

REQUEST FOR TECHNICAL CHANGE

AGENCY: Environmental Management Commission

RULE CITATION: All Rules – Submission for Permanent Rule Forms

DEADLINE FOR RECEIPT: Friday, March 11, 2022

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

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

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

In each of your Forms, in Box 6, you do not list a date for agency adoption. Please specify when the agency adopted these permanent rules.

In each of your Forms, in box 9A, you check the box indicating that the agency prompted the action, and do not check the "Federal regulation" box. Nevertheless, you include a cite to "33 CFR Part 328 and" after "Federal regulation". Please clarify.

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

G.S. 150B-19.3 states that EMC, among other agencies, "may not adopt a rule for the protection of the environment or natural resources that imposes a more restrictive standard, limitation, or requirement than those imposed by federal law or rule, if a federal law or rule pertaining to the same subject matter has been adopted." Please address whether 150B-19.3 applies to these Rules, and if so, whether one of the five exemptions in 150B-19.3(a) apply.

Where is the statutory authority for "Certificates of Coverage"? I see the term twice in the entirety of Ch. 143, in connection with fees, but nowhere else.

Brian Liebman
Commission Counsel
Date submitted to agency: February 28, 2022

REQUEST FOR TECHNICAL CHANGE

AGENCY: Environmental Management Commission

RULE CITATION: 15A NCAC 02H .1301

DEADLINE FOR RECEIPT: Friday, March 11, 2022

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

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

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

Throughout the Rule, I don't see a definition for the key term "isolated." I understand the common meaning of the term, but these are highly technical rules, and I assume "isolated" has a more nuanced meaning than the dictionary definition. Is this defined elsewhere?

Generally to this Rule, where is your statutory authority to delegate these tasks from EMC to the Division and then to the Director of the Division?

In (b), line 10, clarify that "15A NCAC 02B .0300" refers to Section .0300, as there is no Rule .0300.

In (b), lines 22-25, the documents/manuals used by the Division (USACE Wetland Delineation Manual, "subsequent regional supplements," and "Methodology for Identification of Intermittent and Perennial Streams and Their Origins") to confirm the extent of wetlands/surface waters should be incorporated by reference, pursuant to G.S. 150B-21.6.

Further, in (b), lines 22-25, is the Division publication "Methodology..." in a rule elsewhere, or is it exempt from rulemaking pursuant to G.S. 150B-2(8a)(h)?

In (c)(2), lines 31-32, you say the Division "may develop general permits" which will be issued by the Director. This Rule and others throughout Section .1300 reference general permits. Do they not yet exist?

In (c)(2), lines 31-33, what do the terms "similar in nature" and "minimal impact" mean? Who determines whether an activity is so defined?

In (c)(2), line 35, when would written approval be required?

In (c)(2), p.2, lines 1-4, I have several questions:

In lines 1-2, please define “the public’s best interest”, and clarify who “deems” whether a project would be so classified? What circumstances or factors would the Director use to make this determination?

In lines 2-3, please define “significant adverse effect”. What circumstances or factors would the Director use to make this determination?

On line 4, please define “degrade” and “precluded” and describe what circumstances or factors the Director would use to determine whether the waters would be degraded or that use of the waters was precluded.

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

In (e)(2)(A), is an “isolated man-made wetland” different than an “isolated wetland” as defined in (f)(6)?

Similarly, is a “man-made isolated pond” any different than an “isolated water” as defined in (f)(7)?

In (f)(3), p.3, line 4, and in (f)(9), line 30, what does “reasonably foreseeable” mean? Please define “reasonably” in particular. Also, foreseeable to whom?

In (f)(6), lines 9-17, is the definition of “Isolated Wetland” consistent with the statutory definition provided in Section 4.18(a) of SL 2015-286? I see the carveout in (e)(4), but shouldn’t the definition itself be consistent with the statutory term?

In (f)(6)(B), line 13, and (f)(7)(B), line 22, what is a “significant nexus”?

