

**HEARING OFFICER'S REPORT OF PROCEEDINGS
PUBLIC HEARING AND COMMENT PERIOD**

Adoption of Permanent Rules 15A NCAC 02H .1400
Discharges to Federally Non-Jurisdictional Wetlands and Federally Non-Jurisdictional
Classified Surface Waters
AND
Adoption of Amendment to Rule 15A NCAC 02H .1301
Discharges to Isolated Wetlands and Isolated Waters: Purpose and Scope

Environmental Management Commission

December 2021

Basic Information

Commission:	Environmental Management Commission Water Quality Committee
Agency	Department of Environmental Quality, Division of Water Resources
Title	Discharges to Federally Non-Jurisdictional Wetlands and Federally Non-Jurisdictional Classified Surface Waters Discharges to Isolated Wetlands and Isolated Waters
Citations	15A NCAC 02H .1400 15A NCAC 02H .1301
Description of the Proposed Rules	On April 21, 2020, the U.S. Environmental Protection Agency (EPA) and the Department of the Army published the Navigable Waters Protection Rule (NWPR) in the <i>Federal Register</i> to finalize a revised definition of “Waters of the United States” under the Clean Water Act. The NWPR became effective on June 22, 2020. As a result of the Another reason to establish permanent state rules is that, a subset of wetlands classified under State law are no longer subject to federal Clean Water Act jurisdiction. These classified wetlands remain protected by 15A NCAC 02B .0231 - Wetland Standards, but, as a result of the Another reason to establish permanent state rules is that, there was no permitting mechanism available to authorize impacts to these wetlands. To provide a regulatory mechanism to authorize impacts to wetlands that are no longer federally jurisdictional, and to provide regulatory certainty, temporary rules were adopted by the Environmental Management Commission (EMC) and approved by the Rule Review Commission (RRC) in May 2021. In accordance with G.S. 150B-21.1(d)(5), these temporary rules will expire 270 days from the date of publication in the NC Register unless the permanent rule is adopted by the EMC to replace the temporary rule. The proposed permanent rules will provide regulatory certainty by providing a permitting mechanism for wetlands that were determined to be excluded from Federal jurisdiction during the time the NWPR was effective.
Agency Contact	Sue Homewood Sue.Homewood@ncdenr.gov (336) 776-9693
Authority	G.S. 143-215.1(a)(6); G.S. 143-215(b)(3); G.S. 143-215.3(a)(1); G.S. 143-215.3(c)
Statement of Necessity	These rules are proposed for adoption in order to replace temporary rules adopted in May of 2021 which provide a permitting mechanism for classified wetlands and classified surface waters in NC that are no longer eligible for permitting through Section 401 of the Clean Water Act because of the adoption of the NWPR.
Hearing Officer	Commissioner Maggie Monast
Comment Period	October 1, 2021 to December 1, 2021 (DWR issued a Public Notice and began accepting comments on September 22, 2021)

Public Hearing

November 4, 2021

Appendices

- [APPENDIX 1](#) – Public Notice of Permanent Rule
- [APPENDIX 2](#) – List of Registered Attendees for Virtual Public Hearing
- [APPENDIX 3](#) – Link to Audio Recording of the Virtual Public Hearing
- [APPENDIX 4](#) – Link to Public Comments
- [APPENDIX 5](#) – 2001 Environmental Management Commission
Interpretive Ruling and Department of Justice Advisory
Opinion
- [APPENDIX 6](#) – Revised Rule Text
- [APPENDIX 7](#) – OSBM Approved Regulatory Impact Analysis

Background

On April 21, 2020, the U.S. Environmental Protection Agency (EPA) and the Department of the Army – Corps of Engineers (USACE) published the Navigable Waters Protection Rule in the [Federal Register](#) to finalize a revised definition of “Waters of the United States” under the Clean Water Act. The NWPR became effective on June 22, 2020. As a result of the NWPR, a subset of wetlands classified under State law are no longer subject to federal Clean Water Act jurisdiction. These classified wetlands remain protected by 15A NCAC 02B .0231 - Wetland Standards, but, as a result of the NWPR, there is no permitting mechanism available to authorize unavoidable impacts to these wetlands.

To provide a regulatory mechanism to authorize impacts to wetlands that are no longer Federally jurisdictional and to provide regulatory certainty, temporary rules were adopted by the EMC and approved by the RRC in May 2021. In accordance with G.S. 150B-21.1(d)(5), these temporary rules will expire 270 days from the date of publication in the NC Register unless the permanent rule is adopted by the EMC to replace the temporary rule.

The proposed permanent rules will establish a permitting mechanism for classified wetlands that are not eligible for coverage under existing wetland permitting rules in 15A NCAC 02H .0500 or 15A NCAC 02H.1300. In addition, definitions for “isolated wetlands” and “isolated waters” are proposed as a rule amendment to 15A NCAC 02H .1301 in order to define a term that was previously defined by the USACE.

On August 30, 2021, the U.S. District Court for the District of Arizona vacated the NWPR and in light of this order the EPA and USACE halted implementation of the Navigable Waters Protection Rule and are interpreting “Waters of the US” consistent with the pre-2015 regulatory regime. On November 18, 2021 the EPA and the USACE announced the signing of a proposed rule to revise the definition of the “Waters of the United States”. On December 7, 2021 this proposed rule was published in the [Federal Register](#). However, further developments in litigation over the NWPR have the potential to bring the rule back into effect before new rules are promulgated. Therefore, permanent rules are still warranted to avoid future regulatory uncertainty.

Another reason to establish permanent state rules is that under existing USACE policy, Approved Jurisdictional Determination (AJDs) are valid for five years. AJDs that were issued during the time the NWPR was in effect will remain valid until the expiration dates provided in the approvals (typically 5 years). Approximately 300 wetlands in North Carolina were identified as “Federally non-jurisdictional” by USACE issued AJDs between June 2020 and August 2021 in accordance with the NWPR. The adoption of these permanent rules will provide landowners and applicants with a permitting mechanism for unavoidable impacts to these wetlands when valid AJDs identify federally non-jurisdictional wetlands.

Public Comment and Hearing

The proposed permanent rules were approved by the EMC to proceed to public comment and hearing at the September 2021 EMC meeting. Commissioner Maggie Monast was designated as the hearing officer.

The proposed rules were published on the Office of Administrative Hearings (OAH) website on October 1, 2021. The proposed rules were also published on the Division 401 Buffer and Permitting Branch website and on the Department of Environmental Quality’s (DEQ) proposed rules website throughout the public comment period.

The Division also sent a link to the published notice and rule text for public comment to interested parties via email to the 401 and Buffer Permitting Branch Listserv on September 22, 2021. The public notice issued by the Division is included in [Appendix 1](#).

Public Hearing

The Division held a virtual public hearing via WebEx Events on November 4, 2021. Commissioner Maggie Monast served as the hearing officer for the hearing. The public notice also provided a link for attendees to register to speak at the hearing. The list of people who registered to attend and speak at the hearing is included in [Appendix 2](#).

Eight people registered to speak at the hearing. Some of the speakers were representing multiple organizations. In addition, the hearing officer asked if anyone that did not register to speak in advance would still like to provide comments before the hearing was closed. A link to an audio recording of the virtual hearing can be found in [Appendix 3](#). A summary of the comments received during the virtual public hearing is included in Appendix 4. All speakers were in favor of the proposed permanent rules.

The Division also received 13 written comments. Some of the written comments were submitted on behalf of multiple organizations. One comment was a petition representing 757 citizens who signed it. The majority of the comments that were received indicated support for the rules because the commenter/organization believed that wetland protection was important, and because the commenter/organization believed that providing a permitting mechanism for the regulated community was essential. Three commenting organizations stated that they were opposed to the rules and/or did not believe the rules were necessary.

Comments have been summarized into succinct points for ease of review within this document and similar comments, written and oral, have been grouped together with one agency response provided. A few commenters provided specific requests for modifications to the proposed rule text. Copies of all written comments received, and a staff summary of oral comments received, are attached in [Appendix 4](#). The Division has reviewed all comments and has proposed some changes to the text of the rules based on the input received.

Comments and Agency Responses

Written and oral comments in support of the proposed rules and specific items within the rules and the reasons why. Comments received from North Carolina Wildlife Commission, Eco Terra, Mountain True, Sound Rivers, Waterkeepers Carolina, Haw River Assembly, North Carolina Coastal Federation, Yadkin Riverkeeper, NC Conservation Network and 757 signers of a petition, Southern Environmental Law Center (and on behalf of 20 other organizations), and 5 Individuals.

- Support of the proposed deemed permitted threshold of 0.10 acre of wetlands
 - Many wetlands in NC are small and 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

No Agency Response Necessary

Written comment from the North Carolina Aggregates Association:

Opposed to the permanent rule because they do not believe that the DEQ has the authority to implement the opposed rule.

Written comment from the North Carolina Farm Bureau:

States there is a lack of authority under the Administrative Procedures Act (APA). Cites G.S. 150B-19.3(a) which states that an agency may not adopt a rule for the protection of the environment or natural resources that imposes a more restrictive standard, limitation, or requirement than those imposed by federal law or rule, if a federal law or rule pertaining to the same subject matter has been adopted.

Written comment from the Southern Environmental Law Center (and on behalf of 20 other organizations):

Permanent rules are within the Environmental Management Commission's authority – the Commission has regulated impacts to wetlands covered by the rule for decades. That authority is well grounded in the North Carolina Constitution, state statute, and case law. (comment provides citations and attachments of referenced rules, statutes and case law)

Agency Response:

Prior to proposing new rules, the Division carefully evaluated relevant existing federal and state regulations and statutes in detail. Based on this review, the Division concluded that the proposed rules are within the EMC's authority to adopt and are necessary to provide a permitting mechanism to the regulated community for unavoidable impacts to wetlands that are not subject to Section 404 of the Federal Clean Water Act and are not Isolated Wetlands. Wetland Standards (15A NCAC 02B .0231) were first promulgated by the EMC in 1996. The standards protect all wetlands within North Carolina pursuant to directives of the North Carolina General Assembly for the conservation of the State's water resources and based on the definition of Waters of the State in General Statute (G.S. 143-212). The Wetland Standard rules, and state statutes upon which they are promulgated, predate the language cited in G.S. 150B-19.3(a). The rules being proposed are not "for the protection of the environment or natural resources that impose a more restrictive standard, limitation or requirement imposed by federal law or rule" because they are permitting rules which allow for impacts to wetlands which have been protected since 1996. G.S. 150B-19.3(a) is not applicable because the Federal definition of "Waters of the United States" only affects the scope of Federal jurisdiction. Without the proposed permitting rules, the regulated community has no permitting mechanism under which they may impact the subject wetlands.

