



*Request for Approval of Hearing Officer's Report and Request to Adopt
Rules 15A NCAC 02H .1401-1405
Impacts to Federally Non-Jurisdictional Wetlands and Classified Surface Waters
and
Rule Amendment 15A NCAC 02H .1301
Discharges to Isolated Wetlands and Isolated Classified Surface Waters*

January 13, 2022

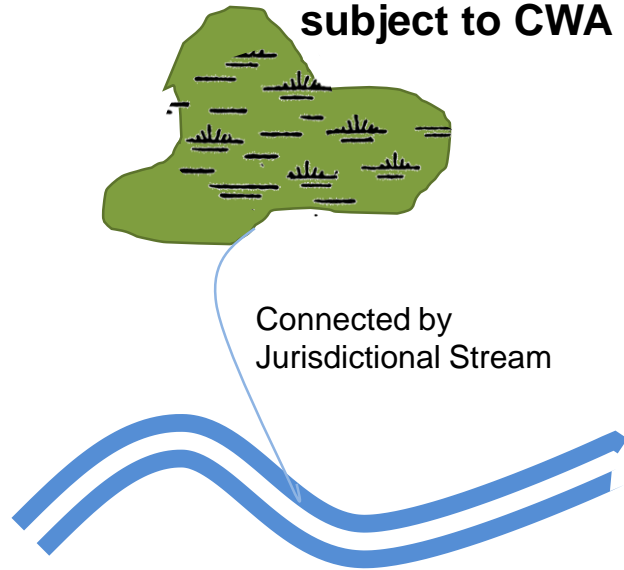


Background

- Recent changes to Clean Water Act Federal Jurisdiction for wetlands in certain landscape positions created a **PERMITTING GAP** in NC for granting authorization to impact those wetlands
 - This permitting gap applies to federally non-jurisdictional wetlands as defined in the Navigable Waters Protection Rule (NWPR). These are not isolated wetlands; they are wetlands that have a direct connection to downstream waters. They are no longer jurisdictional (subject to Section 404 of the Clean Water Act), but they remain protected in NC. DWR did not have a permitting mechanism to authorize impacts to these wetlands when federal jurisdiction was removed by the NWPR
- The EMC adopted **temporary permitting rules in May 2021** to provide a necessary permitting mechanism to the regulated community
 - Adopted temporary rules for expedited relief
 - Division of Water Resources immediately began the permanent rule making process
- EMC approved draft permanent rules for Public Notice and Hearing in Sept 2021

Background

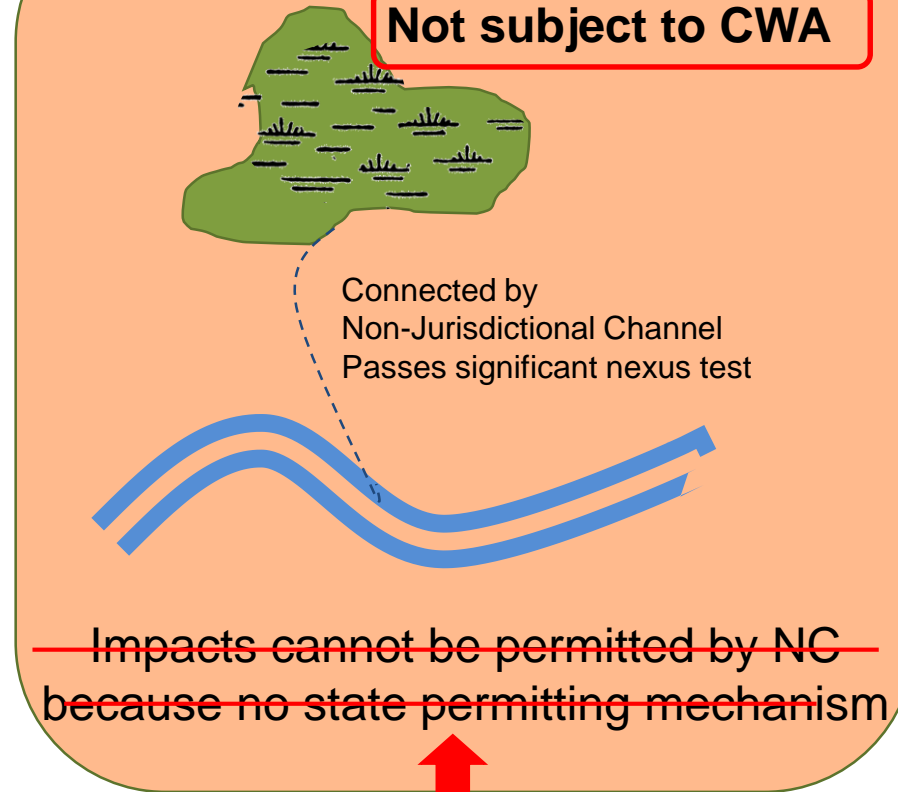
Federally Jurisdictional Wetlands subject to CWA



