

## Burgos, Alexander N

---

**Subject:** FW: EMC 15A NCAC 02H .1300, .1401, .1402, .1403, .1404, .1405 - Return Letter

---

**From:** Everett, Jennifer <jennifer.everett@deq.nc.gov>

**Sent:** Friday, October 6, 2023 1:37 PM

**To:** Snyder, Ashley B <ashley.snyder@oah.nc.gov>

**Cc:** Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Liebman, Brian R <brian.liebman@oah.nc.gov>; McGhee, Dana <dana.McGhee@oah.nc.gov>

**Subject:** RE: EMC 15A NCAC 02H .1300, .1401, .1402, .1403, .1404, .1405 - Return Letter

Thank you, Ashley!

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)-707-8595  
<https://deq.nc.gov/permits-rules/rules-regulations/deq-proposed-rules>

E-mail correspondence to and from this address may be subject to the North Carolina Public Records Law and may be disclosed to third parties.

## **Burgos, Alexander N**

---

**Subject:** FW: EMC 15A NCAC 02H .1300, .1401, .1402, .1403, .1404, .1405 - Return Letter

---

**From:** Snyder, Ashley B <ashley.snyder@oah.nc.gov>

**Sent:** Thursday, October 5, 2023 12:05 PM

**To:** Everett, Jennifer <jennifer.everett@deq.nc.gov>

**Cc:** Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Liebman, Brian R <brian.liebman@oah.nc.gov>; McGhee, Dana <dana.McGhee@oah.nc.gov>

**Subject:** RE: EMC 15A NCAC 02H .1300, .1401, .1402, .1403, .1404, .1405 - Return Letter

Jennifer,

The returned rules included a proposed amendment and adoptions. The objections were not to existing language. Therefore, there will be no change to the Code.

**Ashley Snyder**

Codifier of Rules

Office of Administrative Hearings

(984) 236-1941

## Burgos, Alexander N

---

**From:** Liebman, Brian R  
**Sent:** Thursday, October 5, 2023 11:38 AM  
**To:** Everett, Jennifer  
**Cc:** Burgos, Alexander N; Snyder, Ashley B  
**Subject:** EMC 15A NCAC 02H .1300, .1401, .1402, .1403, .1404, .1405 - Return Letter  
**Attachments:** 10.05.2023 Environmental Management Commission Return Letter 02H.pdf

Good morning,

Attached, please find a letter formally returning the above captioned rules pursuant to S.L. 2023-134, s. 21.2.(m).

Please let me know if you have any questions or concerns.

Best,  
Brian

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

E-mail correspondence to and from this address may be subject to the North Carolina Public Records Law N.C.G.S. Chapter 132 and may be disclosed to third parties.

---

Email correspondence to and from this address may be subject to the North Carolina Public Records Law and may be disclosed to third parties by an authorized state official.

## Burgos, Alexander N

---

**From:** Liebman, Brian R  
**Sent:** Tuesday, October 3, 2023 1:43 PM  
**To:** Everett, Jennifer; Reynolds, Phillip T  
**Cc:** Burgos, Alexander N  
**Subject:** RRC October 2023 Special Meeting - Staff Opinion - 15A NCAC 02H .1301, .1401-.1405  
**Attachments:** 10.2023 Special - EMC 02H .1301, .1401, .1402, .1403, .1404, .1405 Staff Opinion.pdf

Good afternoon,

Attached please find a staff opinion concerning the above captioned rules which will be considered at the RRC Special meeting Thursday, October 5, 2023.

If you have any questions or concerns, please do not hesitate to contact me.

Best,  
Brian

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

E-mail correspondence to and from this address may be subject to the North Carolina Public Records Law N.C.G.S. Chapter 132 and may be disclosed to third parties.

---

Email correspondence to and from this address may be subject to the North Carolina Public Records Law and may be disclosed to third parties by an authorized state official.

## Burgos, Alexander N

---

**From:** Reynolds, Phillip <PReynolds@ncdoj.gov>  
**Sent:** Tuesday, August 16, 2022 3:20 PM  
**To:** Liebman, Brian R  
**Cc:** Everett, Jennifer; robinsmithemc@gmail.com; Burgos, Alexander N  
**Subject:** [External] RRC Objection to EMC's 02H Rules.  
**Attachments:** 2022-08-16 EMC Additional Response to RRC re 02H Rules.pdf

**CAUTION:** External email. Do not click links or open attachments unless you verify. Send all suspicious email as an attachment to [Report Spam](#).

Brian,

I hope this email finds you doing well. I apologize again for the delay, but it was unavoidable. Please find attached a letter providing additional clarification regarding the RRC's objection to the EMC's wetlands rules. Despite any assertions to the contrary, the information primarily relates to the RRC's interpretation of Section 150B-19.3 and does not include any changes to the rules or new justifications related to their adoption. To the extent it is necessary, please also accept this email as a request to address the RRC at the upcoming meeting.

I look forward to seeing you on Thursday.

Sincerely,  
Phillip



JOSH STEIN  
ATTORNEY GENERAL

STATE OF NORTH CAROLINA  
DEPARTMENT OF JUSTICE

REPLY TO:  
PHILLIP T. REYNOLDS  
ENVIRONMENTAL DIVISION  
[preynolds@ncdoj.gov](mailto:preynolds@ncdoj.gov)  
(919)716-6971

August 15, 2022

North Carolina Rules Review Commission  
Office of Administrative Hearings  
1711 New Hope Church Road  
Raleigh, North Carolina 27609

*Via Email to [Brian.Liebman@oah.nc.gov](mailto:Brian.Liebman@oah.nc.gov)*

**Re: EMC Response to RRC's Objections to Rules 15A NCAC 02H .1301  
and 02H .1401 - .1405**

Dear Chair Doran and Commission Members:

As provided in its July 23, 2022 letter submitted through the undersigned counsel, the North Carolina Environmental Management Commission ("EMC") submits the following information to the North Carolina Rules Review Commission ("RRC") for its consideration regarding its objection to the EMC's rules pertaining to "non-federally jurisdictional" wetlands. The EMC offers this information in an effort to clarify issues raised during the RRC's May meeting and requests the RRC to reconsider its objection.

I. The EMC's authority to regulate waters of the State is express and well-established.

The EMC's authority and duty related to waters of the State, including wetlands, is both express and well-established within the provisions of Article 21 of Chapter 143, as well as the EMC's organic statutes found in Part 4 of Article 7 within Chapter 143B. Through these statutes, the EMC is, *inter alia*, charged with classifying waters of the State, adopting standards for their protection, and issuing permits for discharges to waters of the State. N.C. Gen. Stat. §§ 143-211, -214.1, -215.1; and 143B-282. The Court of Appeals affirmed the EMC's authority to regulate wetlands as waters of the State in *In re Declaratory Ruling by the Env't Mgmt. Comm'n*, 155 N.C. App. 408 (2002). In that case, the Court rejected arguments by the RRC and the Homebuilders Association challenging the EMC's authority to adopt wetlands regulations and concluded that the EMC had the necessary authority to regulate wetlands as waters of the State. The decision, which

reviewed the distinction between the definition of waters of the United States under the Clean Water Act and waters of the State, is predicated on the very same statutory authority upon which the proposed rules are based in this matter. In fact, the EMC has had in place rules related to wetlands since 1996.

Neither the RRC objection letter, nor the May staff opinion upon which it is predicated, asserts that the EMC does not have express statutory authority within Chapter 143 and Chapter 143B to adopt the rules at issue. Instead, the objection is predicated on N.C. Gen. Stat. § 150B-19.3, "Limitations on certain environmental rules[.]" despite the absence of any federal law or rule. As described in greater detail below, the objection is contrary to the plain language of Subsection 150B-19.3(a).

## II. Section 150B-19.3 does no strip the EMC of its authority.

In making its objection, the RRC relied on staff's belief that N.C. Gen. Stat. § 150B-19.3(a) prohibited the EMC from adopting the rules at issue. Specifically, the staff opinion states, "staff believes that G.S. 150B-19.3 creates a specific statutory command applicable to EMC which specifically strips them [sic] of statutory authority in this context to adopt Rules .1301 and .1401-.1405." May Staff Opinion, p. 3.<sup>1</sup>

The cardinal rule for statutory interpretation is the plain language of the statute. "It is well settled that where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *In re Est. of Lunsford*, 359 N.C. 382, 391-92, 610 S.E.2d 366 (2005). In pertinent part, Subsection 150B-19.3(a) provides:

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

N.C. Gen. Stat. § 150B-19.3(a) (emphasis added). Simply stated, Subsection 150B-19.3(a) contains no express language supporting staff's belief, especially where there is no applicable standard, limitation, or requirement imposed by federal law or rule. In fact, as its title suggests, Section 150B-19.3 does not contain any provisions "specifically stripping" the subject agencies

---

<sup>1</sup> It must be noted that the staff opinion acknowledges that Section 150B-19.3 is situated within Part 1 of the APA and, therefore, cannot be a basis for objecting to a rule under Section 150B-21.9(a)(4). The EMC agrees that Section 150B-19.3 is not contained within "Part 2," but disagrees that the RRC is authorized to interpret or apply Section 150B-19.3 without specific authority to do so.

of their respective authority to implement State law and, instead, only limits their authority to adopt rules *in the presence of an applicable federal law or rules*.

