

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

Amanda J. Reeder
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.

Amanda J. Reeder
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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Commission Counsel

(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.

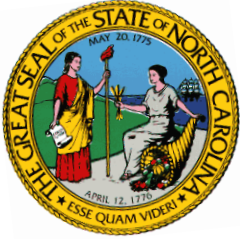
(2) The effective date of the permanent rule adopted to replace the temporary rule, if the Commission approves the permanent rule.

(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).)



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
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*

TEMPORARY RULE-MAKING FINDINGS OF NEED

[Authority G.S. 150B-21.1]

OAH USE ONLY

VOLUME:

ISSUE:

| | |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|
| 1. Rule-Making Agency: NC Environmental Management Commission | |
| 2. Rule citation & name: 15A NCAC 02H .1301 SCOPE AND PURPOSE | |
| 3. Action: <input type="checkbox"/> Adoption <input checked="" type="checkbox"/> Amendment <input type="checkbox"/> Repeal | |
| 4. Was this an Emergency Rule: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No Effective date: | |
| 5. Provide dates for the following actions as applicable: a. Proposed Temporary Rule submitted to OAH: March 12, 2021 b. Proposed Temporary Rule published on the OAH website: March 17, 2021 c. Public Hearing date: March 30, 2021 d. Comment Period: March 17, 2021 – April 12, 2021 e. Notice pursuant to G.S. 150B-21.1(a3)(2): March 15, 2021 f. Adoption by agency on: May 13, 2021 g. Proposed effective date of temporary rule [if other than effective date established by G.S. 150B- 21.1(b) and G.S. 150B-21.3]: h. Rule approved by RRC as a permanent rule [See G.S. 150B-21.3(b2)]: | |
| 6. Reason for Temporary Action. Attach a copy of any cited law, regulation, or document necessary for the review. <input type="checkbox"/> A serious and unforeseen threat to the public health, safety or welfare. <input type="checkbox"/> The effective date of a recent act of the General Assembly or of the U.S. Congress. Cite: Effective date: <input type="checkbox"/> A recent change in federal or state budgetary policy. Effective date of change: <input checked="" type="checkbox"/> A recent federal regulation. Cite: 33 CFR Part 328 and 40 CFR Parts 110, 112, 116, 117, 120, 122, 230, 232, 300, 302 and 401 - Navigable Waters Protection Rule: Definition of “Waters of the United States” Effective date: June 22, 2020 <input type="checkbox"/> A recent court order. Cite order: <input type="checkbox"/> State Medical Facilities Plan. <input type="checkbox"/> Other: Explain: As a result of the US EPA’s <i>Navigable Waters Protection Rule: Definition of “Waters of the United States”</i> Rule (effective June 22, 2020), a subset of wetlands classified under State law are no longer subject to federal Clean Water Act jurisdiction, and therefore no longer eligible for permitting the mechanism available under the Clean Water Act to authorize impacts to these wetlands. Temporary rules are being adopted to create a replacement permitting mechanism for these wetlands. | |

7. Why is adherence to notice and hearing requirements contrary to the public interest and the immediate adoption of the rule is required?

A recent federal rule change resulted in the loss of an essential permitting mechanism for certain wetlands in NC. The regulated community is in need of the immediate adoption of this rule to provide a replacement permitting mechanism so that they may continue planning, designing and constructing proposed projects. The regulated community has stated that delays in providing the permitting mechanism proposed by this rule will create a significant risk to the economic viability of projects in NC. This would be contrary to the public interest as these projects include such activities as roadway construction, school and institution facilities, farming, housing, commercial and industrial development which provide jobs and economic stimulus to the growing NC population. Adhering to the notice and hearing requirements would be contrary to the public interest because it would not provide for timely economic relief to the regulated community.

8. Rule establishes or increases a fee? (See G.S. 12-3.1)

☐ Yes

Agency submitted request for consultation on:
Consultation not required. Cite authority:

☒ No

9. Rule-making Coordinator: Jennifer Everett

Phone: 919-707-8614

E-Mail: Jennifer.Everett@ncdenr.gov

Agency contact, if any: Sue Homewood

Phone: 336-776-9693

E-Mail: Sue.Homewood@ncdenr.gov

10. Signature of Agency Head*:



*** If this function has been delegated (reassigned) pursuant to G.S. 143B-10(a), submit a copy of the delegation with this form.**

Typed Name: Dr. A. Stanley Meiburg

Title: Chairman, Environmental Management Commission

E-Mail: meiburgemc@gmail.com

RULES REVIEW COMMISSION USE ONLY

Action taken:

Submitted for RRC Review:

☐ Date returned to agency:

TEMPORARY RULES
REQUEST FOR TECHNICAL CHANGE

AGENCY: Environmental Management Commission

RULE CITATION: 15A NCAC 02H .1301

DEADLINE FOR RECEIPT: Tuesday, May 18, 2021

NOTE WELL: *This request when viewed on computer extends several pages. Please be sure you have reached the end of the document.*

The Rules Review Commission staff has completed its review of this rule prior to the Commission's next meeting. The Commission has not yet reviewed this rule and therefore there has not been a determination as to whether the rule will be approved. You may call this office to inquire concerning the staff recommendation.

