Burgos, Alexander N

Subject: FW: [External] Letter of Support for Permanent Wetland Rules, in Response to RRC's Objection
Attachments: 2022.08.11 SELC Comments to RRC in Support of Proposed Permanent Rules.pdf

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Subject: [External] Letter of Support for Permanent Wetland Rules, in Response to RRC's Objection

Dear Commissioners and Staff of the Rules Review Commission:

Please find enclosed a copy of comments we are submitting in support of the Permanent Wetland Rules (15A N.C. Admin. Code 02H .1301, .1401-.1405) and in response to the Rules Review Commission's objection to those rules, for consideration at your upcoming meeting.

Best wishes,

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August 11, 2022

Via Electronic Mail

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

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

Dear Commissioners and Commission Staff:

Please accept these comments in support of the proposed permanent wetlands rules adopted by the Environmental Management Commission ("EMC"): 15A N.C. Admin. Code 02H .1301 (Revision) and 15A N.C. Admin. Code 02H .1401 to .1405. We write specifically to request that you reconsider the mistaken conclusion that N.C. Gen. Stat. § 150B-19.3 bars the EMC from adopting the permanent wetlands rules and instead acknowledge that the EMC had statutory authority to adopt them and approve them as written.

The Southern Environmental Law Center submits these comments on its own behalf and on behalf of American Rivers, Cape Fear River Watch, Carolina Wetlands Association, North Carolina Coastal Federation, North Carolina Conservation Network, North Carolina Wildlife Federation, and Sound Rivers. Our organizations have a longstanding interest in maintaining and preserving North Carolina's wetlands and in advocating for a strong permitting program to authorize and impose requirements on impacts to North Carolina's wetlands.

We write specifically to address the objection of the Rules Review Commission ("RRC") that the EMC was "barred" from adopting the permanent wetlands rules by N.C. Gen. Stat. § 150B-19.3 and therefore "lacked statutory authority to adopt" them.[1] Because section 150B-19.3 does not apply to these rules, we urge the RRC to reconsider its prior objection and approve the rules as written.

[1] Letter from Brian Liebman, RRC Counsel, to Jennifer Everett, EMC Rulemaking Coordinator (May 20, 2022).

I. The EMC Undeniably Has Authority to Regulate Wetlands.

The RRC must approve a permanent rule if it finds that the rule is, among other things, "within the authority delegated to the agency by the General Assembly."[2] Here, the RRC must approve the permanent wetland rules because they are squarely "within the authority delegated to the [EMC] by the General Assembly."

When the EMC adopted wetlands rules in 1996 and the RRC objected based on its belief that the EMC lacked statutory authority to adopt the rules, the North Carolina Court of Appeals held definitively that "the EMC does … have statutory authority to implement the wetlands rules."[3]

In addition, the RRC has already acknowledged that the EMC has authority to adopt the permanent wetlands rules. It previously approved the temporary wetlands rules in an 8-0 decision at its May 2021 meeting. That unanimous approval required the RRC to conclude that the EMC has authority to regulate wetlands in the temporary rules. Because the permanent wetland rules cover the exact same subject matter as the temporary rules, it would be arbitrary and capricious for the RRC both to ignore the holding of the North Carolina Court of Appeals and to reverse its own prior decision on virtually identical rules by now maintaining that the EMC does not have that authority. There has been no change to the laws governing the EMC's authority since May 2021, and there is thus no basis for the RRC to change its mind and question the EMC's authority now.

II. Section 150B-19.3 Does Not Apply to Bar the EMC's Authority.

Contrary to the RRC's counsel's conclusion in May 2022, N.C. Gen. Stat. § 150B-19.3 does *not* supersede the Court of Appeals' decision and does *not* prohibit the EMC from adopting the permanent wetland rules. Known as the "Hardison Amendment" after its original bill sponsor, enacted in the 1970s, fully repealed by 1995, and reinstated in 2011, the law prohibits the State from adopting a rule that is more protective of the environment than "a federal law or rule pertaining to the same subject matter."[4] In its current form, section 150B-19.3 of the N.C. General Statutes provides as follows:

> Limitation on certain environmental rules
>
> (a) An agency authorized to implement and enforce State and federal environmental laws 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

[2] N.C. Gen. Stat. §§ 150B-21.9(a), -21.10(1).