There is no document titled “Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States” at the URL specified in (f)(6)(B) and (f)(7)(B). Please correct the URL, or correct the title of the document.

With respect to the “Clean Water Act Jurisdiction...” document referenced in (f)(6)(B) and (f)(7)(B), if this document controls the evaluation conducted by the Division, it should be incorporated by reference here, pursuant to G.S. 150B-21.6.

In (f)(10), line 31, the term defined in 15A NCAC 02B .0202 is “wetlands”. Please correct here.

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

1 15A NCAC 02H .1301 is amended as published in 36:07 NCR 443-450 as follows:

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

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

9 (b) This Section outlines the application and review procedures for permitting of discharges into isolated wetlands
10 and isolated classified surface waters that have been listed in 15A NCAC 02B .0300. If the U.S. Army Corps of
11 Engineers (USACE) or its designee determines that a particular stream or open water is not regulated under Section
12 404 of the Clean Water Act, and the stream or open water meets the definition of an isolated water in Paragraph (f) of
13 this Rule, then discharges to that stream or open water ~~or wetland~~ shall be covered by this Section. If the ~~U.S. Army~~
14 ~~Corps of Engineers~~ USACE or its designee determines that a particular wetland is not regulated under Section 404 of
15 the Clean Water ~~Act~~ Act, that wetland meets the definition of an isolated wetland in Paragraph (f) of this Rule, and
16 that isolated wetland is a Basin Wetland or Bog as described in the North Carolina Wetland Assessment User Manual
17 prepared by the North Carolina Wetland Functional Assessment Team, version 4.1 October 2010 (available online at:
18 <https://deq.nc.gov/about/divisions/water-resources/water-quality-permitting/401-buffer-permitting-branch/401->
19 ~~isolated~~[https://deq.nc.gov/about/divisions/water-resources/water-resources-data/water-quality-program-](https://deq.nc.gov/about/divisions/water-resources/water-resources-data/water-quality-program-development/newam-manual)
20 ~~development/newam-manual~~), then discharges to that wetland shall be covered by this Section. Where the USACE
21 has not confirmed the extent and/or location of the wetlands or surface waters, the ~~The~~ Division shall ~~verify~~ confirm
22 the determination, extent, extent and location of isolated wetlands and isolated classified streams using the U.S. Army
23 Corps of Engineers Wetland Delineation Manual (Technical Report Y-87-1) and subsequent regional supplements
24 and the Division publication, Methodology for Identification of Intermittent and Perennial Streams and Their Origins
25 (v.4.11, 2010).

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

28 (1) Individual permits shall be issued on a case-by-case basis using the procedures outlined in this
29 Section. These ~~Individual~~ individual permits do not require approval by the U.S. Environmental
30 Protection Agency.

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

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

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

(e) The following are exempt from this Section:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REQUEST FOR TECHNICAL CHANGE

AGENCY: Environmental Management Commission

RULE CITATION: All Section .1400 Rules

DEADLINE FOR RECEIPT: Friday, March 11, 2022

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

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

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

*In the header of each of these Rules, you say they were “**adopted** as published... **with changes**”. As these are adoptions, all text not subject to post-publication deletion should be underlined. Any text deleted post-publication should be bracketed and struck through, and all post-publication changes (additions and deletions) should be highlighted. Please reformat appropriately.*

Throughout Section .1400, one of the main changes appears to be to change “discharge” to “impact.” Discharge was a defined term. Is the term “impact” defined anywhere in your Rules or in a statute?

Moreover, it appears from the version of the Rules published in the Register that the change from “discharge” to “impact” was made post-publication. Was this in response to public comment? Is this change a substantial change as defined by G.S. 150B-21.2(g)?

Generally across these Rules, where is your statutory authority to delegate these tasks from EMC to the Division and then to the Director of the Division?