In reviewing these rules, the staff determined that the following technical changes need to be made:

For this and all of the Rules, in the Temporary Rulemaking Findings of Need form, Box 5.d, it states that the comment period began on March 17. I am simply asking if this is correct, as the OAH posting stated it began on March 19.

In (c)(1), line 27, why is "Individual" capitalized?

In (e)(3), Page 2, line 8, why do you need this in light of the changes to (e)(2)? Is this to ensure compliance with SL 2015-286?

In (f)(6)(A), Page 3, line 2 and elsewhere the acronym is used, what is "USACE"? If you mean "US Army Corps of Engineers" then please state that on line 2, then put "USACE" in parenthesis; then you can just retain "USACE" elsewhere it is used in the Rule.

On lines 4-5 and 14, what is a "significant nexus"?

On lines 5 and 14, I do not believe "Jurisdiction" should be capitalized. Also, please insert a comma after "jurisdiction" and make "following" lowercase, thus: "... Act jurisdiction, following the US..."

In (c)(7)(B), line 16, since you've already provided the url in (c)(6)(B), please just end the sentence after "2008"

In (c)(9), line 21, and (c)(10), line 24, please remove the underlining from the struck language.

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Amanda J. Reeder
Commission Counsel
Date submitted to agency: May 14, 2021

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.

(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 isolated man-made ~~ponds~~ ponds, isolated man-made wetlands, or isolated man-made 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.

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).

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).

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.

25
26
27
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*

TEMPORARY RULE-MAKING FINDINGS OF NEED

[Authority G.S. 150B-21.1]

OAH USE ONLY

VOLUME:

ISSUE:

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|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1. Rule-Making Agency: NC Environmental Management Commission |
| 2. Rule citation & name: 15A NCAC 02H .1401 SCOPE AND PURPOSE |
| 3. Action: <input checked="" type="checkbox"/> Adoption <input type="checkbox"/> Amendment <input type="checkbox"/> Repeal |
| 4. Was this an Emergency Rule: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No Effective date: |
| 5. Provide dates for the following actions as applicable: a. Proposed Temporary Rule submitted to OAH: March 12, 2021 b. Proposed Temporary Rule published on the OAH website: March 17, 2021 c. Public Hearing date: March 30, 2021 d. Comment Period: March 17, 2021 – April 12, 2021 e. Notice pursuant to G.S. 150B-21.1(a3)(2): March 15, 2021 f. Adoption by agency on: May 13, 2021 g. Proposed effective date of temporary rule [if other than effective date established by G.S. 150B- 21.1(b) and G.S. 150B-21.3]: h. Rule approved by RRC as a permanent rule [See G.S. 150B-21.3(b2)]: |
| 6. Reason for Temporary Action. Attach a copy of any cited law, regulation, or document necessary for the review. <input type="checkbox"/> A serious and unforeseen threat to the public health, safety or welfare. <input type="checkbox"/> The effective date of a recent act of the General Assembly or of the U.S. Congress. Cite: Effective date: <input type="checkbox"/> A recent change in federal or state budgetary policy. Effective date of change: <input checked="" type="checkbox"/> A recent federal regulation. Cite: 33 CFR Part 328 and 40 CFR Parts 110, 112, 116, 117, 120, 122, 230, 232, 300, 302 and 401 - Navigable Waters Protection Rule: Definition of “Waters of the United States” Effective date: June 22, 2020 <input type="checkbox"/> A recent court order. Cite order: <input type="checkbox"/> State Medical Facilities Plan. <input type="checkbox"/> Other: Explain: As a result of the US EPA’s <i>Navigable Waters Protection Rule: Definition of “Waters of the United States”</i> Rule (effective June 22, 2020), a subset of wetlands classified under State law are no longer subject to federal Clean Water Act jurisdiction, and therefore no longer eligible for permitting the mechanism available under the Clean Water Act to authorize impacts to these wetlands. Temporary rules are being adopted to create a replacement permitting mechanism for these wetlands. |

7. Why is adherence to notice and hearing requirements contrary to the public interest and the immediate adoption of the rule is required?

