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

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

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

Sincerely,

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

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

Burgos, Alexander N

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

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

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

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

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

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

March 14, 2022

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

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

Members of the Rules Review Commission & Commission Staff:

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

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

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

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

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

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

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

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

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

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

EMC January 13th, 2022 Action:

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

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

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

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

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

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

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

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

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

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

The fact is that there is currently a permitting mechanism without utilizing the temporary or proposed permanent rules for these wetlands which completely negates the EMC's purpose for the rule stated in the Public Notice: *"as a result of the new Federal Rule, there is no permitting mechanism available to authorize impacts to these wetlands. To provide a regulatory mechanism to authorize impacts to wetlands that are no longer federally jurisdictional and to provide regulatory certainty, DWR adopted temporary rules and initiated permanent rulemaking."*

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

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

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

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

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

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

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

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

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

Sincerely,

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

John E. Hatcher, Jr., Ph.D., CF
Executive Director - North Carolina Foresty Association

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

Jasper G. Stem, Jr., IOM, PE
Executive Director - North Carolina Aggregates Association

Keith Larick
Natural Resources Director - North Carolina Farm Bureau Federation

Ross M. Smith
President - North Carolina Manufacturers Alliance (NCMA)

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