

## **RRC STAFF OPINION**

*PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.*

AGENCY: Environmental Management Commission

RULE CITATION: 15A NCAC 02H .1301, .1401-.1405

RECOMMENDED ACTION:

- X Approve, but note staff's comment
- Object, based on:
- Lack of statutory authority
  - Unclear or ambiguous
  - Unnecessary
  - Failure to comply with the APA
- Extend the period of review

COMMENT:

*Staff recommends granting the agency's waiver request and approving the above-cited rules as temporary rules, pursuant to G.S. 150B-21.1.*

*The agency is proposing to amend one rule and adopt five others in response to recent federal regulation. The agency reports that the change to the Code of Federal Regulations became effective June 22, 2020. G.S. 150B-21.1(a)(4) authorizes agencies to adopt temporary rules as follows:*

### **§ 150B-21.1. Procedure for adopting a temporary rule.**

- (a) Adoption. - An agency may adopt a temporary rule when it finds that adherence to the notice and hearing requirements of G.S. 150B-21.2 would be contrary to the public interest and that the immediate adoption of the rule is required by one or more of the following:
  - (4) A recent federal regulation.

*G.S. 150B-21.1(a2) defines "recent regulation" as:*

- (a2) A recent act, change, regulation, or order as used in subdivisions (2) through (5) of subsection (a) of this section means an act, change, regulation, or order occurring or made

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Commission Counsel

effective no more than 210 days prior to the submission of a temporary rule to the Rules Review Commission.

*As the regulations cited to by the agency as necessitating this temporary rulemaking became effective on June 22, 2020, the 210-day time frame set by the statute ended on January 18, 2021.*

*The agency began the formal temporary rulemaking process by submitting these temporary rules to OAH on March 12, 2021. The agency completed the formal process and submitted the temporary rules to RRC on May 14, 2021, which was 326 days after the effective date of the recent regulation.*

*G.S. 150B-21.1(a2) contains a provision whereby the Commission may waive this 210-day time frame:*

*Upon written request of the agency, the Commission may waive the 210-day requirement upon consideration of the degree of public benefit, whether the agency had control over the circumstances that required the requested waiver, notice to and opposition by the public, the need for the waiver, and previous requests for waivers submitted by the agency.*

*In the letter signed by the Chair of the EMC, the agency addresses these prongs and asks for a waiver of the 210-day time frame. In that letter, the agency acknowledges that the regulations became effective on June 22, but added that the training and guidance from the federal government as to what the effects of the change to the federal regulations would be continued through September of 2020. It was only after receiving this further federal guidance that the agency was able to begin drafting the proposed rule changes.*

*Staff is aware that this Commission does not generally favor waivers, but it has granted waivers of this time frame in the past. In this instance, the agency represents that the extra time was needed because the impact of the change of federal regulation was not clear at the time the regulation became effective, and it took additional guidance from the federal government to identify the need for this rule change. (Staff notes that the RRC received a public comment that reiterates this point.) As such, staff recommends that RRC grant the EMC's waiver request pursuant to G.S. 150B-21.1(a2) and approve the rules as temporary rules.*

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Commission Counsel

**§ 150B-21.1. Procedure for adopting a temporary rule.**

(a) Adoption. - An agency may adopt a temporary rule when it finds that adherence to the notice and hearing requirements of G.S. 150B-21.2 would be contrary to the public interest and that the immediate adoption of the rule 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 recent federal regulation.
- (5) A recent court order.
- (6) The need for a rule establishing review criteria as authorized by G.S. 131E-183(b) to complement or be made consistent with the State Medical Facilities Plan approved by the Governor, if the rule addresses a matter included in the State Medical Facilities Plan, and the proposed rule and a notice of public hearing is submitted to the Codifier of Rules prior to the effective date of the Plan.
- (7) The need for the Wildlife Resources Commission to establish any of the following:
  - a. No wake zones.
  - b. Hunting or fishing seasons, including provisions for manner of take or any other conditions required for the implementation of such season.
  - c. Hunting or fishing bag limits.
  - d. Management of public game lands as defined in G.S. 113-129(8a).
- (8) The need for the Secretary of State to implement the certification technology provisions of Article 11A of Chapter 66 of the General Statutes, to adopt uniform Statements of Policy that have been officially adopted by the North American Securities Administrators Association, Inc., for the purpose of promoting uniformity of state securities regulation, and to adopt rules governing the conduct of hearings pursuant to this Chapter.
- (9) The need for the Commissioner of Insurance to implement the provisions of G.S. 58-2-205.
- (10) The need for the State Chief Information Officer to implement the information technology procurement provisions of Article 15 of Chapter 143B of the General Statutes.

(11) The need for the State Board of Elections to adopt a temporary rule after prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical for one or more of the following:

- a. In accordance with the provisions of G.S. 163-22.2.
- b. To implement any provisions of state or federal law for which the State Board of Elections has been authorized to adopt rules.
- c. The need for the rule to become effective immediately in order to preserve the integrity of upcoming elections and the elections process.

(12) Repealed by Session Laws 2015-264, s. 22, effective October 1, 2015.

(13), (14) Reserved.

(15) Expired pursuant to Session Laws 2002-164, s. 5, effective October 1, 2004.

(16) Expired pursuant to Session Laws 2003-184, s. 3, effective July 1, 2005.

(17) To maximize receipt of federal funds for the Medicaid or NC Health Choice programs within existing State appropriations, to reduce Medicaid or NC Health Choice expenditures, and to reduce Medicaid and NC Health Choice fraud and abuse.

