



North Carolina Department of Agriculture and Consumer Services

N.C. Forest Service



Steven W. Troxler
Commissioner

Scott Bissette
Assistant Commissioner

Water Quality Interpretive Guidance Letter

WQ-IGL 2018.1 (revised)
January 31, 2018

From: Tom Gerow, Jr. - Water Resources Staff Forester

Subject: Stream and Ditch Obstructions

To All Interested Parties:

Purpose

This Interpretive Guidance Letter is intended to clarify how the North Carolina (N.C.) Forest Service generally interprets certain aspects of state laws and rules pertaining to obstructions in waterways. Much of this guidance has been put into practice by the N.C. Forest Service over the years, but may not have been clearly communicated or spelled-out in one document. The goal is to outline expectations while striving for consistent and predictable outcomes when assessing waterways for possible obstruction. This guidance has been reviewed by staff specialists with expertise in legal interpretation and the adjudication of state law. The guidance in this Letter is nonbinding and is subject to change. Nothing herein shall be considered legal advice.

Background and Topics Addressed

There are state-enacted restrictions intended to avoid adverse impacts from actions that obstruct a waterway. There may be specific, unique situations where a minimal amount of material in a waterway does not result in adverse impacts. However, the state's laws and rules are written very broadly, therefore there is a need for interpretation and guidance. When assessing a possible waterway obstruction, each situation must be assessed on a case-by-case basis. The topics in this Guidance Letter are listed below:

Part 1: Types of Streams	Page 2
Part 2: Assessing Ephemeral Streams	Page 2
Part 3: Evaluating What is an Obstruction	Pages 2, 3
Part 4: FPG Rule 02 NCAC 60C .0202	Page 3
Part 5: State Laws Prohibiting Waterway Obstructions (G.S.77-13, 77-14)	Page 4
Part 6: Obstructions in NCDOT Roadside Ditches	Page 5
Part 7: Stream & Wetland Restoration	Page 5
Part 8: Administrative Process	Page 6
Part 9: Wildfires	Page 7
Disclaimer and References	Page 7

[continued on next page]

Part 1: Types of Streams

For the purposes of this Guidance Letter, the N.C. Forest Service uses the definitions excerpted below from the *Forest Practice Guidelines Related to Water Quality*, 02 NCAC 60C .0102:

“Ephemeral Stream means a stream that flows only during and for short periods following precipitation and flows in low areas that may or may not have a well-defined channel.”

“Intermittent Stream means a stream that flows only during wet periods of the year (30-90 percent of the time) and flows in a continuous well-defined channel.”

“Perennial Stream means a stream that flows throughout a majority of the year (greater than 90 percent of the time) and flows in a well-defined channel.”

“Waterbody means a natural or man-made basin that stores water, not including jurisdictional wetlands or beaver ponds.”

Part 2: Assessing Ephemeral Streams

The N.C. Forest Service usually does not pursue the removal of deposited or accumulated debris or soil within an Ephemeral Stream.

- **However, if any of the following conditions occur, then the N.C. Forest Service may pursue removal of that obstruction, under the authority of G.S. 77-13:**
 - A. The landowner insists that the obstruction caused by a forestry-related, land-disturbing activity on his/her land be cleared from the Ephemeral Stream, even after consulting with the N.C. Forest Service to assess the situation; **or**,
 - B. The obstruction is impounding water upon the land of, or within the waterway of, another owner’s property; **or**,
 - C. The obstruction causes water flow within the Ephemeral Stream to bypass around, or overflow out of, the Ephemeral Stream drainageway; **or**,
 - D. The obstruction causes sedimentation into an Intermittent Stream, Perennial Stream, or perennial Waterbody.

Other common names for an Ephemeral Stream may include gully, swale, hollow, draw, drain, or slough.

Part 3: Evaluating What is an Obstruction

- A. The N.C. Forest Service usually does not pursue the removal of a waterway obstruction that resulted from naturally-occurring events, including tree mortality, flood, or storm.
- B. Even though the state laws and rules on waterway obstructions use the word “debris”, this word is interpreted to also mean soil that has been pushed-in or dropped-into a waterway (stream or ditch) as a result of a forestry-related activity.

C. Because the state laws and rules on waterway obstructions are written so broadly, it is challenging to determine how much deposited material causes an ‘obstruction’. Below are two scenarios which outline interpretive guidance to consider when evaluating waterways:

1) **Obstruction when Water is in the Channel:**

For a stream or hydrologically-connected (functioning) woodland ditch that has water in its channel at the time of inspection, an “obstruction” could be considered as debris or soil that is impeding the flow of water to such a degree that the level of the water immediately upstream of the obstruction is visibly and unusually higher or encompasses an unusually wider surface area than the water immediately downstream of the obstruction; or deposited soil within the channel is contributing to increased sedimentation into the water.

2) **Obstruction when Water is Absent:**

For a stream or hydrologically-connected (functioning) woodland ditch that does not have water in its channel at the time of inspection, an “obstruction” could be considered as debris or soil that is visible within the channel in such a quantity, or in a position within the centerline of the channel, so that the obstruction can reasonably be expected to impede the normal flow of water or contribute an increased amount of sedimentation upon return of water flow.

