

Burgos, Alexander N

Subject: FW: [External] Letter from Farmers on Wetlands Rules
Attachments: Letter from Farmers on Wetlands Rules.pdf

From: Meredith Graf (Rep. John Ager) <Meredith.Graf@ncleg.gov>
Sent: Thursday, March 10, 2022 11:26 AM
To: rrc.comments <rrc.comments@oah.nc.gov>
Cc: Everett, Jennifer <jennifer.everett@ncdenr.gov>
Subject: [External] Letter from Farmers on Wetlands Rules

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Good morning,

Please see the attached letter from Representative John Ager regarding Farmers on Wetlands Rules.

Thank you,

Meredith Graf
Legislative Assistant for Representative John Ager
District 115
1002 Legislative Building

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March 10, 2022

North Carolina Rules Review Commission
Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609

Re: Letter of Support for Permanent Wetland Rules: 15A N.C. Admin. Code 02H .1301 (Revision) and 15A N.C. Admin. Code .1400 (.1401 through .1405)

Dear Commissioners and Commission Staff:

We are farmers who support the Environmental Management Commission's proposed permanent rules, 15A N.C. Admin. Code 2H .1301 and 15A N.C. Admin. Code .1400 (.1401 through .1405). We write to explain how the proposed rule benefits farmers and does not impose unjustified burdens on our industry.

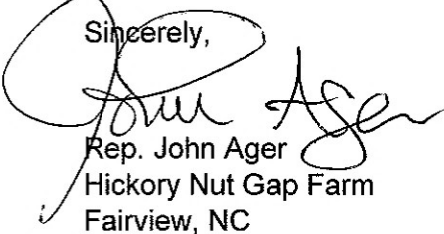
Farmers need clean water for crops and livestock, as well as for drinking, cooking, and numerous other uses around our families' homes. Wetlands help filter water pollution and protect farming operations from flooding. Headwater, seasonal, and rain-dependent streams supply water to larger streams and rivers from which farmers draw water for irrigation and for animals to drink. If upstream industries and developers are allowed to destroy or contaminate these critical water bodies without limit, they put farmers' livelihoods at risk.

Farms have nothing to fear from the proposed permanent rules. Most ordinary agricultural discharges do not require permits under the proposed rules because normal, on-going silviculture, farming, and ranching activities, such as plowing, seeding, cultivating, minor drainage, and harvesting, are deemed to comply with the wetland standards, as are upland soil and water conservation practices, maintaining stock ponds or irrigation ditches, maintaining drainage ditches, and building farm roads using best management practices.

To the extent that some agricultural activities are subject to the wetland rules, the wetlands and other small streams on or flowing through agricultural lands are no less worthy of protection because of the farming and ranching that occurs there. We aim to be good neighbors and good stewards of the environment; following any modest requirements of the proposed permanent rules is part of that goal.

Thank you for considering these comments.

Sincerely,



Rep. John Ager
Hickory Nut Gap Farm
Fairview, NC

Vera Fabian
Ten Mothers Farm
Cedar Grove, NC

Burgos, Alexander N

Subject: FW: [External] letter on 15A NCAC 02H .1301 and .1401-.1405
Attachments: WKC et al wetlands ltr to RRC 3-10-22.pdf

From: Grady McCallie <grady@ncconservationnetwork.org>
Sent: Thursday, March 10, 2022 1:25 PM
To: rrc.comments <rrc.comments@oah.nc.gov>
Cc: Everett, Jennifer <jennifer.everett@ncdenr.gov>
Subject: [External] letter on 15A NCAC 02H .1301 and .1401-.1405

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Thank you for the opportunity to share comments (attached) with the Rules Review Commission in support of the EMC's proposed permanent state wetlands permitting rules, 15A N.C. Admin. Code 02H .1301 (Revision) and 15A N.C. Admin. Code .1400 (.1401 through .1405).

Sincerely,

Grady

919-802-7592



Grady McCallie
NC Conservation Network
Policy Director

grady@ncconservationnetwork.org

P: 919.857.4699 x 101



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**American Rivers • Environmental Defense Fund • NC Conservation Network •
North Carolina Wildlife Federation • Sound Rivers • Waterkeepers Carolina**

March 10, 2022

North Carolina Rules Review Commission
Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609

**Re: Letter of Support for Permanent Wetland Rules: 15A N.C. Admin. Code 02H .1301 (Revision) and
15A N.C. Admin. Code .1400 (.1401 through .1405)**

Dear Commissioners and Commission Staff:

American Rivers, Environmental Defense Fund, NC Conservation Network, NC Wildlife Federation, Sound Rivers, and Waterkeepers Carolina submit these comments in support of the Environmental Management Commission's (EMC) proposed permanent rules, 15A N.C. Admin. Code 2H .1301 and 15A N.C. Admin. Code .1400 (.1401 through .1405). Our organizations advocate across multiple watersheds in North Carolina for the protection of wetlands, streams, and river systems.

Protection of wetlands and streams requires a balance – neither a total prohibition on impacts nor wholesale deregulation, but rather efficient review that protects neighbors, downstream communities, and the health of the landscape. The proposed permanent rules establish such a system, consistent with past practice, that will remain in place no matter the scope of the federal Clean Water Act. The proposed permanent rules will allow development projects to proceed that could otherwise be unpermittable under state law.

Over the last two decades, our organizations have participated in multiple rounds of federal rulemaking over the reach of the federal Clean Water Act, the most recent of those rounds in the form of the Biden administration's proposed rule to restore longstanding federal clean water protections. Despite that proposal, the scope of federal clean water protections remains uncertain.

In 2020, the U.S. EPA and Army Corps of Engineers' Navigable Waters Protection Rule (NWPR) reduced federal jurisdiction over wetlands and headwater streams in North Carolina by hundreds of thousands of acres. Yet, those same streams and wetlands remain unambiguously protected under North Carolina's state statutes because they are critical to protecting the state's natural environment and the communities that depend on them. They cannot be impacted without a state permit. Since the state's traditional permit process for these impacts piggybacked on the federal 404 wetlands permitting program, that state permit process—the 401 water quality certification process—offered no way to authorize impacts to waters of the state not covered by the federal rule. As a result, projects that had been planned for months or years, and were presumably carrying financing costs, could not move forward.

Although the NWPR has been vacated by two federal courts, the flux in federal jurisdiction demonstrates the need for a stand-alone permitting program that authorizes impacts to waters of the state as has occurred through the 401-certification program for decades. Last summer, the Rules Review Commission wisely approved the temporary wetlands permitting rule, providing a path for development with unavoidable impacts to state-defined wetlands to move forward. Yet, it took almost a full year to get that process in place after the NWPR was finalized. For this permanent rule, the EMC has concluded – correctly, we think, but in any event within their discretion – that having the state wetlands permitting rule in place will provide certainty and continuity for both the regulated community and the natural resource. The permanent rules are substantively identical to the 401-certification rules—which have been in place for decades—there is no meaningful difference in the protection provided under the rules.

Wetlands and headwater streams provide vital functions: hedging against downstream floods, filtering pollutants out of surface drinking water sources, recharging groundwater supplies, and serving as vital nursery habitat for commercial and recreational fisheries. The EMC's permanent rules ensure that development projects will be allowed to proceed while their impacts are minimized and at least partially offset to protect downstream communities and the general public. We encourage you to approve the permanent wetland rules to provide continuity in the state program.

Sincerely,

Grady McCallie
Policy Director
NC Conservation Network

David Kelly
North Carolina State Director
Environmental Defense Fund

Tim Gestwicki
Executive Director
NC Wildlife Federation

Peter Raabe
Southeast Regional Director
American Rivers

Heather Deck
Executive Director Policy Director
Sound Rivers
Fiscal sponsor of Waterkeepers Carolina

Waterkeepers Carolina is a science-based, environmental advocacy group representing nine Waterkeeper groups in North Carolina:

Cape Fear Riverkeeper, Cape Fear Riverwatch
Catawba Riverkeeper, Catawba Riverkeeper Foundation
Crystal Coast Waterkeeper, White Oak - New Riverkeeper, Coastal Carolina Riverwatch
Dan Riverkeeper, Good Stewards of Rockingham
Haw Riverkeeper, Haw River Assembly
Neuse Riverkeeper, Pamlico-Tar Riverkeeper, Sound Rivers
Broad Riverkeeper, French Broad Riverkeeper, Green Riverkeeper, Watauga Riverkeeper, MountainTrue
Lumber Riverkeeper, Waccamaw Riverkeeper, Winyah Rivers Alliance
Yadkin Riverkeeper, Yadkin Riverkeeper Foundation



March 10, 2022

North Carolina Rules Review Commission
Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609

Re: Letter of Support for Permanent Wetland Rules: 15A N.C. Admin. Code 02H .1301 (Revision) and 15A N.C. Admin. Code .1400 (.1401 through .1405)

Dear Commissioners and Commission Staff:

Carolina Wetlands Association submits these comments in support of the Environmental Management Commission's proposed permanent rules that revise 15A N.C. Admin. Code 2H .1301 and 15A N.C. Admin. Code .1400 (.1401 through .1405). We support wetlands protection and believe the permanent rules are necessary for continuity in the state's wetland permitting program to authorize unavoidable impacts to wetlands.

A. Carolina Wetlands Association Supports Responsible Development that Mitigates for Unavoidable Wetland Impacts.

Carolina Wetlands Association is a non-partisan, science-based organization advocating for wetlands. We are a non-profit 501(3) status. The mission of the Carolina Wetlands Association is to promote the understanding, protection, restoration, and enjoyment of North and South Carolina's wetlands and associated ecosystems through science-based programs, education, and advocacy. We envision a present and future in which the Carolinas' wetlands are understood, enjoyed and valued as integral parts of our mountain, piedmont, and coastal ecosystems. They should be healthy, plentiful, and support our states' ecological, societal, and economic needs. The citizens of the Carolinas appreciate, care for, and promote these natural treasures which provide for clean water, fisheries, recreation, habitat, flood control, and protection against rising sea levels.

We understand that development in North Carolina is occurring at an increasingly rapid pace. To allow for that growth to responsibly occur, the State must have a standalone permitting program that will fill the gap left by the 2020 Navigable Waters Protection Rule. It is also needed for the Environmental Management Commission to fulfill its obligation in regulating wetlands as waters of the state, to ensure the continuity and consistency of the state permitting program in any future absence of a federal one, and to reduce the burden on the regulated community.

B. North Carolina's Water Quality and Unique Landscape Depend on the Health of the State's Wetlands.

North Carolina's wetlands are an essential part of the State's natural heritage. They include ecological features like Carolina Bays and pocosins, and they provide critical ecosystem services that the people of the State rely on to improve and maintain water quality, guard against storms, mitigate climate change, and provide critical habitat that supports outdoor recreation and tourism.

North Carolina's wetlands filter upstream pollution and prevent the pollution from entering our sensitive estuaries and marine environments. They provide an efficient, low-cost mechanism for treating sewage and other organic wastes and retain runoff from agricultural, industrial, and residential sources. They play a critical role in removing sediment, excess nutrients, and other pollutants that have the potential to decimate North Carolina's valuable commercial and recreational fisheries (not to mention the essential habitat that wetlands provide for the 95% of commercially harvested shellfish and finfish that are wetland dependent). Millions of North Carolinians rely on surface waters kept clean by wetlands as their source of drinking water; wetlands also recharge groundwater supplies and prevent saltwater intrusion—important for the millions more North Carolinians who get their water from wells. Even small North Carolina wetlands provide these key functions, in some cases even more efficiently than larger wetlands.

Wetlands play a critical role to help mitigate increased storm activity caused by climate change by retaining floodwater, stormwater and storm surges. Because of their critical importance during these storm events, wetland protection and conservation is essential to combating the effects of climate change in the Carolinas.

In the last few years, North Carolina has been hit with multiple devastating 500-year storms—including Hurricane Matthew, Hurricane Florence, and Tropical Storm Michael. It has been estimated that the damage from Hurricane Florence reached nearly \$17 billion and from Hurricane Matthew \$4.8 billion, with most of the damage caused by floodwaters. Without the storage capacity of North Carolina's remaining wetlands, the damage would have been even more catastrophic. These types of back-to-back hurricanes are projected to increase in frequency, power, and duration, making the preservation of North Carolina's wetlands more important than ever.

Finally, wetlands play a significant role in climate change mitigation by acting as carbon sinks. Due to their wet and oxygen-free condition, organic matter slowly decays in wetland ecosystems sequestering carbon that would otherwise be released. Through this process, carbon can be stored for thousands or millions of years. According to many studies, the total amount of carbon stored in wetlands around the world is similar to the amount of carbon currently in our atmosphere.

Given the various values and functions of North Carolina's wetlands, we support the proposed permanent wetland rules to ensure that development can proceed responsibly and unavoidable wetland impacts be mitigated, where required.

Thank you for your consideration of these comments. We urge you to adopt the permanent wetland rules as proposed.

Sincerely,

A handwritten signature in black ink that reads "Rick Savage". The signature is fluid and cursive, with a long horizontal line extending from the end of the name.

Rick Savage

Executive Director, Carolina Wetlands Association

Rick.savage@carolinawetlands.org

919-412-9754

www.carolinawetlands.org

Burgos, Alexander N

Subject: FW: [External] Support for Permanent Wetland Rules: 15A N.C. Admin. Code 02H .1301 (Revision) and 15A N.C. Admin. Code .1400 (.1401 through .1405)

From: Norton Webster <norton@ecoterra.com>

Sent: Thursday, March 10, 2022 1:50 PM

To: rrc.comments <rrc.comments@oah.nc.gov>

Cc: Everett, Jennifer <jennifer.everett@ncdenr.gov>

Subject: [External] Support for Permanent Wetland Rules: 15A N.C. Admin. Code 02H .1301 (Revision) and 15A N.C. Admin. Code .1400 (.1401 through .1405)

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March 10, 2022

North Carolina Rules Review Commission
Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609

Re: Letter of Support for Permanent Wetland Rules: 15A N.C. Admin. Code 02H .1301 (Revision) and 15A N.C. Admin. Code .1400 (.1401 through .1405)

Dear Commissioners and Commission Staff:

I am submitting these comments in support of the Environmental Management Commission's proposed permanent rules that revise 15A N.C. Admin. Code 2H .1301 and 15A N.C. Admin. Code .1400 (.1401 through .1405). Our company, Eco Terra, LLC, is an environmental firm based in Atlanta, GA with an office in Raleigh. We work all over the state of North Carolina and support wetlands protection and believe the permanent rules are necessary for continuity in the state's wetland permitting program.

I have spent most of my career in the environmental field conducting wetland delineations and permitting in my early career to move toward restoring and enhancing wetlands in North Carolina. My career has been dedicated to the protection and later to the restoration of water resources in North Carolina. As an expert in wetland, I recognize the significant change that took place with the U.S. EPA and Army Corps of Engineers' 2020 Navigable Waters Protection Rule (NWPR). The change in federal jurisdiction over wetlands meant that many wetlands that were once covered by both federal and state protections are now only covered by state protections. The state's 401 certification process is the primary tool for the Department of Environmental Quality to evaluate and authorize wetland impacts. That process is triggered by a federal permit, so without federal jurisdiction, the state has no permitting process for wetlands that have been regulated by the Environmental Management Commission for decades. Although the NWPR has been vacated by two federal courts, the fluctuation in federal jurisdiction has demonstrated the need for a stand-alone state permitting

program that regulates waters of the State that have been permitted under the 401-certification program for decades.

Protecting wetlands is important for our streams and rivers. The permanent rules strike a balance between providing protection for wetlands that have always been regulated by the Environmental Management Commission pursuant to its legislative authority and a permitting process that allows unavoidable impacts to proceed and provides for mitigation of those impacts. We encourage you to approve the permanent wetland rules to provide continuity in the state program.

Thank you for considering my comments.

Respectfully submitted,

Norton Webster, Chief Strategist
Eco Terra, LLC

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Norton Webster



norton@ecoterra.com
d: 919.548.0949

Eco Terra
117 Centrewest Court
Cary, NC 27513

www.EcoTerra.com

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From: Kelly Moser <kmoser@selcnc.org>

Sent: Thursday, March 10, 2022 4:17 PM

To: rrc.comments <rrc.comments@oah.nc.gov>

Cc: Everett, Jennifer <jennifer.everett@ncdenr.gov>

Subject: [External] SELC Comments to the Rules Review Commission in Support of the Proposed Permanent Wetland Rules: 15A N.C. Admin. Code 02H .1301 (Revision) and 15A N.C. Admin. Code 02H .1400 (.1401 through .1405).

