

## Burgos, Alexander N

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**From:** Liebman, Brian R  
**Sent:** Friday, May 20, 2022 11:32 AM  
**To:** Burgos, Alexander N  
**Subject:** FW: 15A NCAC 02H .1301, .1401-.1405 Objection Letter  
**Attachments:** 05.2022 - EMC 02H Objection letter.pdf

Brian Liebman  
Counsel to the North Carolina Rules Review Commission  
Office of Administrative Hearings  
(984)236-1948  
[brian.liebman@oah.nc.gov](mailto:brian.liebman@oah.nc.gov)

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**From:** Liebman, Brian R  
**Sent:** Friday, May 20, 2022 11:30 AM  
**To:** Everett, Jennifer <[jennifer.everett@ncdenr.gov](mailto:jennifer.everett@ncdenr.gov)>  
**Subject:** 15A NCAC 02H .1301, .1401-.1405 Objection Letter

Good morning Jennifer,

Attached, please find a letter regarding the RRC's objection the above captioned rules considered at yesterday's meeting.

Please do not hesitate to contact me with any questions or concerns.

Thanks,

Brian Liebman  
Counsel to the North Carolina Rules Review Commission  
Office of Administrative Hearings  
(984)236-1948  
[brian.liebman@oah.nc.gov](mailto:brian.liebman@oah.nc.gov)

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**STATE OF NORTH CAROLINA  
OFFICE OF ADMINISTRATIVE HEARINGS**

May 20, 2022

Jennifer Everett  
Environmental Management Commission  
**Sent via email only to: Jennifer.Everett@ncdenr.gov**

Re: Objection to 15A NCAC 02H .1301, .1401, .1402, .1403, .1404, .1405

Dear Ms. Everett:

At its meeting on May 19, 2022, the Rules Review Commission objected to Rules 15A NCAC 02H .1301, .1401, .1402, .1403, .1404, .1405 in accordance with G.S. 150B-21.10.

Specifically, the Commission found the agency lacked statutory authority to adopt Rules 15A NCAC 02H .1301, .1401, .1402, .1403, .1404, .1405 as the agency was barred from doing so pursuant to G.S. 150B-19.3(a). Further, the Commission found the definition of the term "impact" in Rule 15A NCAC .02H .1401, and as applied to Rules .1402, .1403, .1404, and .1405 was unclear and ambiguous as it did not provide certainty as to what acts were subject to regulation. Finally, the Commission found that the post-publication change from "discharge" to "impact" in Rule 15A NCAC 02H .1401, and as applied to Rules .1402, .1403, .1404, and .1405 amounted to a substantial change pursuant to G.S. 150B-21.2(g)(3), in that it produced an effect that could not reasonably have been expected based on the proposed text of these Rules.

Please respond to this objection in accordance with the provisions of G.S. 150B-21.12.

If you have any questions regarding the Commission's actions, please let me know.

Sincerely,

Brian Liebman  
Commission Counsel

**Donald Robert van der Vaart**, Director  
Chief Administrative Law Judge

**Fred G. Morrison, Jr.**  
Senior Administrative Law Judge

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**From:** Reynolds, Phillip <[PReynolds@ncdoj.gov](mailto:PReynolds@ncdoj.gov)>

**Sent:** Tuesday, May 17, 2022 1:10 PM

**To:** Liebman, Brian R <[brian.liebman@oah.nc.gov](mailto:brian.liebman@oah.nc.gov)>; Everett, Jennifer <[jennifer.everett@ncdenr.gov](mailto:jennifer.everett@ncdenr.gov)>

**Cc:** Homewood, Sue <[sue.homewood@ncdenr.gov](mailto:sue.homewood@ncdenr.gov)>; Burgos, Alexander N <[alexander.burgos@oah.nc.gov](mailto:alexander.burgos@oah.nc.gov)>

**Subject:** RE: [External] RE: RRC Requests for Technical Changes

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Brian,

Please find below the responses to your questions. For your convenience I copied and pasted the questions and included our responses in red for consistency.

Thanks,  
Phillip

1. Can you please clarify the status of the EPA's Navigable Waters Protection Rule: Definition of "Waters of the United States" and the impact of its status on these Rules? While you've said in your Submission for Permanent Rule Form, submitted in February 2022, that a subset of wetlands was no longer eligible for permitting under the CWA, and stated in your response to my change requests that "there is no federal jurisdiction over the wetlands at issue," you also indicated in the hearing officer's report that the NWPR was vacated by a federal court on 8/30/21, and that EPA and USACE are implementing the pre-2015 regulatory regime. These seem to be contradictory positions. Is there currently a federal regulation or law relating to permitting of isolated wetlands in North Carolina?

The positions are not contradictory. The statement you cite was in response to your question as to whether the limitations contained in N.C. Gen. Stat. § 150B-19.3 applied to the rules at issue. Irrespective of the status of the Navigable Waters Protection Rule, the general principle remains: where there is no federal jurisdiction, there can be no federal law or rule which can be made more stringent and, therefore, the limitations in Section 150B-19.3 cannot apply.

While it is correct that the federal agencies are currently implementing the pre-2015 on all new jurisdictional determinations and requests, the agencies – and specifically the US Army Corps of Engineers (USACE) – have specifically stated that they will not revisit jurisdictional determinations (referred to as "JDs") that were issued pursuant to the Navigable Waters Protection Rule ("NWP Rule"). Regarding JDs and whether they will be revisited, the USEPA provided the following: "As a general matter, the agencies' actions are governed by the definition of "waters of the United States" that is in effect at the time the Corps completes an [Approved Jurisdictional Determination ("AJD")], not by the date of the request for an AJD. An AJD completed prior to the court's decision to vacate the NWP Rule and not associated with a permit action (also known as "stand-alone" AJDs under RGL 16-01) will not be reopened until their expiration date, unless one of the criteria for revision is met under RGL 05-02." <https://www.epa.gov/wotus/current-implementation-waters-united-states>

Currently, there are approximately 300 wetlands that were determined to be federally non-jurisdictional but do or may have wetlands meeting the definition of “waters of the State,” which is broader than the definition of “waters of the United States.” Therefore, any activities impacting wetlands within the State’s jurisdiction will require a permit. See N.C. Gen. Stat. § 143-215.1(a)(6) (requiring permits for any activities impacting waters of the State). Without the temporary rules adopted in 2021 and the permanent rules at issue, there is no permitting mechanism covering activities impacting wetlands that meet the definition of “waters of the State.” While the adoption of the NWP Rule prompted the need for the permitting mechanism at issue in these rules, the rules are predicated on the EMC’s express statutory authority and apply only to those wetlands that fall outside of federal jurisdiction and are not isolated wetlands. The rules at issue provide regulatory certainty and relief for the 300 wetlands described above and will continue to provide regulatory certainty moving forward, including and especially given the seemingly ever changing federal regulatory landscape.

Similar to the wetlands at issue here, isolated wetlands (codified in 15A NCAC 02H .1300 *et seq.*) meet the definition of “waters of the State,” and fall outside of federal jurisdiction. In other words, isolated wetlands are also a type of “federally non-jurisdictional” wetland and, as such, there is no federal law or rule that applies. As noted in the earlier response to your requests, the EMC’s authority to promulgate rules providing a permitting mechanism for isolated wetlands was upheld on appeal.

It is also important to note that the Clean Water Act was not intended to wholly replace or preempt entirely a state’s authority to regulate waters within its borders. For example, even where a wetland is determined to fall within federal jurisdiction, prior to issuing a permit under Section 404 of the Clean Water Act, the USACE must also obtain state certification under Section 401 that the permit will not result in a violation of state water quality standards. Similarly, a determination that no federal jurisdiction exists for a particular site is not a determination that the site does not contain wetlands for any purpose other than the Clean Water Act and is not a determination as to whether a site contains wetlands under the State’s authority. In other words, a federal jurisdictional determination is just that: a determination as to whether the site contains wetlands for federal jurisdictional purposes only. Thus, as with isolated wetlands, where no federal jurisdiction exists, there is no federal law or rule that can be made more stringent and there is no ability to rely on a federal permit for activities impacting wetlands that meet the definition of “waters of the State.”

2. Are the Approved Jurisdictional Determinations issued under the vacated NWPR not rendered void? If the underlying law was vacated (not merely repealed), then it seems to me that the AJDs based on the vacated law would be of no effect. This is probably more for my own understanding of this regulatory regime than anything else.

The State and not the Corps has jurisdiction over “waters of the State.” The Approved JDs issued under the vacated NWPR were not rendered void – see above answer.



**Phillip T. Reynolds**  
Special Deputy Attorney General  
Environmental Division  
Commissions, Coastal and Administrative Section  
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**From:** Liebman, Brian R <[brian.liebman@oah.nc.gov](mailto:brian.liebman@oah.nc.gov)>  
**Sent:** Tuesday, May 17, 2022 11:10 AM  
**To:** Reynolds, Phillip <[PReynolds@ncdoj.gov](mailto:PReynolds@ncdoj.gov)>; Everett, Jennifer <[jennifer.everett@ncdenr.gov](mailto:jennifer.everett@ncdenr.gov)>  
**Cc:** Homewood, Sue <[sue.homewood@ncdenr.gov](mailto:sue.homewood@ncdenr.gov)>; Burgos, Alexander N <[alexander.burgos@oah.nc.gov](mailto:alexander.burgos@oah.nc.gov)>  
**Subject:** RE: [External] RE: RRC Requests for Technical Changes

Hi Phillip,

Thanks for the update, and I look forward to your responses.

Best,  
Brian

Brian Liebman  
Counsel to the North Carolina Rules Review Commission  
Office of Administrative Hearings  
(984)236-1948  
[brian.liebman@oah.nc.gov](mailto:brian.liebman@oah.nc.gov)

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**From:** Reynolds, Phillip <[PReynolds@ncdoj.gov](mailto:PReynolds@ncdoj.gov)>  
**Sent:** Tuesday, May 17, 2022 10:25 AM  
**To:** Liebman, Brian R <[brian.liebman@oah.nc.gov](mailto:brian.liebman@oah.nc.gov)>; Everett, Jennifer <[jennifer.everett@ncdenr.gov](mailto:jennifer.everett@ncdenr.gov)>  
**Cc:** Homewood, Sue <[sue.homewood@ncdenr.gov](mailto:sue.homewood@ncdenr.gov)>; Burgos, Alexander N <[alexander.burgos@oah.nc.gov](mailto:alexander.burgos@oah.nc.gov)>  
**Subject:** [External] RE: RRC Requests for Technical Changes

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Hi Brian,

I just wanted to let you know that we are working on the responses to your questions and should be able to provide them to you by early afternoon.