Written comments from the North Carolina Home Builders Association (representing 14,000 firms) and the North Carolina Farm Bureau:

Opposed to the rules because they believe that need for these rules is misrepresented by the Division and perceive that the Division's reasoning for the proposed rules is built upon a state wetland definition that was not properly adopted in 2019 during the 15A NCAC 02B rules readoption process. They request that the EMC review the change to the wetland definition that occurred in the 2019 rulemaking process.

Agency Response:

The rules readoption process for 15A NCAC 02B .0200 was conducted by the Division from 2017 – 2019. The definition of "wetlands" as cited is found specifically in .0202 which was readopted as part of the Triennial Review. Information related to that process can be found on the Division's website – [Historical Triennial Review Information 2017-2019](#). The Rules were adopted consistent with the APA as evidenced by RRC approval. The readopted rules became effective on November 1, 2019. The request to the EMC to review the previously conducted rules readoption process is outside of the purview of the current rulemaking proposal.

This question was brought forth during the rules readoption process and was thoroughly reviewed by staff at that time. This issue was addressed by an interpretive ruling of the EMC dated July 12th, 2001 regarding the EMC's authority to enact rules related to Isolated Wetland permitting (see Appendix 5). The ruling states that "*The definition of "wetlands" in 15A NCAC 2B .0202(71) incorporates the definition of "Waters of the United States" that was present in the Army Corps of Engineers (33 CFR 328.3) and the Environmental Protection Agency (40 CFR 230.3) regulation at the time the Commission adopted its definition and water quality standards for wetlands in 1996. 15A NCAC 2B .0202(71); 15A NCAC 2B .0231. By not directing the Division to include subsequent amendments and editions of the cited federal regulations and by omitting where copies of the referenced regulations can be obtained, the Commission incorporated only the definition of wetlands that existed in the cited federal regulations at the time of the adoption of its wetland rules. G.S. §150B-21.6*". The change to the definition of wetlands to remove the reference to the US Army Corps of Engineers jurisdiction was done in order to maintain the definition of "wetlands" from 1996 in accordance with the interpretive ruling.

Written comment from the North Carolina Aggregates Association:

Do not believe that there is a need for the proposed rule, that the state should not have the authority to regulate any wetlands other than basins or bogs, that are not regulated by Section 404 of the Clean Water Act.

Written comment from the Southern Environmental Law Center (and on behalf of 20 other organizations):

In 2014, the North Carolina General Assembly established a set of impact thresholds for wetlands that have been the subject of dispute under federal law. In 2015, the North Carolina General Assembly limited the application of the EMC's existing isolated wetlands regulations to "Basin Wetlands" and "Bogs." Neither the 2014 nor the 2015 session laws applied to the wetlands at issue under the permanent rules, which were clearly "waters of the United States" at that time and, therefore, regulated by North Carolina through the Section 401 Certification process. These session laws directed the EMC to revise North Carolina's existing isolated wetlands regulations – they did not repeal the Commission's authority to authorize or permit activities in wetlands....

Agency Response:

Prior to proposing new rules, the Division carefully evaluated existing Federal and State regulations in detail. Based on the Division's review, the Division concluded that the proposed rules are necessary in order to provide a permitting mechanism to the regulated community for unavoidable impacts to wetlands that are not subject to Section 404 of the Federal Clean Water Act and are not Isolated Wetlands. Wetland Standards (15A NCAC 02B .0231) were promulgated by the EMC in 1996. The standards protect all wetlands within North Carolina pursuant to directives of the North Carolina General Assembly for the conservation of the State's water resources and based on the definition of Water of the State in General Statute (G.S. 143-212), while the scope of Federal jurisdiction was always limited by the Clean Water Act to *navigable* waters. This was reaffirmed by an interpretive ruling of the EMC dated July 12th, 2001 ([Appendix 5](#)) and the 2014 and 2015 Session Laws are examples that the General Assembly has recognized that the EMC's jurisdiction to regulate wetland impacts extends to wetlands that may not fall within Federal jurisdiction. The Isolated Wetland Permitting Rules in 2H .1300 were specifically promulgated to provide a permitting mechanism for wetlands that were determined to be Isolated pursuant by the USACE implementation of the Supreme Court decision in *Solid Waste Authority of Northern Cook County v. US Army Corps of Engineers*; "SWANCC." and subsequently further refined by guidance following the Supreme Court decision in *Rapanos v. United States & Carabell v. United States* "Rapanos". These wetlands were defined by the USACE as those that did not have a "significant nexus" to jurisdictional waters. The narrowing of jurisdiction resulting from the NWPR does not affect the Isolated Wetland Rules nor the 2014 or 2015 NC Session Laws which mandated changes to those rules, nor did it affect the EMC's specific authority by the NC General Assembly to require permits for activities having impacts to waters of the State.

Written comment from the North Carolina Farm Bureau:

Do not believe that there is a need for the proposed rule given recent vacatur of the Navigable Waters Protection Rule and announcements from EPA and the USACE stating that they are beginning rulemaking regarding the definition of Waters of the United States.

Agency Response:

Until litigation is final, there is a potential that the NWPR could be reinstated. More importantly, approximately 300 wetlands have been identified as non-jurisdictional by the USACE during the period of time when the NWPR was in effect and these determinations remain valid until the expiration date established by the USACE (typically 5 years) irrespective of the status of the proposed federal rule revising the definition of "Waters of the United States." Project proponents who have unavoidable impacts to these wetlands would be prevented from proceeding with their proposed projects without a permitting mechanism. These rules provide certainty to the regulated community in both cases.

Written comments from the North Carolina Aggregates Association and the North Carolina Farm Bureau:

Do not agree with DEQ creating a definition of Isolated Wetland and use of the term "significant nexus" to differentiate isolated wetlands from other non-jurisdictional wetlands. Believes that DEQ is creating a new class of state isolated wetlands by adding a definition for isolated wetlands.

Agency Response:

The Isolated Wetland Permitting Rules in 15A NCAC 2H .1300 were specifically promulgated to provide a permitting mechanism for wetlands that were determined to be Isolated pursuant to the USACE implementation of the Supreme Court decision in *Solid Waste Authority of Northern Cook County v. US Army Corps of Engineers*; "SWANCC." and subsequently further refined by guidance following the Supreme Court decision in *Rapanos v. United States &*

Carabell v. United States “Rapanos”. These wetlands were defined by the USACE as those that did not have a “significant nexus” to jurisdictional waters. The narrowing of jurisdiction resulting from the NWPR does not affect the Isolated Wetland Rules nor the 2014 or 2015 NC Session Laws which mandated changes to those rules, nor did it affect the EMC’s authority granted by the NC General Assembly to require permits for activities having impacts to waters of the State. Since the term “Isolated” is not used in the NWPR, the Division has proposed a definition for the term “Isolated Wetlands” in an effort to maintain consistency with the permitting purview of the Isolated Wetlands permitting rule at the time it was promulgated. The inclusion of the term “significant nexus” ensures consistency with rules and court decisions as implemented by the USACE prior to the NWPR.

Oral comments from seven speakers (Eco Terra, Mountain True, Sound Rivers, Waterkeepers Carolina, Haw River Assembly, North Carolina Coastal Federation, Yadkin Riverkeeper, NC Conservation Network, Southern Environmental Law Center) and written comments from the Southern Environmental Law Center (and on behalf of 20 other organizations) and two individuals:

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

Agency Response:

Rule text has modified so as to maintain consistency with the 401 Water Quality Certification program for specific high quality and sensitive wetlands and waters.

Written comments from two individuals:

Urge that the agency consider a 0-acre [wetland] threshold for deemed permitting as every small impact has the potential to add up to significant wetland loss across the state.

Oral comment from Yadkin Riverkeeper:

Would like to see the minimum acreage requirement [deemed permitted] adjusted lower for smaller wetlands.

Written comment from the North Carolina Farm Bureau:

If the proposed rule is to move forward the NCFB is opposed to the proposed [wetland] thresholds and proposes that the thresholds should be consistent with the isolated wetland rule thresholds.

Written comment from the Southern Environmental Law Center (and on behalf of 20 other organizations):

The rules appropriately set the proposed deemed permitted [wetland] threshold at 0.10 acre.

Agency Response:

The Division acknowledges the comments provided and notes that there are comments requesting both changes to decrease and to increase the proposed thresholds. Based on significant comments received during the temporary rule development and evaluation of the conclusions of the Regulatory Impact Analysis ([Appendix 7](#)), the Division has determined that consistency with the 401 Water Quality Certification program is appropriate at this time. It should also be noted that in response to the comments, some changes have been proposed to the rule which will lower the deemed permitted threshold for certain unique and high-quality wetlands.

Oral comments from seven speakers (Eco Terra, Mountain True, Sound Rivers, Waterkeepers Carolina, Haw River Assembly, North Carolina Coastal Federation, Yadkin Riverkeeper, NC Conservation Network, Southern Environmental Law Center) and written comment from the North Carolina Coastal Federation, Southern Environmental Law Center (and on behalf of 20 other organizations), and five individuals:

Request that the agency increase the [wetland] mitigation ratio to greater than 1:1 to account for lost wetland functions which have been shown as not effectively replaced at a 1:1 acreage ratio. Most commenters suggested a 2:1 ratio.

Agency Response:

The Division acknowledges the requests and the scientific justification provided for increasing the mitigation threshold. The Division has determined that consistency with the 401 Water Quality Certification Rules - 15A NCAC 02H .0500 is appropriate at this time. The Division believes that further evaluation of these comments should be conducted during the next rules review and readoption process when it can thoroughly be evaluated for all wetland rules and programs.

Written comments from the Southern Environmental Law Center (and on behalf of 20 other organizations):

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.