REQUEST FOR TECHNICAL CHANGE

AGENCY: Environmental Management Commission

RULE CITATION: 15A NCAC 02H .1401

DEADLINE FOR RECEIPT: Friday, March 11, 2022

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

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

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

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

In (a), lines 15-16, please clarify that “15A NCAC 02B .0300” refers to Section .0300, as there is no Rule .0300.

In (a), lines 20-22, please incorporate the Army Corp of Engineers manual by reference using G.S. 150B-21.6 if it is not already incorporated elsewhere in these Rules.

In (a), lines 26-27, what Division publication is this? Is it in a rule elsewhere, or is it exempt from rulemaking pursuant to G.S. 150B-2(8a)(h)?

In (c)(2), line 37, you say the Division “may develop general permits” which will be issued by the Director. This Rule and others throughout Section .1400 reference general permits. Do they not yet exist?

In (c)(2), p.1 line 38 through p.2 line 1, what do the terms “similar in nature” and “minimal impact” mean? Who determines whether an activity is so defined?

Does “impact” as used in (c)(2), p.2 line 1 mean the same as the term is used elsewhere in this Section?

In (c)(2), p.2, lines 6-10, I have several questions:

In lines 7-8, please define “the public’s best interest”, and clarify who “deems” whether a project would be so classified? What circumstances or factors would the Director use to make this determination?

In line 8, please define “significant adverse effect”. What circumstances or factors would the Director use to make this determination?

Brian Liebman
Commission Counsel

Date submitted to agency: February 28, 2022

On lines 9-10, please define “degrade” and “precluded” and describe what circumstances or factors the Director would use to determine whether the waters would be degraded or that use of the waters was precluded.

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

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

In (e)(2)(A), is an “isolated man-made wetland” different than an “isolated wetland” as defined in .1301(f)(6)?

Similarly, is a “man-made isolated pond” any different than an “isolated water” as defined in .1301(f)(7)?

Please specify which “terms used in this section” are defined in G.S. 143-212, 143-213, and Rule .1301.

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

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

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

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

7 (a) The provisions of this Section shall apply to Division of Water Resources (Division) regulatory and resource
8 management determinations regarding federally non-jurisdictional wetlands and federally non-jurisdictional classified
9 surface waters. ~~For the purpose of this Section, "discharge" shall be the deposition of dredged or fill material (e.g. fill,~~
10 ~~earth, construction debris, soil.)~~ Isolated wetlands and isolated waters as defined in Rule .1301 of this Subchapter shall
11 be regulated pursuant to Section .1300 of this Subchapter. Federally jurisdictional wetlands and federally
12 jurisdictional classified waters that the U.S. Army Corps of Engineers (USACE) or its designee has determined to be
13 subject to Section 404 of the Clean Water Act shall be regulated pursuant to Section .0500 of this Subchapter.

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

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

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

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

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

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

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

27 (f) The terms used in this Section shall be as defined in G.S. 143-212, G.S. 143-213, and Rule .1301 of this Subchapter.
28

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

REQUEST FOR TECHNICAL CHANGE

AGENCY: Environmental Management Commission

RULE CITATION: 15A NCAC 02H .1402

DEADLINE FOR RECEIPT: Friday, March 11, 2022

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

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

In (a), line 7, is the 512 N. Salisbury Street address a functioning mailing address, or just the street address for in-person filing? Please clarify, as I think we all know from experience mail directed to the street address tends to get lost or take excessive amounts of time to be redirected.

In (a), line 8, what is "complete" here? With all required items in this Paragraph completed? Why is this term used for electronic applications but not for mail or in-person applications?

In (a), line 10, what do you mean by "approved" by the Division? Someone can create their own form?

In (a), line 12, generally terms like, "at a minimum" are not favored in rules as rules set the minimum requirements. Do you need to retain it here? Why?

In (a)(4), how will the applicant be able to determine this?

Also in (a)(4), lines 21-22, please consider removing the parentheses and incorporating this information into the body of the Rule.

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

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

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

Also in (d), lines 16-17, how will it be determined whether "such assistance as shall be reasonable" has been provided by the applicant?