Thanks,  
Phillip



**Phillip T. Reynolds**  
Special Deputy Attorney General  
Environmental Division  
Commissions, Coastal and Administrative Section  
Phone: (919) 716-6971  
Email: [preynolds@ncdoj.gov](mailto:preynolds@ncdoj.gov)  
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**From:** Liebman, Brian R <[brian.liebman@oah.nc.gov](mailto:brian.liebman@oah.nc.gov)>  
**Sent:** Monday, May 16, 2022 11:25 AM  
**To:** Everett, Jennifer <[jennifer.everett@ncdenr.gov](mailto:jennifer.everett@ncdenr.gov)>  
**Cc:** Homewood, Sue <[sue.homewood@ncdenr.gov](mailto:sue.homewood@ncdenr.gov)>; Reynolds, Phillip <[PReynolds@ncdoj.gov](mailto:PReynolds@ncdoj.gov)>; Burgos, Alexander N <[alexander.burgos@oah.nc.gov](mailto:alexander.burgos@oah.nc.gov)>  
**Subject:** RE: RRC Requests for Technical Changes

Good morning,

Thank you for these responses. I have a few more questions.

1. Can you please clarify the status of the EPA's Navigable Waters Protection Rule: Definition of "Waters of the United States" and the impact of its status on these Rules? While you've said in your Submission for Permanent Rule Form, submitted in February 2022, that a subset of wetlands was no longer eligible for permitting under the CWA, and stated in your response to my change requests that "there is no federal jurisdiction over the wetlands at issue," you also indicated in the hearing officer's report that the NWPR was vacated by a federal court on 8/30/21, and that EPA and USACE are implementing the pre-2015 regulatory regime. These seem to be contradictory positions. Is there currently a federal regulation or law relating to permitting of isolated wetlands in North Carolina?
2. Are the Approved Jurisdictional Determinations issued under the vacated NWPR not rendered void? If the underlying law was vacated (not merely repealed), then it seems to me that the AIDs based on the vacated law would be of no effect. This is probably more for my own understanding of this regulatory regime than anything else.

I will likely have more questions for you as I work through your responses, but I wanted to get these to you as soon as I could to give you time to respond. I anticipate reaching a decision on my recommendation no later than the end of the day on Tuesday, so we have until then to continue to work on some of these issues.

Thanks,  
Brian

Brian Liebman  
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Office of Administrative Hearings  
(984)236-1948  
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**From:** Everett, Jennifer <[jennifer.everett@ncdenr.gov](mailto:jennifer.everett@ncdenr.gov)>  
**Sent:** Thursday, May 12, 2022 5:47 PM  
**To:** Liebman, Brian R <[brian.liebman@oah.nc.gov](mailto:brian.liebman@oah.nc.gov)>; Rules, Oah <[oah.rules@oah.nc.gov](mailto:oah.rules@oah.nc.gov)>  
**Cc:** Homewood, Sue <[sue.homewood@ncdenr.gov](mailto:sue.homewood@ncdenr.gov)>; Reynolds, Phillip T <[preynolds@ncdoj.gov](mailto:preynolds@ncdoj.gov)>;  
Burgos, Alexander N <[alexander.burgos@oah.nc.gov](mailto:alexander.burgos@oah.nc.gov)>  
**Subject:** RE: RRC Requests for Technical Changes

Brian,

Attached are responses, rewritten rules, forms, and two supporting documents addressing your technical change requests for 15A NCAC 02H.

Thanks.

Jennifer Everett  
DEQ Rulemaking Coordinator  
N.C. Depart. Of Environmental Quality  
Office of General Counsel  
1601 Mail Service Center  
Raleigh, NC 27699-1601  
Tele: (919)-707-8614  
<https://deq.nc.gov/permits-rules/rules-regulations/deq-proposed-rules>

### **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.*

*Please see attached updated forms.*

*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.*

*The Federal Rule citation was provided on the form however the box was inadvertently left unchecked. Please see attached updated forms.*



## **REQUEST FOR TECHNICAL CHANGE**

AGENCY: Environmental Management Commission

RULE CITATION: All 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:

*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.*

Simply stated, the limitations contained in N.C. Gen. Stat. § 150B-19.3 do not apply to the rules at issue because there is no “standard, limitation or requirement imposed by a federal law or rule” that applies to the wetlands subject to these rules. The proposed rules provide a permitting mechanism for the regulated community for unavoidable impacts to wetlands that are not subject to Section 404 of the Federal Clean Water Act and are not Isolated Wetlands. In other words, as with the temporary rules approved by the RRC in 2021, the rules at issue provide regulatory relief by implementing a permitting program for activities that impact wetlands that are neither federally jurisdictional wetlands nor isolated wetlands. Without such a permitting framework, no activities impacting the wetlands subject to these rules can be allowed.

Wetland Standards (15A NCAC 02B .0231) were first promulgated by the EMC in 1996 and remain in effect. The standards protect all wetlands within North Carolina pursuant to directives of the North Carolina General Assembly for the conservation of the State’s water resources and are predicated on the broad definition of “Waters of the State,” as provided in N.C. Gen. Stat. § 143-212(6). Conversely, the scope of federal jurisdiction was always limited by the Clean Water Act to “navigable waters.”

While the adoption of temporary rules that will be replaced by the proposed permanent rules were necessitated by a change in federal regulation (specifically the adoption of the Navigable Waters Protection Rule), the EMC’s authority to adopt rules related to waters of the State is not predicated on federal law or a delegation of federal authority. Instead, the rules at issue are predicated on the EMC’s well-established authority to enact rules related to wetlands within the State’s jurisdiction. *See In re Declaratory Ruling by the Env’tl. Mgmt. Comm’n v. Env’tl. Mgmt. Comm’n*, 155 N.C. App. 408, 573 S.E.2d 732 (2002) (holding that wetlands are considered

waters of the State and that the EMC has authority to adopt rules pertaining to wetlands, including isolated wetlands that fall outside of federal jurisdiction); see also N.C. Gen. Stat. §§ 143-212(6) (defining waters of the State) and -215.1(a)(6) (requiring permits for activities impacting waters of the State). The EMC's authority to regulate isolated wetlands, which are also federally non-jurisdictional wetlands, was reaffirmed through Session Laws 2015-286 and 2017-10.

Because there is no federal jurisdiction over the wetlands at issue, there can be no applicable federal requirement that can be made more stringent by these rules. By its express language, Section 150B-19.3 does not apply in the absence of a federal standard or jurisdiction. Were it to be applied otherwise, it would effectively prohibit the EMC and any other State "environmental" agency from adopting any rule or regulation not already established by, for example, the USEPA. Such an interpretation cannot be supported.

*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.*

*The statutory authority for general permits is 143-215.1(b)(3). A Certificate of Coverage is a cover letter issued by the agency notifying the applicant that they are authorized to conduct their project under a general permit. Certificates of Coverage are used for general permits issued under 15A NCAC 02H .0500 and 15A NCAC .1300, as well as many other permitting programs established within the EMC's authority. The term and its relationship to general permits is well understood by the regulated community.*

## **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.*

*Action/response not necessary per email correspondence from Mr. Brian Liebman on 3/1/22.*

*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?*

*The term “impact” is well understood by the regulated public and used throughout federal and State wetland permitting programs. Additionally, clarification of the term has been added to 2H .1401(a) lines 9-11.*

*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)?*

*The change was made in response to a public comment. Please see attached Page 10-11 of the Hearing Officer's Report.*

*The change does not meet any of the conditions listed in G.S. 150B-21.2(g):*

- (1) There is no change as to which wetlands or projects are subject to these rules, nor does it alter the nature of the activities that are prohibited without a permit.*
- (2) The change in terminology does not address a new subject matter that was not addressed in the published text of the proposed rule.*
- (3) Because the change was in response to public comment and because it does not substantively alter the nature or purpose of the rules, the regulated public could reasonably expect that this change based on the proposed text of the rule.*

*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?*

*Please see G.S. 143-215.3(a)(4)*

## **REQUEST FOR TECHNICAL CHANGE**

AGENCY: Environmental Management Commission

RULE CITATION: 15A NCAC 02H .1301

**DEADLINE FOR RECEIPT: Friday, March 11, 2022**

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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?*

*The terms "Isolated Waters" and "Isolated Wetlands" are defined in 2H .1301(f), and are considered "waters of the State." In response to this comment, staff reviewed the rule opportunities to provide further clarification within the text. In addition, the definition of "Isolated waters" has been further revised to clearly include isolated ditches, isolated ponds and isolated streams.*

*Staff further reviewed and revised the text of .1401 ensure that language was consistent.*

*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?*

*Please see G.S. 143-215.3(a)(4).*

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

*Citation has been revised.*

*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.*

*Rule text revised.*

*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)?*

*The “Methodology for Identification of Intermittent and Perennial Streams and Their Origins and the corresponding Stream ID form are scientific standards and forms per G.S. 150B-21.6. Additionally, those standards and forms were created pursuant to a statutory requirement for DWR to develop the Surface Water Identification Training and Certification Program. See G.S. 143-214.25A.*

*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?*

*General Permits are developed as needed for certain minor activities. A general permit currently exists and was adopted pursuant to the temporary rule and G.S. 143-215.1(b)(3).*

*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?*

*The Director of DWR, after a required notice and comment period, may issue a general permit. The phrases or factors (“similar in nature” and “minimal impact”) have been in wetland related permitting rules (.0500 and .1300) for at least the last 20 years, and mirror similar language regarding general permits issued under 143-215.2 (see 15A NCAC .0501 for 401 General Certifications; 15A NCAC 02H .0103 (12) definition of “General Permit” for NPDES discharge permits; and 15A .02H .0127 for development of General Permits for NPDES discharges). Those phrases have been reviewed many times by the RRC in other rulemakings and the regulated community understands those phrases.*

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

*This is specified within the General Permit.*

*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?*

*The language has been modified.*

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

*The language has been modified.*

*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.*

*The language has been modified.*

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

*Paragraph (d) mirrors language in 15A NCAC 02B .0201 for the 401 Certification program. The regulated community understands this language and has requested this language because it reinforces the concept that activities authorized by and complying with a DWR permit will not be considered a water quality standard violation.*

