

RRC STAFF OPINION

PERIODIC REVIEW AND EXPIRATION OF EXISTING RULES REPORT

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

REPORT: 15A NCAC Subchapter 12H

RECOMMENDED ACTION:

- X Note staff's comment
- X Find the public comments do not have merit and approve the report as submitted.

COMMENT:

Rules 15A NCAC Subchapter 12H govern the Natural Heritage Program. When the schedule of the existing rule review was approved by the RRC as Rule 26 NCAC 05 .0211, effective April 1, 2014, the rules in this Subchapter were under the authority of the Department of Environment and Natural Resources (DENR). As such, DENR undertook the review process; it classified the rules, posted the report for the required comment period, reviewed the public comments received, and submitted its final report for RRC review on September 18, 2015.

S.L. 2015-241, the 2015 Appropriations Act, transferred the Natural Heritage Program (including its rules) to the newly named Department of Natural and Cultural Resources. (See S.L. 2015-241, Section 14.30(a)) The Act was signed by the Governor on September 18, 2015. The portion of the Act governing the transfer became effective July 1, 2015. In addition, the Act renamed DENR as the Department of Environmental Quality (DEQ).

As reflected in an attached letter ("Attachment A"), the Department of Natural and Cultural Resources (DNCR) has reviewed the report and comments submitted regarding the same. DNCR is in agreement with the final determinations and responses to the public comments.

Staff recommends approval of the report as submitted by DEQ, and allowing DNCR to proceed to schedule the readoption of the 22 rules designated as "necessary with substantive public interest."



North Carolina Department of Natural and Cultural Resources
Office of the Secretary

Governor Pat McCrory

Secretary Susan Kluttz

November 5, 2015

Amanda Reeder, Commission Counsel
Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609

Dear Ms. Reeder,

The Department of Natural and Cultural Resources (DNCR) has reviewed the report and comments for the Natural Heritage Program rules - 15A NCAC Subchapter 12H that were put through the Existing Rules Review process by the former Department of Environment and Natural Resources (DENR). DNCR agrees with the former DENR's determinations and wishes to go forward to readopt the 22 rules and repeal the two rules in 15A NCAC Subchapter 12H as identified in the Natural Heritage Program - Existing Rules Review report.

Sincerely,

A handwritten signature in blue ink that reads "Joshua Davis".

Joshua Davis
Strategy & Policy Advisor, Rulemaking Coordinator

SUBCHAPTER 12H - NATURAL HERITAGE PROGRAM

SECTION .0100 - GENERAL PROVISIONS

15A NCAC 12H .0101 STATEMENT OF POLICY

The policy implemented by this Subchapter is that natural areas important to the maintenance of the state's natural diversity be identified; that agencies, organizations, and individuals be encouraged to protect those natural areas best representing North Carolina's natural heritage; and that natural areas be registered as protected or dedicated as nature preserves for the benefit of the people of present and future generations.

*History Note: Authority G.S. 113-3; 113-8; 113A-164.2; 113A-164.4;
Eff. April 4, 1979;
Amended Eff. January 1, 1986; October 1, 1984.*

§ 113A-164.2. Declaration of policy and purpose.

(a) The continued population growth and land development in North Carolina have made it necessary and desirable that areas of natural significance be identified and preserved before they are destroyed. These natural areas are irreplaceable as laboratories for scientific research, as reservoirs of natural materials for uses that may not now be known, as habitats for plant and animal species and biotic communities, as living museums where people may observe natural biotic and environmental systems and the interdependence of all forms of life, and as reminders of the vital dependence of the health of the human community on the health of the other natural communities.

(b) It is important to the people of North Carolina that they retain the opportunity to maintain contact with these natural communities and environmental systems of the earth and to benefit from the scientific, aesthetic, cultural, and spiritual values they possess. The purpose of this Article is to establish and maintain a State Registry of Natural Heritage Areas and to prescribe methods by which nature preserves may be dedicated for the benefit of present and future citizens of the State. (1985, c. 216, s. 1.)

§ 113-3. Duties of the Department.

(a) It shall be the duty of the Department, by investigation, recommendation and publication, to aid:

(1) In the promotion of the conservation and development of the natural resources of the State;

(2) In promoting a more profitable use of lands and forests;

(3) Repealed by Session Laws 1977, c. 198, s. 15; c. 771, s. 7;

(4) In coordinating existing scientific investigations and other related agencies in formulating and promoting sound policies of conservation and development; and

(5) Repealed by Session Laws 1977, c. 771, s. 7.

(b) Repealed by Session Laws 1959, c. 779, s. 3. (1925, c. 122, s. 4; 1957, c. 753, s. 3; c. 1424, s. 1; 1959, c. 779, s. 3; 1977, c. 198, s. 15; c. 771, s. 7.)

