may be determined to be necessary by the Secretary*, but

---

[28] N.C. Gen. Stat. § 113A-31.

[29] N.C. Gen. Stat. § 113A-36(d).

[30] 15A N.C. Admin. Code 12F .0202 (stating the criteria listed therein are "[i]n addition to the criteria listed in G.S. 113A-35").

[31] *Compare* N.C. Gen. Stat. § 113A-35 *with* 15A N.C. Admin. Code 12F .0202(b)(3), (c)(3).

[32] 15A N.C. Admin. Code 12F .0202(b)(3), (c)(3).

[33] N.C. Gen. Stat. § 113A-34.

[34] N.C. Gen. Stat. § 113A-35(1)

[35] 15A N.C. Admin. Code 12F .0202(1).

shall not be less than 20 feet."[36] The rule codified in 15A N.C. Admin. Code 12F .0202 expresses the Secretary's determination that "the natural features and forces necessary for the maintenance of a high quality riverine resource must be identified, and boundaries should be established to provide for adequate protection of these features."[37] A clarification authorized and invited by the legislature can hardly be described as "unnecessary."

Another invitation for clarification was extended when the legislature stated, in the Natural and Scenic Rivers Act, that public access to designated rivers "shall be limited, *but may be permitted to the extent deemed proper by the Secretary*, and in keeping with the property interest acquired by the Department and the purposes of this Article."[38] The statute clearly envisions the codification of one or more rules to govern the terms of public access to support those purposes. The resulting rule, codified pursuant to that statute, speaks to the means of access, addresses the permissible location and visibility of roads, and provides specific instruction applicable to coastal waters. The rule that establishes "the extent" of public access "deemed proper by the Secretary" is therefore necessary to implement the statute.

To continue, because the shoreline of a designated river is not necessarily owned by DENR, the rule in 15A N.C. Admin. Code 12F .0302 is necessary to clarify the bounds of DPR's jurisdiction. By statute, the law enforcement jurisdiction of park rangers is limited to "lands or waters under the control or supervision of the Department of Environment and Natural Resources."[39] Thus, the rule provides an important distinction between places where the law (e.g., "rules" and "regulations") may be enforced (i.e., "only in areas to which the state has either prior jurisdiction or fee simple possession"[40]) and places where DPR's law enforcement jurisdiction is nonexistent and enforcement of "policies and procedures" may be appropriately limited by the terms attached to the grant of a lesser property interest. Certainly a rule explaining how, if at all, the implementation of the Natural and Scenic Rivers Act affects the jurisdiction of the implementing agency is necessary to the successful implementation of the Act itself.

Perhaps no rules are more important to the implementation of the Natural and Scenic Rivers Act than the two rules addressing the management of natural and scenic rivers. The rules codified in 15A N.C. Admin. Code 12F .0303 and 15A N.C. Admin. Code 12F .0304 are especially important because the Act itself is entirely silent regarding how these natural resources, after their inclusion in the natural and scenic rivers system, should be managed.[41] No statute addresses, for instance, the nature and management of facilities adjacent to, the recreational activities consistent with designation as, or the location of public access points along

---

[36] N.C. Gen. Stat. § 113A-35(2) (emphasis added).

[37] 15A N.C. Admin. Code 12F. 0202(2).

[38] N.C. Gen. Stat. § 113A-35(5). The rest of the Article merely provides that natural rivers should be "generally inaccessible except by trail" and scenic rivers should be "accessible in places by roads." N.C. Gen. Stat. § 113A-34.

[39] N.C. Gen. Stat. § 113-282. However, a Ranger may pursue beyond Park property a suspect seen violating the law on Park property. *Id.*

[40] N.C. Admin. Code 12F .0302.

[41] As such, any argument that these rules are "redundant" in light of statutory guidance is facially inaccurate.

a natural or scenic river. This guidance is provided exclusively in the rules in Subchapter 12F.[42] Indeed, with the exception of a statute prohibiting State authorization of certain public projects that would affect natural and scenic rivers,[43] the Natural and Scenic Rivers Act says nothing about what can or cannot be done on or near rivers after they are acquired as part of the system.

In contrast, the rules provide necessary guidance critical to managing these resources so as to preserve their natural and scenic condition. The implementation of a program for the preservation of natural resources inherently requires maintenance of those resources to preserve the natural characteristics deemed worthy of preservation. As such, it is troubling that DENR would be complicit in the potential expiration of all rules pertaining to the management of natural and scenic rivers, even as DPR seeks to administer the natural and scenic rivers system.

To summarize, the rules governing designation and management of natural and scenic rivers are not "unnecessary," and, if DPR has received no adverse public comments with respect to these rules, they should be designated as "necessary without substantive public interest."

III. Subchapter 12G - State Trails System

The Department has also proposed to allow the expiration of rules pertaining to the implementation of the North Carolina Trails System Act. Yet, the Act itself states that the "Secretary *shall* make such rules as to trail development, management, and use that are necessary for the implementation of this Article."[44] Where the General Assembly specifically commands an agency to provide necessary elaboration on a statute, it is remarkable when the agency responds as though no elaboration is necessary and instead moves to eliminate existing rules that implement the statute.

To be fair, a few rules in Subchapter 12G mirror statutory guidance to such a degree that they might legitimately be considered redundant. The declaration of policy and purpose in 15A NC Admin. Code 12G .0101 is substantially similar to the parallel declaration in the North Carolina Trails System Act.[45] Also, for the most part, provisions in 15A N.C. Admin. Code 12G .0103 addressing the composition of the State Trails System mirror statutory language.[46] Likewise, the provisions of that rule addressing management of the System add little to the

---

[42] *See* 15A N.C. Admin. Code 12F .0303, .0304.

[43] *See* N.C. Gen. Stat. § 113A-44.

[44] N.C. Gen. Stat. § 113A-88(d).

[45] *Compare* 15A N.C. Admin. Code 12G .0101 ("The state establishes trails in natural and scenic areas, and in urban areas in order to promote public enjoyment of the outdoor areas of the state.") *with* N.C. Gen. Stat. § 113A-84 (stating the need for trails in "natural, scenic areas of the State, and in and near urban areas" to "promote public access to, travel within, and enjoyment and appreciation of the outdoor, natural and remote areas of the State.").