In (d), line 17, remove the comma following "credentials".

In (d), line 17, to whom must the Division submit notice?

Brian Liebman
Commission Counsel

Date submitted to agency: February 28, 2022

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

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

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

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

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

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

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

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

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

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

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

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

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

REQUEST FOR TECHNICAL CHANGE

AGENCY: Environmental Management Commission

RULE CITATION: 15A NCAC 02H .1403

DEADLINE FOR RECEIPT: Friday, March 11, 2022

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

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

Does G.S. 143-215.1(c) apply to the procedures laid out here? If so, there are several inconsistencies between the statute and this Rule. For instance, 215.1(c)(1) requires applicants to submit applications at least 180 days in advance of their proposed start dates/expiration of existing permits. Additionally, 215.1(c)(2)(a1) states that notice "shall be given at least 45 days prior to any proposed final action granting or denying the permit." Here, the notice timeframe is "30 calendar days prior to the issuance of the general permit" or "30 calendar days prior prior t the proposed final action by the Division" for individual permits. There are other timeframes specified throughout 215.1(c) that I don't see acknowledged here.

In (a), line 4, the Rule states that the Division shall provide notice for "proposed general permits", but the Rule provides no further specifics, as it does for individual permits, as to who notice should go to, what information should be contained in the notice, etc.

In (a), lines 7-8, you state that notice is not required for activities covered by Certificates of Coverage under a general permit. Please explain the distinction between Certificates of Coverage and general permits.

In (c), line 12, please remove the "s" from "permits".

Is there a reason that the first sentence on line 17 is not just added as item (5) in the list above it?

Moreover, what does "additional information" on line 17 refer to?

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

- (d) The public notice... by a joint notice with:*
 - (1) the Division of Coastal Management...;*
 - (2) the US Army Corp of Engineers...*

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

Brian Liebman
Commission Counsel

Date submitted to agency: February 28, 2022

Moreover, with respect to the US Army Corps of Engineers, what are their “established procedures” and where can your regulated public find them? I think these should be incorporated by reference pursuant to G.S. 150B-21.6.

In (e), line 27, bear in mind that in Rule .1402, you list both the MSC address and the N. Salisbury St. address. I asked for clarification as to which was the mailing address there, and I think clarification is also warranted here. This extends to whether the written notice contemplated here may be hand delivered to the street address.

In (e), line 28, what happens if the notice is not received within 30 days?

In (f), line 29, G.S. 143-215.1 requires the Commission to make the determination of whether the hearing should be held. Has this been delegated to the Director pursuant to G.S. 143-215.3(a)(4)?

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

In (f), line 30-31, what is a “significant adverse effect”?

In (f), lines 31-32, please define “degrade” and “precluded” and describe what circumstances or factors the Director would use to determine whether the waters would be degraded or that use of the waters was precluded.

In (h), p.2, line 6, what does “coordinated” mean?

In the History Note, why are you citing to G.S. 143-215.3(a)(1e)?

In the History Note, should there be a cite to 143-215.1(c)?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REQUEST FOR TECHNICAL CHANGE

AGENCY: Environmental Management Commission

RULE CITATION: 15A NCAC 02H .1404

DEADLINE FOR RECEIPT: Friday, March 11, 2022

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

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

In (a), (b), and (c), the process of approving/denying/attaching conditions to a permit is given to the Director. Where is your statutory authority delegating these duties from the Commission to the Director?

In the list under (a), please place the first letter of each item in lowercase.

In (a)(4), line 15, what does this mean? How will this be determined?

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

And I assume the modification/revocation provisions in (d)(1) and (2) are a reference to G.S. 143-215.1(b)(4)(c)?

In (d)(1), lines 24-25, when "may" the Director choose not to modify or revoke a permit or certificate when violations occur?

Similarly, in (d)(2), lines 27-30, when "may" the Director choose not to modify or revoke a permit or certificate when the determinations/findings mentioned in the rule are made?

