Burgos, Alexander N

Subject: FW: [External] RRC Agenda Item 7: Environmental Management Commission - 15A NCAC 02H .1301, .1401, .1402, .1403, .1404, .1405
Attachments: NCHBA-NCC-RRC Public Comment-Wetlands-031422.pdf

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From: Millis, Chris <CMillis@nchba.org>
Sent: Thursday, August 11, 2022 1:11 PM
To: Liebman, Brian R <brian.liebman@oah.nc.gov>
Cc: rrc.comments <rrc.comments@oah.nc.gov>; Everett, Jennifer <jennifer.everett@ncdenr.gov>; Peter Daniel, Jr. <pdaniel@ncchamber.com>
Subject: [External] RRC Agenda Item 7: Environmental Management Commission - 15A NCAC 02H .1301, .1401, .1402, .1403, .1404, .1405

Mr. Liebman, I hope you are doing very well. Please note that concerning the RRC August Agenda Item 7: Environmental Management Commission - 15A NCAC 02H .1301, .1401, .1402, .1403, .1404, .1405, at this time (8/11/22) we are only aware of the 7/23/22 response (posted 7/25/22) by Mr. Reynolds with the NCDOJ. https://www.oah.nc.gov/media/13495/open (pages 1 & 2 at the time of this communication).

It is our understanding, per Mr. Reynold's response to the RRC, that the EMC has chosen to *"(2) Submit a written response to the Commission indicating that the agency has decided not to change the rule" [G.S. 150B-21.12(a)]* but has added a phrase outside the statute of "*at this time*". We are interested in the interpretation of how this response complies with the time limit subsection established in G.S. 150B-21.12(b). In addition, it is our understanding that the EMC response to the RRC claims that "*the EMC will provide additional information for the RRC's consideration prior to its August meeting*".

Within our previous letters to the RRC (one example attached), and our verbal comments during the RRC meeting when the rules were considered, we argued that the rule package violated G.S. 150B-19.3. It is our understanding per the 5/20/22 objection letter from OAH sent to the EMC that the RRC found that the agency lacked statutory authority to adopt the rule package as the agency was barred from doing so pursuant to G.S. 150B-19.3(a). https://www.oah.nc.gov/media/13303/open

Please find that we are currently unable to provide constructive public comments by the 8/11/22 deadline as we have no current knowledge of the contents of the "*additional information*" that the EMC and Mr. Reynolds intend to provide the RRC prior to the August meeting.

Based on our current knowledge, and timeframe constraints to provide public comment, we ask that since G.S. 150B-19.3 was extensively argued before the RRC verbally and in writing this past spring, and since the RRC has ruled that the rule package (still not revised by the EMC) is barred from enactment due to G.S. 150B-19.3, that further consideration not be granted and the rule package be returned to the agency according to G.S.150B-21.12(d).

It is our understanding that if the roles were reversed, and the agency was successful in fully adopting a rule that we found objectionable, we are not aware of a mechanism that the regulated community could utilize to seek reconsideration of the same rule package by the Commission prior to enactment. Instead, we recognize that the regulated community would have to utilize Legislative Review or seek to amend the rules that we found objectionable after adoption by starting over at the beginning of the rulemaking process. As a result, we humbly ask that equity between the regulators and the regulated community be maintained concerning this rule package.

Thank you for your time and consideration.

Chris Millis
Director of Regulatory Affairs
North Carolina Home Builders Association
5580 Centerview Drive, Suite 415
Raleigh, NC 27606
(919) 676-9090

March 14, 2022

Rules Review Commission
1711 New Hope Church Road
Raleigh, NC 27609

RE: Wetlands - NCHBA & NC Chamber Additional Written Comment on Proposed Permanent Rules 15A NCAC 02H .1301 (Revision) and 15A NCAC 02H .1400 (.1401 through .1405)

Members of the Rules Review Commission & Commission Staff:

The North Carolina Home Builders Association (NCHBA) and North Carolina Chamber joined a public comment letter that was published on February 24, 2022 to the Commission outlining how the Environmental Management Commission's proposed permanent Rules 15A NCAC 02H .1301 (Revision) and 15A NCAC 02H .1400 (.1401 through .1405) violate portions of the Administrative Procedures Act (APA). One of the violations raised in the joint letter concerns Section 19.3-Limitation on certain environmental rules of G.S. 150B.