[46] The relevant statute says the System is composed of "State scenic trails," "State recreation trails," and "Connecting or side trails." N.C. Gen. Stat. § 113A-86. The rule states that the System also includes "trail access areas and primitive campsites." 15A N.C. Admin. Code 12G .0103(a). While neither of these components is addressed in the General Statutes, the legislature did reference "campsites, shelters, and related public-use facilities" when discussing DENR's administration of the North Carolina Trails System. N.C. Gen. Stat. § 113A-93.

statutory guidance on that topic, though they do identify the types of entities to which DENR may "designate responsibility" for trail maintenance.[47] That said, the remainder of the rules in Subchapter 12G provide important information to the public, found nowhere in the General Statutes, about the operation of the State Trails System.[48]

First, the rules elaborate on the process by which trails may be designated as part of the System. The legislature was vague on this subject; the North Carolina Trails System Act simply states, "The Secretary, with advice of the [North Carolina Trails] Committee, shall study trail needs and potentials, and make additions to the State Trails System as needed."[49] The Act also requires the Trails Committee, at least twice a year, to advise the Department on matters "directly or indirectly pertaining to trails, their use, extent, location, and the other objectives and purposes of this Article."[50] Taken together, the statutory guidance can be summarized as follows: DENR and the Committee should study trails and add necessary trails to the Trails System.

This statutory ambiguity underscores the necessity of the rule codified in 15A N.C. Admin. Code 12G .0201, which clarifies the relationship between the Committee and the agency. The rule elaborates on which matters "directly or indirectly" pertain to trails and requires the Committee to advise the agency on a variety of subjects in addition to the use, length, and location of trails, including the "population served" by the trail, "public access rights" to the trail, "maintenance" of the trail, and "design and use" of the trail.[51] Without this rule, the Department may be deprived of useful counsel.

Moreover, without regulatory guidance, the Committee itself would be deprived of useful input. Unlike any provision of the North Carolina Trails System Act, the rule in 15A N.C. Admin. Code 12G .0201 contemplates a process by which applications for designation of State Trails may be processed by the Trails Committee.[52] The Act does not mention an application process, and instead simply charges DENR with identifying trails for inclusion. Insofar as DENR's decision is informed by the Committee, which is in turn informed by information and applications received from the public, rules allowing and governing the submission of such information and applications by the public are necessary to inform DENR's decisions.

---

[47] The statute says that the Department shall "have or designate" maintenance responsibility. N.C. Gen. Stat. § 113A-93. The rule provides that "State trails may be managed by federal, state or local governmental units or corporations registered with the Secretary of State." 15A N.C. Admin. Code 12G .0103(c).

[48] Granted, the rule in 15A N.C. Admin. Code 12G .0102 simply provides definitions of terms included elsewhere in Subchapter 12G, so if the rest of the Subchapter expires, the definitions will be of limited utility. However, because we believe various provisions of Subchapter 12G are in fact necessary, the continued existence of the rules, for which we are advocating, merits definition of certain terms employed therein.

[49] N.C. Gen. Stat. § 113A-88(d).

[50] N.C. Gen. Stat. § 113A-88(b).

[51] 15A N.C. Admin. Code 12G .0201.

[52] *Id.* ("Applications must be reviewed by the committee.").

The rules also dictate the contents of an application for designation, and each rule better enables the Committee to advise the Department. For instance, one rule requires applications to "include resolutions or other appropriate documents clearly indicating the support of affected governmental units for state designation of the trail."[53] In contrast, the North Carolina Trails System Act merely requires the Department to "consult" with local governments before determining the *location* of the route of a trail through that local government's jurisdiction.[54] By requiring proof of support for a proposed trail by the affected governmental units, the rule better equips the Trails Committee to "coordinate trail development among local governments," as required by statue.[55]

Similarly, 15A N.C. Admin. Code 12G .0203 requires any application for trail designation to "include a discussion of the potential effects designation could have on adjacent landowners as well as how negative effects will be minimized." This rule is necessary to implement the statutory requirement that "[r]easonable effort shall be made to minimize any adverse effects upon adjacent landowners and users."[56] Unless information is submitted as now required by the rule, it is unclear, in the language of the Trails System Act, how the Department will ensure compliance with N. C. Gen. Stat. § 113A-89. Like other rules that require an application that includes important information, this rule is necessary to implement the Trails System Act.

The rules in Subchapter 12G also provide useful guidance regarding the use of designated trails. The North Carolina Trails System Act does not specify the appropriate use of trails; instead it directs the Secretary to make rules addressing that subject.[57] The resulting rule provides that "[t]he secretary shall determine the appropriate uses permitted on a single trail within the system, based on user safety, user enjoyment, and protection of the environment."[58] This rule is necessary because it indicates by whom, and under what criteria, the use of designated trails will be established.

Another matter that is not adequately addressed in the North Carolina Trails System Act is the use of volunteer efforts.[59] 15A N.C. Admin. Code 12G .0305 is necessary to express an agency policy of encouraging and facilitating the use of "trained volunteers in planning

---

[53] 15A N.C. Admin. Code 12G .0202.

[54] N.C. Gen. Stat. § 113A-89.

[55] N.C. Gen. Stat. § 113A-88(c).

[56] N.C. Gen. Stat. § 113A-89. The rule requires an applicant to provide information necessary for the Committee to ensure, after reviewing the application, that the statutory requirement is met.

[57] N.C. Gen. Stat. § 113A-88(d). The only statutory direction regarding the use of trails is the mention that, with respect to "State recreation trails," the Secretary retains discretion to permit "more than one" type of travel (e.g., "foot travel" and travel by "horseback"). N.C. Gen. Stat. § 113A-86(2).

[58] 15A N.C. Admin. Code 12G .0301.

[59] The only use of the word "volunteer" is in the title, not even the text, of a statute exclusively addressing trails used for cycling. N.C. Gen. Stat. § 113A-87.1.

constructing and maintaining components of the system." The rule is also a useful reminder of the legal protections afforded to volunteers working on behalf of the State.

The final rule in Subchapter 12G dictates naming conventions for trails in the system.[60] The rule states the agency's reluctance to name trails after living individuals, permission to name trails after organized groups and corporations, and preference for naming trails after natural features, historic events, or places.[61] Since named trails are still being added to the system, and the subject of their naming is not mentioned in the General Statutes, the rule is neither redundant nor obsolete. Moreover, when property owners contemplate conveyance of a property interest to the State for use as a trail, DPR's policy regarding the naming of trails may affect the terms of the transaction.

As with the other subchapters discussed above, the rules within Subchapter 12G should be deemed "necessary without substantive public interest" if no adverse comments have been received by DPR.

IV. Subchapter 12I - State Natural Areas

The Nature Preserves Act recognizes the importance of affording "the people of North Carolina" the opportunity to "benefit from the scientific, aesthetic, cultural, and spiritual values" possessed by natural areas.[62] In order to ensure this opportunity, the Act seeks "to establish and maintain a State Registry of Natural Heritage Areas" and "prescribe methods" for the dedication thereof.[63] However, the Act defers to agency expertise regarding the selection of natural areas that merit protection as natural areas or nature preserves. The Nature Preserves Act therefore commands the Secretary of DENR to "establish by rule the criteria for selection, registration, and dedication of natural areas and nature preserves."[64] The legislature's silence on these issues belies any argument that the rules subsequently issued to govern natural areas are "redundant" or obsolete due to statutory guidance.