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

*Yes.*

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

*The addition of the term man-made is to indicate that the wetland was constructed by human activity.*

*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?*

*This language is consistent with federal regulations for jurisdictional wetlands permitted through Section 404 of the Clean Water Act (specifically §230.10). The regulated community is very familiar with this terminology, and it is important to maintain consistency between the programs.*

*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?*

*Section 4.18(a) of SL 2015-286 does not define “Isolated Wetland” but rather specifies that the provisions of Section .1300 (permitting regulations) shall only apply to specific types of Isolated Wetlands (Basin Wetlands and Bogs).*

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

*The term is as the U.S. Supreme Court decided *Rapanos v. United States* & *Carabell v. United States* and as the USEPA has set forth in its guidance document.*

*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.*

*The URL has been corrected and the document has been properly cited on the website*

*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.*

*Rule text revised*

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

*Corrected*

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



## **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?*

**Yes**

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

**Term has been revised in Rule .1301**

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

**Citation has been revised.**

*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.*

**Rule text revised.**

*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)?*

**The “Methodology for Identification of Intermittent and Perennial Streams and Their Origins and the corresponding Stream ID form are scientific standards and forms per G.S. 150B-21.6. Additionally, those standards and forms were created pursuant to a statutory requirement for DWR to develop the Surface Water Identification Training and Certification Program. See G.S. 143-214.25A.**

*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?*

**General Permits are developed as needed for certain minor activities. A general permit currently exists and was adopted pursuant to the temporary rule and G.S. 143-215.1(b)(3)**

*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?*

*The Director of DWR, after a required notice and comment period, may issue a general permit. The phrases or factors (“similar in nature” and “minimal impact have been in wetland related permitting rules (.0500 and .1300) for at least the last 20 years, and mirror similar language regarding general permits issued under 143-215.2 (see 15A NCAC .0501 for 401 General Certifications; 15A NCAC 02H .0103 (12) definition of “General Permit” for NPDES discharge permits; and 15A .02H .0127 for development of General Permits for NPDES discharges). Those phrases have been reviewed many times by the RRC in other rulemakings and the regulated community understands those phrases.*

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

*Yes*

*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?*

*The language has been modified.*

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

*The language has been modified.*

*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.*

*The language has been modified.*

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

*Paragraph (d) mirrors language in 15A NCAC 02B .0201 for the 401 Certification program. The regulated community understands this language and has requested this language because it reinforces the concept that activities authorized by and complying with a DWR permit will not be considered a water quality standard violation.*

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

*Correct*

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

Yes

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

Yes

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

*Rule text revised for clarification*

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

## **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.*

*512 N. Salisbury Street is the location address necessary for in person delivery and for express delivery methods such as Fedex delivery. Language has been clarified,*

*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?*

*Complete is used within its ordinary meaning and refers to the submission of all required information. Text has been revised to include requirement for complete application for mail in and in-person applications.*

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

*The Division often coordinates with other regulatory agencies such as the US Corps of Engineers and the Division of Coastal Management to use joint application forms. This language provides for those cases where joint forms have been created by other agencies and approved for use by the Division.*

*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?*

*Yes. It may be necessary to request additional project details, and/or maps, or scales, in order to staff to verify that the project will meet the requirements of .1405(b). The regulated community is familiar with the information the agencies will need to conduct a thorough review and will submit this information with the application.*

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

*The regulated community is familiar with the information the agencies will need to conduct a thorough review and will submit sufficient information with the application. The applicant will have*

*detailed knowledge of the proposed project and the nature of the impact and any cumulative impacts to Waters of the State.*

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

*Text revised*

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

*Yes*

*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?*

*Yes*

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

*Safe is used within its ordinary meaning.*

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

*Reasonable is used within its ordinary meaning.*

*In (d), line 17, remove the comma following “credentials”.*

*Correction made.*

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

*Clarification added to text.*

*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.”*

*It is important to keep the language consistent with 02H .1302.*

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

## **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.*

*No, 143-215.1(c) describes timelines for NPDES wastewater discharge permits.*

*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.*

*The current rule text states who the Division is required to send the public notice to and how long the public notice period is. The notice necessarily provides a copy of the proposed general permit upon which the Division is soliciting feedback from the public. Staff has attached an example of a public notice that was issued for a General Permit adopted pursuant to temporary rules 15A 02H .1403.*

*With regards to who the notice should go to, (a) specifically states: "This notice shall be sent to all individuals on the mailing list described in Paragraph (g) of this Rule and posted on the Division's website: <https://deq.nc.gov/about/divisions/water-resources/water-quality-permitting/401-buffer-permitting-branch/public-notices>. Notice shall be made at least 30 calendar days prior to issuance of the general permit by the Division."*

*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.*

*This language was incorporated pursuant to a public comment received during the adoption of the Temporary Rules Section .1400. As discussed above, a Certificate of Coverage is simply a cover letter issued by the agency notifying the applicant they are authorized to conduct their*

*project under an existing general permit. This a term used throughout many of the agency's permitting programs and well known to the regulated public.*

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

*Rule text corrected.*

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

*It is important to keep the language consistent with 02H .1303.*

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

*Additional information would be anything related to the application that the public may wish to view or request. It would include the entire application file as well as any internal documents.*

*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...*

*It is important to keep the language consistent with 02H .1303.*

*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.*

*"Joint notice" is applicable for multiple permitting requirements within the agency. Other notices are not considered "joint" but will satisfy the agency's requirement that the public be notified of the proposed application/project.*

*The rule text has been revised for further clarification.*

*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.*

*The agency is not proposing to incorporate by reference the US Army Corps of Engineers public notice process, but rather to state that a notice issued by the US Army Corps of Engineers would satisfy the requirement for a public notice within this rule. The rule text has been revised to provide clarification.*

*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.*

*Rule text revised.*

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

*The rule states “In order to be considered by the Director, the request must be received by the Division within 30 calendar days following the public notice.” If the request for a public hearing is not received within 30 days then it will not be considered by the Director.*

*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)?*

*Please see previous response.*

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

*It’s based on the number of requests, the content of those requests, and the type of project. This language is consistent with the process set out in 02H .0503 and .1303.*

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

*Additional language added to provide clarification. The regulated public is very familiar with this term as related to wetlands/surface water permitting regulations.*

*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.*

*Degrade has its dictionary meaning. This term is used throughout the water quality standards listed in 15A NCAC 02B. The regulated public is very familiar with this term.*

*Preclude has its dictionary meaning. This term is used throughout the water quality standards listed in 15A NCAC 02B. The regulated public is very familiar with this term.*

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

*The term is used within its ordinary meaning, and is defined as “held in conjunction with.”*

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

*This was in error and has been removed.*

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

*No, G.S. 143-215.1(c) describes timelines for NPDES wastewater discharge permits.*

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



## **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?*

*Please see G.S. 143-215.3(4).*

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

*Rule text revised.*

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

*This could be information that is to be supplied by other resources agencies that are essential to the Division's completion of their review – e.g. a ROD or FONSI from NEPA/SEPA review, a Biological Opinion from USFWS or NMF. This will be a case by case decision.*

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

*Yes.*

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

*Yes.*

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

*The Division, through the rules and within its statutory enforcement authority, has enforcement discretion when working to resolve violations – revoking or modifying a certification is a tool that can be utilized by the agency but isn't always appropriate. It may be appropriate for the permit or Certificate of Coverage to remain valid to continue to provide coverage to other portions of a project that are not in violation. In addition, when a Permittee cooperates to resolve violations on*

*site the permit may not require any modifications and it may be unnecessary to revoke and then reissue the Permit or Certificate of Coverage.*

*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?*

*The Division, through the rules and within its statutory enforcement authority, has enforcement discretion when working to resolve violations – revoking or modifying a certification is a tool that can be utilized by the agency but isn’t always appropriate. It may be appropriate for the permit or Certificate of Coverage to remain valid to continue to provide coverage to other portions of a project that are not in violation. In addition, when a Permittee cooperates to resolve violations on site the permit may not require any modifications and it may be unnecessary to revoke and then reissue the Permit or Certificate of Coverage.*

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

*There is no statute that prescribes a minimum or maximum term for non-NPDES general permits. However we have proposed 5 years for consistency purposes.*

*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?*

*No. An extension is approval to extend an existing permit expiration date but a renewal requires resubmission and review of the project.*

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

*General Permits are not specific to project sites. Permittees are issued a Certificate of Coverage authorizing them to conduct the project under coverage of a General Permit.*

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

*Rule text has been revised.*

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

*Rule text has been revised.*

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

## **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.*

*Rule text revised.*

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

*The term adjacent is used within its ordinary meaning.*

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

*The change was made in response to a public comment. As noted in the attached Page 9 of the Hearing Officer's Report this is consistent with the requirements in the Division's other wetland programs.*

*The change does not meet any of the conditions listed in G.S. 150B-21.2(g):*

- (1) There is no change as to which wetlands or projects are subject to these rules, nor does it alter the nature of the activities that are prohibited without a permit.*
- (2) The change in terminology does not address a new subject matter that was not addressed in the published text of the proposed rule.*
- (3) Because the change was in response to public comment and because it does not substantively alter the nature or purpose of the rules, the regulated public could reasonably expect that this change based on the proposed text of the rule.*

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

*Yes. The Permittee should not be prevented from utilizing practices beyond the minimum required by the references identified.*

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

*Local delegated programs are those approved by North Carolina Sedimentation Control Commission ("SCC") to implement the Sediment and Erosion Control regulations. The regulated public is very familiar with these programs and this terminology.*

*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.*

*The rule text specifies that the practices shall be those required by the SCC and the Division of Energy Mineral and Land Resources (“DEMLR”), local delegated program.*

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

*Turbidity and other water quality standards are specified in 15A NCAC 02B Section .0200 pursuant to the specific water classification of the stream.*

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

*Yes.*

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

*Adjacent is used within its ordinary meaning.*

*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?*

*No. The measures necessary are dependent on the site conditions, size of stream, type of project, etc. The regulated public is familiar with this terminology and expectation.*

*In (a)(4)(E), line 37, what does “adversely affected” mean?*

*Language has been modified.*

*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.*

*Rule text revised.*

*In (b)(1), line 8, delete “that” between “designs” and “the”.*

*Removed.*

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

*Though these rules were adopted pursuant to the EMC’s authority pertaining to “waters of the State,” this language is consistent with federal regulations for jurisdictional wetlands permitted through Section 404 of the Clean Water Act (specifically §230.10). In order to provide clarity and “ease of use” to the regulated public, these proposed rules were drafted to be consistent with the terminology and language used in the agency’s other wetland permitting regulations in 15A NCAC 02H .0500 and 15A NCAC 02H .1300. The regulated community is very familiar with this terminology and it is important to maintain consistency between the programs.*