Part 4: FPG .0202, Prohibition of Debris Entering Streams and Waterbodies

The North Carolina FPG standard 02 NCAC 60C .0202 states the following (April 2018 revision):

“Stream obstruction and the impediment of stream flow or degradation of water quality shall be prevented by keeping soil and debris from forestry-related, land-disturbing activities out of intermittent streams, perennial streams and perennial waterbodies.”

Key Interpretations for FPG Standard .0202:

- A. This FPG standard only applies to Intermittent Streams, Perennial Streams, and perennial Waterbodies. This FPG .0202 does not apply to Ephemeral Streams nor ditches.
- B. When debris or soil is deposited into a perennial Waterbody (for example: a pond or lake), this FPG standard may be out-of-compliance if that debris causes “degradation of water quality”. In practice, this will require a case-by-case assessment, and it could be difficult to establish baseline standards for achieving consistent determinations. Factors to consider may include:
 - How much and/or what type of deposited material is in the waterbody.
 - The potential for increased sedimentation caused by the deposited debris.
 - The classification or type of waterbody (for example: a drinking water supply, or aquaculture pond, or high-quality water designation, or other special designation).

Part 5: State Laws Prohibiting Waterway Obstructions

There are two state law General Statutes (G.S.) which, generally speaking, prohibit obstructing natural or artificial waterways in North Carolina. These two statewide laws are, at times, applicable to forestry-related, land-disturbing activities:

North Carolina G.S. 77-13, *Obstructing Streams a Misdemeanor*.

North Carolina G.S. 77-14, *Obstructions in Streams and Drainage Ditches*.

Each of these laws authorizes “forest law-enforcement officers” of the North Carolina Department of Agriculture and Consumer Services (N.C. Forest Service) to enforce the provisions of these laws when the obstruction occurs “in woodlands”. If an offense occurs entirely upon agricultural land, then the N.C. Forest Service would not have authority to pursue obstruction removal.

Part 5.A: G.S. 77-13, Obstructing Streams a Misdemeanor

1. This law applies to naturally-occurring waterways.
2. When applying the provisions of G.S. 77-13, the N.C. Forest Service **usually does not pursue** the removal of an obstruction when it occurs in an Ephemeral Stream, except as noted in Part 2 of this Letter.

Part 5.B: G.S. 77-14, Obstructions in Streams and Drainage Ditches

1. This law applies to both natural and artificial waterways, but not for NCDOT road ditches (see Part 6 of this Letter).
2. In practice, the N.C. Forest Service applies the provisions of G.S. 77-14 when assessing possible obstructions in functioning woodland ditches. If the vegetation within the ditch is grown-up so much that there is no evidence of water, or if the ditch has not been maintained to facilitate drainage flow, then that ditch is generally considered not to be functioning.
3. When applying the provisions of G.S. 77-14, the N.C. Forest Service **usually does not pursue** the removal of a ditch obstruction when all of the following conditions below are met:
 - a) The landowner gives notice to keep the obstruction in place; **and**,
 - b) That ditch is entirely located on land owned or controlled by that landowner; **and**,
 - c) The ditch obstruction does not cause water to impound upon the land of, or within the waterway of, another owner’s property, **and**,
 - d) The ditch obstruction does not cause sedimentation into an Intermittent Stream, Perennial Stream, or perennial Waterbody.

[NOTE: all four of the above conditions must be ‘true’ for that ditch obstruction to remain.]

Part 6: Obstructions in N.C. Department of Transportation Roadside Ditches

North Carolina G.S.136-92 and G.S.136-92.1 prohibit blockage of a ditch along or from roads that are maintained by the N.C. Department of Transportation (NCDOT), excerpted below:

136-92. [Obstructing Highway Drains Prohibited.](#)

“It is unlawful to obstruct a drain along or leading from any public road in the State. A person who violates this section is responsible for an infraction.”

136-92.1. [Exemption from Temporary Driveway Permitting for Forestry Operations.](#)

“Forestry operations and silviculture operations, including the harvesting of timber, and other related management activities that require temporary ingress from a property to State roads shall be exempt from the temporary driveway permit process of the Department for State roads, except for controlled access facilities, if the operator of the temporary driveway has attended an educational course on timbering access and obtained a safety certification. Driveway access points covered by this section shall be temporary and shall be removed upon the earlier of six months or the end of forestry or silviculture operations on the property.”

The N.C. Forest Service does not have authority to enforce NCDOT laws. However, if our employees observe a potential violation of these laws, then we will take the following action:

1. Verbally inform the logger or operator (if known) that the site may be violating NCDOT laws and recommend that the obstruction/temporary driveway be removed as soon as possible.
2. Prepare and send a letter to the landowner informing the owner that a potential violation may exist, and recommend that the obstruction/temporary driveway be removed, and provide the landowner with contact information for the appropriate NCDOT office.
3. If the NCDOT or a law enforcement officer requests information about the name(s) of the logger, timber buyer, or other involved parties that may have caused the obstruction or installed the temporary driveway, then the N.C. Forest Service will make an effort to help identify the involved parties and, if identified, will share this information with the NCDOT or law enforcement officer.

