

SUBCHAPTER 02H - PROCEDURES FOR PERMITS: APPROVALS

SECTION .0500 - WATER QUALITY CERTIFICATION

15A NCAC 02H .0501 APPLICABILITY AND DEFINITIONS

(a) This Section outlines the application and review procedures for activities that require State water quality certifications (certifications) pursuant to Section 401 of the Clean Water Act (33 U.S.C. 1341). Certifications are required for a federally permitted or licensed activity including, but not limited to, the construction or operation of facilities, which may result in a discharge into navigable waters. Failure to obtain a required certification is enforceable by the Department pursuant to Chapter 143, Article 21, Part 1.

(b) Water quality certifications may be issued for individual activities (individual certifications) or issued for specific types or groups of activities (general certifications):

- (1) Individual certifications shall be issued on a case-by-case basis using the procedures outlined in this Section.
- (2) General certifications may be developed by the Division and issued by the Director for specific types or groups of activities that are similar in nature and considered to have minimal impact. All activities that receive a Certificate of Coverage under a general certification from the Division shall be covered under that general certification. When written approval is required in the general certification, the application and review procedures for requesting a Certificate of Coverage under a general certification from the Division for the proposed activity are the same as the procedures outlined in this Section for individual certifications.

(c) The terms used in this Section shall be as defined in G.S. 143-212 and G.S. 143-213 and as follows:

- (1) "Certification" means the State water quality certification pursuant to Section 401 of the Clean Water Act (33 U.S.C. 1341).
- (2) "Class SWL wetland" means the term as defined at 15A NCAC 02B .0101.
- (3) "Class UWL wetland" means the term as defined at 15A NCAC 02B .0101.
- (4) "Cumulative impact" means environmental impacts resulting from incremental effects of an activity when added to other past, present, and reasonably foreseeable future activities, regardless of what entities undertake such other actions.
- (5) "Department" means the Department of Environmental Quality and the Secretary of the Department of Environmental Quality.
- (6) "Director" means the Director of the Division.
- (7) "Division" means the Division of Water Resources of the North Carolina Department of Environmental Quality.
- (8) "Secondary impact" means indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable to the applicant or the Division.
- (9) "Wetland" means the term as defined in 15A NCAC 02B .0202.

History Note: Authority G.S. 143-211(c); 143-215.3(a)(1); 143-215.3(c); 143B-282(a)(1)(u); S.L 2017, c. 145, s. 2(b);
RRC Objection Eff. July 18, 1996 due to lack of statutory authority and ambiguity;
Eff. October 1, 1996;
Readopted Eff. June 1, 2019.

15A NCAC 02H .0502 FILING APPLICATIONS

(a) Any person needing issuance of an individual water quality certification or Certificate of Coverage under a general certification required by this Section and Section 401 of the Clean Water Act shall file with the Director, at 1617 Mail Service Center, Raleigh, North Carolina, 27699-1617 or 512 N. Salisbury Street, Raleigh, NC 27604, one complete copy of an application for certification or submit one complete copy of an application electronically via the following website: https://edocs.deq.nc.gov/Forms/DWR_Wetlands_Online_Submittal_Page. The application shall be made on a form provided or approved by the Division or the U.S. Army Corps of Engineers, available electronically via the following website: <https://deq.nc.gov/about/divisions/water-resources/water-quality-permitting/401-buffer-permitting-branch/application>. The application shall include at a minimum the following:

- (1) the date of application;

- (2) the name, address, and phone number of the applicant. If the applicant is not the property owner(s), the name, address, and phone number of the property owner(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 is sought. The corporation must be registered with the NC Secretary of State's Office to conduct business in NC;
- (4) the nature of the activity to be conducted by applicant;
- (5) whether the discharge has occurred or is proposed;
- (6) the location of the discharge, stating the municipality, if applicable; the county; the drainage basin; the name of the receiving waters; and the location of the point of discharge with regard to the receiving waters;
- (7) a description of the receiving waters, including type (creek, river, swamp, canal, lake, pond, or estuary) if applicable; nature (fresh, brackish, or salt); and wetland classification;
- (8) a description of the type of waste treatment facilities, if applicable;
- (9) a map(s) or sketch(es) with a scale(s) and a north arrow(s) that is legible to the reviewer and of sufficient detail to delineate the boundaries of the lands owned or proposed to be utilized by the applicant in carrying out the activity; the location, dimensions, and type of any structures erected or to be erected on the lands for use in connection with the activity; and the location and extent of the receiving waters, including wetlands within the boundaries of the lands;
- (10) an application fee as required by G.S. 143-215.3D(e); and
- (11) a signature by the applicant for the federal permit or license or an agent authorized by the applicant. If an agent is signing for the applicant, an agent authorization letter must be provided. In signing the application, the applicant certifies that all information contained therein or in support thereof is true and correct to the best of their knowledge.