(a1) Recodified as subdivision (a)(16) of this section by Session Laws 2004-156, s. 1.

(a2) A recent act, change, regulation, or order as used in subdivisions (2) through (5) of subsection (a) of this section means an act, change, regulation, or order occurring or made effective no more than 210 days prior to the submission of a temporary rule to the Rules Review Commission. Upon written request of the agency, the Commission may waive the 210-day requirement upon consideration of the degree of public benefit, whether the agency had control over the circumstances that required the requested waiver, notice to and opposition by the public, the need for the waiver, and previous requests for waivers submitted by the agency.

(a3) Unless otherwise provided by law, the agency shall:

(1) At least 30 business days prior to adopting a temporary rule, submit the rule and a notice of public hearing to the Codifier of Rules, and the Codifier of Rules shall publish the proposed temporary rule and the notice of public hearing on the Internet to be posted within five business days.

(2) At least 30 business days prior to adopting a temporary rule, notify persons on the mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule and of the public hearing.

(3) Accept written comments on the proposed temporary rule for at least 15 business days prior to adoption of the temporary rule.

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(4) Hold at least one public hearing on the proposed temporary rule no less than five days after the rule and notice have been published. If notice of a public hearing has been published and that public hearing has been cancelled, the agency shall publish notice at least five days prior to the date of any rescheduled hearing.

(a4) An agency must also prepare a written statement of its findings of need for a temporary rule stating why adherence to the notice and hearing requirements in G.S. 150B-21.2 would be contrary to the public interest and why the immediate adoption of the rule is required. If the temporary rule establishes a new fee or increases an existing fee, the agency shall include in the written statement that it has complied with the requirements of G.S. 12-3.1. The statement must be signed by the head of the agency adopting the temporary rule.

(b) Review. - When an agency adopts a temporary rule it must submit the rule and the agency's written statement of its findings of the need for the rule to the Rules Review Commission. Within 15 business days after receiving the proposed temporary rule, the Commission shall review the agency's written statement of findings of need for the rule and the rule to determine whether the statement meets the criteria listed in subsection (a) of this section and the rule meets the standards in G.S. 150B-21.9. The Commission shall direct a member of its staff who is an attorney licensed to practice law in North Carolina to review the statement of findings of need and the rule. The staff member shall make a recommendation to the Commission, which must be approved by the Commission or its designee. The Commission's designee shall be a panel of at least three members of the Commission. In reviewing the statement, the Commission or its designee may consider any information submitted by the agency or another person. If the Commission or its designee finds that the statement meets the criteria listed in subsection (a) of this section and the rule meets the standards in G.S. 150B-21.9, the Commission or its designee must approve the temporary rule and deliver the rule to the Codifier of Rules within two business days of approval. The Codifier of Rules must enter the rule into the North Carolina Administrative Code on the sixth business day following receipt from the Commission or its designee.

(b1) If the Commission or its designee finds that the statement does not meet the criteria listed in subsection (a) of this section or that the rule does not meet the standards in G.S. 150B-21.9, the Commission or its designee must immediately notify the head of the agency. The agency may supplement its statement of need with additional findings or submit a new statement. If the agency provides additional findings or submits a new statement, the Commission or its designee must review the additional findings or new statement within five business days after the agency submits the additional findings or new statement. If the Commission or its designee again finds that the statement does not meet the criteria listed in subsection (a) of this section or that the rule does not meet the standards in G.S. 150B-21.9, the Commission or its designee must immediately notify the head of the agency and return the rule to the agency.

(b2) If an agency decides not to provide additional findings or submit a new statement when notified by the Commission or its designee that the agency's findings of need for a rule do not meet the required criteria or that the rule does not meet the required standards, the agency must notify the Commission or its designee of its decision. The Commission or its designee shall then return the rule to the agency. When the Commission returns a rule to an agency in accordance with this subsection, the agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes.

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(b3) Notwithstanding any other provision of this subsection, if the agency has not complied with the provisions of G.S. 12-3.1, the Codifier of Rules shall not enter the rule into the Code.

(c) Standing. - A person aggrieved by a temporary rule adopted by an agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes. In the action, the court shall determine whether the agency's written statement of findings of need for the rule meets the criteria listed in subsection (a) of this section and whether the rule meets the standards in G.S. 150B-21.9. The court shall not grant an ex parte temporary restraining order.

(c1) Filing a petition for rule making or a request for a declaratory ruling with the agency that adopted the rule is not a prerequisite to filing an action under this subsection. A person who files an action for declaratory judgment under this subsection must serve a copy of the complaint on the agency that adopted the rule being contested, the Codifier of Rules, and the Commission.

(d) Effective Date and Expiration. - A temporary rule becomes effective on the date specified in G.S. 150B-21.3. A temporary rule expires on the earliest of the following dates:

(1) The date specified in the rule.

(2) The effective date of the permanent rule adopted to replace the temporary rule, if the Commission approves the permanent rule.

(3) The date the Commission returns to an agency a permanent rule the agency adopted to replace the temporary rule.

(4) The effective date of an act of the General Assembly that specifically disapproves a permanent rule adopted to replace the temporary rule.

(5) 270 days from the date the temporary rule was published in the North Carolina Register, unless the permanent rule adopted to replace the temporary rule has been submitted to the Commission.