DENR adopted two notable bodies of rules in Title 15A of the North Carolina Administrative Code to satisfy the statutory mandate. The first was a general set of rules in Subchapter 12H governing the Natural Heritage Program.[65] However, by also enacting rules in Subchapter 12I governing "natural areas within the state parks and recreation system,"[66] the agency distinguished between land on the Registry and land in the State Parks System.

---

[60] *See* 15A N.C. Admin. Code 12G .0306.

[61] *Id.*

[62] N.C. Gen. Stat. § 113A-164.2(b).

[63] *Id.*

[64] N.C. Gen. Stat. § 113A-164.4(1). The Act itself speaks briefly to the registration of natural areas, *see* N.C. Gen. Stat. 113A-164.5 (2013), and designation of nature preserves, *see id.* § 113A-164.6, but does not address the criteria by which land is selected for registration or designation.

[65] *See* 15A N.C. Admin. Code 12H .0202.

[66] 15A N.C. Admin. Code 12I .0101.

There are some similarities between natural areas managed by the Natural Heritage Program and those managed by DPR. Both the Natural Heritage Program and the State Parks System seek to preserve natural areas of special significance to the people of North Carolina. This similarity in program goals is evident in the DPR rule discussing the "purpose of establishing natural areas within the state parks and recreation system."[67] The criteria by which sites are evaluated for inclusion in the Registry or the State Parks System,[68] as well as criteria by which natural features are evaluated,[69] are also similar.

Notwithstanding, there are important distinctions between natural areas that are simply listed on the Registry and natural areas under DPR's control. The Registry is "a voluntary, non-regulatory, non-binding recognition program,"[70] and lands on the Registry may be managed by private citizens. In contrast, State parks are managed by DPR and are subject to specific rules and regulations not necessarily applicable to natural areas outside of the State Parks System. The rules in Subchapter 12I are necessary to define the characteristics of natural areas that merit inclusion in the State Parks System and dictate principles by which those natural areas will be managed.[71]

As such, the rules specific to natural areas in the State Parks System go further than those in Subchapter 12H, reflecting additional considerations attendant to the State's management responsibility. First, only natural areas of "statewide significance" (i.e., those of "high natural or scenic quality or exceptional scientific and educational value") may be considered for acquisition by DPR.[72] While "natural areas worthy of permanent preservation" that "are of less than statewide significance may be designated" on DPR lands, 15A N.C. Admin. Code 12I .0203 clarifies that the additional public expense related to acquisition and management of new natural areas by DPR is only appropriate for exceptional natural areas.

Also unlike the general rules applicable to the Natural Heritage Program, a rule in Subchapter 12I establishes size and buffer restrictions applicable only to natural areas managed

---

[67] *Compare* 15A N.C. Admin. Code 12I .0101 (stating DPR's goals of "(1) preserving and protecting areas of scientific value; (2) portraying and interpreting plant and animal life and other natural features; and (3) conserving and perpetuating outstanding examples of North Carolina's natural diversity and scenic grandeur") *with* 15A N.C. Admin. Code 12H .0102 (explaining that the purpose of the registry is, *inter alia*, "to . . . identify . . . natural areas which best exemplify the state's natural heritage" and "promote public awareness and appreciation of natural diversity").

[68] *Compare* 15A N.C. Admin. Code 12I .0201 (listing types of natural features eligible for inclusion as a natural area in the State Parks System) *with* 15A N.C. Admin. Code 12H .0202(a).

[69] *Compare* 15A N.C. Admin. Code 12I .0202 *with* 15A N.C. Admin. Code 12H .0202(b).

[70] 15A N.C. Admin. Code 12H .0201.

[71] The agency clearly contemplated different management regimes for natural areas in State parks when it developed rules for management of natural areas on State lands but explicitly excluded natural areas on State lands managed by DENR. 15A N.C. Admin. Code .0208(a) ("This Rule establishes procedures for designating Natural Heritage Areas on state lands that are administered by agencies other than the Department of Natural Resources and Community Development."). The Department referenced in the rule has since been renamed the Department of Environment and Natural Resources.

[72] 15A N.C. Admin. Code 12I .0203.

by DPR.[73] While, under the general rules, a "buffer zone is desirable to assure protection" of a natural area, when the natural area is managed by DPR, the buffer zone is a strict requirement.[74] DPR's heightened interest in permanent preservation is also evident in rules discussing perpetual agency management. While private owners of registered natural areas need only sign a "non-binding agreement" to manage the site for protection of natural resources, and may rescind that agreement at any time, DPR will only accept property for establishment of a natural area if the devise involves "no commitments, privileges, or conditions inconsistent with conservation and maintenance of the property as a natural area."[75] In other words, when DPR undertakes to manage a natural area, it does so only where the land is reserved for "permanent preservation."[76]

Perhaps the most important DPR rules related to natural areas are those specifying the three different categories of natural areas in the State Parks System and the management principles applicable to land in each category. Neither the Nature Preserves Act nor the rules in Subchapter 12H delineate lands based on their capacity to serve specific functions. DPR rules distinguish between natural areas in ways exclusively dictated by the rules in Subchapter 12I.

The first such rule pertains to "scientific areas," which the agency defines as natural areas that merit "special protection for scientific and educational purposes."[77] Under this rule, access to scientific areas is limited primarily to scientists and researchers, while other activity such as construction in these areas is prohibited if "unrelated to observation and scientific study."[78] There is no statute or rule that similarly dictates this management policy for natural areas that DPR deems to have exceptional scientific value.

Because DPR's educational mission spans beyond facilitating research, another necessary rule addresses "interpretive areas" and their management. Use of these kinds of natural areas "shall be primarily for educational and interpretive purposes," and development should be limited to that necessary to support those purposes.[79] Again, no other statute or rule delimits the acceptable use of "interpretive areas" or adequately ensures that these areas will be preserved to facilitate the interpretive mission of DPR.

Finally, the rule in 15A N.C. Admin. Code 12I .0303 speaks to the management of "conservation areas" – natural areas that are not reserved for scientific or interpretive use. These conservation areas may accommodate additional construction and recreational activity, provided such activity does not "conflict with conservation needs." The designation of acceptable uses and practices is necessary to guide DPR's conservation and management of these natural areas,

---

[73] 15A N.C. Admin. Code 12I .0204.

[74] *Id.* ("Sites selected as natural areas shall be large enough to insure adequate buffer protection of the included natural features from external disturbances and encroachments.").