Agency Response:

The Division has determined that consistency with the 401 Water Quality Certification Rules - 15A NCAC 02H .0500 is appropriate at this time and therefore proposes no changes to the requirement that mitigation be provided for in the same river basin as the impact. However, the Division has realized that it inadvertently omitted a mitigation requirement specific to Unique Wetlands when drafting these rules and therefore has been added a requirement that states that mitigation for Unique Wetlands be provided for within the same watershed as the impact.

Oral comments from Mountain True, Yadkin Riverkeeper, and Haw River Assembly:

Deemed permitted and mitigation thresholds are too high for stream impacts.

Agency Response:

It is the Division's experience that very few streams are determined by the US Army Corps of Engineers to be Federally Non-Jurisdictional. The Division proposes to maintain the deemed permitted and mitigation threshold for streams to be consistent with the 401 Water Quality Certification Rules 15A NCAC 02H .0500 and Isolated Wetlands and Waters Rules 15A NCAC 2H .1300.

Written comment from Natural Resource Consultants:

The proposed rules provide a permitting system for discharges to this type of wetland. Discharges are defined as a deposition of dredge or fill material. Limiting the proposed rules to discharges does not provide a permitting mechanism for other types of impacts that would violate water quality and wetland standards such as flooding and draining. These standards are important to protect wetlands and classified surface waters and require permitting mechanisms for all types of impacts to ensure proper avoidance, minimization and mitigation. Therefore, the rule should be expanded to apply to all types of impacts that would otherwise violate water quality standards.

Agency Response:

The Division agrees that the term “discharge” unnecessarily limits the use of these rules. Applicants, consultants and engineers have previously expressed concern regarding the limitations of this term within the other wetland programs. Upon further review it was determined that the Division used both the term “discharge” and the term “impact” interchangeably throughout the rules. Therefore, the Division proposes revising the rules to only use the term “impact” which is consistent with terminology used throughout the other wetland permitting programs and is well understood by the regulated community. This would allow for these rules to be utilized for projects that propose alterations that would otherwise violate water quality standards but would not meet the definition of “discharge.”

Written comment from the North Carolina Farm Bureau:

If the proposed rule is to move forward the rules should be written so that entities do not require both state and federal permits, should ensure that there state and federal rules do not overlap or create another “permitting gap” in the future.

Agency Response:

The Division agrees and has strived to create a rule which would not create any overlap between programs nor create any future permitting gaps.

Written comment from the North Carolina Farm Bureau:

If the proposed rule is to move forward the NCFB would oppose any change that alters the prior converted cropland exclusion.

Agency Response:

There are no proposed changes to this exclusion.

Written comment from the North Carolina Farm Bureau:

If the proposed rule is to move forward the NCFB believes that proposed rule appropriately exempts ephemeral streams from regulation and would oppose any change that would include regulation of ephemeral streams

Agency Response:

There are no proposed changes to this exemption.

Hearing Officer’s Recommendation

The Hearing Officer recommends that the Environmental Management Commission adopt Permanent Rules .15A NCAC 2H .1401 through .1405 and Permanent Rule Amendment 15A NCAC 2H .1301 with the following proposed changes (also see specific rule text as shown in [Appendix 6](#)):

1. Make technical edits to correct typographical errors and to correct terminology errors identified by staff.
2. Change “discharge” to “impact” throughout Section .1400 in order to expand the use of these rules to all possible types of projects/impacts and improve consistency in language used throughout the rules.
3. Add language in .1405 to establish consistency with deemed permitted thresholds and mitigation requirements for Unique Wetlands, Coastal Wetlands and wetlands adjacent to various High Quality and other sensitive waterbodies.

15A NCAC 2H .1405(a)(3): 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, Discharges resulting from activities 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.

15A NCAC 2H .1405(c)(8): 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;

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

APPENDIX 1

Public Notice of Proposed Rules

APPENDIX 2

List of Registered Attendees for Virtual Public Hearing

APPENDIX 3

Link to Audio Recording of Virtual Public Hearing:

<https://edocs.deq.nc.gov/WaterResources/Browse.aspx?id=2097046&dbid=0&repo=WaterResources>

APPENDIX 4

Link to Public Comments:

<https://edocs.deq.nc.gov/WaterResources/Browse.aspx?id=2097050&dbid=0&repo=WaterResources>

APPENDIX 5

2001 Environmental Management Commission Interpretive Ruling

APPENDIX 6

Revised Rule Text

APPENDIX 7

Link to OSBM Approved Regulatory Impact Analysis:

<https://edocs.deq.nc.gov/WaterResources/DocView.aspx?id=2104146&dbid=0&repo=WaterResources>

APPENDIX 1

Public Notice of Proposed Rules



NORTH CAROLINA
Environmental Quality

ROY COOPER

Governor

ELIZABETH S. BISER

Secretary

S. DANIEL SMITH

Director

September 22, 2021

TO: DEQ-DWR-Wetlands-Public Listserv

FROM: Jeff Poupart, N.C. Division of Water Resources, Water Quality Permitting Section

RE: Public Hearing for Permanent Rules 15A NCAC 02H .1301 (Revision) and 15A NCAC 02H .1400 (.1401 through .1405)

The purpose of this Public Notice is outlined below. This notice is available electronically at <http://deq.nc.gov/about/divisions/water-resources/water-resources-permits/wastewater-branch/401-wetlands-buffer-permits/401-public-notices>.

I. Public Notice and Notice of a Public Hearing on November 4, 2021 for Permanent Rules 15A NCAC 02H .1301 (Revision) and 15A NCAC 02H .1400 (.1401 through .1405)

PUBLIC NOTICE is hereby given that, on September 9, 2021, the North Carolina Environmental Management Commission approved the Division of Water Resources (DWR) to initiate rulemaking for Permanent Rules 15A NCAC 02H .1301 (Revision) and 15A NCAC 02H .1400 (.1401 through .1405).

Background: On April 21, 2020, the U.S. Environmental Protection Agency (EPA) and the Department of the Army published the Navigable Waters Protection Rule in the Federal Register to finalize a revised definition of “waters of the United States” under the Clean Water Act (“Federal Rule”). The new Federal Rule became effective on June 22, 2020. As a result of the new Federal Rule, a subset of wetlands classified under North Carolina State law are no longer subject to federal Clean Water Act jurisdiction. These classified wetlands remain protected by 15A NCAC 02B .0231 - Wetland Standards, but, as a result of the new Federal Rule, there is no permitting mechanism available to authorize impacts to these wetlands. To provide a regulatory mechanism to authorize impacts to wetlands that are no longer federally jurisdictional and to provide regulatory certainty, DWR adopted temporary rules and initiated permanent rulemaking.

The public is hereby notified that DWR will hold a public hearing at 6 p.m. on Thursday, November 4, 2021 via an online WebEx meeting event detailed below. Sign-in will begin at 5:45 p.m. The purpose of this public hearing is to allow interested persons to submit oral comments regarding the DWR’s proposed Permanent Rules 15A NCAC 02H .1301 (Revision) and 15A NCAC 02H .1400 (.1401 through .1405).



North Carolina Department of Environmental Quality | Division of Water Resources
512 North Salisbury Street | 1650 Mail Service Center | Raleigh, North Carolina 27699-1650
919.707.9000

Register to attend and/or speak at this hearing using the following registration form. *This form will be active until noon on November 4, 2021.*

Registration form: Link to Registration Form: <https://forms.office.com/g/FhPHLB99a8>

QR Code for Registration Form:



WebEx event address for attendees:

<https://ncdenrits.webex.com/ncdenrits/onstage/g.php?MTID=e654c6f5c2c373a09e7107df42864e546>

Event number: 2425 226 6629

Event password: X2p8DPmSf8p

Audio conference: To receive a call back, provide your phone number when you join the event, or call the number below and enter the access code.

+1-415-655-0003, *Access code:* 2425 226 6629

The public is also invited to comment in writing on the application. Written comments must be received by DWR no later than 5:00 p.m. on December 1, 2021. Please email written comments to PublicComments@ncdenr.gov. Please include "Wetland Rules" in the email's subject line. Comments may also be submitted in writing to: Sue Homewood, Division of Water Resources, 450 W. Hanes Mill Rd, Winston Salem NC 27107.

The proposed permanent rules and supporting documents are available on DWR's website: <https://deq.nc.gov/about/divisions/water-resources/water-resources-regulations-guidance/401-buffer-permitting-statutes>

The permanent rules and supporting documents are also available at the DWR Central Office, located at 512 N. Salisbury St., 9th Floor, Raleigh, NC 26704, and may be inspected with an appointment between 8 am and 5 pm, Monday through Friday, excluding state holidays. For questions or to schedule an appointment, contact Paul Wojoski at Paul.Wojoski@ncdenr.gov. File materials may not be removed from any DWR office; copy machines are available for use upon payment of the cost thereof to DWR pursuant to G.S. 132-6.2.