The limitation on certain environmental rules found in G.S. 150B-19.3 applies clearly to the Department of Environmental Quality (DEQ) and the Environmental Management Commission (EMC) per subsection (b)(1) and (b)(2) of Section 19.3. As a result, the proposed permanent rules 15A NCAC 02H .1301 (Revision) and 15A NCAC 02H .1400 (.1401 through .1405) are fully subject to G.S. 150B-19.3. Subsection (a) of G.S. 150B-19.3 establishes that both the DEQ and the EMC "*may not adopt a rule for the protection of the environment or natural resources that imposes a more restrictive standard, limitation, or requirement than those imposed by federal law or rule, if a federal law or rule pertaining to the same subject matter has been adopted, unless adoption of the rule is required by one of the subdivisions of this subsection*."

The clear meaning of G.S. 150B-19.3 establishes that DEQ and the EMC may not adopt a rule within their environmental and natural resource protection purview that is more restrictive than a *standard, limitation, or requirement* imposed by federal law, or rule, when a federal law or rule *pertaining to the same subject matter has been adopted*. The subject matter of the proposed permanent Rules 15A NCAC 02H .1301 (Revision) and 15A NCAC 02H .1400 (.1401 through .1405) is wetlands, which are a significant subject matter of both federal law and rule. Even the proposed permanent rules themselves illustrate the existing presence of federal involvement in this subject matter as the proposed rules are riddled with references and citations to federal law and rule.

Regarding existing federal law and rule, please note that the federal government regulates wetlands by way of Section 404 of the Clean Water Act (33 U.S.C 1344), which establishes the federal permit requirement for the discharge of dredged or fill material. Section 404 of the

CWA is administered by the US Army Corps of Engineers (USACE). Years of implementation and litigation have led to the regulatory expansion of the meaning of the term waters beyond maritime shipping lanes to a broad environmental protection measure of all types of water-related features including wetlands on the premise that all waters are connected, irrespective of a distinct surface connection. Another component of the CWA is Section 401 which provides for states to certify that a proposed federal permit will not result in the violation of state water quality standards or other applicable state requirements. In North Carolina, DEQ is responsible for administering this section of federal law. There should be no question that federal law and rule completely engulf the *subject matter* of the proposed permanent rules.

Since federal law and rule clearly exist regarding the subject matter of wetlands, G.S. 150B-19.3 restrains DEQ and the EMC from adopting rules that are more restrictive than federal *standards, limitations, or requirements* unless the adoption of the rule is required by one of the subdivisions of G.S. 150B-19.3(a)(1-5). Regarding subsection (a)(1-5) of G.S. 150-19.3 and concerning the proposed permanent rules, there is not (1) "*a serious and unforeseen threat to the public health, safety, or welfare*", there has not been (2) "*an act of the General Assembly or United States Congress that expressly requires the agency to adopt rules*", there has not been (3) "*a change in federal or State budgetary policy*", there has not been (4) "*a federal regulation required by an act of the United States Congress to be adopted or administered by the State*", nor has there been (5) "*a court order*" to exempt these rules from G.S. 150B-19.3.

Specifically, G.S. 150B-19.3(a)(1) has not been argued by DEQ or the EMC in any public-facing document that the proposed permanent rules are in response to "*a serious and unforeseen threat to public health, safety, or welfare*". In fact, the main argument to the public by DEQ has been to "*reinstate a permitting mechanism to authorize unavoidable impacts to wetlands in North Carolina that are no longer eligible for permitting through Section 401 of the Clean Water Act because of a recent change in Federal Rule; 2) add definitions for terms that were previously defined by the U.S. Army Corps of Engineers; and 3) replace temporary rules that were adopted pursuant to G.S. 150B-21.1 and published in the North Carolina Register on March 17, 2021.*" Statements have been made by the agency to the public regarding the ecological impact of wetlands, specifically "*wetlands provide ecological functions that are extremely valuable to society such as providing habitat for fish and wildlife, flood control, natural water quality improvement, shoreline protection, and recreational opportunities*." Those concerns are also addressed by the federal government by way of the U.S. Army Corps of Engineers, which determines whether the water into which a discharge is proposed has a "significant nexus" to downstream waters, and whether the discharge will have an unacceptable adverse effect on, among other things, water supplies, recreational areas, fisheries or wildlife. Indeed, nothing regarding these rules has claimed to be due to "*a serious and unforeseen threat to the public health, safety, or welfare*".