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Please see the attached letter and accompanying exhibits from the Southern Environmental Law Center to the Rules Review Commission in support of the Environmental Management Commission's proposed permanent wetland rules: 15A N.C. Admin. Code 02H .1301 (Revision) and 15A N.C. Admin. Code 02H .1400 (.1401 through .1405).

Thank you for your assistance in providing this to the Commissioners and Commission Staff for consideration.

Sincerely,

Kelly Moser

Kelly Moser (she/her)
Senior Attorney

March 10, 2022

Via Email

North Carolina Rules Review Commission
Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609
rrc.comments@oah.nc.gov

Re: Letter of Support for Permanent Wetland Rules: 15A N.C. Administrative Code 02H .1301 (Revision) and 15A N.C. Administrative Code 02H .1400 (.1401 through .1405)

Dear Commissioners and Commission Staff:

The Southern Environmental Law Center has a longstanding interest in maintaining and preserving North Carolina's wetlands and in advocating for a strong permitting program to authorize and impose requirements on unavoidable impacts to North Carolina's wetlands. We submit these comments in support of the Environmental Management Commission's proposed permanent rules: 15A N.C. Administrative Code 02H .1301 (Revision) and 15A N.C. Administrative Code 02H .1400 (.1401 through .1405).

As a result of changes in federal law, many wetlands and headwater streams in North Carolina were for a time left unprotected by the federal Clean Water Act. These wetlands and streams remain protected under state law as "waters of the State" and are therefore under the jurisdiction of the Environmental Management Commission. But because the State's permitting program is largely dependent on federal permitting, and federal permits are no longer required for activities in these wetlands, there is no permanent permitting mechanism available for the North Carolina Department of Environmental Quality to authorize (and impose requirements on the) unavoidable impacts to the affected wetlands, leading to unnecessary conflict and increasing the potential for illegal wetland destruction. The permanent wetland rules are needed to fill the existing permitting gap. Given the instability in the federal definition of "waters of the United States," this permitting gap could reoccur; therefore, the permanent wetland rules are also necessary to provide a continuous permitting regime moving forward consistent with the State's longstanding practice.

As has already been settled by the Rules Review Commission when approving the temporary rules and by the North Carolina Court of Appeals when upholding the Environmental Management Commission's authority to regulate wetlands, the permanent rules are well within the authority delegated to the Environmental Management Commission ("agency") by the General Assembly. The permanent rules are also clear and unambiguous, they are necessary to ensure consistent and continuous implementation of the agency's statutory duty to regulate wetlands as "waters of the State," they reduce the burden on the regulated community by providing a permitting mechanism for wetland impacts where there is none, and they were adopted in accordance with the procedures required for permanent rulemakings. We therefore urge the Rules Review Commission to adopt the rules as written.

I. Standard of Review

All permanent rules must be reviewed by the Rules Review Commission before they can become effective.¹ Upon review, the Rules Review Commission must approve the permanent rule² if the Commission finds the rule is:

- (1) "within the authority delegated to the agency by the General Assembly";³
- (2) "clear and unambiguous";⁴
- (3) "reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency";⁵ and
- (4) "adopted in accordance with Part 2 of this Article."⁶

In addition to the requirements set forth above, "Part 2 of this Article" requires the Rules Review Commission to find that the rules "seek to reduce the burden upon those persons or entities who must comply with the rule."⁷

Here, the permanent wetland rules must be approved because they are "within the authority delegated to the agency by the General Assembly," "clear and unambiguous," and "necessary"—indeed, they are required.

The Rules Review Commission previously found that the temporary rules are within the authority delegated to the agency; it would be arbitrary for the Rules Review Commission to make a contrary finding for the permanent rules. Given the gap left by the change in federal law when the Navigable Waters Protection Rule was finalized, a standalone state permitting program

¹ N.C. Gen. Stat. §§ 150B-21.1(b), 21.8(b).

² *Id.* §§ 150B-21.9(a), -21.10(1).

³ *Id.* § 150B-21.9(a)(1).

⁴ *Id.* § 150B-21.9(a)(2).

⁵ *Id.* § 150B-21.9(a)(3).

⁶ *Id.* § 150B-21.9(a)(4).

⁷ *Id.* § 150B-19.1(a)(2); *see id.* § 150B-19.1(a)(4), (b).

is required so that the North Carolina Department of Environmental Quality can authorize and impose requirements on impacts to North Carolina's wetlands that lost federal jurisdictional status under that rule. Given the ongoing fluctuation in the federal definition of "waters of the United States," the permanent rules are also needed to reduce the burden on the regulated community by creating continuity in the State's permitting program for authorizing impacts in wetlands that may not be "waters of the United States" in the future but would remain "waters of the State." The Rules Review Commission has no basis for objecting to the proposed permanent rules.

II. The Permanent Rules Will Create a Standalone State Permitting Program for Impacts to Wetlands That Are "Waters of the State" and Have Been Regulated by the Environmental Management Commission for at Least 20 Years.

There is no question that the permanent rules are within the Environmental Management Commission's authority—the agency has regulated impacts to the wetlands covered by the rule for decades. That authority is well grounded in the North Carolina Constitution, state statute, and case law. As discussed in more detail in Section IV below, it was also found to exist when the Rules Review Commission approved the agency's temporary rules.

The North Carolina Constitution mandates that the State protect its wetlands. Article XIV, Section 5 of the North Carolina Constitution establishes the policy of the State to conserve and protect its land and waters and explicitly states that it is the policy of the State "*in every other appropriate way to preserve* as a part of the common heritage of this State its forests, *wetlands*, estuaries, beaches, historical sites, openlands, and places of beauty."⁸

In keeping with this broad mandate, the North Carolina General Assembly declared it to be the public policy of the State to provide for the conservation of the State's water resources and has acknowledged the State's responsibility for the preservation and development of those resources in the best interests of all its citizens.⁹ "Waters of the State" include:

any stream, river, brook, swamp, lake, sound, tidal estuary, bay, creek, reservoir, waterway, or *other body or accumulation of water*, whether surface or underground, public or private, or natural or artificial, that is contained in, flows through, or borders upon any portion of this State, including any portion of the Atlantic Ocean over which the State has jurisdiction.¹⁰

The General Assembly directs that "waters of the State" be regulated in a manner:

⁸ N.C. Const. art. XIV, § 5 (emphasis added).

⁹ See N.C. Gen. Stat. § 143-211.

¹⁰ *Id.* § 143-212(6) (emphasis added).

to protect human health, to prevent injury to plant and animal life, to prevent damage to public and private property, to insure the continued enjoyment of the natural attractions of the State, to encourage the expansion of employment opportunities, to provide a permanent foundation for healthy industrial development and to secure for the people of North Carolina, now and in the future, the beneficial uses of these great natural resources.¹¹

The General Assembly has given the Environmental Management Commission the authority *and the duty* to grant, revoke, or deny permits to control sources of pollution, *e.g.*, the direct or indirect discharge of waste, to the “waters of the State” to prevent violations of the State’s water quality standards,¹² including those that specifically apply to wetlands.¹³ “Waste” includes industrial waste, refuse, sediment, and “all other substances.”¹⁴ The discharge of fill material into the State’s wetlands will violate the State water quality standards;¹⁵ therefore, a permit is required prior to the discharge or indirect discharge of waste into “waters of the State.”¹⁶ It is within the agency’s broad rulemaking authority to adopt rules to implement state water protection statutes, including to adopt rules to create a standalone permitting process to regulate discharges into “waters of the State.”¹⁷

The Environmental Management Commission’s authority to adopt wetlands regulations and authorize impacts to wetlands as “waters of the State,” including the wetlands covered by the proposed permanent rules, has been litigated and affirmed. In 2002, the North Carolina Court of Appeals ruled that wetlands are “waters of the State” and fully upheld the agency’s statutory authority to regulate activities impairing or destroying wetlands.¹⁸

For decades, North Carolina’s Department of Environmental Quality has worked cooperatively with the United States Army Corps of Engineers to protect the State’s wetlands and authorize impacts to them when impacts are unavoidable. The State has relied on the Army Corps to identify wetlands considered “waters of the United States,” to which impacts cannot occur without obtaining a Clean Water Act § 404 permit from the Army Corps and a Clean Water Act § 401 certification from the Department. As part of these processes, applicants must employ methods of avoiding and mitigating impacts to the covered wetlands. Applicants must also provide compensatory mitigation, where necessary, to replace impacted wetlands by

¹¹ N.C. Gen. Stat. § 143-211(c).

¹² *Id.* § 143-215.1(a)(6).

¹³ 15A N.C. Admin. Code 02B .0231.

¹⁴ N.C. Gen. Stat. § 143-213(18).

¹⁵ *See* 15A N.C. Admin. Code 02B .0231(c).

¹⁶ N.C. Gen. Stat. § 143-215.1(a)(6).

¹⁷ *Id.* § 143-215.3(a)(1) (“[T]he Commission shall have the power . . . [t]o make rules implementing Articles 21, 21A, 21B, or 38 of this Chapter.”)

¹⁸ *In re Request for Declaratory Ruling by Env’t Mgmt. Comm’n*, 155 N.C. App. 408, 414–15, 573 S.E.2d 732, 737 (2002).

restoring or enhancing wetlands or ensuring the preservation of other existing wetlands that serve similar ecological functions. Where state wetlands fall outside the federal definition of “waters of the United States,” state authorization (permitting) is required because those waters remain “waters of the State.”

In 2014, the North Carolina General Assembly established a set of impact thresholds for the narrow subset of wetlands characterized as geographically “isolated” wetlands that had been excluded from the federal definition of “waters of the United States” at that time.¹⁹ In 2015, the North Carolina General Assembly limited the application of the Environmental Management Commission’s existing isolated wetlands regulations to “Basin Wetlands” and “Bogs.”²⁰ Neither the 2014 session law nor the 2015 law applied to the wetlands at issue under the permanent rules, which were clearly not only “waters of the State” but also “waters of the United States” at that time and, therefore, regulated by the State through the § 401 certification process.

The 2014 and 2015 session laws directed the Environmental Management Commission to revise North Carolina’s existing isolated wetlands regulations—they did not repeal the agency’s authority to authorize or permit activities in wetlands that remained “waters of the State,” nor did they alter state law or regulations defining wetlands as “waters of the State” and requiring protection of the State’s wetlands. They did not affect the agency’s water quality certification rules²¹ that have been used for decades to authorize impacts to the wetlands subject to the proposed permanent rules that are before the Rules Review Commission.

The Environmental Management Commission has the authority—indeed the obligation—to regulate impacts to the State’s wetlands. It has done so for decades under the State’s water quality certification rules in 15A N.C. Administrative Code 02H .0506. It must be able to regulate impacts to the wetlands left unprotected by the Navigable Waters Protection Rule and to continuously regulate impacts to the State’s wetlands in the event of a similar permitting gap in the future.

III. North Carolina Needs the Permanent Wetlands Rules to Authorize and Impose Requirements on Unavoidable Impacts to the State’s Critical Wetlands.

Development in North Carolina is occurring at a rapid pace. This growth makes development in and around wetlands increasingly more likely. North Carolina is the ninth most populous state in the United States, but only 29th largest by land area.²² The United States Census Bureau found that from 2010 to 2020, North Carolina gained just over 900,000 new residents, an increase of 9.5%.²³ North Carolina’s growth going forward is likely to accelerate.

¹⁹ N.C. Sess. Law 2014-120 § 54 (setting impact thresholds for review and mitigation under the state program).

²⁰ N.C. Sess. Law 2015-286 § 4.18(a).

²¹ 15A N.C. Admin. Code 02H .0506.

²² U.S. Census Bureau, North Carolina State Profile: 2020 Census (Aug. 25, 2021), <https://perma.cc/JCB4-CZGC>.

²³ *Id.*

And a significant portion of that growth is occurring in areas with a large percentage of wetlands. For example, one study projected growth of up to 18% between 2010 and 2020 in the coastal plain counties of Currituck, Dare, Pitt, Carteret, Duplin, Cumberland, Onslow, Pender, New Hanover, and Brunswick.²⁴

Given the rapid pace of development in the State and the ongoing fluctuation in the federal definition of “waters of the United States,” North Carolina needs the permanent wetland rules to provide a consistent, continuous permitting mechanism for unavoidable wetland impacts while preserving avoidable wetlands and the valuable flood control and water quality services they provide.

A. Federal Clean Water Act Rollbacks Created a Permitting Gap for the Majority of North Carolina’s Wetlands.

Section 401 of the Clean Water Act has provided North Carolina with its primary tool (certification authority) to impose conditions to limit pollution and protect waters and wetlands within the State’s boundaries from destructive projects that require a federal license or permit.²⁵ The Clean Water Act requires a federal license or permit only where there is a discharge of pollutants into “waters of the United States.”²⁶

Between the late 1970s and early 2000s, federal courts and agencies defined the term “waters of the United States” broadly to include many kinds of water bodies, including wetlands. Beginning in 1985, the United States Supreme Court recognized that the term “waters of the United States” extends to waters and wetlands that “have significant effects on water quality and the aquatic ecosystem.”²⁷ Despite cases in the late 1990s that created some uncertainty about the scope of the term,²⁸ federal agencies have at least protected streams and wetlands with a “significant nexus” to traditional navigable waters as “waters of the United States.”²⁹ Under federal law, a water has a “significant nexus,” if it, or its functions, “significantly affect the

²⁴ N.C. Dep’t of Env’t Quality & Off. of the Att’y Gen., Comments on Proposed Revised Waters of the United States (“WOTUS”) Rule at 3 (April 15, 2019) [hereinafter “N.C. Waters of the U.S. Comments”], <https://perma.cc/984M-UQKF>.

²⁵ 33 U.S.C. § 1341(d).

²⁶ *Id.* § 1362(7).

²⁷ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 n.9 (1985).

²⁸ *See, e.g., Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 167 (2001) (holding the federal government could not regulate an isolated, abandoned gravel pit); *United States v. Wilson*, 133 F.3d 251, 258 (4th Cir. 1997) (holding the federal government cannot regulate wetlands that “are [not] connected closely to [either] interstate [or] navigable waters” and “which do not otherwise substantially affect interstate commerce”).

²⁹ *See* Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217, 41,250–51 (Nov. 13, 1986); 33 C.F.R. § 328.3(a) (1987); 40 C.F.R. § 232.2 (1988); Clean Water Rule: Definition of “Waters of the U.S.” 80 Fed. Reg. 37,054 (June 29, 2015); Definition of “Waters of the U.S.”—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5,200 (Feb. 6, 2018); Definition of “Waters of the U.S.”—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019); U.S. Env’t Prot. Agency & U.S. Army Corps of Eng’rs, Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States*, 1, 8, 12 (2008).

chemical, physical, and biological integrity” of traditional navigable waters or other jurisdictional waters.³⁰ Under this broad, longstanding definition of “waters of the United States,” North Carolina was able to use its § 401 certification authority to protect wetlands and other “waters of the State” that the United States Army Corps determined to have the requisite “significant nexus.”

Then, in 2020, the prior administration defined “waters of the United States” more narrowly than had any other administration before. In the so-called “Navigable Waters Protection Rule” (“NWPR”), the Trump administration abandoned the longstanding “significant nexus” test, unlawfully excluding countless essential wetlands and streams from federal Clean Water Act protections—including at least 900,000 acres of wetlands in North Carolina’s Cape Fear and Neuse River basins alone.³¹

Under the NWPR, federal permits were no longer required to impact many North Carolina wetlands, including countless acres of headwater forests, Carolina Bays, pocosins, bottomland hardwoods, floodplain pools, pine flats, pine savannahs, hardwood flats, and non-riverine swamp forests. With no federal permits required, the State was unable to use its water quality certification authority to meet its obligation to regulate discharges into these wetlands as “waters of the State” or impose conditions on unavoidable impacts. After decades of relying on the water quality certification rules to regulate impacts to the wetlands with a “significant nexus,” North Carolina was left without a permitting regime for these wetlands because North Carolina’s existing wetlands regulations did not separately authorize activities in these wetlands absent a water quality certification.³²

To reinstate a regulatory mechanism to authorize and impose requirements on impacts to wetlands and waters that are “waters of the State” but were no longer “waters of the United States” under the NWPR, the Environmental Management Commission adopted temporary wetland rules.³³ These rules temporarily established a state permitting program for federally non-jurisdictional wetlands and waters that are not eligible for permitting coverage under other existing wetland permitting rules in 15A N.C. Administrative Code 02H .0500 (401 Certification) or .1300 (Isolated Wetlands). For the sake of expediency, the temporary rules were adopted to be substantively similar to 15A N.C. Administrative Code 02H .1300 (Isolated Wetlands).³⁴ These temporary rules were adopted by the Environmental Management

³⁰ *Rapanos v. United States*, 547 U.S. 715, 759, 779–80, 787 (Kennedy, J., concurring) (quoting 33 U.S.C. § 1251(a)).

