

Information and Instructions for Making Technical Changes

This document is requesting technical changes from your agency for the rules pending Commission review.

If the technical corrections require you to rewrite and resubmit the rule, the rewritten rule is due on the date specified in this document.

In order to properly submit rewritten rules, please refer to the following rules in the NC Administrative Code:

- Rule 26 NCAC 02C .0108 – The Rule addresses general formatting.
- Rule 26 NCAC 02C .0404 – The Rule addresses changing the introductory statement.
- Rule 26 NCAC 02C .0405 – The Rule addresses properly formatting changes made after publication in the NC Register.

Note the following general instructions:

1. You must submit three hard copies of the rewritten rule and one copy via email. The electronic copy must be saved as the official rule name (XX NCAC XXXX) and sent to oah.rules@oah.nc.gov.
2. For rules longer than one page, insert a page number.
3. Use line numbers; if the rule spans more than one page, have the line numbers reset at one for each page.
4. Do not use track changes. Make all changes using manual strikethroughs, underlines and highlighting.
5. You cannot change just one part of a word. For example:
 - Wrong: “aAssociation”
 - Right: “~~association~~ Association”
6. Treat punctuation as part of a word. For example:
 - Wrong: “day;; and”
 - Right: “~~day,~~ day, and”
7. Formatting instructions and examples may be found at:
www.ncoah.com/rules/examples.html

If you have any questions regarding proper formatting of technical changes after reviewing the rules and examples, please contact the reviewing attorney.

REQUEST FOR TECHNICAL CHANGE

AGENCY: Environmental Management Commission

RULE CITATION: 15A NCAC 02B .0295

DEADLINE FOR RECEIPT: Friday, August 14, 2015

NOTE WELL: This request when viewed on computer extends several pages. Please be sure you have reached the end of the document.

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

In reviewing these rules, the staff determined that the following technical changes need to be made:

On the Submission for Permanent Rule form, please correct the date the Notice of Text was published to February 16, 2015.

On Page 1, (b)(1), line 15, insert a comma after “.0267”

On Page 2, (b)(11), line 6, who determines whether this is appropriate? And how?

In (b)(12), line 10, I take it your regulated public knows what is meant by “dense”?

In (b)(15), line 21, insert a comma after “shrub”

In (b)(16), line 22, I suggest inserting an “either” after “that is”

On line 23, I recommend inserting “is located” between “or” and “within”

In (c)(1) and (2), lines 31 and 33, insert a comma after “.0267”

In (c)(1), line 32, since “authorization certificate” is used in other Rules in the Subchapter, I take it your regulated public is familiar with the term?

On Page 3, (d), line 26, and (e), line 36, why is “Zone” capitalized?

In (d), line 27 why not just state “the applicable Rule .0233, ...”?

So that I understand – using the guidance in Paragraphs (d) and (e), the Authority will determine how much impact/how many credits are needed for the alternatives?

On Page 4, the changes to (f) regarding the “Outside of the eight-digit HUC” means that the location no longer needs to be adjacent? And there are no longer requirements for explaining the mitigation is not practical?

Amanda J. Reeder
Commission Counsel
Date submitted to agency: July 31, 2015

In (g)(1), line 15, I suggest you replace “in which” with “where”

So that I understand – the locations and Rules referenced in (g)(1)(A) through (D) are not referenced elsewhere in the Rule. Why is this? I note that Paragraph (c) states that the Rule applies to Rules .0233, .0243, .0250, .0259, .0267, and .0607. Why are these other Rules listed in this Part?

In (h), line 29, how is the proposed? Following the procedure in Paragraph (c) by submitting a written proposal?

On Page 5, (h)(1), line 1, who will restore or enhance?

In (h)(3), line 7, I do not think you should delete “of real property or an interest in real property” but if you want to delete, at least retain “property” This is a very long Rule and it is helpful for people to see this to understand what the cross-reference will lead to.

In (i), do you need to insert a reference to G.S. 143-214.20 to make it clear that government entities have a broader ability to make this purchase than non-governmental actors? Or do you believe it is clear to your regulated public?

On Page 6, you are allowing the property to be donated to the Riparian Buffer Restoration Fund. G.S. 143-214.20 allows offsets for donations of real property or an interest in real property to the Department, another State agency, a unit of local government, or a private nonprofit conservation organization approved by the Department. Or is Paragraph (k) intended to address G.S. 143-214.20(a1)(1) and (a2)(1)? You won’t allow payment of money, only donation of property?

In (l)(2)(B), line 21, “as appropriate” as determined by whom?

In (l)(2)(C), what is the authority for this financial assurance?

In (l)(2)(C), line 27, why are you spelling out “Division of Mitigation Services”? You just created the acronym in Paragraph (j).

In (l)(3), line 32, who determines it is “not feasible”?

On line 35, insert a comma after “review and approval”

On line 36, will the Division reduce the credit or the Authority? I note that (l) begins that the Authority will issue the mitigation determination.

On Page 7, (l)(4), line2, replace “is” after “Zone 1” with “shall not be”

In (l)(5), the applicant does not have to do this? I don’t understand why “applicant” was removed here.

On line 11, why is “Mitigation Banking Instrument” capitalized? It is not in (b)(7).

In (l)(6), line 13, I suggest deleting “that have been” and “are” so it reads “Projects constructed and within the ...”

On line 14, replace “are” with “shall be”

On line 15, should this say “Division” or “Authority”?

On line 20, replace the semicolon after “following” with a colon.