A recent federal rule change resulted in the loss of an essential permitting mechanism for certain wetlands in NC. The regulated community is in need of the immediate adoption of this rule to provide a replacement permitting mechanism so that they may continue planning, designing and constructing proposed projects. The regulated community has stated that delays in providing the permitting mechanism proposed by this rule will create a significant risk to the economic viability of projects in NC. This would be contrary to the public interest as these projects include such activities as roadway construction, school and institution facilities, farming, housing, commercial and industrial development which provide jobs and economic stimulus to the growing NC population. Adhering to the notice and hearing requirements would be contrary to the public interest because it would not provide for timely economic relief to the regulated community.

8. Rule establishes or increases a fee? (See G.S. 12-3.1)

☐ Yes
Agency submitted request for consultation on:
Consultation not required. Cite authority:

☒ No

9. Rule-making Coordinator: Jennifer Everett

Phone: 919-707-8614

E-Mail: Jennifer.Everett@ncdenr.gov

Agency contact, if any: Sue Homewood

Phone: 336-776-9693

E-Mail: Sue.Homewood@ncdenr.gov

10. Signature of Agency Head*:



*** If this function has been delegated (reassigned) pursuant to G.S. 143B-10(a), submit a copy of the delegation with this form.**

Typed Name: Dr. A. Stanley Meiburg

Title: Chairman, Environmental Management Commission

E-Mail: meiburgemc@gmail.com

RULES REVIEW COMMISSION USE ONLY

Action taken:

Submitted for RRC Review:

☐ Date returned to agency:

TEMPORARY RULES
REQUEST FOR TECHNICAL CHANGE

AGENCY: Environmental Management Commission

RULE CITATION: 15A NCAC 02H .1401

DEADLINE FOR RECEIPT: Tuesday, May 18, 2021

The Rules Review Commission staff has completed its review of this rule prior to the Commission's next meeting. The Commission has not yet reviewed this rule and therefore there has not been a determination as to whether the rule will be approved. You may call this office to inquire concerning the staff recommendation.

In reviewing these rules, the staff determined that the following technical changes need to be made:

In (a), lines 8 and 9, and elsewhere the terms are used, are “federally non-jurisdictional wetlands” and “federally non-jurisdictional classified surface waters” known to your regulated public?

On line 10, I do not believe you need both “e.g.” and “etc.”

Also on line 10, the term defined in Rule .1301 is “isolated wetland” (singular).

And on line 10, why are the terms “Isolated Wetland” and “Isolated Waters” capitalized? They are not on lines 15 and 16.

On lines 18-19, please incorporate the Army Corp of Engineers manual by reference using G.S. 150B-21.6 if it is not already incorporated elsewhere in these Rules.

On lines 19-20, what Division publication is this? Is it in rule elsewhere, or is it exempt from rulemaking pursuant to G.S. 150B-2(8a)(h)?

On line 22, consider replacing “is” after “determination” with “shall be”

In (c)(1), line 28, why is “individual” capitalized?

In (c)(2), line 29, you say the Division may create general permits; those will be developed via rulemaking, correct?

On line 30, what is “similar in nature” and “minimal impact”? Who will determine this and based upon what?

What does Paragraph (d) mean? I am sure your regulated public understands this, but I do not and wanted to ask.

In (e), so that I’m clear – if conducting one of these activities, then no permit is required?

In (e)(3), how does this differ from (e)(2), line 6?

Amanda J. Reeder
Commission Counsel
Date submitted to agency: May 14, 2021

And how does (e)(4) differ from (e)(2), lines 6-7? Is it because (e)(4) addresses treated effluent?

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

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.

(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 federally non-jurisdictional man-made ponds, federally non-jurisdictional man-made wetlands, or federally non-jurisdictional man-made 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.*

TEMPORARY RULE-MAKING FINDINGS OF NEED

[Authority G.S. 150B-21.1]

OAH USE ONLY

VOLUME:

ISSUE:

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| 1. Rule-Making Agency: NC Environmental Management Commission |
| 2. Rule citation & name: 15A NCAC 02H .1402 FILING APPLICATIONS |
| 3. Action: <input checked="" type="checkbox"/> Adoption <input type="checkbox"/> Amendment <input type="checkbox"/> Repeal |
| 4. Was this an Emergency Rule: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No Effective date: |
| 5. Provide dates for the following actions as applicable: a. Proposed Temporary Rule submitted to OAH: March 12, 2021 b. Proposed Temporary Rule published on the OAH website: March 17, 2021 c. Public Hearing date: March 30, 2021 d. Comment Period: March 17, 2021 – April 12, 2021 e. Notice pursuant to G.S. 150B-21.1(a3)(2): March 15, 2021 f. Adoption by agency on: May 13, 2021 g. Proposed effective date of temporary rule [if other than effective date established by G.S. 150B- 21.1(b) and G.S. 150B-21.3]: h. Rule approved by RRC as a permanent rule [See G.S. 150B-21.3(b2)]: |
| 6. Reason for Temporary Action. Attach a copy of any cited law, regulation, or document necessary for the review. <input type="checkbox"/> A serious and unforeseen threat to the public health, safety or welfare. <input type="checkbox"/> The effective date of a recent act of the General Assembly or of the U.S. Congress. Cite: Effective date: <input type="checkbox"/> A recent change in federal or state budgetary policy. Effective date of change: <input checked="" type="checkbox"/> A recent federal regulation. Cite: 33 CFR Part 328 and 40 CFR Parts 110, 112, 116, 117, 120, 122, 230, 232, 300, 302 and 401 - Navigable Waters Protection Rule: Definition of “Waters of the United States” Effective date: June 22, 2020 <input type="checkbox"/> A recent court order. Cite order: <input type="checkbox"/> State Medical Facilities Plan. <input type="checkbox"/> Other: Explain: As a result of the US EPA’s <i>Navigable Waters Protection Rule: Definition of “Waters of the United States”</i> Rule (effective June 22, 2020), a subset of wetlands classified under State law are no longer subject to federal Clean Water Act jurisdiction, and therefore no longer eligible for permitting the mechanism available under the Clean Water Act to authorize impacts to these wetlands. Temporary rules are being adopted to create a replacement permitting mechanism for these wetlands. |

7. Why is adherence to notice and hearing requirements contrary to the public interest and the immediate adoption of the rule is required?

A recent federal rule change resulted in the loss of an essential permitting mechanism for certain wetlands in NC. The regulated community is in need of the immediate adoption of this rule to provide a replacement permitting mechanism so that they may continue planning, designing and constructing proposed projects. The regulated community has stated that delays in providing the permitting mechanism proposed by this rule will create a significant risk to the economic viability of projects in NC. This would be contrary to the public interest as these projects include such activities as roadway construction, school and institution facilities, farming, housing, commercial and industrial development which provide jobs and economic stimulus to the growing NC population. Adhering to the notice and hearing requirements would be contrary to the public interest because it would not provide for timely economic relief to the regulated community.

8. Rule establishes or increases a fee? (See G.S. 12-3.1)

☐ Yes
Agency submitted request for consultation on:
Consultation not required. Cite authority:

☒ No

9. Rule-making Coordinator: Jennifer Everett

Phone: 919-707-8614

E-Mail: Jennifer.Everett@ncdenr.gov

Agency contact, if any: Sue Homewood

Phone: 336-776-9693

E-Mail: Sue.Homewood@ncdenr.gov

10. Signature of Agency Head*:



*** If this function has been delegated (reassigned) pursuant to G.S. 143B-10(a), submit a copy of the delegation with this form.**

Typed Name: Dr. A. Stanley Meiburg

Title: Chairman, Environmental Management Commission

E-Mail: meiburgemc@gmail.com

RULES REVIEW COMMISSION USE ONLY

Action taken:

Submitted for RRC Review:

☐ Date returned to agency:

TEMPORARY RULES
REQUEST FOR TECHNICAL CHANGE

AGENCY: Environmental Management Commission

RULE CITATION: 15A NCAC 02H .1402

DEADLINE FOR RECEIPT: Tuesday, May 18, 2021

The Rules Review Commission staff has completed its review of this rule prior to the Commission's next meeting. The Commission has not yet reviewed this rule and therefore there has not been a determination as to whether the rule will be approved. You may call this office to inquire concerning the staff recommendation.

In reviewing these rules, the staff determined that the following technical changes need to be made:

In (a), line 4, consider replacing “needing” with “seeking”

On line 7 and elsewhere the term is used, why is “Permit” capitalized?

On line 8, what is “complete” here? With all required items in this Paragraph completed?

On line 10, what do you mean by “approved” by the Division? Someone can create their own form?

On line 12, generally terms like, “at a minimum” are not favored in rules as rules set the minimum requirements. Do you need to retain it here?

In (a)(4), so that I’m clear – the applicant will be able to determine this?

And on line 22, please insert a comma after “wetlands”

In (a)(6), line 26, should this say, “stating the municipality, if applicable, and the county;”?

In (a)(8), line 31, do you need to retain “sufficient” here?

On line 36, consider replacing “said” with “the”

In (a)(9), Page 2, line 4, I take it you need to use “their” because the applicant can be a person or a corporation, correct?

In (d), line 16, what is “safe” access?

And how will the determination of “such assistance as shall be reasonable” be determined?

On line 17, I take it you need to retain “at least”?