³¹ Decl. of Jovian Sackett at 8-9, *S.C. Coastal Conservation League v. Wheeler*, No. 2:20-cv-01687-BHH (D.S.C. July 10, 2020), ECF No. 58-50 (Attachment A).

³² 15A N.C. Admin. Code 02H .1301(b) (applying State’s isolated wetlands permitting regulations to “Basin Wetland[s]” and “Bog[s]”).

³³ N.C. Dep’t of Env’t Quality, *Regulatory Impact Analysis for Proposed Rule 15A N.C. Admin. Code 02H .1301, 1401-.1405* at 7 (2021) [hereinafter “Regulatory Impact Analysis”], <https://perma.cc/XU69-Z572>; see 15A N.C. Admin. Code 02H .1401-.1405.

³⁴ Regulatory Impact Analysis at 7.

Commission on May 13, 2021, with an effective date of May 28, 2021. Now, permanent rules are needed.

B. Notwithstanding the NWPR's Vacatur, North Carolina Needs the Permanent Rules to Authorize and Impose Requirements on Impacts to the State's Wetlands That Were Excluded from Federal Jurisdiction While the NWPR Was in Effect.

The NWPR was challenged in federal courts across the country. In addition to several states, the North Carolina Department of Environmental Quality asked a federal district court to enjoin the NWPR (*i.e.*, stop it from being applied) nationwide. But the court unexpectedly denied that request on June 19, 2020,³⁵ allowing ongoing implementation of the NWPR and its effect of creating the North Carolina permitting gap. Ultimately, a federal district court vacated the NWPR on August 30, 2021,³⁶ so that it no longer applied. Despite the court's vacatur of the NWPR, North Carolina lacks any permanent permitting mechanism for the State's wetlands excluded from the federal definition of "waters of the United States" *while the NWPR was in effect*.

In response to the NWPR's vacatur, the United States Army Corps of Engineers issued guidance on how it will treat the approved jurisdictional determinations made under the NWPR.³⁷ As the Corps explained in its guidance, where an approved jurisdictional determination made under the NWPR identified "waters of the United States" (jurisdictional waters) and a § 404 permit is thus required, the Corps will not rely on those NWPR approved jurisdictional determinations when issuing the permit.³⁸ *But* where approved jurisdictional determinations made under the NWPR found no jurisdictional waters and no § 404 permit is required (what the Corps' describes as "stand-alone" approved jurisdictional determinations), the Corps explained that those "stand-alone" approved jurisdictional determinations "will not be reopened until their [5-year] expiration date."³⁹

Based on our review of Army Corps' data from the Wilmington, North Carolina District, there are at least 399 "stand-alone" approved jurisdictional determinations made in North Carolina involving wetlands found to be non-jurisdictional under the NWPR.⁴⁰ For these "stand-alone" approved jurisdictional determinations, there is no associated § 404 permitting process (or

³⁵ *California v. Wheeler*, 467 F. Supp. 3d 864, 877 (N.D. Cal. 2020) (denying the request for an injunction made by the North Carolina Department of Environmental Quality, the City of New York, the District of Columbia, and following states: California, Connecticut, New York, Illinois, Maine, Maryland, Massachusetts, Michigan, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Virginia, Washington, and Wisconsin).

³⁶ *Pascua Yaqui Tribe v. U.S. Env't Prot. Agency*, No. CV-20-00266-TUC-RM, 2021 WL 3855977 (D. Ariz. Aug. 30, 2021).

³⁷ U.S. Army Corps of Eng'rs, Navigable Waters Protection Rule Vacatur (Jan. 5, 2022) (Attachment B), <https://perma.cc/H29N-38NF>.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Army Corps Data from the Wilmington, NC District (Attachment C).

attendant § 401 state certification process) and the Corps will not reopen or otherwise require permits for the associated projects. Therefore, without the permanent wetland rules, there is no mechanism for the State to authorize impacts to the affected wetlands, and the project proponents would simply have to avoid impacting the affected wetlands.

C. North Carolina Needs the Proposed Rules to Provide Continuity and Consistency in the State’s Authorization of Unavoidable Wetland Impacts and To Reduce the Burden on the Regulated Community.

Although the Biden administration has begun the process of adopting new rules to define “waters of the United States,” that rulemaking process will take time. The comment period on the Biden administration’s proposed rule just closed on February 7, 2022. The federal agencies received over 100,000 comments on their proposal.⁴¹ Prior to finalizing the rule, the agencies must consider and respond to the public comments received.⁴²

Even if the federal rulemakings were complete, the United States Supreme Court has agreed to hear a case in which the issue presented relates to the scope of “waters of the United States.”⁴³ The federal definition of “waters of the United States” thus remains uncertain, as does the existence and scope of the § 404 permitting system necessary to invoke North Carolina’s § 401 certification process for authorizing impacts to the State’s wetlands. The permanent rules are therefore necessary to eliminate uncertainty regarding wetland protections and to create a standalone state permitting regime in the event of future changes in the federal system. They are also needed to provide a future permitting pathway for the wetlands that lost protection under the NWPR. Without the permanent wetland rules in place, the Department of Environmental Quality cannot consistently issue permits for or impose requirements on unavoidable impacts to these North Carolina wetlands as required by North Carolina statute and Constitution.

IV. North Carolina General Statutes § 150B-19.3 Does Not Prohibit the State from Adopting the Permanent Wetland Rules.

North Carolina General Statutes § 150B-19.3 prohibits the State from adopting “a rule for the protection of the environment or natural resources that imposes a more restrictive standard, limitation, or requirement than those imposed by federal law or rule if a federal law or rule pertaining to the same subject matter has been adopted.”⁴⁴ This provision does not bar the adoption of the permanent wetland rules.

⁴¹ Revised Definition of “Waters of the United States” Docket No. EPA-HQ-OW-2021-0602 (showing number of comments received at 113,533), <https://perma.cc/B454-4U5P>.

⁴² See 5 U.S.C. § 553.

⁴³ *Sackett v. U.S. Env’t Prot. Agency*, 8 F.4th 1075 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 896 (Jan. 24, 2022) (No. 21-454).

⁴⁴ N.C. Gen. Stat. § 150B-19.3(a).

As an initial matter, the Commission previously approved the temporary rules which required its conclusion that those rules—which cover the exact same subject matter as the proposed permanent rules—did not violate § 150B-19.3. There is thus no basis for the Rules Review Commission to question that authority now.

Even if that were not the case, the proposed permanent wetland rules are not “a rule for the protection of the environment”⁴⁵; they *authorize impacts to wetlands*. They also do not “pertain[] to the same subject matter” as a federal law, because the proposed permanent rules pertain to “waters of the State” while the federal Clean Water Act pertains to “waters of the United States.” Accordingly, North Carolina General Statutes § 150B-19.3 does not apply. Even if it did, the permanent wetlands rules are required by a change in federal policy,⁴⁶ as explained previously in Section III.

A. The Rules Review Commission Previously Found the Temporary Rules Were Not Hindered by North Carolina General Statutes § 150B-19.3; It Would Be Arbitrary for the Rules Review Commission to Make a Contrary Finding for the Permanent Rules.

The Rules Review Commission approved the temporary wetland rules by an 8-0 vote at its May 2021 meeting.⁴⁷ Before approving the temporary wetland rules, the Rules Review Commission was required to assess whether the rules were within the authority of the Environmental Management Commission to promulgate. The Rules Review Commission is required by statute to review both temporary and permanent rules for consistency with a list of discrete criteria.⁴⁸ As relevant here, the Rules Review Commission *must* determine that a rule is “within the authority delegated to the agency by the General Assembly” before approving of the rule.⁴⁹ In the case of the Environmental Management Commission, § 150B-19.3 of the General Statutes constrains that authority by barring the agency from adopting certain rules for protection of the environment.

In reviewing the temporary rules, the Rules Review Commission was required to determine whether the rules were within the authority delegated to the Environmental Management Commission by the General Assembly,⁵⁰ including by determining whether the rules violated § 150B-19.3. Therefore, by approving the temporary rules, the Rules Review Commission necessarily determined that those rules were within the authority delegated to the agency and did not violate § 150B-19.3.

⁴⁵ *Id.*

⁴⁶ *See* N.C. Gen. Stat. § 150B-19.3(a)(3).

⁴⁷ Rules Review Commission, May 20, 2021 Signed Meeting Minutes 5 (June 17, 2021), <https://perma.cc/GJ66-GUFT>.

⁴⁸ N.C. Gen. Stat. § 150B-21.8(b).

⁴⁹ *Id.* § 150B-21.9(a).

⁵⁰ *See id.* §§ 150B-21.8(b), 21.9(a).

Because the Rules Review Commission previously determined that the temporary rules—which covered the same subject matter—*were* within the agency’s authority, finding that the permanent rules violate § 150B-19.3 and therefore are not within the agency’s authority to promulgate would be arbitrary.

B. The Proposed Permanent Wetlands Rules Do Not Pertain to the Same Subject Matter as the Federal Clean Water Act.

North Carolina General Statutes § 150B-19.3 applies only “*if a federal law or rule pertaining to the same subject matter has been adopted.*”⁵¹ Where there is no federal law or rule on the same subject matter, § 150B-19.3 is not implicated. It is not implicated with the proposed permanent rules.

Section 150B-19.3 does not apply here because no federal law or rule pertains to the same subject matter as the proposed permanent wetland rules. The proposed rules provide a permitting mechanism for wetlands that the North Carolina General Assembly defines as “waters of the State.” By contrast, the federal Clean Water Act permitting programs, including the dredge and fill permitting program under § 404, pertain to “navigable waters,” which the United States Congress defined as “waters of the United States.”⁵² The definition of “waters of the State” contains no such limitation based on navigability, instead encompassing any waterbody or accumulation of water that is “contained in, flows through, or borders upon any portion of this State.”⁵³

The Clean Water Act’s cooperative federalism model enlists the State in sharing responsibilities with the federal government to protect “waters of the United States,” but North Carolina alone has responsibility for regulating “waters of the State.” Of course, the Clean Water Act will apply to *some* of North Carolina’s “waters of the State,” as occurs when those waters also meet the definition of “waters of the United States.” In that case, the Clean Water Act’s § 404 permitting program and North Carolina’s associated § 401 certification authority apply to authorize impacts to North Carolina’s wetlands as “waters of the United States.” The proposed permanent wetland rules would not apply when that overlap occurs.

But where North Carolina’s wetlands fall outside of the definition of “waters of the United States,” federal law has no role in regulating those North Carolina waters. The proposed permanent wetland rules cover precisely those waters that meet the definition of “waters of the State” but do not meet the definition of “waters of the United States.” Thus, there is no federal

⁵¹ N.C. Gen. Stat. § 150B-19.3(a) (emphasis added).

⁵² 33 U.S.C. § 1362(7).

⁵³ See N.C. Gen. Stat. § 143-212(6) (defining “waters” to mean “any stream, river, brook, swamp, lake, sound, tidal estuary, bay, creek, reservoir, waterway, or other body or accumulation of water, whether surface or underground, public or private, or natural or artificial, that is contained in, flows through, or borders upon any portion of this State, including any portion of the Atlantic Ocean over which the State has jurisdiction”).

law or rule pertaining to the “same subject matter” as the proposed permanent rules, and § 150B-19.3 does not apply.

C. The Proposed Permanent Wetland Rules Are Not a Rule for the Protection of the Environment or Natural Resources; Instead, They Authorize and Impose Requirements on Impacts to Wetlands.

North Carolina General Statutes § 150B-19.3 applies only where the state agencies adopt rules “for the protection of the environment or natural resources” that are more restrictive than federal rules on the same subject matter. The proposed permanent wetland rules are not a rule “for the protection of the environment or natural resources”; as explained by the Department, “the proposed rules *will allow impacts to non-jurisdictional wetlands that would otherwise be prohibited* due to the current lack of a permanent State permitting mechanism.”⁵⁴

Although the proposed rules impose requirements on impacts to wetlands, such as the requirement to mitigate impacts at a 1:1 ratio, “there is still likely to be net loss of wetland function and potentially some net loss of wetland acreage.”⁵⁵ “Indeed, “wetland losses could be cumulatively significant in terms of wetland area and function.”⁵⁶

This loss of wetland acreage and function will naturally result in the loss of benefits that these wetlands provide. The wetland losses anticipated to result from the proposed rules will lead to “forgone benefits over time,” such as “flood and water quality protection, aquatic habitat, recreation, and aesthetic benefits.”⁵⁷

By contrast, while the proposed rules are likely to lead to adverse impacts to wetlands and the ecosystems they support, the rules are anticipated to result in “significant indirect benefits” to regulated entities, including the transportation and development communities.⁵⁸ As the Department of Environmental Quality explained, the North Carolina Department of Transportation is “likely to avoid significant costs” as a result of the rules. With no permitting mechanism to authorize impacts to federally non-jurisdictional wetlands, the Department of Transportation has to avoid these wetlands in its projects, which can mean “design[ing] longer roads, purchasing more right-of-way acreage, relocating more existing homes and businesses, and paying higher mitigation costs from impacting jurisdictional wetlands.”⁵⁹ With rules in place to authorize impacts to federally non-jurisdictional wetlands, however, the Department of

⁵⁴ Regulatory Impact Analysis at 27.

⁵⁵ *Id.* at 29.

⁵⁶ *Id.* at 30.

⁵⁷ *Id.* at 33.

⁵⁸ *Id.* at 20.

⁵⁹ *Id.* at 20.

Transportation can avoid these costs.

Further, the development community—including private developers, local governments, and industries like agriculture and mining—are likely to benefit from the proposed rules.⁶⁰ Because impacts to federally non-jurisdictional wetlands are not authorized in the absence of these State wetland rules, the proposed rules will create “increased development opportunities” that would not otherwise exist.⁶¹

The proposed rules therefore do not constitute rules for the protection of the environment or natural resources and do not fall within the terms of § 150B-19.3.

D. The proposed permanent wetland rules are not more restrictive than federal rules.

North Carolina General Statutes § 150B-19.3 bars certain agencies from adopting certain rules that are more restrictive than federal rules on the same subject matter.⁶² As explained above, there is no federal law or rule on the “same subject matter”; but further, the proposed permanent wetland rules are not more restrictive than restrictions under the federal Clean Water Act.

Section 401 of the Clean Water Act gives states the authority to certify that certain activities subject to the Act will comply with water quality standards and to impose requirements on those activities.⁶³ North Carolina has promulgated regulations governing the State’s implementation of this authority,⁶⁴ and the requirements under the proposed permanent wetland rules align with the State’s § 401 requirements. First, under the proposed permanent rules, the required baseline mitigation ratio for impacts to federally non-jurisdictional wetlands is 1:1.⁶⁵ This ratio matches the required 1:1 baseline mitigation ratio under North Carolina’s § 401 rules.⁶⁶ The required mitigation multipliers—when a greater area or length of mitigation is required based on the type of mitigation used—also match.⁶⁷

Additionally, the “deemed permitted” threshold—the level under which mitigation of impacts to wetlands is not required—is the same under the proposed permanent rules and the State’s § 401 rules. The proposed wetland rules provide that “[t]otal impacts to less than 1/10 acre of federally non-jurisdictional wetlands shall not require compensatory mitigation,”⁶⁸ while

⁶⁰ *Id.* at 20-21.

⁶¹ *Id.*

⁶² N.C. Gen. Stat. § 150B-19.3.

⁶³ 33 U.S.C. § 1341.

⁶⁴ 15A N.C. Admin. Code 02H .0501-.0507.