On line 30, I suggest stating “These buffer mitigation sites” or “The buffer mitigation sites identified in this Subparagraph”

On Page 8, the table in Paragraph (m), I take it that your regulated public knows what “non-subject” and “subject” mean?

In (n), so that I understand – the applicant will propose that a site qualifies as a restoration or enhancement site? If so, does that mean that in (n)(1), that the applicant may now only propose a 33% credit for a buffer that is between 101 and 200 feet, rather than the published 50%? Further, I note this is not the amount in the stakeholder report. What is the authority for this change?

In (n)(2), line 26, insert a period after “approval” However, to make the sentence clearer, you may wish to say “The application or mitigation provider shall submit a restoration or enhancement mitigation plan to the Authority for written approval.”

On Page 9, (n)(2)(B), I take it the applicant requests the alternative vegetation plans in the request?

In (n)(2)(C) and (D), who determines if this is applicable?

In (n)(2)(E), line 21, please insert a comma after “water”

Also, is (n)(2)(E) intended to state how often the applicant or mitigation provider will monitor this? Is this connected to the annual reports required for five years in (n)(4)?

In (n)(3), is this language intended to state that mitigation must be completed within one year unless a longer period is agreed to? But the baseline in the Rule is one year? And how does this agreement in writing occur? Is it in the Authority approval at the outset? If not, how is this extension requested and granted?

In (n)(4), line 35, I take it the approval is by the Authority?

On Page 10, line 5, will this occur because of the reports required? Is this how the Authority will know?

On line 7, if the Authority “may” require this, when will it not? Please note the same question in line 9.

On line 11, please insert a comma after “period”

On line 12, what will the Authority base the decision for further monitoring and the length of that monitoring upon?

On Page 12, Paragraph (o), who determines this? The Division or the Authority? The Paragraph states "Division" throughout, but elsewhere, the Authority makes the decision. Is this intentional? Are you relying upon G.S. 143-214.20(a1)94) and (a2)(4), which requires approval by the Department?

§ 143-214.20. Riparian Buffer Protection Program: Alternatives to maintaining riparian buffers; compensatory mitigation fees.

(a1) Compensatory Mitigation Options Available to Government Entities. - A government entity, as defined in G.S. 143-214.11, may satisfy compensatory mitigation requirements by any of the following actions:

(4) Construction of an alternative measure that reduces nutrient loading as well or better than the riparian buffer that is lost in the same river basin as the riparian buffer that is lost and that is approved by the Department.

(a2) Compensatory Mitigation Options Available to Applicants Other than Government Entities. - An applicant other than a government entity, as defined in G.S. 143-214.11, may satisfy compensatory mitigation requirements by any of the following actions:

(4) Restoration or enhancement of an existing riparian buffer that is not otherwise required to be protected, or creation of a new riparian buffer, that will provide protection of water quality that is equivalent to or greater than that provided by the riparian buffer that is lost in the same river basin as the riparian buffer that is lost and that is approved by the Department.

On Page 13, (o)(1) on line 14, I take it your regulated public knows what "Outer Coastal Plain" means?

On line 22, do you need to retain "at least"?

In (o)(2), line 25, do you need to retain "the applicable riparian buffer"? Couldn't you state "subject to Rules .0233,..."? Please note the same for (o)(3), line 33.

On line 26, please insert an "or" after ".0267" Please note the same for (o)(3), lines 33-34

On line 28 and 29, please put "Methodology for Identification... (v.4.11, 2010" in quotation marks.

In (o)(2) and (3), what is your authority to cite to an internal publication? Are you relying upon SL 2014-95?

Amanda J. Reeder
Commission Counsel
Date submitted to agency: July 31, 2015

On Page 14, in (o)(3) and (4), so that I understand, where you reference 15A NCAC 02R .0403, that rule governs the donation of real property? That is applicable here?

In (o)(4), line 9, do you need to retain “the applicable riparian buffer”?

On Page 15, (o)(6), line 8, please insert a comma after “data”

On line 9, define “immediate”

In (o)(7), on line 32, do you need to retain “at least”?

In (o)(8)(A), what are “structural measures”? Are they the same as “structural options” in (o)(8)(D)?

On Page 16, line 10, how are these “potentially approvable”? How does the request occur and what is the basis for making the decision.

Also on line 10, please remove the parenthesis from “(BMPs)”

On line 14, please replace “would not be” with “is not”

In (o)(8)(B), line 19, approved by the Division based upon what? The review?

On lines 24 and 26, please put the publication in quotation marks. Also, what is your authority to use this internal publication the Rule?

In (o)(8)(C), lines 31 and 32, please put the publication in quotation marks. Also, what is your authority to use this internal publication the Rule?

In (o)(8)(D), how will the Division approve this?

On Page 17, (o)(8)(E), what are “continuous” and “perpetual”?

In (o)(8)(G), line 8, who determines if the capacity is “equal or better”? The Division?

Also on line 8, please change “Paragraph” to “Paragraphs”

In (o)(8)(H), who determines the need for renovation or repair?

In (o)(8)(I), line 13, I suggest inserting a comma after “options” and “maintenance”

On line 20, please insert a comma after “holder”

In (o)(9), lines 25 – 26, why is this in all capital letters? (o)(1) through (8) are not.

On line 26, state “options not specified within this Rule...”

On line 29, “Paragraph” should be capitalized.

On line 35, please confirm that you meant to state "DWRwetlands" and there is no space.

On Page 18, in the History Note, do not delete the Temporary Adoption date.

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

Amanda J. Reeder
Commission Counsel
Date submitted to agency: July 31, 2015