*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.*

*Line removed, it was a formatting error only.*

*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).*

*GS 143-211; GS 143-215.1(b)(1); GS 143-215.1(b)(2); GS 143-215.1(b)(4)(a).*

*GS 143-215.1(b) states that the Commission shall act on all permits so as to prevent a violation of water quality standards due to the cumulative effects of permit decisions. Replacement by mitigation of water quality resources addresses cumulative impacts to Waters of the State.*

*In addition, the General Assembly has confirmed the authority of the EMC and DEQ to require mitigation by enacting Session Laws which dictated thresholds for mitigation within different portions of the program. See SL: 2015-286 and SL 2017-10.*

*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.*

*The terms used in (c)(6) are all forms of replacement. The regulated community is familiar with this terminology.*

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

*This is an interagency workgroup established by the US Army Corps of Engineers. This term is well known to the regulated community.*

*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)?*

*As discussed elsewhere, the EMC has the authority to require mitigation as a permit condition. Rather than developing a similar but different mitigation framework, the rule language refers to the existing federal mitigation framework to ensure consistency across the wetland permitting programs and reduce confusion.*

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

*Rule text revised.*

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

*This determination would be made by the Director as part of a permit application review upon request/appeal by the applicant. For example, preservation of a rare ecological habitat may be of significant benefit such that exceeding the 25% limit would be appropriate.*

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

*Rule text revised.*

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

*This determination would be made by the Director as part of a permit application review upon request/appeal by the applicant. For example, if a project is close to the edge of a river basin and mitigation within an adjacent river basin with similar ecological habitat may be important for a specific aquatic species and more appropriate than mitigation within the same river basin.*

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

*The change was made in response to a public comment. As noted in the attached Page 10 of the Hearing Officer’s Report this is consistent with the requirements in the Division’s the other wetland programs.*

*The change does not meet any of the conditions listed in G.S. 150B-21.2(g):*

- (1) There is no change to what wetlands this rule affects/applies to.*
- (2) The addition of this language does not address a new subject matter that was not addressed in the published text of the proposed rule.*
- (3) The regulated public could reasonably expect that these rules would dictate specific requirements for permitting Federally Non-Jurisdictional Wetlands and Surface Waters.*

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

*This determination would be made by the Director as part of a permit application review upon request/appeal by the applicant. For example, in a very urban setting, water quality benefit may be gained by retrofitting an existing site for stormwater control management.*

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

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.

(2) General permits may be developed by the Division and issued by the Director for types or groups of discharges resulting from activities that are similar in nature and considered to have minimal impact. General permits do not require approval by the U.S. Environmental Protection Agency. All activities that receive a Certificate of Coverage under a general permit from the Division shall be covered under that general permit. When written approval is required in the general permit, the application and review procedures for requesting a Certificate of Coverage under a general permit 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.] for which the Director determines that coverage under a General Permit is insufficient to ensure that the project will comply with State water quality standards, which includes designated uses, numeric criteria, narrative criteria, and the State's antidegradation policy, as defined in 15A NCAC 02B Section.0200 and in 15A NCAC 02L Sections.0100 and .0200.

(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:



- 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://dec.nc.gov/about/divisions/water-](https://dec.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.

11  
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~~) 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

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

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

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

(2) General permits may be developed by the Division and issued by the Director for types or groups of ~~discharges~~ impacts resulting from activities that are similar in nature and considered to have minimal impact. General permits do not require approval by the U.S. Environmental Protection Agency. All activities that receive a Certificate of Coverage under a general permit from the Division shall be covered under that general permit. When written approval is required in the general permit, the application and review procedures for requesting a Certificate of Coverage under a general permit 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~~ 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, for which the Director determines that coverage under a General Permit is insufficient to ensure that the project will comply with State water quality standards, which includes designated uses, numeric criteria, narrative criteria, and the State's antidegradation policy, as defined in 15A NCAC 02B Section .0200 and 15A NCAC 02L Sections .0100 and .0200.

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

(e) The following are exempt from this Section:

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

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

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

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

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

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

- (9) a signature by the applicant or an agent authorized by the applicant. If an agent is signing for the applicant, an agent authorization letter shall be provided. In signing the application, the applicant certifies that all information contained therein or in support thereof is true and correct to the best of their knowledge.
- (b) The Division may request in writing, and the applicant shall furnish, any additional information necessary to clarify or complete the information provided in the application under Paragraph (a) of this Rule, or to complete the evaluation in Rule .1405 of this Section.
- (c) If the applicant believes that it is not feasible or is unnecessary to furnish any portion of the information required by Paragraphs (a) and (b) of this Rule, then the applicant shall submit an explanation detailing the reasons for omission of the information. The final decision regarding the completeness of the application shall be made by the Division based upon the information required in Paragraphs (a) and (b) of this Rule, and any explanation provided by the applicant regarding omitted information provided in this Paragraph.
- (d) Pursuant to G.S. 143-215.3(a)(2), the staff of the Division shall conduct such investigation as the Division deems necessary to clarify the information provided in the application under Paragraph (a) of this Rule or to complete the evaluation in Rule .1405 of this Section. For the purpose of review of an application, the applicant shall allow the staff safe access to the lands and facilities of the ~~applicant~~ proposed impacts and lend such assistance as shall be reasonable for those places, upon the presentation of ~~credentials~~, credentials and advanced notice to the applicant or their representative of at least three days.
- (e) Joint applications with 401 certification and/or isolated wetlands permitting submitted to the Division shall suffice for an application pursuant to this Rule, so long as the application contains all of the information required by this Rule and provided that the applicant specifically indicates that authorization is sought under this Rule.
- (f) Submission of an application to the Division of Coastal Management for a permit to develop in North Carolina's coastal area in accordance with the rules of 15A NCAC 07J .0200 shall suffice as an application for ~~a water quality certification~~ individual permit or certificate of coverage under a general ~~certification permit~~ upon receipt by the Division from the Division of Coastal Management.

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

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

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

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

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

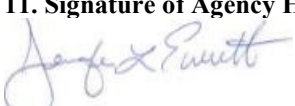
(7) Mitigation for impacts to federally non-jurisdictional wetlands and federally non-jurisdictional classified surface waters shall be conducted in North Carolina within the same river basin and in accordance with 33 CFR Part 332, available free of charge ~~on the internet~~ at: [http://water.epa.gov/lawsregs/guidance/wetlands/wetlandsmitigation\\_index.cfm](ht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

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

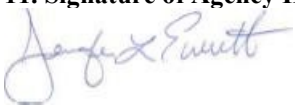
~~(8)(9)~~ In-kind mitigation is required unless the Director determines that other forms of mitigation would provide greater water quality or aquatic life benefit.

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

# SUBMISSION FOR PERMANENT RULE

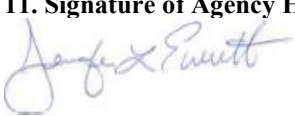
<b>1. Rule-Making Agency:</b> NC Environmental Management Commission	
<b>2. Rule citation &amp; name (name not required for repeal):</b> 15A NCAC 02H .1301 SCOPE AND PURPOSE	
<b>3. Action:</b> <input type="checkbox"/> ADOPTION <input checked="" type="checkbox"/> AMENDMENT <input type="checkbox"/> REPEAL <input type="checkbox"/> READoption <input type="checkbox"/> REPEAL through READoption	
<b>4. Rule exempt from RRC review?</b> <input type="checkbox"/> Yes. Cite authority: <input checked="" type="checkbox"/> No	<b>5. Rule automatically subject to legislative review?</b> <input type="checkbox"/> Yes. Cite authority: <input checked="" type="checkbox"/> No
<b>6. Notice for Proposed Rule:</b> <input checked="" type="checkbox"/> Notice Required Notice of Text published on: October 1, 2021 Link to Agency notice: <a href="https://deq.nc.gov/permits-rules/rules-regulations/deq-proposed-rules/proposed-rules">https://deq.nc.gov/permits-rules/rules-regulations/deq-proposed-rules/proposed-rules</a> Hearing on: November 4, 2021 Adoption by Agency on: January 13, 2022 <input type="checkbox"/> Notice not required under G.S.: Adoption by Agency on:	
<b>7. Rule establishes or increases a fee? (See G.S. 12-3.1)</b>  <input type="checkbox"/> Yes Agency submitted request for consultation on: Consultation not required. Cite authority:  <input checked="" type="checkbox"/> No	<b>8. Fiscal impact. Check all that apply.</b> <input checked="" type="checkbox"/> This Rule was part of a combined analysis.  <input checked="" type="checkbox"/> State funds affected <input checked="" type="checkbox"/> Local funds affected <input checked="" type="checkbox"/> Substantial economic impact (≥\$1,000,000) <input checked="" type="checkbox"/> Approved by OSBM <input type="checkbox"/> No fiscal note required
<div style="text-align: center;"><b>9. REASON FOR ACTION</b></div> <b>9A. What prompted this action? Check all that apply:</b> <div style="display: flex; justify-content: space-between;"> <div style="width: 45%;"> <input checked="" type="checkbox"/> Agency  <input type="checkbox"/> Court order / cite:  <input type="checkbox"/> Federal statute / cite:  <input checked="" type="checkbox"/> Federal regulation / cite: 33 CFR Part 328 and 40 CFR Parts 110, 112, 116, 117, 120, 122, 230, 232, 300, 302 and 401 - Navigable Waters Protection Rule: Definition of "Waters of the United States"         </div> <div style="width: 45%;"> <input type="checkbox"/> Legislation enacted by the General Assembly              Cite Session Law:  <input type="checkbox"/> Petition for rule-making  <input type="checkbox"/> Other:         </div> </div> <p><b>9B. Explain:</b> As a result of the US EPA's <i>Navigable Waters Protection Rule: Definition of "Waters of the United States"</i> Rule (effective June 22, 2020), a subset of wetlands classified under State law are no longer subject to federal Clean Water Act jurisdiction, and therefore no longer eligible for permitting the mechanism available under the Clean Water Act to authorize impacts to these wetlands. Temporary rules were adopted to create a replacement permitting mechanism for these wetlands and permanent rules were adopted to replace the temporary rules.</p>	
<b>10. Rulemaking Coordinator: Jennifer Everett</b>  <b>Phone:</b> 919-707-8614 <b>E-Mail:</b> Jennifer.Everett@ncdenr.gov  <b>Additional agency contact, if any:</b> Sue Homewood <b>Phone:</b> 336-776-9693 <b>E-Mail:</b> sue.homewood@ncdenr.gov	<b>11. Signature of Agency Head* or Rule-making Coordinator:</b> <div style="text-align: center; margin-top: 10px;">  </div> <hr style="border: 0; border-top: 1px solid black; margin: 5px 0;"/> <p><b>*If this function has been delegated (reassigned) pursuant to G.S. 143B-10(a), submit a copy of the delegation with this form.</b></p> <p><b>Typed Name:</b> Jennifer Everett  <b>Title:</b> DEQ Rulemaking Coordinator</p>
<b>RRC AND OAH USE ONLY</b>	