Impacts permitted by NC through
15A NCAC 02H .0500 (401 cert)

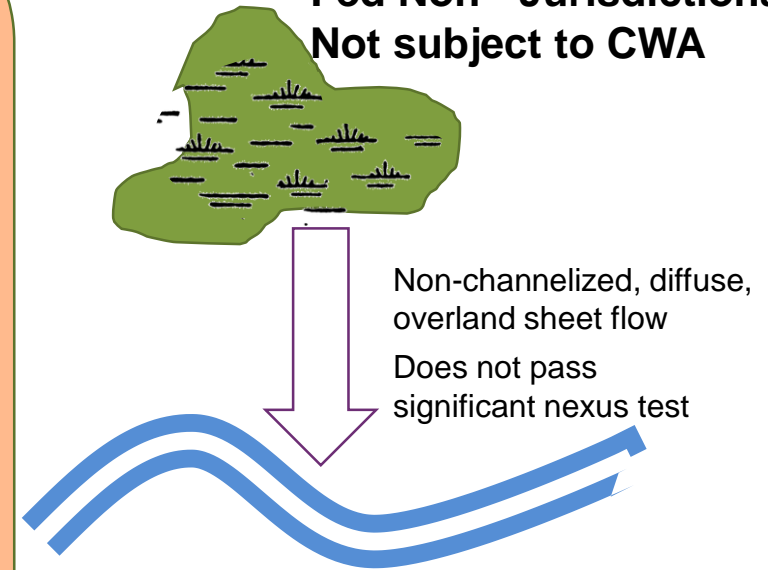
Not changing

Federally **Non-Jurisdictional** Wetlands **Not subject to CWA**



15A NCAC 02H .1401 – 1405 Discharges
to Federally Non-Jurisdictional Wetlands
and Classified Surface Waters

Isolated Wetlands Fed Non - Jurisdictional Not subject to CWA



Impacts permitted by NC through
15A NCAC 02H .1300 (IWP)

Not changing

Recent Federal Actions



EPA & USACE announced their intention to revise the definition of “Waters of the US”

- The federal revision process is unlikely to be completed prior to the expiration of Temporary Rules. Delaying development of permanent rules could result in leaving the regulated community without a permitting mechanism for unavoidable impacts to these wetlands in the interim.

August 30, 2021 action by the US District Court for the District of Arizona on “Waters of the US” and the Navigable Waters Protection Rules

- EPA/USACE released initial guidance and updated guidance between Oct - Jan on how the federal agencies intend to interpret and implement the vacatur. Guidance has been, and may continue to be, evolving and does not address all possible scenarios.

Regardless of recent and future actions at the federal level, approximately 300 wetlands were determined to be Federally Non-Jurisdictional while the 2020 Navigable Waters Protection Rule was in effect. A permitting gap would continue to exist for these wetlands without adoption of the proposed permanent rules.