§ 113-8. Powers and duties of the Department.

The Department shall make investigations of the natural resources of the State, and take such measures as it may deem best suited to promote the conservation and development of such resources.

It shall have the protection of lands and water supplies; it shall also have the care of ~~State parks, and other~~¹ recreational areas now owned or to be acquired by the State, including the lakes referred to in G.S. 146-7.

It shall make such examination, survey and mapping of the geology, mineralogy and topography of the State, including their industrial and economic utilization, as it may consider necessary; make investigations of water supplies and water powers, prepare and maintain a general inventory of the water resources of the State, and take such measures as it may consider necessary to promote their development.

It shall have the duty of enforcing all laws relating to the conservation of marine and estuarine resources.

The Department may take such other measures as it may deem advisable to obtain and make public a more complete knowledge of the State and its resources, and it is authorized to cooperate with other departments and agencies of the State in obtaining and making public such information.

The Department may acquire such real and personal property as may be found desirable and necessary for the performance of the duties and functions of the Department and pay for same out of any funds appropriated for the Department or available unappropriated revenues of the Department, when such acquisition is approved by the Governor and Council of State. The title to any real estate acquired shall be in the name of the State of North Carolina for the use and benefit of the Department. (1925, c. 122, s. 9; 1927, c. 57; 1947, c. 118; 1957, c. 753, s. 4; c. 1424, s. 2; 1965, c. 957, s. 11; 1973, c. 1262, ss. 28, 86; 1977, c. 198, ss. 16, 17; c. 771, s. 4; 1989, c. 727, s. 33; 2011-145, s. 13.25(j).)

¹ As amended by SL 2015-241, Section 14.30(nn)

Comment #1:

Commenter Name: Will Hendrick

Affiliation: Southern Environmental Law Center

Comment Text: The first NHP rule deemed “unnecessary” by DENR is the “Statement of Policy” codified at 15A N.C. Admin Code 12H .0101 (hereinafter “NHP Policy Rule”). The NHP Policy Rule states:

The policy implemented by this Subchapter is that natural areas important to the maintenance of the state's natural diversity be identified; that agencies, organizations, and individuals be encouraged to protect those natural areas best representing North Carolina's natural heritage; and that natural areas be registered as protected or dedicated as nature preserves for the benefit of the people of present and future generations. As noted in the text of the rule itself, it informs the underlying philosophy implemented by all NHP rules. Because the existence of NHP rules is mandated by the Nature Preserves Act, this statement of the overarching policy they implement is not “obsolete.” Indeed, as long as NHP Rules are part of the N.C. Administrative Code, the statement of policy they were adopted to implement provides necessary clarity regarding their interpretation.

The Policy Rule is also not “redundant.” Although presumably inspired by the “Statement of Policy and Purpose” in the Nature Preserves Act, the rule goes beyond the statutory language to provide important context for the public and the regulated community regarding how the NHP will interpret and implement statutory language. For example, while the statute states that “areas of natural significance” should be identified and preserved, the Policy Rule fleshes out that directive. The Policy Rule directs focus on certain types of “natural significance” by specifically seeking to identify and preserve natural areas “important to the maintenance of the State’s natural diversity” or representative of “North Carolina’s natural heritage.” Accordingly, NHP rules implementing this policy vision define and prioritize “natural diversity” and specify eligibility requirements for an area to be considered representative of the state’s “natural heritage.”

Finally, the Policy Rule is not “otherwise not needed.” To the contrary, it provides DENR’s unique interpretation and elaboration of the policy stated in the Nature Preserves Act. Moreover, the agency policy stated in this rule is implemented through an important existing program and therefore useful to inform the content of other NHP Rules. Because the Policy Rule is not “obsolete, redundant, or otherwise not needed,” it was incorrect to label it “unnecessary.” We support the Policy Rule in its current form, and urge DENR to label it “necessary without substantive public interest.”

Comment #2:

Commenter Name: Charles Roe

Comment Text: I find the current proposal to eliminate the introductory two sections of the subject 15A Administrative Code 12H -- .0101 Statement of Policy, and .0102 Statement of Purpose will be illogical and harmful, in that deletion of these introductory sections will remove the rationale and the context for the rest of the provisions in the subchapter. Other than as an attempt to generally reduce the total word/line content of the Department's total volume of administrative rules by an arbitrary percentage, the proposed removal of the introductory sections of the section of the code pertaining to the state's Natural Heritage Program will serve no reasonable purpose and will only create confusion and mischief. From my viewpoint as the original author of these administrative rules and procedures, and from my professional background as a public policy planner and program manager, I strongly recommend retaining the entirety and whole of the present administrative code pertaining to the North Carolina Natural Heritage Program, Registry of Natural Heritage Areas, and Dedicated Nature Preserves.