(b) Submission of an application to the Division of Coastal Management for a permit to develop in North Carolina's coastal area in accordance with the rules of 15A NCAC 07J .0200 shall suffice as an application for a water quality certification or certificate of coverage under a general certification upon receipt by the Division from the Division of Coastal Management.

(c) The Division may request in writing, and the applicant shall furnish, any additional information necessary to clarify the information provided in the application under Paragraph (a) of this Rule, or to complete the evaluation in Rule .0506 of this Section.

(d) If the applicant believes that it is not feasible or is unnecessary to furnish any portion of the information required by Paragraphs (a), (b) and (c) of this Rule, then the applicant shall submit an explanation detailing the reasons for omission of the information. The final decision regarding the completeness of the application shall be made by the Division based upon the information required in Paragraphs (a), (b) and (c) of this Rule, and any explanation provided by the applicant regarding omitted information provided in this Paragraph.

(e) Pursuant to G.S. 143-215.3(a)(2), the staff of the Division shall conduct such investigation as the Division deems necessary to clarify the information provided in the application under Paragraph (a) of this Rule or to complete the evaluation in Rule .0506 of this Section. The applicant shall allow the staff safe access to the lands and facilities of the applicant and lend such assistance as shall be reasonable for those places, upon the presentation of credentials.

History Note: Authority G.S. 143-211(c); 143-215.3(a)(1); 143-215.3(c); 143B-282(a)(1)(u); Eff. February 1, 1976; Amended Eff. December 1, 1984; January 1, 1979; RRC Objection Eff. July 18, 1996 due to lack of statutory authority and ambiguity; Recodified from 15A NCAC 2H .0501 Eff. October 1, 1996; Amended Eff. October 1, 1996; Readopted Eff. June 1, 2019.

15A NCAC 02H .0503 PUBLIC NOTICE AND PUBLIC HEARING

(a) The Division shall provide public notice for proposed General Certifications. This notice shall be sent to all individuals on the mailing list described in Paragraph (g) of this Rule and posted on the Division's website: <https://deq.nc.gov/about/divisions/water-resources/water-quality-permitting/401-buffer-permitting-branch/public-notices>. Notice shall be made at least 30 calendar days prior to issuance of the General Certification by the Division. Public notice shall not be required for those activities covered by Certificates of Coverage under a General Certification.

(b) Notice of each pending application for an individual certification shall be sent to all individuals on the mailing list described in Paragraph (g) of this Rule and shall be posted on the Division's website. Notice shall be made at least 30 calendar days prior to proposed final action by the Division on the application.

(c) The notice shall set forth:

- (1) the name and address of the applicant;
- (2) the action requested in the application;
- (3) the nature and location of the discharge; and
- (4) the proposed date of final action to be taken by the Division on the application.

The notice shall also state where additional information is available online and on file with the Division. Information on file shall be made available upon request between 8:00 am and 5:00 pm, Monday through Friday, excluding State holidays, and copies shall be made available upon payment of the cost thereof to the Division pursuant to G.S. 132-6.2.

(d) The public notice requirement for an individual certification as described in Paragraph (b) of this Rule may be satisfied by a joint notice with the Division of Coastal Management (15A NCAC 07J .0206) or the U.S. Army Corps of Engineers according to their established procedures.

(e) Any person who desires a public hearing on a General Certification or an individual certification application shall so request in writing to the Division at the address listed in Rule .0502 of this Section. The request must be received by the Division within 30 calendar days following the Public Notice.

(f) If the Director determines that there is significant public interest in holding a hearing, based upon such factors as the reasons why a hearing was requested, the nature of the project, and the proposed impacts to waters of the State, the Division shall notify the applicant in writing that there will be a hearing. The Division shall also provide notice of the hearing to all individuals on the mailing list as described in Paragraph (g) of this Rule and shall post the notice on the Division's website. The notice shall be published at least 30 calendar days prior to the date of the hearing. The notice shall state the time, place, and format of the hearing. The notice can be combined with the notice required under Paragraph (c) of this Rule. The hearing shall be held within 90 calendar days following date of notification to the applicant. The record for each hearing held under this Paragraph shall remain open for a period of 30 calendar days after the public hearing to receive public comments.