Had the General Assembly intended to strip the EMC of its authority to provide permits related to activities impacting “non-federally jurisdictional wetlands” (i.e. wetlands that fall outside of federal jurisdiction), it could have done so, but there is no express statutory language evincing such an intention. In enacting legislation, the General Assembly is “presumed to know the existing law and to legislate with reference to it.” *State v. Elmore*, 224 N.C. App. 331, 334, 736 S.E.2d 568, 569 (2012) (quoting *State v. Southern R. Co.*, 145 N.C. 495, 542, 59 S.E. 570, 587 (1907)). Even absent this presumption, there can be no reasonable assertion that the General Assembly is unaware of the EMC or its authority with respect to the waters of the State as there are innumerable instances in which the General Assembly has, for example, taken specific action directing the EMC to adopt certain rules or undertake studies on water-related matters within the EMC’s authority.

Moreover, had the General Assembly intended to make a fundamental change to the regulatory framework pertaining to discharges to waters of the State or intended to cede entirely the State’s authority over its waters to the federal government, it would not have done so in vague terms or through ancillary provisions. *See, e.g., Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001) (holding that Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”).

### III. Section 150B-19.3 does not apply in the absence of federal jurisdiction.

The staff opinion underlying the RRC’s objection has also taken the position that the limitations contained in Subsection 150B-19.3(a) applies both in the presence of federal jurisdiction and in the absence of federal jurisdiction. Specific to the absence of federal jurisdiction, the staff opinion provides:

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

May Staff Opinion, p. 2.

On its face, this assertion is contradicted by the plain language of the statute. Subsection 150B-19.3(a) only applies **if**: 1) there is already an applicable federal law or rule that imposes a standard, limitation, or requirement, and 2) the state rule imposes a more restrictive standard, limitation, or requirement. *Id.* In other words, if there is no applicable federal law or rule, or there is no standard, limitation, or requirement imposed by a federal law or rule, then Subsection 150B-



19.3(a) does not apply. The implications of this interpretation for the State to regulate its own environment and resources cannot be overstated, especially in light of the express declaration of policy adopted by the General Assembly with respect to the protection of the State's water resources as found in N.C. Gen. Stat. § 143-211.

First, to be clear, the proposed rules do not apply where the federal government, and specifically the United States Army Corps of Engineers ("USACE"), has determined that it has jurisdiction over wetlands found on any given site. Both the text of the rules and the EMC's rulemaking record has expressly and repeatedly noted the limits of the proposed rules applicability and, therefore, they are not implemented "on top of" the applicable federal rules.

Second, it is inarguable that jurisdiction – whether federal or state – must be present in order for any law or rule to be applicable, irrespective of whether the law prohibits or expressly allows any given act. Because the rules at issue address wetlands outside of federal jurisdiction, it is incontrovertible that federal law does not apply to the wetlands covered by these rules and, therefore, there is no federal law or rule that imposes a standard, limitation, or requirement. Simply stated, Section 150B-19.3(a) does not apply to these rules because there is no applicable federal law or rule and, as such, there is no federal standard, limitation, or requirement to be made more stringent.

Third, the assertion that the limitations contained in Subsection 150B-19.3(a) applies in the absence of federal jurisdiction is not only directly contrary to the plain language of the statute, it evinces a misapprehension of what the rules seek to accomplish. The proposed rules do not create a prohibition on activities impacting the "non-federally jurisdictional" wetlands because such activities are already prohibited by State law unless the person causing the impacts has a permit to do so.

Pursuant to N.C. Gen. Stat. § 143-215.1(a)(6),

[N]o person shall do any of the following things or carry out any of the following activities unless that person has received a permit from the Commission and has complied with all conditions set forth in the permit ... (6) [c]ause or permit any waste, directly or indirectly, to be discharged to or in any manner intermixed with the waters of the State in violation of the water quality standards applicable to the assigned classifications ...."

N.C. Gen. Stat. § 143-215.1(a)(6). As evident by its plain language, a permit is required for any activities that directly or indirectly results in a discharge (generally referred to as "impact") to waters of the State, including the "non-federally jurisdictional wetlands" covered by the proposed rules. The rules at issue – like the previously approved and substantially identical temporary rules – provide the very permitting mechanism required by Subsection 143-215.1(a)(6) and, in the absence of the proposed rules, any activities impacting the wetlands covered by these rules are

subject to enforcement actions. In other words, the proposed rules provide regulatory relief by providing a permitting mechanism to allow impacts to the subject wetlands.

A federal jurisdictional determination is not itself the imposition of a standard, limitation, or requirement, nor is it a determination as to whether a particular site contains wetlands. A federal "jurisdictional determination" or "JD" determines only whether a site contains wetlands meeting the definition of "waters of the United States," not whether wetlands are present at all. Where the USACE determines that it does not have jurisdiction, its authority ends. Far from regulating by making a determination that it does not have jurisdiction, the USACE is merely making a determination of *the limit of its own authority*, not that of the State's. It is an extraordinary distortion to turn a determination that federal jurisdiction does not exist into a determination that the federal government is, in fact, regulating the water body to the exclusion of the State.

Importantly, a determination that a wetland does not fall within federal jurisdiction is not tantamount to a determination that either the activity would otherwise be permissible under federal law or that the wetlands are no subject to any regulation. As noted above, where there is no federal jurisdiction, federal law cannot be asserted as a basis to either allow or prohibit an activity because the law does not apply. Similarly, where there is no federal law or rule, there is nothing to be made more stringent. As such, though the reversal of the Navigable Water Protection Rule ("NWP Rule") will likely result in more wetlands being subject Section 404 of the Clean Water Act, it does not alter the EMC's express authority to adopt rules with respect to "waters of the State," nor does its reversal eliminate the need for the proposed rules at issue.

Though the USACE has announced a return to its pre-2015 approach for all new jurisdictional determinations and requests, the USACE has stated that it will not revisit JDs issued pursuant to the NWP Rule. Specifically, the USACE has issued the following position:

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>.

Given the USACE's approach to JDs issued under the NWP Rule, the rules at issue remain necessary to address the existing permitting gap predicated on the need for the existing temporary rules. Additionally, the frequent change and uncertainty with respect to federal jurisdictional determinations also demonstrate the long-term need for the rules at issue. By limiting the application of the rules to only those wetlands determined to be "non-federally jurisdictional," the

regulated community will have a certain and appropriate State program for obtaining permits, even as the scope of federal jurisdiction remains in flux.

In conclusion and based on the clarification provided in this letter, as well as the information previously submitted to the RRC, the EMC respectfully requests that the RRC rescind its earlier objection based on Section 150B-19.3. By rescinding the objection under Section 150B-19.3, the EMC will be able to take appropriate action with respect to the RRC's objection under N.C. Gen. Stat. § 150B-21.2(g) related to the change in terminology. While it is the EMC's position that the change was made in response to public comment and, therefore, could not have been unanticipated by the public, the EMC is willing to revisit the change to address the RRC's objection.

Sincerely,

*s/Phillip T. Reynolds*  
Phillip T. Reynolds  
Special Deputy Attorney General  
Counsel to the EMC

cc: Robin W. Smith, EMC Chair, *electronically*  
Jennifer Everett, EMC Rulemaking Coordinator, *electronically*  
Brian Liebman, Rules Review Commission Counsel, *electronically*  
Alex Burgos, Paralegal, Office of Administrative Hearings, *electronically*

## Burgos, Alexander N

---

**Subject:** FW: [External] EMC Response to RRC's Objection to Rules 02H .1301 and .1401-.1405

---

**From:** Reynolds, Phillip <PREynolds@ncdoj.gov>

**Sent:** Monday, August 15, 2022 3:45 PM

**To:** Liebman, Brian R <brian.liebman@oah.nc.gov>

**Cc:** Robin Smith <robinsmithemc@gmail.com>; Everett, Jennifer <jennifer.everett@ncdenr.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>

**Subject:** RE: [External] EMC Response to RRC's Objection to Rules 02H .1301 and .1401-.1405

**CAUTION:** External email. Do not click links or open attachments unless you verify. Send all suspicious email as an attachment to [Report Spam](#).

Brian,

Unfortunately I will not be in a position to provide you the additional response by close of business today, but will do so by tomorrow, which I understand still complies with the RRC's rules for submitting information related to permanent rules.

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)

114 W. Edenton St., Raleigh, NC 27603

[www.ncdoj.gov](http://www.ncdoj.gov)

Please note that messages to or from this address may be public records.

## **Burgos, Alexander N**

---

**Subject:** FW: [External] EMC Response to RRC's Objection to Rules 02H .1301 and .1401-.1405

---

**From:** Liebman, Brian R <brian.liebman@oah.nc.gov>

**Sent:** Friday, August 12, 2022 10:06 AM

**To:** Reynolds, Phillip T <preynolds@ncdoj.gov>

**Cc:** Robin Smith <robinsmithemc@gmail.com>; Everett, Jennifer <jennifer.everett@ncdenr.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>

**Subject:** RE: [External] EMC Response to RRC's Objection to Rules 02H .1301 and .1401-.1405

Phillip,

I appreciate the response. With respect to Mr. Millis, his email and my response thereto are available on our website. Further, as to your reference to a discussion between us, I'd just like to clarify for the record that this is in reference to the email exchange between us on July 8 and July 11, which is also available on the website.

Thanks,  
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)

E-mail correspondence to and from this address may be subject to the North Carolina Public Records Law N.C.G.S. Chapter 132 and may be disclosed to third parties.

## Burgos, Alexander N

---

**Subject:** FW: [External] EMC Response to RRC's Objection to Rules 02H .1301 and .1401-.1405  
**Attachments:** EMCvRRCFinalJudgment.pdf

---

**From:** Reynolds, Phillip <PREynolds@ncdoj.gov>  
**Sent:** Thursday, August 11, 2022 5:08 PM  
**To:** Liebman, Brian R <brian.liebman@oah.nc.gov>  
**Cc:** Robin Smith <robinsmithemc@gmail.com>; Everett, Jennifer <jennifer.everett@ncdenr.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>  
**Subject:** RE: [External] EMC Response to RRC's Objection to Rules 02H .1301 and .1401-.1405

**CAUTION:** External email. Do not click links or open attachments unless you verify. Send all suspicious email as an attachment to [Report Spam](#).