Regarding G.S. 150B-19.3(a)(2), we are not aware of any act of the General Assembly that "*expressly requires the agency to adopt rules*" to place more stringent standards, limitations, or

requirements than the federal government concerning the subject matter of wetlands. When establishing the duties and powers of DEQ and the EMC within Article 21 of G.S. 143, the General Assembly never expressly directs the agency to protect wetlands beyond federal standards, limitations, or requirements. While the general charge established by the General Assembly within G.S. 143 concerning DEQ and the EMC is law, so is G.S. 150B-19.3 where the General Assembly requires certain limitations on environmental rules and those limitations are not to exceed federal regulations when the federal government occupies the same subject matter and when not expressly authorized by the General Assembly. To be blunt, if G.S. 150B-19.3 does not apply in this instance, then G.S. 150B-19.3 will most likely never constrain any state agency from exceeding federal standards, limitations, or requirements; therefore, it is imperative that the clear meaning of G.S. 150B-19.3 is respectfully upheld here and now.

Since none of the exemptions to G.S. 150B-19.3(a)(1-5) apply to the proposed permanent rules, state law forbids the proposed permanent rules from being more restrictive than federal standards, limitations, or requirements. Please note that the entire contents of the proposed permanent rules are more stringent than what the federal government has chosen to regulate concerning the subject matter of wetlands. As a result, the proposed permanent rules violate G.S. 150B-19.3 and should be rejected by the Commission.

We humbly ask the Commission to uphold the clear language of G.S. 150B-19.3 and reject the adoption of the proposed permanent rules 15A NCAC 02H .1301 (Revision) and 15A NCAC 02H .1400 (.1401 through .1405). Please note that the NCHBA and the North Carolina Chamber do not find these outlined and apparent violations of G.S. 150B-19.3 presented in this letter to be exhaustive. Thank you for your time regarding this matter and your service to our state.

Sincerely,

Chris Millis, PE
Director of Regulatory Affairs - North Carolina Home Builders Association

Gary J. Salamido,
President and CEO - North Carolina Chamber

Burgos, Alexander N

Subject: FW: [External] Public Comment Concerning EMC Wetland Rules
Attachments: NCHBA-NCC-RRC Public Comment-Wetlands-031422.pdf

From: Millis, Chris <CMillis@nchba.org>
Sent: Monday, March 14, 2022 2:15 PM
To: rrc.comments <rrc.comments@oah.nc.gov>
Cc: Everett, Jennifer <jennifer.everett@ncdenr.gov>; Liebman, Brian R <brian.liebman@oah.nc.gov>
Subject: [External] Public Comment Concerning EMC Wetland Rules

Please find attached to this email a written public comment from the North Carolina Home Builders Association and the North Carolina Chamber concerning the EMC's proposed permanent rules 15A NCAC 02H .1301 (Revision) and 15A NCAC 02H .1400 (.1401 through .1405).

In addition to the written public comment attached, please also find this email as a request to provide verbal comments to the RRC when the proposed permanent rules are up for adoption. Per the information on the agenda website, it appears that the agency is requesting an extension; therefore, if not at the upcoming meeting on March, 17th, whenever the proposed permanent wetland rules will be considered by the RRC, if allowed, I would like the opportunity to give public comment.

Thank you so very much for your time and effort concerning this matter.

Chris Millis
Director of Regulatory Affairs
North Carolina Home Builders Association
5580 Centerview Drive, Suite 415
Raleigh, NC 27606
(919) 676-9090

March 14, 2022

Rules Review Commission
1711 New Hope Church Road
Raleigh, NC 27609

RE: Wetlands - NCHBA & NC Chamber Additional Written Comment on Proposed Permanent Rules 15A NCAC 02H .1301 (Revision) and 15A NCAC 02H .1400 (.1401 through .1405)

Members of the Rules Review Commission & Commission Staff:

The North Carolina Home Builders Association (NCHBA) and North Carolina Chamber joined a public comment letter that was published on February 24, 2022 to the Commission outlining how the Environmental Management Commission's proposed permanent Rules 15A NCAC 02H .1301 (Revision) and 15A NCAC 02H .1400 (.1401 through .1405) violate portions of the Administrative Procedures Act (APA). One of the violations raised in the joint letter concerns Section 19.3-Limitation on certain environmental rules of G.S. 150B.

The limitation on certain environmental rules found in G.S. 150B-19.3 applies clearly to the Department of Environmental Quality (DEQ) and the Environmental Management Commission (EMC) per subsection (b)(1) and (b)(2) of Section 19.3. As a result, the proposed permanent rules 15A NCAC 02H .1301 (Revision) and 15A NCAC 02H .1400 (.1401 through .1405) are fully subject to G.S. 150B-19.3. Subsection (a) of G.S. 150B-19.3 establishes that both the DEQ and the EMC "*may not adopt a rule for the protection of the environment or natural resources that imposes a more restrictive standard, limitation, or requirement than those imposed by federal law or rule, if a federal law or rule pertaining to the same subject matter has been adopted, unless adoption of the rule is required by one of the subdivisions of this subsection*."