(g) Any person may request that he or she be emailed copies of all public notices required by this Rule. The Division shall add the email address of any such person to an email listerv and shall email copies of notices to all persons on the list.

(h) Any public hearing held pursuant to this Rule may be coordinated with other public hearings held by the Department or the U.S. Army Corps of Engineers.

History Note: Authority G.S. 143-211(c); 143-215.3(a)(1); 143-215.3(c); 143B-282(a)(1)(u);
Eff. February 1, 1976;
Amended Eff. December 1, 1984; September 1, 1984;
RRC Objection Eff. July 18, 1996 due to lack of statutory authority and ambiguity;
Recodified from 15A NCAC 02H .0502 Eff. October 1, 1996;
Amended Eff. October 1, 1996;
Readopted Eff. June 1, 2019.

15A NCAC 02H .0504 HEARING

History Note: Authority G.S. 143-215.3(a)(1); 143-215.3(c); 143B-282(1)(u);
Eff. February 1, 1976;
Amended Eff. July 1, 1988; December 1, 1984;
RRC Objection Eff. July 18, 1996 due to lack of statutory authority and ambiguity;
Recodified from 15A NCAC 2H .0503 Eff. October 1, 1996;
Amended Eff. October 1, 1996;
Repealed Eff. June 1, 2019.

15A NCAC 02H .0505 DELEGATIONS

History Note: Authority G.S. 143-215.3(a)(1); 143-215.3(c);
Eff. February 1, 1976;
Repealed Eff. December 1, 1984.

15A NCAC 02H .0506 REVIEW OF APPLICATIONS

(a) **NO WRITTEN CONCURRENCE REQUIRED.** Applicants shall request a Certificate of Coverage under a general certification by submitting an application to the Division unless that general certification states that written concurrence from the Division is not required. When written concurrence is not required, the activities shall be deemed certified if all of the conditions of the general certification are followed and may proceed without the review procedures outlined in Paragraph (b) of this Rule.

(b) **EVALUATION.** The Division shall issue an individual certification or a "Certificate of Coverage" under a general certification upon determining that the proposed activity will comply with state water quality standards, which includes designated uses, numeric criteria, narrative criteria and the state's antidegradation policy, as defined in the rules of 15A NCAC 02B .0200 and the rules of 15A NCAC 02L .0100 and .0200. In assessing whether the proposed activity will comply with water quality standards, the Division shall evaluate if the proposed activity:

- (1) has avoided and minimized impacts to surface waters and wetlands to ensure any remaining surface waters or wetlands, and any surface waters or wetlands downstream, continue to support existing uses during and after project completion;
- (2) would cause or contribute to a violation of water quality standards;
- (3) would result in secondary or cumulative impacts that cause or contribute to, or will cause or contribute to, a violation of water quality standards;
- (4) provides for replacement of existing uses through compensatory mitigation as described in Paragraph (c) of this Rule;
- (5) for Class SWL wetlands, is water dependent and requires access to water as a central element of its basic function. Projects funded by government agencies may be exempted from this requirement; and
- (6) for Class UWL wetlands and wetlands that are habitat for state or federally listed threatened or endangered species, is necessary to meet a demonstrated public need.

(c) **MITIGATION.** Replacement or mitigation of unavoidable losses of existing uses shall be reviewed in accordance with all of the following guidelines:

- (1) The Division shall coordinate mitigation requirements with other permitting agencies that are requiring mitigation for a specific project;
- (2) Total impacts to less than one-tenth of one acre of Class WL and Class SWL wetlands for the entire project shall not require compensatory mitigation;
- (3) All impacts to Class UWL wetlands shall require compensatory mitigation;
- (4) Total impacts to less than 300 linear feet of perennial streams for the entire project shall not require compensatory mitigation. For linear publicly owned and maintained transportation projects that the U.S. Army Corps of Engineers determines are not part of a larger common plan of development, impacts to less than 300 linear feet per perennial stream shall not require compensatory mitigation;
- (5) The ratio of mitigation required to classified surface waters or wetlands impacted is 1:1. The required area or length of mitigation required shall be multiplied by 1 for restoration, 1.5 for establishment, 2 for enhancement and 5 for preservation. These multiplier ratios shall not apply to approved mitigation sites where the Interagency Review Team (insert CFR reference) has approved other ratios;
- (6) Mitigation shall comply with the requirements set forth in G.S. 143-214.11;
- (7) Acceptable methods of mitigation, as defined in 33 CFR Part 332 available free of charge on the internet at: http://water.epa.gov/lawsregs/guidance/wetlands/wetlandsmitigation_index.cfm, include restoration, including both re-establishment and rehabilitation, establishment (creation), enhancement, and preservation. No more than 25 percent of the mitigation required by Subparagraph (c)(2), (3) or (4) of this Rule can be met through preservation, unless the Director determines that the public good would be better served by a higher percentage of preservation.
- (8) Mitigation for impacts to classified surface waters and wetlands shall be conducted in North Carolina within the same river basin and in accordance with 33 CFR Part 332, available free of charge on the internet at: http://water.epa.gov/lawsregs/guidance/wetlands/wetlandsmitigation_index.cfm, unless otherwise approved by the Director;
- (9) Mitigation for impacts to Class SWL wetlands shall be of the same wetland type (Class SWL wetlands);

- (10) 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
- (11) Mitigation for impacts to surface waters classified as WS-I, WS-II or WS-III and wetlands adjacent to waters classified as WS-I, WS-II or WS-III shall be within the same water supply watershed when practical.

History Note: Authority G.S. 143-211(c); 143-214.7C; 143-215.3(a)(1); 143-215.3(c); 143B-282(a)(1)(u); S.L. 2015-286; S.L. 2017-10; RRC Objection Eff. July 18, 1996 due to lack of statutory authority and ambiguity; Eff. October 1, 1996; Readopted Eff. June 15, 2020.

15A NCAC 02H .0507 DECISION ON APPLICATION FOR CERTIFICATION

(a) The Director shall issue the certification, deny the application, provide notice of hearing pursuant to Rule .0503 of this Section, or request additional information within 60 calendar days after receipt of an application for certification. When the Director requests additional information, the 60-day review period restarts upon receipt of all of the additional information requested by the Director. Failure to issue the certification, deny the application, provide notice of hearing, or request additional information within 60 calendar days shall result in a waiver of the certification requirement by the Director, unless:

- (1) The applicant agrees, in writing, to a longer period;
- (2) The final decision is to be made pursuant to a public hearing;
- (3) The applicant refuses the staff access to its records or premises for the purpose of gathering information necessary for the Director's decision; or
- (4) Information necessary for the Director's decision is unavailable.

(b) The Director shall issue the certification, deny the application, or request additional information within 60 calendar days following the close of the record for the public hearing. Failure to take action within 60 calendar days shall result in a waiver of the certification requirement by the Director, unless Subparagraphs (a)(1), (3), or (4) of this Rule apply.

(c) Any certification issued pursuant to this Section may contain such conditions as the Director shall deem necessary to ensure compliance with Sections 301, 302, 303, 306, and 307 of the Clean Water Act and with State water law. The conditions included in the certification shall become enforceable by the Department pursuant to Chapter 143, Article 21, Part 1 when the federal permit or license is issued.

(d) Modification or Revocation of Certification:

- (1) Any certification issued pursuant to this Section may be subject to revocation or modification by the Director for violation of Sections 301, 302, 303, 306, or 307 of the Clean Water Act or State water law.
- (2) Any certification issued pursuant to this Section may be subject to revocation or modification by the Director upon a determination that information contained in the application or presented in support thereof is incorrect or if the conditions under which the certification was made have changed.

(e) The Division shall notify the applicant of the final action to issue or deny the application. In the event that the Director denies the application, the Director shall specify the reasons for the denial. A copy of the notification shall be sent to the appropriate federal licensing or permitting agency and EPA.

(f) The issuance or denial is a final agency decision that is subject to administrative review pursuant to G.S. 150B-23.

History Note: Authority G.S. 143-211(c); 143-215.3(a)(1); 143-215.3(c); 143B-282(a)(1)(u); Eff. February 1, 1976; Amended Eff. July 1, 1988; December 1, 1984; RRC Objection Eff. July 18, 1996 due to lack of statutory authority and ambiguity; Recodified from 15A NCAC 2H .0504 Eff. October 1, 1996; Amended Eff. October 1, 1996; Readopted Eff. June 1, 2019.