Amanda J. Reeder
Commission Counsel
Date submitted to agency: May 14, 2021

In (e), this reads very awkwardly. Have you considered simplifying it by stating something like, "Other applications for permitting or certification submitted to another division within the Department shall suffice for an application pursuant to this Rule, so long as the application contains all information required by this Rule. The applicant shall submit that application to the Division for review under this Rule."

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

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. 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.*

TEMPORARY RULE-MAKING FINDINGS OF NEED

[Authority G.S. 150B-21.1]

OAH USE ONLY

VOLUME:

ISSUE:

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| 1. Rule-Making Agency: NC Environmental Management Commission | |
| 2. Rule citation & name: 15A NCAC 02H .1403 PUBLIC NOTICE AND PUBLIC HEARING | |
| 3. Action: <input checked="" type="checkbox"/> Adoption <input type="checkbox"/> Amendment <input type="checkbox"/> Repeal | |
| 4. Was this an Emergency Rule: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No Effective date: | |
| 5. Provide dates for the following actions as applicable: a. Proposed Temporary Rule submitted to OAH: March 12, 2021 b. Proposed Temporary Rule published on the OAH website: March 17, 2021 c. Public Hearing date: March 30, 2021 d. Comment Period: March 17, 2021 – April 12, 2021 e. Notice pursuant to G.S. 150B-21.1(a3)(2): March 15, 2021 f. Adoption by agency on: May 13, 2021 g. Proposed effective date of temporary rule [if other than effective date established by G.S. 150B- 21.1(b) and G.S. 150B-21.3]: h. Rule approved by RRC as a permanent rule [See G.S. 150B-21.3(b2)]: | |
| 6. Reason for Temporary Action. Attach a copy of any cited law, regulation, or document necessary for the review. <input type="checkbox"/> A serious and unforeseen threat to the public health, safety or welfare. <input type="checkbox"/> The effective date of a recent act of the General Assembly or of the U.S. Congress. Cite: Effective date: <input type="checkbox"/> A recent change in federal or state budgetary policy. Effective date of change: <input checked="" type="checkbox"/> A recent federal regulation. Cite: 33 CFR Part 328 and 40 CFR Parts 110, 112, 116, 117, 120, 122, 230, 232, 300, 302 and 401 - Navigable Waters Protection Rule: Definition of “Waters of the United States” Effective date: June 22, 2020 <input type="checkbox"/> A recent court order. Cite order: <input type="checkbox"/> State Medical Facilities Plan. <input type="checkbox"/> Other: Explain: As a result of the US EPA’s <i>Navigable Waters Protection Rule: Definition of “Waters of the United States”</i> Rule (effective June 22, 2020), a subset of wetlands classified under State law are no longer subject to federal Clean Water Act jurisdiction, and therefore no longer eligible for permitting the mechanism available under the Clean Water Act to authorize impacts to these wetlands. Temporary rules are being adopted to create a replacement permitting mechanism for these wetlands. | |

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8. Rule establishes or increases a fee? (See G.S. 12-3.1)

☐ Yes

Agency submitted request for consultation on:

Consultation not required. Cite authority:

☒ No

9. Rule-making Coordinator: Jennifer Everett

Phone: 919-707-8614

E-Mail: Jennifer.Everett@ncdenr.gov

Agency contact, if any: Sue Homewood

Phone: 336-776-9693

E-Mail: Sue.Homewood@ncdenr.gov

10. Signature of Agency Head*:



*** If this function has been delegated (reassigned) pursuant to G.S. 143B-10(a), submit a copy of the delegation with this form.**

Typed Name: Dr. A. Stanley Meiburg

Title: Chairman, Environmental Management Commission

E-Mail: meiburgemc@gmail.com

RULES REVIEW COMMISSION USE ONLY

Action taken:

Submitted for RRC Review:

☐ Date returned to agency:

TEMPORARY RULES
REQUEST FOR TECHNICAL CHANGE

AGENCY: Environmental Management Commission

RULE CITATION: 15A NCAC 02H .1403

DEADLINE FOR RECEIPT: Tuesday, May 18, 2021

The Rules Review Commission staff has completed its review of this rule prior to the Commission's next meeting. The Commission has not yet reviewed this rule and therefore there has not been a determination as to whether the rule will be approved. You may call this office to inquire concerning the staff recommendation.

In reviewing these rules, the staff determined that the following technical changes need to be made:

In (c), is this for both types of permits?

In (d), line 21, please replace "This" with "The"

Consider breaking down the language in (d) on lines 22-25 into Subparagraphs, like so:

(d) The public notice... by a joint notice with:

(1) the Division of Coastal Management...;

(2) the US Army Corp of Engineers...