# SUBMISSION FOR PERMANENT RULE

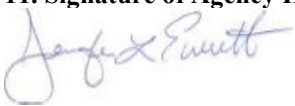
<b>1. Rule-Making Agency:</b> NC Environmental Management Commission	
<b>2. Rule citation &amp; name (name not required for repeal):</b> 15A NCAC 02H .1401 SCOPE AND PURPOSE	
<b>3. Action:</b> <input checked="" type="checkbox"/> <b>ADOPTION</b> <input type="checkbox"/> <b>AMENDMENT</b> <input type="checkbox"/> <b>REPEAL</b> <input type="checkbox"/> <b>READoption</b> <input type="checkbox"/> <b>REPEAL through READoption</b>	
<b>4. Rule exempt from RRC review?</b> <input type="checkbox"/> Yes. Cite authority: <input checked="" type="checkbox"/> No	<b>5. Rule automatically subject to legislative review?</b> <input type="checkbox"/> Yes. Cite authority: <input checked="" type="checkbox"/> No
<b>6. Notice for Proposed Rule:</b> <input checked="" type="checkbox"/> <b>Notice Required</b> Notice of Text published on: <b>October 1, 2021</b> Link to Agency notice: <a href="https://deq.nc.gov/permits-rules/rules-regulations/deq-proposed-rules/proposed-rules">https://deq.nc.gov/permits-rules/rules-regulations/deq-proposed-rules/proposed-rules</a> Hearing on: <b>November 4, 2021</b> Adoption by Agency on: <b>January 13, 2022</b> <input type="checkbox"/> <b>Notice not required under G.S.:</b> Adoption by Agency on:	
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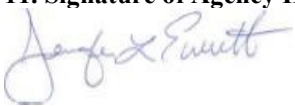
# SUBMISSION FOR PERMANENT RULE

<b>1. Rule-Making Agency:</b> NC Environmental Management Commission	
<b>2. Rule citation &amp; name (name not required for repeal):</b> 15A NCAC 02H .1402 FILING APPLICATIONS	
<b>3. Action:</b> <input checked="" type="checkbox"/> <b>ADOPTION</b> <input type="checkbox"/> <b>AMENDMENT</b> <input type="checkbox"/> <b>REPEAL</b> <input type="checkbox"/> <b>READoption</b> <input type="checkbox"/> <b>REPEAL through READoption</b>	
<b>4. Rule exempt from RRC review?</b> <input type="checkbox"/> Yes. Cite authority: <input checked="" type="checkbox"/> No	<b>5. Rule automatically subject to legislative review?</b> <input type="checkbox"/> Yes. Cite authority: <input checked="" type="checkbox"/> No
<b>6. Notice for Proposed Rule:</b> <input checked="" type="checkbox"/> <b>Notice Required</b> Notice of Text published on: <b>October 1, 2021</b> Link to Agency notice: <a href="https://deq.nc.gov/permits-rules/rules-regulations/deq-proposed-rules/proposed-rules">https://deq.nc.gov/permits-rules/rules-regulations/deq-proposed-rules/proposed-rules</a> Hearing on: <b>November 4, 2021</b> Adoption by Agency on: <b>January 13, 2022</b> <input type="checkbox"/> <b>Notice not required under G.S.:</b> Adoption by Agency on:	
<b>7. Rule establishes or increases a fee? (See G.S. 12-3.1)</b>  <input type="checkbox"/> Yes Agency submitted request for consultation on: Consultation not required. Cite authority:  <input checked="" type="checkbox"/> No	<b>8. Fiscal impact. Check all that apply.</b> <input checked="" type="checkbox"/> <b>This Rule was part of a combined analysis.</b>  <input checked="" type="checkbox"/> <b>State funds affected</b> <input checked="" type="checkbox"/> <b>Local funds affected</b> <input checked="" type="checkbox"/> <b>Substantial economic impact (≥\$1,000,000)</b> <input checked="" type="checkbox"/> <b>Approved by OSBM</b> <input type="checkbox"/> <b>No fiscal note required</b>
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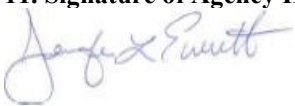
# SUBMISSION FOR PERMANENT RULE

<b>1. Rule-Making Agency:</b> NC Environmental Management Commission	
<b>2. Rule citation &amp; name (name not required for repeal):</b> 15A NCAC 02H .1403 PUBLIC NOTICE AND PUBLIC HEARING	
<b>3. Action:</b> <input checked="" type="checkbox"/> <b>ADOPTION</b> <input type="checkbox"/> <b>AMENDMENT</b> <input type="checkbox"/> <b>REPEAL</b> <input type="checkbox"/> <b>READoption</b> <input type="checkbox"/> <b>REPEAL through READoption</b>	
<b>4. Rule exempt from RRC review?</b> <input type="checkbox"/> Yes. Cite authority: <input checked="" type="checkbox"/> No	<b>5. Rule automatically subject to legislative review?</b> <input type="checkbox"/> Yes. Cite authority: <input checked="" type="checkbox"/> No
<b>6. Notice for Proposed Rule:</b> <input checked="" type="checkbox"/> <b>Notice Required</b> Notice of Text published on: <b>October 1, 2021</b> Link to Agency notice: <a href="https://deq.nc.gov/permits-rules/rules-regulations/deq-proposed-rules/proposed-rules">https://deq.nc.gov/permits-rules/rules-regulations/deq-proposed-rules/proposed-rules</a> Hearing on: <b>November 4, 2021</b> Adoption by Agency on: <b>January 13, 2022</b> <input type="checkbox"/> <b>Notice not required under G.S.:</b> Adoption by Agency on:	
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<b>10. Rulemaking Coordinator: Jennifer Everett</b>  <b>Phone: 919-707-8614</b> <b>E-Mail: <a href="mailto:Jennifer.Everett@ncdenr.gov">Jennifer.Everett@ncdenr.gov</a></b>  <b>Additional agency contact, if any: Sue Homewood</b> <b>Phone: 336-776-9693</b> <b>E-Mail: <a href="mailto:sue.homewood@ncdenr.gov">sue.homewood@ncdenr.gov</a></b>	<b>11. Signature of Agency Head* or Rule-making Coordinator:</b> <div style="text-align: center; margin-top: 10px;">  </div> <hr style="width: 80%; margin: 10px auto;"/> <p><b>*If this function has been delegated (reassigned) pursuant to G.S. 143B-10(a), submit a copy of the delegation with this form.</b></p> <p><b>Typed Name: Jennifer Everett</b>  <b>Title: DEQ Rulemaking Coordinator</b></p>
<b>RRC AND OAH USE ONLY</b>	

# SUBMISSION FOR PERMANENT RULE

<b>1. Rule-Making Agency:</b> NC Environmental Management Commission	
<b>2. Rule citation &amp; name (name not required for repeal):</b> 15A NCAC 02H .1404 DECISION ON APPLICATION FOR PERMITS OR CERTIFICATES OF COVERAGE	
<b>3. Action:</b> <input checked="" type="checkbox"/> <b>ADOPTION</b> <input type="checkbox"/> <b>AMENDMENT</b> <input type="checkbox"/> <b>REPEAL</b> <input type="checkbox"/> <b>READoption</b> <input type="checkbox"/> <b>REPEAL through READoption</b>	
<b>4. Rule exempt from RRC review?</b> <input type="checkbox"/> Yes. Cite authority: <input checked="" type="checkbox"/> No	<b>5. Rule automatically subject to legislative review?</b> <input type="checkbox"/> Yes. Cite authority: <input checked="" type="checkbox"/> No
<b>6. Notice for Proposed Rule:</b> <input checked="" type="checkbox"/> <b>Notice Required</b> Notice of Text published on: October 1, 2021 Link to Agency notice: <a href="https://deq.nc.gov/permits-rules/rules-regulations/deq-proposed-rules/proposed-rules">https://deq.nc.gov/permits-rules/rules-regulations/deq-proposed-rules/proposed-rules</a> Hearing on: November 4, 2021 Adoption by Agency on: January 13, 2022 <input type="checkbox"/> <b>Notice not required under G.S.:</b> Adoption by Agency on:	
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<b>10. Rulemaking Coordinator: Jennifer Everett</b>  <b>Phone:</b> 919-707-8614 <b>E-Mail:</b> Jennifer.Everett@ncdenr.gov  <b>Additional agency contact, if any:</b> Sue Homewood <b>Phone:</b> 336-776-9693 <b>E-Mail:</b> sue.homewood@ncdenr.gov	<b>11. Signature of Agency Head* or Rule-making Coordinator:</b> <div style="text-align: center; margin-top: 10px;">  </div> <hr style="border: 0; border-top: 1px solid black; margin: 5px 0;"/> <p><b>*If this function has been delegated (reassigned) pursuant to G.S. 143B-10(a), submit a copy of the delegation with this form.</b></p> <p><b>Typed Name:</b> Jennifer Everett  <b>Title:</b> DEQ Rulemaking Coordinator</p>
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# SUBMISSION FOR PERMANENT RULE

<b>1. Rule-Making Agency:</b> NC Environmental Management Commission	
<b>2. Rule citation &amp; name (name not required for repeal):</b> 15A NCAC 02H .1405 REVIEW OF APPLICATIONS	
<b>3. Action:</b> <input checked="" type="checkbox"/> <b>ADOPTION</b> <input type="checkbox"/> <b>AMENDMENT</b> <input type="checkbox"/> <b>REPEAL</b> <input type="checkbox"/> <b>READOPTION</b> <input type="checkbox"/> <b>REPEAL through READOPTION</b>	
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**HEARING OFFICER'S REPORT OF PROCEEDINGS  
PUBLIC HEARING AND COMMENT PERIOD**