Brian,

Thank you for your email. While I am away from the office this week, the EMC intends to submit a letter outlining additional information to clarify its position and the impacts of the rules. The intent is to submit it by Monday, if not before.

I am also aware of a letter and email submitted earlier by the Home Builders Association and the Chamber of Commerce. Mr. Millis email appears to request your interpretation as to whether the EMC's July 23, 2022 letter complies with the time limits contained in G.S. §150B-21.12. There also appears to be some request for equity, though I am uncertain to what extent his email is requesting a response from you on that issue.

Regardless, I trust and appreciate that you will copy us on any interpretation provided to Mr. Millis. As you are aware, you and I previously discussed the requirements of Section 150B-21.12 and I believe that we are on the same page on that issue. As an aside, I have also attached a case from Superior Court on the issue in case it is helpful to you.

Thank you again for your email, and I look forward to seeing you this coming Thursday.

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)  
114 W. Edenton St., Raleigh, NC 27603  
[www.ncdoj.gov](http://www.ncdoj.gov)

Please note that messages to or from this address may be public records.

FILED

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

JUN 14 PM 5:27

SUPERIOR COURT DIVISION

COUNTY OF WAKE

04 CVS 3157

WAKE COUNTY, C.S.C.

BY \_\_\_\_\_

ENVIRONMENTAL MANAGEMENT

COMMISSION, )

Plaintiff, )

v. )

RULES REVIEW COMMISSION, )

Defendant. )

ORDER AND

FINAL JUDGMENT

This matter came on to be heard at the April 13, 2005, Administrative Session before the undersigned Judge on the parties' cross motions for summary judgment. James C. Gulick argued for the Plaintiff, Environmental Management Commission ("EMC") and Gary R. Govert argued on behalf of the Defendant, Rules Review Commission ("RRC").

**PROCEDURAL BACKGROUND AND PRELIMINARY MOTIONS**

Plaintiff EMC filed this declaratory judgment action on March 8, 2004. The action challenges the February 5, 2004, decision of the Defendant RRC (a) to return the EMC's stormwater rules to the EMC, thereby terminating the rulemaking process, and (b) to continue its objections on the basis of ambiguity and lack of statutory authority. The complaint seeks a declaration, pursuant to N.C.G.S. §§ 1-253 *et seq.*, of the EMC's rights with respect to the RRC's decision under Article 2A of the North Carolina Administrative Procedure Act, N.C.G.S. §§ 150B-18 through 21.16 (2001). The RRC answered the complaint on May 7, 2004.

With the consent of both parties, on December 20, 2004, the undersigned assigned this matter to himself in accordance with Local Rule 2.2, and set the matter for hearing during the April 11, 2005 Administrative Session. The parties proposed and the Court ordered a schedule for the filing of dispositive motions and briefs.

The parties filed and served Stipulations, Stipulation Exhibits, one affidavit (of Bradley Bennett by the EMC) and motions for summary judgment on February 25, 2005. On March 28, 2005, the parties filed and served their responsive briefs. Also on March 28 the Marine Fisheries Commission, represented by Allen Jernigan, filed and served a motion for leave to file an amicus curiae brief along with the proposed brief.

RECEIVED  
JUN 21 2005  
N.C. Dept. of Justice  
Environmental Division

On April 4, 2005 the RRC filed and served (1) a Motion to Strike Attachment to Plaintiff's Response Brief and (2) the RRC's Response to Marine Fisheries Commission's Motion for Leave to File *Amicus* Brief. On April 11, the EMC filed and served its response to RRC's Motion to Strike.

On April 13, the undersigned heard oral argument from the parties with respect to the motion to strike the attachment to the EMC's Response Brief which was entitled Joint Legislative Administrative Procedure Oversight Committee, "Report to the 2004 Regular Session of the 2003 General Assembly of North Carolina," May 19, 2004, ("Committee Report"). At the conclusion of the arguments the Court ruled that it would deny the Motion to Strike, but that the Court would not consider the Committee report for any purpose.

As counsel for the proposed amicus was not present, the Court considered the written motion for leave and the RRC's response. The Court ruled that it would allow the Motion for Leave to file amicus and would consider the amicus for whatever weight its arguments add.

The Court then heard arguments of counsel for the parties on their motions for summary judgment. At the close of argument the Court took the matter under advisement and asked counsel for both sides to prepare and present proposed, alternative judgments by May 13, 2005 at 5:00 P.M. Both parties have presented their proposals and the Court has considered them along with the arguments and admissible matters of record. Neither party objected to the Court's ruling out of term.

### Stipulations

The parties stipulated the following:

1. Plaintiff Environmental Management Commission ("EMC") is a State agency empowered to protect the State's water quality from contaminants transported by stormwater runoff. The EMC is established pursuant to N.C.G.S. §§ 143B-282, *et seq.*, with the power and duty to adopt rules for the protection, preservation, and enhancement of the water resources of the State. N.C.G.S. §§ 143-211, 143-214.7, and 143-215.3.

2. Defendant Rules Review Commission ("RRC") is a State agency established pursuant to N.C.G.S. §§ 143B-30.1, *et seq.*, for the purpose of reviewing administrative rules in accordance with the North Carolina Administrative Procedure Act ("APA"), Chapter 150B of the General Statutes.

3. The United States Environmental Protection Agency ("EPA") has authorized the State of North Carolina, pursuant to 33 U.S.C. § 1342(b), to administer the federal Clean Water Act ("CWA"), National Pollutant Discharge Elimination System ("NPDES") permit program. The NPDES permit program regulates, among other things, discharges of stormwater from point sources to the waters of the United States. Pursuant to state law, the EMC is authorized to issue



NPDES permits in North Carolina.

4. North Carolina's NPDES permit program must comply with the requirements and subsequent amendments of the CWA and federal regulations implementing the CWA.

5. Since 1990, the CWA, its implementing regulations promulgated by the EPA, and EMC rules have required public bodies with populations over 100,000 to obtain NPDES permits for discharges of stormwater from their storm sewer systems. This stormwater control program is known as the Phase I stormwater program.

6. In 1999, EPA amended the federal NPDES regulations to extend the stormwater permitting requirements to smaller public bodies. 64 Fed. Reg. 68722 *et seq.*, 40 CFR §§ 122.21, 122.26, 122.28, 122.30-37, 122.44, 122.62, 123.25, 123.35, 124.52. The stormwater control program mandated by these 1999 amendments is known as the Phase II stormwater program.

7. Since 1999, representatives of the EMC and the Department of Environment and Natural Resources Division of Water Quality ("DWQ") have conducted numerous public meetings and workshops in connection with their development of the State's Phase II stormwater program.

8. In April 2000, the EMC convened a stakeholder process to inform interested persons of the federal requirements and to solicit their input in the development of Phase II stormwater rules. **Stipulation Exhibit 1** is the report of the stakeholder group.

9. The EMC proceeded with a temporary rule.

10. On May 15, 2002, the EMC published a Notice of Rulemaking Proceedings consisting of draft rule language for the Phase II program in the North Carolina Register. **Stipulation Exhibit 2** is a copy of the Notice of Rule-making Proceedings published in the North Carolina Register on May 15, 2002. In May and June of 2002, EMC published notices of public hearings in newspapers in Asheville, Charlotte, Durham, Elizabeth City, Fayetteville, Greensboro, Hickory, New Bern, Raleigh, Wilmington and Winston-Salem. In June 2002, the EMC held public hearings in Asheville, Kernersville, Smithfield, Washington and Wilmington.

11. The EMC approved a temporary rule implementing the Phase II program in October 2002. **Stipulation Exhibit 3** is a copy of the temporary rule, which was published in the North Carolina Register in November 2002. **Stipulation Exhibit 4** is a copy of the EMC's minutes for its October 10, 2002 meeting.

12. On March 17, 2003, the EMC published a Notice of Text for proposed permanent Phase II stormwater rules, 15A NCAC 2H .0126 and 15A NCAC 2H .1014, in the North Carolina Register, v. 17, no. 18. **Stipulation Exhibit 5** is the Notice of Text for the proposed permanent Phase II stormwater rules.

13. From April 1, 2003 through April 28, 2003, the EMC conducted five public hearings and accepted comments on the proposed Phase II stormwater rules. Over 200 people attended the five hearings and 62 provided comments during the hearings. Written comments were received from over 225 individuals and interest groups. **Stipulation Exhibit 6** is the Hearing Officers' Report. **Stipulation Exhibit 7** is a sampling of the public comments on the proposed rules.

14. In North Carolina, unlike most states, the most extensive stormwater system in unincorporated areas is associated with the public road system, which is maintained by the Department of Transportation, which already has a Phase I stormwater permit.

15. On July 10, 2003, the EMC approved a motion to adopt 15A NCAC 2H .0126 and 2H .1014 as permanent rules ("the EMC's Phase II Rules"). **Stipulation Exhibit 8** is a copy of the EMC's Phase II Rules. **Stipulation Exhibit 9** is a copy of the minutes of the EMC's July 10, 2003 meeting.

16. The EMC submitted 15A NCAC 2H .0126 and 2H .1014 to the RRC as required by N.C.G.S. § 150B-21.8(b). **Stipulation Exhibit 10** contains copies of the comments by interested parties filed with the RRC.