On line 22, please state "Coastal Management, pursuant to 15A NCAC 07J .0206"

On line 22, will this not be a joint notice with the US Army Corp of Engineers? I note for all other notices, the Rule specifies it will be joint.

In (e), lines 26 – 27, replace "so request in writing" with "submit a written request"

On line 27, I suggest replacing "shall" with "must"

And if it's not received within 30 days, what happens?

In (f), line 29, what is "significant public interest"? Is this used to mirror the language of G.S. 143-215.1(c)?

G.S. 143-215.2(c) requires the Commission to make the determination of whether the hearing should be held. Has this been delegated to the Director pursuant to G.S. 143-215.3(a)(4)?

On line 34, replace "can" with "may"

In the History Note, why are you citing to G.S. 143-215.3(a)(1e)? And is 143-215.3(a)(3) not applicable?

Amanda J. Reeder
Commission Counsel
Date submitted to agency: May 14, 2021

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

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 be 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.

TEMPORARY RULE-MAKING FINDINGS OF NEED

[Authority G.S. 150B-21.1]

OAH USE ONLY

VOLUME:

ISSUE:

| | |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|
| 1. Rule-Making Agency: NC Environmental Management Commission | |
| 2. Rule citation & name: 15A NCAC 02H .1404 DECISION ON APPLICATION FOR PERMITS OR CERTIFICATES OF COVERAGE | |
| 3. Action: <input checked="" type="checkbox"/> Adoption <input type="checkbox"/> Amendment <input type="checkbox"/> Repeal | |
| 4. Was this an Emergency Rule: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No Effective date: | |
| 5. Provide dates for the following actions as applicable: a. Proposed Temporary Rule submitted to OAH: March 12, 2021 b. Proposed Temporary Rule published on the OAH website: March 17, 2021 c. Public Hearing date: March 30, 2021 d. Comment Period: March 17, 2021 – April 12, 2021 e. Notice pursuant to G.S. 150B-21.1(a3)(2): March 15, 2021 f. Adoption by agency on: May 13, 2021 g. Proposed effective date of temporary rule [if other than effective date established by G.S. 150B- 21.1(b) and G.S. 150B-21.3]: h. Rule approved by RRC as a permanent rule [See G.S. 150B-21.3(b2)]: | |
| 6. Reason for Temporary Action. Attach a copy of any cited law, regulation, or document necessary for the review. <input type="checkbox"/> A serious and unforeseen threat to the public health, safety or welfare. <input type="checkbox"/> The effective date of a recent act of the General Assembly or of the U.S. Congress. Cite: Effective date: <input type="checkbox"/> A recent change in federal or state budgetary policy. Effective date of change: <input checked="" type="checkbox"/> A recent federal regulation. Cite: 33 CFR Part 328 and 40 CFR Parts 110, 112, 116, 117, 120, 122, 230, 232, 300, 302 and 401 - Navigable Waters Protection Rule: Definition of “Waters of the United States” Effective date: June 22, 2020 <input type="checkbox"/> A recent court order. Cite order: <input type="checkbox"/> State Medical Facilities Plan. <input type="checkbox"/> Other: Explain: As a result of the US EPA’s <i>Navigable Waters Protection Rule: Definition of “Waters of the United States”</i> Rule (effective June 22, 2020), a subset of wetlands classified under State law are no longer subject to federal Clean Water Act jurisdiction, and therefore no longer eligible for permitting the mechanism available under the Clean Water Act to authorize impacts to these wetlands. Temporary rules are being adopted to create a replacement permitting mechanism for these wetlands. | |

7. Why is adherence to notice and hearing requirements contrary to the public interest and the immediate adoption of the rule is required?

A recent federal rule change resulted in the loss of an essential permitting mechanism for certain wetlands in NC. The regulated community is in need of the immediate adoption of this rule to provide a replacement permitting mechanism so that they may continue planning, designing and constructing proposed projects. The regulated community has stated that delays in providing the permitting mechanism proposed by this rule will create a significant risk to the economic viability of projects in NC. This would be contrary to the public interest as these projects include such activities as roadway construction, school and institution facilities, farming, housing, commercial and industrial development which provide jobs and economic stimulus to the growing NC population. Adhering to the notice and hearing requirements would be contrary to the public interest because it would not provide for timely economic relief to the regulated community.