Agency Response:

The comments received focus on the classification rather than an objection to the rules, in whole or in part as defined in G.S. 150B-21.3A(a)(5). These two rules are redundant of G.S. 113A-164.4 and have been classified as Unnecessary. We are maintaining the classification as the final Agency determination.

15A NCAC 12H .0102

15A NCAC 12H .0102 STATEMENT OF PURPOSE

Principal purposes of the Natural Heritage Program are to:

- (1) identify through a systematic inventory the special elements of natural diversity and natural areas which best exemplify the state's natural heritage;
- (2) provide inventory information for use in development planning, environmental impact assessment, and resource management decisions;
- (3) establish for present and future generations a statewide system of registered natural areas and dedicated nature preserves;
- (4) develop strategies for active citizen and landowner participation in preserving the state's natural heritage;
- (5) promote public awareness and appreciation of natural diversity, and publish and disseminate information pertaining to natural areas and nature preserves;
- (6) prepare a Natural Heritage Plan that governs the program in the creation of a system of registered and dedicated natural areas.

*History Note: Authority G.S. 113-3; 113-8; 113A-164.4;
Eff. April 4, 1979;
Amended Eff. January 1, 1986.*

§ 113A-164.4. Powers and duties of the Secretary.

The Secretary shall:

- (1) Establish by rule the criteria for selection, registration, and dedication of natural areas and nature preserves.
- (2) Cooperate or contract with any federal, State, or local government agency, private conservation organization, or person in carrying out the purposes of this Article.
- (3) Maintain a Natural Heritage Program to provide assistance in the selection and nomination for registration or dedication of natural areas. The Program shall include classification of natural heritage resources, an inventory of their locations, and a data bank for that information. The Program shall cooperate with the Department of Agriculture and Consumer Services in the selection and nomination of areas that contain habitats for endangered and rare plant species, and shall cooperate with the Wildlife Resources Commission in the selection and nomination of areas that contain habitats for endangered and rare animal species. Information from the natural heritage data bank may be made available to public agencies and private persons for environmental assessment and land management purposes. Use of the inventory data for any purpose inconsistent with the Natural Heritage Program may not be authorized. The Program shall include other functions as may be assigned for registration, dedication, and protection of natural areas and nature preserves.
- (4) Prepare a Natural Heritage Plan that shall govern the Natural Heritage Program in the creation of a system of registered and dedicated natural areas.

- (5) Publish and disseminate information pertaining to natural areas and nature preserves within the State.
- (6) Appoint advisory committees composed of representatives of federal, State, and local governmental agencies, scientific and academic institutions, conservation organizations, and private business, to advise him on the identification, selection, registration, dedication, and protection of natural areas and nature preserves.
- (7) Submit to the Governor and the General Assembly a biennial report on or before February 15, 1987, and on or before February 15 of subsequent odd-numbered years describing the activities of the past biennium and plans for the coming biennium, and detailing specific recommendations for action that the Secretary deems necessary for the improvement of the Program. (1985, c. 216, s. 1; 1987, c. 827, s. 152; 1997-261, s. 82.)

Comment #1:

Commenter Name: Will Hendrick

Affiliation: Southern Environmental Law Center

The second NHP rule deemed “unnecessary” by DENR is the “Statement of Purpose” codified at 15A N.C. Admin Code 12H .0102 (hereinafter “Purpose Rule”). The Purpose Rule also provides important guidance regarding the role of the NHP in identifying and protecting important natural resources in our state. As DENR is statutorily required to “maintain a Natural Heritage Program,” the rule that codifies the “principal purposes” of the Program is not “obsolete.”

As explained in the Purpose Rule, the “principal purposes” of the NHP are to:

- (1) identify through a systematic inventory the special elements of natural diversity and natural areas which best exemplify the state's natural heritage;
- (2) provide inventory information for use in development planning, environmental impact assessment, and resource management decisions;
- (3) establish for present and future generations a statewide system of registered natural areas and dedicated nature preserves;
- (4) develop strategies for active citizen and landowner participation in preserving the state's natural heritage;
- (5) promote public awareness and appreciation of natural diversity, and publish and disseminate information pertaining to natural areas and nature preserves;
- (6) prepare a Natural Heritage Plan that governs the program in the

creation of a system of registered and dedicated natural areas.

