

## RRC STAFF OPINION

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

AGENCY: North Carolina Plant Conservation Board

REPORT CITATION: 02 NCAC 48F

RECOMMENDED ACTION:

- X Approve, but note staff's comment
- Change the agency determination following public comment

COMMENT:

Staff counsel has received comments on the above-referenced report, but recommends approval of the report as submitted by the agency. Attached are two separate emails received by the Office of Administrative Hearings:

- (1) January 14, 2017 (Saturday) email from Lynda Waldrep with attachment
- (2) January 16, 2017 (Monday) email from Lynda Waldrep

The January 14, 2017 email has an attachment that contains the following statement:

*As currently written, PCP regulations, under penalty of law (106.202.19), prohibit a private citizen gardener from sharing any of these legally obtained, listed plants or plant parts, with a fellow gardener without first obtaining a state permit per each plant species. (106.202.15).*

The attachment indicates that Mrs. Waldrep is seeking a legislative change to the process and that request is outside the purview of the Periodic Review and Expiration of Existing Rules process. The January 16, 2017 email requests that "02 NCAC 48F .0401 be changed to "necessary with substantive public comment." G.S. 150B-21.3A(a)(5) defines "public comment" as "written comments...received by an agency." The request does not address the specific substance of the rule or reference any review standards of the Rules Review Commission as set forth in G.S. 150B-21.9(a).

The Plant Conservation Board did have a comment period on the rules set forth in 02 NCAC 48F from August 29, 2016 to October 29, 2016. The comments received on January 14 and 16 of 2017 were not received by the Plant Conservation Board and were provided to the agency staff on Tuesday, January 17, 2017 by staff counsel. Based upon the statutory structure of G.S. 150B-21.3A, the comments received by email were not part of the periodic review process, as they were not received during the 60-day public comment period conducted by the agency. The agency is required to submit a report to the Rules Review Commission that contains the following items:

Abigail M. Hammond  
Commission Counsel

- a. The agency's initial determination.
- b. All public comments received in response to the agency's initial determination.
- c. The agency's response to the public comments.

See G.S. 150B-21.3A(c)(1). G.S. 150B-21.3A(c)(2) restricts the Rules Review Commission to “review the reports as received from the agency pursuant to subdivision (1) of this subsection.” There is no procedure set forth in G.S. 150B-21.31A for the Rules Review Commission to accept additional comments to a report in which the 60-day comment period expired for the agency.

**Recommendation:**

The written comment submitted by Mrs. Waldrep was provided to the Rules Review Commission after the close of the Plant Conservation Board’s 60-day comment period and is therefore not part of the report filed by the agency and pending for review. Staff does not recommend changing the classification of the rules of this Subchapter, but to approve the report as submitted by the agency.

Further, the issue sought to be addressed by Mrs. Waldrep may not be an issue with current rule language set forth in 02 NCAC 48F, but to existing statutory directives from the General Assembly to the Plant Conservation Board. That matter is outside the review of the Rules Review Commission.

**Statutory standard for review:**

**§ 150B-21.3A. Periodic review and expiration of existing rules.**

- ....
- (c) Review Process. - Each agency subject to this Article shall conduct a review of the agency's existing rules at least once every 10 years in accordance with the following process:
- (1) Step 1: The agency shall conduct an analysis of each existing rule and make an initial determination as to whether the rule is (i) necessary with substantive public interest, (ii) necessary without substantive public interest, or (iii) unnecessary. The agency shall then post the results of the initial determination on its Web site and invite the public to comment on the rules and the agency's initial determination. The agency shall also submit the results of the initial determination to the Office of Administrative Hearings for posting on its Web site. The agency shall accept public comment for no less than 60 days following the posting. The agency shall review the public comments and prepare a brief response addressing the merits of each comment. After completing this process, the agency shall submit a report to the Commission. The report shall include the following items:
    - a. The agency's initial determination.
    - b. All public comments received in response to the agency's initial determination.
    - c. The agency's response to the public comments.
  - (2) Step 2: The Commission shall review the reports received from the agencies pursuant to subdivision (1) of this subsection. 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. For purposes of this subsection, a public comment has merit if it addresses the specific substance of the rule and relates to any of the standards for review by the Commission set forth in G.S. 150B-21.9(a).