Part 7: Stream & Wetland Restoration

The restoration of streams and/or wetlands may require that a stream, ditch, or other waterway be temporarily or permanently obstructed. Restoration work should only occur under the authority of applicable federal, state, and/or local government permit(s), or an administrative order.

The process of restoring a stream or wetland is not considered to be a forestry-related, land-disturbing activity. Therefore, the FPG standards are not applicable, and the N.C. Forest Service would not apply the provisions of G.S. 77-13 or G.S. 77-14.

Part 8: Administrative Process

The primary method of documentation used by the N.C. Forest Service to record information about water quality site inspections is Form 4808-1, “Forest Water Quality Site Inspection & Compliance Notification Form”, and subsequent follow-up forms in the 4808 series (-2, -3, -4).

If a tract’s forestry operation is determined to be Out of Compliance, then all involved parties will receive a copy of Form 4808-1. In addition, they should receive a “Site Summary Report” on N.C. Forest Service agency letterhead. That report will briefly outline the timelines of inspections done by the N.C. Forest Service, the noted compliance problems that need to be fixed, a map of the site prepared by the N.C. Forest Service, and it may include photos of the issues of concern.

Part 8.A: N.C. Forest Service Administrative Process for Obstructions in an Intermittent Stream, Perennial Stream, or Perennial Waterbody:

Step 1: Applicable FPG noted as Out of Compliance. Timeframe given to remove obstruction and stabilize the site.

- FPG .0202, if the obstruction occurs generally on the job site.
- FPG .0203, if the obstruction is caused by, or located at, a stream crossing.

Step 2: If necessary due to continued lack of effort to effectively remove the obstruction, then N.C. Forest Service Law Enforcement Officer may initiate legal action for a violation of G.S. 77-13.

Step 3: If necessary due to continued lack of effort, then N.C. Forest Service can make an interagency referral to the N.C. Dept. of Environmental Quality’s Division of Energy, Mineral, and Land Resources (DEMLR). That agency will then invoke its authority to pursue removal of the obstruction in accordance with the requirements of the N.C. Sedimentation Pollution Control Act.

Part 8.B: N.C. Forest Service Administrative Process for Obstructions in Drainage Ditches:

Step 1: Site noted to be in violation of G.S. 77-14. Timeframe given to remove obstruction and stabilize the site.

Step 2: If necessary due to continued lack of effort to effectively remove the obstruction, then N.C. Forest Service Law Enforcement Officer may initiate legal action for a violation of G.S. 77-14.

Part 8.C: N.C. Forest Service Administrative Process for Obstructions in Ephemeral Streams*:

**[See Part 2 of this Letter for the few, special situations when this may occur.]*

Step 1: Site noted to be in violation of G.S. 77-13. Timeframe given to remove obstruction and stabilize the site.

Step 2: If necessary due to continued lack of effort to effectively remove the obstruction, then N.C. Forest Service Law Enforcement Officer may initiate legal action for a violation of G.S. 77-13.

Part 9: Wildfires

During the control, containment and/or suppression of a wildfire, there are times when a waterway may be temporarily obstructed as a result of the tactics employed. When such obstructions are caused by the N.C. Forest Service, the agency will remove obstructions and implement BMPs afterwards to rehabilitate areas for the protection of water quality, so as to comply with the FPGs and other applicable state and federal environmental standards. Rehabilitation work usually occurs after the fire is controlled.

Disclaimer

This Interpretive Guidance Letter is nonbinding. Nothing herein shall be considered legal advice. The interpretations and guidance in this Letter are subject to change without notice.

The circumstances of an individual case of waterway obstruction(s) may require a different determination than what is outlined in this Letter. The governing laws and/or rule standards are subject to change; if changes occur, then this Letter will be rescinded and/or revised as needed.

You should consult with legal counsel for questions concerning specific facts or circumstances regarding the applicability of any law or rule.

References

More information on protecting water quality during forestry activities is available from the N.C. Forest Service website, <http://ncforestservice.gov/>, in the “Programs & Services -- Water Quality” section, including the following:

- North Carolina Forestry Best Management Practices (BMP) Manual to Protect Water Quality
- North Carolina Forestry BMP Quick Reference Field Guide
- Forestry Leaflet #WQ-1, Forest Practice Guidelines Related to Water Quality
- Online Forest Preharvest Planning Tool
- Forestry BMP Quarterly Newsletter

Excerpts of all state laws and rules are available from the websites below:

- State Laws (G.S.): <https://www.ncleg.net/gascripts/statutes/Statutes.asp>
- State Rules (NCAC): <http://reports.oah.state.nc.us/ncac.asp>

cc: Scott Bissette, Assistant Commissioner - NCDA&CS / N.C. Forest Service
Sean Brogan, Forest Management & Development Division Director - N.C. Forest Service
Greg Hicks, Forest Protection Division Director - N.C. Forest Service
David Lane, State Forester - N.C. Forest Service
Jonathan Lanier, Assistant General Counsel - NCDA&CS
Amery Wells, Law Enforcement Chief - N.C. Forest Service