17. On August 19, 2003, RRC staff notified the EMC of technical changes it considered necessary. **Stipulation Exhibit 11** is a copy of the RRC's notification to the EMC.

18. At its August 21, 2003 meeting, the RRC voted to extend the period of review of the EMC's Phase II Rules pursuant to N.C.G.S. § 150B-21.10(3). By letter dated August 21, 2003, the RRC stated that the purpose of the extension was to determine whether the EMC wished to restore the original language concerning "existing development" and "vested rights" as it was originally proposed in the North Carolina Register. **Stipulation Exhibit 12** is a copy of the RRC's August 21, 2003 letter. **Stipulation Exhibit 13** is a copy of the minutes of the RRC's August 21, 2003 meeting.

19. On September 11, 2003, the EMC amended its July 10, 2003 rulemaking in order to address the RRC's concerns over vested rights language by returning to the language that was publicly noticed. **Stipulation Exhibit 14** is a copy of the minutes of the EMC's September 11, 2003 meeting. **Stipulation Exhibit 15** is a copy of the EMC's Phase II Rules as amended in accordance with the EMC vote at its September 11, 2003 meeting.

20. At its October 16, 2003 meeting, the RRC voted to object to the EMC's Phase II Rules as amended September 11, 2003. **Stipulation Exhibit 16** is a copy of the minutes of the RRC's October 16, 2003 meeting.

21. On November 5, 2003, the RRC issued its written objection to the EMC's Phase II Rules as amended September 11, 2003. **Stipulation Exhibit 17** is a copy of the RRC's letter of November 5, 2003.

22. On December 11, 2003, the EMC approved a motion to amend the EMC's Phase II Rules as amended September 11, 2003, to respond to the RRC's November 5, 2003 objections. **Stipulation Exhibit 18** is a copy of the EMC's Phase II Rules as amended September 11, 2003, and as further amended December 11, 2003 ("the Stormwater Rules at Issue"). **Stipulation Exhibit 19** is a copy of the minutes of the EMC's December 11, 2003 meeting, together with Attachment No. 6 to the minutes, which relates to the EMC's action on the stormwater rules. **Stipulation Exhibit 20** consists of an interim draft of the changed rules presented to the EMC's members on December 8 in advance of their December 11 meeting, together with a cover memorandum and a copy of the RRC's November 5, 2003 letter (**Stipulation Exhibit 17**).

23. At its January 15, 2004 meeting, the RRC voted to return the Stormwater Rules at Issue. **Stipulation Exhibit 21** is a copy of an unofficial transcript of the official tape recording of the RRC's January 15, 2004 meeting, which the parties agree is the best transcript of the official recording of that meeting. **Stipulation Exhibit 22** is a copy of the minutes of the RRC's January 15, 2004 meeting.

24. On February 5, 2004, the RRC issued its written decision of the action it took at its January 15, 2004 meeting with respect to the Stormwater Rules at Issue. **Stipulation Exhibit 23** is a copy of the RRC's February 5, 2004 written decision.

25. At its February 12, 2004 meeting, the EMC voted to direct its counsel to pursue appropriate judicial relief from the RRC's decision. **Stipulation Exhibit 24** is a copy of the minutes of the EMC's February 12, 2004 meeting.

26. The General Assembly ratified Senate Bill 1210 on July 12, 2004, and the Governor signed it on August 2, 2004. **Stipulation Exhibit 25** is a copy of Session Law 2004-163 (S.B. 1210).

27. The present dispute between the RRC and EMC involves "rulemaking" as that term is used in N.C.G.S. § 150B-2 and Article 2A of Chapter 150B.

28. Because this matter involves rulemaking, it is not a contested case within the meaning of N.C.G.S. § 150B-2, and the EMC has not filed a petition for a contested case with the Office of Administrative Hearings.

29. Because no "contested case" hearing was authorized by North Carolina law in this dispute and no such hearing was initiated by the EMC, there is no official record of such a "contested case" hearing made pursuant to either N.C.G.S. § 150B-37 or N.C.G.S. § 150B-

42(b).

30. Both parties reserve the right to assert or deny the relevance of any stipulated fact.

### CONCLUSIONS OF LAW

Based on the undisputed facts and exhibits of record the Court makes the following conclusions of law.

1. This Court has jurisdiction of this declaratory judgment action because (1) the complaint alleges an actual controversy between the parties; (2) the controversy arises out of opposing contentions of the parties as to the construction of Article 2A of the North Carolina Administrative Procedure Act with respect to a particular decision of the RRC as to specific rules adopted by the EMC; and (3) the parties have legal rights that may be determined by a judgment or decree in this action. *Carolina Power & Light Co. v. Iseley*, 203 N.C. 811, 820, 167 S.E. 56, 60 (1933); *Nationwide Mut. Ins. Co. v. Roberts*, 261 N.C. 285, 286, 134 S.E.2d 654, 656-657 (1964).

2. Summary judgment may be entered in a declaratory judgment action where there is no genuine issue as to any material fact and either party is entitled to judgment as a matter of law. *Blades v. City of Raleigh*, 280 N.C. 531, 544, 187 S.E. 2d 35, 42- 43 (1972). In this case, the court concludes that it can render judgment, as set forth hereinafter, as to all issues based on the undisputed facts of record.

### Return of the Rules

3. The RRC erred and exceeded its authority when it unilaterally returned the Stormwater Rules at Issue, terminating the EMC's rulemaking. The EMC is entitled to have the RRC continue its review of the rules in a manner consistent with this Court's judgment.

4. The RRC's review of the Stormwater Rules at Issue was and remains governed by the 2001 APA, i.e., that version of G.S. Chapter 150B that was in effect with respect to the adoption and review of permanent rules prior October 1, 2003, the date on which Session Law 2003-229 became effective with respect to permanent rules.

a. The Court concludes that by the plain reading of Section 15 of Session Law 2003-229, the 2003 APA amendments contained therein do not apply to the review of the rulemaking at issue in this case. The review of the EMC's rules was and is governed by the APA as it was prior to those amendments. Section 15 provided in pertinent part, "This act becomes effective July 1, 2003, and applies to temporary and emergency rules adopted on or after that date and to permanent rules adopted on or after October 1, 2003." The EMC adopted its Phase II stormwater rules as permanent rules on July 10, 2003 (Stipulation 15), clearly prior to October 1, 2003.

b. If the General Assembly had any intent for the 2003 APA amendments to be applied to the process of reviewing a set of permanent rules that was already underway, it would not have postponed the effective date for its applicability to permanent rules from July 1 to October 1, 2003. Had the General Assembly intended the 2003 APA amendments to apply to the review of permanent rules that were changed in response to RRC objections after October 1, 2003, it easily could and would have said so.

c. The court rejects the RRC's contention that the 2003 APA amendments applied to its review of the Stormwater Rules at Issue because the EMC amended the rules on December 11, 2003 and, therefore, "adopted" them within the meaning of Section 15 of Session Law 2003-229 after October 1, 2003. This Court concludes that the EMC's December 11, 2003 amendments to the rules were changes in response to the RRC's November 5, 2003 objections.

d. In the context of Chapter 150B, Article 2A, the words "adopt," "adoption," and "adopted" are used to describe the action by which a rulemaking agency triggers the rules review process with respect to permanent rules. See, e.g., N.C.G.S. § 150B- 21.2 (2001) (entitled "Procedure for Adopting a Permanent Rule" and governing the procedure that must be followed before 'adoption' of a permanent rule and prohibiting subsequent action without following the rules review process); N.C.G.S. § 150B-21.8 (2001) ("An agency must submit a permanent rule adopted by it to the [Rules Review] Commission before the rule can be included by it in the North Carolina Administrative Code.")

e. The word "adopted" is not used in Article 2A with respect to changes made by an agency in response to a request or objection from the RRC; the statute uses the words 'change' or 'changes.' The distinction is apparent in the APA section which governs the review procedure when the RRC objects to a permanent rule:

“ (a) Action. -- When the Commission objects to a permanent rule, it must send the agency that adopted the rule a written statement of the objection and the reason for the objection. The agency that adopted the rule must take one of the following actions:

(1) Change the rule to satisfy the Commission's objection and submit the revised rule to the Commission.

\* \* \*

(c) Changes. -- When an agency changes a rule in response to an objection by the Commission, the Commission must determine whether the change satisfies the Commission's objection. If it does, the Commission must approve the rule. If it does not, the Commission must send the agency a written statement of the

Commission's continued objection and the reason for the continued objection."

N.C.G.S. § 150B-21.12 (2001) (emphasis added). The use of the word "adopted" in Session Law 2003-229, § 15, must be construed *in pari materia* with its meaning and use in Article 2A of Chapter 150B.

5. The Court concludes that the RRC erred in finding that the EMC failed to comply with the APA procedural requirements when it changed the rules on December 11, 2003, because N.C.G.S. 150B-21.5(a)(6) (2001) provided: "An agency is not required to publish a notice of rule-making proceedings or a notice of text in the North Carolina Register or hold a public hearing when it proposes to . . . change a rule in response to a request or an objection by the [RRC]."

a. The RRC contends that its "return of the rules was based on the EMC's failure to comply with the APA's procedural rulemaking requirements." (Defendant's Brief in Support of Motion for Summary Judgment at p. 37, n. 5) The RRC concedes that its concern was not about the opportunity for public notice and comment before the rules were adopted on July 10, 2003. (Defendant's Response Brief at p. 3)

b. The Court rejects the RRC's contention that the EMC improperly avoided APA notice and comment requirements when it changed the rules on December 11 in a manner the RRC argues substantially changed the rules.

