

RRC STAFF OPINION

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

AGENCY: Environmental Management Commission

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

RECOMMENDED ACTION:

- Approve, but note staff's comment
- X Object, based on:
 - X Lack of statutory authority (All Rules)
 - X Unclear or ambiguous (.1400-.1405)
Unnecessary
 - X Failure to comply with the APA (.1400-.1405)
- Extend the period of review

COMMENT:

EMC has submitted permanent rules to replace temporary rules in Section .1300 and .1400 which were approved by RRC in September 2021. Generally speaking, the rules of Section .1300 establish the permitting process for isolated waters and wetlands, while the rules of Section .1400 establish a permitting process for all wetlands and surface waters that are outside federal jurisdiction.

The rules before you seek to 1) define isolated wetlands and isolated waters and 2) establish a permitting process for federally non-jurisdictional wetlands and surface waters, including isolated waters and wetlands. Rule .1301 has been amended principally to define "Isolated Wetlands" and "Isolated Waters." By adding these definitions, isolated wetlands and waters come under the permitting process specified elsewhere in Section 1300 (these rules are not before you). As stated above, Rules .1401-.1405 establish a permitting process for all

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Commission Counsel
Issued May 17, 2022

wetlands and surface waters, including isolated waters and wetlands, which are outside federal jurisdiction.

These rules were originally adopted as temporary rules, which RRC approved in May 2021. The impetus for their adoption was, and remains, changes to the federal definition of “Waters of the United States.” The federal government implemented the “Navigable Waters Protection Rule” (NWPR) on June 22, 2020, which relinquished federal jurisdiction over isolated wetlands and waters. As a result, such waters were no longer eligible for permitting under the Clean Water Act. Thus, the agency acted to create a replacement permitting mechanism. However, on August 30, 2021, a federal court vacated the NWPR. Both the EPA and the United States Army Corps of Engineers have stated that due to the court’s decision, they are no longer enforcing NWPR and have returned to the previous regulatory scheme, which reinstates federal jurisdiction and permitting over the waters at issue. The agency represents that there are approximately 300 wetlands within the state that were subject to federal Approved Jurisdictional Determinations while the NWPR was in force, and thus remain outside federal jurisdiction and permitting for up to the next five years.

Pursuant to G.S. 150B-19.3(a):

An agency authorized to implement and enforce State and federal environmental laws [which includes EMC] 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, unless adoption of the rule is required by one of the subdivisions of this subsection.

For those waters which have been returned to federal jurisdiction, staff believes that the implementation of a state permitting process on top of a federal permitting process creates a more restrictive standard, limitation, or requirement than that imposed by federal law or rule, as potential permittees will be required to comply with additional set of requirements to obtain and maintain a permit.

On the other hand, where the federal government has explicitly determined that it does not have jurisdiction over isolated waters and wetlands, staff believes that to impose a state permitting process also creates a more restrictive standard, limitation, or requirement, as the State seeks to implement a permitting process which the federal government has decided not to impose.

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Staff notes that G.S. 150B-19.3 is part of the APA. However, because Section 19.3 is Part 1 of Article 2A of the APA, RRC may not object on the basis that these Rules were not adopted in accordance with G.S. 150B-21.9(a)(4). Rather, staff believes that G.S. 150B-19.3 creates a specific statutory command applicable to EMC which specifically strips them of statutory authority in this context to adopt Rules .1301 and .1401-.1405.

Further, with respect only to the Section .1400 rules, following publication in the Register, the agency broadened the scope of activities regulated by these Rules by changing the term “discharge” to “impact” in Rule .1401. “Discharge” had previously been defined as “the deposition of dredged or fill material (e.g., fill, earth, construction debris, soil).” The new term, “impact” includes the former definition but also captures “any other activity (e.g. ditching, draining, flooding) that may cause or contribute to a violation of wetland standards.”

In addition to the concerns stated above with respect to G.S. 150B-19.3, staff also believes that the definition of “impact” is impermissibly ambiguous, as it provides no certainty as to what specific acts require the regulated public to seek a permit or certificate of coverage. Although the agency states in its response to staff that the term is “well understood by the regulated public” and is widely used throughout other State and federal wetland permitting programs, staff notes that the definition is tied not to an activity (i.e. dredging) but to a *possible* outcome (“may cause or contribute to a violation of wetland standards”).