(e) Publication. - When the Codifier of Rules enters a temporary rule in the North Carolina Administrative Code, the Codifier must publish the rule in the North Carolina Register. (1973, c. 1331, s. 1; 1981, c. 688, s. 12; 1981 (Reg. Sess., 1982), c. 1232, s. 1; 1983, c. 857; c. 927, ss. 4, 8; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(1), 1(8); 1987, c. 285, ss. 10-12; 1991, c. 418, s. 1; 1991 (Reg. Sess., 1992), c. 900, s. 149; 1993, c. 553, s. 54; 1995, c. 507, s. 27.8(c); 1996, 2nd Ex. Sess., c. 18, ss. 7.10(c), (d); 1997-403, ss. 1-3; 1998-127, s. 2; 1998-212, s. 26B(h); 1999-434, s. 16; 1999-453, s. 5(a); 2000-69, ss. 3, 5; 2000-148, ss. 4, 5; 2001-126, s. 12; 2001-421, ss. 2.3, 5.3; 2001-424, ss. 27.17(b), (c), 27.22(a), (b); 2001-487, s. 21(g); 2002-97, ss. 2, 3; 2002-164, s. 4.6; 2003-184, s. 3; 2003-229, s. 2; 2003-413, ss. 27, 29; 2004-156, s. 1; 2011-398, s. 4; 2013-360, s. 12H.9(d); 2013-413, s. 39; 2015-241, s. 7A.4(ee); 2015-264, s. 22; 2017-6, s. 3; 2018-146, ss. 3.1(a), (b), 6.1; 2020-3, s. 4.25(a).)

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Commission Counsel



## ENVIRONMENTAL MANAGEMENT COMMISSION

### NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY

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May 14, 2021

Ms. Jeanette Doran, Chair  
North Carolina Rules Review Commission  
Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh, NC 27609-6700  
[oah.rules@oah.nc.gov](mailto:oah.rules@oah.nc.gov)  
Via email only

Re: Waiver Request for Temporary Rules 15A NCAC 02H Section .1300 and .1400

Dear Chair Doran and Members of the Commission,

On behalf of the North Carolina Environmental Management Commission (EMC), I am writing to request that the North Carolina Rules Review Commission (RRC) grant the EMC a waiver pursuant to N.C. Gen. Stat. § 150B-21.1(a2) and approve proposed temporary rules (15A NCAC 02H Sections .1300 and .1400) adopted by the EMC at its May 13, 2021, meeting.

As you may be aware, the EMC rarely undertakes temporary rulemaking. It is my understanding that the last time the EMC sought to adopt temporary rules was 2015, which was primarily predicated on the direction of the General Assembly. Moreover, after a review of its records by staff, it does not appear that the EMC has previously sought a waiver to the 210-day requirement. This waiver request is not submitted lightly, but is necessary in order to provide relief to the regulated community, while also continuing to protect our State's important natural resources.

At the outset, it is important to note that the temporary rules at issue do not change or expand the long-standing and well-established law in North Carolina as to what constitutes a "wetland." Instead, the temporary rules are necessary to fill a permitting void resulting from the United States Environmental Protection Agency's (EPA) adoption of the *Navigable Waters Protection Rule: Definition of "Waters of the United States"* Rule ("NWP" rule).

State of North Carolina | Environmental Quality  
1611 Mail Service Center | Raleigh, North Carolina 27699-1611  
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The EPA's change to the NWP rule resulted in creating a subset of wetlands that remained protected under State law, but did not have an existing permitting framework allowing for impacts to those wetlands. Under the previous version of the NWP rule, projects impacting federally-jurisdictional wetlands could be permitted through federal regulations. With the change, however, the ability to seek a permit to allow projects to proceed no longer exists.

The temporary rules provide a permitting framework to allow the types of impacts for which permits were previously available to continue and, thereby, provide regulatory relief and certainty to the regulated community. If the temporary rules are not approved, the permitting void will remain and no impacts to the wetlands can be allowed.

While the federal rule necessitating the temporary rules at issue became effective on June 22, 2020, the United States Corps of Engineers (USACE) continued to issue guidance and conduct training for several months after the effective date of the rule. For example, the USACE continued to issue its determinations of newly non-federal jurisdiction wetlands through the end of September 2020. Much of the guidance and training took place during August and September of that year.

Until staff from the Division of Water Resources (DWR) within the Department of Environmental Quality (DEQ) received the necessary guidance documents, trainings and determinations issued by EPA and USACE, which included these newly federally non-jurisdictional wetlands, DWR was unable to determine the extent of the change in the regulation or the newly implemented constraints on the federal permitting mechanism. Only after the determinations were made could DWR staff determine the extent of the resulting permitting void and begin crafting meaningful rules for the EMC's consideration.

The EMC approved the temporary rules to proceed to public comment at its March 11, 2021 meeting using expedited procedures. As part of the public comment process, 550 written comments were received, which were overwhelming supportive of the rules. Also, as part of its review of the public comments, various changes were made to the proposed temporary rules to provide additional clarity and to address specific concerns. The EMC took final action to approve the rules at its May 13, 2021 meeting.

As part of this waiver request, pursuant to RRC rule 26 NCAC 05 .0105, I also request that the EMC's counsel and DWR be allowed to present this request to the RRC.

I appreciate your attention to and consideration of this request.