6. The EMC's December 11, 2003 rule changes were clearly designed overall to satisfy the specific ambiguity and statutory authority objections that the RRC made at its October 16, 2003 meeting and wrote in its November 5, 2003 letter to the EMC (**Stipulation Exhibit 17**). The Court is unpersuaded that the "[c]reation of a permit obligation for entities which are not owners or operators of MS4s and not governmental bodies" in the Stormwater Rules at Issue constituted a "new rulemaking" that justified their return, as the RRC's February 5, 2004 decision (**Stipulation Exhibit 23**) asserts. The RRC's contention that "instead of responding to [the RRC's] earlier objections, the EMC essentially had engaged in a 'new rulemaking,'" is incorrect. (RRC Response Brief at 14)

a. A permit obligation for such entities governing post construction practices was present in .1014(7) in the text of the permanent rule published in the North Carolina Register on March 17, 2003 (**Stipulation Exhibit 5**, p 1660) and was first published in the North Carolina Register in the May 15, 2002, Notice of Rulemaking Proceedings for the temporary rulemaking. (**Stipulation Exhibit 2**). As the RRC's February 5 decision itself concedes, the EMC's December 11 rule changes were designed to achieve a 'comparable substantive result' as the earlier versions.

b. The EMC's December 11, 2003 changes may have raised some new, specific issues that

the RRC might reasonably object to, as the RRC argues in its briefs but failed to state in its February 5 decision, but the changes were not a "new rule-making" that warranted unilateral return of the rules and termination of the rule-making process. The RRC may raise its new objections on remand, provided that it does so with sufficient particularity that the EMC may reasonably respond. This Court expresses no opinion as to their merit.

7. Even if the Court were to rule that the RRC's review of the Stormwater Rules at Issue was governed by the 2003 APA, i.e., that version of the Chapter 150B that became effective with respect to permanent rules adopted on or after October 1, 2003, the RRC's unilateral return of the rules was still erroneous and exceeded the RRC's authority.

a. The 2003 APA amendments gave the RRC additional authority and imposed a related new obligation on rulemaking agencies. Subsection (c) of N.C.G.S. 150B-21.12 was amended thus:

"(c) Changes. -- When an agency changes a rule in response to an objection by the Commission, the Commission must determine whether the change satisfies the Commission's objection. If it does, the Commission must approve the rule. If it does not, the Commission must send the agency a written statement of the Commission's continued objection and the reason for the continued objection. The Commission must also determine whether the change is substantial. In making this determination, the Commission shall use the standards set forth in G.S. 150B-21.2(g). If the change is substantial, the revised rule shall be published and reviewed in accordance with the procedure set forth in G.S. 150B-21.1(a3) and (b)."

The 2003 APA amendments concomitantly changed N.C.G.S. § 150B-21.5, as follows:

"(a) Amendment. -- An agency is not required to publish a notice of rule-making proceedings or a notice of text in the North Carolina Register or hold a public hearing when it proposes to amend a rule to do one of the following:

\*\*\*

(6) Change a rule in response to a request or an objection by the Commission. Commission, unless the Commission determines that the change is substantial."

b. Assuming that the RRC determined that the EMC's December 11, 2003 rule changes were "substantial" within the meaning of N.C.G.S. § 150B-21.12(c) (2003), which is not what the RRC's February 5, 2004 decision actually said, the EMC perforce could not have failed to meet its new publication and public hearing duty until it first received notice of the RRC's "determination" that the changes were "substantial." The statute does not require the rule-making agency to divine the RRC's "substantial change" determination in advance.

c. In addition, Section 9 of Session Law 2003-229 amended N.C.G.S. 150B-21.9(a)(4) to delete the sentence which had said, "The Commission must notify the agency that adopted the rule if it determines that a rule was not adopted in accordance with Part 2 of this Article and must return the rule to the agency." As it did before the 2003 amendments, Part 3 of Article 2A continues to provide, "A rule to which the Commission has objected remains under review by the Commission until the agency that adopted the rule decides not to satisfy the Commission's objection and makes a written request to the Commission to return the rule to the agency." N.C.G.S. § 150B-21.12(d)(2003) (emphasis supplied)

### **The RRC's Continuing Objections Based on Ambiguity and Statutory Authority**

8. The Court concludes that these issues are ripe for review to the extent that is necessary to adequately govern the RRC's continued review of the EMC's stormwater permanent rules on remand, so that the rules review process has a reasonable opportunity to proceed to conclusion, as contemplated by the Article 3A of the Chapter 150B, and so that this matter does not unnecessarily return to this Court for further review.

9. The Court concludes that the RRC erred and acted arbitrarily when it failed, in its February 5, 2004, decision (**Stipulation Exhibit 23**), to state in any meaningful way the reasons for its continued objections to the EMC's NPDES rules and State Stormwater rules on statutory authority or ambiguity grounds, in violation of the express command of the APA, which provides in pertinent part:

"When an agency changes a rule in response to an objection by the Commission, the Commission must determine whether the change satisfies the Commission's objection. If it does, the Commission must approve the rule. If it does not, the Commission must send the agency a written statement of the Commission's continued objection and the reason for the continued objection."(N.C.G.S. § 150B-21.12(c)(2001)(emphasis supplied)).

a. The Court rejects the RRC's contention that its February 5, 2004 statement of reasons, which was that the EMC did not "appropriately respond" to the RRC's earlier objections, complied with §150B-21.12(c) on the grounds that the statute "is silent on how detailed these statements must be or what form they must take, other than to say that they should be in writing." (RRC's Response Brief at page 13)

b. The Court concludes that the statement of reasons for a continuing objection, as for an initial objection, must be sufficiently particular to enable the rule-making agency, here the EMC, to understand what it must change in order to satisfy the RRC's objection. This process is clearly contemplated by the statute in order for the review process to work and come to a successful conclusion. The RRC's February 5 decision clearly fails to meet this purpose.



c. Such particularity is also essential for a court to rule whether or not the RRC's continued objection was reasonable or arbitrary, in the event that the rule-making agency decides, pursuant to § 150B-21.12(d), not to satisfy the RRC's objection and to request return of the rule so that it may seek judicial review.

d. The RRC's November 5, 2003, statutory authority and ambiguity objections, in contrast with those in its February 5, 2004 decision, were stated with sufficient particularity and the EMC obviously understood them and was able to respond to them in its December 11 rule changes.

10. The Court concludes that the RRC's February 5, 2004 decision that the EMC failed to respond 'appropriately' to the RRC's earlier ambiguity objection is erroneous as well as arbitrary and capricious in that it indicates 'a lack of fair and careful consideration' and 'fails to indicate any course of reasoning and the exercise of judgment.' *Mann Media, Inc. v. Randolph County Planning Bd.*, 356 N.C. 1, 16, 565 S.E.2d 9, 19 (2002).

a. The RRC's November 5, 2003 letter (**Stipulation Exhibit 17**) objected that:

"Rules .0126 and .1014 are both ambiguous in that each is formatted in such a way that they are almost impossible to read and follow. There are as many as six sub-levels . . . in these two rules spread out over 26 pages. That is too many and too difficult to follow. The rules need to be rewritten. . . . [T]hey need to be broken down into multiple discrete rules to satisfy this objection."

i. To respond to this objection, the EMC on December 11, 2003 revised .0126 (the NPDES rule) by breaking it into eight smaller rules, 15A NCAC 2H .0126, .0150 - .0156, each with no more than three sub-levels. Section .0126 is an introductory paragraph. Section .0150 contains all of the definitions applicable to the NPDES Phase II program. Section .0151 concerns the designation process by which public entities become subject to the NPDES Phase II program. Section .0152 governs petitions for designation. Section .0153 governs permits. Section .0154 contains the implementation schedule. Section .0155 contains the post construction stormwater management requirements, and section .0156 contains the exemptions. (**Stipulation Exhibit 18**)

ii. Also to respond to this objection the EMC broke the .1014 rule (the State Stormwater Rule) into six smaller rules, sections .1014 - .1019, each containing no more than three sub-levels. Section .1014 contains the introduction to the State stormwater management program for projects in urbanizing areas not governed under the NPDES programs. Section .1015 contains definitions applicable to the State Stormwater Rules, and section .1016 contains the designation process for urbanizing counties. Section .1017 governs permits. Section .1018 contains the post-construction model practices, and section .1019 contains the exemptions. (**Stipulation Exhibit 18**)

b. In its November 5, 2003, decision (**Stipulation Exhibit 17**) the RRC also stated that .1014 was unclear in that the RRC could not determine whether the rule applied to counties that were not owners or operators of storm sewer systems. The RRC told the EMC that the rule needed to be rewritten to clarify the intent and requirement of the EMC. In response, the EMC made clear in its December 2003 changes in Rules .1014-.1019 that the State would directly regulate stormwater control at new development projects disturbing one acre or more in designated counties that did not themselves own or operate MS4s, unless those counties voluntarily sought delegation of the permitting program.

c. In light of the earlier, specific ambiguity objections and the changes the EMC made in response to them, the Court concludes that the following determination in the RRC's February 5 decision (**Stipulation Exhibit 23**) is erroneous and arbitrary:

“ In addition, the Rules Review Commission objected to Rules .0126 and .0150-.0156 [the NPDES Rules] on the basis of . . . ambiguity (N.C. Gen. Stat. § 150B-21.9(a) (2)), for failure to appropriately respond to the objection made at the RRC's October 16th meeting. The RRC also objected to Rules .1014 - .1019 [the State stormwater rules] on the basis of . . . ambiguity (N.C. Gen. Stat. § 150B-21.9(a) (2)), for failure to appropriately respond to the objection made at the RRC's October 16th meeting.”