APPENDIX 2

List of Registered Attendees for Virtual Public Hearing

ID	Name:	Title:	Employer/Representing:	Email Address:	Do you wish to speak at the hearing?
1	Luna Mountainsea	member, Friends of Pokeberry Creek Beavers and Wetlands	Friends of Pokeberry Creek Beavers and Wetlands	9goldenmoon@gmail.com	No
2	Marjorie Fish		JC ROWLAND FARMS LLC	Marjoriebarker@live.com	No
3	Norton Webster	Chief Strategy Officer	Eco Terra	norton@ecoterra.com	Yes
4	Jonathan Hinkle	Lead Environmental Engineer	GPI	jhinkle@gpinet.com	No
5	Gray Jernigan	Southern Regional Director	MountainTrue	gray@mountaintrue.org	Yes
6	Heather Deck	Executive Director	Sound Rivers and Waterkeepers Carolina	heather@soundrivers.org	Yes
7	Emily Sutton	Haw Riverkeeper	Haw River Assembly	emily@hawriver.org	Yes
8	Kerri Allen	Coastal Advocate	North Carolina Coastal Federation	kerria@nccoast.org	Yes
9	Anne Coan		NC Farm Bureau Federation	anne.coan@ncfb.org	No
10	Edgar Miller	Riverkeeper/Executive Director	Yadkin Riverkeeper	edgar@yadkinriverkeeper.org	Yes
11	Grady McCallie	Policy Director	NC Conservation Network	grady@ncconservationnetwork.org	Yes
12	Dakota Loveland	Associate Attorney	Southern Environmental Law Center	dloveland@selcnc.org	No
13	Kelly Moser	Senior Attorney	Southern Environmental Law Center	kmoser@selcnc.org	Yes

APPENDIX 3

Link to Audio Recording of Virtual Public Hearing:

<https://edocs.deq.nc.gov/WaterResources/Browse.aspx?id=2097046&dbid=0&repo=WaterResources>

APPENDIX 4

Link to Public Comments:

<https://edocs.deq.nc.gov/WaterResources/Browse.aspx?id=2097050&dbid=0&repo=WaterResources>

APPENDIX 5

2001 Environmental Management Commission Interpretive Ruling

9

STATE OF NORTH CAROLINA
COUNTY OF WAKE

BEFORE THE
ENVIRONMENTAL MANAGEMENT
COMMISSION

INTERPRETIVE RULING)
ON THE APPLICATION OF)
THE WETLANDS RULES TO)
ISOLATED WETLANDS)

INTERPRETIVE RULING

This matter came before the North Carolina Environmental Management Commission on 12 April 2001 for an interpretive ruling on the proper interpretation of G.S. §143-212(6) (Waters of the State Definition), 15A NCAC 2B .0202(71) (Wetlands Definition), 15A NCAC 2B .0230 (Activities Deemed To Comply With Wetlands Standards) and 15A NCAC 2B .0231 (Wetland Standards) as applied to isolated wetlands. The Division of Water Quality staff stated the issue before the Commission as follows:

Does the Commission intend to regulate activities occurring in isolated wetlands as they were defined in 33 CFR 328.3 and 40 CFR 230.3 when the Commission's wetlands rules were adopted?

In consideration of the issue, the Commission found as follows:

1. Waters of the State are defined in G.S. §143-212(6) as:

any stream, river, brook, swamp, lake, sound, tidal estuary, bay, creek, reservoir, waterway, or other body or accumulation of water, whether surface or underground, public or private, or natural or artificial, that is contained in, flows through, or borders upon any portion of this State, including any portion of the Atlantic Ocean over which the State has jurisdiction.

2. In the rules establishing water quality classifications and standards applicable to waters of the State, the Commission defines wetlands as "waters" of the State in 15A NCAC 2B .0202(71) as follows:

Wetlands are "waters" as defined by G.S. §143-212(6) and are areas that are inundated or saturated by an accumulation of surface or ground water at a frequency and duration

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sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas. Wetlands classified as waters of the state are restricted to waters of the United States as defined by 33 CFR 328.3 and 40 CFR 230.3.

3. Isolated wetlands possess the definitive characteristics of wetlands and are waters of the State. Isolated wetlands maintain the wetland uses, such as storm water storage and retention; groundwater recharge and discharge; the filtration and storage of nutrients and sediments; and habitat for the propagation of resident wetland-dependent aquatic organisms and wildlife species, identified in the Wetland Standards that serve to protect, restore and enhance the groundwaters and other waters of the State. 15A NCAC 2B .0231.

4. The definition of "wetlands" in 15A NCAC 2B .0202(71) incorporates the definition of "waters of the United States" that was present in the Army Corps of Engineers (33 CFR 328.3) and the Environmental Protection Agency (40 CFR 230.3) regulations at the time the Commission adopted its definition and water quality standards for wetlands in 1996. 15A NCAC 2B .0202(71); 15A NCAC 2B .0231. By not designating that subsequent amendments and editions of the cited federal regulations were to be included and by omitting where copies of the referenced regulations can be obtained, the Commission incorporated only the definition of wetlands that existed in the cited federal regulations at the time of the adoption of its wetlands rules. G.S. §150B-21.6

5. The hearing officer's Report of Proceedings for the Proposed Rule Amendments and Adoptions Relating to the Classification of Wetlands and Review Procedures for 401 Water Quality Certifications for Activities Which Involve the Discharge for Fill Material Into Waters and Wetlands, Volume I: Summary and Recommendations (December 1995) specifically

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references isolated wetlands for inclusion under the rules. It incorporated the following passage from the Attorney General's Advisory Opinion: "DEM has stated its primary goal in applying proposed rule 15A NCAC 2H .0506 is to ensure that all projects affecting state wetlands, especially those such as isolated and headwater wetlands, which are not evaluated by the Corps under the federal Guidelines, are thoroughly examined for their effects on state water quality." In addition, the Report of Proceedings confirms this emphasis by stating: "The review procedures are designed to focus the state's regulatory review on those aspects of the program that receive only perfunctory review by the United States Army Corps of Engineers (USACOE)."

6. The Commission's 401 Water Quality Certification requirements for mitigation of losses of uses to wetlands recognizes the difference between isolated wetlands and wetlands adjacent to surface waters by varying the mitigation ratios as the distance of the affected wetland from surface waters increases. 15A NCAC 2H .0506.

7. Although the Army Corps of Engineers jurisdiction under §404(a) of the Clean Water Act of activities in wetlands has been narrowed by recent court decisions, the Commission has acted to reinstate exemptions for normal farming and forestry practices that affect all wetlands within the definition of wetlands. The application of the Commission's rules to isolated wetlands was not affected by the court decisions because those rulings did not void or otherwise limit the definition of wetlands in the federal regulations that supports the definition of wetlands in 15A NCAC 2B .202(71).

Based upon those findings, the Commission issued the following:

INTERPRETIVE RULING

The definition of wetlands in 15A NCAC 2B .0202(71) incorporates the definition of

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wetlands that stood in the Corps of Engineers and Environmental Protection Agency regulations (33 CFR 328.3 and 40 CFR 230.3) at the time the wetlands rules were adopted in 1996 and specifically includes isolated wetlands. Therefore the Commission's wetland rules apply to isolated wetlands.

This the 12th day of July, 2001.

ENVIRONMENTAL MANAGEMENT COMMISSION


David H. Moreau, Chairman



State of North Carolina

ROY COOPER
ATTORNEY GENERAL

Department of Justice

P. O. Box 629

RALEIGH

27602-0629

REPLY TO: James C. Gulick
Environmental Division
jgulick@mail.jus.state.nc.us
Telephone: 919/716-6600
Fax: 919/716-6767

September 5, 2001

Dr. Charles H. Peterson
Vice Chairman
Environmental Management Commission
232 Oakleaf Drive
Pine Knoll Shores, North Carolina 28512

Ms. Coleen Sullins
Water Quality Section
Division of Water Quality
1617 Mail Service Center
Raleigh, North Carolina 27699-1617

RE: Advisory Opinion: Authority of the Environmental Management Commission to Adopt Temporary and Permanent Rules Requiring Permits for Impacts to Isolated Wetlands and Surface Waters.

Dear Dr. Peterson and Ms. Sullins:

You have requested, on behalf of the Water Quality Committee of the Environmental Management Commission, an opinion as to (1) whether the Commission is presently authorized to adopt rules requiring permits for impacts to isolated wetlands and surface waters; and (2) whether the recent decision of the Supreme Court of the United States in the case of *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 148 L. Ed. 2d 576, 121 S. Ct. 675 (2001) provides a basis to adopt rules regulating impacts to isolated wetlands and surface waters as temporary rules under N.C.G.S. §150b-21(a)(5). In our opinion, the short answer to both questions is "yes."

(1) As an administrative agency created by the legislature, the Environmental Management Commission's authority is both derived from and defined and limited by statute. *State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 269 S.E. 2d 547 (1980); N.C.G.S. §150B-19(1). The legislature has given the Commission the authority and duty to grant, revoke or deny permits pursuant to N.C.G.S. §143-215.1 regarding the controlling of sources of water pollution, including the direct or indirect discharge of waste to the waters of the

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State in violation of water quality standards. N.C.G.S. §143B-282(a)(1)(a); §143-215.1(a)(6).
N.C. Gen. Stat. § 143-212(6) provides:

“‘Waters’ means any stream, river, brook, swamp, lake, sound, tidal estuary, bay, creek, reservoir, waterway, or other body or accumulation of water, whether surface or underground, public or private, or natural or artificial, that is contained in, flows through, or borders upon any portion of this State, including any portion of the Atlantic Ocean over which the State has jurisdiction.”

[Emphasis supplied] It is hard to imagine a broader, more all-encompassing definition of “waters” than this. That this definition includes “wetlands” is amply supported by the United States Supreme Court’s conclusion that the Army Corps of Engineers acted reasonably in interpreting “waters of the United States” to include “wetlands” adjacent to other “waters of the United States.” *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131-139, 88 L. Ed. 2d 419, 106 S. Ct. 455 (1985). The application of § 143-212(6) to “isolated” wetlands is in no way undermined by the Supreme Court’s recent, narrower ruling in *Solid Waste Agency v. United States Army Corps of Eng’rs*, 531 U.S. 159, 148 L. Ed. 2d 576, 121 S. Ct. 675 (2001), which rejected the Corp’s regulatory interpretation of the Clean Water Act to include *isolated* wetlands having no nexus to “navigable” waters. Unlike the federal law, North Carolina’s statutory definition is not constrained by inclusion of the word “navigable.” Nor does the State, unlike the federal government, have constitutional restrictions on the scope of its purely local regulations. Finally, interpretation of § 143-212(6) to permit regulation of isolated wetlands serves to effectuate the public policy of the State to conserve and protect wetlands:

It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry, and to this end it shall be a proper function of the State of North Carolina and its political subdivisions to acquire and preserve park, recreational, and scenic areas, to control and limit the pollution of our air and water, to control excessive noise, and in every other appropriate way to preserve as a part of the common heritage of this State its forests, wetlands, estuaries, beaches, historical sites, openlands, and places of beauty.

North Carolina Constitution, Art. XIV, Sec. 5 [Emphasis supplied] “It is . . . well settled that every statute is to be considered in light of the State Constitution and with a view to its intent.” *Faulkner v. New Bern-Craven County Bd. Of Educ.*, 311 N.C. 42, 58, 316 S.E. 2d 281 (1984).