Finally, staff believes that the post-publication change from “discharge” to “impact” constitutes a substantial change under G.S. 150B-21.2(g). Staff acknowledges that the change was made pursuant to public comment. Nonetheless, given that this change broadens the scope of activities regulated under Section .1400 from a single activity (depositing material into a wetland) to “any” activity that “may cause or contribute” to a violation of wetlands standards, staff believes that the change “produces an effect that could not have reasonably been expected based on the proposed text” of the Rule.

Because Rule .1401 contains definitions which control for the permitting process described in the other Section .1400 rules, staff believes an objection to .1401 would involve interconnectivity concerns with Rules .1402-.1405. The agency may be able to speak to this in more detail at the hearing.

1 15A NCAC 02H .1301 is amended as published in 36:07 NCR 443-450 **with changes** 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 **Section** .0300. If the U.S. Army Corps
11 of 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->

20 ~~development/newam-manual~~), then discharges to that **isolated** wetland shall be covered by this Section. Where the

21 USACE has not confirmed the extent and/or location of the wetlands or isolated stream, [surface waters,] the ~~The~~

22 Division shall ~~verify~~ confirm the determination, extent, extent and location of isolated wetlands and isolated classified

23 streams using the U.S. Army Corps of Engineers Wetland Delineation Manual (Technical Report Y-87-1) which is

24 hereby incorporated by reference, including subsequent amendments and editions, and available free of charge at:

25 <https://usace.contentdm.oclc.org/digital/collection/p266001coll1/id/4530>

26 and subsequent appropriate regional supplements which are hereby incorporated by reference, including subsequent

27 amendments and editions and available free of charge at: <https://www.usace.army.mil/Missions/Civil->

28 Works/Regulatory-Program-and-Permits/reg_supp/ and of isolated streams using the Division publication,

29 Methodology for Identification of Intermittent and Perennial Streams and Their Origins (v.4.11, 2010), which is

30 hereby incorporated by reference including subsequent amendments and editions available at free of charge at:

31 <https://deq.nc.gov/water-quality/surface-water-protection/401/policies-guides-manuals/streamid-v-4point11-final->

32 [sept-01-2010/download](https://deq.nc.gov/water-quality/surface-water-protection/401/policies-guides-manuals/streamid-v-4point11-final-sept-01-2010/download).

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

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

1 (2) General permits may be developed by the Division and issued by the Director for types or groups
2 of discharges resulting from activities that are similar in nature and considered to have minimal
3 impact. General permits do not require approval by the U.S. Environmental Protection Agency. All
4 activities that receive a Certificate of Coverage under a general permit from the Division shall be
5 covered under that general permit. When written approval is required in the general permit, the
6 application and review procedures for requesting a Certificate of Coverage under a general permit
7 from the Division for the proposed activity are the same as the procedures outlined in this Section
8 for individual permits. The Director may require an Individual Permit for any project [if it is deemed
9 in the public's best interest or determined that the project is likely to have a significant adverse effect
10 upon water quality, including state or federally listed endangered or threatened aquatic species, or
11 will degrade the waters so that existing uses of the waters or downstream waters are precluded.] for
12 which the Director determines that coverage under a General Permit is insufficient to ensure that
13 the project will comply with State water quality standards, which includes designated uses, numeric
14 criteria, narrative criteria, and the State's antidegradation policy, as defined in 15A NCAC 02B
15 Section.0200 and in 15A NCAC 02L Sections.0100 and .0200.

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

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

- 20 (1) Activities described in 15A NCAC 02B .0230;
- 21 (2) Discharges to the following features if they were constructed for erosion control or stormwater
22 management purposes:
23 (A) isolated man-made ponds, ponds, isolated man-made wetlands;
24 (B) or isolated man-made ditches; ditches constructed for [erosion control or] stormwater
25 management purposes;
- 26 (3) Discharges to any man-made isolated pond;
- 27 (4) Discharges to any isolated wetland not regulated under Section 404 of the Clean Water Act that is
28 not a Basin Wetland or Bog as described in the North Carolina Wetland Assessment User Manual
29 prepared by the North Carolina Wetland Functional Assessment Team, version 4.1 October 2010
30 (available online at: [https://deq.nc.gov/about/divisions/water-resources/water-resources-](https://deq.nc.gov/about/divisions/water-resources/water-resources-data/water-quality-program-development/ncwam-manual)
31 [data/water-quality-program-development/ncwam-manual](https://deq.nc.gov/about/divisions/water-resources/water-resources-data/water-quality-program-development/ncwam-manual));
- 32 (5) Discharges to isolated ephemeral streams as defined by 15A NCAC 02B .0610;
- 33 ~~(5)~~(6) Discharges of treated effluent into isolated wetlands and isolated classified surface waters resulting
34 from activities that receive NPDES Permits or State Non-Discharge Permits;
- 35 ~~(6)~~(7) Discharges for water dependent structures as defined in 15A NCAC 02B .0202; and
- 36 ~~(7)~~(8) A discharge resulting from an activity if:

- 1 (A) The discharge resulting from the activity requires a 401 Certification and 404 Permit and
2 these were issued prior to October 22, 2001;
- 3 (B) The project requires a State permit, such as landfills, NPDES discharges of treated effluent,
4 Non-Discharge Permits, land application of residuals and road construction activities, that
5 has begun construction or are under contract to begin construction and have received all
6 required State permits prior to October 22, 2001;
- 7 (C) The project is being conducted by the N.C. Department of Transportation and they have
8 completed 30% of the hydraulic design for the project prior to October 22, 2001; or
- 9 (D) The applicant has been authorized for a discharge into isolated wetlands or isolated waters
10 for a project that has established a Vested Right under North Carolina law prior to October
11 22, 2001.

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

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

21 (6) "Isolated ~~Wetland~~ Wetlands" means:

- 22 (A) a wetland confirmed to be isolated by the USACE; or
23 (B) a wetland that has been determined to be non-jurisdictional by the USACE but has not been
24 confirmed to be isolated as indicated in Part (A) of this Subparagraph, and for which an
25 evaluation confirmed by the Division documents that a significant nexus is not present
26 pursuant to the Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision
27 in *Rapanos v. United States & Carabell v. United States* memorandum dated December 02,
28 2008 which is hereby incorporated by reference, not including subsequent amendments or
29 editions and is available free of charge at: [https://deq.nc.gov/about/divisions/water-
30 resources/water-quality-permitting/401-buffer-permitting/helpful-documents-
31 links#Isolated-NJD](https://deq.nc.gov/about/divisions/water-resources/water-quality-permitting/401-buffer-permitting/helpful-documents-links#Isolated-NJD) [(available online at: [https://deq.nc.gov/about/divisions/water-
32 resources/water-quality-permitting/401-buffer-permitting-branch/401-isolated](https://deq.nc.gov/about/divisions/water-resources/water-quality-permitting/401-buffer-permitting-branch/401-isolated)).]

33 (7) "Isolated Waters" and "Isolated Surface Waters" means:

- 34 (A) a surface water, including but not limited to streams, ditches, ponds, and lakes that is
35 confirmed to be isolated by the USACE; or
36 (B) a surface water that has been determined to be non-jurisdictional by the USACE but has
37 not been confirmed to be isolated as indicated in Part (A) of this Subparagraph, and for

1 which an evaluation confirmed by the Division documents that a significant nexus is not
2 present pursuant to the Clean Water Act Jurisdiction Following the U.S. Supreme Court's
3 Decision in Rapanos v. United States & Carabell v. United States memorandum dated
4 December 02, 2008. [2008 (available online at: [https://deq.nc.gov/about/divisions/water-](https://deq.nc.gov/about/divisions/water-resources/water-quality-permitting/401-buffer-permitting-branch/401-isolated)
5 resources/water-quality-permitting/401-buffer-permitting-branch/401-isolated).]

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

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

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

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12
13 *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.*
14 *54; S.L. 2015-286, s. 4.18;*
15 *Codifier determined that findings did not meet criteria for temporary rule on September 26, 2001*
16 *and October 12, 2001;*
17 *Temporary Adoption Eff. October 22, 2001;*
18 *Eff. April 1, 2003;*
19 *Readopted Eff. June 15, 2020;*
20 *Temporary Amendment Eff. May 28, 2021;*
21 *Amended Eff. June 1, 2022.*

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" "impact" shall be the deposition of dredged or fill material
10 (e.g. fill, earth, construction debris, soil) or any other activity (e.g. ditching, draining, flooding) that may cause
11 or contribute to a violation of wetland standards. Isolated wetlands and isolated waters as defined in Rule .1301 of this
12 Subchapter shall be regulated pursuant to Section .1300 of this Subchapter. Federally jurisdictional wetlands and
13 federally jurisdictional classified waters that the U.S. Army Corps of Engineers (USACE) or its designee has
14 determined to be subject to Section 404 of the Clean Water Act shall be regulated pursuant to Section .0500 of this
15 Subchapter.