11. The RRC has failed to provide any reason why the EMC did not respond 'appropriately' to the RRC's November 5, 2003 statutory authority objections to the NPDES rule. The Court concludes that the RRC's failure to acknowledge satisfaction of its earlier objection is erroneous, arbitrary and capricious in that it indicates 'a lack of fair and careful consideration' and 'fails to indicate any course of reasoning and the exercise of judgment.' *Mann Media, Inc. v. Randolph County Planning Bd.*, 356 N.C. at 16.

a. In its November 5, 2003 letter (**Stipulation Exhibit 17**), the RRC explained its statutory authority objection to rule .0126 as follows:

“ Rule .0126 is beyond the authority delegated to the agency by the legislature. There is no authority cited that allows the agency to require units of local government to enact ordinances that would require other people to comply with those local government ordinances. To the extent the rule does this, it is beyond the agency's authority.”

b. In response to this objection, the EMC's December, 2003 amendments removed the requirement that local governments enact ordinances and replaced it with the following options: “A Regulated Entity may develop its own comprehensive watershed plan, may use the Department's [DENR's] model ordinance, may design its own Post-Construction practices based on the Department's guidance on scientific and engineering standards for

best management practices (BMPs) or it may incorporate this Rule's Post-Construction model practices to fulfill the Post-Construction minimum measure program requirement." (Stipulation Exhibit 18 (15A NCAC 2H .0155))

c. In light of the original objection and the EMC's response, the RRC's following assertion in its February 5, 2004 decision (Stipulation Exhibit 23) is erroneous, arbitrary and capricious:

" In addition, the Rules Review Commission objected to Rules .0126 and .0150-.0156 [i.e., the NPDES rules] on the basis of lack of statutory authority (N.C. Gen. Stat. § 150B-21.9(a)(1)), for failure to appropriately respond to the objection made at the RRC's October 16, 2003 meeting; . . ."

12. The RRC's February 5 decision stated that "[t]he Changes to Rules .1014 - .1019 made by the EMC are not responsive to an objection by the RRC because the objection was to a lack of statutory authority to compel a local government to adopt ordinances and to require a local government which was not an owner or operator of a MS4 to adopt ordinances or obtain a permit. The responsive EMC change was to make application for a storm water permit optional for a local government which was not the owner or operator of a MS4." (Stipulation Exhibit 23)

a. It is clear that the EMC in Rules .1014 - .1019 (Stipulation Exhibit 18) did indeed make application for a storm water permit optional for a local government which was not a the owner or operator of an MS4.

b. The Court concludes that the RRC's failure to acknowledge satisfaction of this objection is erroneous, arbitrary and capricious in that it indicates 'a lack of fair and careful consideration' and 'fails to indicate any course of reasoning and the exercise of judgment.' *Mann Media, Inc. v. Randolph County Planning Bd.*, 356 N.C. at 16.

13. The RRC has in its two briefs stated several specific objections to the Stormwater Rules at Issue, that it did not state in its February 5, 2004 decision. (RRC Initial Brief at 14-22; Response Brief at 16-17, 20-21) Regardless of their merit, about which the Court expresses no opinion, neither the RRC nor this Court can substitute these reasons for what the RRC actually stated in its February 5, 2004 decision. It is inappropriate for an agency whose determination is being reviewed to advance grounds for affirmance other than and additional to those set forth in its decision. *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 64, 344 S.E. 2d 272, 280 (1986). Furthermore, a reviewing court may not affirm an agency's decision by substituting for its basis grounds not relied upon by the agency in its decision. *Id.* at 63, 344 S.E. 2d at 279.

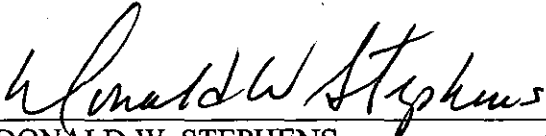
14. The RRC may, however, raise its new, specific objections on remand if it chooses to do so, provided that it does so with sufficient particularity that the EMC will have a reasonable opportunity to respond with further changes that may satisfy the new objections.

**Now, therefore, this Court orders, adjudges and decrees and declares:**

- (1) The RRC erred, acted arbitrarily and exceeded its statutory authority in unilaterally returning the Stormwater Rules at Issue to the EMC.
- (2) The amendments to the APA set forth in Session Law 2005-229 do not apply to the review of the EMC's permanent Stormwater rules; the review of the EMC's permanent Phase II Stormwater Rules continues to be governed by the APA as it was prior to those amendments.
- (3) The RRC erred in determining that the EMC failed to comply with the procedures for adopting permanent rules in Part 2 of Article 2A of Chapter 150B of the General Statutes.
- (4) The RRC erred and acted arbitrarily and capriciously in failing to state any meaningful reasons why the EMC's December 11, 2003 changes failed to satisfy the RRC's November 5, 2003 specific written objections that the NPDES rule (.0126) and the State Stormwater Rule (.1014) were ambiguous and in excess of the EMC's statutory authority.
- (5) The EMC's December 11, 2003 changes in fact satisfied the RRC's November 5, 2003 specific written objections that the NPDES Rule (.0126) and State Stormwater Rule (.1014) were ambiguous and the RRC erred and acted arbitrarily in deciding otherwise.
- (6) The EMC's December 11, 2003 changes in fact satisfied the RRC's November 5, 2003 specific written objections that the EMC lacked authority for the NPDES rule (.0126) and for the State Stormwater Rule (.1014) and the RRC erred and acted arbitrarily in deciding otherwise.
- (7) The EMC is entitled to have the RRC continue to review the EMC's NPDES Rules (.0126 and .0150 - .0156) and State Stormwater Rules (.1014 - .1019) in a manner consistent with this Court's decision.
- (8) On remand, the RRC is entitled to assert any new objections it may have with respect to the EMC's December 11, 2003 changes to the NPDES Rules and State Stormwater Rules.
- (9) In doing so, the RRC shall state the reasons for its continued objections with sufficient particularity so that the EMC can reasonably respond by changing the rules to satisfy the objection, if the EMC decides to do so, in accordance with N.C.G.S. 150B-21.12 (2001).

WHEREFORE, this matter is remanded to the Rules Review Commission for further proceedings as set forth in this opinion and order.

This 15 day of June, 2005.

  
\_\_\_\_\_  
DONALD W. STEPHENS  
SENIOR RESIDENT SUPERIOR COURT JUDGE

## Burgos, Alexander N

---

**Subject:** FW: [External] EMC Response to RRC's Objection to Rules 02H .1301 and .1401-.1405  
**Attachments:** EMCvRRCFinalJudgment.pdf

---

**From:** Liebman, Brian R <[brian.liebman@oah.nc.gov](mailto:brian.liebman@oah.nc.gov)>  
**Sent:** Thursday, August 11, 2022 4:54 PM  
**To:** Reynolds, Phillip <[PReynolds@ncdoj.gov](mailto:PReynolds@ncdoj.gov)>  
**Cc:** Robin Smith <[robinsmithemc@gmail.com](mailto:robinsmithemc@gmail.com)>; Everett, Jennifer <[jennifer.everett@ncdenr.gov](mailto:jennifer.everett@ncdenr.gov)>; Burgos, Alexander N <[alexander.burgos@oah.nc.gov](mailto:alexander.burgos@oah.nc.gov)>  
**Subject:** RE: [External] EMC Response to RRC's Objection to Rules 02H .1301 and .1401-.1405

Dear Phillip,

In your July 23, 2022 letter, you indicated that EMC would “provide additional information for the RRC’s consideration prior to its August meeting.” As you are aware, RRC’s August meeting will take place next Thursday, August 11, 2022. We are anticipating receiving written remarks regarding continuation of pre-reviews on top of this month’s rule filings. As such, in the interest of providing the Commissioners time to review materials prior to the meeting, please advise when, and in what form, EMC intends to provide additional information for RRC’s consideration, if this remains EMC’s intention.

Thank you,  
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)

E-mail correspondence to and from this address may be subject to the North Carolina Public Records Law N.C.G.S. Chapter 132 and may be disclosed to third parties.

## Burgos, Alexander N

---

**From:** Reynolds, Phillip <PReynolds@ncdoj.gov>  
**Sent:** Saturday, July 23, 2022 3:24 PM  
**To:** Liebman, Brian R  
**Cc:** Robin Smith; Everett, Jennifer; Burgos, Alexander N  
**Subject:** [External] EMC Response to RRC's Objection to Rules 02H .1301 and .1401-.1405  
**Attachments:** 2022-07-23 EMC Response to RRC re 02H Rules.pdf

**CAUTION:** External email. Do not click links or open attachments unless you verify. Send all suspicious email as an attachment to [Report Spam](#).

Brian,

Pursuant to N.C. Gen. Stat. § 150B-21.12(a), please find attached the North Carolina Environmental Management Commission's response to the North Carolina Rules Review Commission's objections to the above referenced rules.

Should you have any questions, please feel free to contact me.

Sincerely,  
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)  
114 W. Edenton St., Raleigh, NC 27603  
[www.ncdoj.gov](http://www.ncdoj.gov)

Please note that messages to or from this address may be public records.