Waste is defined in N.C.G.S. §143-213(18) to include refuse, sediment and other fill materials. The discharge of fill material into the State’s waters, when done to any significant degree, will violate State water quality standards for both surface waters and wetlands. See, e.g. 15A N.C.A.C. 2B .0211, .0220, .0231. Thus, the discharge of fill material into waters of the

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State in violation of water quality standards is lawful only when done pursuant to a permit issued by the Commission. In addition, the Commission is authorized to adopt rules implementing the N.C.G.S. §143-215.1 permit programs and to charge permit fees. N.C.G.S. §143-215.3(a). Thus, the Commission is enabled to adopt rules on this subject. N.C.G.S. §150B-19(1).

Therefore, we are of the opinion that the Commission has been granted specific authority by the Legislature to require permits for activities having impacts on isolated wetlands within the State's definition of waters, which would include filling for purposes of development.¹

(2) The second question to be addressed is whether the recent decision of the Supreme Court of the United States in the case of *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* provides the Commission with a basis under N.C.G.S. §150B-21(a)(5) for the immediate adoption of temporary rules establishing a permit program for regulating impacts to isolated wetlands and surface waters. In *Solid Waste Agency*, the Supreme Court invalidated the Corps of Engineers' "migratory bird rule," which the Corps of Engineers had used as a basis for asserting jurisdiction over isolated, intrastate waters, including wetlands, under Section 404 of the federal Clean Water Act.

Permanent and temporary rules establishing a permit program to regulate impacts to isolated wetlands and surface waters must be adopted using the procedures set forth in Article 2A of the Administrative Procedure Act, N.C.G.S. §150B-21.1 to 21.7. The Administrative Procedure Act allows the adoption of a temporary rule when the agency finds that adherence to the notice and hearing requirements for permanent rules would be contrary to the public interest and that immediate adoption is required by one or more of the following:

- (1) A serious and unforeseen threat to the public health, safety, or welfare.
- (2) The effective date of a recent act of the General Assembly or the United States Congress.
- (3) A recent change in federal or State budgetary policy.
- (4) A federal regulation.
- (5) A court order.

¹ The Commission is no doubt aware of the pending lawsuit, *N.C. Homebuilders, et al. v. Environmental Management Commission*, Wake County File 99 CVS 11706, challenging the EMC's authority to make its wetlands rules. This case has been argued to Judge Donald Stephens and is pending decision in Superior Court.

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- (6) The need for the rule to become effective the same date as the State Medical Facilities Plan approved by the Governor, if the rule addresses a matter included in the State Medical Facilities Plan.

N.C.G.S. §150B-21.1(a).

The six listed actions or events that will support the adoption of a temporary rule share the common characteristic of being initiated or triggered by an entity other than the agency adopting the rule. The Supreme Court's recent decision invalidating the Army Corps of Engineers' jurisdiction over the discharge of fill into isolated waters is the action or event triggering the need for adoption of a State program for permitting impacts to isolated waters. Until this decision changed the law of the land, the Corps of Engineers' §404 permit was required before the discharge of fill into isolated waters could occur. The State did not duplicate the federal permitting of discharges in such waters; it only provided certification pursuant to Section 401 of the Clean Water Act regarding the impact on State water quality standards by the proposed activity.

With the Corps of Engineers' loss of jurisdiction, the federal program that allowed limited filling or alteration of isolated wetlands is no longer available to land owners wanting to develop their properties. The State alone retains jurisdiction over activities impacting isolated, intrastate waters. Until a permit program is codified in the Commission's rules, no activities involving the discharge of waste into isolated waters in violation of water quality standards can occur in this State. Although the immediate necessity for proceeding with temporary rules is evident, it must be ascertained whether "a court order" under N.C.G.S. §150B-21.1(a)(5) includes a decision of the Supreme Court of the United States.

The "primary rule of statutory construction is that the intent of the Legislature controls the interpretation of the statute." *Stevenson v. Durham*, 281 N.C. 300, 303, 188 S.E. 2d 281, 283 (1972). That intent is ascertained by "consider[ing] the language of the statute, the spirit of the act, and what the act seeks to accomplish." *Id.* When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning. *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 517 S.E. 2d 874 (1999).

We find little difficulty in determining that "court" includes federal as well as state courts, in view of the General Assembly's concern about federal as well as state acts in this section. It would also make no sense that we can fathom to interpolate a limitation between trial and appellate courts. Why would the legislature make authority to adopt a rule depend on the issuance of an order of a trial court, but not the Supreme Court?

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The final query is whether "order" has a narrow or broad meaning. We are aware of at least some circumstances where our appellate courts have distinguished "orders" from "judgments." For example, in *State v. Williamson*, 61 N.C. App. 531, 532, 301 S.E.2d 423, (1983), in which there was an issue arising out of different wording between an "order" and the "judgment" entered in the same case, the North Carolina Court of Appeals stated:

"An order is distinguishable from a judgment. [A]n order has been defined . . . as being every direction of a court or judge made in writing and not included in a judgment." 46 Am. Jur. 2d Judgments § 3 at p. 315 (1969). A judgment is "a final determination of the rights of the parties in an action." *Id.* at § 1, p. 314. We hold, therefore, that when there is a conflict between the language or interpretation of an order and a judgment on the same subject matter, the judgment shall control."

On the other hand, our legislature has used "order" to refer to "judgments" as well as "orders." See, e.g. N.C. Gen. Stat. § 110-129(1), part of North Carolina's child support enforcement law which provides this definition: "'Court order' means any judgment or order of the courts of this State or of another state."

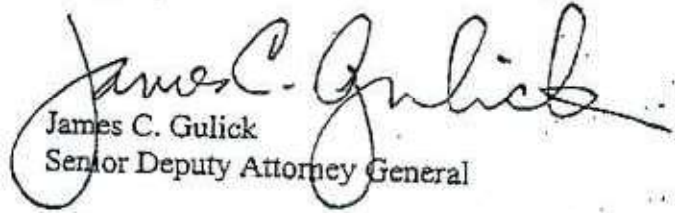
With this in mind, it is clear to us that the term "court order," as used by our General Assembly, is flexible enough to include decisions of the Supreme Court of the United States. It is our opinion that the legislature intended that decisions issued by both State and federal courts at any level provide a basis for the adoption of temporary rules under N.C.G.S. §150B-21.1(a)(5) when the public interest would be served by the immediate adoption of the rule. We can think of no reason that the General Assembly would have intended that temporary rules be permissible as a result of orders as distinguished from judgments or final decisions. Also, since the enumerated bases for adopting a temporary rule include a recent act of the United States Congress, a recent change in federal budgetary policy, and a federal regulation, the legislature must have intended that decisions by federal courts, including the Supreme Court of the United States, would be encompassed within the court orders that support the adoption of temporary rules under N.C.G.S. §150B-21.1(a)(5).

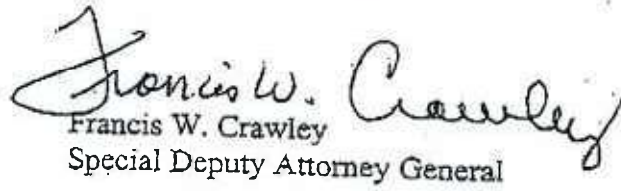
In conclusion, we are of the opinion that the Environmental Management Commission is authorized by statute to implement through rules a program of permits to regulate activities impacting isolated wetlands and surface waters in the State. In addition, it is our opinion that the recent decision of the Supreme Court of the United States invalidating the Army Corps of Engineers exercise of jurisdiction over such isolated waters is a court order under N.C.G.S. §150B-21.1(a)(5) and supports the immediate adoption of temporary rules.

We trust that this advisory opinion will be of assistance to the Commission as it carries out its duties with respect to isolated waters, including wetlands.

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Sincerely,


James C. Gulick
Senior Deputy Attorney General


Francis W. Crawley
Special Deputy Attorney General

ep/49156

APPENDIX 6

Revised Rule Text

1 15A NCAC 02B .1401 is adopted as published in 36: 07 NCR 443-450 with changes as follows:
2

3 **SECTION .1400 – DISCHARGES IMPACTS TO FEDERALLY NON-JURISDICTIONAL WETLANDS**
4 **AND FEDERALLY NON-JURISDICTIONAL CLASSIFIED SURFACE WATERS**
5

6 **15A NCAC 02H .1401 SCOPE AND PURPOSE**

7 (a) The provisions of this Section shall apply to Division of Water Resources (Division) regulatory and resource
8 management determinations regarding federally non-jurisdictional wetlands and federally non-jurisdictional classified
9 surface waters. ~~For the purpose of this Section, "discharge" shall be the deposition of dredged or fill material (e.g. fill,~~

10 ~~earth, construction debris, soil.)~~ Isolated wetlands and isolated waters as defined in Rule .1301 of this Subchapter shall
11 be regulated pursuant to Section .1300 of this Subchapter. Federally jurisdictional wetlands and federally
12 jurisdictional classified waters that the U.S. Army Corps of Engineers (USACE) or its designee has determined to be
13 subject to Section 404 of the Clean Water Act shall be regulated pursuant to Section .0500 of this Subchapter.

14 (b) This Section outlines the application and review procedures for permitting of ~~discharges into impacts to~~ federally
15 non-jurisdictional wetlands and federally non-jurisdictional classified surface waters that have been listed in 15A
16 NCAC 02B .0300. If the USACE or its designee determines that a particular water or wetland is not regulated under
17 Section 404 of the Clean Water Act, and the particular water or wetland is not an isolated wetland or isolated water as
18 defined in Rule .1301 of this Subchapter, then ~~discharges impacts~~ to that water or wetland shall be covered by this
19 Section. Where the USACE has not previously confirmed the extent and/or location of the federally non-jurisdictional
20 wetlands, the Division shall confirm the extent and location of federally non-jurisdictional wetlands using the U.S.
21 Army Corps of Engineers Wetland Delineation Manual (Technical Report Y-87-1) (available free of charge on the
22 internet at: <https://usace.contentdm.oclc.org/digital/collection/p266001coll1/id/4532/>) and subsequent regional
23 supplements (available free of charge on the internet at: [https://www.usace.army.mil/Missions/Civil-](https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/reg_supp/)
24 [Works/Regulatory-Program-and-Permits/reg_supp/](https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/reg_supp/)). Where the USACE has not previously confirmed the extent
25 and/or location of the federally non-jurisdictional streams, the Division shall confirm the extent and location of
26 federally non-jurisdictional streams using the Division publication, Methodology for Identification of Intermittent and
27 Perennial Streams and Their Origins (v.4.11, 2010). Any disputes by the applicant or landowner over wetland or
28 stream determinations made by the Division shall be referred to the Director in writing within 60 calendar days of
29 written notification from the Division. The Director's determination shall be subject to review as provided in Article
30 3 of G.S. 150B.

