

**REPORT ON THE PROCEEDINGS OF A RULEMAKING ON A
PROPOSED AMENDMENT TO 15A NCAC 02B .0304 TO IMPLEMENT
THE RECLASSIFICATION OF THE FRESHWATER SANDY BOTTOM
WETLANDS IN BUNCOMBE COUNTY(FRENCH BROAD RIVER
BASIN), NORTH CAROLINA, FROM CLASS WL (WETLANDS) TO
CLASS WL UWL (UNIQUE WETLANDS) CLASSIFICATION**

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Prepared for

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by

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Background

Introduction

This report provides information for the North Carolina (State) Environmental Management Commission (EMC) to consider for final action on the reclassification of the Sandy Bottom wetlands in Buncombe County, in the French Broad River basin from Class WL to Class WL UWL. Mountain True, Defenders of Wildlife, and the North Carolina Wildlife Federation submitted the proposed amendment to 15A NCAC 02B .0304 – French Broad River Basin through a petition for rulemaking to the EMC on November 20, 2018.

This report serves as the record of the rulemaking proceedings on the proposed amendment to 15A NCAC 02B .0304 in connection with the Sandy Bottom wetlands reclassification proposal. In accordance with North Carolina General Statute (NCGS) §150-21.2, written comments received and a transcript of the public hearing on the proposed change to 15A NCAC 02B .0304 and a written explanation for adopting the proposed rule change are required in the record. Also, this report contains exhibits and the final recommendation of the Hearing Officer as to the proposed rule change for consideration by the EMC, in accordance with 15A NCAC 02B .0101.

North Carolina Wetland Water Quality Standards

North Carolina’s wetland water quality standards¹ support the State’s ability to “protect, preserve, restore, and enhance the quality and existing uses of wetlands and other waters of the State influenced by wetlands.” The definition of “wetlands” in 15A NCAC 02B .0202(61) is stated as "Wetlands" are "waters" as defined by G.S. 143-212(6) that are inundated or saturated by an accumulation of surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions....” North Carolina’s wetland water quality standards are addressed in rules - [15A NCAC 02B .0231](#) -Wetland Standards and [15A NCAC 02B .0201](#) - Antidegradation Policy.

The water quality standards in 02B .0231 lists desired uses (functions) that could exist (existing uses²) within wetlands classified by the Division of Water Resources (DWR). These existing uses are water storage and retention, water level moderation, groundwater discharge and recharge, shoreline and erosion protection, pollutant filtration or storage, and habitat for wetland-dependent aquatic organisms and wildlife. The water quality standards also list narrative standards (statements describing activities that are allowed or prohibited) designed to guide the maintenance and enhancement of existing uses within wetlands. The narrative standards are liquids, fill or other solids/dissolved gases; floating or submerged debris, oil, deleterious substances; color, odor, taste producing materials; and substances toxic or harmful to human,

¹NCGS §143-214 for State authority to establish water quality standards for all surface waters including wetlands.

²“(27) “Existing uses” mean uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards.” (15A NCAC 02B .0202 Definitions)

animal or plant life shall not be present in amounts that may cause adverse impacts on existing wetland uses, hydrologic conditions must be protected, and populations of wetland flora and fauna must be maintained.

Lastly, 02B .0231 describes three wetland classifications to which the above uses and narrative standards apply. These classifications are: 1) Class WL; 2) Class SWL; and 3) Class UWL. The WL classification is the designation for “waters that meet the definition of wetlands as defined in Rule .0202... except those designated as SWL...” The State’s wetlands definition is found at 15A NCAC 02B .0202(61).³ The SWL classification is the designation for “waters that meet the definition of coastal wetlands as defined by [15A NCAC 07H .0205](#), which are landward of the mean high water line, and wetlands contiguous to estuarine waters as defined by [15A NCAC 07H .0206](#).” The WL and SWL classifications provide for the protection of CWA Section 101(a)(2) uses (fishable/swimmable). The supplemental designation for wetlands identified in the 02B .0231 is the UWL classification. The purpose of the UWL classification is to recognize and protect those special features of the Class WL and Class SWL wetlands that make them of “exceptional State or national ecological significance.” To classify wetlands supplementally with UWL, the exceptional ecological significance standard must be met and maybe determined with “documentation that the wetlands serve as habitat essential for the conservation of State or federally listed threatened or endangered species.” DWR and the North Carolina Natural Heritage Program (NCNHP) developed criteria to evaluate wetlands for the UWL classification. These criteria are found in the Division’s guidance document: Unique Wetland Classification: A Wetland Management and Protection Tool. Based on the UWL criteria, “wetlands of exceptional state or national ecological significance” are wetlands identified by the NCNHP as supporting viable populations of imperiled or vulnerable high quality natural communities or habitat for federal or state listed endangered or threatened or special concern animal and plant species, or other rare species. A Class UWL wetland retains all aquatic life uses and supporting water quality criteria of the State’s wetland designation (Class WL or Class SWL) and receives additional layer of protection to maintain existing uses of the wetland.