[75] 15A N.C. Admin. Code 12I .0205.

[76] *See* 15A N.C. Admin. Code 12I .0203.

[77] 15A N.C. Admin. Code 12I .0301.

[78] *Id.*

[79] 15A N.C. Admin. Code 12I .302.

and, accordingly, these rules, and the others in Subchapter 12I, should be designated "necessary without substantive public interest" if no adverse comments have been received by DPR.

V. Subchapter 12J - Land and Water Conservation Fund

The last group of rules labeled "unnecessary" comprises all the rules in Subchapter 12J of Title 15A. These rules explain how state agencies and local governments can access federal funds allocated by the Land and Water Conservation Fund (LWCF). These funds are granted to the State "for the purposes of statewide outdoor recreation planning; and, the acquisition and/or development of outdoor recreation areas and facilities."[80] The Land and Water Conservation Fund Act established the LWCF and mandates certain requirements for State LWCF programs, but offers scant guidance to inform the actual administration of State programs.[81] Moreover, no North Carolina statute or rule outside of Subchapter 12J addresses the role that the State plays in the review, evaluation, and recommendation of projects for LWCF funding or the responsibilities of the State regarding project monitoring and administration. These rules are therefore not only necessary, but also obviously "adopted to conform to or implement federal law."[82]

The first rule in Subchapter 12J notes the availability of LWCF funding and defines the role of the "state program" established to access that funding for projects in North Carolina.[83] Without it, there is little doubt that accessing LWCF funding would be more difficult. As explained in the rule (and nowhere else in the law), this State program serves as a "liaison between local, state and federal agencies in administration of the [LWCF] grants program" and "reviews, evaluates and recommends which project [sic] should be funded to the National Park Service (NPS)."[84]

The next rule in Subchapter 12J states that "authority to accept and administer funds for the program at the state level is vested through a formal agreement between the state and the U.S. Department of the Interior."[85] Potential applicants need to understand that, although LWCF funds are federally allocated, they are administered at the State level. The rule further explains that authority to administer the State's LWCF program is vested in a state liaison officer (SLO) appointed by the Governor. This provision supplies important clarification, as the federal government allows appointment of the SLO by either the Governor or the legislature.[86] Finally, the rule authorizes the SLO to appoint "[a]lternate state liaison officers" to aid in the

---

[80] 15A N.C. Admin. Code 12J .0101.

[81] Land and Water Conservation Fund Act of 1965, P.L. 88-578, 78 Stat. 897 (Sept. 3, 1964).

[82] *See* N.C. Gen. Stat. § 150B-21.3A(e) (explaining that rules adopted for these purposes "shall not expire" even if labeled "unnecessary" during the rules review process).

[83] 15A N.C. Admin. Code 12J .0101.

[84] *Id.*

[85] 15A N.C. Admin. Code 12J .0102.

[86] *See* National Park Service, U.S. Department of the Interior, *Land and Water Conservation Fund State Assistance Program: Federal Financial Assistance Manual* at 1-1 (Oct. 1, 2008) (stating that the SLO may be designated by the Governor or by state statute).

administration of the program. This provision is important, as the designation of "and alternate(s) to act on behalf of the SLO is strongly encouraged," albeit not required, by the federal agency that administers the LWCF.[87]

Because the SLO is responsible for administering the LWCF program at the state level, rules defining those administrative responsibilities are also necessary to implement the program. Accordingly, the rules in Subchapter 12J require the SLO to establish the "minimum and maximum amount of grant awards for state agency projects and local government projects."[88] This determination, which is not dictated by federal or state law, is necessary to inform each applicant of the scope of the financial assistance available under North Carolina's LWCF program. Next, the SLO is required to approve the funding cycle schedule.[89] This duty is critical to the administration of the State LWCF program because the funding cycle informs both the deadline for submission of applications [90] and the continued viability of rejected applications.[91] Third, the rules require the SLO to conduct an annual review of the LWCF allocation,[92] which is necessary to assist in the production of the nation-wide LWCF report prepared each year by the National Park Service.[93]

A number of other rules in Subchapter 12J are also necessary to the submission and evaluation of funding requests. First, several rules provide guidance regarding the pre-application process and fall into the category of rules that are, by definition, "necessary without substantive public interest" under 150B-21.3A-(a)(4). These rules include those that are necessary to tell applicants where to send their pre-applications[94] and to state DENR's authority to prescribe the requirements for the submission of pre-applications.[95] Notably, the pre-application requirements established by DENR may differ from those established by the U.S. Department of Interior for the submission of LWCF applications, so the rule codified in 15A N.C. Admin. Code 12J .0304 provides necessary clarification to applicants.[96]

---

[87] *Id.* at 1-2.

[88] 15A N.C. Admin. Code 12J .0203.

[89] 15A N.C. Admin. Code 12J .0302(b).

[90] 15A N.C. Admin. Code 12J .0302(b) ("Applications must be received according to the funding cycle schedule approved by the state liaison officer.")

[91] 15A N.C. Admin. Code 12J .0302(c) ("Project applications which are considered for funding but cannot be funded during a funding cycle may be carried over to the next funding cycle up to a total of two funding cycles.").

[92] 15A N.C. Admin. Code 12J .0201.

[93] National Park Service, U.S. Department of the Interior, Land and Water Conservation Fund State Assistance Program: Federal Financial Assistance Manual at 1-7 (Oct. 1, 2008).

[94] 15A N.C. Admin. Code 12J .0301 ("All pre-application and applications for LWCF assistance must be submitted to the Division's regional office park and recreation consultant serving the applicant . . . .")

[95] 15A N.C. Admin. Code 12J. .0303.

[96] *Compare* 15A N.C. Admin. Code 12J .0303 ("Pre-application shall be submitted according to requirements prescribed by the Department.") *with* 15A N.C. Admin. Code 12J .0304 ("All applications must be submitted according to requirements . . . prescribed by the Department of the Interior in the Land and Water Conservation Fund Grants Manual.").

Finally, the rule regarding the evaluation of applications establishes the process by which applications will be considered, both at the regional and state-wide levels, prior to the State's submission of funding recommendations.[97] This process is not dictated by any other law, so the rule is necessary to explain how, and by whom, applications will be reviewed.

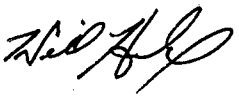
Ultimately, while DPR continues to operate a program that processes applications for federal funds allocated by the Land and Water Conservation Fund, the rules explaining that program, and how it can be used by the public to access funding, are necessary. Assuming there has been no objection to these rules, they should therefore be labeled "necessary without substantive public interest."