The clear meaning of G.S. 150B-19.3 establishes that DEQ and the EMC may not adopt a rule within their environmental and natural resource protection purview that is more restrictive than a *standard, limitation, or requirement* imposed by federal law, or rule, when a federal law or rule *pertaining to the same subject matter has been adopted*. The subject matter of the proposed permanent Rules 15A NCAC 02H .1301 (Revision) and 15A NCAC 02H .1400 (.1401 through .1405) is wetlands, which are a significant subject matter of both federal law and rule. Even the proposed permanent rules themselves illustrate the existing presence of federal involvement in this subject matter as the proposed rules are riddled with references and citations to federal law and rule.

Regarding existing federal law and rule, please note that the federal government regulates wetlands by way of Section 404 of the Clean Water Act (33 U.S.C 1344), which establishes the federal permit requirement for the discharge of dredged or fill material. Section 404 of the

CWA is administered by the US Army Corps of Engineers (USACE). Years of implementation and litigation have led to the regulatory expansion of the meaning of the term waters beyond maritime shipping lanes to a broad environmental protection measure of all types of water-related features including wetlands on the premise that all waters are connected, irrespective of a distinct surface connection. Another component of the CWA is Section 401 which provides for states to certify that a proposed federal permit will not result in the violation of state water quality standards or other applicable state requirements. In North Carolina, DEQ is responsible for administering this section of federal law. There should be no question that federal law and rule completely engulf the *subject matter* of the proposed permanent rules.

Since federal law and rule clearly exist regarding the subject matter of wetlands, G.S. 150B-19.3 restrains DEQ and the EMC from adopting rules that are more restrictive than federal *standards, limitations, or requirements* unless the adoption of the rule is required by one of the subdivisions of G.S. 150B-19.3(a)(1-5). Regarding subsection (a)(1-5) of G.S. 150-19.3 and concerning the proposed permanent rules, there is not (1) "*a serious and unforeseen threat to the public health, safety, or welfare*", there has not been (2) "*an act of the General Assembly or United States Congress that expressly requires the agency to adopt rules*", there has not been (3) "*a change in federal or State budgetary policy*", there has not been (4) "*a federal regulation required by an act of the United States Congress to be adopted or administered by the State*", nor has there been (5) "*a court order*" to exempt these rules from G.S. 150B-19.3.

Specifically, G.S. 150B-19.3(a)(1) has not been argued by DEQ or the EMC in any public-facing document that the proposed permanent rules are in response to "*a serious and unforeseen threat to public health, safety, or welfare*". In fact, the main argument to the public by DEQ has been to "*reinstate a permitting mechanism to authorize unavoidable impacts to wetlands in North Carolina that are no longer eligible for permitting through Section 401 of the Clean Water Act because of a recent change in Federal Rule; 2) add definitions for terms that were previously defined by the U.S. Army Corps of Engineers; and 3) replace temporary rules that were adopted pursuant to G.S. 150B-21.1 and published in the North Carolina Register on March 17, 2021.*" Statements have been made by the agency to the public regarding the ecological impact of wetlands, specifically "*wetlands provide ecological functions that are extremely valuable to society such as providing habitat for fish and wildlife, flood control, natural water quality improvement, shoreline protection, and recreational opportunities*." Those concerns are also addressed by the federal government by way of the U.S. Army Corps of Engineers, which determines whether the water into which a discharge is proposed has a "significant nexus" to downstream waters, and whether the discharge will have an unacceptable adverse effect on, among other things, water supplies, recreational areas, fisheries or wildlife. Indeed, nothing regarding these rules has claimed to be due to "*a serious and unforeseen threat to the public health, safety, or welfare*".

Regarding G.S. 150B-19.3(a)(2), we are not aware of any act of the General Assembly that "*expressly requires the agency to adopt rules*" to place more stringent standards, limitations, or

requirements than the federal government concerning the subject matter of wetlands. When establishing the duties and powers of DEQ and the EMC within Article 21 of G.S. 143, the General Assembly never expressly directs the agency to protect wetlands beyond federal standards, limitations, or requirements. While the general charge established by the General Assembly within G.S. 143 concerning DEQ and the EMC is law, so is G.S. 150B-19.3 where the General Assembly requires certain limitations on environmental rules and those limitations are not to exceed federal regulations when the federal government occupies the same subject matter and when not expressly authorized by the General Assembly. To be blunt, if G.S. 150B-19.3 does not apply in this instance, then G.S. 150B-19.3 will most likely never constrain any state agency from exceeding federal standards, limitations, or requirements; therefore, it is imperative that the clear meaning of G.S. 150B-19.3 is respectfully upheld here and now.