16 (b) This Section outlines the application and review procedures for permitting of ~~discharges into~~ impacts to federally
17 non-jurisdictional wetlands and federally non-jurisdictional classified surface waters that have been listed in 15A
18 NCAC 02B Section .0300. If the USACE or its designee determines that a particular stream or open water or wetland
19 is not regulated under Section 404 of the Clean Water Act, and the particular stream or open water or wetland is not
20 an isolated wetland or isolated water as defined in Rule .1301 of this Subchapter, then ~~discharges impacts~~ to that
21 stream or open water or wetland shall be covered by this Section. Where the USACE has not previously confirmed
22 the extent and/or location of the federally non-jurisdictional wetlands, the Division shall confirm the extent and
23 location of federally non-jurisdictional wetlands using the U.S. Army Corps of Engineers Wetland Delineation Manual
24 (Technical Report Y-87-1) which is hereby incorporated by reference, including subsequent amendments and editions
25 and available (available free of ~~charge~~ charge ~~on the internet~~ at:
26 <https://usace.contentdm.oclc.org/digital/collection/p266001coll1/id/4530>
27 <https://usace.contentdm.oclc.org/digital/collection/p266001coll1/id/4532/>) and subsequent appropriate regional
28 supplements which are hereby incorporated by reference, including subsequent amendments and editions and available
29 (available free of charge on the internet at: [https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-](https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/reg_supp/)
30 [https://www.usace.army.mil/Missions/Civil-Works/Regulatory Program and](https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/reg_supp/)
31 [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 and/or location of the federally non-
32 jurisdictional streams, the Division shall confirm the extent and location of federally non-jurisdictional streams using
33 the Division publication, Methodology for Identification of Intermittent and Perennial Streams and Their Origins
34 (v.4.11, 2010), which is hereby incorporated by reference including subsequent amendments and editions available at
35 free of charge at: [https://deq.nc.gov/water-quality/surface-water-protection/401/policies-guides-manuals/streamid-v-](https://deq.nc.gov/water-quality/surface-water-protection/401/policies-guides-manuals/streamid-v-4point11-final-sept-01-2010/download)
36 [4point11-final-sept-01-2010/download](https://deq.nc.gov/water-quality/surface-water-protection/401/policies-guides-manuals/streamid-v-4point11-final-sept-01-2010/download). Any disputes by the applicant or landowner over wetland or stream
37 determinations made by the Division shall be referred to the Director in writing within 60 calendar days of written

1 notification from the Division. The Director's determination shall be subject to review as provided in Article 3 of G.S.
2 150B.

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

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

9 (2) General permits may be developed by the Division and issued by the Director for types or groups
10 of ~~discharges~~ impacts resulting from activities that are similar in nature and considered to have
11 minimal impact. General permits do not require approval by the U.S. Environmental Protection
12 Agency. All activities that receive a Certificate of Coverage under a general permit from the
13 Division shall be covered under that general permit. When written approval is required in the general
14 permit, the application and review procedures for requesting a Certificate of Coverage under a
15 general permit from the Division for the proposed activity are the same as the procedures outlined
16 in this Section for individual permits. The Director may require an ~~Individual Permit~~ individual
17 permit for any project ~~if it is deemed in the public's best interest or determined that the project is~~
18 ~~likely to have a significant adverse effect upon water quality, including state or federally listed~~
19 ~~endangered or threatened aquatic species, or will degrade the waters so that existing uses of the~~
20 ~~waters or downstream waters are precluded, for which the Director determines that coverage under~~
21 ~~a General Permit is insufficient to ensure that the project will comply with State water quality~~
22 ~~standards, which includes designated uses, numeric criteria, narrative criteria, and the State's~~
23 ~~antidegradation policy, as defined in 15A NCAC 02B Section .0200 and 15A NCAC 02L Sections~~
24 ~~.0100 and .0200.~~

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

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

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

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

32 (A) federally non-jurisdictional man-made wetlands, or

33 (B) federally non-jurisdictional man-made ditches;

34 (3) ~~Discharges~~ Impacts to federally non-jurisdictional man-made ponds;

35 (4) ~~Discharges~~ Impacts to federally non-jurisdictional ephemeral streams as defined by 15A NCAC 02B
36 .0610;

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

4 (6) ~~Discharges Impacts~~ for water dependent structures as defined in 15A NCAC 02B .0202.