31 (c) Activities that result in ~~a discharge an impact~~ may be deemed permitted as described in Rule .1405(a) of this
32 Section or authorized by the issuance of either an individual permit or a Certificate of Coverage to operate under a
33 general permit:

- 34 (1) Individual permits shall be issued on a case-by-case basis using the procedures outlined in this
35 Section. These individual permits do not require approval by the U.S. Environmental Protection
36 Agency.
- 37 (2) General permits may be developed by the Division and issued by the Director for types or groups
38 of ~~discharges impacts~~ resulting from activities that are similar in nature and considered to have

1 minimal impact. General permits do not require approval by the U.S. Environmental Protection
 2 Agency. All activities that receive a Certificate of Coverage under a general permit from the
 3 Division shall be covered under that general permit. When written approval is required in the general
 4 permit, the application and review procedures for requesting a Certificate of Coverage under a
 5 general permit from the Division for the proposed activity are the same as the procedures outlined
 6 in this Section for individual permits. The Director may require an **Individual Permit individual**
 7 **permit** for any project if it is deemed in the public's best interest or determined that the project is
 8 likely to have a significant adverse effect upon water quality, including state or federally listed
 9 endangered or threatened aquatic species, or will degrade the waters so that existing uses of the
 10 waters or downstream waters are precluded.

11 (d) **Discharges Impacts** resulting from activities that are deemed permitted as described in Rule .1405(a) of this
 12 Section, or that receive an individual permit or Certificate of Coverage under a general permit pursuant to this Section
 13 shall not be considered to remove existing uses of the wetland or classified surface waters.

14 (e) The following are exempt from this Section:

- 15 (1) Activities described in 15A NCAC 02B .0230;
- 16 (2) **Discharges Impacts** to the following features if they were constructed for erosion control or
 17 stormwater management purposes:
 - 18 (A) federally non-jurisdictional man-made wetlands, or
 - 19 (B) federally non-jurisdictional man-made ditches;
- 20 (3) **Discharges Impacts** to federally non-jurisdictional man-made ponds;
- 21 (4) **Discharges Impacts** to federally non-jurisdictional ephemeral streams as defined by 15A NCAC 02B
 22 .0610;
- 23 (5) Discharges of treated effluent into federally non-jurisdictional wetlands or federally non-
 24 jurisdictional classified surface waters resulting from activities that receive NPDES Permits or State
 25 Non-Discharge Permits; and
- 26 (6) **Discharges Impacts** for water dependent structures as defined in 15A NCAC 02B .0202.

27 (f) The terms used in this Section shall be as defined in G.S. 143-212, G.S. 143-213, and Rule .1301 of this Subchapter.

28
 29 *History Note: Authority G.S. 143-215.1(a)(6); 143-215.1(b)(3); 143-215.3(a)(1); 143-215.3(c);*
 30 *Temporary Adoption Eff. May 28, 2021.*
 31 *Eff. March 1, 2022.*

1 15A NCAC 02B .1402 is adopted as published in 36: 07 NCR 443-450 with changes as follows:
2

3 **15A NCAC 02H .1402 FILING APPLICATIONS**

4 (a) Any person seeking issuance of an individual permit or Certificate of Coverage under a general permit for
5 **discharges resulting from** activities that **affect propose to impact** federally non-jurisdictional wetlands or federally
6 non-jurisdictional classified surface waters shall file with the Director, at 1617 Mail Service Center, Raleigh, North
7 Carolina, 27699-1617, or 512 N Salisbury Street, Raleigh, NC 27604, an original and one copy of an application for
8 a permit or submit one complete application electronically via the following website:
9 https://edocs.deq.nc.gov/Forms/DWR_Wetlands_Online_Submittal_Page. The application shall be made on a form
10 provided or approved by the Division, available electronically via the following website:
11 [https://deq.nc.gov/about/divisions/water-resources/water-quality-permitting/401-buffer-permitting-](https://deq.nc.gov/about/divisions/water-resources/water-quality-permitting/401-buffer-permitting-branch/application)
12 [branch/application](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:

- 13 (1) the date of application;
- 14 (2) the name, address, and phone number of the **property** applicant. If the applicant is not the property
15 owner(s), name, address, and phone number of the property owners(s);
- 16 (3) if the applicant is a corporation, the name and address of the North Carolina process agency, and
17 the name, address, and phone number of the individual who is the authorized agent of the corporation
18 and responsible for the activity for which **certification permit** is sought. The corporation must be
19 registered with the NC Secretary of State's Office to conduct business in NC;
- 20 (4) the nature of the **discharge, impact**, including cumulative impacts to all wetlands and waters
21 (isolated wetlands, isolated classified surface waters, federally non-jurisdictional wetlands, federally
22 non-jurisdictional classified surface waters, jurisdictional wetlands, and jurisdictional waters) that
23 cause or will cause a violation of downstream water quality standards resulting from an activity to
24 be conducted by the applicant;
- 25 (5) whether the **discharge impact** has occurred or is proposed;
- 26 (6) the location and extent of the **discharge, impact**, stating the municipality, if applicable, and the
27 county; the drainage basin; the name of the nearest named surface waters; and the location of the
28 **point of discharge impact** with regard to the nearest named surface waters;
- 29 (7) an application fee as required by G.S. 143-215.3D. If payment of a fee is required for a 401 Water
30 Quality Certification, then that fee shall suffice for this Rule;
- 31 (8) a map(s) with scales and north arrows that is legible to the reviewer and of sufficient detail to
32 delineate the boundaries of the lands owned or proposed to be utilized by the applicant in carrying
33 out the **discharge: impact**, the location, dimensions, and type of any structures that affect federally
34 non-jurisdictional wetlands or federally non-jurisdictional classified surface waters for use in
35 connection with the **discharge: impact**; and the location and extent of the federally non-jurisdictional
36 wetlands or federally non-jurisdictional classified surface waters within the boundaries of the lands;
37 and

1 (9) a signature by the applicant or an agent authorized by the applicant. If an agent is signing for the
2 applicant, an agent authorization letter shall be provided. In signing the application, the applicant
3 certifies that all information contained therein or in support thereof is true and correct to the best of
4 their knowledge.

5 (b) The Division may request in writing, and the applicant shall furnish, any additional information necessary to
6 clarify or complete the information provided in the application under Paragraph (a) of this Rule, or to complete the
7 evaluation in Rule .1405 of this Section.

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

13 (d) Pursuant to G.S. 143-215.3(a)(2), the staff of the Division shall conduct such investigation as the Division deems
14 necessary to clarify the information provided in the application under Paragraph (a) of this Rule or to complete the
15 evaluation in Rule .1405 of this Section. For the purpose of review of an application, the applicant shall allow the staff
16 safe access to the lands and facilities of the applicant proposed impacts and lend such assistance as shall be reasonable
17 for those places, upon the presentation of credentials, and advanced notice of at least three days.

18 (e) Joint applications with 401 certification and/or isolated wetlands permitting submitted to the Division shall suffice
19 for an application pursuant to this Rule, so long as the application contains all of the information required by this Rule
20 and provided that the applicant specifically indicates that authorization is sought under this Rule.

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

25
26
27 *History Note: Authority G.S. 143-214.1; 143-215.1(a)(6); 143-215.3(a)(1);*
28 *Temporary Adoption Eff. May 28, 2021.*
29 *Eff. March 1, 2022.*

1 15A NCAC 02B .1403 is adopted as published in 36: 07 NCR 443-450 with changes as follows:
2

3 **15A NCAC 02H .1403 PUBLIC NOTICE AND PUBLIC HEARING**

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

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

12 (c) The notice for each pending application for an individual permits shall set forth:

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

17 The notice shall also state where additional information is available online and on file with the Division. Information
18 on file shall be made available upon request between 8:00 am and 5:00 pm, Monday through Friday, excluding State
19 holidays, and copies shall be made available upon payment of the cost thereof to the Division pursuant to G.S. 132-
20 6.2.

21 (d) The public notice requirement for an individual permit as described in Paragraph (b) of this Rule may be satisfied
22 by a joint notice with the Division of Coastal Management, pursuant to 15A NCAC 07J .0206, the U.S. Army Corps
23 of Engineers according to their established procedures, by a joint notice by the Division for an individual certification
24 in accordance with Rule .0503 of this Subchapter, or by a joint notice by the Division for an individual permit in
25 accordance with Rule .1303 of this Subchapter.

26 (e) Any person who desires a public hearing on a general permit or an individual permit application shall submit a
27 written request to the to the Division at the address listed in Rule .1402 of this Section. In order to be considered by
28 the Director, the request must be received by the Division within 30 calendar days following the public notice.

29 (f) If the Director determines that there is significant public interest in holding a hearing, based upon such factors as
30 the reasons why a hearing was requested, the nature of the project, and whether the project is likely to have a significant
31 adverse effect upon water quality, including state or federally listed endangered or threatened aquatic species, or will
32 degrade the waters so that existing uses of the waters or downstream waters are precluded, the Division shall notify
33 the applicant in writing that there will be a hearing. The Division shall also provide notice of the hearing to all
34 individuals on the mailing list as described in Paragraph (g) of this Rule and shall post the notice on the Division's
35 website. The notice shall be published at least 30 calendar days prior to the date of the hearing. The notice shall state
36 the time, place, and format of the hearing. The notice may be combined with the notice required under Paragraph (c)
37 of this Rule. The hearing shall be held within 90 calendar days following date of notification to the applicant. The

1 record for each hearing held under this Paragraph shall remain open for a period of 30 calendar days after the public
2 hearing to receive public comments.