⁶⁵ Proposed 15A N.C. Admin. Code 02H .1405(c)(2)-(3).

⁶⁶ 15A N.C. Admin. Code 02H .0506(c)(5).

⁶⁷ Proposed 15A N.C. Admin. Code 02H .1405(c)(4); 15A N.C. Admin. Code 02H .0506(c)(5).

⁶⁸ Proposed 15A N.C. Admin. Code 02H .1405(c)(2).

the State's § 401 rules state that "[t]otal impacts to less than one-tenth of one acre" of federally jurisdictional freshwater and coastal wetlands do not require mitigation.⁶⁹ Further, the State's § 401 program includes an exception to this deemed permitted threshold, requiring compensatory mitigation of *all* impacts to federally jurisdictional wetlands of exceptional ecological significance.⁷⁰ The proposed wetland rules do not contain such a carveout for exceptional, non-federally jurisdictional wetlands and are therefore *less* restrictive than the State's § 401 program in this respect.⁷¹

Finally, certain types of waters that are explicitly exempt from regulation under the federal Clean Water Act's requirements for the discharge of dredged or fill material into federally jurisdictional waters are also exempt from the proposed permanent wetland rules governing discharges into federally non-jurisdictional waters that are "waters of the State." Exemptions from § 404 requirements include the discharge of dredged or fill material from "normal farming, silviculture, and ranching activities"; maintenance of "structures such as dikes, dams, levees," and other such structures; "construction or maintenance of farm or stock ponds or irrigation ditches" or "maintenance of drainage ditches"; and certain "construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment," among other activities.⁷² The proposed permanent wetland rules incorporate these same exclusions, explicitly citing North Carolina's rules embracing the federal § 404 exclusions.⁷³

The proposed permanent wetland rules therefore are not "more restrictive" than federal law.

V. Conclusion

North Carolina's rapid pace of growth is expected to continue for the foreseeable future. That is why, in the absence of federal regulation, we need state wetlands regulations to ensure that North Carolina's growth can occur with necessary measures to mitigate for losses to these valuable waters of the State. We support the Environmental Management Commission's permanent wetlands rules because they are needed to fill the immediate permitting gap left by NWPR and to ensure consistency moving forward as federal law remains in flux. We respectfully request that the Rules Review Commission fully adopt the permanent rules as written.

⁶⁹ 15A N.C. Admin. Code 02H .0506(c)(2).

⁷⁰ 15A N.C. Admin. Code 02H .0506(c)(3).

⁷¹ See Proposed 15A N.C. Admin. Code 02H .1405(c).

⁷² 33 U.S.C. § 1344(f).


⁷³ Proposed 15A N.C. Admin. Code 02H .1401(e)(1) (providing that activities described in 15A N.C. Admin. Code 02B .0230 are exempt from the proposed wetland rule requirements); 15A N.C. Admin. Code 02B .0230 (outlining "activities for which Section 404 permits are not required," including normal "silviculture, farming, and ranching activities"; maintenance of "structures such as dikes, dams, levees," and others; "construction of farm or stock ponds or irrigation ditches"; "maintenance of drainage ditches"; and "construction or maintenance of farm roads, forest roads, and temporary roads for moving mining equipment," among others).

Thank you for considering these comments. Please contact us at 919-967-1450 if you have any questions regarding this letter.

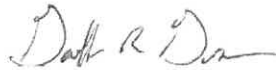
Sincerely,

A handwritten signature in black ink, appearing to read "Kelly F. Moser".

Kelly F. Moser
Senior Attorney

A handwritten signature in black ink, appearing to read "Dakota F. Loveland".

Dakota Foard Loveland
Associate Attorney

A handwritten signature in black ink, appearing to read "Geoffrey R. Gisler".

Geoffrey R. Gisler
Senior Attorney

cc: Jennifer Everett

Attachment A

Exhibit 47

**IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

SOUTH CAROLINA COASTAL
CONSERVATION LEAGUE, *et al.*,

Plaintiffs,

v.

ANDREW R. WHEELER, *et al.*,

Defendants.

AMERICAN FARM BUREAU
FEDERATION, *et al.*,

Intervenor-Defendants.

No. 2:20-cv-01687-DCN

DECLARATION OF JOVIAN SACKETT

I, Jovian Sackett, make the following declaration.

1. I am over the age of eighteen (18) and suffer from no legal incapacity. This declaration is based on my personal knowledge and belief.
2. I am a resident of Durham, North Carolina.
3. I am employed by the Southern Environmental Law Center as the Director of Geospatial Science. I have a B.A. in Environmental Studies and a B.A. in Geography from the University of North Carolina at Wilmington and a M.A. in Geography from the University of South Carolina. I am also a Geographic Information Systems Professional (GISP), certification number 66528, awarded on 4/25/2012.

4. In my role as Director of Geospatial Science, I am responsible for the management of SELC's Geospatial Team and data; the design and implementation of geospatial projects (both analytical and cartographic); and the application of, interpretation of, and communication about geographic data. In other words, I oversee both the production of geospatial deliverables based on geographic data (usually maps, but summary statistics and data visualizations too) and the reading and critique of third-party maps and geographic data with respect to environmental law and policy. I have had similar responsibilities since joining the Southern Environmental Law Center in 2007.

5. Geographers, like myself, are generally integrative scientists, meaning our expertise is in the study of the connections and relationships throughout the earth (ex. climate and society, or land development and ecosystem function). I have experience with geographic information systems (GIS) as a tool for measuring and studying human/environment interactions and cartography as a tool for depicting the significant connections between earth objects. My expertise allows me to understand the difference between the abstracted lines on maps and their absolute and discrete reality on earth. I then coach environmental attorneys and decision makers about how to best apply the geographic data (field notes, instruments readings, photography and sensors) available.

Analysis Background

6. For the present case, I used available science about hydrology/geomorphology and geospatial data about wetlands to approximate the wetland acreage by water regime in the entire contiguous United States as well as in selected watersheds. Water regime is a characteristic to describe the duration and completeness with which wetlands hold water in any given year. The analyzed watersheds and primary corresponding states were: VA – Potomac

River,¹ Rappahannock River, James River; NC – Cape Fear River, Lake Norman (Catawba River), Neuse River; SC – Charleston Harbor, Congaree River, Saluda River; GA/AL – Chattahoochee River.

7. For the purpose of this analysis, I focused on wetland water regimes as described by the U.S. Fish and Wildlife Service (FWS) National Wetlands Inventory (NWI) using the well-established Cowardin Classification System. Developed by Cowardin, et al., during the mid-to-late 1970s the system was intended to “provide basic data on the characteristics and extent of the Nation’s wetlands and deepwater habitats and should facilitate the management of these areas on a sound, multiple-use basis.”^{2, 3} More importantly though, that mandate was driven by a need to update a previous nationwide system of wetlands inventory from the 1950s in order to document natural and anthropogenic changes and collect more refined information due to “federal legislation...passed to protect wetlands.”⁴ The National Wetlands Inventory exists as a direct result of the need to better understand and plan for management of the nation’s water resources, as part of the Clean Water Act of 1972. It is fitting that the most recent version of the NWI continues to inform decision making about the Clean Water Act today.

8. The National Wetlands Inventory was designed to provide a consistent classification of wetlands as ecological mapping units for use by FWS.⁵ Furthermore, NWI provides a detailed classification of the water regime of each wetland type it maps.

¹ The Potomac River watershed also includes portions of West Virginia, Maryland, Pennsylvania, and the District of Columbia.

² Documents in the administrative record contain the prefix EPA-HQ-OW-2018-0149 followed by the Docket Document ID. See Administrative Record Index (Doc. No. 54-1, Ex. 1). In citing to documents in the administrative record, Plaintiffs have omitted the prefix and cite only to the author, title of the document, its date, and the Administrative Record Docket Document ID (“AR”).

³ Cowardin, L. M., et al., Classification of Wetlands and Deepwater Habitats of the United States, U.S. Fish and Wildlife Service (AR 11626) at 2 (1979), <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-11626> (“Cowardin”).

⁴ Id.

⁵ Dahl, T.E., J. Dick, J. Swords, and B.O. Wilen, Data Collection Requirements and Procedures for

9. I focused on wetlands where surface water is rarely or only temporarily present: Temporarily Flooded (A), Seasonally Saturated (B), Continuously Saturated (D), and Intermittently Flooded (J) water regime modifiers of the NWI.⁶ These modifiers refer to water regimes that are non-tidal, primarily in palustrine (wetland) systems, but also some lacustrine (lake) and riverine (river) systems.⁷ This analysis only focused on palustrine systems, since that is where the majority of these water regimes are represented.

10. Cowardin describes temporarily/intermittently flooded wetlands as including seasonally flooded basins and flats, including wet meadows.⁸ For example, despite being “largely controlled by precipitation and evapotranspiration,” Carolina and Delmarva bays experience “nearly continuous shallow ground-water recharge” and periodic shallow ground-water discharge, resulting in periods with no surface water.⁹

11. Saturated wetlands include bogs, pocosins, fens, and similar wetland types.¹⁰ Fens are a kind of slope wetland¹¹ that is groundwater driven, while bogs and pocosins typically collect precipitation.¹² These wetland types are not typically flooded by perennial or intermittent streams, but rather “temporarily hold water and then slowly release it to downstream waters.”¹³

Mapping Wetland, Deepwater and Related Habitats of the United States. Division of Habitat and Resource Conservation (version 2) at 6 (2015), <https://www.fws.gov/wetlands/documents/Data-Collection-Requirements-and-Procedures-for-Mapping-Wetland-Deepwater-and-Related-Habitats-of-the-United-States.pdf>. (“Dahl”).

⁶ The capital letters used to represent water regime modifiers in NWI are reassigned from the letters used in Cowardin, et. el. (1979).

⁷ Federal Geographic Data Committee, Wetlands Subcommittee, Classification of Wetlands and Deepwater Habitats of the United States, Docket ID No. FGDC-STD-004-2013, Second Edition (AR 11629) at 38 (August 2013), <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-11629>. (“NWI Metadata”).

⁸ Cowardin at 13.

⁹ EPA Office of Res. & Dev., Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (AR 11691) at B-5, <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-11691> (“Science Report”).

¹⁰ Cowardin at 28.

¹¹ Science Report at 4-20.

¹² Science Report at 4-21.

¹³ See U.S. Environmental Protection Agency & U.S. Army Corps of Engineers, Technical Support Document for the Clean Water Rule: Definition of Waters of the United States (see AR 11460, document 285) at 340 (May 27, 2015), <https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-20869>.

12. Cowardin illustrates the position of these water regimes, with respect to others, across a landscape matrix of palustrine and upland systems, as copied here in Figure 1:¹⁴

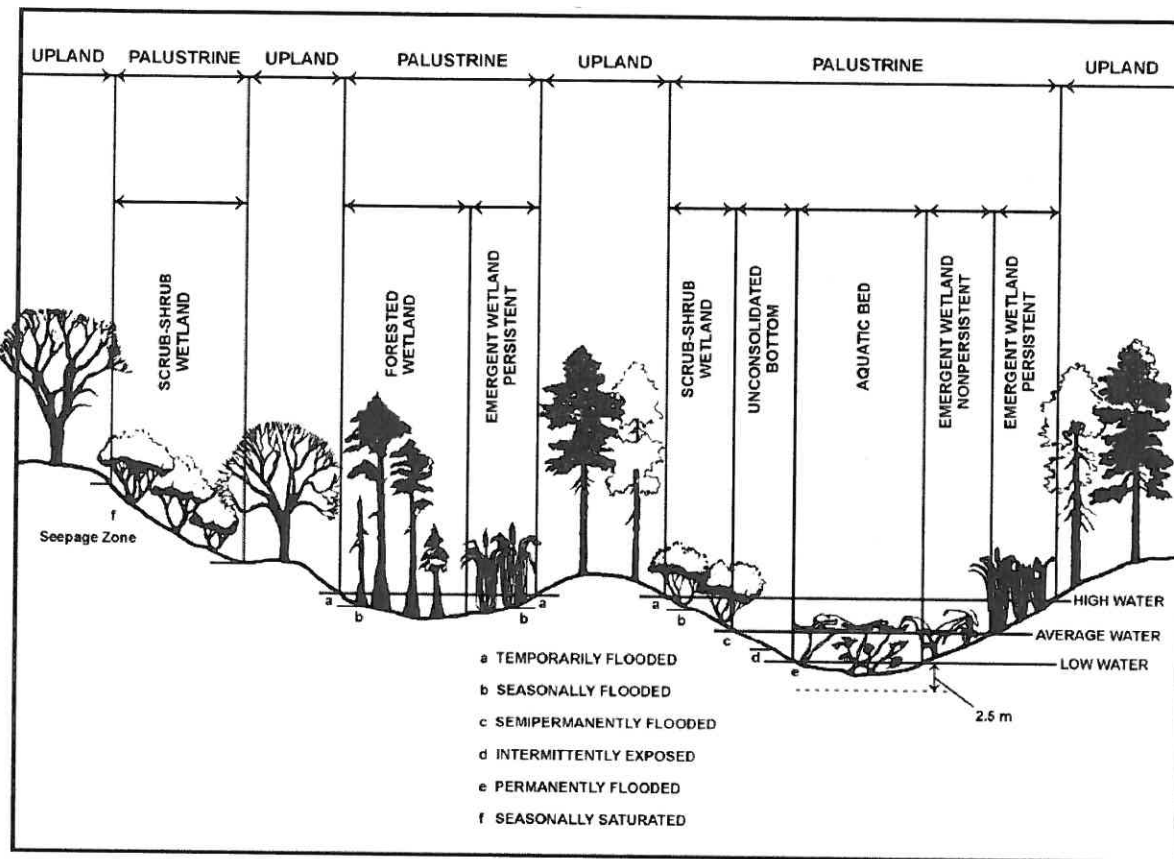


Figure 1

13. In their Economic Analysis for the Navigable Waters Protection Rule: Definition of “Waters of the United States” (2020), the Environmental Protection Agency and Corps of Engineers cited the NWI metadata pertaining to water regime modifiers. Specifically, the agencies noted that Temporarily Flooded wetlands only have surface water for “a few days to a few weeks” during the growing season and Intermittently Flooded wetlands may have years

¹⁴ Cowardin at 13.

between periods of inundation.¹⁵ In addition, Seasonally Saturated wetlands typically do not have surface water for longer than “a few days after heavy rain and upland runoff.”¹⁶ In Continuously Saturated wetlands, “widespread surface inundation is rare.”¹⁷

14. In sum, the presence of surface water in these wetland regimes is sporadic and most often due to elevated vertical (groundwater) or temporal (precipitation).¹⁸ To the extent these wetlands receive overflow from a perennial or intermittent river or stream, that flooding is also sporadic and short-lived.¹⁹ Therefore, these water regimes are the most likely to be excluded from the new “waters of the United States” definition. They are collectively referred to below as the “target” water regimes.

Technical Analysis

15. To complete this analysis, I used Esri ArcGIS Pro v.2.4.2 for geospatial tasks, R v3.5.1 for generating summary statistics, and Microsoft Excel 2019 for combining and presenting results.

16. Data collection was the first phase of the study. Although there is no single dataset that maps all the nation’s streams, wetlands, and watersheds systematically, there are best available nationwide data approximating streams, wetlands, and watersheds published by the mapping divisions of U.S. government agencies. Those data are published for helping understand the complexities and inter-relationships of human-environment interactions, as it relates to natural resource management and policy. My intent was to create both a nationwide

¹⁵ U.S. Environmental Protection Agency & U.S. Army Corps of Engineers, Economic Analysis for the Navigable Waters Protection Rule: Definition of “Waters of the United States (AR 11572) at 101 (Jan. 22, 2020) (“Economic Analysis”).

¹⁶ Id.

¹⁷ Id.

¹⁸ Science Report at 1-4–1-7.