Rule Justification

- ❖ Finalizing 15A NCAC 02H .1400 rules would:
 - ❖ Provide regulatory certainty by providing a permitting pathway for projects with wetland impacts within North Carolina regardless of “Waters of the US” actions that occur at the federal level
 - ❖ Provide a permitting pathway for projects that require impacts to wetlands identified as “Federally Non-Jurisdictional” pursuant to approved jurisdictional determinations issued by USACE while the 2020 Navigable Waters Protection Rule was in effect

Timeline



Date	Action
May 28, 2021	Effective Date of Temporary Rule
July 7, 2021	WQC - approval to proceed to EMC with request to initiate public notice/hearing process
August 11, 2021	OSBM Approval of Regulatory Impact Analysis
Sept 9, 2021	EMC - request to initiate public notice/hearing process
Sept 22, 2021	DWR issues Public Notice
Oct 1 – Dec 1, 2021	APA Public comment period
Jan 2022	EMC – HO report and request to adopt permanent rules
Jan – Feb 2022	RRC submittal and review
March 12, 2022	Temporary Rule Expiration

Public Hearing and Comments

- Proposed Rules were published on the Office of Administrative Hearings Website on October 1, 2021 and on DWR's website on September 22, 2021. Email was sent to the DWR 401 Listserv
- Public comment period: September 22 – December 1, 2021. Virtual Public Hearing on November 4, 2021
- 15 people registered to attend the public hearing and 8 people spoke at the hearing. Some of the speakers were representing multiple organizations. All speakers were in favor of adoption of the proposed rules
- 13 written comments were received by the Division
 - 1 comment was submitted on behalf of 20 other organizations
 - 1 comment was a petition representing 757 citizens
 - The majority of the written comments were favor of adoption of the proposed rules, including the petition and comments submitted on behalf of multiple organizations
 - 3 comments were opposed to the rules
 - Some comments recommended revisions to the proposed rules
- Comments are summarized with Division responses in the Hearing Officer's Report – All comments provided in Appendix 4 of the Hearing Officer's Report
- Changes made to the rule text as a result of review of all comments are highlighted in the rules presented in Appendix 6 of the Hearing Officer's Report

Public Hearing and Comments



- General comments in support of proposed rules (Majority of comments):
 - Support of the proposed deemed permitted threshold of 0.10 acre of wetlands
 - Many wetlands in NC are small and many small wetlands can be as important as large wetlands
 - Will provide for reasonable permitting pathway while managing the resources responsibly
 - Will provide important knowledge of what is being impacted
 - Development is expected to double in the Piedmont over the next 20 years where small wetlands are prominent
 - Support of the rules to address the permitting gap for wetlands that have been regulated by the EMC for at least 20 years
 - Regulatory certainty is important
 - Important to finalize rules with uncertainty of Federal regulations/litigation
 - Wetland functions are essential to the health of NC, flood resiliency, coastal seafood and fisheries, tourism and recreation
 - North Carolina's water quality and unique landscape depend on the health of the state's wetlands
 - Wetlands are the kidneys of the coast
 - The state has an obligation to protect wetlands
 - Will provide mitigation of impacts, not stop impacts
 - Important to provide consistency with the 401 Certification program
 - Non jurisdictional wetlands provide essential habitat for numerous state and federal listed species as well as Species of Greatest Conservation Need across the state

Public Hearing and Comments

- General comments opposed to proposed rules:
 - Question DEQ's authority to adopt the proposed rules
 - Addressed during temporary rule adoption process. Detailed response is provided in Hearing Officer's report
 - Question the need for definition of Isolated Wetlands and question the proposed definition
 - Addressed during temporary rule adoption process. Detailed response is provided in Hearing Officer's report
 - Opinion that the proposed rules are only necessary because of a change made to the definition of Wetlands in 15A NCAC 02B .0202 during the 2017-2019 rules readoption process
 - Rules readoption process for 15A NCAC 2B .0202 was consistent with APA as evidenced by RRC approval
 - Detailed response to this comment is provided in Hearing Officer's report

Proposed Rule Changes



Make technical edits to correct typographical errors and to correct terminology errors identified by staff.