8. Rule establishes or increases a fee? (See G.S. 12-3.1)

☐ Yes

Agency submitted request for consultation on:

Consultation not required. Cite authority:

☒ No

9. Rule-making Coordinator: Jennifer Everett

Phone: 919-707-8614

E-Mail: Jennifer.Everett@ncdenr.gov

Agency contact, if any: Sue Homewood

Phone: 336-776-9693

E-Mail: Sue.Homewood@ncdenr.gov

10. Signature of Agency Head*:



*** If this function has been delegated (reassigned) pursuant to G.S. 143B-10(a), submit a copy of the delegation with this form.**

Typed Name: Dr. A. Stanley Meiburg

Title: Chairman, Environmental Management Commission

E-Mail: meiburgemc@gmail.com

RULES REVIEW COMMISSION USE ONLY

Action taken:

Submitted for RRC Review:

☐ Date returned to agency:

TEMPORARY RULES
REQUEST FOR TECHNICAL CHANGE

AGENCY: Environmental Management Commission

RULE CITATION: 15A NCAC 02H .1404

DEADLINE FOR RECEIPT: Tuesday, May 18, 2021

The Rules Review Commission staff has completed its review of this rule prior to the Commission's next meeting. The Commission has not yet reviewed this rule and therefore there has not been a determination as to whether the rule will be approved. You may call this office to inquire concerning the staff recommendation.

In reviewing these rules, the staff determined that the following technical changes need to be made:

In (a)(4), what does this mean? How will this be determined?

In (c), I take it this is a reference to G.S. 143-215.1(b)(4)(a)?

In (f), line 34, why is "Permit" capitalized? It is not elsewhere within the Rule.

In (f), line 34, you refer to "extension," as well as in multiple places in Paragraph (g). But in (g), line 36, you also refer to a "renewal" Should these be called the same thing?

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Amanda J. Reeder
Commission Counsel
Date submitted to agency: May 14, 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

TEMPORARY RULE-MAKING FINDINGS OF NEED

[Authority G.S. 150B-21.1]

OAH USE ONLY

VOLUME:

ISSUE:

| | |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|
| 1. Rule-Making Agency: NC Environmental Management Commission | |
| 2. Rule citation & name: 15A NCAC 02H .1405 REVIEW OF APPLICATIONS | |
| 3. Action: <input checked="" type="checkbox"/> Adoption <input type="checkbox"/> Amendment <input type="checkbox"/> Repeal | |
| 4. Was this an Emergency Rule: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No Effective date: | |
| 5. Provide dates for the following actions as applicable: a. Proposed Temporary Rule submitted to OAH: March 12, 2021 b. Proposed Temporary Rule published on the OAH website: March 17, 2021 c. Public Hearing date: March 30, 2021 d. Comment Period: March 17, 2021 – April 12, 2021 e. Notice pursuant to G.S. 150B-21.1(a3)(2): March 15, 2021 f. Adoption by agency on: May 13, 2021 g. Proposed effective date of temporary rule [if other than effective date established by G.S. 150B- 21.1(b) and G.S. 150B-21.3]: h. Rule approved by RRC as a permanent rule [See G.S. 150B-21.3(b2)]: | |
| 6. Reason for Temporary Action. Attach a copy of any cited law, regulation, or document necessary for the review. <input type="checkbox"/> A serious and unforeseen threat to the public health, safety or welfare. <input type="checkbox"/> The effective date of a recent act of the General Assembly or of the U.S. Congress. Cite: Effective date: <input type="checkbox"/> A recent change in federal or state budgetary policy. Effective date of change: <input checked="" type="checkbox"/> A recent federal regulation. Cite: 33 CFR Part 328 and 40 CFR Parts 110, 112, 116, 117, 120, 122, 230, 232, 300, 302 and 401 - Navigable Waters Protection Rule: Definition of “Waters of the United States” Effective date: June 22, 2020 <input type="checkbox"/> A recent court order. Cite order: <input type="checkbox"/> State Medical Facilities Plan. <input type="checkbox"/> Other: Explain: As a result of the US EPA’s <i>Navigable Waters Protection Rule: Definition of “Waters of the United States”</i> Rule (effective June 22, 2020), a subset of wetlands classified under State law are no longer subject to federal Clean Water Act jurisdiction, and therefore no longer eligible for permitting the mechanism available under the Clean Water Act to authorize impacts to these wetlands. Temporary rules are being adopted to create a replacement permitting mechanism for these wetlands. | |

7. Why is adherence to notice and hearing requirements contrary to the public interest and the immediate adoption of the rule is required?

A recent federal rule change resulted in the loss of an essential permitting mechanism for certain wetlands in NC. The regulated community is in need of the immediate adoption of this rule to provide a replacement permitting mechanism so that they may continue planning, designing and constructing proposed projects. The regulated community has stated that delays in providing the permitting mechanism proposed by this rule will create a significant risk to the economic viability of projects in NC. This would be contrary to the public interest as these projects include such activities as roadway construction, school and institution facilities, farming, housing, commercial and industrial development which provide jobs and economic stimulus to the growing NC population. Adhering to the notice and hearing requirements would be contrary to the public interest because it would not provide for timely economic relief to the regulated community.