5 (f) **The Unless as otherwise provided all** terms used in this Section shall be as defined in G.S. 143-212, G.S. 143-213,
6 and Rule .1301 of this Subchapter.

7

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

9 *Temporary Adoption Eff. May 28, 2021;*

10 *Eff. June 1, 2022.*

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 one complete original application with the Director, by mailing
7 it to at 1617 Mail Service Center, Raleigh, North Carolina, 27699-1617, or by hand delivery or express delivery to the
8 Archdale Building at 512 N Salisbury Street, Raleigh, NC 27604, ~~an original and one copy of an application for a~~
9 ~~permit~~ or by submitting ~~submit~~ one complete application electronically via the following website:
10 https://edocs.deq.nc.gov/Forms/DWR_Wetlands_Online_Submittal_Page. The application shall be made on a form
11 provided or approved by the Division, available electronically via the following website:
12 [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)
13 [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:

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

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

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

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

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~~ permit 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 by the Division of Coastal Management, pursuant to 15A NCAC 07J .0206, the U.S. Army
23 Corps of Engineers ~~according to their established procedures,~~ pursuant to their rules and procedures for the
24 implementation of Section 404 of the Clean Water Act, by a joint notice by the Division for an individual certification
25 in accordance with Rule .0503 of this Subchapter, or by a joint notice by the Division for an individual permit in
26 accordance with Rule .1303 of this Subchapter.

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

31 (f) If the Director determines that there is significant public interest in holding a hearing, based upon such factors as
32 the reasons why a hearing was requested, the nature of the project, and whether the project is likely to have a significant
33 adverse effect upon water ~~quality;~~ quality standards which includes designated uses, numeric criteria, narrative criteria,
34 and the State's antidegradation policy, as defined in 15A NCAC 02B Section .0200 and 15A NCAC 02L Sections
35 .0100 and .0200, including state or federally listed endangered or threatened aquatic species, or will degrade the waters
36 so that existing uses of the waters or downstream waters are precluded, the Division shall notify the applicant in
37 writing that there will be a hearing. The Division shall also provide notice of the hearing to all individuals on the
38 mailing list as described in Paragraph (g) of this Rule and shall post the notice on the Division's website. The notice

1 shall be published at least 30 calendar days prior to the date of the hearing. The notice shall state the time, place, and
2 format of the hearing. The notice may be combined with the notice required under Paragraph (c) of this Rule. The
3 hearing shall be held within 90 calendar days following date of notification to the applicant. The record for each
4 hearing held under this Paragraph shall remain open for a period of 30 calendar days after the public hearing to receive
5 public comments.

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

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

11

12 *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);

13 *Temporary Adoption Eff. May 28, 2021;*

14 *Eff. June 1, 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~~ ~~the~~ applicant agrees, in writing, to a longer period;
- 12 (2) ~~The~~ ~~the~~ final decision is to be made pursuant to a public hearing;
- 13 (3) ~~The~~ ~~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~~ ~~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 Director** grant an extension before the permit expires. An
2 extension may be granted by the **Division Director** for a time period of one additional year, provided that the
3 construction has commenced or is under contract to commence before the permit expires.

4 (i) The issuance or denial **of a permit application** is a final agency decision that is subject to administrative review
5 pursuant to G.S. 150B-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. June 1, 2022.*

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)~~ waters, such as lakes and ponds for the
7 entire project are deemed to be permitted provided they comply with the conditions listed in
8 Subparagraph (4) of this Paragraph, and it shall not be necessary for the Division to issue permits
9 for these activities.