¹⁹ Id.

dataset of wetlands, classified by water regime, and to have that dataset subdivided by both ecological (watersheds) and political (county/state) geographic units.²⁰ Geospatial data for 12-digit hydrologic units (watersheds) came from the U.S. Geological Survey (USGS) Watershed Boundaries Dataset (WBD), 4th edition, “to ensure the digital geographic data are usable with other related” geospatial data.²¹ The geospatial dataset for wetlands, the FWS’s NWI v.2, affirms its applicability to this type of analysis, “[t]he information collected using these requirements and procedures are intended to support the decision-making process.”^{22, 23} From their metadata, I knew neither of these datasets were designed to represent jurisdictional determinations but are intended to map the nation’s waters and wetlands using uniform national mapping standards developed by U.S governmental agencies. The NWI applies the Cowardin Classification System, designed to provide a consistent classification of wetlands as ecological mapping units for use by FWS.²⁴

17. In order to compile NWI data for the contiguous United States, SELC hired and I supervised Esri, a geospatial software and services company, to download and process the source data with computing power much greater than what SELC possesses. Esri downloaded all the source data for each state from FWS, and produced enhanced geodatabases of the contiguous United States, with wetlands aggregated by state and county geography in one database and 12-

²⁰ Geospatial data for county and state boundaries, were from the U.S. Census Bureau, and although built into the final data through analysis, were not included in any of my results, in order to focus solely on the ecological side of the impacts.

²¹ U.S. Geological Survey and U.S. Department of Agriculture, Natural Resources Conservation Service, Federal Standards and Procedures for the National Watershed Boundary Dataset (WBD) at 1 (2013), <http://pubs.usgs.gov/tm/tm11a3/>.

²² NWI v.2 represents the methodologies of Dahl et.al. Within the version numbers, actual data are updated more frequently, and this analysis used data, associated with the October 2019 release, the most recently available at the time.

²³ Dahl, et. al. at 5.

²⁴ Dahl, et. al. at 6.

digit HUC watersheds in another.²⁵ I verified Esri's process and reformatted the summary tables they provided.

18. At this stage, I brought an additional team member, Libbie Weimer, geospatial analyst, in to help work with the data. The geodatabases created by Esri were incredibly large, and therefore difficult to summarize with the GIS software, ArcGIS Pro. Ms. Wiemer used the statistical programming language, R, to create more workable summary tables of data that estimated the number of acres of wetlands assigned to each NWI wetland classification across the contiguous United States.

19. This table (Table 1) shows the HUC codes corresponding to each watershed selected for in-depth analysis:

Table 1

Watershed	All 12-digit HUCs comprising these larger 6-,8-,10-digit HUCs
Potomac	020700
Rappahannock	02080103, 02080104
James	020802
Neuse	030202
Cape Fear	030300
Lake Norman (Catawba River)	0305010111, 0305010112
Saluda	03050109
Congaree	03050110
Charleston Harbor	03050201, 03050202, 03050209
Chattahoochee	03130001, 03130002, 03130003, 03130004

20. In their data processing, Esri isolated the water regime modifier from the full Cowardin code in NWI, using the Wetlands Decoder Table, which *“provides a crosswalk from U.S. Fish and Wildlife Service, National Wetlands Inventory (NWI) wetlands data, as defined by*

²⁵ Esri (2020). NWI Data Processing Steps.

*the Federal Wetland Mapping Standard, to the complete wetland definitions, as defined by the Federal Wetlands Classification Standard.”*²⁶

21. In order to estimate wetland types by target water regime, I utilized the summary tables for water regime codes of the NWI dataset, those created in R, within the watersheds of interest listed in Table 1.

22. After creating a new row of values for the select watersheds, based on their HUC code, I then summarized the results in Excel. A single pivot table was created to show columns for wetland acres in each target water regime and rows for each watershed. The values of the pivot tables were the total acres of wetlands classified by each water regime for each Table 1 watershed. Some values were zero.

Results

23. As shown in Table 2, and based on my analysis, I estimate that 45,103,442 acres of wetlands in the contiguous United States are classified as Temporarily Flooded, Seasonally Saturated, Continuously Saturated, or Intermittently Flooded. Table 2 also contains the results for the selected watersheds analysis:

²⁶ U.S. Fish and Wildlife Service, Wetland Classification Codes (2019), <https://www.fws.gov/wetlands/Data/Wetland-Codes.html> (downloaded Feb. 3, 2020).

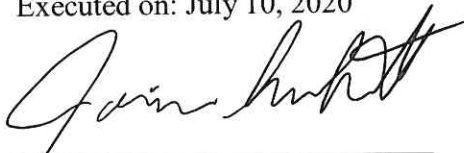
Table 2

Analysis Area		Temporarily Flooded (A)	Seasonally Saturated (B)	Continuously Saturated (D)	Intermittently Flooded (J)	Total
Target Watershed	Potomac	66,079	7,142	7,142	253	80,616
	Rappahannock	14,021	9,723		5	23,750
	James	70,364	14,750	5,184	1	90,299
	Neuse	167,544	197,042			364,586
	Cape Fear	141,801	385,195			526,996
	Lake Norman	783	12			796
	Saluda	16,679	3,852			20,531
	Congaree	29,144	13,762			42,906
	Charleston Harbor	76,626	81,148			157,774
	Chattahoochee	147,076	15,073			162,149
Contiguous U.S.		25,214,419	11,530,268	7,749,017	609,738	45,103,442

24. The results of my analysis estimate the acreage for a subset of wetlands that less frequently have surface water and are therefore likely to be excluded by the new waters of the United States definition. This vulnerable subset includes waters classified as Temporarily Flooded, Seasonally Saturated, Continuously Saturated, and Intermittently Flooded. Estimating the exact amount of any type of wetlands that lose jurisdiction under the Rule would require on-the-ground, site-specific analysis. However, the analysis described above provides estimates based on the most complete nationwide geospatial data, while honoring the limitations of scale and the data's intended use.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on: July 10, 2020


 Joivan Sackett

Attachment B



US Army Corps
of Engineers®

HQ USACE Regulatory

Announcements

5 January 2022 – Navigable Waters Protection Rule Vacatur

Published Jan. 5, 2022

The Environmental Protection Agency and U.S. Army Corps of Engineers (“the agencies”) are in receipt of the U.S. District Court for the District of Arizona’s August 30, 2021, order vacating and remanding the Navigable Waters Protection Rule in the case of *Pascua Yaqui Tribe v. U.S. Environmental Protection Agency*. In light of this order, the agencies have halted implementation of the Navigable Waters Protection Rule (“NWPR”) nationwide and are interpreting “waters of the United States” consistent with the pre-2015 regulatory regime until further notice. The agencies are working expeditiously to move forward with the rulemakings announced on June 9, 2021, in order to better protect our nation’s vital water resources that support public health, environmental protection, agricultural activity, and economic growth. The agencies remain committed to crafting a durable definition of “waters of the United States” that is informed by diverse perspectives and based on an inclusive foundation.

On November 18, 2021, the agencies announced the signing of a proposed rule to revise the definition of “waters of the United States.” This proposal marks a key milestone in the regulatory process announced in June 2021. The agencies propose to put back into place the pre-2015 definition of “waters of the United States,” updated to reflect consideration of Supreme Court decisions. This familiar approach would support a stable implementation of “waters of the United States” while the agencies continue to consult with states, tribes, local governments, and a broad array of stakeholders in both the current implementation and future regulatory actions.

A durable definition of “waters of the United States” is essential to ensuring clean and safe water in all communities—supporting human health, animal habitat, agriculture, watersheds, flood management, local economies, and industry. This rulemaking process follows a review conducted by the agencies as directed by the January 20, 2021 Executive Order 13990 on “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.”

Further details about the agencies' plans, including information regarding the upcoming public meetings and proposed rule docket, [can be found here](#).

An approved jurisdictional determination ("AJD") is a document provided by the Corps stating the presence or absence of "waters of the United States" on a parcel or a written statement and map identifying the limits of "waters of the United States" on a parcel. See 33 C.F.R. § 331.2. Under existing Corps' policy, AJDs are generally valid for five years unless new information warrants revision prior to the expiration date. See U.S. Army Corps of Engineers, Regulatory Guidance Letter No. 05-02, § 1(a), p. 1 (June 2005) (Regulatory Guidance Letter (RGL) 05-02).

As a general matter, the agencies' actions are governed by the definition of "waters of the United States" that is in effect at the time the Corps completes an AJD, not by the date of the request for an AJD. AJDs completed prior to the court's decision and not associated with a permit action (also known as "stand-alone" AJDs under RGL 16-01) will not be reopened until their expiration date, unless one of the criteria for revision is met under RGL 05-02. A NWPR AJD could also be reopened if the recipient of such an AJD requests a new AJD be provided pursuant to the pre-2015 regulatory regime. In that case, the Corps will honor such request recognizing that if the recipient of a NWPR AJD intends to discharge into waters identified as non-jurisdictional under the NWPR but which may be jurisdictional under the pre-2015 regulatory regime, such recipient may want to discuss their options with the Corps. AJD requests pending on, or received after, the Arizona court's vacatur decision will be completed consistent with the pre-2015 regulatory regime.

As the agencies' actions are governed by the regulatory definition at the time of the action, permit decisions made prior to the court's decision that relied on a NWPR AJD will not be reconsidered in response to the NWPR vacatur. Permit decisions may be modified, suspended, or revoked per 33 C.F.R. § 325.7 where the regulatory criteria are met. The Corps will not rely on an AJD issued under the NWPR (a "NWPR AJD") in making a new permit decision. The Corps will make new permit decisions pursuant to the currently applicable regulatory regime (i.e., the pre-2015 regulatory regime). Therefore, for any currently pending permit action that relies on a NWPR AJD, or for any future permit application received that intends to rely on a NWPR AJD for purposes of permit processing, the Corps will discuss with the applicant, as detailed in RGL 16-01, whether the applicant would like to receive a new AJD completed under the pre-2015 regulatory regime to continue their permit processing or whether the applicant would like to proceed in reliance on a preliminary JD or no JD whatsoever.

ATTACHMENT C

United States Army Corps Data - Wilmington District
 "Stand-alone" Approved Jurisdictional Determinations under NWPR

Stand-alone AJDs - Excluded Wetlands	JD Type	District	AJD Number	Link	Project Name	Date Issued/Denied	Longitude	Latitude
X	NWPR	Wilmington	SAW-2020-00881	https://saw-reg.usace.army.mil/JD/2020/SAW-2020-00881-JD.pdf	Louisburg Bank Capacitor Station / Louisburg NC / Franklin County	9/30/2020	-78.31858	36.10264
X	NWPR	Wilmington	SAW-2020-01690	https://saw-reg.usace.army.mil/JD/2020/SAW-2020-01690-JD.pdf	PC 3 Old Fayetteville Tracts	9/29/2020	-78.02143	34.23469
X	NWPR	Wilmington	SAW-2020-01665	https://saw-reg.usace.army.mil/JD/2020/SAW-2020-01665-JD.pdf	Whispering Pines Street in Ocean Isle	9/22/2020	-78.476	33.895
X	NWPR	Wilmington	SAW-2020-01311	https://saw-reg.usace.army.mil/JD/2020/SAW-2020-01311-JD.pdf	Andrew & Jazmia Inzerillo / 308 Vinewood Place / Holly Springs / Wake County	9/15/2020	-78.84764	35.66658
X	NWPR	Wilmington	SAW-2020-01449	https://saw-reg.usace.army.mil/JD/2020/SAW-2020-01449-JD.pdf	Wind Over Waves Phase 3 Interior Lots / John Robbins / Dare	9/10/2020	-75.47085	35.55256
X	NWPR	Wilmington	SAW-2019-00503	https://saw-reg.usace.army.mil/JD/2020/SAW-2019-00503-JD.pdf	Spiegel, Josh / Meadows at Oxford Subdivision	9/9/2020	-78.57854	36.28233
X	NWPR	Wilmington	SAW-2020-01025	https://saw-reg.usace.army.mil/JD/2020/SAW-2020-01025-JD.pdf	Outbox Hickory	9/1/2020	-81.37289	35.74975
X	NWPR	Wilmington	SAW-2011-02148	https://saw-reg.usace.army.mil/JD/2020/SAW-2011-02148-JD.pdf	Robeson-Zinn Property / Parker Louis, LLC / Chapel Hill, Orange County	8/28/2020	-79.10134	35.96902
X	NWPR	Wilmington	SAW-2020-00987	https://saw-reg.usace.army.mil/JD/2020/SAW-2020-00987-JD.pdf	2525 Snow Hill Road Pump Station / Durham NC / Durham County	8/18/2020	-78.86501	36.09586
X	NWPR	Wilmington	SAW-2019-02355	https://saw-reg.usace.army.mil/JD/2020/SAW-2019-02355-JD.pdf	Apollo site/McCrimmon Parkway/Cary/Wake County	8/13/2020	-78.8786	35.82685

United States Army Corps Data - Wilmington District
 "Stand-alone" Approved Jurisdictional Determinations under NWPR

X	NWPR	Wilmington	SAW-2020-00879	https://saw-reg.usace.army.mil/JD/2020/SAW-2020-00879-JD.pdf	1708 Petty Farm Road/Cary/Wake County	8/10/2020	-78.87728	35.8344
X	NWPR	Wilmington	SAW-2020-00888	https://saw-reg.usace.army.mil/JD/2020/SAW-2020-00888-JD.pdf	4306 & 4320 Page Road / Durham NC / Durham County	8/3/2020	-78.8286	35.88981
X	NWPR	Wilmington	SAW-2014-00057	Microsoft Word - Town of Morrisville JD tearsheet (army.mil)	Morrisville Public Works Yard; 414 Aviation Parkway; Morrisville; JD	7/17/2020	-78.81674	35.82922
X	NWPR	Wilmington	SAW-2019-02357	Microsoft Word - Wake Prep JD tearsheet (army.mil)	Wake Preparatory Academy / 0 Harris Road / Wake County / Wake Forest NC	6/24/2020	-78.51685	36.00151
X	NWPR	Wilmington	SAW-2020-02076	Microsoft Word - AJD_TS.xml (army.mil)	6242 Pleasant Grove Rd	12/18/2020	-80.90214	35.30515
X	NWPR	Wilmington	SAW-2020-01936	Microsoft Word - AJD_TS.xml (army.mil)	Ranson Road	12/4/2020	-80.87132	35.41781
X	NWPR	Wilmington	SAW-2020-01662	SAW-2020-01662-JD.pdf (army.mil)	Franklin County 911 Center / 285 T Kemp Road / Louisburg / Franklin County	12/4/2020	-78.31968	36.09443
X	NWPR	Wilmington	SAW-2020-01531	00000001.pdf (army.mil)	Manning Avenue / 1031 Gibsonville Ossipee Road / Elon / Alamance County	11/20/2020	-79.52358	36.12262
X	NWPR	Wilmington	SAW-2005-21354	Microsoft Word - WW Davis Dr tearsheet (army.mil)	W&W PARTNERS / AL GOODRICH / DAVIS DRIVE	11/18/2020	-78.85181	35.82867
X	NWPR	Wilmington	SAW-2020-01880	Microsoft Word - Roberts Road tearsheet (army.mil)	Hudson Landing/Roberts Road Assemblage / Cary NC / Wake County	11/18/2020	-78.89572	35.76886
X	NWPR	Wilmington	SAW-2020-01533	00000001.pdf (army.mil)	Emerson / 4806 South NC 62 Hwy / Burlington / Alamance County	11/18/2020	-79.49493	36.01705
X	NWPR	Wilmington	SAW-2019-01339	Microsoft Word - SAW-2019-01339 - Approved Jurisdictional Determination.xml (army.mil)	Wimberly Trace/subdivision/Wimberly Rd/Apex/Wake County	11/13/2020	-78.92387	35.76247
X	NWPR	Wilmington	SAW-2020-00228	SAW-2020-00228 Johnston County Detention Center AJD.pdf (army.mil)	Johnston County Detention Center Project / McGill Associates / Off US-70 Bus / Smithfield / Johnston County	11/9/2020	-78.3059	35.50071

United States Army Corps Data - Wilmington District
"Stand-alone" Approved Jurisdictional Determinations under NWPR

