

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

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

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

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

(e) The following are exempt from this Section:

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

(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) "Class SWL wetland" means the term as defined at 15A NCAC 02B ~~.0101-.0231(a).~~
- (2) "Class UWL wetland" means the term as defined at 15A NCAC 02B ~~.0101-.0231(a).~~
- (3) "Cumulative impact" means environmental impacts resulting from incremental effects of an activity when added to other past, present, and reasonably foreseeable future activities, regardless of what entities undertake such other actions.
- (4) "Director" means the Director of the Division.

(5) "Division" means the Division of Water Resources of the North Carolina Department of Environmental Quality.

(6) "Isolated Wetland" means:

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

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

(7) "Isolated Waters" means:

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

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

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

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

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

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. 54; S.L. 2015-286, s. 4.18;
Codifier determined that findings did not meet criteria for temporary rule on September 26, 2001 and October 12, 2001;
Temporary Adoption Eff. October 22, 2001;
Eff. April 1, 2003;
Readopted Eff. June 15, 2020.
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 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~~ ~~soil, etc.~~). Isolated ~~Wetlands~~ ~~wetlands~~ and ~~Isolated Waters~~ ~~isolated waters~~ as defined
11 in Rule .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) ~~(available free of charge on the internet at:~~
20 ~~<https://usace.contentdm.oclc.org/digital/collection/p266001coll1/id4532/>)~~ and subsequent regional supplements
21 ~~(available free of charge on the internet at: [https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-](https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/reg_supp/)~~
22 ~~[and-Permits/reg_supp/](https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/reg_supp/))~~ and the Division publication, Methodology for Identification of Intermittent and Perennial
23 Streams and Their Origins (v.4.11, 2010). ~~Any disputes by the applicant or landowner over on-site wetland or stream~~
24 ~~determinations shall be referred to the Director in writing within 60 calendar days of written notification from the~~
25 ~~Division. The Director's determination [is] shall be subject to review as provided in Article 3 of G.S. 150B.~~

26 (c) Activities that result in a discharge may be deemed permitted as described in Rule .1405(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:

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

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

(e) The following are exempt from this Section:

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

(2) Discharges to ~~the following features if they were constructed for erosion control or stormwater management purposes;~~ federally non-jurisdictional man-made ponds, federally non-jurisdictional man-made wetlands, or federally non-jurisdictional man-made ~~ditches; ditches constructed for erosion control or stormwater management purposes;~~

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

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

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

(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.

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

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~~ **seeking** issuance of an individual permit or Certificate of Coverage under a general permit
5 for 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~~ **permit**
8 or submit one complete copy of an 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 is sought. The corporation must be registered
19 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~~ **wetlands**, and jurisdictional waters)
23 that cause or will cause a violation of downstream water quality standards resulting from an activity
24 to be 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, ~~and~~ **and** 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 connection
35 with the discharge; and the location and extent of the federally non-jurisdictional wetlands or
36 federally non-jurisdictional classified surface waters ~~within~~ **within** the boundaries of ~~said~~ **the** 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 of
4 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 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 ~~The~~ applicant shall allow
16 the staff safe access to the lands and facilities of the applicant and lend such assistance as shall be reasonable for those
17 places, upon the presentation of ~~credentials.~~ credentials, and advanced notice of at least three days.

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

22
23 *History Note: Authority G.S. 143-214.1; 143-215.1(a)(6); 143-215.3(a)(1);*
24 *Temporary Adoption Eff. May 28, 2021.*
25

1 15A NCAC 02H .1403 is adopted **with changes** 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 **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; 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]~~ **The** public notice requirement for an individual permit as described in Paragraph (b) of this Rule may be
22 satisfied by a joint notice with the Division of Coastal ~~[Management]~~ **Management**, **pursuant to 15A NCAC 07J .0206,**
23 **[15A NCAC 07J .0206]** the U.S. Army Corps of Engineers according to their established procedures, by a joint
24 notice by the Division for an individual certification in accordance with Rule .0503 of this Subchapter, or by a joint
25 notice by the Division for an individual permit in 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 **[so request**
27 **in writing]** **submit a written request** to the to the Division at the address listed in Rule .1402 of this Section. The request
28 **[shall]** **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 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]** **may** be combined with the notice required
35 under Paragraph (c) of this Rule. The hearing shall be held within 90 calendar days following date of notification to
36 the applicant. The record for each hearing held under this Paragraph shall remain open for a period of 30 calendar
37 days 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.