Conclusion

As demonstrated above, Title 15A of the North Carolina Administrative Code is replete with important guidance regarding the administration of various natural resources programs under the purview of DPR. For most of these programs, a simple skeletal framework was enacted by the legislature, and the agency was ordered and/or authorized to flesh out the details. Without the rules in Subchapters 12D, 12F, 12G, 12I, and 12J, North Carolinians will lose important information, elaboration, and clarification regarding programs administered with their tax dollars and the agency will lose years of institutional expertise memorialized in regulatory guidance.

Therefore, we urge the agency to reconsider its initial determination that the rules discussed above are "unnecessary," and deem them instead "necessary" as well as "without substantive public interest" if no adverse comments have been received by DPR. We trust the agency does not intend to terminate the operations of DPR, and that DPR will continue to perform the functions described in the rules discussed above—e.g., acquiring land for parks, designating and managing natural and scenic rivers, growing and managing the Trails System, establishing and managing natural areas, and administering the State LWCF program—with the full support of DENR. If that is the case, DENR should retain these rules, as they are used by the agency and the public to understand how agency functions will be performed, how these resources will be protected, and how DPR will fulfill its mandate to "promote understanding of and pride in the natural heritage of this State."[98]

Respectfully,



Will Hendrick
Associate Attorney

---

[97] 15A N.C. Admin. Code 12J .0305.

[98] N.C. Gen. Stat. § 113-44.8(b).

Post Office Box 37655
Raleigh, NC 27627
(919) 827-1088
www.ncfsp.org

August 8, 2014

DENR Rule Comments
1601 Mail Service Center
Raleigh, NC 27699

Dear Sir or Madam:

The following comments are submitted on behalf of Friends of State Parks, Inc., a non-profit corporation organized "to enhance and perpetuate the state park system of North Carolina for the enjoyment and benefit of all the state's people."[1] To fulfill this role, we seek to "assist and advise" the Division of Parks and Recreation (DPR) on issues of importance to our State Parks.[2] As such, we appreciate the opportunity to comment on the initial determination that all rules in Subchapters 12D, 12F, 12G, 12I, and 12J of Title 15A (more than a third of the rules administered by DPR) are "unnecessary."

We are very concerned by the consequence of this initial determination. Rules ultimately deemed "unnecessary" as part of the rules review process will automatically expire unless they were adopted "to conform to or implement federal law."[3] The rules in question were, for the most part, adopted to implement State law, so they are at risk of expiration unless the agency revisits its labeling decision.

Specifically, these rules were adopted to accomplish the legislative vision expressed by our General Assembly[4] in the State Parks Act,[5] the Natural and Scenic Rivers Act,[6] the North Carolina Trails System Act,[7] and the Nature Preserves Act.[8] With each enactment, our lawmakers recognized the value of our State's natural heritage, outlined a program to preserve it, then expressly authorized, and in some instances directly commanded, the Department of Environmental and Natural Resources (DENR) to adopt rules to fill in the specifics.

---

[1] Bylaws of Friends of State Parks, Inc., Art. III (Nov. 2, 2013).
[2] *Id.*
[3] N.C. Gen. Stat. § 150B-21.3A(c)(2)f.
[4] There is one exception to the observation that the rules in question were adopted to implement state law. The rules in Subchapter 12J of Chapter 15A were adopted instead in response to federal legislation—the Land and Water Conservation Fund Act. This law established a funding stream to support land conservation and the improvement of outdoor recreation opportunities. *See generally* Land and Water Conservation Fund Act of 1965, P.L. 88-578, 78 Stat. 897 (Sept. 3, 1964). Rules implementing this law are, however, directly related to the mission of the Division of Parks and Recreation and in furtherance of the overall goals of the State Parks Act.
[5] N.C. Gen. Stat. § 113-44.7 *et seq.*
[6] N.C. Gen. Stat. § 113A-30 *et seq.*
[7] N.C. Gen. Stat. § 113A-83 *et seq.*
[8] N.C. Gen. Stat. § 113A-164.1 *et seq.*

The rules subsequently adopted by the agency, and codified in Subchapters 12D, 12F, 12G, 12I, and 12J, flesh out the legislature's vision and often address related issues not directly contemplated in the statutes, but necessary to fully implement them. In other words, these rules are not "redundant." Moreover, DPR is still performing the functions governed by these rules, such as acquiring lands for inclusion in the State Parks system, managing natural and scenic rivers, expanding the trails system, preserving designated natural areas, and distributing money allocated by the Land and Water Conservation fund. So these rules are not "obsolete."[9]

Since these rules are neither "obsolete" nor "redundant," the agency presumably deemed them "otherwise not needed."[10] However, we believe there is still a need for these rules. To be clear, we have the utmost faith in our partners in DPR; we are confident that DPR personnel will always strive to protect the natural resources they control for the people of North Carolina, even absent a rule stating how to do so. But good intent must be supported by clear guidance to ensure adequate protection of the resources in question. The rules provide useful guidance to DPR and to the public regarding how the State manages its natural resources. The elimination of these rules would negatively affect the operation of the DPR programs, and this is why we urge DPR to keep them on the books.

Importantly, there is a way to retain these rules while limiting the expenditure of agency resources. We understand that the rules were labeled "unnecessary" in part to avoid the rulemaking burden associated with their re-adoption. This is a legitimate concern, given the hours of time spent completing the paperwork, analysis, and hearings associated with environmental rulemaking.[11] We appreciate, perhaps more than most organizations, the value of efficiently utilizing DPR resources. However, we believe the retention of these rules is possible without overburdening DPR with rulemaking obligations. We deduce from that fact that these rules were labeled "unnecessary" that no one has objected to these rules and the agency does not anticipate such objection.[12] Therefore, if the agency simply affirms the necessity of the rules, each of them will, in the absence of objections, remain in the North Carolina Administrative Code without any additional agency action. [13] We urge DENR to take the simple, yet impactful, step of labeling the rules "necessary without substantive public interest."

---

[9] To the extent that the current operation of DPR programs warrants *revision* to the rules to better align them with DPR's current practices, we defer to the expertise of the Division. After all, amendment of a rule recognizes the continued necessity of regulatory guidance coupled with a need for updates. In contrast, allowing whole groups of rules to expire implies that regulatory guidance is not simply outdated but instead not needed at all.

[10] N.C. Gen. Stat. § 150B-21.3A(a)(6) (defining an "unnecessary" rule as "a rule that the agency determines to be obsolete, redundant, or otherwise not needed .

[11] *See, e.g.*, N.C. Gen. Stat. § 150B-21.2 (stating the procedure for adopting a permanent rule); *id.* § 150B-19.3 (imposing additional rulemaking requirements related to rules adopted "for the protection of the environment or natural resources").