8. Rule establishes or increases a fee? (See G.S. 12-3.1)

☐ Yes

Agency submitted request for consultation on:

Consultation not required. Cite authority:

☒ No

9. Rule-making Coordinator: Jennifer Everett

Phone: 919-707-8614

E-Mail: Jennifer.Everett@ncdenr.gov

Agency contact, if any: Sue Homewood

Phone: 336-776-9693

E-Mail: Sue.Homewood@ncdenr.gov

10. Signature of Agency Head*:



*** If this function has been delegated (reassigned) pursuant to G.S. 143B-10(a), submit a copy of the delegation with this form.**

Typed Name: Dr. A. Stanley Meiburg

Title: Chairman, Environmental Management Commission

E-Mail: meiburgemc@gmail.com

RULES REVIEW COMMISSION USE ONLY

Action taken:

Submitted for RRC Review:

☐ Date returned to agency:

TEMPORARY RULES
REQUEST FOR TECHNICAL CHANGE

AGENCY: Environmental Management Commission

RULE CITATION: 15A NCAC 02H .1405

DEADLINE FOR RECEIPT: Tuesday, May 18, 2021

The Rules Review Commission staff has completed its review of this rule prior to the Commission's next meeting. The Commission has not yet reviewed this rule and therefore there has not been a determination as to whether the rule will be approved. You may call this office to inquire concerning the staff recommendation.

In reviewing these rules, the staff determined that the following technical changes need to be made:

In (a), line 4, and elsewhere this is used, why are the introductory sentences in all caps?

In (a)(1), line 8, and elsewhere the term is used, what is "fully" comply? Who determines this?

In (a)(1), line 9, this should read "Subparagraph (4) of this Paragraph" Please note a conforming change in (a)(2) and (a)(3).

In (a)(3)(D), what authority are you relying upon to require this licensure?

In (a)(4)(A), Page 2, line 8, do you need "at a minimum" here?

On line 10, what is "full" compliance?

On line 11, who is the "appropriate" local delegated program? Will your regulated public know? What about what is "proper" design?

On line 12, please insert a comma after "operation"

On line 12, are "Best Management Practices" known? And why is the term capitalized?

In (a)(4)(B), lines 17-18, should this be changed to mirror the language on line 11, "DEMLR or appropriate local delegated program"?

Delete the "and" at the end of (a)(4)(C), line 20, and insert a semicolon and "and" at the end of (a)(4)(D) on line 25.

In (a)(4)(D), lines 24-24, what are these manuals? Where can they be found? Are they exempt from rulemaking pursuant to G.S. 150B-2(8a)(h)?

In (b), line 29, why are "Individual Permit" and "General Permit" capitalized?

On line 31, insert a comma after "criteria"

Amanda J. Reeder
Commission Counsel
Date submitted to agency: May 14, 2021

In (b)(1), line 35, please insert a comma after “configuration”

On lines 36 through Page 3, line 1, what is “practically accomplished in an economically viable manner”? Who determines this? Based upon what?

In (c), line 12, you refer to “replacement or mitigation” but then (c)(1) through (8) refer only to mitigation. Is replacement a type of mitigation?

In (c)(2), line 18, please underline the addition of (a)(2).

On lines 20-21, what are “404 jurisdictional wetlands”? Should this mirror the language in (c)(5), lines 32-33, “wetlands that are regulated under Section 404 of the Clean Water Act”?

In (c)(4), line 31, what is the “Interagency Review Team”?

In (c)(6), Page 4, lines 2-3, will the Director be determining this through rulemaking? How will this occur?

In (c)(7), since you will be enforcing the CFR, please incorporate it by reference pursuant to G.S. 150B-21.6 if you have not already done so.

In (c)(8), how will the Director determine this?

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

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

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. 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 and maintenance of such Best Management 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 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. 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 or a Certificate of Coverage under a General Permit upon determining that the proposed activity will comply with State water quality standards, which includes designated uses, numeric criteria, narrative criteria and the State's antidegradation policy, as defined in the rules of 15A NCAC 02B .0200 and the rules of 15A NCAC 02L .0100 and .0200. In assessing whether the proposed activity will comply with water quality standards, the Division shall evaluate if the proposed activity:

- (1) has no practical alternative. A lack of practical alternatives may be shown by demonstrating that, considering the potential for a reduction in size, 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 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 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;
- (6) Acceptable methods of mitigation as defined in 33 CFR Part 332 available free of charge on the internet at: http://water.epa.gov/lawsregs/guidance/wetlands/wetlandsmitigation_index.cfm, include restoration, including both re-establishment and rehabilitation, establishment (creation),

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

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

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

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)
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