In (f), line 33, where is your statutory authority to limit Certificates of Coverage to 5 years?

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

In (g), is there a reason that general permits are not included here?

In (h), why are extensions directed to the Division, but the original permits/certificates directed to the Director?

In (i), p.2, line 4, do you mean "The issuance or denial of a permit or certificate is a final agency decision..."

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

Brian Liebman
Commission Counsel

Date submitted to agency: February 28, 2022

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

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

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

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

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

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

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

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

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

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

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

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

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

6
7 *History Note: Authority G.S. 143-215.1(a)(6); 143-215.1(b); 143-215.3(a)(1); 143-215.3(c);*
8 *Temporary Adoption Eff. May 28, 2021;*
9 *Eff. April 1, 2022.*

REQUEST FOR TECHNICAL CHANGE

AGENCY: Environmental Management Commission

RULE CITATION: 15A NCAC 02H .1405

DEADLINE FOR RECEIPT: Friday, March 11, 2022

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

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

In (a)(1), line 6, please remove the parentheses and include the text in the body of the Rule.

In (a)(3), line 14, what does it mean to be "adjacent" to a water so designated?

Was (a)(3) added post-publication? Is this a "substantial change" as defined by G.S. 150-B-21.2(g)?

In (a)(4)(A), line 21, do you need "at a minimum" here? Why?

In (a)(4)(A), line 24, who is the local delegated program? Will your regulated public know?

In (a)(4)(A), lines 25-26, can you clarify what kinds of "practices" the entity conducting the project should maintain to assure compliance with the turbidity and water quality standards.

Moreover, what are the "appropriate" turbidity standards? What "other" water quality standards must the entity conducting the project comply with?

In (a)(4)(C), line 31, is "waters of the State" the same as defined at 143-212(6)?

In (a)(4)(D), line 32, what does it mean to be "adjacent" to a federally non-jurisdictional intermittent or perennial stream?

In (a)(4)(E), line 35, can you be more specific as to what "measures" the entity conducting the project shall take that will comply with this provision?

In (a)(4)(E), line 37, what does "adversely affected" mean?

In (b), p.2, lines 3-4, please clarify that the references to 15A NCAC 02B .0200 and 02L .0100 and .0200 are to these respective Sections.

In (b)(1), line 8, delete "that" between "designs" and "the".

In (b)(1), lines 8-9, what does “practically accomplished in an economically viable manner” mean? Who determines this? Based upon what?

In (b)(5), line 19, there is a line to the left of the line numbers that looks like the indication of tracked changes. Please confirm the language here is correct and consistent with what was published in the Register.

In (c), where is your statutory authority for these provisions on mitigation? I see in your History Note a reference to 143-214.7C, which accounts for (c)(2) and (3), and a reference in (c)(5) to 143-214.11—which is not in the History Note—but otherwise I am unsure what the statutory authority is for the other portions of (c).

In (c), line 22, you refer to “replacement by mitigation of unavailable losses of existing uses...” What does this mean? I don’t see “replacement” mentioned in (c)(6) or in 143-214.11.

In (c)(4), p.3, line 3, what is the “Interagency Review Team”?

In (c)(6) and (7), I see reference to 33 CFR Part 332. Is it correct to state that you’re applying these provisions of federal law to waters which are not under federal jurisdiction? If so, does this violate G.S. 150B-19.3(a)?

To the extent that it does not, please properly incorporate these provisions by reference in accordance with 150B-21.6.

In (c)(6), p.3, lines 10-11, will the Director be determining this through rulemaking? How will this occur?

In (c)(6), line 12, what does “the public good” mean in this context?

In (c)(7), line 16-17, under what circumstances will the Director approve or disapprove departures from the federal regulation?

Was (c)(8) added post-publication? Is this a “substantial change” as defined by G.S. 150-B-21.2(g)?

In (c)(9), how will the Director determine this?

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

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

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

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

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

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

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

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

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

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

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