[3] *In re Ruling by Env't Mgmt. Comm'n*, 155 N.C. App. 408, 413 (2002) (citing N.C. Gen. Stat. §§ 143-211(a), (c), 212(6), 214(a)(1) as statutory sources of that authority).

[4] N.C. Gen. Stat. § 150B-19.3(a).

pertaining to the same subject matter has been adopted, unless adoption of the rule is required by one of the subdivisions of this subsection. …

(b) For purposes of this section, "an agency authorized to implement and enforce State and federal environmental laws" means any of the following:

(1) The Department of Environmental Quality …

(2) The Environmental Management Commission … [5]

The Hardison Amendment does not take away the state's authority to regulate wetlands by developing and adopting the permanent wetlands rules, an authority that was granted to the EMC by the legislature and validated by the adjudication of the North Carolina Court of Appeals. First, there is no federal law or rule on the books pertaining to the same subject matter as North Carolina's permanent wetlands rules. Second, the permanent rules are not "a rule for the protection of the environment or natural resources." Third, the permanent rules are not "more restrictive" than any federal rules that even arguably regulate the same subject matter."

Indeed, the RRC's unanimous approval of the temporary wetland rules in May 2021 required it to conclude that that the temporary rules, which cover the exact same subject matter as the permanent rules, did not violate § 150B-19.3. For the RRC to conclude otherwise now, with no intervening change of law governing the EMC's authority, would be arbitrary and capricious.

A. Section 150B-19.3 does not apply to the permanent wetland rules because they do not pertain to the same subject matter as any federal law or rule.

Section 150B-19.3 applies only "*if* a federal law or rule pertaining to the *same subject matter* has been adopted,"[6] but the permanent wetlands rules do not "pertain[] to the same subject matter" as any federal law or rule. Rather, they provide a permitting mechanism for wetlands that the North Carolina General Assembly defines as "waters of the State." In contrast, the federal Clean Water Act permitting programs pertain to "navigable waters," which the United States Congress defined as "waters of the United States."[7] The definition of "waters of the State" contains no limitation based on navigability, instead encompassing any waterbody or accumulation of water that is "contained in, flows through, or borders upon any portion of this State."[8]

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[5] N.C. Gen. Stat. § 150B-19.3(a).

[6] *Id.* (emphasis added).

[7] 33 U.S.C. § 1362(7).

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

The federal Clean Water Act enlists the State in sharing responsibilities with the federal government to protect "waters of the United States," but North Carolina alone has responsibility for regulating "waters of the State." Of course, the Clean Water Act will apply to *some* of North Carolina's "waters of the State."

The crucial fact that ensures that there is no overlap of jurisdiction between the EMC's proposed permanent wetland rules and federal rules promulgated under the federal Clean Water Act is this: The proposed permanent wetland rules *specifically state* that they would *not* apply when that overlap occurs and would apply only to waters that are *not* "waters of the United States." Section .1301, which governs so-called "isolated wetlands," states as follows:

> *If* the U.S. Army Corps of Engineers … determines that a particular stream or open water is *not* regulated under Section 404 of the Clean Water Act, and the stream or open water meets the definition of an isolated water in Paragraph (f) of this Rule, *then* discharges to that stream or open water or wetland *shall be covered* by this Section. [9]

Likewise, section .1401 also clearly does not apply to wetlands that are governed and protected by the federal Clean Water Act. It clarifies this fact both by its title ("Discharges to *Federally Non-Jurisdictional* Wetlands") and by explicitly stating, "The provisions of this Section shall apply to … management determinations regarding *federally non-jurisdictional* wetlands," that is, wetlands that the U.S. Corps of Engineers has determined *not* "to be subject to Section 404 of the Clean Water Act."[10]

The RRC Staff Opinion for the May 2022 meeting was clearly mistaken on this point;[11] the vacatur of the federal "Navigable Waters Protection Rule" may mean that there are now more waters in North Carolina that are governed by the Clean Water Act, but it had no bearing on the fact that the state's proposed permanent wetlands rules, *by their very terms*, simply do not apply to any waters in the state that are governed by the federal Clean Water Act.