Adoption of Permanent Rules 15A NCAC 02H .1400  
Discharges to Federally Non-Jurisdictional Wetlands and Federally Non-Jurisdictional  
Classified Surface Waters  
AND  
Adoption of Amendment to Rule 15A NCAC 02H .1301  
Discharges to Isolated Wetlands and Isolated Waters: Purpose and Scope

Environmental Management Commission

December 2021

## Basic Information

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Commission:	Environmental Management Commission Water Quality Committee
Agency	Department of Environmental Quality, Division of Water Resources
Title	Discharges to Federally Non-Jurisdictional Wetlands and Federally Non-Jurisdictional Classified Surface Waters  Discharges to Isolated Wetlands and Isolated Waters
Citations	15A NCAC 02H .1400 15A NCAC 02H .1301
Description of the Proposed Rules	<p>On April 21, 2020, the U.S. Environmental Protection Agency (EPA) and the Department of the Army published the Navigable Waters Protection Rule (NWPR) in the <i>Federal Register</i> to finalize a revised definition of “Waters of the United States” under the Clean Water Act. The NWPR became effective on June 22, 2020. As a result of the Another reason to establish permanent state rules is that, a subset of wetlands classified under State law are no longer subject to federal Clean Water Act jurisdiction. These classified wetlands remain protected by 15A NCAC 02B .0231 - Wetland Standards, but, as a result of the Another reason to establish permanent state rules is that, there was no permitting mechanism available to authorize impacts to these wetlands. To provide a regulatory mechanism to authorize impacts to wetlands that are no longer federally jurisdictional, and to provide regulatory certainty, temporary rules were adopted by the Environmental Management Commission (EMC) and approved by the Rule Review Commission (RRC) in May 2021. In accordance with G.S. 150B-21.1(d)(5), these temporary rules will expire 270 days from the date of publication in the NC Register unless the permanent rule is adopted by the EMC to replace the temporary rule. The proposed permanent rules will provide regulatory certainty by providing a permitting mechanism for wetlands that were determined to be excluded from Federal jurisdiction during the time the NWPR was effective.</p>
Agency Contact	Sue Homewood <a href="mailto:Sue.Homewood@ncdenr.gov">Sue.Homewood@ncdenr.gov</a> (336) 776-9693
Authority	G.S. 143-215.1(a)(6); G.S. 143-215(b)(3); G.S. 143-215.3(a)(1); G.S. 143-215.3(c)
Statement of Necessity	These rules are proposed for adoption in order to replace temporary rules adopted in May of 2021 which provide a permitting mechanism for classified wetlands and classified surface waters in NC that are no longer eligible for permitting through Section 401 of the Clean Water Act because of the adoption of the NWPR.
Hearing Officer	Commissioner Maggie Monast
Comment Period	October 1, 2021 to December 1, 2021 (DWR issued a Public Notice and began accepting comments on September 22, 2021)

Appendices

- [APPENDIX 1](#) – Public Notice of Permanent Rule
- [APPENDIX 2](#) – List of Registered Attendees for Virtual Public Hearing
- [APPENDIX 3](#) – Link to Audio Recording of the Virtual Public Hearing
- [APPENDIX 4](#) – Link to Public Comments
- [APPENDIX 5](#) – 2001 Environmental Management Commission  
Interpretive Ruling and Department of Justice Advisory  
Opinion
- [APPENDIX 6](#) – Revised Rule Text
- [APPENDIX 7](#) – OSBM Approved Regulatory Impact Analysis

## Background

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On April 21, 2020, the U.S. Environmental Protection Agency (EPA) and the Department of the Army – Corps of Engineers (USACE) published the Navigable Waters Protection Rule in the [Federal Register](#) to finalize a revised definition of “Waters of the United States” under the Clean Water Act. The NWPR became effective on June 22, 2020. As a result of the NWPR, a subset of wetlands classified under State law are no longer subject to federal Clean Water Act jurisdiction. These classified wetlands remain protected by 15A NCAC 02B .0231 - Wetland Standards, but, as a result of the NWPR, there is no permitting mechanism available to authorize unavoidable impacts to these wetlands.

To provide a regulatory mechanism to authorize impacts to wetlands that are no longer Federally jurisdictional and to provide regulatory certainty, temporary rules were adopted by the EMC and approved by the RRC in May 2021. In accordance with G.S. 150B-21.1(d)(5), these temporary rules will expire 270 days from the date of publication in the NC Register unless the permanent rule is adopted by the EMC to replace the temporary rule.

The proposed permanent rules will establish a permitting mechanism for classified wetlands that are not eligible for coverage under existing wetland permitting rules in 15A NCAC 02H .0500 or 15A NCAC 02H.1300. In addition, definitions for “isolated wetlands” and “isolated waters” are proposed as a rule amendment to 15A NCAC 02H .1301 in order to define a term that was previously defined by the USACE.

On August 30, 2021, the U.S. District Court for the District of Arizona vacated the NWPR and in light of this order the EPA and USACE halted implementation of the Navigable Waters Protection Rule and are interpreting “Waters of the US” consistent with the pre-2015 regulatory regime. On November 18, 2021 the EPA and the USACE announced the signing of a proposed rule to revise the definition of the “Waters of the United States”. On December 7, 2021 this proposed rule was published in the [Federal Register](#). However, further developments in litigation over the NWPR have the potential to bring the rule back into effect before new rules are promulgated. Therefore, permanent rules are still warranted to avoid future regulatory uncertainty.

Another reason to establish permanent state rules is that under existing USACE policy, Approved Jurisdictional Determination (AJDs) are valid for five years. AJDs that were issued during the time the NWPR was in effect will remain valid until the expiration dates provided in the approvals (typically 5 years). Approximately 300 wetlands in North Carolina were identified as “Federally non-jurisdictional” by USACE issued AJDs between June 2020 and August 2021 in accordance with the NWPR. The adoption of these permanent rules will provide landowners and applicants with a permitting mechanism for unavoidable impacts to these wetlands when valid AJDs identify federally non-jurisdictional wetlands.

## Public Comment and Hearing

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The proposed permanent rules were approved by the EMC to proceed to public comment and hearing at the September 2021 EMC meeting. Commissioner Maggie Monast was designated as the hearing officer.

The proposed rules were published on the Office of Administrative Hearings (OAH) website on October 1, 2021. The proposed rules were also published on the Division 401 Buffer and Permitting Branch website and on the Department of Environmental Quality's (DEQ) proposed rules website throughout the public comment period.



The Division also sent a link to the published notice and rule text for public comment to interested parties via email to the 401 and Buffer Permitting Branch Listserv on September 22, 2021. The public notice issued by the Division is included in [Appendix 1](#).

### Public Hearing

The Division held a virtual public hearing via WebEx Events on November 4, 2021. Commissioner Maggie Monast served as the hearing officer for the hearing. The public notice also provided a link for attendees to register to speak at the hearing. The list of people who registered to attend and speak at the hearing is included in [Appendix 2](#).

Eight people registered to speak at the hearing. Some of the speakers were representing multiple organizations. In addition, the hearing officer asked if anyone that did not register to speak in advance would still like to provide comments before the hearing was closed. A link to an audio recording of the virtual hearing can be found in [Appendix 3](#). A summary of the comments received during the virtual public hearing is included in Appendix 4. All speakers were in favor of the proposed permanent rules.

The Division also received 13 written comments. Some of the written comments were submitted on behalf of multiple organizations. One comment was a petition representing 757 citizens who signed it. The majority of the comments that were received indicated support for the rules because the commenter/organization believed that wetland protection was important, and because the commenter/organization believed that providing a permitting mechanism for the regulated community was essential. Three commenting organizations stated that they were opposed to the rules and/or did not believe the rules were necessary.

Comments have been summarized into succinct points for ease of review within this document and similar comments, written and oral, have been grouped together with one agency response provided. A few commenters provided specific requests for modifications to the proposed rule text. Copies of all written comments received, and a staff summary of oral comments received, are attached in [Appendix 4](#). The Division has reviewed all comments and has proposed some changes to the text of the rules based on the input received.

### Comments and Agency Responses

*Written and oral comments in support of the proposed rules and specific items within the rules and the reasons why. Comments received from North Carolina Wildlife Commission, Eco Terra, Mountain True, Sound Rivers, Waterkeepers Carolina, Haw River Assembly, North Carolina Coastal Federation, Yadkin Riverkeeper, NC Conservation Network and 757 signers of a petition, Southern Environmental Law Center (and on behalf of 20 other organizations), and 5 Individuals.*

- Support of the proposed deemed permitted threshold of 0.10 acre of wetlands
  - Many wetlands in NC are small and small wetlands can be as important as large wetlands
  - Will provide for reasonable permitting pathway while managing the resources responsibly
  - Will provide important knowledge of what is being impacted
  - Development is expected to double in the Piedmont over the next 20 years where small wetlands are prominent
- Support of the rules to address the permitting gap for wetlands that have been regulated by the EMC for at least 20 years
- Regulatory certainty is important
- Important to finalize rules with uncertainty of Federal regulations/litigation
- Wetland functions are essential to the health of NC, flood resiliency, coastal seafood

- and fisheries, tourism and recreation
- North Carolina's water quality and unique landscape depend on the health of the state's wetlands
- Wetlands are the kidneys of the coast
- The state has an obligation to protect wetlands
- Will provide mitigation of impacts, not stop impacts
- Important to provide consistency with the 401 Certification program
- Non jurisdictional wetlands provide essential habitat for numerous state and federal listed species as well as Species of Greatest Conservation Need across the state

*No Agency Response Necessary*

*Written comment from the North Carolina Aggregates Association:*

Opposed to the permanent rule because they do not believe that the DEQ has the authority to implement the opposed rule.

*Written comment from the North Carolina Farm Bureau:*

States there is a lack of authority under the Administrative Procedures Act (APA). Cites G.S. 150B-19.3(a) which states that an agency 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.