JOSH STEIN  
ATTORNEY GENERAL

STATE OF NORTH CAROLINA  
DEPARTMENT OF JUSTICE

REPLY TO:  
PHILLIP T. REYNOLDS  
ENVIRONMENTAL DIVISION  
[preynolds@ncdoj.gov](mailto:preynolds@ncdoj.gov)  
(919)716-6971

July 23, 2022

North Carolina Rules Review Commission  
Office of Administrative Hearings  
1711 New Hope Church Road  
Raleigh, North Carolina 27609

*Via Email to [Brian.Liebman@oah.nc.gov](mailto:Brian.Liebman@oah.nc.gov)*

**Re: EMC Response to RRC's Objections to Rules 15A NCAC 02H .1301  
and 02H .1401 - .1405**

Dear Chair Doran and Commission Members:

On behalf of the North Carolina Environmental Management Commission ("EMC") and pursuant to N.C. Gen. Stat. § 150B-21.12(a)(2), please accept this letter as the EMC's written response to the North Carolina Rules Review Commission ("RRC") indicating that the EMC has decided not to change the above referenced rules at this time. The EMC is not opposed to revising its rules to address the RRC's objections pertaining to the definition of "impact"; however, it is necessary to first address the RRC's objection under N.C. Gen. Stat. § 150B-19.3(a) before taking action to address the RRC's remaining objections. In an effort to address the RRC's concerns related to N.C. Gen. Stat. § 150B-19.3, the EMC will provide additional information for the RRC's consideration prior to its August meeting.

While the EMC disagrees with the RRC's objections, this written response is not intended to be – and should not be interpreted as – a written request to return the rules pursuant to N.C. Gen. Stat. § 150B-21.12(d). The EMC is not seeking the return of its rules at this time and, instead, appreciates the opportunity to continue working with the RRC and its staff to resolve the RRC's objections.



EMC Response to RRC's Objections to  
Rules 15A NCAC 02H .1301 and 02H .1401 - .1405  
July 23, 2022  
Page 2

Sincerely,

s/Phillip T. Reynolds  
Phillip T. Reynolds  
Special Deputy Attorney General  
Counsel to the EMC

cc: Robin W. Smith, EMC Chair, *electronically*  
Jennifer Everett, EMC Rulemaking Coordinator, *electronically*  
Brian Liebman, Rules Review Commission Counsel, *electronically*  
Alex Burgos, Paralegal, Office of Administrative Hearings, *electronically*

## **Burgos, Alexander N**

---

**Subject:** FW: [External] RE: 15A NCAC 02H .1301, .1401-.1405 Objection Letter

---

**From:** Liebman, Brian R <brian.liebman@oah.nc.gov>

**Sent:** Monday, July 11, 2022 9:32 AM

**To:** Reynolds, Phillip T <preynolds@ncdoj.gov>

**Cc:** Everett, Jennifer <jennifer.everett@ncdenr.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>

**Subject:** RE: [External] RE: 15A NCAC 02H .1301, .1401-.1405 Objection Letter

Phillip,

Thanks for catching that, my mistake. Also, thanks for confirming the meeting is next week. Based on that timing, I will expect the agency's response by 7/24.

Have a great day,

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)

E-mail correspondence to and from this address may be subject to the North Carolina Public Records Law N.C.G.S. Chapter 132 and may be disclosed to third parties.

## Burgos, Alexander N

---

**Subject:** FW: [External] RE: 15A NCAC 02H .1301, .1401-.1405 Objection Letter

### Alexander Burgos

Paralegal  
Office of Administrative Hearings  
1711 New Hope Church Road  
Raleigh NC, 27609  
(984) 236-1940  
[Alexander.burgos@oah.nc.gov](mailto:Alexander.burgos@oah.nc.gov)

---

**From:** Reynolds, Phillip <PREynolds@ncdoj.gov>  
**Sent:** Friday, July 8, 2022 4:40 PM  
**To:** Liebman, Brian R <brian.liebman@oah.nc.gov>  
**Cc:** Everett, Jennifer <jennifer.everett@ncdenr.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>  
**Subject:** [External] RE: 15A NCAC 02H .1301, .1401-.1405 Objection Letter

**CAUTION:** External email. Do not click links or open attachments unless you verify. Send all suspicious email as an attachment to [Report Spam](#).

Resending to loop in Alex.



**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)  
114 W. Edenton St., Raleigh, NC 27603  
[www.ncdoj.gov](http://www.ncdoj.gov)

Please note that messages to or from this address may be public records.

---

**From:** Reynolds, Phillip  
**Sent:** Friday, July 8, 2022 4:37 PM  
**To:** Liebman, Brian R <[brian.liebman@oah.nc.gov](mailto:brian.liebman@oah.nc.gov)>  
**Cc:** Everett, Jennifer <[jennifer.everett@ncdenr.gov](mailto:jennifer.everett@ncdenr.gov)>  
**Subject:** FW: 15A NCAC 02H .1301, .1401-.1405 Objection Letter

Brian,

The EMC will take up the RRC's objection at its meeting next week. Please also be aware that you have misstated what the statute requires of agencies in responding to objections from the RRC. In relevant part, NCGS 150B-21.12(a) provides:

(a) Action. — When the Commission objects to a permanent rule, it must send the agency that adopted the rule a written statement of the objection and the reason for the objection. The agency that adopted the rule **must take one of the following actions**:

- (1) Change the rule to satisfy the Commission’s objection and submit the revised rule to the Commission.
- (2) Submit a written response to the Commission **indicating that the agency has decided not to change the rule.**

NCGS 150B-21.12(a) (emphasis added).

As you can see, the plain language of the statute does not include a requirement that an agency request the rule to be returned as one of the two options required to be taken. In fact, as provided in subsection (d), a rule remains under review unless the agency makes a written request to return the rule. A request to return the rule is not provided for in subsection (a), nor does subsection (d) specify a timeframe in which any request to return the rule must be submitted. We will notify the RRC as required once it determines what response it will take.

Thank you,



**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)  
114 W. Edenton St., Raleigh, NC 27603  
[www.ncdoj.gov](http://www.ncdoj.gov)

Please note that messages to or from this address may be public records.

---

**From:** Everett, Jennifer <[jennifer.everett@ncdenr.gov](mailto:jennifer.everett@ncdenr.gov)>  
**Sent:** Friday, July 8, 2022 3:46 PM  
**To:** Reynolds, Phillip <[PREynolds@ncdoj.gov](mailto:PREynolds@ncdoj.gov)>  
**Subject:** FW: 15A NCAC 02H .1301, .1401-.1405 Objection Letter

fyi

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>

E-mail correspondence to and from this address may be subject to the North Carolina Public Records Law and may be disclosed to third parties.

---

**From:** Liebman, Brian R <[brian.liebman@oah.nc.gov](mailto:brian.liebman@oah.nc.gov)>  
**Sent:** Friday, July 8, 2022 3:01 PM  
**To:** Everett, Jennifer <[jennifer.everett@ncdenr.gov](mailto:jennifer.everett@ncdenr.gov)>

**Cc:** Burgos, Alexander N <[alexander.burgos@oah.nc.gov](mailto:alexander.burgos@oah.nc.gov)>  
**Subject:** RE: 15A NCAC 02H .1301, .1401-.1405 Objection Letter

Hi Jennifer,

I am following up with you about the objection to the above-captioned Rules from the May meeting. Pursuant to G.S. 150B-21.12(b), a board or commission has until the later of 30 days after receipt of the objection, or 10 days after its next regularly scheduled meeting to respond to RRC's objection by either requesting in writing that the rules be returned or changing the rule to satisfy RRC's objection and resubmitting the changed rule.

I see on EMC's website that their next scheduled meeting is July 13-14. If that's correct, I assume EMC will respond no later than July 24. Please let me know if there have been any changes to the schedule that would affect the timing of EMC's response.

Thanks,  
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)

E-mail correspondence to and from this address may be subject to the North Carolina Public Records Law N.C.G.S. Chapter 132 and may be disclosed to third parties.

## Burgos, Alexander N

---

**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)

E-mail correspondence to and from this address may be subject to the North Carolina Public Records Law N.C.G.S. Chapter 132 and may be disclosed to third parties.

---

**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)

E-mail correspondence to and from this address may be subject to the North Carolina Public Records Law N.C.G.S. Chapter 132 and may be disclosed to third parties.

---

Email correspondence to and from this address may be subject to the North Carolina Public Records Law and may be disclosed to third parties by an authorized state official.



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

*An Equal Employment Opportunity Employer*  
1711 New Hope Church Road, Raleigh, NC 27609  
Telephone: (984) 236-1850 | Facsimile: (984) 236-1871  
[www.oah.nc.gov](http://www.oah.nc.gov)

**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

**CAUTION:** External email. Do not click links or open attachments unless you verify. Send all suspicious email as an attachment to [Report Spam](#).

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  
Phone: (919) 716-6971  
Email: [preynolds@ncdoj.gov](mailto:preynolds@ncdoj.gov)  
114 W. Edenton St., Raleigh, NC 27603  
[www.ncdoj.gov](http://www.ncdoj.gov)

Please note that messages to or from this address may be public records.

**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)

E-mail correspondence to and from this address may be subject to the North Carolina Public Records Law N.C.G.S. Chapter 132 and may be disclosed to third parties.

**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

**CAUTION:** External email. Do not click links or open attachments unless you verify. Send all suspicious email as an attachment to [Report Spam](#).

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)  
114 W. Edenton St., Raleigh, NC 27603  
[www.ncdoj.gov](http://www.ncdoj.gov)

Please note that messages to or from this address may be public records.

**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 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.

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  
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)

E-mail correspondence to and from this address may be subject to the North Carolina Public Records Law N.C.G.S. Chapter 132 and may be disclosed to third parties.