Sincerely,



Dr. A. Stanley Meiburg, Chair  
NC Environmental Management Commission

Chair Doran  
EMC Waiver Request  
May 14, 2021  
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Cc: Phillip T. Reynolds, EMC Counsel, *electronically*  
Danny Smith, Director, DWR, *electronically*  
Jennifer Everett, DEQ Rulemaking Coordinator, *electronically*  
Andrew D. Hargrove, Assistant General Counsel, DEQ, *electronically*  
Sue Homewood, DWR Staff, *electronically*  
Paul Wojoski, DWR Staff, *electronically*  
Amanda Reeder, RRC Counsel, *electronically*

1 15A NCAC 02H .1301 is amended with changes under temporary procedures 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 or its designee determines that a particular water is not regulated under Section 404 of the Clean Water Act,  
12 ~~and the water meets the definition of isolated waters in Paragraph (f) of this Rule, then discharges to that water or~~  
13 ~~wetland shall be covered by this Section. If the U.S. Army Corps of Engineers or its designee determines that a~~  
14 ~~particular wetland is not regulated under Section 404 of the Clean Water Act Act, that wetland meets the definition of~~  
15 ~~isolated waters in Paragraph (f) of this Rule, and that wetland is a Basin Wetland or Bog as described in the North~~  
16 ~~Carolina Wetland Assessment User Manual prepared by the North Carolina Wetland Functional Assessment Team,~~  
17 ~~version 4.1 October 2010 (available online at: [https://deq.nc.gov/about/divisions/water-resources/water-quality-](https://deq.nc.gov/about/divisions/water-resources/water-quality-permitting/401-buffer-permitting-branch/401-isolated)~~  
18 ~~permitting/401-buffer-permitting-branch/401-isolated~~~~[https://deq.nc.gov/about/divisions/water-resources/water-](https://deq.nc.gov/about/divisions/water-resources/water-resources-data/water-quality-program-development/newam-manual)~~  
19 ~~resources-data/water-quality-program-development/newam-manual~~), then discharges to that wetland shall be covered  
20 by this Section. The Division shall verify the determination, extent, and location of isolated wetlands and isolated  
21 classified surface waters using the U.S. Army Corps of Engineers Wetland Delineation Manual (Technical Report Y-  
22 87-1) and subsequent regional supplements and the Division publication, Methodology for Identification of  
23 Intermittent and Perennial Streams and Their Origins (v.4.11, 2010).

24 (c) Activities that result in a discharge may be deemed permitted as described in Rule .1305~~(b)~~(a) of this Section or  
25 authorized by the issuance of either an individual permit or a Certificate of Coverage to operate under a general permit:

- 26 (1) Individual permits shall be issued on a case-by-case basis using the procedures outlined in this  
27 Section. These Individual permits do not require approval by the U.S. Environmental Protection  
28 Agency.
- 29 (2) General permits may be developed by the Division and issued by the Director for types or groups  
30 of discharges resulting from activities that are similar in nature and considered to have minimal  
31 impact. General permits do not require approval by the U.S. Environmental Protection Agency. All  
32 activities that receive a Certificate of Coverage under a general permit from the Division shall be  
33 covered under that general permit. When written approval is required in the general permit, the  
34 application and review procedures for requesting a Certificate of Coverage under a general permit  
35 from the Division for the proposed activity are the same as the procedures outlined in this Section  
36 for individual permits.

1 (d) Discharges resulting from activities that receive an individual permit or Certificate of Coverage under a general  
2 permit pursuant to this Section shall not be considered to remove existing uses of the isolated wetland or isolated  
3 surface waters.

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

- 5 (1) Activities described in 15A NCAC 02B .0230;
- 6 (2) Discharges to isolated man-made ~~ponds~~ ponds, isolated man-made wetlands, or isolated man-made  
7 ditches constructed for erosion control or stormwater management purposes;
- 8 (3) Discharges to any man-made isolated pond;
- 9 (4) Discharges to any isolated wetland not regulated under Section 404 of the Clean Water Act that is  
10 not a Basin Wetland or Bog as described in the North Carolina Wetland Assessment User Manual  
11 prepared by the North Carolina Wetland Functional Assessment Team, version 4.1 October 2010  
12 (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)  
13 [data/water-quality-program-development/ncwam-manual](https://deq.nc.gov/about/divisions/water-resources/water-resources-data/water-quality-program-development/ncwam-manual));
- 14 (5) Discharges of treated effluent into isolated wetlands and isolated classified surface waters resulting  
15 from activities that receive NPDES Permits or State Non-Discharge Permits;
- 16 (6) Discharges for water dependent structures as defined in 15A NCAC 02B .0202; and
- 17 (7) A discharge resulting from an activity if:
  - 18 (A) The discharge resulting from the activity requires a 401 Certification and 404 Permit and  
19 these were issued prior to October 22, 2001;
  - 20 (B) The project requires a State permit, such as landfills, NPDES discharges of treated effluent,  
21 Non-Discharge Permits, land application of residuals and road construction activities, that  
22 has begun construction or are under contract to begin construction and have received all  
23 required State permits prior to October 22, 2001;
  - 24 (C) The project is being conducted by the N.C. Department of Transportation and they have  
25 completed 30% of the hydraulic design for the project prior to October 22, 2001; or
  - 26 (D) The applicant has been authorized for a discharge into isolated wetlands or isolated waters  
27 for a project that has established a Vested Right under North Carolina law prior to October  
28 22, 2001.

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

- 30 (1) "Class SWL wetland" means the term as defined at 15A NCAC 02B ~~.0101~~.0231(a).
- 31 (2) "Class UWL wetland" means the term as defined at 15A NCAC 02B ~~.0101~~.0231(a).
- 32 (3) "Cumulative impact" means environmental impacts resulting from incremental effects of an activity  
33 when added to other past, present, and reasonably foreseeable future activities, regardless of what  
34 entities undertake such other actions.
- 35 (4) "Director" means the Director of the Division.
- 36 (5) "Division" means the Division of Water Resources of the North Carolina Department of  
37 Environmental Quality.