Thus, the proposed permanent wetland rules cover precisely those waters that meet the definition of "waters of the State" but do *not* meet the definition of "waters of the United States." Accordingly, there is no federal law or rule pertaining to the "same subject matter" as the proposed permanent rules, and § 150B-19.3 does not apply.

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[9] N.C. Admin. Code § 02H .1301(b) (proposed) (emphasis added).

[10] N.C. Admin. Code § 02H .1401(a) (emphasis added).

[11] Brian Liebman, RRC Staff Opinion, 2 (May 17, 2022), https://www.oah.nc.gov/media/13283/open.

B. Section 150B-19.3 does not apply to the permanent wetland rules because they are not "a rule for the protection of the environment or natural resources."

Section 150B-19.3 prevents a state agency from adopting a "rule for the protection of the environment or natural resources" that is more restrictive or protective than any "federal law or rule." The permanent wetland rules provide a permitting scheme that will allow the state to *authorize impacts to wetlands* where none are currently authorized. As explained by the Department of Environmental Quality ("DEQ"), "the proposed rules *will allow impacts to non-jurisdictional wetlands* [that is, wetlands to which the federal Clean Water Act does not apply] *that would otherwise be prohibited* due to the current lack of a permanent State permitting mechanism."[12]

Although the proposed rules impose requirements on impacts to wetlands, such as the requirement to mitigate impacts at a 1:1 ratio, "there is still likely to be net loss of wetland function and potentially some net loss of wetland acreage."[13] "Indeed, "wetland losses could be cumulatively significant in terms of wetland area and function."[14]

Moreover, while the proposed rules are likely to lead to adverse impacts to wetlands and the ecosystems they support, the rules are anticipated to result in "significant indirect benefits" to regulated entities, including the transportation and development communities.[15] As DEQ explained, the North Carolina Department of Transportation is "likely to avoid significant costs" as a result of the rules. With no permitting mechanism to authorize impacts to federally non-jurisdictional wetlands, the Department of Transportation has to avoid these wetlands in its projects, which can mean "design[ing] longer roads, purchasing more right-of-way acreage, relocating more existing homes and businesses, and paying higher mitigation costs from impacting jurisdictional wetlands."[16] With rules in place to authorize impacts to federally non-jurisdictional wetlands, however, the Department of Transportation can avoid these costs.

Further, the development community—including private developers, local governments, and industries like agriculture and mining—are likely to benefit from the proposed rules.[17] Because impacts to federally non-jurisdictional wetlands are not authorized at all in the absence of these State wetland rules, the proposed rules will create "increased development

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[12] N.C. Dep't of Env't Quality, *Regulatory Impact Analysis for Proposed Rule 15A N.C. Admin. Code 02H .1301, .1401-.1405 at* 27 (2021).

[13] *Id.* at 29.

[14] *Id.* at 30.

[15] *Id.* at 20.

[16] *Id.*

[17] *Id.* at 20-21.

opportunities" that would not otherwise exist.[18]

The proposed permanent wetland rules therefore do not constitute rules "for the protection of the environment or natural resources," and therefore are not barred by the terms of section 150B-19.3.

Conclusion

For the foregoing reasons, we respectfully request that you reconsider and withdraw the objection based on the erroneous conclusion that N.C. Gen. Stat. § 150B-19.3 bars the EMC from adopting the permanent wetlands rules and instead acknowledge that the EMC had statutory authority to adopt them. Such a decision would align with the 2002 decision of the North Carolina Court of Appeals and with the RRC's own treatment of the temporary wetlands rules last year. Because section 150B-19.3 does not apply to the permanent wetland rules, we urge the RRC to approve the rules as written.

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

Sincerely,

Julie Furr Youngman
Senior Attorney

Kelly F. Moser
Senior Attorney

[18] *Id.*

cc: *via electronic mail*

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