**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 a/so 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**

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

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

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

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

*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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7

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

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

10 *Eff. June 1, 2022.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 (d) The public notice requirement for an individual permit as described in Paragraph (b) of this Rule may be satisfied  
22 by a joint notice with by the Division of Coastal Management, pursuant to 15A NCAC 07J .0206, the U.S. Army  
23 Corps of Engineers ~~according to their established procedures,~~ pursuant to their rules and procedures for the  
24 implementation of Section 404 of the Clean Water Act, by a joint notice by the Division for an individual certification  
25 in accordance with Rule .0503 of this Subchapter, or by a joint notice by the Division for an individual permit in  
26 accordance with Rule .1303 of this Subchapter.

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

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

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

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

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

11

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

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

14 *Eff. June 1, 2022.*

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

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

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

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

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

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

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

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

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

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

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

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

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

6

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

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

9 *Eff. June 1, 2022.*



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

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

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

5 (1) ~~Discharges resulting from activities~~ Activities that impact less than 1/2 acre of federally non-  
6 jurisdictional classified open ~~waters (e.g., lakes, ponds)~~ waters, such as lakes and ponds for the  
7 entire project are deemed to be permitted provided they comply with the conditions listed in  
8 Subparagraph (4) of this Paragraph, and it shall not be necessary for the Division to issue permits  
9 for these activities.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

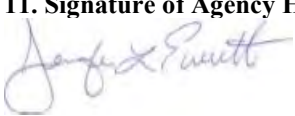
17 (7) Mitigation for impacts to federally non-jurisdictional wetlands and federally non-jurisdictional  
18 classified surface waters shall be conducted in North Carolina within the same river basin and in  
19 accordance with 33 CFR Part 332, available free of charge ~~on the internet~~ at:  
20 [http://water.epa.gov/lawsregs/guidance/wetlands/wetlandsmitigati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

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

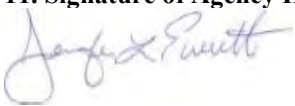
24 ~~(8)(9)~~ In-kind mitigation is required unless the Director determines that other forms of mitigation would  
25 provide greater water quality or aquatic life benefit.

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

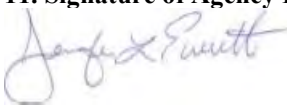
# SUBMISSION FOR PERMANENT RULE

<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"/> <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"/> <b>Yes</b> Agency submitted request for consultation on: Consultation not required. Cite authority:  <input checked="" type="checkbox"/> <b>No</b>	<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"/> 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
<b>9. REASON FOR ACTION</b>	
<b>9A. What prompted this action? Check all that apply:</b> <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"  <input type="checkbox"/> Legislation enacted by the General Assembly Cite Session Law: <input type="checkbox"/> Petition for rule-making <input type="checkbox"/> Other:	
<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.	
<b>10. Rulemaking Coordinator:</b> Jennifer Everett  <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>    <hr/> <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>  <b>Typed Name:</b> Jennifer Everett <b>Title:</b> DEQ Rulemaking Coordinator
<b>RRC AND OAH USE ONLY</b>	

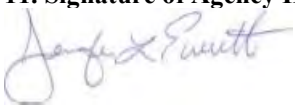
# SUBMISSION FOR PERMANENT RULE

<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>READOPTIO</b> N <input type="checkbox"/> <b>REPEAL through READOPTIO</b> N	
<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>
<b>9. REASON FOR ACTION</b>	
<b>9A. What prompted this action? Check all that apply:</b> <input checked="" type="checkbox"/> <b>Agency</b> <input type="checkbox"/> <b>Court order / cite:</b> <input type="checkbox"/> <b>Federal statute / cite:</b> <input checked="" type="checkbox"/> <b>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"</b> <input type="checkbox"/> <b>Legislation enacted by the General Assembly</b> Cite Session Law: <input type="checkbox"/> <b>Petition for rule-making</b> <input type="checkbox"/> <b>Other:</b>	
<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.	
<b>10. Rulemaking Coordinator: Jennifer Everett</b>  <b>Phone: 919-707-8614</b> <b>E-Mail: Jennifer.Everett@ncdenr.gov</b>  <b>Additional agency contact, if any: Sue Homewood</b> <b>Phone: 336-776-9693</b> <b>E-Mail: sue.homewood@ncdenr.gov</b>	<b>11. Signature of Agency Head* or Rule-making Coordinator:</b>  <hr/> <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>  <b>Typed Name: Jennifer Everett</b> <b>Title: DEQ Rulemaking Coordinator</b>
<b>RRC AND OAH USE ONLY</b>	

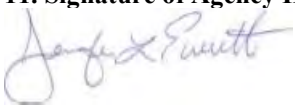
# SUBMISSION FOR PERMANENT RULE

<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 .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>READOPTIO</b> N <input type="checkbox"/> <b>REPEAL through READOPTIO</b> N	
<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>
<b>9. REASON FOR ACTION</b>	
<b>9A. What prompted this action? Check all that apply:</b> <input checked="" type="checkbox"/> <b>Agency</b> <input type="checkbox"/> <b>Court order / cite:</b> <input type="checkbox"/> <b>Federal statute / cite:</b> <input checked="" type="checkbox"/> <b>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"</b> <input type="checkbox"/> <b>Legislation enacted by the General Assembly</b> Cite Session Law: <input type="checkbox"/> <b>Petition for rule-making</b> <input type="checkbox"/> <b>Other:</b>	
<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.	
<b>10. Rulemaking Coordinator:</b> Jennifer Everett  <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>   *If this function has been delegated (reassigned) pursuant to G.S. 143B-10(a), submit a copy of the delegation with this form.  <b>Typed Name:</b> Jennifer Everett <b>Title:</b> DEQ Rulemaking Coordinator
<b>RRC AND OAH USE ONLY</b>	

# SUBMISSION FOR PERMANENT RULE

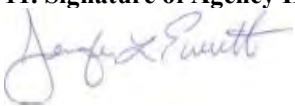
<b>1. Rule-Making Agency:</b> NC Environmental Management Commission	
<b>2. Rule citation &amp; name (name not required for repeal):</b> 15A NCAC 02H .1403 PUBLIC NOTICE AND PUBLIC HEARING	
<b>3. Action:</b> <input checked="" type="checkbox"/> <b>ADOPTION</b> <input type="checkbox"/> <b>AMENDMENT</b> <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:	
<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>
<b>9. REASON FOR ACTION</b>	
<b>9A. What prompted this action? Check all that apply:</b> <input checked="" type="checkbox"/> <b>Agency</b> <input type="checkbox"/> <b>Court order / cite:</b> <input type="checkbox"/> <b>Federal statute / cite:</b> <input checked="" type="checkbox"/> <b>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"</b>  <input type="checkbox"/> <b>Legislation enacted by the General Assembly</b> Cite Session Law: <input type="checkbox"/> <b>Petition for rule-making</b> <input type="checkbox"/> <b>Other:</b>	
<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.	
<b>10. Rulemaking Coordinator:</b> Jennifer Everett  <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>   *If this function has been delegated (reassigned) pursuant to G.S. 143B-10(a), submit a copy of the delegation with this form.  <b>Typed Name:</b> Jennifer Everett <b>Title:</b> DEQ Rulemaking Coordinator
<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"/> ADOPTION <input type="checkbox"/> AMENDMENT <input type="checkbox"/> REPEAL <input type="checkbox"/> READOPTIOIN <input type="checkbox"/> REPEAL through READOPTIOIN	
<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: <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"/> 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
<b>9. REASON FOR ACTION</b>	
<b>9A. What prompted this action? Check all that apply:</b> <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" <input type="checkbox"/> Legislation enacted by the General Assembly Cite Session Law: <input type="checkbox"/> Petition for rule-making <input type="checkbox"/> Other:	
<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.	
<b>10. Rulemaking Coordinator:</b> Jennifer Everett  <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>  <hr/> <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>  <b>Typed Name:</b> Jennifer Everett <b>Title:</b> DEQ Rulemaking Coordinator
<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 .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>READOPTIO</b> <input type="checkbox"/> <b>REPEAL through READOPTIO</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>
<b>9. REASON FOR ACTION</b>	
<b>9A. What prompted this action? Check all that apply:</b> <input checked="" type="checkbox"/> <b>Agency</b> <input type="checkbox"/> <b>Court order / cite:</b> <input type="checkbox"/> <b>Federal statute / cite:</b> <input checked="" type="checkbox"/> <b>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"</b> <input type="checkbox"/> <b>Legislation enacted by the General Assembly</b> Cite Session Law: <input type="checkbox"/> <b>Petition for rule-making</b> <input type="checkbox"/> <b>Other:</b>	
<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.	
<b>10. Rulemaking Coordinator: Jennifer Everett</b>  <b>Phone: 919-707-8614</b> <b>E-Mail: Jennifer.Everett@ncdenr.gov</b>  <b>Additional agency contact, if any: Sue Homewood</b> <b>Phone: 336-776-9693</b> <b>E-Mail: sue.homewood@ncdenr.gov</b>	<b>11. Signature of Agency Head* or Rule-making Coordinator:</b>  <hr/> <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>  <b>Typed Name: Jennifer Everett</b> <b>Title: DEQ Rulemaking Coordinator</b>
<b>RRC AND OAH USE ONLY</b>	

**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

---

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)

Public Hearing

November 4, 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

---

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

---

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**

---

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



NORTH CAROLINA  
Environmental Quality

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)"

---

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  
512 North Salisbury Street | 1617 Mail Service Center | Raleigh, North Carolina 27699-1617  
919.707.9000

E-mail correspondence to and from this address may be subject to the North Carolina Public Records Law and may be disclosed to third parties.

**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  
[brian.liebman@oah.nc.gov](mailto:brian.liebman@oah.nc.gov)

E-mail correspondence to and from this address may be subject to the North Carolina Public Records Law N.C.G.S. Chapter 132 and may be disclosed to third parties.