## Hammond, Abigail M

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**From:** LyndaWaldrep@aol.com  
**Sent:** Saturday, January 14, 2017 6:46 PM  
**To:** rrc.comments; jeff.hyde@aestheticimages.net  
**Cc:** lyndawaldrep@aol.com  
**Subject:** Comments Re #3-02NCAC 48F  
**Attachments:** NC Regulatory Reform Act of 2013.doc

Members of the Committee:

I have been in contact with agriculture members concerning section 0400 (PCP) since writing Commissioner Troxler in August of 2012. His response of 08-08-12 was also sent to then head Gene Cross. I traveled to Raleigh for a two hour meeting with Mr. Cross, later communicating by phone with him and then Rob Evans on various occasions. Mr. Evans attended several NCNPS meetings to explain rules and regulations to us.

More recently I sent a letter to Ms. Trudy Wade (02-07-15) with my concerns.

I cannot understand why there is no mention of public concerns in the list sent to me for this meeting. I am attaching a copy of the letter I sent to Ms. Wade for clarification of my concerns. I realize that the deadline is passed, and my husband is having surgery on the day of the meeting, so I cannot attend.

However, given the numbers of earlier communications I have had on this topic with members of the committee, I feel my concerns should be presented.

Thank you for your consideration,

Lynda B. Waldrep 7230 Strawberry Rd.,  
Summerfield, NC 27358  
336-643-5555

## NC Regulatory Reform Act of 2013 – Comments on the Plant Conservation Program (PCP)

Current PCP regulations deny private property rights to NC residents and hurt private nursery businesses with burdensome paperwork.

Under Article 19B, PCP was established to create and maintain a list of endangered or threatened plants and to adopt and enforce regulations pertinent to their conservation. (106.202.13) There are 419 plants on this list, many of which have been in the nursery trade for years.

As currently written, PCP regulations, under penalty of law (106.202.19), prohibit a private citizen gardener from sharing any of these legally obtained, listed plants or plant parts, with a fellow gardener without first obtaining a state permit per each plant species. (106.202.15).

These regulations also negatively impact the green industry with added paperwork and expense associated with the nursery-propagated sale of each listed plant.

Points to consider in re-evaluating PCP regulations:

- Regulations will hurt small businesses in the green industry due to excessive paperwork.
- They are too complicated and cannot be enforced effectively.
- They have not been publicized; neither small nurseries nor private citizens are aware.
- They infringe on individual property rights.
- They will not deter poaching and theft, actions already addressed by laws.
- They discourage use of native plants in landscapes.
- They discourage donations to land trusts and PCP projects and limit support for land protection programs.

My correspondence with Agriculture Commissioner Steve Troxler, as well as phone calls and meetings with former PCP Director Gene Cross, PCP's Rob Evans, and former PCP Chairperson during the past two years should be on record.

My suggestion for amending these regulations would include exemptions for private citizen gardeners, non-profit plant advocacy groups such as the NC Native Plant Society, and small nurseries in the green industry.

Thank you for all consideration,

Lynda B. Waldrep (336-643-5555)

Private citizen/gardener, member and former VP of the NC Native Plant Society, member Guilford Horticultural Society, former Extension Master Gardener

## Hammond, Abigail M

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**From:** LyndaWaldrep@aol.com  
**Sent:** Monday, January 16, 2017 4:10 PM  
**To:** Hammond, Abigail M  
**Subject:** Regulatory Review of Plant Conservation

**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

Dear Ms. Hammond:

I have just learned that the Plant Conservation Board is up for review this Thursday. I have been active since August, 2012, trying to affect some changes to regulations listed under PCP. I have documented items that confirm my work in this area..

Therefore, I wish to request that the classification of rules for PCB in section .0400 02NCAC 48F.0401 be changed to "necessary with substantive public comment."

Quite a few NC citizens support my request for having public comments accepted in this area,. Therefore, I ask that the Committee, when it reviews PCB this Thursday, change the designation so that future input will be possible.

Thank you for you attention to this request,

Lynda B. Waldrep  
7230 Summerfield, NC 27358  
336-643-5555