1       (6) “Isolated Wetland” means:

2           (A) a wetland confirmed to be isolated by the USACE prior to June 22, 2020; or

3           (B) a wetland that has been determined to be non-jurisdictional by the USACE after June 22,  
4               2020 and for which an evaluation confirmed by the Division documents that a significant  
5               nexus is not present pursuant to the Clean Water Act Jurisdiction Following the U.S.  
6               Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States  
7               memorandum dated December 02, 2008 (available online at:  
8               [https://deq.nc.gov/about/divisions/water-resources/water-quality-permitting/401-buffer-](https://deq.nc.gov/about/divisions/water-resources/water-quality-permitting/401-buffer-permitting-branch/401-isolated)  
9               [permitting-branch/401-isolated](https://deq.nc.gov/about/divisions/water-resources/water-quality-permitting/401-buffer-permitting-branch/401-isolated)).

10       (7) “Isolated Waters” means:

11           (A) a surface water confirmed to be isolated by the USACE prior to June 22, 2020; or

12           (B) a surface water that has been determined to be non-jurisdictional by the USACE after June  
13               22, 2020 and for which an evaluation confirmed by the Division documents that a  
14               significant nexus is not present pursuant to the Clean Water Act Jurisdiction Following the  
15               U.S. Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States  
16               memorandum dated December 02, 2008 (available online at:  
17               [https://deq.nc.gov/about/divisions/water-resources/water-quality-permitting/401-buffer-](https://deq.nc.gov/about/divisions/water-resources/water-quality-permitting/401-buffer-permitting-branch/401-isolated)  
18               [permitting-branch/401-isolated](https://deq.nc.gov/about/divisions/water-resources/water-quality-permitting/401-buffer-permitting-branch/401-isolated)).

19       (8) “Project” means the total project proposed or accomplished by one owner/developer or partnership  
20           or other association of owners/developers.

21       (6)(8)(9)       "Secondary impact" means indirect effects, which are caused by the action and are later in  
22           time or farther removed in distance, but are still reasonably foreseeable to the applicant or the  
23           Division.

24       (7)(9)(10)       "Wetland" means the term as defined in 15A NCAC 02B .0202.

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28       *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.*  
29           *54; S.L. 2015-286, s. 4.18;*  
30           *Codifier determined that findings did not meet criteria for temporary rule on September 26, 2001*  
31           *and October 12, 2001;*  
32           *Temporary Adoption Eff. October 22, 2001;*  
33           *Eff. April 1, 2003;*  
34           *Readopted Eff. June 15, 2020.*  
35           *Temporary Amendment Eff. May 28, 2021*

1 15A NCAC 02H .1401 is adopted with changes under temporary procedures as follows:

2  
3 **SECTION .1400 – DISCHARGES TO FEDERALLY NON-JURISDICTIONAL WETLANDS AND**  
4 **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  
9 classified surface waters. For the purpose of this Section, "discharge" shall be the deposition of dredged or fill  
10 material (e.g. fill, earth, construction debris, soil, etc.). Isolated Wetlands and Isolated Waters as defined in Rule  
11 .1301 of this Subchapter shall be regulated pursuant to Section .1300 of this Subchapter.

12 (b) This Section outlines the application and review procedures for permitting of discharges into federally non-  
13 jurisdictional wetlands and federally non-jurisdictional classified surface waters that have been listed in 15A NCAC  
14 02B .0300. If the U.S. Army Corps of Engineers or its designee determines that a particular water or wetland is not  
15 regulated under Section 404 of the Clean Water Act, and the particular water or wetland is not an isolated wetland or  
16 isolated water as defined in Rule .1301 of this Subchapter, then discharges to that water or wetland shall be covered  
17 by this Section. The Division shall verify the determination, extent, and location of federally non-jurisdictional  
18 wetlands and federally non-jurisdictional classified surface waters using the U.S. Army Corps of Engineers Wetland  
19 Delineation Manual (Technical Report Y-87-1) and subsequent regional supplements and the Division publication,  
20 Methodology for Identification of Intermittent and Perennial Streams and Their Origins (v.4.11, 2010). Any  
21 disputes by the applicant or landowner over on-site wetland or stream determinations shall be referred to the  
22 Director in writing within 60 calendar days of written notification from the Division. The Director's determination is  
23 subject to review as provided in Article 3 of G.S. 150B.

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

- 27 (1) Individual permits shall be issued on a case-by-case basis using the procedures outlined in this Section.  
28 These Individual permits do not require approval by the U.S. Environmental Protection Agency.
- 29 (2) General permits may be developed by the Division and issued by the Director for types or groups of  
30 discharges resulting from activities that are similar in nature and considered to have minimal impact.  
31 General permits do not require approval by the U.S. Environmental Protection Agency. All activities that  
32 receive a Certificate of Coverage under a general permit from the Division shall be covered under that  
33 general permit. When written approval is required in the general permit, the application and review  
34 procedures for requesting a Certificate of Coverage under a general permit from the Division for the  
35 proposed activity are the same as the procedures outlined in this Section for individual permits.