The North Carolina’s Antidegradation Policy in 15A NCAC 02B .0201, another component of the State’s wetland water quality standards, helps to maintain and protect existing wetland uses by classifying wetlands with standards sufficient to protect identified existing uses. The policy imposes the following restriction on projects that affect existing wetland uses: “A project that affects wetlands that have an existing use not included in the classification of the wetlands will not be permitted unless the existing uses are protected.”

Reason for Proposed Amendment

On November 20, 2018, the EMC received a rulemaking petition (Petition) (Attachment A-1) from Southern Environmental Law Center (SELC) on behalf of Mountain True, the Defender of Wildlife, and the North Carolina Wildlife Federation (Petitioners) in accordance with NCGS §150B-20. The Petition requested the EMC “to amend 15A NCAC 02B .0304 with

³ See North Carolina’s wetlands definition ¶3

a new subsection (w) as follows: The Schedule of Classifications and Water Quality Standards for the French Broad River Basin was amended effective ... with the reclassification of the Sandy Bottom Wetlands adjacent to the French Broad River [Index No. 6-(54.5)] and Orton Branch [Index No. 6-(66)] from Class WL to Class WL UWL as defined in 15A NCAC 02B .0101. The North Carolina Division of Water Quality maintains a Geographic Information Systems data layer of this UWL.”

The Petitioners in the Petition provide the reasons for the proposed amendment to Rule 02B .0304 which are summarized below.

- The Sandy Bottom wetlands complex supports a rare and nationally significant Montane Floodplain Slough Forest. The Sandy Bottom wetlands contains two of the only three known Montane Floodplain Slough Forest along the mainstem of the French Broad River comprising 75% of acreage of those occurrences.
- Other aquatic habitats present within the Sandy Bottom wetlands complex include ponds, vernal pools, swamp forest, shrub and herbaceous bogs, and streams. (Mountain to Sea (MTS) Ecological Wetland Delineation October 2018 Report identifies these aquatic habitats as jurisdiction features and is attached to the Petition in Attachment A-1).
- A number of rare species have been documented from the wetland areas of Sandy Bottom wetlands complex, including the most diverse collection of 17 salamander species found in any comparable size in the world including two NC Species of Special Concern (four-toad salamander and mole salamander), the state and federally listed bog turtle. More than 40 species of amphibians and reptiles have been documented at Sandy Bottom. Sandy Bottom harbors a population of the State Significantly Rare lax manna grass.

MTS identified approximately 10 acres of jurisdictional wetlands within a 35-acre area of Sandy Bottom properties in the Sandy Bottom Natural Area in Buncombe County, North Carolina. The MTS delineation report states that “The site is located west of the French Broad River boarding Highway 191...south of the Blue Ridge Parkway.” The floodplain of the French Broad River crosses NC 191. Approximately 30 acres of the Sandy Bottom wetlands site is a nature preserve and owned by the Board of Trustees for the Endowment Fund of the University of North Carolina at Asheville (UNC-A). This area is subject to a deed restriction that requires the area to be kept in its natural state in perpetuity with exceptions only for scientific research, stewardship, and maintenance. Approximately 4.55 acres is owned by the non-profit organization Long Branch Environmental Education Center (LBEEC), Inc. and is registered with NCNHP as heritage area. This area is subject to a deed restriction that prohibits the use of the property for any commercial purpose in perpetuity. The deed restriction goes on to say that the property shall be used only in an “ecologically sound manner.” The remaining 0.6 acres of the site is owned by Boniske Properties LLC. The landuse immediately surrounding the Sandy Bottom wetlands site is predominately low-density residential and forest.

Rulemaking Petition

The EMC Chairman, DWR staff, and EMC Counsel reviewed the rulemaking Petition to determine whether it was complete in accordance with criteria outlined in [15A NCAC 02I .0501](#).