3 (g) Any person may request that he or she be emailed copies of all public notices required by this Rule. The Division
4 shall add the email address of any such person to an email listerv and follow procedures set forth in Rule .0503(g) of
5 this Subchapter.

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

8
9 *History Note: Authority G.S. 143-215.1(a)(6); 143-215.3(a)(1); 143-215.3(a)(1e); 143-215.3(a)(3); 143-215.3(c);*
10 *Temporary Adoption Eff. May 28, 2021.*
11 *Eff. March 1, 2022.*

1 15A NCAC 02B .1404 is adopted as published in 36: 07 NCR 443-450 with changes as follows:
2

3 **15A NCAC 02H .1404 DECISION ON APPLICATION FOR PERMITS OR CERTIFICATES OF**
4 **COVERAGE**

5 (a) The Director shall issue the permit or Certificate of Coverage, deny the application, provide notice of hearing
6 pursuant to Rule .1403 of this Section, or request additional information within 60 calendar days after receipt of the
7 application. When the Director requests additional information, the 60-day review period restarts upon receipt of all
8 of the additional information requested by the Director. Failure to issue the permit or Certificate of Coverage, deny
9 the application, provide notice of hearing, or request additional information within 60 calendar days shall be
10 considered an approval of the application, unless:

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

16 (b) The Director shall issue the permit or Certificate of Coverage, deny the application, or request additional
17 information within 60 calendar days following the close of the record for the public hearing. Failure to take action
18 within 60 calendar days shall be considered an approval of the application by the Director, unless Subparagraphs
19 (a)(1), (3), or (4) of this Rule apply.

20 (c) Any permit or Certificate of Coverage issued pursuant to this Section may contain such conditions as the Director
21 shall deem necessary to ensure compliance with this Section, including written **post-discharge** notification to the
22 **Division. Division that the impacts have been completed.**

23 (d) Modification or Revocation of permit or Certificate of Coverage:

- 24 (1) Any permit or Certificate of Coverage issued pursuant to this Section may be subject to revocation
25 or modification by the Director for violation of conditions of the permit or Certificate of Coverage;
26 and
27 (2) Any permit or Certificate of Coverage issued pursuant to this Section may be subject to revocation
28 or modification by the Director upon a determination that information contained in the application
29 or presented in support thereof is incorrect or if the Director finds that the **discharge has activities**
30 **have** violated or may violate a downstream water quality standard.

31 (e) The Division shall notify the applicant of the final action to issue or deny the application. In the event that the
32 Director denies the application, the Director shall specify the reasons for the denial.

33 (f) Certificates of Coverage for general permits shall be issued for a period of five years, after which time the approval
34 shall be void, unless the **discharge impact** is complete or an extension is granted pursuant to Paragraph (h) of this Rule.
35 The permit shall become enforceable when a Certificate of Coverage is issued.

36 (g) Individual permit or Certificate of Coverage renewals shall require a new complete application.

1 (h) A Permittee may request in writing that the Division grant an extension before the permit expires. An extension
2 may be granted by the Division for a time period of one additional year, provided that the construction has commenced
3 or is under contract to commence before the permit expires.

4 (i) The issuance or denial is a final agency decision that is subject to administrative review pursuant to G.S. 150B-
5 23.

6

7 *History Note: Authority G.S. 143-215.1(a)(6); 143-215.1(b); 143-215.3(a)(1); 143-215.3(c);*

8 *Temporary Adoption Eff. May 28, 2021.*

9 *Eff. March 1, 2022.*

1 15A NCAC 02B .1405 is adopted as published in 36: 07 NCR 443-450 with changes as follows:
2

3 **15A NCAC 02H .1405 REVIEW OF APPLICATIONS**

4 (a) The following activities shall be deemed to be permitted:

- 5 (1) ~~Discharges resulting from activities~~ **Activities** that impact less than 1/2 acre of federally non-
6 jurisdictional classified open waters (e.g., lakes, ponds) for the entire project are deemed to be
7 permitted provided they comply with the conditions listed in Subparagraph (4) of this Paragraph,
8 and it shall not be necessary for the Division to issue permits for these activities.
- 9 (2) ~~Discharges resulting from activities~~ **Activities** that impact less than a total of 150 linear feet of
10 federally non-jurisdictional classified intermittent and perennial streams for the entire project are
11 deemed to be permitted provided they comply with the conditions listed in Subparagraph (4) of this
12 Paragraph, and it shall not be necessary for the Division to issue permits for these activities.
- 13 (3) ~~Except for activities that impact wetlands classified as coastal wetlands [15A NCAC 07H .0205],~~
14 ~~Unique Wetlands (UWL) [15A NCAC 02B .0231]; or are adjacent to waters designated as: ORW~~
15 ~~(including SAV), HQW (including PNA), SA, WS-I, WS-II, Trout or North Carolina National Wild~~
16 ~~and Scenic River,~~ ~~Discharges resulting from activities~~ **activities** that impact less than or equal to
17 1/10 acre of federally non-jurisdictional wetlands for the entire project are deemed to be permitted
18 provided they comply with the conditions listed in Subparagraph (4) of this Paragraph, and it shall
19 not be necessary for the Division to issue permits for these activities.
- 20 (4) Conditions which shall be met for projects deemed to be permitted:
- 21 (A) Erosion and sediment control practices are required and shall equal at a minimum those
22 required by the N.C. Division of Energy, Mineral, and Land Resources (DEMLR) or its
23 local delegated program for the Sedimentation Pollution Control Act and shall be in
24 compliance with all DEMLR or appropriate local delegated program specifications
25 governing the design, installation, operation, and maintenance of such practices in order to
26 help assure compliance with the appropriate turbidity and other water quality standards;
- 27 (B) All erosion and sediment control practices placed in federally non-jurisdictional wetlands
28 or federally non-jurisdictional classified surface waters shall be removed and the original
29 grade restored within two months after the DEMLR or appropriate local delegated program
30 has released the specific drainage area within the project;
- 31 (C) Uncured or curing concrete shall not come into direct contact with waters of the State;
- 32 (D) All work in or adjacent to federally non-jurisdictional intermittent or perennial streams
33 shall be conducted so that the flowing stream does not come in contact with the disturbed
34 area; and
- 35 (E) Measures shall be taken to ensure that the hydrologic functions of any remaining federally
36 non-jurisdictional wetlands and federally non-jurisdictional classified surface waters are
37 not adversely affected by the ~~discharge.~~ **impact.**

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

- 6 (1) has no practical alternative. A lack of practical alternatives may be shown by demonstrating that,
7 considering the potential for a reduction in size, configuration, or density of the proposed project
8 and all alternative designs, that the basic project purpose cannot be practically accomplished in an
9 economically viable manner, which would avoid or result in less adverse impact to federally non-
10 jurisdictional wetlands and federally non-jurisdictional classified surface waters;
- 11 (2) has avoided and minimized impacts to federally non-jurisdictional wetlands and federally non-
12 jurisdictional classified surface waters to ensure any remaining surface waters or wetlands, and any
13 surface waters or wetlands downstream, continue to support existing uses during and after project
14 completion;
- 15 (3) would not cause or contribute to a violation of water quality standards;
- 16 (4) would not result in secondary or cumulative impacts that cause or contribute to, or will cause or
17 contribute to, a violation of downstream water quality standards; and
- 18 (5) provides for replacement of existing uses through compensatory mitigation as described in
19 Paragraph (c) of this Rule;
- 20 (6) for Class UWL wetlands and wetlands that are habitat for state or federally listed threatened or
21 endangered species, is necessary to meet a demonstrated public need.

22 (c) Replacement by mitigation of unavoidable losses of existing uses in federally non-jurisdictional wetlands and
23 federally non-jurisdictional classified surface waters shall be reviewed in accordance with all of the following
24 guidelines:

- 25 (1) The Division shall coordinate mitigation requirements with other permitting agencies that are
26 requiring mitigation for a specific project;
- 27 (2) Total impacts to less than 1/10 acre of federally non-jurisdictional wetlands shall not require
28 compensatory mitigation. The mitigation ratio for federally non-jurisdictional wetlands shall be 1:1.
29 Impacts to non-jurisdictional wetlands shall not be combined with the project impacts to wetlands
30 that are regulated under Section 404 of the Clean Water Act or isolated wetlands for the purpose of
31 determining when impact thresholds that trigger a mitigation requirement are met;
- 32 (3) Total impacts to less than 300 linear feet of federally non-jurisdictional perennial streams for the
33 entire project shall not require compensatory mitigation. For linear publicly owned and maintained
34 transportation projects that the U.S. Army Corps of Engineers determines are not part of a larger
35 common plan of development, impacts to less than 300 linear feet per stream shall not require
36 compensatory mitigation. The mitigation ratio for federally non-jurisdictional stream impacts shall
37 be 1:1;

- 1 (4) The required area or length of mitigation required shall be multiplied by 1 for restoration, 1.5 for
 2 establishment, 2 for enhancement and 5 for preservation. These multipliers do not apply to approved
 3 mitigation sites where the Interagency Review Team has approved other ratios;
- 4 (5) Mitigation shall comply with the requirements set forth in G.S. 143-214.11. Mitigation projects
 5 implemented within waters or wetlands that are regulated under Section 404 of the Clean Water Act
 6 or Section .1300 of this Subchapter may be used to satisfy the requirements of this Paragraph;
- 7 (6) Acceptable methods of **mitigation mitigation**, as defined in 33 CFR Part 332 available free of charge
 8 on the internet at: http://water.epa.gov/lawsregs/guidance/wetlands/wetlandsmitigation_index.cfm,
 9 include restoration, including both re-establishment and rehabilitation, establishment (creation),
 10 enhancement and preservation. No more than 25 percent of the mitigation required by Subparagraph
 11 (2) or (3) of this Paragraph may be met through preservation, unless the Director determines that
 12 the public good would be better served by a higher percentage of preservation;
- 13 (7) Mitigation for impacts to federally non-jurisdictional wetlands and federally non-jurisdictional
 14 classified surface waters shall be conducted in North Carolina within the same river basin and in
 15 accordance with 33 CFR Part 332, available free of charge on the internet at:
 16 http://water.epa.gov/lawsregs/guidance/wetlands/wetlandsmitigation_index.cfm, unless otherwise
 17 approved by the Director; **and**
- 18 **(8) Mitigation for impacts to wetlands designated in Subparagraph (b)(6) of this Rule shall be of the**
 19 **same wetland type and within the same watershed when practical; and**
- 20 **(8)(9)** In-kind mitigation is required unless the Director determines that other forms of mitigation would
 21 provide greater water quality or aquatic life benefit.