Since none of the exemptions to G.S. 150B-19.3(a)(1-5) apply to the proposed permanent rules, state law forbids the proposed permanent rules from being more restrictive than federal standards, limitations, or requirements. Please note that the entire contents of the proposed permanent rules are more stringent than what the federal government has chosen to regulate concerning the subject matter of wetlands. As a result, the proposed permanent rules violate G.S. 150B-19.3 and should be rejected by the Commission.

We humbly ask the Commission to uphold the clear language of G.S. 150B-19.3 and reject the adoption of the proposed permanent rules 15A NCAC 02H .1301 (Revision) and 15A NCAC 02H .1400 (.1401 through .1405). Please note that the NCHBA and the North Carolina Chamber do not find these outlined and apparent violations of G.S. 150B-19.3 presented in this letter to be exhaustive. Thank you for your time regarding this matter and your service to our state.

Sincerely,

Chris Millis, PE
Director of Regulatory Affairs - North Carolina Home Builders Association

Gary J. Salamido,
President and CEO - North Carolina Chamber

Burgos, Alexander N

Subject: FW: [External] Upcoming RRC Meeting, Request to Speak IN OPPOSITION to Proposed Rules 15A NCAC 02H .1400 - .1405

From: Jim Spangler <jspangler@spanglerenvironmental.com>
Sent: Monday, March 7, 2022 6:06 PM
To: Liebman, Brian R <brian.liebman@oah.nc.gov>
Subject: [External] Upcoming RRC Meeting, Request to Speak IN OPPOSITION to Proposed Rules 15A NCAC 02H .1400 - .1405

Counsel Liebman,
I would like to briefly speak in opposition to these rules. I have over 30 years of practical experience performing wetland/stream delineations and obtaining permits for projects that involve wetland/stream fill or impacts otherwise.

I believe that these proposed rules are unnecessary in light of the following:

A) my very recent, pertinent, direct project experience that contradicts the stated purpose of these rules identified by NC DEQ DWR staff during the Public Involvement process, and
B) the current, published policy guidance from US EPA and the Corps of Engineers that explicitly contradicts the stated purpose of these rules identified by NC DEQ DWR staff during the Public Involvement process.
C) he insertion of the word "impact" in place of "discharge" throughout these proposed rules is a subjective, not objective concern. I participated in no fewer than four stakeholder meetings with DWR staff (as well as several meetings on the temporary rules, and assisted stakeholder groups with their formal comments for the Public Involvement hearing, and this subjective, undefined term was identified by DWR staff to be "more consistent with the 401 Water Quality Certification process" of the Division. This is, in fact, not the case, as I pointed out in stakeholder meetings. In fact, **15A NCAC 02H .0501(a) Water Quality Certification, Applicability and Definitions** says, "Certifications are required for federally permitted or licensed activity including, but not limited to the construction or operation of facilities which may result in a *discharge* to navigable waters." (Emphasis added). To be clear, in addition to the fact that the 401 Certification process in the .0500 rules is for waters that are subject to Section 404 and 401 of the Clean Water Act (i.e. "federally permitted") while the .1400 rules are specifically for areas that are NOT federally permitted, the only mention of impacts in the .0500 rules are the definitions of "Cumulative impacts" and "Secondary impacts". The .0500 rules are clear—the direct impact is the "discharge" (and this is what the proposed .1400 rules should be about because they are regulating the cause and effect on a specific resource) and the .0500 rules add cumulative and secondary impacts as additional, objective, defined considerations. The insertion of the mere word "impact" in place of "discharge" is the insertion of an undefined term.

I expect my statement in opposition to be less than three minutes in length.

If possible, I would like to make my statements via remote connection over the Webex link or other video-conference means. Please advise.

SPANGLER
ENVIRONMENTAL, INC.