X	NWPR	Wilmington	SAW-2020-01616	Microsoft Word - NWPR Summary SAW-2020-01616 20201103.rtf (army.mil)	535 US Highway 70/Terracon Consultants, Inc./Craven County	11/3/2020	-76.93968	34.91214
X	NWPR	Wilmington	SAW-2020-00286	SAW-2020-00286-JD.pdf (army.mil)	Maso, David - RV Park	11/3/2020	-75.46502	35.57356
X	NWPR	Wilmington	SAW-2020-01258	00000001.pdf (army.mil)	Ashcroft Future Subdivision / 1800 Block of North O'Neil Street / Clayton / Johnston County	10/21/2020	-78.43431	35.66806
X	NWPR	Wilmington	SAW-2020-01657	Microsoft Outlook - Memo Style (army.mil)	Clark Property / 8121 Panther Lake Road / Willow Springs / Wake County	10/9/2020	-78.69115	35.56882
X	NWPR	Wilmington	SAW-2020-01698	Microsoft Word - AJD TS.xml (army.mil)	Plainwood Townhomes	10/6/2020	-80.8809	35.26997
X	NWPR	Wilmington	SAW-2017-02392	00000001.pdf (army.mil)	111 Bonita Lane - Lucy Norris	10/6/2020	-77.90008	34.0237
X	NWPR	Wilmington	SAW-2021-01609	Microsoft Word - Draft JD.xml (army.mil)	804 Live Oak Church Road / Selma NC / Johnston	8/27/2021	-78.29715	35.59184
X	NWPR	Wilmington	SAW-2021-01635	U (army.mil)	Banner Farm Subdivision	8/20/2021	-82.56161	35.368
X	NWPR	Wilmington	SAW-2021-01479	Microsoft Word - AJD TS.xml (army.mil)	Neal Rd	8/19/2021	-80.77539	35.30194
X	NWPR	Wilmington	SAW-2020-00347	NWPR AJD Form (army.mil)	Wake Tech Community College-East Campus / The Trustees of Wake Tech Community College / Wendell, Wake County	8/19/2021	-78.41535	35.80736
X	NWPR	Wilmington	SAW-2020-00890	NWPR AJD Form (army.mil)	Harmony Landing Subdivision / Forestar Real Estate Group, Inc. / Wendell, Wake County	8/18/2021	-78.40156	35.81224
X	NWPR	Wilmington	SAW-2021-01622	Microsoft Word - draft jd.xml (army.mil)	American Leadership Academy / 3770 US Hwy 70 Bus W / Clayton NC / Johnston County	8/18/2021	-78.38756	35.56212
X	NWPR	Wilmington	SAW-2020-02197	GP MFR-DecDoc Combo Letter (army.mil)	1688 Ocean Pearl Road/Les and Abbie Penland	8/16/2021	-75.84822	36.45136
X	NWPR	Wilmington	SAW-2010-00541	Microsoft Word - 1208 Swordfish Lane NWPR AJD Form 081021.docx (army.mil)	1208 Swordfish Lane/Block 35, lot 8 Wilmington Beach/SEE ALSO 2004-01080	8/16/2021	-77.90021	34.02207
X	NWPR	Wilmington	SAW-2008-00981	Microsoft Word - NWPR AJD form WA.docx (army.mil)	Onslow Beach Bridge / USMC-Camp Lejeune / Bridge Replacement / Bridge Maintenance and Temporary Ferry Service with Piers	8/6/2021	-77.27185	34.57278
X	NWPR	Wilmington	SAW-2021-00602	Microsoft Word - Ashby Village Tearsheet (army.mil)	Ashby Village / 3107 S Horner Blvd. / Sanford NC / Lee County	8/5/2021	-79.13086	35.45325
X	NWPR	Wilmington	SAW-2021-01647	Microsoft Word - Starway Village AJD.xml (army.mil)	2346 Carolina Beach Road / Wilmington / New Hanover	8/4/2021	-77.93957	34.19617
X	NWPR	Wilmington	SAW-2021-01148	Microsoft Word - AJD TS.xml (army.mil)	Beatties Ford Rd	8/2/2021	-80.8735	35.32935

United States Army Corps Data - Wilmington District
 "Stand-alone" Approved Jurisdictional Determinations under NWPR

X	NWPR	Wilmington	SAW-2021-01624	SAW-2021-01624-JD.pdf (army.mil)	710 and 712 Orange Factory Road / Bahama NC / Durham County	7/30/2021	-78.88649	36.12081
X	NWPR	Wilmington	SAW-2020-01779	Microsoft Word - SAW-2020-01779 NWPR Summary DRAFT.rtf (army.mil)	Eagle Crest industrial park / 4100 Auburn Church Road / Garner / Wake County	7/28/2021	-78.57388	35.71517
X	NWPR	Wilmington	SAW-2021-00933	SAW-2021-00933-JD.pdf (army.mil)	Oxford Park / Horner Siding Road / Oxford NC / Granville County	7/16/2021	-78.56924	36.34482
X	NWPR	Wilmington	SAW-2021-01436	Microsoft Word - AJD TS.xml (army.mil)	Miranda Road (Sunbriar Subdivision)	7/13/2021	-80.89459	35.32918
X	NWPR	Wilmington	SAW-2021-00780	SAW-2021-00780-JD.pdf (army.mil)	3511 S Memorial Avenue/Nags Head Group, LLC.	7/12/2021	-75.63246	35.96955
X	NWPR	Wilmington	SAW-2018-01192	Microsoft Word - SAW-2018-01192-JD.rtf (army.mil)	Reidsville Nursing Home / Reid School Road / Reidsville / Rockingham County / commercial	7/9/2021	-79.69643	36.33494
X	NWPR	Wilmington	SAW-2020-02130	Microsoft Word - SAW-2020-02130 Share the Table AJD.xml (army.mil)	Share the Table / NC 17 and Perkins Drive / Pender	7/6/2021	-77.58174	34.4689
X	NWPR	Wilmington	SAW-2019-00741	SAW-2019-00741-JD.pdf (army.mil)	Cheek Swan & Burt Tract / Stephen Burt / Orange County / Array Subdivision	6/30/2021	-79.18692	35.95773
X	NWPR	Wilmington	SAW-2021-01307	NWPR AJD Form (army.mil)	JD	6/25/2021	-78.47959	35.89076
X	NWPR	Wilmington	SAW-2015-02292	GP MFR-DecDoc Combo Letter (army.mil)	111 WAREHOUSE RD/ARTILLERY INVEST/SUTTON	6/21/2021	-77.89584	34.23973
X	NWPR	Wilmington	SAW-2021-01142	Microsoft Word - AJD TS.xml (army.mil)	Bartles	6/17/2021	-80.49926	34.97516
X	NWPR	Wilmington	SAW-2021-01245	U (army.mil)	Copperleaf Parkway / 2400 Sanders Ave / Durham NC / Durham County	6/17/2021	-78.82308	35.94392
X	NWPR	Wilmington	SAW-2009-01095	SAW-2009-01095-JD.pdf (army.mil)	7704 East Beach Drive, Oak Island by Todd Morgan parcel #250BJ002	6/10/2021	-78.0879	33.9059
X	NWPR	Wilmington	SAW-2020-01924	Microsoft Word - AJD and AJD form (army.mil)	916 and 918 Monteray Drive/William Ardern	6/10/2021	-75.82187	36.34367
X	NWPR	Wilmington	SAW-2021-00286	GP MFR-DecDoc Combo Letter (army.mil)	1953 Sandpiper Road/Mike Meola	6/10/2021	-75.8581	36.4917
X	NWPR	Wilmington	SAW-2021-01011	NWPR AJD Form (army.mil)	Production Construction Inc / 2602 & 2604 Angier Ave / Durham County	6/8/2021	-78.872	35.97921
X	NWPR	Wilmington	SAW-2020-02249	Microsoft Word - Conservancy tearsheet (army.mil)	The Conservancy / Partin Road Moncure Assemblage / Chatham County	6/4/2021	-79.01422	35.66343
X	NWPR	Wilmington	SAW-2021-00688	Microsoft Word - WCC tearsheet (army.mil)	WCC Annex / O Mckrimmon Parkway / Morrisville, NC / Wake County	6/3/2021	-78.81712	35.83937

United States Army Corps Data - Wilmington District
 "Stand-alone" Approved Jurisdictional Determinations under NWPR

X	NWPR	Wilmington	SAW-2021-00158	Microsoft Word - Oxendine tearsheet (army.mil)	Oxendine Property / 5612 Oxendine Road / Randleman NC / Randolph County	5/26/2021	-79.77804	35.87146
X	NWPR	Wilmington	SAW-2020-00140	GP MFR-DecDoc Combo Letter (army.mil)	865 Whalehead Dr / Currituck / PJD	5/24/2021	-75.81523	36.33713
X	NWPR	Wilmington	SAW-2020-02161	GP MFR-DecDoc Combo Letter (army.mil)	Bazemore Site/2020 Gurley Road/Timothy Bazemore	5/21/2021	-76.93904	35.92371
X	NWPR	Wilmington	SAW-2021-00807	SAW202100807 Baker Tract - Franklin County NC (Sage Project #2019.103).pdf (army.mil)	Baker Tract / Franklin County	5/21/2021	-78.3655	35.9809
X	NWPR	Wilmington	SAW-2020-02179	GP MFR-DecDoc Combo Letter (army.mil)	NC Highway 12/Ocean Trail/Coastland Corporation	5/17/2021	-75.8049	36.3078
X	NWPR	Wilmington	SAW-2021-00918	Microsoft Word - 6124 Carolina Beach Rd AJD.xml (army.mil)	6124 Carolina Beach Road / Wilmington / New Hanover / ARFA Holdings, LLC	5/14/2021	-77.90227	34.11889
X	NWPR	Wilmington	SAW-2020-02147	Microsoft Word - JD Brook hollow.xml (army.mil)	Brook Hollow Section 5/Dickinson Avenue Extension/Pitt	5/12/2021	-77.4204	35.58561
X	NWPR	Wilmington	SAW-2020-02294	Microsoft Word - AJD Ridgewood.xml (army.mil)	Ridgewood Farms/Thomas Langston Rd/Pitt	5/12/2021	-77.41609	35.56508
X	NWPR	Wilmington	SAW-2020-01994	NWPR AJD Form (army.mil)	Stanley Martin Homes / Southport / Brunswick / Edna Harper	5/11/2021	-78.01287	34.9292
X	NWPR	Wilmington	SAW-2020-01995	SAW-2020-01995-JD.pdf (army.mil)	Duke Energy PNG Maxton Site Renovations / Maxton / Scotland / Piedmont Natural Gas / Ronald Howell	5/10/2021	-79.34851	34.7205
X	NWPR	Wilmington	SAW-2021-00372	NWPR AJD Form (army.mil)	Infinity Road Site / North Roxboro Street and 115 Infinity Road / Durham County	4/30/2021	-78.90941	36.07953
X	NWPR	Wilmington	SAW-2020-02132	GP MFR-DecDoc Combo Letter (army.mil)	Ocean Trail/NC Highway 12/CB Development, LLC.	4/28/2021	-75.8242	36.3565
X	NWPR	Wilmington	SAW-2020-00587	Microsoft Word - SAW-2020-00587-AJDform1.docx (army.mil)	NCDOT/Airport Blvd extension/WBS 36249.4033/DIV 5	4/26/2021	-78.84011	35.83467
X	NWPR	Wilmington	SAW-2021-00168	SAW-2021-00168 ADMIN FILE 01 27 21.pdf (army.mil)	2801 Olive Branch Road / Durham County	4/14/2021	-78.762	35.93
X	NWPR	Wilmington	SAW-2021-00165	Microsoft Word - Jones Ferry tearsheet (army.mil)	Jones Ferry Merritt Property / Carrboro NC / Chatham and Orange County	4/14/2021	-79.15056	35.86345

United States Army Corps Data - Wilmington District
"Stand-alone" Approved Jurisdictional Determinations under NWPR

X	NWPR	Wilmington	SAW-2021-00350	Preliminary and Approved Jurisdictional Determination for Junction and Ferrell Road in Durham (SAW-2021-00350) (002).pdf (army.mil)	Junction and Ferrell Site / Durham NC / Durham County	4/8/2021	-78.89562	35.86971
X	NWPR	Wilmington	SAW-2021-00064	Approved and Preliminary JD for NC 55 and Hopson in Durham County (SAW-2021-00064). Signed.pdf (army.mil)	Scannell Properties LLC / NC 55 and Hopson Road Site / Durham County	4/6/2021	-78.83449	36.01802
X	NWPR	Wilmington	SAW-2021-00456	Microsoft Word - Monroe-Raleigh Ave. NWPR AJD Form 032621.docx (army.mil)	Lot between Raleigh and Monroe_600 Block	4/2/2021	-77.90212	34.03696
X	NWPR	Wilmington	SAW-2020-00974	NWPR AJD Form (army.mil)	Greene Tract / Purefoy Drive / Chapel Hill NC / Orange County	3/31/2021	-79.07357	35.96054
X	NWPR	Wilmington	SAW-2021-00091	Microsoft Word - Church St tearsheet (army.mil)	Smyle Investments LLC / 611 703 and 704 Church St / Morrisville NC / Wake County	3/29/2021	-78.83615	35.83387
X	NWPR	Wilmington	SAW-2020-01423	NWPR AJD Form (army.mil)	Wendell Blvd DD / Watson Family II, LLC / Wendell, Wake County	3/19/2021	-78.3421	35.7972
X	NWPR	Wilmington	SAW-2020-01710	NWPR AJD Form (army.mil)	0 Oakwood Street / Mebane / Orange County	3/19/2021	-79.254	36.086
X	NWPR	Wilmington	SAW-2020-02236	SAW-2020-02236-JD.pdf (army.mil)	NC 12 Highway/Carl Worsley	3/16/2021	-75.5874	35.259
X	NWPR	Wilmington	SAW-2019-00719	SAW-2019-0071990001020.PDF (army.mil)	Preservation Point	3/9/2021	-77.94012	34.26897
X	NWPR	Wilmington	SAW-2021-00408	Microsoft Word - AJD TS.xml (army.mil)	Harrisburg Road / Broadstreet Homes	3/1/2021	-80.66114	35.24632
X	NWPR	Wilmington	SAW-2020-01464	NWPR AJD Form (army.mil)	Jasper Place / Lennar Homes / Zebulon, Wake County	2/2/2021	-78.34274	35.82272
X	NWPR	Wilmington	SAW-2020-00658	NWPR AJD Form (army.mil)	850 North Estes Drive / Chapel Hill NC / Orange County	2/2/2021	-79.05419	35.93616
X	NWPR	Wilmington	SAW-2020-00555	Microsoft Word - SAW-2020-00555-JD.docx (army.mil)	The Farm and Neills Creek SC/Wester Property/4203 NC-210/Connie Wester	1/28/2021	-78.79934	35.45574
X	NWPR	Wilmington	SAW-2012-01399	SAW-2012-01399-JD.pdf (army.mil)	Branaman Tract/Creedmoor Partners, LLC/Wake Forest/Wake County	1/19/2021	-78.59688	36.0053

Burgos, Alexander N

Subject: FW: [External] letter on 15A NCAC 02H .1301 and .1401-.1405
Attachments: WKC et al wetlands ltr to RRC 3-10-22.pdf

From: Grady McCallie <grady@ncconservationnetwork.org>
Sent: Thursday, March 10, 2022 1:25 PM
To: rrc.comments <rrc.comments@oah.nc.gov>
Cc: Everett, Jennifer <jennifer.everett@ncdenr.gov>
Subject: [External] letter on 15A NCAC 02H .1301 and .1401-.1405

CAUTION: External email. Do not click links or open attachments unless you verify. Send all suspicious email as an attachment to [Report Spam](#).

Thank you for the opportunity to share comments (attached) with the Rules Review Commission in support of the EMC's proposed permanent state wetlands permitting rules, 15A N.C. Admin. Code 02H .1301 (Revision) and 15A N.C. Admin. Code .1400 (.1401 through .1405).

Sincerely,
Grady
919-802-7592



Grady McCallie
NC Conservation Network
Policy Director

grady@ncconservationnetwork.org

P: 919.857.4699 x 101



Email correspondence to and from this address may be subject to the North Carolina Public Records Law and may be disclosed to third parties by an authorized state official.

**American Rivers • Environmental Defense Fund • NC Conservation Network •
North Carolina Wildlife Federation • Sound Rivers • Waterkeepers Carolina**

March 10, 2022

North Carolina Rules Review Commission
Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609

**Re: Letter of Support for Permanent Wetland Rules: 15A N.C. Admin. Code 02H .1301 (Revision) and
15A N.C. Admin. Code .1400 (.1401 through .1405)**

Dear Commissioners and Commission Staff:

American Rivers, Environmental Defense Fund, NC Conservation Network, NC Wildlife Federation, Sound Rivers, and Waterkeepers Carolina submit these comments in support of the Environmental Management Commission's (EMC) proposed permanent rules, 15A N.C. Admin. Code 2H .1301 and 15A N.C. Admin. Code .1400 (.1401 through .1405). Our organizations advocate across multiple watersheds in North Carolina for the protection of wetlands, streams, and river systems.