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7 *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)*
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 the
10 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 Director
21 shall deem necessary to ensure compliance with this Section, including written post-discharge notification to the
22 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 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 violated or
30 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, after
34 which time the ~~Permit~~ 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 that
2 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**
9 **this Rule, (4) of this Paragraph** and it shall not be necessary for the Division to issue permits for
10 these activities.

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

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

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

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

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

- (D) When a landowner believes their property is not in the correct region for purposes of this Rule, they may ~~have a soil scientist~~ conduct a site-specific evaluation to determine the soil series. ~~The soil scientist shall be an individual who is currently licensed or authorized to practice soil science under G.S. 89F by the North Carolina Board for Licensing of Soil Scientists.~~ If required by G.S. 89F, a soil scientist shall prepare this evaluation. The landowner shall submit the soil report to ~~the supervisor of the 401 & Buffer Permitting Branch of~~ the Division of Water Resources for review. Soil series that occur in North Carolina have been categorized by the Natural Resources Conservation Service of the US Department of Agriculture as defined in Rule .1306 of this Subchapter.
- (4) Conditions which shall be met for projects deemed to be permitted:
- (A) Erosion and sediment control practices shall equal at a minimum those required by the N.C. Division of Energy, Mineral, and Land Resources ~~(DEMLR)~~ or its local delegated program for the Sedimentation Pollution Control Act and shall be in ~~full~~ compliance with all ~~DEMLR or appropriate local delegated program~~ specifications governing the ~~proper~~ design, installation, ~~operation~~ ~~operation~~, and maintenance of such ~~Best Management Practices~~ ~~practices~~ in order to help assure compliance with the appropriate turbidity and other water quality standards;
- (B) All erosion and sediment control practices placed in federally non-jurisdictional wetlands or federally non-jurisdictional classified surface waters shall be removed and the original grade restored within two months after the ~~Division of Energy, Mineral, and Land Resources or local delegated program~~ ~~DEMLR or appropriate local delegated program~~ has released the specific ~~drainage~~ area within the project;
- (C) Uncured or curing concrete shall not come into direct contact with waters of the State; ~~and~~
- (D) All work in or adjacent to federally non-jurisdictional intermittent or perennial streams shall be conducted so that the flowing stream does not come in contact with the disturbed ~~area; and area.~~ ~~Approved best management practices from the NC Sediment and Erosion Control Manual, or the NC DOT Construction and Maintenance Activities Manual shall be used to minimize excavation in flowing water.~~
- (E) Measures shall be taken to ensure that the ~~hydrology~~ ~~hydrologic functions~~ of any remaining federally non-jurisdictional wetland and federally non-jurisdictional classified surface waters are not ~~adversely~~ affected by the discharge.
- (b) ~~EVALUATION.~~ The Division shall issue an ~~Individual Permit~~ ~~individual permit~~ or a Certificate of Coverage under a ~~General Permit~~ ~~general permit~~ upon determining that the proposed activity will comply with State water quality standards, which includes designated uses, numeric criteria, narrative ~~eriteria~~ ~~criteria~~, and the State's antidegradation policy, as defined in the rules of 15A NCAC 02B .0200 and the rules of 15A NCAC 02L .0100 and .0200. In assessing whether the proposed activity will comply with water quality standards, the Division shall evaluate if the proposed activity:

- (1) has no practical alternative. A lack of practical alternatives may be shown by demonstrating that, considering the potential for a reduction in size, ~~configuration~~ ~~configuration~~ or density of the proposed project and all alternative designs, that the basic project purpose cannot be practically accomplished in an economically viable manner, which would avoid or result in less adverse impact to federally non-jurisdictional wetland and federally non-jurisdictional classified surface waters;
 - (2) has avoided and minimized impacts to federally non-jurisdictional wetland and federally non-jurisdictional classified surface waters to ensure any remaining surface waters or wetlands, and any surface waters or wetlands downstream, continue to support existing uses during and after project completion;
 - (3) would not cause or contribute to a violation of water quality standards;
 - (4) would not result in secondary or cumulative impacts that cause or contribute to, or will cause or contribute to, a violation of downstream water quality standards; and
 - (5) provides for replacement of existing uses through compensatory mitigation as described in Paragraph (c) of this Rule.
- (c) ~~MITIGATION~~. Replacement ~~or by~~ mitigation of unavoidable losses of existing uses in federally non-jurisdictional wetland and federally non-jurisdictional classified surface waters shall be reviewed in accordance with all of the following guidelines:
- (1) The Division shall coordinate mitigation requirements with other permitting agencies that are requiring mitigation for a specific project;
 - (2) Mitigation requirements for impacts to federally non-jurisdictional wetlands shall only apply to the amount of impact that exceeds the threshold set out in Subparagraph ~~(b)(3)~~ ~~(a)(3)~~ of this Rule. The mitigation ratio for impacts exceeding the threshold for the entire project shall be 1:1. Impacts to non-jurisdictional wetlands shall not be combined with the project impacts to ~~404 jurisdictional~~ wetlands ~~that are regulated under Section 404 of the Clean Water Act~~ or isolated wetlands for the purpose of determining when impact thresholds that trigger a mitigation requirement are met;
 - (3) Total impacts to less than 300 linear feet of federally non-jurisdictional perennial streams for the entire project shall not require compensatory mitigation. For linear publicly owned and maintained transportation projects that the U.S. Army Corps of Engineers determines are not part of a larger common plan of development, impacts to less than 300 linear feet per stream shall not require compensatory mitigation. The mitigation ratio for federally non-jurisdictional stream impacts shall be 1:1;
 - (4) The required area or length of mitigation required shall be multiplied by 1 for restoration, 1.5 for establishment, 2 for enhancement and 5 for preservation. These multipliers do not apply to approved mitigation sites where the Interagency Review Team has approved other ratios;
 - (5) Mitigation shall comply with the requirements set forth in G.S. 143-214.11. Mitigation projects implemented within waters or wetlands that are regulated under Section 404 of the Clean Water Act or Section .1300 of this Subchapter may be used to satisfy the requirements of this Paragraph;

- 1 (6) Acceptable methods of mitigation as defined in 33 CFR Part 332 available free of charge on the
2 internet at: http://water.epa.gov/lawsregs/guidance/wetlands/wetlandsmitigation_index.cfm,
3 include restoration, including both re-establishment and rehabilitation, establishment (creation),
4 enhancement and preservation. No more than 25 percent of the mitigation required by Subparagraph
5 (2) or (3) of this Paragraph may be met through preservation, unless the Director determines that
6 the public good would be better served by a higher percentage of preservation;
- 7 (7) Mitigation for impacts to federally non-jurisdictional wetland and federally non-jurisdictional
8 classified surface waters shall be conducted in North Carolina within the same river basin and in
9 accordance with 33 CFR Part 332, available free of charge on the internet at:
10 http://water.epa.gov/lawsregs/guidance/wetlands/wetlandsmitigation_index.cfm, unless otherwise
11 approved by the Director; and
- 12 (8) In-kind mitigation is required unless the Director determines that other forms of mitigation would
13 provide greater water quality or aquatic life benefit.

14
15 *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)*
16 *Temporary Adoption Eff. May 28, 2021.*