[12] Had such objection been documented or anticipated, the agency could not label the rules "unnecessary." *See See* N.C. Gen. Stat. § 150B-21.3A(a)(3) (explaining that if public comment—defined in G.S. § 150B-21.3A(a)(5) to mean objection—has been received in the past two years, or if the agency anticipates objection to a rule affecting a property interest, the agency must label the rule "necessary with substantive public interest"). Were there such documented or anticipated objection, the agency would have to readopt the rules through the arduous and cumbersome rulemaking process.

[13] *See* N.C. Gen. Stat. § 150B-21.3A(c)(2)e (explaining that "all rules that the agency determined to be necessary and without substantive public interest" and for which to which no meritorious objection was raised will "be allowed to remain in effect without further action.").

For the reasons stated below, we believe these rules are critical to the operation of the Parks programs as intended by the legislature. We hope, in light of our comments, that the agency will reach the same conclusion.

The State Parks Act established our State Parks System to preserve "representative examples" of North Carolina's natural resources "in order to promote understanding of and pride in the natural heritage of this State."[14] Notably, the State Parks Act does not explain how lands will be selected for acquisition to augment the system; it simply says that acquisitions should be consistent with a System Plan that is developed with "full public participation."[15] The two rules in Subchapter 12D enable, and inform, public participation in the land acquisition decisions made by DPR, and are therefore necessary. The first rule encourages citizens to recommend acquisition of lands for parks, dictates the contents of such a recommendation, and ensures an agency response to such recommendations.[16] The second rule outlines the criteria that DENR considers when making land acquisition decisions.[17] These criteria are necessary to ensure that parks lands are suitable examples of our State's natural resources; they are also necessary to guide citizen recommendations for land acquisition.

The Natural and Scenic Rivers Act discusses additional natural resources managed by DPR. That law recognized that that "certain rivers of North Carolina" should be preserved "in their natural and scenic condition,"[18] but it provided scant guidance as to which rivers should be protected or how their natural or scenic qualities would be preserved. DENR adopted four rules to fulfill the legislature's vision, and we believe they are necessary to achieve that purpose. The first rule clarifies and augments the list of criteria for designation of a river as "natural" or "scenic."[19] The second rule provides important clarification of the law enforcement jurisdiction of DPR on or near natural and scenic rivers.[20] The third and fourth rules are especially important. They include various provisions related to the management of natural and scenic rivers, including language detailing the acceptable recreational activities in, location of public access to, and management of facilities near these exceptional water bodies.[21] In sum, the rules in Subchapter 12F are necessary to implement the Natural and Scenic Rivers Act because they explain, in far more detail than the Act itself, how these rivers will be selected and protected.

Another statute central to the mission of DPR is the North Carolina Trails System Act. The General Assembly unambiguously stated that DENR "shall make such rules as to trail development, management, and use that are necessary for the implementation of this Article."[22] The rules in Subchapter 12G respond to this command. For instance, one rule requires the North

---

[14] N.C. Gen. Stat. § 113-44.8(b).
[15] N.C. Gen. Stat. § 113-44.11.; N.C. Gen. Stat. § 113-44.14(b).
[16] 15A N.C. Admin. Code 12D .0101.
[17] 15A N.C. Admin. Code 12D .0102.
[18] N.C. Gen. Stat. § 113A-31.
[19] 15A N.C. Admin. Code 12F .0202. The rule provides clarification absent from the statute regarding, for example the length and boundaries of, and public access to, natural and scenic rivers. *Id.* Notably, the legislature specifically sought this clarification with respect to river boundaries, G.S. § 113A-35(2), and public access, G.S. § § 113A-35(5).
[20] 15A N.C. Admin. Code 12F .0302. Because DPR jurisdiction is limited to "lands or waters under the control or supervision of the Department of Environment and Natural Resources," the rule explains the limited applicability of DPR "rules" and "regulations" and notes that DPR policies and procedures may be limited by the terms of its property interest.
[21] 15A N.C. Admin. Code 12F .0303, .0304
[22] N.C. Gen. Stat. § 113A-88(d).

Carolina Trails Committee to review applications for inclusion in the State Trails System and counsel the agency regarding "the trail's readiness for use, location and population served, length, design and use, public access rights, and management."[23] Two additional rules ensure that the Committee will receive necessary information by requiring applicants to document appropriate consultation with local governments and explain efforts to minimize effects of trail designation on adjacent landowners.[24] Another rule curbs inappropriate use of trails by explaining that use will be permitted "based on user safety, user enjoyment, and protection of the environment."[25] Two more rules discuss the legal protections afforded volunteer trail workers[26] and the conventions used when naming trails.[27] Taken together, these rules are critical to the continued operation of the trails system, and they help guide the public's participation in that endeavor.

While DPR manages trails primarily for recreational purposes, it manages other resources with a particular focus on conservation. For instance, DPR manages numerous natural areas in furtherance of the Nature Preserves Act. That law directs DENR to "establish by rule the criteria for selection, registration, and dedication of natural areas" and the rules in Subchapter 12I do so with respect to natural areas managed by DPR. First, the rules clarify that only natural areas of "statewide significance" should be acquired by DPR.[28] The rules require DPR to manage these particularly valuable natural resources with a goal of "permanent preservation."[29] They therefore impose size and buffer requirements[30] while also preventing grantors from reserving property rights inconsistent with the land's preservation.[31] Of notable importance are the rules explaining the three types of natural areas managed by DPR: scientific areas,[32] interpretive areas,[33] and "conservation areas."[34] The rules memorialize DPR's commitment to education and research by clarifying the appropriate use (and users) of areas specifically reserved to enable academic or interpretive efforts. Taken together, the rules in Subchapter 12I are necessary to ensure the continued protection of designated natural areas managed by DPR.

While the aforementioned rules all address the acquisition and management of natural resources *by* the State, DPR also adopted rules governing the allocation of financial resources *to* the State through the Land and Water Conservation Fund (LWCF). The federal Land and Water Conservation Fund Act established a revenue stream to support the development of parks and

---

[23] 15A N.C. Admin. Code 12G .0201.
[24] 15A N.C. Admin. Code 12G .202, .0203.
[25] 15A N.C. Admin. Code 12G .0301.
[26] 15A N.C. Admin. Code 12G .0305.
[27] 15A N.C. Admin. Code 12G .0306.
[28] 15A N.C. Admin. Code 12I .0203. Pursuant to a separate rule, *id.* 12I .0203, natural areas of less than statewide significance may be *designated* on park lands, but the rules clarify that public funds should only be spent to *acquire* natural areas of statewide significance.
[29] *See* 15A N.C. Admin. Code 12I .0203
[30] 15A N.C. Admin. Code 12I .0204.
[31] 15A N.C. Admin. Code 12I .0205.
[32] 15A N.C. Admin. Code 12I .0301.
[33] 15A N.C. Admin. Code 12I .302.
[34] in 15A N.C. Admin. Code 12I .0303

outdoor recreation opportunities.[35] The rules in Subchapter 12J implement this Act, first by establishing a state program to process applications for, and distribute federal allocations of, such funding.[36] Another rule dictates who (the state liaison officer) heads this program and has authority to administer LWCF funds.[37] Additional rules address important details about the program, including the scope of available awards, the funding cycle, and the annual program review.[38] Still other rules explain how interested municipalities can apply for LWCF funding.[39] When combined, these rules provide necessary guidance to both DPR and the public regarding access by North Carolinians to available federal funding in furtherance of DPR's mission.