Protection of wetlands and streams requires a balance – neither a total prohibition on impacts nor wholesale deregulation, but rather efficient review that protects neighbors, downstream communities, and the health of the landscape. The proposed permanent rules establish such a system, consistent with past practice, that will remain in place no matter the scope of the federal Clean Water Act. The proposed permanent rules will allow development projects to proceed that could otherwise be unpermittable under state law.

Over the last two decades, our organizations have participated in multiple rounds of federal rulemaking over the reach of the federal Clean Water Act, the most recent of those rounds in the form of the Biden administration's proposed rule to restore longstanding federal clean water protections. Despite that proposal, the scope of federal clean water protections remains uncertain.

In 2020, the U.S. EPA and Army Corps of Engineers' Navigable Waters Protection Rule (NWPR) reduced federal jurisdiction over wetlands and headwater streams in North Carolina by hundreds of thousands of acres. Yet, those same streams and wetlands remain unambiguously protected under North Carolina's state statutes because they are critical to protecting the state's natural environment and the communities that depend on them. They cannot be impacted without a state permit. Since the state's traditional permit process for these impacts piggybacked on the federal 404 wetlands permitting program, that state permit process—the 401 water quality certification process—offered no way to authorize impacts to waters of the state not covered by the federal rule. As a result, projects that had been planned for months or years, and were presumably carrying financing costs, could not move forward.

Although the NWPR has been vacated by two federal courts, the flux in federal jurisdiction demonstrates the need for a stand-alone permitting program that authorizes impacts to waters of the state as has occurred through the 401-certification program for decades. Last summer, the Rules Review Commission wisely approved the temporary wetlands permitting rule, providing a path for development with unavoidable impacts to state-defined wetlands to move forward. Yet, it took almost a full year to get that process in place after the NWPR was finalized. For this permanent rule, the EMC has concluded – correctly, we think, but in any event within their discretion – that having the state wetlands permitting rule in place will provide certainty and continuity for both the regulated community and the natural resource. The permanent rules are substantively identical to the 401-certification rules—which have been in place for decades—there is no meaningful difference in the protection provided under the rules.

Wetlands and headwater streams provide vital functions: hedging against downstream floods, filtering pollutants out of surface drinking water sources, recharging groundwater supplies, and serving as vital nursery habitat for commercial and recreational fisheries. The EMC's permanent rules ensure that development projects will be allowed to proceed while their impacts are minimized and at least partially offset to protect downstream communities and the general public. We encourage you to approve the permanent wetland rules to provide continuity in the state program.

Sincerely,

Grady McCallie
Policy Director
NC Conservation Network

David Kelly
North Carolina State Director
Environmental Defense Fund

Tim Gestwicki
Executive Director
NC Wildlife Federation

Peter Raabe
Southeast Regional Director
American Rivers

Heather Deck
Executive Director Policy Director
Sound Rivers
Fiscal sponsor of Waterkeepers Carolina

Waterkeepers Carolina is a science-based, environmental advocacy group representing nine Waterkeeper groups in North Carolina:

Cape Fear Riverkeeper, Cape Fear Riverwatch
Catawba Riverkeeper, Catawba Riverkeeper Foundation
Crystal Coast Waterkeeper, White Oak - New Riverkeeper, Coastal Carolina Riverwatch
Dan Riverkeeper, Good Stewards of Rockingham
Haw Riverkeeper, Haw River Assembly
Neuse Riverkeeper, Pamlico-Tar Riverkeeper, Sound Rivers
Broad Riverkeeper, French Broad Riverkeeper, Green Riverkeeper, Watauga Riverkeeper, MountainTrue
Lumber Riverkeeper, Waccamaw Riverkeeper, Winyah Rivers Alliance
Yadkin Riverkeeper, Yadkin Riverkeeper Foundation

Burgos, Alexander N

Subject: FW: [External] NCSGA Letter Supporting Propsed Permanent Wetland Rules
Attachments: Wetlands - NCSGA_LOS_030922.pdf; Sea Grant Newsletter.pdf

From: chris@chadwickcreek.com <chris@chadwickcreek.com>
Sent: Wednesday, March 9, 2022 12:33 PM
To: rrc.comments <rrc.comments@oah.nc.gov>
Cc: Everett, Jennifer <jennifer.everett@ncdenr.gov>
Subject: [External] NCSGA Letter Supporting Propsed Permanent Wetland Rules

CAUTION: External email. Do not click links or open attachments unless you verify. Send all suspicious email as an attachment to [Report Spam](#).

Please see attached files. Thank you.

Chris Matteo
NCSGA

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March 10, 2022

North Carolina Rules Review Commission
Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609

Re: Letter Supporting Proposed Permanent Wetland Rules: 15A N.C. Admin. Code 02H .1301 (Revision) and 15A N.C. Admin. Code .1400 (.1401 through .1405)

Dear Commissioners and Commission Staff:

The North Carolina Shellfish Growers Association submits these comments in support of the Environmental Management Commission's proposed permanent rules that revise 15A N.C. Admin. Code 2H .1301 and 15A N.C. Admin. Code .1400 (.1401 through .1405).

The North Carolina Shellfish Growers Association was originally founded in 1995 to represent the interests of the many North Carolinians involved in the shellfish industry. We have approximately 40 members who include shellfish farmers, hatchery operators, seafood dealers, educators, researchers, government regulators, and service providers. We have been involved in wetland protection in North Carolina for decades and we believe the permanent rules are necessary for continuity in the state's wetland permitting program.

As we have seen in the past, unregulated wetland destruction can cause staggering damage to our coast and our members' businesses. In the 1970s, large corporations ditched and drained more than 200,000 acres of wetlands near estuaries. Fish and shellfish suffered from the resulting runoff and pollution.

As described in the attached UNC Sea Grant College Newsletter from 1976, 3,000 commercial fishermen and residents signed a petition that pleaded with state officials to do something about the runoff that plagued our estuaries and threatened their ability to make a living fishing. Trillions of gallons of drainage flowed directly into salty estuaries. This runoff made these essential fish nurseries much less productive for shrimp, oysters, flounder, trout and other commercially and recreationally important marine life.

The North Carolina Shellfish Growers Association is a 501(c)(6) trade association for shellfish farmers.

(919) 360-2278 - chris@chadwickcreek.com - 124 Trent Shores Drive Trent Woods, NC 28562

In response to this growing controversy, lawmakers and agencies finally stopped many of these wetland conversions. They recognized that it was necessary to protect wetlands to maintain water quality and fisheries—common sense that was also a legal obligation under state law.

After these wetlands losses were stopped, hundreds of thousands of acres of wetlands were restored in eastern North Carolina, making our coast more resilient against hurricanes, saltwater intrusion and flooding. Those efforts made it possible for our members to build businesses as commercial fishermen and shellfish growers.

Our members can earn a good living providing seafood to North Carolina's residents and visitors. But life as a shellfish grower and commercial fisher isn't easy. We battle weather that seems to grow more extreme each year and face severe business pressures including competition from foreign imports and management questions about how best to allocate and regulate the seafood they harvest or catch. The biggest threat to their livelihood, however, is degradation of water quality and fisheries habitats. Contaminated shellfish can lead to illness when consumed. Our members simply can't earn a living if estuaries are no longer safe places to harvest seafood.

North Carolina needs the proposed permanent rules to allow responsible development while ensuring that everyone does their part to keep our estuaries healthy. Those estuaries collect water from thousands of small streams and wetlands as far inland as Durham and Raleigh. Without a practical and protective state permitting regime, the estuaries we fish will not only be jeopardized by wetland loss in the coastal plain, but by all of the pollution that flows downstream.

We urge you to adopt the proposed permanent wetland rules.

Thank you for considering these comments.

A handwritten signature in blue ink, appearing to read "Chris Matteo".

Chris Matteo, President
North Carolina Shellfish Growers Association

The North Carolina Shellfish Growers Association is a 501(c)(6) trade association for shellfish farmers.

(919) 360-2278 - chris@chadwickcreek.com - 124 Trent Shores Drive Trent Woods, NC 28562



UNIVERSITY OF NORTH CAROLINA

SEA GRANT COLLEGE

NEWSLETTER

August, 1976

1235 Burlington Laboratories
NCSU, Raleigh, N.C. 27607 Tel: (919) 737-2454

Trading oysters for beans?

... the question of fresh water

In the old West, the issue was fences. On the North Carolina coast, it's ditches and "fresh water intrusion."

Fresh water intrusion is the runoff of fresh water into normally brackish or salty water. The definition is simple but the implications are complex. Many of the brackish, estuary waters that receive fresh water such as rain are also the nursery grounds for shrimp, oysters, flounder, trout and other commercially important marine life. These creatures can adapt to a wide range of salinities and temperatures, but they all have limits to the amount of fresh water they can stand. And they may be hurt by rapid fluctuations in water's salt content.

Other factors are involved, but according to a study on brown shrimp done by the North Carolina Division of Marine Fisheries, salinity is a major ingredient for survival in the estuaries.

Runoff has always occurred along the coast. When it rained, the fresh rainwater eventually found its way to the shore. But in recent years, as corporations have cleared vast acreages for "superfarms" and developers have made room for homes, the face of the coastal area has changed. Mazes of drainage ditches now make more avenues for fresh water to rush to the brackish coastal areas. And fewer swamp forests are present to trap the water and slowly filter it to the shore.

(See "The Problem," page two)



The problem: changing land use

(Continued from page one)

Now when it rains, rainwater can run in wide channels to the brackish nursery areas, opening the possibility for changing salinity rapidly and altering the directions of water flow. The effect could be destruction of the nursery grounds.

The problem, according to the state report, is particularly prevalent in tributaries of the northern Pamlico Sound, such as Long Shoal River, Swanquarter Bay and Rose Bay. And fishermen in those areas are getting worried, and upset.

Opposition has focused on one drainage operation in Hyde County which would drain 1,200 acres into Rose Bay. A law suit was filed and is now in limbo, according to Swanquarter attorney John S. Fletcher. He calls the suit a "warning to the landowner that people felt he was doing something he shouldn't and that if anything went wrong they'd look to him for recompense" and a "notice to the government to do something."

The fishermen brought their worries to the state more directly in June:



Rose Bay oyster houses stand empty.

"We, the undersigned, being commercial and sport fishermen who use the creeks, rivers and bays adjacent to Pamlico Sound and the waters of Pamlico Sound, petition the Marine Fisheries Commission and state officials as follows:

"—to investigate the invasion of traditionally salt or brackish waters by fresh water.

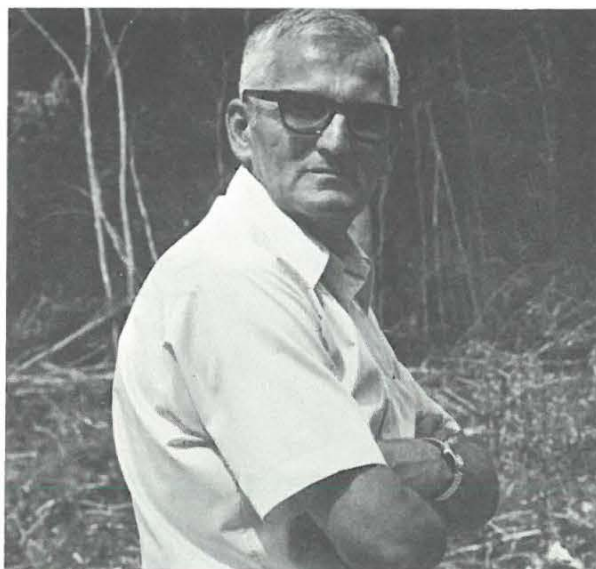
"—to investigate the effect of changing salinity in said waters upon the production of oysters, shrimp and other salt water species.

"—to initiate programs to preserve the traditional salt waters of the aforesaid waters.

"—to investigate the effect of decreased salinity in said waters upon the economy of the Pamlico drainage area, and to initiate proper controls to insure the continued health of commercial and sport fishing in this area.

"—to investigate the feasibility of dredging Ocracoke Inlet or a new inlet near the Ocracoke area.

"This petition is prompted by the belief that



Troy Mayo

during the past decade the fresh water has been encroaching upon salt water areas in a gradual, but persistent manner."

The petition was signed with about 3,000 names and carried to Raleigh by fisherman Harold Harris and his neighbor Troy Mayo. Harris has fished Rose Bay and the sound for 10 years and Mayo is a native of Swanquarter who fished a quarter of a century ago and now works an oyster bed in the middle of Pamlico Sound. Harris and Mayo agree Rose Bay production is down and they point to fresh water intrusion as the main culprit.

"The bureaucrats and educated fools can't see what's going on without a study. But you can ask the stupidest person in Hyde County and he'll tell you," Mayo declared. "The damage has been done in the past 10 years by the big corporate farms. We've got sense enough to know that farming has to continue but if we don't stop these big corporate farms or get some new laws, all these sounds and bays and tributaries will be gone.

"Twenty-five years ago, I owned a 26-foot shad boat. We used to go out in Rose Bay, two people, for five or six hours and we'd catch 35 to 40 tubs of oysters—that was two men pulling by hand," Mayo continued. "Today you go out in this same area with a power winder and all modern equipment and I'd be surprised if you catch 10 tubs of oysters. Up until about five years ago we had 10 to 15 people that made their living just in Rose Bay. Today you haven't got a one—it's just that simple."

The University of North Carolina Sea Grant College Newsletter is published monthly by the University of North Carolina Sea Grant College, 1235 Burlington Laboratories, Yarbrough Drive, North Carolina State University, Raleigh, N.C. 27607. Vol. 3, No. 8, August, 1976. Dr. B. J. Copeland, director. Written and edited by Karen Jurgensen and Johanna Seltz. Second-class postage paid at Raleigh, N.C. 27611.

More than one culprit—a many-faceted situation

The problem is a little more complicated, according to Fentress ("Red") Munden of the Oyster Rehabilitation Section of the Division of Marine Fisheries. He agrees that state oyster production has dropped considerably in the past 25 years, although the drop has leveled off in the last five years. But fresh water intrusion is only part of the cause.

Extreme overharvesting at the turn of the century is still hurting today's oyster production, Munden said. And passage of minimum wage laws helped close the oyster shucking houses that had produced a major source of cultch—the broken shells scattered on the water's bottom to catch oyster spat, or seed. With less readily available cultch, there was less shell material going back into the water to develop oyster beds, Munden explained. Harvesting pressures, particularly in Rose Bay which has an exceptionally fine oyster, also took their toll, he said. Recently low prices due to low oyster demand have encouraged fishermen to



A dredging operation in the Rose Bay area. The water will eventually wind its way to Rose Bay itself.

diversify and depend more on crabs and shrimp, he added.

"Fresh water definitely plays a part, but oyster production is very complex. You can't put your finger on one thing and say 'Aha, this is it,'" Munden said. "I can't deny, though, that I feel very strongly that fresh water intrusion is a problem.

But we'd do better to approach it not from oyster production, but from shrimp—they're more susceptible to water changes."

A study of juvenile shrimp in Rose Bay showed that fresh water intrusion definitely disrupted the salinity of small creeks in the area. The result was a smaller shrimp harvest by fishermen, particularly if salinity dipped and fluctuated during the critical early spring months.

The study is not conclusive, though, according to its author, Preston Pate, of the Division of Marine Fisheries. The state really does not know the extent of the fresh water intrusion problem, Pate said.

To find the "truth," the Environmental Management Commission has authorized another study, based on the demands in the Rose Bay petition. This study is expected to take three years and will look at the problem, its solutions and their costs and benefits as well as possible legislation.

Wrinkles in the law

Right now most fresh water intrusion is not under any government jurisdiction. State dredge and fill laws apply only to marsh areas and estuarine water. And, according to Pate and permit coordinator John Parker, much of the draining is done where there is either no marsh, not enough to justify refusal of a permit or in areas that do not drain directly into the estuaries.

The Army Corps of Engineers was scheduled to gain regulatory control this summer over activity in wetlands adjacent to tributaries of navigable waters. President Ford issued a moratorium on the law, however, and the wording would exclude much of the land now being drained and all ditches now in operation, according to Corps spokesman Wayne Wright.