Corrections are in multiple locations throughout .1401 - .1405, for example:

(2) the name, address, and phone number of the **property** applicant. If the applicant is not the property owner(s), name, address, and phone number of the property owners(s);

(3) if the applicant is a corporation, the name and address of the North Carolina process agency, and the name, address, and phone number of the individual who is the authorized agent of the corporation and responsible for the activity for which **certification permit** is sought. The corporation must be registered with the NC Secretary of State's Office to conduct business in NC;

Proposed Rule Changes



Comment: Request to increase deemed permitted threshold for wetlands to be consistent with Isolated Wetland Rules (02H .1300)

Response: No change proposed. Permanent rules were drafted based on significant public comments received during adoption of the temporary rules and informed by Regulatory Impact Analysis, and are consistent with 401 certification program

Proposed Rule Changes



Comment: Revise rules to accommodate other types of impacts to wetlands, not just discharges

Response: Modified language to use the term “impact” for more consistency within the rules and for consistency with the 401 Water Quality General Certifications. Term is well understood by regulated community

Language changed throughout .1401 - .1405, for example:

(b) This Section outlines the application and review procedures for permitting of ~~discharges into~~ impacts to federally non-jurisdictional wetlands and federally non-jurisdictional classified surface waters that have been listed in 15A NCAC 02B .0300. If the USACE or its designee determines that a particular water or wetland is not regulated under Section 404 of the Clean Water Act, and the particular water or wetland is not an isolated wetland or isolated water as defined in Rule .1301 of this Subchapter, then ~~discharges~~ impacts to that water or wetland shall be covered by this Section.

Proposed Rule Changes

Comment: Request that the agency consider lower, or no, deemed permitted thresholds for impacts to Unique Wetlands, Wetlands adjacent to High Quality Water, Outstanding Resource Waters, 303d listed waters, etc.

Response: Added language to be consistent with the deemed permitted thresholds within the 401 certification program

Except for activities that impact wetlands classified as coastal wetlands [15A NCAC 07H .0205], Unique Wetlands (UWL) [15A NCAC 02B .0231; or are adjacent to waters designated as: ORW (including SAV), HQW (including PNA), SA, WS-I, WS-II, Trout or North Carolina National Wild and Scenic River, activities that impact less than or equal to 1/10 acre of federally non-jurisdictional wetlands for the entire project are deemed to be permitted provided they comply with the conditions listed in Subparagraph (4) of this Paragraph, and it shall not be necessary for the Division to issue permits for these activities.

Proposed Rule Changes

Comment: The final rule should include a more explicit requirement that mitigation occur not just in the same river basin, but also in the same watershed as the project in question

Response: Added language limiting mitigation to the same watershed only for specific wetlands in order maintain consistency with the 401 Water Quality Certification mitigation requirements as intended

Mitigation for impacts to wetlands designated in Subparagraph (b)(6) of this Rule shall be of the same wetland type and within the same watershed when practical; and

Subparagraph (b)(6): “Class UWL wetlands and wetlands that are habitat for state or federally listed threatened or endangered species”

Timeline

Date	Action
Jan 2022	EMC – HO report and request to adopt permanent rules
March 12, 2022	Temporary Rule Expiration

- ❖ Finalizing 15A NCAC 02H .1400 rules would:
 - ❖ Provide regulatory certainty by providing a permitting pathway for projects with wetland impacts within North Carolina regardless of “waters of the US” actions that have occur/will occur at the Federal level
 - ❖ Provide a permitting pathway for projects that require impacts to wetlands identified as “Federally Non-Jurisdictional” pursuant to valid approved jurisdictional determinations issued by the US Army Corps of Engineers while the 2020 Navigable Waters Protection Rule was in effect. **Project proponents who have unavoidable impacts to these wetlands would be prevented from proceeding with their proposed projects without a permitting mechanism**

Recommendation

Approve the Hearing Officer's Report and Adopt the Proposed Rules 15A NCAC 02H Section 1400 "Impacts to Federally Non-Jurisdictional Wetlands and Federally Non-Jurisdictional Classified Surface Waters" (.1401 through .1405) with recommended changes, and Rule Amendments to 15A NCAC 02H .1301 "Discharges to Isolated Wetlands and Isolated Waters: Purpose and Scope"