In December 2018, the Petition was determined to be complete and was referred to the Water Quality Committee (WQC) of the EMC for review under [15A NCAC 02I .0502](#). The DWR Director prepared a Determination of Completeness Letter Regarding the Petition (Attachment A-2). At the January 9, 2019 WQC meeting the DWR Director recommended that the WQC proceed to the EMC with the Petition based on the information in the Petition that reveals that Sandy Bottom wetlands meet the Unique Classification criteria. The information in the section immediately above qualifies the wetlands for the UWL classification.

On March 14, 2019, the WQC Chair, in accordance with [15A NCAC 02I .0503](#), presented to the EMC additional supporting materials from the Petitioners (Attachment A-3) as requested during the January 9, 2019 WQC meeting and a recommendation to approve the rulemaking petition. The EMC approved the Petition which is confirmed in the March 14, 2019 EMC meeting minutes (Attachment A-4). The EMC's approval signifies that it grants the rulemaking petition and, therefore, it must initiate rulemaking proceedings to reclassify the Sandy Bottom wetlands as required by NCGS §150B-20(c).

Rulemaking Process

In May 2019, the DWR revised the original proposed rule amendment for clarification purposes and SELC was contacted to make it aware of the rule changes. On July 10, 2019, the WQC voted to recommend the EMC proceed to public notice with the following revised proposed amendment to 02B .0304 ⁴:

“(x) The French Broad River Basin Classification Schedule is amended effective [Date] with the reclassification of the Sandy Bottom Wetlands adjacent to the French Broad River [Index No. 6-(54.75)] and Orton Branch [Index No. 6-(66)] from Class WL to Class WL UWL as defined in 15A NCAC 02B .0101. The North Carolina Division of Water Resources maintains a Geographic Information Systems data layer of this UWL.”

On September 12, 2019, the EMC granted DWR staff to proceed with the revised proposed amendment (Attachment A-5) to 02B .0304 and associated regulatory impact analysis to public notice and comment for the Sandy Bottom wetlands UWL reclassification project. Confirmation of this action is provided in the September 12, 2019 EMC meeting minutes (Attachment A-6). Attachment A-7 is the EMC Certification of Adherence to NCGS § 150B-19.1

Costs and Benefits Analysis for Proposed Rulemaking

All wetlands in the State receive protection under 02B .0231 and those that are classified as Unique Wetlands also receive protection from projects that will impact them under 15A NCAC

⁴On May 30, 2019, DWR discovered inaccuracies in the originally proposed amendment; for instance, (w) should be (x) and the Index No. for the French Broad River should be [6-(54.75)] instead of [6-(54.5)]. On June 3, 2019, the SELC made the following statement to the DWR concerning these inaccuracies “*We looked and agree with you, the code in the petition language we submitted is a typo and 6-(54.75) is the correct designation.*” Under further examination, DWR became aware that additional language in the proposed amendment needed to be revised. The phrase ‘Schedule of Classifications and Water Quality Standards’ was changed to ‘The French Broad River Basin Classification Schedule’ and ‘Quality’ was changed to ‘Resources’.

02H .0506(e). Under 02H .0506 project activities that will impact UWLs (e.g., placing fill or dredge material in a wetland) are prohibited; and therefore, not eligible for a Department of Environmental Quality (DEQ) water quality certification unless wetland impacts can be demonstrated to be “necessary for the proposed project to meet a demonstrated public need.”

A regulatory impact analysis was prepared to assess the costs and benefits associated with this rulemaking per NCGS §150B-21.4. The DWR staff conducted outreach activities to potentially affected parties, including landowners, a local government with jurisdiction in the UWL area, and state agencies. As measured from the baseline conditions, it was concluded that there will be a one-time cost to DEQ of about \$400 for DWR to update its UWL Geographic Information Systems data layer.

As an additional benefit the formal recognition of the Sandy Bottom wetlands as a UWL, their presence on UNC-A and LBEEC lands may increase wetland and stewardship opportunities. This environmental benefit could not be quantified, and as such it could not be monetized. DWR staff revised the original proposed regulatory impact analysis draft with additional information from the Petitioner. The North Carolina Office of State Budget Management and the EMC approved the revised draft of the regulatory impact analysis (DEQ_2019-0515) on June 6, 2019, and September 12, 2019, respectively. The finalized regulatory impact analysis can be viewed on the [OSBM website](#).