James A. Spangler, EP, CEI, AM ASCE
President | Senior Principal
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4338 Bland Rd., Raleigh, NC 27609

Burgos, Alexander N

Subject: FW: [External] NCHBA, NCMA, et al. Comment to the RRC: EMC Proposed Permanent Wetland Rules - 15A NCAC 02H .1301 (Revision) and 15A NCAC 02H .1400 (.1401 through .1405)
Attachments: RRC Public Comment-Wetlands-Joint Ltr-022422.pdf

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From: rrc.comments <rrc.comments@oah.nc.gov>
Sent: Thursday, February 24, 2022 10:46 AM
To: Liebman, Brian R <brian.liebman@oah.nc.gov>
Subject: FW: [External] NCHBA, NCMA, et al. Comment to the RRC: EMC Proposed Permanent Wetland Rules - 15A NCAC 02H .1301 (Revision) and 15A NCAC 02H .1400 (.1401 through .1405)

From: Millis, Chris <CMillis@nchba.org>
Sent: Thursday, February 24, 2022 9:42 AM
To: rrc.comments <rrc.comments@oah.nc.gov>
Cc: Everett, Jennifer <jennifer.everett@ncdenr.gov>; Jay Stem <jay@ncaggregates.org>; jhatcher@ncforestry.org; Keith Larick <keith.larick@ncfb.org>; Peter Daniel, Jr. <pdaniel@ncchamber.com>; Ross Smith <ross.smith@myncma.org>; Minton, Tim <TMinton@nchba.org>
Subject: [External] NCHBA, NCMA, et al. Comment to the RRC: EMC Proposed Permanent Wetland Rules - 15A NCAC 02H .1301 (Revision) and 15A NCAC 02H .1400 (.1401 through .1405)

Members of the Rules Review Commission & Commission Staff:

Please find attached to this email a joint comment letter concerning the Environmental Review Commission's (EMC) desired adoption of 15A NCAC 02H .1301 (Revision) and 15A NCAC 02H .1400 (.1401 through .1405) issued by the North Carolina Home Builders Association (NCHBA), North Carolina Forestry Association, North Carolina Chamber, North Carolina Aggregates Association (NCAA), North Carolina Farm Bureau (NCFB), and the North Carolina Manufacturers Alliance (NCMA).

Please also find this email as a formal request to provide public comment during the RRC Meeting when this rule is to be considered.

Thank you for your time regarding this matter and your service to our state.

Chris Millis
Director of Regulatory Affairs
North Carolina Home Builders Association
5580 Centerview Drive, Suite 415
Raleigh, NC 27606

February 24, 2022

Rules Review Commission
1711 New Hope Church Road
Raleigh, NC 27609

RE: Wetlands - NCHBA Written Comment on Proposed Permanent Rules 15A NCAC 02H .1301 (Revision) and 15A NCAC 02H .1400 (.1401 through .1405)

Members of the Rules Review Commission & Commission Staff:

On behalf of the members of the North Carolina Home Builders Association (NCHBA), North Carolina Forestry Association, North Carolina Chamber, North Carolina Aggregates Association (NCAA), North Carolina Farm Bureau (NCFB), and the North Carolina Manufacturers Alliance (NCMA) please find this letter regarding the Environmental Management Commission's January 13th, 2022 adoption of permanent Rules 15A NCAC 02H .1301 (Revision) and 15A NCAC 02H .1400 (.1401 through .1405). We appreciate your investment of time and energy to consider the facts concerning this issue. The information provided in this document show that the proposed rules violate GS 150B; therefore, we ask that the Rule Review Commission object to the adoption of the permanent rules.

Background:
According to the Environmental Management Commission (EMC) Public Hearing notice concerning 15A NCAC 02H .1301 (Revision) and 15A NCAC 02H .1400 (.1401 through .1405), the purpose to adopt a new set of state wetland regulations is due to the past action by the federal government narrowing what is considered Waters of the United States (WOTUS) and the state's desire to step in and regulate the formerly federal regulated wetlands. Specifically, the Public Hearing notice states: *"as a result of the new Federal Rule, there is 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, DWR adopted temporary rules and initiated permanent rulemaking."*

After the EMC's initial action to move forward with the rule-making process to adopt additional permanent state wetland regulations, the Federal Courts along with the Biden Administration completely rolled back the Trump Administration's Federal Rule (Navigable Waters Protection

Rule (NWPR)) by way of remand and vacate. It is now firmly established at the Federal level that wetlands are currently being regulated by way of a pre-2015 regulatory scheme.

Since the Federal Rule (NWPR) cited in the Public Hearing notice has been completely abandoned by the Federal courts and the Biden Administration, the purpose for additional state wetland regulations cited in the Public Hearing notice is no longer valid and the rules are not reasonably necessary. We attest that the adoption of 15A NCAC 02H .1301 (Revision) and 15A NCAC 02H .1400 (.1401 through .1405) are in violation of 150B-21.9(3) as the proposed rules, according to "the specific purpose for which the rule is proposed" are no longer "reasonably necessary".