*Written comment from the Southern Environmental Law Center (and on behalf of 20 other organizations):*

Permanent rules are within the Environmental Management Commission's authority – the Commission has regulated impacts to wetlands covered by the rule for decades. That authority is well grounded in the North Carolina Constitution, state statute, and case law. (comment provides citations and attachments of referenced rules, statutes and case law)

*Agency Response:*

Prior to proposing new rules, the Division carefully evaluated relevant existing federal and state regulations and statutes in detail. Based on this review, the Division concluded that the proposed rules are within the EMC's authority to adopt and are necessary to provide a permitting mechanism to the regulated community for unavoidable impacts to wetlands that are not subject to Section 404 of the Federal Clean Water Act and are not Isolated Wetlands. Wetland Standards (15A NCAC 02B .0231) were first promulgated by the EMC in 1996. The standards protect all wetlands within North Carolina pursuant to directives of the North Carolina General Assembly for the conservation of the State's water resources and based on the definition of Waters of the State in General Statute (G.S. 143-212). The Wetland Standard rules, and state statutes upon which they are promulgated, predate the language cited in G.S. 150B-19.3(a). The rules being proposed are not "for the protection of the environment or natural resources that impose a more restrictive standard, limitation or requirement imposed by federal law or rule" because they are permitting rules which allow for impacts to wetlands which have been protected since 1996. G.S. 150B-19.3(a) is not applicable because the Federal definition of "Waters of the United States" only affects the scope of Federal jurisdiction. Without the proposed permitting rules, the regulated community has no permitting mechanism under which they may impact the subject wetlands.

*Written comments from the North Carolina Home Builders Association (representing 14,000 firms) and the North Carolina Farm Bureau:*

Opposed to the rules because they believe that need for these rules is misrepresented by the Division and perceive that the Division's reasoning for the proposed rules is built upon a state wetland definition that was not properly adopted in 2019 during the 15A NCAC 02B rules readoption process. They request that the EMC review the change to the wetland definition that occurred in the 2019 rulemaking process.

*Agency Response:*

The rules readoption process for 15A NCAC 02B .0200 was conducted by the Division from 2017 – 2019. The definition of "wetlands" as cited is found specifically in .0202 which was readopted as part of the Triennial Review. Information related to that process can be found on the Division's website – [Historical Triennial Review Information 2017-2019](#). The Rules were adopted consistent with the APA as evidenced by RRC approval. The readopted rules became effective on November 1, 2019. The request to the EMC to review the previously conducted rules readoption process is outside of the purview of the current rulemaking proposal.

This question was brought forth during the rules readoption process and was thoroughly reviewed by staff at that time. This issue was addressed by an interpretive ruling of the EMC dated July 12th, 2001 regarding the EMC's authority to enact rules related to Isolated Wetland permitting (see Appendix 5). The ruling states that "*The definition of "wetlands" in 15A NCAC 2B .0202(71) incorporates the definition of "Waters of the United States" that was present in the Army Corps of Engineers (33 CFR 328.3) and the Environmental Protection Agency (40 CFR 230.3) regulation at the time the Commission adopted its definition and water quality standards for wetlands in 1996. 15A NCAC 2B .0202(71); 15A NCAC 2B .0231. By not directing the Division to include subsequent amendments and editions of the cited federal regulations and by omitting where copies of the referenced regulations can be obtained, the Commission incorporated only the definition of wetlands that existed in the cited federal regulations at the time of the adoption of its wetland rules. G.S. §150B-21.6*". The change to the definition of wetlands to remove the reference to the US Army Corps of Engineers jurisdiction was done in order to maintain the definition of "wetlands" from 1996 in accordance with the interpretive ruling.

*Written comment from the North Carolina Aggregates Association:*

Do not believe that there is a need for the proposed rule, that the state should not have the authority to regulate any wetlands other than basins or bogs, that are not regulated by Section 404 of the Clean Water Act.

*Written comment from the Southern Environmental Law Center (and on behalf of 20 other organizations):*

In 2014, the North Carolina General Assembly established a set of impact thresholds for wetlands that have been the subject of dispute under federal law. In 2015, the North Carolina General Assembly limited the application of the EMC's existing isolated wetlands regulations to "Basin Wetlands" and "Bogs." Neither the 2014 nor the 2015 session laws applied to the wetlands at issue under the permanent rules, which were clearly "waters of the United States" at that time and, therefore, regulated by North Carolina through the Section 401 Certification process. These session laws directed the EMC to revise North Carolina's existing isolated wetlands regulations – they did not repeal the Commission's authority to authorize or permit activities in wetlands....

*Agency Response:*

Prior to proposing new rules, the Division carefully evaluated existing Federal and State regulations in detail. Based on the Division's review, the Division concluded that the proposed rules are necessary in order to provide a permitting mechanism to the regulated community for unavoidable impacts to wetlands that are not subject to Section 404 of the Federal Clean Water Act and are not Isolated Wetlands. Wetland Standards (15A NCAC 02B .0231) were promulgated by the EMC in 1996. The standards protect all wetlands within North Carolina pursuant to directives of the North Carolina General Assembly for the conservation of the State's water resources and based on the definition of Water of the State in General Statute (G.S. 143-212), while the scope of Federal jurisdiction was always limited by the Clean Water Act to *navigable* waters. This was reaffirmed by an interpretive ruling of the EMC dated July 12th, 2001 ([Appendix 5](#)) and the 2014 and 2015 Session Laws are examples that the General Assembly has recognized that the EMC's jurisdiction to regulate wetland impacts extends to wetlands that may not fall within Federal jurisdiction. The Isolated Wetland Permitting Rules in 2H .1300 were specifically promulgated to provide a permitting mechanism for wetlands that were determined to be Isolated pursuant by the USACE implementation of the Supreme Court decision in *Solid Waste Authority of Northern Cook County v. US Army Corps of Engineers*; "SWANCC." and subsequently further refined by guidance following the Supreme Court decision in *Rapanos v. United States & Carabell v. United States* "Rapanos". These wetlands were defined by the USACE as those that did not have a "significant nexus" to jurisdictional waters. The narrowing of jurisdiction resulting from the NWPR does not affect the Isolated Wetland Rules nor the 2014 or 2015 NC Session Laws which mandated changes to those rules, nor did it affect the EMC's specific authority by the NC General Assembly to require permits for activities having impacts to waters of the State.

*Written comment from the North Carolina Farm Bureau:*

Do not believe that there is a need for the proposed rule given recent vacatur of the Navigable Waters Protection Rule and announcements from EPA and the USACE stating that they are beginning rulemaking regarding the definition of Waters of the United States.

*Agency Response:*

Until litigation is final, there is a potential that the NWPR could be reinstated. More importantly, approximately 300 wetlands have been identified as non-jurisdictional by the USACE during the period of time when the NWPR was in effect and these determinations remain valid until the expiration date established by the USACE (typically 5 years) irrespective of the status of the proposed federal rule revising the definition of "Waters of the United States." Project proponents who have unavoidable impacts to these wetlands would be prevented from proceeding with their proposed projects without a permitting mechanism. These rules provide certainty to the regulated community in both cases.

*Written comments from the North Carolina Aggregates Association and the North Carolina Farm Bureau:*

Do not agree with DEQ creating a definition of Isolated Wetland and use of the term "significant nexus" to differentiate isolated wetlands from other non-jurisdictional wetlands. Believes that DEQ is creating a new class of state isolated wetlands by adding a definition for isolated wetlands.

*Agency Response:*

The Isolated Wetland Permitting Rules in 15A NCAC 2H .1300 were specifically promulgated to provide a permitting mechanism for wetlands that were determined to be Isolated pursuant to the USACE implementation of the Supreme Court decision in *Solid Waste Authority of Northern Cook County v. US Army Corps of Engineers*; "SWANCC." and subsequently further refined by guidance following the Supreme Court decision in *Rapanos v. United States &*

*Carabell v. United States* “Rapanos”. These wetlands were defined by the USACE as those that did not have a “significant nexus” to jurisdictional waters. The narrowing of jurisdiction resulting from the NWPR does not affect the Isolated Wetland Rules nor the 2014 or 2015 NC Session Laws which mandated changes to those rules, nor did it affect the EMC’s authority granted by the NC General Assembly to require permits for activities having impacts to waters of the State. Since the term “Isolated” is not used in the NWPR, the Division has proposed a definition for the term “Isolated Wetlands” in an effort to maintain consistency with the permitting purview of the Isolated Wetlands permitting rule at the time it was promulgated. The inclusion of the term “significant nexus” ensures consistency with rules and court decisions as implemented by the USACE prior to the NWPR.

*Oral comments from seven speakers (Eco Terra, Mountain True, Sound Rivers, Waterkeepers Carolina, Haw River Assembly, North Carolina Coastal Federation, Yadkin Riverkeeper, NC Conservation Network, Southern Environmental Law Center) and written comments from the Southern Environmental Law Center (and on behalf of 20 other organizations) and two individuals:*

Request that the agency consider lower, or no, deemed permitted thresholds for impacts to Unique Wetlands and wetlands adjacent to High Quality Water, Outstanding Resource Waters, 303d listed waters, etc.

*Agency Response:*

Rule text has modified so as to maintain consistency with the 401 Water Quality Certification program for specific high quality and sensitive wetlands and waters.

*Written comments from two individuals:*

Urge that the agency consider a 0-acre [wetland] threshold for deemed permitting as every small impact has the potential to add up to significant wetland loss across the state.

*Oral comment from Yadkin Riverkeeper:*

Would like to see the minimum acreage requirement [deemed permitted] adjusted lower for smaller wetlands.

*Written comment from the North Carolina Farm Bureau:*

If the proposed rule is to move forward the NCFB is opposed to the proposed [wetland] thresholds and proposes that the thresholds should be consistent with the isolated wetland rule thresholds.

*Written comment from the Southern Environmental Law Center (and on behalf of 20 other organizations):*

The rules appropriately set the proposed deemed permitted [wetland] threshold at 0.10 acre.

*Agency Response:*

The Division acknowledges the comments provided and notes that there are comments requesting both changes to decrease and to increase the proposed thresholds. Based on significant comments received during the temporary rule development and evaluation of the conclusions of the Regulatory Impact Analysis ([Appendix 7](#)), the Division has determined that consistency with the 401 Water Quality Certification program is appropriate at this time. It should also be noted that in response to the comments, some changes have been proposed to the rule which will lower the deemed permitted threshold for certain unique and high-quality wetlands.



*Oral comments from seven speakers (Eco Terra, Mountain True, Sound Rivers, Waterkeepers Carolina, Haw River Assembly, North Carolina Coastal Federation, Yadkin Riverkeeper, NC Conservation Network, Southern Environmental Law Center) and written comment from the North Carolina Coastal Federation, Southern Environmental Law Center (and on behalf of 20 other organizations), and five individuals:*

Request that the agency increase the [wetland] mitigation ratio to greater than 1:1 to account for lost wetland functions which have been shown as not effectively replaced at a 1:1 acreage ratio. Most commenters suggested a 2:1 ratio.