Public Notice and Hearing

The following is a list of evidence used to engage public interest in the public hearing with respect to the proposed rulemaking for the reclassification of the Sandy Bottom wetlands under NCGS §§150B-19.1(c) and 150B.21.2.

- A notice of the revised proposed amendment to 02B .0304 with an explanation of and the reason for the proposed amendment appeared in the NC Register on December 2, 2019 (Volume 34 Issue 11) (Attachment A-8). The notice provides a link to DEQ’s Public Notice and Hearings website where relevant documents were posted such as the Notice of Text Form, a Memorandum, Map, Rule 02B .0304 with the proposed amendment, Regulatory Impact Analysis, and Public Hearing Announcement. Also, provided in notice were instructions on how and where to submit comments, including procedures for subjecting a proposed rule to legislative review.
- In accordance with federal rules, interested and affected parties were mailed an announcement of the public hearing through federal, state, and local agency emails 45 (+) days prior to the public hearing.
- Posted the notice to DEQ’s Public Notice and Hearings, News Events, and Proposed Rules websites and sent to the DWRPublicNotices listserv.

Public Hearing

The EMC Chairman, in a letter, appointed Commissioner Mitch Gillespie to preside over the public hearing on the proposed Sandy Bottom UWL reclassification proposal (Attachment A-9). The hearing was held on January 21, 2020, at 6pm at UNC-Asheville, One University Heights,

Asheville, NC 28804. An announcement of the public hearing and comment period was posted to the DEQ website November 2019 (Attachment A-10). A DEQ press release of this matter was issued January 9, 2020 (Attachment A-11). Hearing Officer Gillespie opened the hearing with a statement (Attachment A-12). DWR staff then presented an overview of Sandy Bottom wetlands reclassification proposal (Attachment A-13).

The public hearing was attended by 38 people representing themselves as a citizen of Buncombe County or a town within Buncombe County or a federal, state, or local environmental agency/organization (Attachment A-14). In accordance with state and federal rules, a 60 (+) day comment period was provided to the public. Between December 2, 2019 to January 31, 2020, the DWR received 24 comments from the public. One additional comment came a day after the comment period ended and was accepted by the Hearing Officer Gillespie. Copies of the public comments are in Attachment A-15. An audio recording of the public hearing is on the DWR Current Reclassification Proposal website.⁵

Summary of Public Comments Received and DWR Response

Twenty-four commenters support the Unique Wetlands (UWL) designation for the Sandy Bottom wetlands identified in the Mountain to Sea (MTS) Ecological Wetland Delineation October 2018 Report attached the Petition. Two commenters brought up two issues: The first is that the EMC needs to address upland areas whether or not they are within the jurisdictional boundary of a Sandy Bottom wetland because they perform similar functions and services as wetlands as well as being important areas for animals that reside within the wetlands.

DWR staff states that upland activities adjacent to wetlands are not regulated under Section 401.

The second issue is about the proposed NC 191 highway widening project and the impact it would have on the Sandy Bottom wetlands.

DWR staff acknowledges a potential widening of the NC Highway 191 project to the west of the French Broad River that could impact the wetlands in Sandy Bottom Preserve. On April 10, 2019 there was a meeting between the U.S. Army Corps of Engineers, Division of Water Resources, North Carolina Department of Transportation and other stakeholder agencies and local units of government on the proposed project. The goal of the meeting was to reach concurrence on the proposed project's purpose and need. All the agencies agreed that the purpose and need of the project is valid. The agencies also discussed alternatives that were being investigated to avoid/minimize impacts to the Sandy Bottom wetlands. Some of the constraints within this area were also discussed to better understand the alternatives. An USACE representative expressed concern about a project alternative, a "two-lane bridge concept", impacting Sandy Bottom on the west side of NC 191. A NCWRC representative emphasized that the Sandy Bottom Preserve is an important area to protect and hydrology is delicate and should not be altered. The next meeting would involve an in-depth alternative analysis to help determine the different alignments that are being propose.

⁵<https://deq.nc.gov/about/divisions/water-resources/planning/classification-standards/current-reclassification-proposals>

Hearing Officer's Final Recommendation

It is the recommendation of the Hearing Officer that the EMC approve the proposed rule amendment (Attachment A-16) to reclassify the Sandy Bottom wetlands in the French Broad River Basin as Class WL UWL as proposed in this report.