EMC January 13th, 2022 Action:

At the EMC's January 13th, 2022 meeting, a vote to delay the adoption of 15A NCAC 02H .1301 (Revision) and 15A NCAC 02H .1400 (.1401 through .1405) until further justification confirming the necessity of the rules was provided to the EMC failed by way of a 7-7 tie. Without confirming for the benefit of the regulated community whether the rules were, in fact necessary, according to the purpose stated within the Public Hearing notice, the EMC decided by way of an 8-6 vote to still adopt the permanent rules.

According to the discussion between EMC Members and Staff during the motions involving the adoption of 15A NCAC 02H .1301 (Revision) and 15A NCAC 02H .1400 (.1401 through .1405), it is understood that a continued desire to move forward with permanent wetland rules evolved from the purpose stated in the Public Hearing notice, allegedly needed to serve a "permitting gap". In addition, a secondary argument was presented by EMC Members and Staff during the discussion to have rules in place if and when the Federal Government acts on wetlands in the state in a manner that the EMC and the Agency (DEQ) disagree.

The Alleged "Permitting Gap" & GS 150B 21.9(3) vs. GS 150B-19.3:

According to the EMC's discussion at the time of adoption, one of the reasons for the adoption of the permanent rules is based upon an alleged "permitting gap". The alleged "permitting gap" consists of an unknown, but arguably a very small, subset of potential applicants who received Federal wetlands/waters determinations by the U.S. Army Corps of Engineers (USACE) during the time the Trump-era rule (NWPR) was in effect who also failed to utilize the temporary state-level wetland rules. The desire to move forward with permanent wetland rules, even after the recent Federal action to completely roll back the NWPR, based on the claim to serve the "permitting gap" does not align with current written Federal guidance.

> Federal Guidance - Current Federal Implementation of WOTUS:
> *"As the agencies' actions are governed by the regulatory definition at the time of the action, permit decisions made prior to the court's decision that relied on a NWPR AJD will not be reconsidered in response to the NWPR vacatur. Permit decisions may be modified, suspended, or revoked per 33 C.F.R. § 325.7 where the regulatory criteria are*

> *met. The Corps will not rely on an AJD issued under the NWPR (a "NWPR AJD") in making a new permit decision. The Corps will make new permit decisions pursuant to the currently applicable regulatory regime (i.e., the pre-2015 regulatory regime). Therefore, for any currently pending permit action that relies on a NWPR AJD, or for any future permit application received that intends to rely on a NWPR AJD for purposes of permit processing, the Corps will discuss with the applicant, as detailed in RGL 16-01, whether the applicant would like to receive a new AJD completed under the pre-2015 regulatory regime to continue their permit processing or whether the applicant would like to proceed in reliance on a preliminary JD or no JD whatsoever." 1*

Written communication provided by the Federal Government clearly outlines that approved jurisdictional determinations (AJDs) by the USACE made when the Federal Rule (NWPR) was in effect will NOT be allowed to be used for a new permit action: "*The Corps will not rely on an AJD issued under the NWPR in making a new permit decision*". The published federal guidance outlines that the applicant desiring a permit action who has an NWPR AJD will be required to either request a "new AJD be provided pursuant to the pre-2015 regulatory regime" or the applicant would "proceed in reliance on a preliminary JD or no JD whatsoever". Please note that a preliminary JD (PJD) covers all regulated types of wetlands which includes federally jurisdictional wetlands, federally non-jurisdictional wetlands, and isolated wetlands. It is clear that all written communication provided by the Federal Government indicates that there is no "permitting gap". These applicants who have NWPR AJDs and desire permitting action can either get a new AJD or use a PJD.

The EMC Staff attests that they have conferred directly with the USACE regarding their recent implementation guidance and has confirmed that a narrow permitting gap still exists. It was confirmed during the EMC's discussion when voting to adopt the rules that this claim is based upon verbal communications with the USACE that contradict what the Federal Government has put in writing as guidance to the regulated public.

In addition, as a result of conversations that NCDEQ has had with the USACE, there is a belief by NCDEQ that the USACE will honor a no-jurisdiction determination for permitting purposes issued under the NWPR until the AJD expires (5 years after issuance). We have been informed by environmental consultants who have first-hand experience recently handling (within the month) NWPR AJDs that the belief that these NWPR AJDs described above would not allow the state to protect wetland resources as required under existing water quality laws without the passage of these permanent rules is not accurate. In fact, in the weeks leading up to the EMC vote, the USACE processed permit applications using PJDs, new AJDs, and NCDEQ processed 401 certifications for exactly the 'gap' wetlands they allege are not protected without the permanent permitting rules.