Some of these “principal purposes” in 15A NCAC 12H .0102 are similar to the NHP “Responsibilities and Duties” stated in 15A NCAC 12H .0104. Notably, DENR declared the latter rule to be “necessary with substantive public interest.” It lists actions for which the NHP is “responsible.” Importantly, however, a rule addressing implementation measures for which the NHP is responsible does not render “redundant” a separate rule discussing NHP’s fundamental purposes, especially when the text of the two rules differs. Although there are varying degrees of similarity in NHP rule language addressing programmatic purposes and responsibilities, substantial variation that exists in some parts of the two rules belies any argument that 12H .0104 renders 12H .0102 “redundant.” Even in the one instance where language is very similar, the language is drawn almost verbatim from the Nature Preserves Act. And even then, the context of the rules differs notably. Moreover, certain “principal purposes” of the NHP are *only* stated in the Purpose Rule. Most notably, the Purpose Rule uniquely requires the NHP to encourage public participation in, and increase public awareness of the need for, identification and protection of natural resources.

Because the Purpose Rule establishes distinct and important direction for the statutorily mandated NHP, it is neither “obsolete, redundant,” nor “otherwise not needed.” We encourage DENR to retain the Purpose Rule in its current form by labeling it “necessary without substantive public interest.”

Comment #2:

Commenter Name: Charles Roe

Comment Text: I find the current proposal to eliminate the introductory two sections of the subject 15A Administrative Code 12H -- .0101 Statement of Policy, and .0102 Statement of Purpose will be illogical and harmful, in that deletion of these introductory sections will remove the rationale and the context for the rest of the provisions in the subchapter. Other than as an attempt to generally reduce the total word/line content of the Department’s total volume of administrative rules by an arbitrary percentage, the proposed removal of the introductory sections of the section of the code pertaining to the state’s Natural Heritage Program will serve no reasonable purpose and will only create confusion and mischief. From my viewpoint as the original author of these administrative rules and procedures, and from my professional background as a public policy planner and program manager, I strongly recommend retaining the entirety and whole of the present administrative code pertaining to the North Carolina Natural Heritage Program, Registry of Natural Heritage Areas, and Dedicated Nature Preserves.

Agency Response:

The comments received focus on the classification rather than an objection to the rules, in whole or in part as defined in G.S. 150B-21.3A(a)(5). These two rules are redundant of G.S. 113A-164.4 and have been classified as Unnecessary. We are maintaining the classification as the final Agency determination.

15A NCAC 12H Sections .0200, .0300, .0400

Commenter Name: Will Hendrick

Affiliation: Southern Environmental Law Center

Comment Text: With the exception of the two rules discussed above, DENR labeled every rule in 15A NCAC 12H “necessary with substantive interest.” Fortunately, that means that twenty-two of twenty-four rules administered by the NHP are currently safe from automatic expiration. However, it also means that none of the NHP rules will “be allowed to remain in effect without further action.” We hope this means those rules will ultimately be retained. After all, rules labeled “necessary with substantive interest” must be “readopted as though the rules were new rules.” Yet, we note with concern that DENR has, during the process of rules review, proposed to delete entire rules even after labeling them “necessary with substantive public interest.”

To be clear, we do not intend to quibble with the agency’s documentation of public objection. As discussed above, a rule must be labeled “necessary with substantive interest” if DENR received “written comments objecting to the rule.” However, it is unclear whether the labeling determinations for these twenty-two NHP rules were dictated by public objection or instead made at DENR’s discretion. After all, a rule may also be labeled “necessary with substantive public interest” if “the rule affects the property interest of the regulated public *and* the agency knows or suspects that any person may object to the rule.” It bears emphasis that some NHP rules explicitly disavow any regulatory effect on any property interest. DENR has no authority to label those rules “necessary with substantive public interest” without receipt of written public objection. For any rules that *do* have a regulatory effect on the public’s property interest, if DENR has not received, but instead merely anticipates, public objection, we encourage the agency to reconsider its determinations. DENR should not needlessly subject itself to the administratively burdensome rulemaking process. Nor should the agency unreasonably overburden its rulemaking coordinators. DENR may retain an existing rule without undergoing rulemaking by simply labeling the rule “necessary without substantive public interest.” So, unless the agency intends to alter its rules, we support re-labeling them. And because the NHP rules in their current form implement important policy objectives, we urge DENR to label them “necessary without substantive public interest” whenever possible.

Agency Response:

These rules were classified as Necessary With Substantive Public Interest for the public comment period. This classification made a representation to the public that the rules will go through the readoption process. And based on that representation, someone may not have commented. By changing the classification after the close of the comment period we could have unfairly restrained someone from participating in the process. The final

classifications will remain as Necessary With Substantive Public Interest. We will be address these comments during the readoption process.