In conclusion, as detailed above, the rules in Subchapters 12D, 12F, 12G, 12I, and 12J are neither redundant, obsolete, nor otherwise not needed. On the contrary, they provide important details necessary to the operation of programs established by our lawmakers and implemented by DPR. These rules have guided DPR to effective operation of these programs in the past; we hope that guidance will be preserved.

It is rare when an opportunity is presented to accomplish so much by doing so little. Yet, all that DPR must do to preserve decades of operational expertise memorialized in Chapter 12 of Title 15A is label the rules in Subchapters 12D, 12F, 12G, 12I, and 12J as "necessary without substantive public interest." We sincerely hope that the agency will take this small step in recognition of the necessity of, and public support for, these rules.

Respectfully submitted,

Mary Penny Kelley

Mary Penny Kelley
President
Friends of State Parks, Inc.

---

[35] Land and Water Conservation Fund Act of 1965, P.L. 88-578, 78 Stat. 897 (Sept. 3, 1964); *see also* 15A N.C. Admin. Code 12J .0101 (explaining that LWCF funds are allocated "for the purposes of statewide outdoor recreation planning; and, the acquisition and/or development of outdoor recreation areas and facilities.").

[36] *See* 15A N.C. Admin. Code 12J .0101.

[37] 15A N.C. Admin. Code 12J .0102.

[38] 15A N.C. Admin. Code 12J .0203.; 15A N.C. Admin. Code 12J .0302; 15A N.C. Admin. Code 12J .0201.

[39] 15A N.C. Admin. Code 12J .0301 to .0305.

15A NCAC 12F .0202 CRITERIA FOR DESIGNATION

Comment - (Southern Environmental Law Center on behave of the North Carolina Conservation Network, Pamlico-Tar River Foundation, Clean Air Carolina, Appalachian Voices, Cape Fear River Watch, Western North Carolina Alliance, Clean Water for North Carolina, Environmental Defense Fund, Neuse Riverkeeper Foundation, and North Carolina League of Conservation Voters):

First, the rule codified in 15A N.C. Admin. Code 12F .0202 state the criteria for inclusion in the natural and scenic rivers system. This rule explicitly supplements criteria stated in N.C. Gen. Stat. § 113A-35, and demonstrates agency recognition of the need for regulations to elaborate on the skeletal framework provided the legislature.[30] The expiration of this rule would entirely eliminate certain criteria from consideration by the State. For instance, the State would no longer be required to consider the "environmental quality" of the waters proposed for designation as "natural or "scenic" rivers.[31]

The provisions of the rule related to "environmental quality" provide important guidance about, *inter alia*, the desirable natural state of the shoreline adjacent to these river segments.[32] Without this rule, the only statutory guidance on this subject must be wrested from the undefined phrases "essentially primitive" and "largely primitive and largely undeveloped."[33] In contrast, the rule clarifies the acceptable degree of habitation, development, and "evidence of man's intrusion" that may be visible from a river worthy of "natural" and "scenic" designation.

Even where the Natural and Scenic Rivers Act states a criterion for consideration, the rules provide important clarity. For instance, the Act simply requires that, to be eligible for designation, a river segment "must be no less than one mile."[34] The rule states, however, that "a river segment should be long enough to provide a rewarding experience and to encompass a sufficient portion of those features and processes that make the segment worthy of consideration"; accordingly, the rule provides that, in urban areas, designated river segments should generally be "at least two and one-half miles long" while, in rural areas, "a segment should be at least five miles in length.[35]

With respect to the "boundaries" of natural and scenic rivers, the legislature expressly recognized the value of agency input, stating that boundaries should be "the visual horizon *or such distance from each shoreline as may be determined to be necessary by the Secretary,* but shall not be less than 20 feet."[36] The rule codified in 15A N.C. Admin. Code 12F .0202 expresses the Secretary's determination that "the natural features and forces necessary for the maintenance of a high quality riverine resources must be identified, and boundaries should be established to provide for adequate protection of these features."[37] A clarification authorized and invited by the legislature can hardly be described as "unnecessary."

Another invitation for clarification was extended when the legislature stated, in the Natural and Scenic Rivers Act, that public access to designated rivers "shall be limited, *but may be permitted to the extent deemed proper by the Secretary,* and in keeping with the property interest acquired by the Department and the purposes of this Article."[38] The statute clearly envisions the codification of one or more rules to govern the terms of public access to support those purposes. The resulting rule, codified pursuant to that statute, speaks to the means of access, addresses the permissible location and visibility of roads, and provides specific instruction applicable to coastal waters. The rule that establishes "the extent" of public access "deemed proper by the Secretary" is therefore necessary to implement the statute.

To summarize, the rules governing designation and management of natural and scenic rivers are not “unnecessary,” and, if DPR has received no adverse public comments with respect to these rules, they should be designated as “necessary without substantive public interest.”

Agency Response:

We have made the final determination as Necessary with Substantive Public Interest and will consider your comments during the readoption process.

Comment - (Friends of State Parks):

DENR adopted four rules to fulfill the legislature's vision, and we believe they are necessary to achieve that purpose. The first rule clarifies and augments the list of criteria for designation of a river as "natural" or "scenic." In sum, the rules in Subchapter 12F are necessary to implement the Natural and Scenic Rivers Act because they explain, in far more detail than the Act itself, how these rivers will be selected and protected.

Agency Response:

We have made the final determination as Necessary with Substantive Public Interest and will consider your comments during the readoption process.

.