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[1] *Source derived from U.S. Army Corps of Engineers via Current Implementation of Waters of the United States: https://www.epa.gov/wotus/current-implementation-waters-united-states*

The fact is that there is currently a permitting mechanism without utilizing the temporary or proposed permanent rules for these wetlands which completely negates the EMC's purpose for the rule stated in the Public Notice: *"as a result of the new Federal Rule, there is 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, DWR adopted temporary rules and initiated permanent rulemaking."*

Based upon known and verifiable written documentation provided by the Federal Government, a "permitting gap" does not exist. First-hand practice by environmental consultants verifies that an existing permit mechanism to handle NWPR AJDs currently exists. As a result, we attest that the adoption of 15A NCAC 02H .1301 (Revision) and 15A NCAC 02H .1400 (.1401 through .1405) are in violation of 150B-21.9(3) as the proposed rules are not "reasonably necessary".

If the Commission happens to accept the Agency's "permitting gap" argument, then those who have NWPR AJDs will be subject to rules that impose a more restrictive standard than those imposed by federal law or rule as, in this case, both the proposed state rules and the federal rules are regulating the same wetlands. As a result, if the "permitting gap" argument is upheld, we attest the proposed rules are in violation of GS 150B-19.3-Limitation on certain environmental rules.

Unnecessary Rules for Today, Ambiguous Rules for Tomorrow:
As previously outlined, the EMC's stated justification to move forward with permanent rules after the Federal Rule (NWPR) was completely rolled back by the federal government, not only included the claim of a "permitting gap" but also included the desire to have rules in place if and when the Federal Government acts on wetlands in the state in a manner that the EMC and the Agency (NCDEQ) disagree. This belief, made clear by DEQ staff and EMC members during the discussion, is one of the significant fears of the regulated community.

It is understood that the current federal approach, after the NWPR was rolled back, will result in the USACE claiming jurisdiction over wetlands that the EMC and DEQ believe they have an obligation to protect. The uncertainty surrounding the pathway to entitle property with the necessary environmental permits comes in when the federal government begins to not claim jurisdiction over wetlands that the EMC and DEQ believe they have an obligation to protect; therefore, triggering the future enforcement of 15A NCAC 02H .1301 (Revision) and 15A NCAC 02H .1400 (.1401 through .1405).

Complying with 15A NCAC 02H .1301 (Revision) and 15A NCAC 02H .1400 (.1401 through .1405) is no simple feat by the regulated community as it can easily double the time to establish uplands from wetlands on a property. The significant time to conform to the new state wetland regulations is significant as the process to establish what is protected in the eyes of the state

cannot commence until the federal process is completed. The enforcement of the temporary rules has confirmed this anticipated impact on the permitting schedule of the regulated community. In fact, the cumbersome process caused by the temporary rules to traverse both Federal and State wetland regulations have caused volume builders to consider other states besides North Carolina as their top market to meet housing demands. We fear that more builders will follow suit once knowledge of the cumbersome permitting mechanism surrounding these permanent state-level wetland rules are fully realized.

While these rules are now alleged to just serve the "permitting gap" of NWPR era AJDs, there is no certainty as to when Agency (DEQ) latitude through policy interpretations could expand who is subject to these additional wetland regulations in the future. Agency interpretation of how the Federal government is enforcing WOTUS in relation to the Agency's interpretation of how Waters of the State should be enforced in the future could capture more applicants that would be subject to the proposed permanent Rules 15A NCAC 02H .1301 (Revision) and 15A NCAC 02H .1400 (.1401 through .1405) beyond just the applicants within the alleged "permitting gap". As a result, we attest that the adoption of these rules violates GS 150B-21.9(2) as the rules are neither "clear" or "unambiguous" to the regulated community. The cloud of uncertainty that will exist over property in this state is concerning when the rules will apply in the future is a direct result of rulemaking rooted in ambiguity.

Clearly deviating from the stated purpose for the permanent rules within the Public Hearing notice, evolving justification for adoption that is based upon verbal communication with the federal government that negates written federal guidance, rules that are more stringent in specific instances than federal rules, and ambiguity to when the written rules will apply to individuals beyond the alleged "permitting gap" all result in multiple violations of GS 150B-21.9(a) and a violation of GS 150B-19.3.

We greatly appreciate your consideration of the facts concerning 15A NCAC 02H .1301 (Revision) and 15A NCAC 02H .1400 (.1401 through .1405). Since the proposed rules violate GS 150B, we ask that the Rule Review Commission object to the adoption of the permanent rules. Thank you for your time regarding this matter and your service to our state.

Sincerely,

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John E. Hatcher, Jr., Ph.D., CF
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