22
 23 *History Note: Authority G.S. 143-211(c); 143-214.7C; 143-215.1(a)(6); 143-215.3(a)(1); 143-215.3(c);*
 24 *Temporary Adoption Eff. May 28, 2021.*
 25 *Eff. March 1, 2022.*

1 15A NCAC 02B .1401 is amended as published in 36: 07 NCR 443-450 as follows:

2
3 **15A NCAC 02H .1301 SCOPE AND PURPOSE**

4 (a) The provisions of this Section shall apply to Division of Water Resources (Division) regulatory and resource
5 management determinations regarding isolated wetlands and isolated classified surface waters. This Section shall only
6 apply to discharges resulting from activities that require State review after October 22, 2001 and that require a Division
7 determination concerning effects on isolated wetlands and isolated classified surface waters. For the purpose of this
8 Section, "discharge" shall be the deposition of dredged or fill material (e.g. fill, earth, construction debris, soil, etc.).

9 (b) This Section outlines the application and review procedures for permitting of discharges into isolated wetlands
10 and isolated classified surface waters that have been listed in 15A NCAC 02B .0300. If the U.S. Army Corps of
11 Engineers (USACE) or its designee determines that a particular stream or open water is not regulated under Section
12 404 of the Clean Water Act, and the stream or open water meets the definition of an isolated water in Paragraph (f) of
13 this Rule, then discharges to that stream or open water ~~or wetland~~ shall be covered by this Section. If the ~~U.S. Army~~
14 ~~Corps of Engineers~~ USACE or its designee determines that a particular wetland is not regulated under Section 404 of
15 the Clean Water ~~Act~~ Act, that wetland meets the definition of an isolated wetland in Paragraph (f) of this Rule, and
16 that isolated wetland is a Basin Wetland or Bog as described in the North Carolina Wetland Assessment User Manual
17 prepared by the North Carolina Wetland Functional Assessment Team, version 4.1 October 2010 (available online at:
18 [26 \(c\) Activities that result in a discharge may be deemed permitted as described in Rule .1305~~\(b\)~~\(a\) of this Section or
27 authorized by the issuance of either an individual permit or a Certificate of Coverage to operate under a general permit:](https://deq.nc.gov/about/divisions/water-resources/water-quality-permitting/401-buffer-permitting-branch/401-
19 isolatedhttps://deq.nc.gov/about/divisions/water-resources/water-resources-data/water-quality-program-
20 development/newam-manual), then discharges to that wetland shall be covered by this Section. <u>Where the USACE</u>
21 <u>has not confirmed the extent and/or location of the wetlands or surface waters, the</u> The Division shall verify <u>confirm</u>
22 <u>the determination, extent, extent and location of isolated wetlands and isolated classified streams using the U.S. Army</u>
23 <u>Corps of Engineers Wetland Delineation Manual (Technical Report Y-87-1) and subsequent regional supplements</u>
24 <u>and the Division publication, Methodology for Identification of Intermittent and Perennial Streams and Their Origins</u>
25 <u>(v.4.11, 2010).</u></p>
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- 28 (1) Individual permits shall be issued on a case-by-case basis using the procedures outlined in this
29 Section. These ~~Individual~~ individual permits do not require approval by the U.S. Environmental
30 Protection Agency.
- 31 (2) General permits may be developed by the Division and issued by the Director for types or groups
32 of discharges resulting from activities that are similar in nature and considered to have minimal
33 impact. General permits do not require approval by the U.S. Environmental Protection Agency. All
34 activities that receive a Certificate of Coverage under a general permit from the Division shall be
35 covered under that general permit. When written approval is required in the general permit, the
36 application and review procedures for requesting a Certificate of Coverage under a general permit
37 from the Division for the proposed activity are the same as the procedures outlined in this Section

1 for individual permits. The Director may require an Individual Permit for any project if it is deemed
 2 in the public's best interest or determined that the project is likely to have a significant adverse effect
 3 upon water quality, including state or federally listed endangered or threatened aquatic species, or
 4 will degrade the waters so that existing uses of the waters or downstream waters are precluded.

5 (d) Discharges resulting from activities that are deemed permitted as described in Rule .1305(a) of this Section, or
 6 that receive an individual permit or Certificate of Coverage under a general permit pursuant to this Section shall not
 7 be considered to remove existing uses of the isolated wetland or isolated surface waters.

8 (e) The following are exempt from this Section:

9 (1) Activities described in 15A NCAC 02B .0230;

10 (2) Discharges to the following features if they were constructed for erosion control or stormwater
 11 management purposes:

12 (A) ~~isolated man-made ponds ponds;~~ isolated man-made wetlands;

13 (B) ~~or isolated man-made ditches; ditches constructed for [erosion control or] stormwater~~
 14 ~~management purposes;~~

15 (3) Discharges to any man-made isolated pond;

16 (4) Discharges to any isolated wetland not regulated under Section 404 of the Clean Water Act that is
 17 not a Basin Wetland or Bog as described in the North Carolina Wetland Assessment User Manual
 18 prepared by the North Carolina Wetland Functional Assessment Team, version 4.1 October 2010
 19 (available online at: [https://deq.nc.gov/about/divisions/water-resources/water-resources-](https://deq.nc.gov/about/divisions/water-resources/water-resources-data/water-quality-program-development/ncwam-manual)
 20 [data/water-quality-program-development/ncwam-manual](https://deq.nc.gov/about/divisions/water-resources/water-resources-data/water-quality-program-development/ncwam-manual));

21 (5) ~~Discharges to isolated ephemeral streams as defined by 15A NCAC 02B .0610;~~

22 ~~(5)(6)~~ Discharges of treated effluent into isolated wetlands and isolated classified surface waters resulting
 23 from activities that receive NPDES Permits or State Non-Discharge Permits;

24 ~~(6)(7)~~ Discharges for water dependent structures as defined in 15A NCAC 02B .0202; and

25 ~~(7)(8)~~ A discharge resulting from an activity if:

26 (A) The discharge resulting from the activity requires a 401 Certification and 404 Permit and
 27 these were issued prior to October 22, 2001;

28 (B) The project requires a State permit, such as landfills, NPDES discharges of treated effluent,
 29 Non-Discharge Permits, land application of residuals and road construction activities, that
 30 has begun construction or are under contract to begin construction and have received all
 31 required State permits prior to October 22, 2001;

32 (C) The project is being conducted by the N.C. Department of Transportation and they have
 33 completed 30% of the hydraulic design for the project prior to October 22, 2001; or

34 (D) The applicant has been authorized for a discharge into isolated wetlands or isolated waters
 35 for a project that has established a Vested Right under North Carolina law prior to October
 36 22, 2001.

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

- 1 (1) "Class SWL wetland" means the term as defined at 15A NCAC 02B .~~0101~~.0231(a).
- 2 (2) "Class UWL wetland" means the term as defined at 15A NCAC 02B .~~0101~~.0231(a).
- 3 (3) "Cumulative impact" means environmental impacts resulting from incremental effects of an activity
4 when added to other past, present, and reasonably foreseeable future activities, regardless of what
5 entities undertake such other actions.
- 6 (4) "Director" means the Director of the Division.
- 7 (5) "Division" means the Division of Water Resources of the North Carolina Department of
8 Environmental Quality.
- 9 (6) "Isolated Wetland" means:
- 10 (A) a wetland confirmed to be isolated by the USACE; or
- 11 (B) a wetland that has been determined to be non-jurisdictional by the USACE but has not been
12 confirmed to be isolated as indicated in Part (A) of this Subparagraph, and for which an
13 evaluation confirmed by the Division documents that a significant nexus is not present
14 pursuant to the Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision
15 in Rapanos v. United States & Carabell v. United States memorandum dated December 02,
16 2008 (available online at: [https://deq.nc.gov/about/divisions/water-resources/water-](https://deq.nc.gov/about/divisions/water-resources/water-quality-permitting/401-buffer-permitting-branch/401-isolated)
17 quality-permitting/401-buffer-permitting-branch/401-isolated).
- 18 (7) "Isolated Waters" means:
- 19 (A) a surface water confirmed to be isolated by the USACE; or
- 20 (B) a surface water that has been determined to be non-jurisdictional by the USACE but has
21 not been confirmed to be isolated as indicated in Part (A) of this Subparagraph, and for
22 which an evaluation confirmed by the Division documents that a significant nexus is not
23 present pursuant to the Clean Water Act Jurisdiction Following the U.S. Supreme Court's
24 Decision in Rapanos v. United States & Carabell v. United States memorandum dated
25 December 02, 2008. [~~2008 (available online at: [28 or other association of owners/developers.](https://deq.nc.gov/about/divisions/water-</u>
26 <u>resources/water-quality-permitting/401-buffer-permitting-branch/401-isolated).]</u></p>
<p>27 <u>(8))~~
- 29 ~~(6)~~(9) "Secondary impact" means indirect effects, which are caused by the action and are later in time or
30 farther removed in distance, but are still reasonably foreseeable to the applicant or the Division.
- 31 ~~(7)~~(10) "Wetland" means the term as defined in 15A NCAC 02B .0202.

34 *History Note:* Authority G.S. 143-215.1(a)(6); 143-215.1(b)(3); 143-215.3(a)(1); 143-215.3(c); S.L. 2014-120, s.
35 54; S.L. 2015-286, s. 4.18;
36 Codifier determined that findings did not meet criteria for temporary rule on September 26, 2001
37 and October 12, 2001;

1 *Temporary Adoption Eff. October 22, 2001;*
2 *Eff. April 1, 2003;*
3 *Readopted Eff. June 15, 2020.*
4 *Temporary Amendment Eff. May 28, 2021.*
5 *Amended Eff. March 1, 2022.*

APPENDIX 7

Link to OSBM Approved Regulatory Impact Analysis:

<https://edocs.deq.nc.gov/WaterResources/DocView.aspx?id=2104146&dbid=0&repo=WaterResources>