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

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

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

6 (2) Discharges to federally non-jurisdictional man-made ponds, federally non-jurisdictional man-made  
7 wetlands, or federally non-jurisdictional man-made ditches constructed for erosion control or stormwater  
8 management purposes;

9 (3) Discharges to any federally non-jurisdictional man-made pond;

10 (4) Discharges of treated effluent into federally non-jurisdictional wetlands or federally non-jurisdictional  
11 classified surface waters resulting from activities that receive NPDES Permits or State Non-Discharge  
12 Permits; and

13 (5) Discharges for water dependent structures as defined in 15A NCAC 02B .0202.

14 (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  
15 Subchapter.

16  
17 *History Note:* Authority G.S. 143-215.1(a)(6); 143-215.1(b)(3); 143-215.3(a)(1); 143-215.3(c);

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

1 15A NCAC 02H .1402 is adopted with changes under temporary procedures as follows:

2  
3 **15A NCAC 02H .1402 FILING APPLICATIONS**

4 (a) Any person needing issuance of an individual permit or Certificate of Coverage under a general permit for  
5 discharges resulting from activities that affect federally non-jurisdictional wetlands or federally non-jurisdictional  
6 classified surface waters shall file with the Director, at 1617 Mail Service Center, Raleigh, North Carolina, 27699-  
7 1617, or 512 N Salisbury Street, Raleigh, NC 27604, an original and one copy of an application for a Permit or  
8 submit one complete copy of an application electronically via the following website:  
9 [https://edocs.deq.nc.gov/Forms/DWR\\_Wetlands\\_Online\\_Submittal\\_Page](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  
18 corporation and responsible for the activity for which certification is sought. The corporation must  
19 be registered with the NC Secretary of State's Office to conduct business in NC;
- 20 (4) the nature of the discharge, including cumulative impacts to all wetlands and waters (isolated  
21 wetlands, isolated classified surface waters, federally non-jurisdictional wetlands, federally non-  
22 jurisdictional classified surface waters, jurisdictional wetlands and jurisdictional waters) that cause  
23 or will cause a violation of downstream water quality standards resulting from an activity to be  
24 conducted by the applicant;
- 25 (5) whether the discharge has occurred or is proposed;
- 26 (6) the location and extent of the discharge, stating the municipality, if applicable, the county; the  
27 drainage basin; the name of the nearest named surface waters; and the location of the point of  
28 discharge 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; the location, dimensions, and type of any structures that affect federally non-  
34 jurisdictional wetlands or federally non-jurisdictional classified surface waters for use in  
35 connection with the discharge; and the location and extent of the federally non-jurisdictional  
36 wetlands or federally non-jurisdictional classified surface waters the boundaries of said lands; 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  
4 of their knowledge.

5 (b) The Division may request in writing, and the applicant shall furnish, any additional information necessary to  
6 clarify the information provided in the application under Paragraph (a) of this Rule, or to complete the evaluation in  
7 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  
10 omission of the information. The final decision regarding the completeness of the application shall be made by the  
11 Division based upon the information required in Paragraphs (a) and (b) of this Rule, and any explanation provided  
12 by the 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  
14 deems necessary to clarify the information provided in the application under Paragraph (a) of this Rule or to  
15 complete the evaluation in Rule .1405 of this Section. For the purpose of review of an application, the The applicant  
16 shall allow the staff safe access to the lands and facilities of the applicant and lend such assistance as shall be  
17 reasonable for those places, upon the presentation of credentials, credentials, and advanced notice of at least three  
18 days.

19 (e) Other applications for permitting or certification by a division of the Department shall suffice for application for  
20 this Permit as long as the application contains all of the information specified in this Rule and it is specifically  
21 requested to the Division by the applicant that authorization is sought under this Rule. This application shall be  
22 submitted by the applicant to the Division for review under this Permit.

23  
24 *History Note: Authority G.S. 143-214.1; 143-215.1(a)(6); 143-215.3(a)(1);*  
25 *Temporary Adoption Eff. May 28, 2021.*  
26

1 15A NCAC 02H .1403 is adopted under temporary procedures 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 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; 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) This 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 (15A NCAC 07J .0206), the U.S. Army Corps of Engineers  
23 according to their established procedures, by a joint notice by the Division for an individual certification in accordance  
24 with Rule .0503 of this Subchapter, or by a joint notice by the Division for an individual permit in accordance with  
25 Rule .1303 of this Subchapter.

26 (e) Any person who desires a public hearing on a general permit or an individual permit application shall so request  
27 in writing to the to the Division at the address listed in Rule .1402 of this Section. The request shall be received by the  
28 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 the proposed impacts to waters of the State,  
31 the Division shall notify the applicant in writing that there will be a hearing. The Division shall also provide notice of  
32 the hearing to all individuals on the mailing list as described in Paragraph (g) of this Rule and shall post the notice on  
33 the Division's website. The notice shall be published at least 30 calendar days prior to the date of the hearing. The  
34 notice shall state the time, place, and format of the hearing. The notice can be combined with the notice required under  
35 Paragraph (c) of this Rule. The hearing shall be held within 90 calendar days following date of notification to the  
36 applicant. The record for each hearing held under this Paragraph shall remain open for a period of 30 calendar days  
37 after the public hearing to receive public comments.

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

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

6  
7 History Note: Authority G.S. 143-215.1(a)(6); 143-215.3(a)(1); 143-215.3(a)(1e); 143-215.3(c)  
8 Temporary Adoption Eff. May 28, 2021.

1 15A NCAC 02H .1404 is adopted with changes under temporary procedures 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 result in  
10 the waiver of the permit requirement by the Director, 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 result in the waiver of the permit requirement 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  
21 Director shall deem necessary to ensure compliance with this Section, including written post-discharge notification  
22 to the Division.