*Agency Response:*

The Division acknowledges the requests and the scientific justification provided for increasing the mitigation threshold. The Division has determined that consistency with the 401 Water Quality Certification Rules - 15A NCAC 02H .0500 is appropriate at this time. The Division believes that further evaluation of these comments should be conducted during the next rules review and readoption process when it can thoroughly be evaluated for all wetland rules and programs.

*Written comments from the Southern Environmental Law Center (and on behalf of 20 other organizations):*

The final rule should include a more explicit requirement that mitigation occur not just in the same river basin, but also in the same watershed as the project in question.

*Agency Response:*

The Division has determined that consistency with the 401 Water Quality Certification Rules - 15A NCAC 02H .0500 is appropriate at this time and therefore proposes no changes to the requirement that mitigation be provided for in the same river basin as the impact. However, the Division has realized that it inadvertently omitted a mitigation requirement specific to Unique Wetlands when drafting these rules and therefore has been added a requirement that states that mitigation for Unique Wetlands be provided for within the same watershed as the impact.

*Oral comments from Mountain True, Yadkin Riverkeeper, and Haw River Assembly:*

Deemed permitted and mitigation thresholds are too high for stream impacts.

*Agency Response:*

It is the Division's experience that very few streams are determined by the US Army Corps of Engineers to be Federally Non-Jurisdictional. The Division proposes to maintain the deemed permitted and mitigation threshold for streams to be consistent with the 401 Water Quality Certification Rules 15A NCAC 02H .0500 and Isolated Wetlands and Waters Rules 15A NCAC 2H .1300.

*Written comment from Natural Resource Consultants:*

The proposed rules provide a permitting system for discharges to this type of wetland. Discharges are defined as a deposition of dredge or fill material. Limiting the proposed rules to discharges does not provide a permitting mechanism for other types of impacts that would violate water quality and wetland standards such as flooding and draining. These standards are important to protect wetlands and classified surface waters and require permitting mechanisms for all types of impacts to ensure proper avoidance, minimization and mitigation. Therefore, the rule should be expanded to apply to all types of impacts that would otherwise violate water quality standards.

*Agency Response:*

The Division agrees that the term “discharge” unnecessarily limits the use of these rules. Applicants, consultants and engineers have previously expressed concern regarding the limitations of this term within the other wetland programs. Upon further review it was determined that the Division used both the term “discharge” and the term “impact” interchangeably throughout the rules. Therefore, the Division proposes revising the rules to only use the term “impact” which is consistent with terminology used throughout the other wetland permitting programs and is well understood by the regulated community. This would allow for these rules to be utilized for projects that propose alterations that would otherwise violate water quality standards but would not meet the definition of “discharge.”

*Written comment from the North Carolina Farm Bureau:*

If the proposed rule is to move forward the rules should be written so that entities do not require both state and federal permits, should ensure that there state and federal rules do not overlap or create another “permitting gap” in the future.

*Agency Response:*

The Division agrees and has strived to create a rule which would not create any overlap between programs nor create any future permitting gaps.

*Written comment from the North Carolina Farm Bureau:*

If the proposed rule is to move forward the NCFB would oppose any change that alters the prior converted cropland exclusion.

*Agency Response:*

There are no proposed changes to this exclusion.

*Written comment from the North Carolina Farm Bureau:*

If the proposed rule is to move forward the NCFB believes that proposed rule appropriately exempts ephemeral streams from regulation and would oppose any change that would include regulation of ephemeral streams

*Agency Response:*

There are no proposed changes to this exemption.

## **Hearing Officer’s Recommendation**

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The Hearing Officer recommends that the Environmental Management Commission adopt Permanent Rules .15A NCAC 2H .1401 through .1405 and Permanent Rule Amendment 15A NCAC 2H .1301 with the following proposed changes (also see specific rule text as shown in [Appendix 6](#).):

1. Make technical edits to correct typographical errors and to correct terminology errors identified by staff.
2. Change “discharge” to “impact” throughout Section .1400 in order to expand the use of these rules to all possible types of projects/impacts and improve consistency in language used throughout the rules.
3. Add language in .1405 to establish consistency with deemed permitted thresholds and mitigation requirements for Unique Wetlands, Coastal Wetlands and wetlands adjacent to various High Quality and other sensitive waterbodies.

**15A NCAC 2H .1405(a)(3):** Except for activities that impact wetlands classified as coastal wetlands [15A NCAC 07H .0205], Unique Wetlands (UWL) [15A NCAC 02B .0231]; or are adjacent to waters designated as: ORW (including SAV), HQW (including PNA), SA, WS-I, WS-II, Trout or North Carolina National Wild and Scenic River, ~~Discharges resulting from activities activities~~ that impact less than or equal to 1/10 acre of federally non-jurisdictional wetlands for the entire project are deemed to be permitted provided they comply with the conditions listed in Subparagraph (4) of this Paragraph, and it shall not be necessary for the Division to issue permits for these activities.

**15A NCAC 2H .1405(c)(8):** Mitigation for impacts to wetlands designated in Subparagraph (b)(6) of this Rule shall be of the same wetland type and within the same watershed when practical;

*[Subparagraph (b)(6): "Class UWL wetlands and wetlands that are habitat for state or federally listed threatened or endangered species"]*



## **APPENDIX 1**

Public Notice of Proposed Rules

## **APPENDIX 2**

List of Registered Attendees for Virtual Public Hearing

### **APPENDIX 3**

Link to Audio Recording of Virtual Public Hearing:

<https://edocs.deq.nc.gov/WaterResources/Browse.aspx?id=2097046&dbid=0&repo=WaterResources>

## **APPENDIX 4**

Link to Public Comments:

<https://edocs.deq.nc.gov/WaterResources/Browse.aspx?id=2097050&dbid=0&repo=WaterResources>

## **APPENDIX 5**

2001 Environmental Management Commission Interpretive Ruling

## **APPENDIX 6**

Revised Rule Text

## **APPENDIX 7**

Link to OSBM Approved Regulatory Impact Analysis:

<https://edocs.deq.nc.gov/WaterResources/DocView.aspx?id=2104146&dbid=0&repo=WaterResources>

ROY COOPER  
Governor  
DIONNE DELLI-GATTI  
Secretary  
S. DANIEL SMITH  
Director



May 27 2021

TO: DEQ-DWR-Wetlands-Public Listserv

FROM: Danny Smith, Director, Division of Water Resources

RE: Notice of Temporary Rules and Proposed General Permit in response to the new Navigable Waters Protection Rule: Definition of "Waters of the United States (WOTUS)"

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On April 21, 2020, the U.S. Environmental Protection Agency (EPA) and the Department of the Army published the [Navigable Waters Protection Rule](#) in the *Federal Register* to finalize a revised definition of "waters of the United States" under the Clean Water Act ("Federal Rule"). The new Federal Rule became effective on June 22, 2020. As a result of the new Federal Rule, certain wetlands are no longer subject to federal Clean Water Act jurisdiction. These wetlands remain protected by the State's Wetland Standards (15A NCAC 02B .0231), but, as a result of the new Federal Rule, the State 401 permitting mechanism is no longer available to authorize impacts. Impacts to these wetlands cannot be authorized by the state's existing Isolated Wetlands permitting program (15A NCAC 02H .1300, et. seq.) because they are not within the scope of those rules. Impacts to these wetlands, which formerly relied on the Federal Rule for a permitting pathway, are prohibited until a state permitting process is in place.

To provide a regulatory mechanism to authorize impacts to wetlands that are no longer federally jurisdictional and to provide regulatory certainty, the Environmental Management Commission has adopted temporary rules [15A NCAC 02H Section .1400](#). These rules become effective on May 28, 2021.

In order to provide an efficient permitting mechanism for activities subject to 15A NCAC 02H .1401 when impacts proposed are above the deemed permitted thresholds set out in 15A NCAC 02H .1405 and less than 1 acre of wetlands and/or 300 linear feet of stream, the Division of Water Resources (DWR) has developed a General Permit for Impacts to Federally Non-Jurisdictional Wetlands and Classified Surface Water. DWR invites public comment the proposed [General Permit](#).

The public is invited to comment in writing to the DWR on the proposed General Permit. Comments should be emailed to: [PublicComments@ncdenr.gov](mailto:PublicComments@ncdenr.gov); please include "Non-Jurisdictional General Permit" in the email's subject line. Alternatively, comments may be mailed to the NC Division of Water Resources, Attn: Sue Homewood, 450 W. Hanes Mill Rd., Winston-Salem, NC, 27107. **Comments must be received no later than close of business on June 28, 2021.**

This notice is available electronically at <https://deq.nc.gov/about/divisions/water-resources/water-resources-permits/wastewater-branch/401-wetlands-buffer-permits/401-public-notices>.



North Carolina Department of Environmental Quality | Division of Water Resources  
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**From:** Liebman, Brian R <[brian.liebman@oah.nc.gov](mailto:brian.liebman@oah.nc.gov)>  
**Sent:** Monday, February 28, 2022 8:06 PM  
**To:** Everett, Jennifer <[jennifer.everett@ncdenr.gov](mailto:jennifer.everett@ncdenr.gov)>  
**Cc:** Homewood, Sue <[sue.homewood@ncdenr.gov](mailto:sue.homewood@ncdenr.gov)>; Burgos, Alexander N <[alexander.burgos@oah.nc.gov](mailto:alexander.burgos@oah.nc.gov)>  
**Subject:** RRC Requests for Technical Changes

Good evening,

I'm the attorney who reviewed the Rules submitted by the Environmental Management Commission for the March 2022 RRC meeting. The RRC will formally review these Rules at its meeting on Thursday, March 17, 2022, at 9:00 a.m. The meeting will be a hybrid of in-person and WebEx attendance, and an invite should be sent to you as we get closer to the meeting. If there are any other representatives from your agency who will want to attend virtually, let me know prior to the meeting, and we will get invites out to them as well.

Please submit the revised Rules and forms to me via email, no later than 5 p.m. on Friday, March 11, 2022.

In the meantime, please let me know if you have any questions or concerns about these changes.

Thanks,

Brian Liebman  
Counsel to the North Carolina Rules Review Commission  
Office of Administrative Hearings  
(984)236-1948  
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