Sedimentation control laws apply to the silt flowing in the water, but not the freshwater itself. And agricultural and forestry lands are exempt, according to Taylor Currin, Chief Engineer in the Department of Natural and Economic Resources (DNER) Land Quality Section.

The Coastal Area Management Act, with its provisions for designating special areas of environmental concern, also excludes farming and logging operations. Attempts to change the law so it would apply to farming or logging would be "practically impossible politically," according to one DNER official.

(See "Plodding," page four)

Plodding along; so far, so good?

(Continued from page three)

"At present time, no one has regulatory authority over fresh water going into salt water," concluded Robert A. Carter, head of the Water Quality Operations Branch of the Division of Environmental Management. "It's a pollutant to salt water organisms, but it's not defined as such."

UNC Sea Grant Director B. J. Copeland says there is a possibility that his program may become involved in the state study on Rose Bay. Sea Grant researchers have already been studying runoff effects of the Open Grounds superfarm and a Water Resources Research Institute study of First Colony Farms has just begun.

If fresh water runoff is identified as a pollution problem, several controls have already been suggested. One idea is to leave a buffer zone between drainage projects and the shorelines to retard fresh water intrusion. Diverting drainage ditches into deeper areas of the sounds or into less productive nursery areas where excess fresh water would have less impact is another idea. Or the draining water could be maneuvered to a large holding area where it would be released more slowly.

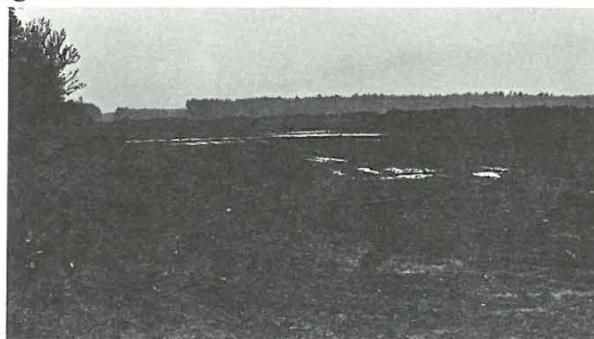
Any state action will take time, Pate said, but any action must be backed with hard data.

"The problem is not so severe that there's any potential for complete destruction of, say, the shrimp industry. But we feel if the trend continues in converting these highly valuable nursery areas into fresh water habitat, the effects will certainly be detrimental to the seafood industry. We want to attack the problem as rapidly as we logistically can. We recognize that just because the drainage ways are there, the potential is there for some drastic effects—even if it doesn't occur 100 times out of 100."

"We love beans and beef and we have a serious need to extend agricultural operations," Jim Brown, also of the Division of Marine Fisheries, added. "At the same time we dearly love shrimp and oysters. There exists a very serious need for imposing compatability between the two. Can it be done? That's the question. Can it be done under existing authorities or does it mean we'll have to pass new laws and add more control to the existing maze we have now. Or do we just keep plodding along with our fingers crossed?"

"The problem has been developing probably since the very first drainage projects," Brown continued. "We've been aware of it as a potential problem for 10 to 12 years but only recently have we come up with any data that pinpoints it as a serious problem. The initial effect is reducing the effectiveness of some of our more productive nursery areas. The subsequent effect that bothers us is the type of pollution that may result from the land use at the other end—the possibilities of accidents with pesticides and runoff of fertilizer."

"The whole thing sometimes reminds me of the fellow who jumped off the Empire State Building. When he passed the 13th floor he saw there was a party going on. He waved and said 'So far, so good.'"



Drained and logged land, an increasingly common coastal sight.

University of North Carolina
Sea Grant College
1235 Burlington Laboratories
North Carolina State University
Raleigh, N.C. 27607



Second-class postage paid at Raleigh
N.C. 27611

Burgos, Alexander N

From: rrc.comments
Subject: FW: [External] NC Coastal Federation comments on permanent wetland rules
Attachments: NC Coasta Federation-RRC-Permanent wetland rules.pdf; PastedGraphic-1.tiff

From: Ana Zivanovic-Nenadovic <anaz@nccoast.org>
Sent: Wednesday, March 9, 2022 10:43 AM
To: rrc.comments <rrc.comments@oah.nc.gov>
Cc: Everett, Jennifer <jennifer.everett@ncdenr.gov>
Subject: [External] NC Coastal Federation comments on permanent wetland rules

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Good morning,

On behalf of the North Carolina Coastal Federation please find attached comments supporting the proposed permanent wetland rules.

Thank you for taking our comments under consideration.

Best regards,
Ana

Ana Zivanovic-Nenadovic
Assistant Director of Policy
3609 N.C. 24 (Ocean)
Newport, NC 28570

anaz@nccoast.org



March 9, 2022

North Carolina Rules Review Commission
Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609

**Re: Letter Supporting Proposed Permanent Wetland Rules: 15A N.C. Admin. Code 02H
.1301 (Revision) and 15A N.C. Admin. Code .1400 (.1401 through .1405)**

Dear Commissioners and Commission Staff:

The North Carolina Coastal Federation submits these comments in strong support of the proposed permanent wetlands rules proposed by the N.C. Environmental Management Commission.

The federation is a non-profit organization dedicated to protecting and restoring the North Carolina coast. Our organization represents 16,000 supporters statewide and works with the public, agencies and local governments to communicate and collaborate wherever possible towards solutions that lead to the stewardship and resiliency of our coast. Since 1982, the federation has been working with coastal communities and other partners to improve and protect coastal water quality and natural habitats, which are intricately tied to our coastal economy. By focusing primarily, but not exclusively on natural and productive estuarine shorelines, oyster and marsh restoration, coastal management and cleaning the estuaries of marine debris, we strive to support and enhance the coastal natural environment.

Wetlands are the kidneys of the coast

At over 5.7 million acres, 17% of North Carolina's total landmass is comprised of wetlands. Of these wetlands, 95% are located in the coastal plain. In eastern North Carolina, wetlands are the kidneys of our coastal communities. They are crucial regulators of freshwater, nutrient, and sediment inputs to the estuaries. They improve water quality and provide critical habitat to a multitude of plants and animals and their protection is of the utmost importance.

Without wetlands there is no seafood. About 90% of the State's commercial fish harvest is derived from estuary-dependent species. Tidal and nontidal creeks surrounded by wetlands and vast beds of submersed aquatic vegetation function as nursery areas for larval and juvenile fish and provide critical finfish and shellfish habitats for adults.

The rapidly growing shellfish aquaculture industry strongly depends on coastal water quality which in part is protected by wetlands and their ability to filter out pollutants and sediments carried in stormwater. If wetlands continue to be degraded, the industry will not be able to reach its full potential and its objective of growing to \$33 million in dockside value by the year 2030, a goal strongly supported by the state.

Coastal wetlands have already experienced significant degradation through conversion to farmland, development and climate change. Aerial imagery collected by NOAA's Coastal Change Analysis Program shows that impacts from climate change have resulted in the loss of nearly 135,000 acres of nontidal, freshwater wetlands within the coastal plain.

The State has an obligation to protect wetlands

North Carolina's constitution establishes that: "It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry".^{1,2}

Before the federal government's change of the definition of the Waters of the United States (WOTUS) that significantly narrowed down the jurisdictional waters under the Clean Water Act, most of the state's wetlands were regulated under the federal law through the state's 401 certification. However, a large portion of state's wetlands has been left with no federal protection after the change in the definition of the WOTUS, leaving a permitting gap between the federal and state laws.³

The federation believes that requiring permits for any disturbance of wetlands exceeding 1/10 acre is appropriate and consistent with the 401-certification process. This permit threshold will allow the Division to properly review proposed projects and assess their impacts on wetlands and downstream water quality, and determine if there is a need for appropriate mitigation.

Developing strong permanent wetland protection rules is consistent with State's other efforts

Realizing the importance of the value of wetlands and their ability to mitigate storm hazards (i.e. flood reduction) our state has worked diligently on protecting and restoring wetlands. In particular:

- Governor Cooper has recently signed into law the state budget that includes more than \$290 million - including wetland protection and restoration- to protect against increased flooding and extreme weather.
- The State recently updated the State's Wetlands Protection Plan that was a result of a year-long multi stakeholder effort. The plan set key goals through 2025 among which is

¹ NC Constitution, Article XIV, Section 5

² "Waters" means any stream, river, brook, swamp, lake, sound, tidal estuary, bay, creek, reservoir, waterway, or other body or accumulation of water, whether surface or underground, public or private, or natural or artificial, that is contained in, flows through, or borders upon any portion of this State, including any portion of the Atlantic Ocean over which the State has jurisdiction. G.S. 143-212(6)

³ Some estimates show that around 900,000 acres just in the Cape Fear and Neuse River basins alone would be left without protection.

to work with NC's citizens to manage and restore the state's wetland resources; and promote statewide voluntary wetland restoration and protection.⁴

- The Commission recently approved the amendment to the Coastal Habitat Protection Plan that calls for greater protection of wetlands to protect and restore water quality in order to maintain productive marine fisheries habitats such as submerged aquatic vegetation.

Conclusion

Our state's wetlands are rapidly declining and efforts are made across the board to protect and restore them. The Commission should seize this opportunity, and promulgate these proposed rules to safeguard these invaluable wetland resources.

Thank you for taking our comments under consideration.

With best regards,

A handwritten signature in black ink, appearing to read 'Ana Zivanovic-Nenadovic'.

Ana Zivanovic-Nenadovic
Assistant Director of Policy

⁴ North Carolina Wetland Program Plan <https://www.ncwetlands.org/wpp/>

Burgos, Alexander N

Subject: FW: [External] Support Letter for Permanent Wetlands Rules
Attachments: Support Letter for Permanent Wetland Rules.pdf

From: Debra Thompson <Debra.Thompson@ci.kinston.nc.us>
Sent: Tuesday, March 8, 2022 5:01 PM
To: Everett, Jennifer <jennifer.everett@ncdenr.gov>; rrc.comments <rrc.comments@oah.nc.gov>
Cc: Mayor Hardy <Mayor.Hardy@ci.kinston.nc.us>
Subject: [External] Support Letter for Permanent Wetlands Rules

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Please see attached.

Debra Thompson, CMC, NCCMC

City Clerk

debra.thompson@ci.kinston.nc.us

207 E. King Street

PO Box 339

Kinston, NC 28502



<https://www.facebook.com/KinstonCityHall/>



Pursuant to North Carolina General Statutes Chapter 132, Public Records, this electronic mail message and any attachments hereto, as well as any electronic mail message(s) that may be sent in response to it may be considered public record and as such are subject to request and review.

CITY OF KINSTON

Office of the Mayor



March 8, 2022

North Carolina Rules Review Commission
Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609

Re: Letter of Support for Permanent Wetland Rules: 15A N.C. Admin. Code 02H .1301 (Revision) and 15A N.C. Admin. Code .1400 (.1401 through .1405)

Dear Commissioners and Commission Staff:

I am writing in support of the Environmental Management Commission's proposed permanent rules, 15A N.C. Admin. Code 2H .1301 and 15A N.C. Admin. Code .1400 (.1401 through .1405). As Mayor of the City of Kinston, North Carolina, I recognize the need for a state permitting system to authorize impacts to wetlands and to provide an efficient review of projects that will also protect communities like Kinston.

Given the size and frequency of flooding events and storms we have experienced over the last several years, wetlands are increasingly important to Kinston. They guard against flooding by absorbing flood waters that would otherwise cause more damage to homes, businesses, and the community. In October 2016, Hurricane Matthew caused over \$1.5 billion in damage in eastern North Carolina and caused the worst flooding we have ever seen in the City of Kinston. The relatively flat terrain of eastern North Carolina slowed the fast-moving waters coming from higher elevations, causing a significant increase in both the depth and breadth of the Neuse River. Homes were destroyed, business was interrupted, many lives were upended, and almost 30 were lost.

Although Hurricane Matthew's impact on the City of Kinston was extreme, it is not unique. It was the third major flood in the past 21 years, and one of countless smaller flooding events. In April 2017, the City of Kinston experienced the fourth highest crest for the Neuse River after merely a couple of days of rainfall. In February 2021, floodwaters covered our city for days after a heavy rainfall.

The City of Kinston recognizes the danger of flooding and has taken many steps to protect our citizens and their property. Restoring North Carolina's streams and wetlands is the best natural guard against flooding and one of many tools in the flood management toolbox. It has been shown to be an effective method to help contain and mitigate flood intensity for surrounding communities. These kinds of preventative measures are essential to the citizens of Kinston. They are consistent with the state's budget which provides historic investments for flood resilience – including to enhance the natural capacity of wetlands to reduce and manage flood water.

The wetlands protected by the Permanent Wetlands Rules have long been protected under state law. The Rules will both provide for the thoughtful oversight of wetland impacts and allow development to proceed responsibly. We support these rules.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in blue ink, appearing to read "D. Hardy", followed by a large, stylized flourish.

Mayor D. Hardy, City of Kinston, NC

North Carolina Mayor's Association Chairman
North Carolina League of Municipalities Board of Directors
North Carolina Governor's Crime Commission
National League of Cities-Small Cities Council Chairman
National League of Cities Board of Directors
US Conference of Mayors Business Council Member

Burgos, Alexander N

Subject: FW: [External] Permanent Wetlands Rule
Attachments: Permanent Wetlands Rule Support Letter Jennings.pdf

From: rrc.comments <rrc.comments@oah.nc.gov>
Sent: Monday, March 7, 2022 2:54 PM
To: Liebman, Brian R <brian.liebman@oah.nc.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: FW: [External] Permanent Wetlands Rule

From: Greg Jennings <greg@jenningsenv.com>
Sent: Monday, March 7, 2022 6:34 AM
To: rrc.comments <rrc.comments@oah.nc.gov>; Everett, Jennifer <jennifer.everett@ncdenr.gov>
Subject: [External] Permanent Wetlands Rule

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RRC:

Please find attached my letter regarding the Permanent Wetlands Rule.

Thank you,

Greg Jennings, PhD, PE
Jennings Environmental PLLC
7 Samuel Ashe Dr, Asheville, NC 28805
greg@jenningsenv.com

Email correspondence to and from this address may be subject to the North Carolina Public Records Law and may be disclosed to third parties by an authorized state official.

March 6, 2022

North Carolina Rules Review Commission
Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609

Re: Letter of Support for Permanent Wetland Rules: 15A N.C. Admin. Code 02H .1301 (Revision) and 15A N.C. Admin. Code .1400 (.1401 through .1405)

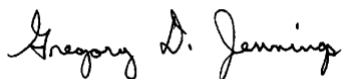
Dear Commissioners and Commission Staff:

I am submitting these comments in support of the NC Environmental Management Commission's proposed permanent rules that revise 15A N.C. Admin. Code 2H .1301 and 15A N.C. Admin. Code .1400 (.1401 through .1405). My company, Jennings Environmental PLLC, is a licensed engineering consulting firm based in Asheville, NC. We support wetlands protection and believe the permanent rules are necessary for continuity in the state's wetland permitting program.

I am a former member of the NC Environmental Management Commission (2002-2005) and a retired Professor of Biological and Agricultural Engineering at NC State University. My career has been dedicated to education, research, restoration, and protection of water resources. As an expert in wetland and stream protection, I recognize the significant change that took place with the U.S. EPA and Army Corps of Engineers' 2020 Navigable Waters Protection Rule (NWPR). The change in federal jurisdiction meant that many wetlands that were once covered by federal and state protections are now only covered by state protections. The state's 401 certification process is the primary tool for DEQ to evaluate and authorize wetland impacts. That process is triggered by a federal permit, so without federal jurisdiction, the state has no permitting process for wetlands that have been regulated by the EMC for decades. Although the NWPR has been vacated by two federal courts, the fluctuation in federal jurisdiction has demonstrated the need for a stand-alone state permitting program that regulates waters of the State that have been permitted under the 401-certification program for decades.

Protecting wetlands is important for our streams and rivers. The permanent rules strike a balance between providing protection for wetlands that have always been regulated by the EMC pursuant to its legislative authority and a permitting process that allows unavoidable impacts to proceed and provides for mitigation of those impacts. I strongly encourage you to approve the permanent wetland rules to provide continuity in the state program. Thank you for considering my comments.

Respectfully submitted,



Gregory D. Jennings, Ph.D., P.E., President
Jennings Environmental PLLC