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  
26 Coverage; 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 violated  
30 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) Individual permits and Certificates of Coverage for general permits shall be issued for a period of five years,  
34 after which time the Permit shall be void, unless the discharge is complete or an extension is granted pursuant to  
35 Paragraph (g) of this Rule. The permit shall become enforceable when issued.

36 (g) **Individual permit Permit** or Certificate of Coverage renewals shall require a new complete application. The  
37 applicant may request in writing that the Division grant an extension before the permit expires. An extension may be

1 granted by the Division based on the new complete application for a time period of one additional year, provided  
2 that the construction has commenced or is under contract to commence before the permit expires.

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

5

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

7

*Temporary Adoption Eff. May 28, 2021.*

8

1 15A NCAC 02H .1405 is adopted with changes under temporary procedures as follows:

2  
3 **15A NCAC 02H .1405 REVIEW OF APPLICATIONS**

4 (a) DISCHARGES FROM ACTIVITIES DEEMED TO BE PERMITTED. The following activities shall be deemed  
5 to be permitted:

6 (1) Discharges resulting from activities that impact less than 1/2 acre of federally non-jurisdictional  
7 classified open waters (e.g., lakes, ponds) surface waters for the entire project are deemed to be  
8 permitted provided they fully comply with the conditions listed in Subparagraph ~~(b)(4)~~ (a)(4) of this  
9 Rule, and it shall not be necessary for the Division to issue permits for these activities.

10 (2) Discharges resulting from activities that impact less than a total of 150 linear feet of federally non-  
11 jurisdictional classified intermittent and perennial streams for the entire project are deemed to be  
12 permitted provided they fully comply with the conditions listed in Subparagraph ~~(b)(4)~~ (a)(4) of this  
13 Rule, and it shall not be necessary for the Division to issue permits for these activities.

14 (3) Discharges resulting from activities that impact less than or equal to one acre of federally non-  
15 jurisdictional wetlands for the entire project in the coastal region, less than or equal to one-half acre  
16 of federally non-jurisdictional wetlands for the entire project in the piedmont region, and less than  
17 or equal to one-third acre of federally non-jurisdictional wetlands for the entire project in the  
18 mountain region are deemed to be permitted provided they fully comply with the conditions listed  
19 in Subparagraph ~~(b)(4)~~ (a)(4) of this Rule, and it shall not be necessary for the Division to issue  
20 permits for these activities. For purposes of implementing this Subparagraph, the coastal, piedmont  
21 and mountain regions shall be as follows:

22 (A) "Coastal Region" includes Beaufort, Bertie, Bladen, Brunswick, Camden, Carteret,  
23 Chowan, Columbus, Craven, Cumberland, Currituck, Dare, Duplin, Edgecombe, Gates,  
24 Greene, Halifax, Harnett, Hertford, Hoke, Hyde, Johnston, Jones, Lee, Lenoir, Martin,  
25 Moore, Nash, New Hanover, Northampton, Onslow, Pamlico, Pasquotank, Pender,  
26 Perquimans, Pitt, Richmond, Robeson, Sampson, Scotland, Tyrrell, Washington, Wayne,  
27 and Wilson Counties;

28 (B) "Piedmont Region" includes Alamance, Alexander, Anson, Burke, Cabarrus, Caldwell,  
29 Caswell, Catawba, Chatham, Cleveland, Davidson, Davie, Durham, Forsyth, Franklin,  
30 Gaston, Granville, Guilford, Iredell, Lincoln, Mecklenburg, Montgomery, Orange, Person,  
31 Polk, Randolph, Rockingham, Rowan, Rutherford, Stanly, Stokes, Surry, Union, Vance,  
32 Wake, Warren, Wilkes, and Yadkin Counties;

33 (C) "Mountain Region" includes Alleghany, Ashe, Avery, Buncombe, Cherokee, Clay,  
34 Graham, Haywood, Henderson, Jackson, Macon, Madison, McDowell, Mitchell, Swain,  
35 Transylvania, Watauga and Yancey Counties.

36 (D) When a landowner believes their property is not in the correct region for purposes of this  
37 Rule, they may have a soil scientist conduct a site-specific evaluation to determine the soil

1 series. The soil scientist shall be an individual who is currently licensed or authorized to  
2 practice soil science under G.S. 89F by the North Carolina Board for Licensing of Soil  
3 Scientists. The landowner shall submit the soil report to **the supervisor of the 401 & Buffer**  
4 **Permitting Branch of** the Division of Water Resources for review. Soil series that occur in  
5 North Carolina have been categorized by the Natural Resources Conservation Service of  
6 the US Department of Agriculture as defined in Rule .1306 of this Subchapter.

7 (4) Conditions which shall be met for projects deemed to be permitted:

8 (A) Erosion and sediment control practices shall equal at a minimum those required by the N.C.  
9 Division of Energy, Mineral, and Land Resources (**DEMLR**) or its local delegated program  
10 for the Sedimentation Pollution Control Act and shall be in full compliance with all  
11 **DEMLR or appropriate local delegated program** specifications governing the proper  
12 design, installation, operation and maintenance of such Best Management Practices in  
13 order to help assure compliance with the appropriate turbidity and other water quality  
14 standards;

15 (B) All erosion and sediment control practices placed in federally non-jurisdictional wetlands  
16 or federally non-jurisdictional classified surface waters shall be removed and the original  
17 grade restored within two months after the Division of Energy, Mineral, and Land  
18 Resources or local delegated program has released the specific **drainage** area within the  
19 project;

20 (C) Uncured or curing concrete shall not come into direct contact with waters of the State; and

21 (D) All work in or adjacent to federally non-jurisdictional intermittent or perennial streams  
22 shall be conducted so that the flowing stream does not come in contact with the disturbed  
23 area. Approved best management practices from the NC Sediment and Erosion Control  
24 Manual, or the NC DOT Construction and Maintenance Activities Manual shall be used to  
25 minimize excavation in flowing water.