15A NCAC 12F .0302 NATURAL AND SCENIC RIVERS

Comment - (Southern Environmental Law Center on behave of the North Carolina Conservation Network, Pamlico-Tar River Foundation, Clean Air Carolina, Appalachian Voices, Cape Fear River Watch, Western North Carolina Alliance, Clean Water for North Carolina, Environmental Defense Fund, Neuse Riverkeeper Foundation, and North Carolina League of Conservation Voters):

To continue, because the shoreline of a designated river is not necessarily owned by DENR, the rule in 15A N.C. Admin. Code 12F .0302 is necessary to clarify the bounds of DPR's jurisdiction. By statute, the law enforcement jurisdiction of park rangers is limited to "lands or waters under the control or supervision of the Department of Environment and Natural Resources."[39] Thus, the rule provides an important distinction between places where the law (e.g., "rules" and "regulations") may be enforced (i.e., "only in areas to which the state has either prior jurisdiction or fee simple possession"[40]) and places where DPR's law enforcement jurisdiction is nonexistent and enforcement of "policies and procedures" may be appropriately limited by the terms attached to the grant of a lesser property interest. Certainly a rule explaining how, if at all, the implementation of the Natural and Scenic Rivers Act affects the jurisdiction of the implementing agency is necessary to the successful implementation of the Act itself.

To summarize, the rules governing designation and management of natural and scenic rivers are not "unnecessary," and, if DPR has received no adverse public comments with respect to these rules, they should be designated as "necessary without substantive public interest."

Agency Response:

We have made the final determination as Necessary with Substantive Public Interest and will consider your comments during the readoption process.

Comment - (Friends of State Parks):

DENR adopted four rules to fulfill the legislature's vision, and we believe they are necessary to achieve that purpose. The second rule provides important clarification of the law enforcement jurisdiction of DPR on or near natural and scenic rivers. In sum, the rules in Subchapter 12F are necessary to implement the Natural and Scenic Rivers Act because they explain, in far more detail than the Act itself, how these rivers will be selected and protected.

Agency Response:

We have made the final determination as Necessary with Substantive Public Interest and will consider your comments during the readoption process

15A NCAC 12F .0303 MANAGEMENT OF NATURAL RIVER AREAS

Comment - (Southern Environmental Law Center on behave of the North Carolina Conservation Network, Pamlico-Tar River Foundation, Clean Air Carolina, Appalachian Voices, Cape Fear River Watch, Western North Carolina Alliance, Clean Water for North Carolina, Environmental Defense Fund, Neuse Riverkeeper Foundation, and North Carolina League of Conservation Voters):

Perhaps no rules are more important to the implementation of the Natural and Scenic Rivers Act than the two rules addressing the management of natural and scenic rivers. The rules codified in 15A N.C. Admin. Code 12F .0303 and 15A N.C. Admin. Code 12F .0304 are especially important because the Act itself is entirely silent regarding how these natural resources, after their inclusion in the natural and scenic rivers system, should be managed.[41] No statute addresses, for instance, the nature and management of facilities adjacent to, the recreational activities consistent with designation as, or the location of public access points along a natural or scenic river. This guidance is provided exclusively in the rules in Subchapter 12F.[42] Indeed, with the exception of a state prohibiting State authorization of certain public projects that would affect natural and scenic rivers,[43] the Natural and Scenic Rivers Act says nothing about what can or cannot be done on or near rivers after they are acquired as part of the system.

In contrast, the rules provide necessary guidance critical to managing these resources so as to preserve their natural and scenic condition. The implementation of a program for the preservation of natural resources inherently requires maintenance of those resources to preserve the natural characteristics deemed worthy or preservation. As such, it is troubling that DENR would be complicit in the potential expiration of all rules pertaining to the management of natural and scenic rivers, even as DPR seeks to administer the natural and scenic rivers system.

To summarize, the rules governing designation and management of natural and scenic rivers are not "unnecessary," and, if DPR has received no adverse public comments with respect to these rules, they should be designated as "necessary without substantive public interest."

Agency Response:

We have made the final determination as Necessary with Substantive Public Interest and will consider your comments during the readoption process.

Comment (Friends of State Parks):

DENR adopted four rules to fulfill the legislature's vision, and we believe they are necessary to achieve that purpose. The third and fourth rules are especially important. They include various provisions related to the management of natural and scenic rivers, including language detailing the acceptable recreational activities in, location of public access to, and management of facilities near these exceptional water bodies. In sum, the rules in Subchapter 12F are necessary to implement the Natural and Scenic Rivers Act because they explain, in far more detail than the Act itself, how these rivers will be selected and protected.

Agency Response:

We have made the final determination as Necessary with Substantive Public Interest and will consider your comments during the readoption process.

15A NCAC 12F .0304 MANAGEMENT OF SCENIC RIVER AREAS

Comment - (Southern Environmental Law Center on behave of the North Carolina Conservation Network, Pamlico-Tar River Foundation, Clean Air Carolina, Appalachian Voices, Cape Fear River Watch, Western North Carolina Alliance, Clean Water for North Carolina, Environmental Defense Fund, Neuse Riverkeeper Foundation, and North Carolina League of Conservation Voters):

Perhaps no rules are more important to the implementation of the Natural and Scenic Rivers Act than the two rules addressing the management of natural and scenic rivers. The rules codified in 15A N.C. Admin. Code 12F .0303 and 15A N.C. Admin. Code 12F .0304 are especially important because the Act itself is entirely silent regarding how these natural resources, after their inclusion in the natural and scenic rivers system, should be managed.[41] No statute addresses, for instance, the nature and management of facilities adjacent to, the recreational activities consistent with designation as, or the location of public access points along a natural or scenic river. This guidance is provided exclusively in the rules in Subchapter 12F.[42] Indeed, with the exception of a state prohibiting State authorization of certain public projects that would affect natural and scenic rivers,[43] the Natural and Scenic Rivers Act says nothing about what can or cannot be done on or near rivers after they are acquired as part of the system.

In contrast, the rules provide necessary guidance critical to managing these resources so as to preserve their natural and scenic condition. The implementation of a program for the preservation of natural resources inherently requires maintenance of those resources to preserve the natural characteristics deemed worthy or preservation. As such, it is troubling that DENR would be complicit in the potential expiration of all rules pertaining to the management of natural and scenic rivers, even as DPR seeks to administer the natural and scenic rivers system.

To summarize, the rules governing designation and management of natural and scenic rivers are not "unnecessary," and, if DPR has received no adverse public comments with respect to these rules, they should be designated as "necessary without substantive public interest."

Agency Response:

We have made the final determination as Necessary with Substantive Public Interest and will consider your comments during the readoption process.

Comment (Friends of State Parks):

DENR adopted four rules to fulfill the legislature's vision, and we believe they are necessary to achieve that purpose. The third and fourth rules are especially important. They include various provisions related to the management of natural and scenic rivers, including language detailing the acceptable recreational activities in, location of public access to, and management of facilities near these exceptional water bodies. In sum, the rules in Subchapter 12F are necessary to implement the Natural and Scenic Rivers Act because they explain, in far more detail than the Act itself, how these rivers will be selected and protected.

Agency Response:

We have made the final determination as Necessary with Substantive Public Interest and will consider your comments during the readoption process.