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

14 (3) Except for activities that impact wetlands classified as coastal wetlands [15A NCAC 07H .0205],
15 Unique Wetlands (UWL) [15A NCAC 02B .0231]; or are adjacent to waters designated as: ORW
16 (including SAV), HQW (including PNA), SA, WS-I, WS-II, Trout or North Carolina National Wild
17 and Scenic River. ~~Discharges resulting from activities~~ activities that impact less than or equal to
18 1/10 acre of federally non-jurisdictional wetlands for the entire project are deemed to be permitted
19 provided they comply with the conditions listed in Subparagraph (4) of this Paragraph, and it shall
20 not be necessary for the Division to issue permits for these activities.

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

22 (A) Erosion and sediment control practices are required and shall equal at a minimum those
23 required by the N.C. Division of Energy, Mineral, and Land Resources (DEMLR) or its
24 local delegated program for the Sedimentation Pollution Control Act and shall be in
25 compliance with all DEMLR or appropriate local delegated program specifications
26 governing the design, installation, operation, and maintenance of such practices in order to
27 help assure compliance with the appropriate turbidity and other water quality standards;

28 (B) All erosion and sediment control practices placed in federally non-jurisdictional wetlands
29 or federally non-jurisdictional classified surface waters shall be removed and the original
30 grade restored within two months after the DEMLR or appropriate local delegated program
31 has released the specific drainage area within the project;

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

33 (D) All work in or adjacent to federally non-jurisdictional intermittent or perennial streams
34 shall be conducted so that the flowing stream does not come in contact with the disturbed
35 area; and

36 (E) Measures shall be taken to ensure that the hydrologic functions of any remaining federally
37 non-jurisdictional wetlands and federally non-jurisdictional classified surface waters are

1 ~~maintained to ensure compliance with wetland standards. not adversely affected by the~~
2 ~~discharge. impact.~~

3 (b) The Division shall issue an individual permit or a Certificate of Coverage under a general permit upon determining
4 that the proposed activity will comply with State water quality standards, which includes designated uses, numeric
5 criteria, narrative criteria, and the State's antidegradation policy, as defined in the rules of 15A NCAC 02B Section
6 .0200 and the rules of 15A NCAC 02L Section .0100 and .0200. In assessing whether the proposed activity will
7 comply with water quality standards, the Division shall evaluate if the proposed activity:

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

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

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

1 compensatory mitigation. The mitigation ratio for federally non-jurisdictional stream impacts shall
2 be 1:1;

3 (4) The required area or length of mitigation required shall be multiplied by 1 for restoration, 1.5 for
4 establishment, 2 for enhancement and 5 for preservation. These multipliers do not apply to approved
5 mitigation sites where the Interagency Review Team has approved other ratios;

6 (5) Mitigation shall comply with the requirements set forth in G.S. 143-214.11. Mitigation projects
7 implemented within waters or wetlands that are regulated under Section 404 of the Clean Water Act
8 or Section .1300 of this Subchapter may be used to satisfy the requirements of this Paragraph;

9 (6) Acceptable methods of ~~mitigation~~ mitigation, as defined in 33 CFR Part ~~332~~ 332.2 incorporated by
10 reference and available free of charge ~~on the internet~~ at:
11 http://water.epa.gov/lawsregs/guidance/wetlands/wetlandsmitigation_index.cfm, include
12 restoration, including both re-establishment and rehabilitation, establishment (creation),
13 enhancement and preservation. No more than 25 percent of the mitigation required by Subparagraph
14 (2) or (3) of this Paragraph may be met through preservation, unless the Director determines that
15 ~~the public good would be better served by~~ a higher percentage of ~~preservation~~; preservation would
16 provide greater water quality or aquatic life benefit.

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

22 (8) Mitigation for impacts to wetlands designated in Subparagraph (b)(6) of this Rule shall be of the
23 same wetland type and within the same watershed when practical; and

24 ~~(8)(9)~~ In-kind mitigation is required unless the Director determines that other forms of mitigation would
25 provide greater water quality or aquatic life benefit.

26
27 *History Note:* Authority G.S. 143-211(b); 143-211(c); 143-214.7C; 143-215.1(a)(6); 143-215.3(a)(1); G.S. 143-
28 215.1(b)(1); G.S. 143-215.1(b)(2); G.S. 143-215.1(b)(4)(a); 143-215.3(c);
29 *Temporary Adoption Eff. May 28, 2021;*
30 *Eff. June 1, 2022.*