26 (E) Measures shall be taken to ensure that the **hydrology hydrologic functions** of any remaining  
27 federally non-jurisdictional wetland and federally non-jurisdictional classified surface  
28 waters are not **adversely** affected by the discharge.

29 (b) EVALUATION. The Division shall issue an Individual Permit or a Certificate of Coverage under a General Permit  
30 upon determining that the proposed activity will comply with State water quality standards, which includes designated  
31 uses, numeric criteria, narrative criteria and the State's antidegradation policy, as defined in the rules of 15A NCAC  
32 02B .0200 and the rules of 15A NCAC 02L .0100 and .0200. In assessing whether the proposed activity will comply  
33 with water quality standards, the Division shall evaluate if the proposed activity:

34 (1) has no practical alternative. A lack of practical alternatives may be shown by demonstrating that,  
35 considering the potential for a reduction in size, configuration or density of the proposed project and  
36 all alternative designs, that the basic project purpose cannot be practically accomplished in an

1 economically viable manner, which would avoid or result in less adverse impact to federally non-  
2 jurisdictional wetland and federally non-jurisdictional classified surface waters;

- 3 (2) has avoided and minimized impacts to federally non-jurisdictional wetland and federally non-  
4 jurisdictional classified surface waters to ensure any remaining surface waters or wetlands, and any  
5 surface waters or wetlands downstream, continue to support existing uses during and after project  
6 completion;
- 7 (3) would not cause or contribute to a violation of water quality standards;
- 8 (4) would not result in secondary or cumulative impacts that cause or contribute to, or will cause or  
9 contribute to, a violation of downstream water quality standards; and
- 10 (5) provides for replacement of existing uses through compensatory mitigation as described in  
11 Paragraph (c) of this Rule.

12 (c) MITIGATION. Replacement or mitigation of unavoidable losses of existing uses in federally non-jurisdictional  
13 wetland and federally non-jurisdictional classified surface waters shall be reviewed in accordance with all of the  
14 following guidelines:

- 15 (1) The Division shall coordinate mitigation requirements with other permitting agencies that are  
16 requiring mitigation for a specific project;
- 17 (2) Mitigation requirements for impacts to federally non-jurisdictional wetlands shall only apply to the  
18 amount of impact that exceeds the threshold set out in Subparagraph ~~(b)(3)~~ (a)(3) of this Rule. The  
19 mitigation ratio for impacts exceeding the threshold for the entire project shall be 1:1. Impacts to  
20 non-jurisdictional wetlands shall not be combined with the project impacts to 404 jurisdictional  
21 wetlands or isolated wetlands for the purpose of determining when impact thresholds that trigger a  
22 mitigation requirement are met;
- 23 (3) Total impacts to less than 300 linear feet of federally non-jurisdictional perennial streams for the  
24 entire project shall not require compensatory mitigation. For linear publicly owned and maintained  
25 transportation projects that the U.S. Army Corps of Engineers determines are not part of a larger  
26 common plan of development, impacts to less than 300 linear feet per stream shall not require  
27 compensatory mitigation. The mitigation ratio for federally non-jurisdictional stream impacts shall  
28 be 1:1;
- 29 (4) The required area or length of mitigation required shall be multiplied by 1 for restoration, 1.5 for  
30 establishment, 2 for enhancement and 5 for preservation. These multipliers do not apply to approved  
31 mitigation sites where the Interagency Review Team has approved other ratios;
- 32 (5) Mitigation shall comply with the requirements set forth in G.S. 143-214.11. Mitigation projects  
33 implemented within waters or wetlands that are regulated under Section 404 of the Clean Water Act  
34 or Section .1300 of this Subchapter may be used to satisfy the requirements of this Paragraph;
- 35 (6) Acceptable methods of mitigation as defined in 33 CFR Part 332 available free of charge on the  
36 internet at: [http://water.epa.gov/lawsregs/guidance/wetlands/wetlandsmitigation\\_index.cfm](http://water.epa.gov/lawsregs/guidance/wetlands/wetlandsmitigation_index.cfm),  
37 include restoration, including both re-establishment and rehabilitation, establishment (creation),

1 enhancement and preservation. No more than 25 percent of the mitigation required by Subparagraph  
2 (2) or (3) of this Paragraph may be met through preservation, unless the Director determines that  
3 the public good would be better served by a higher percentage of preservation;

4 (7) Mitigation for impacts to federally non-jurisdictional wetland and federally non-jurisdictional  
5 classified surface waters shall be conducted in North Carolina within the same river basin and in  
6 accordance with 33 CFR Part 332, available free of charge on the internet at:  
7 [http://water.epa.gov/lawsregs/guidance/wetlands/wetlandsmitigation\\_index.cfm](http://water.epa.gov/lawsregs/guidance/wetlands/wetlandsmitigation_index.cfm), unless otherwise  
8 approved by the Director; and

9 (8) In-kind mitigation is required unless the Director determines that other forms of mitigation would  
10 provide greater water quality or aquatic life benefit.

11  
12 *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)*  
13 *Temporary Adoption Eff. May 28, 2021.*