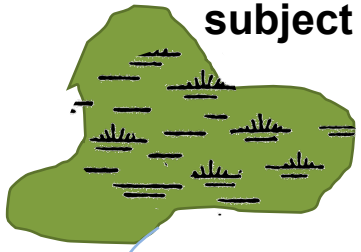
Request for Approval Hearing Officer's Report and Request to Adopt
Temporary Rules 15A NCAC 02H .1401-1405
Discharges to Federally Non-Jurisdictional Wetlands and Classified Surface Waters
and
Temporary Rule Amendment 15A NCAC 02H .1301
Discharges to Isolated Wetlands and Isolated Classified Surface Waters

Background

- As a result of recent changes to Clean Water Act Federal Jurisdiction for wetlands in certain landscape positions there is now a PERMITTING GAP in NC for granting authorization to impact those wetlands
- Division of Water Resources is proposing permitting rules to provide a necessary permitting mechanism to the regulated community
  - Proposing temporary rules for expedited relief
  - Proposed to maintain consistency with existing Isolated Wetland and Waters rules – familiarity/ease of use
  - Many projects will fall under proposed "deemed permitted" thresholds and may proceed without the need for application/review/approval under proposed temporary rule criteria
  - Immediately begin permanent rule making process with full stakeholder involvement process and fiscal analysis
- Without a permitting mechanism, proposed projects that need to impact these Federally Non-Jurisdictional Wetlands that are not Isolated Wetlands will be unable to do so because there is no permitting mechanism/authority. Many projects (e.g., roads, utilities, schools, agriculture, economic development projects) will be unable to proceed with planning, design and/or construction for an unspecified amount of time due to the current regulatory uncertainty

Background

Federally Jurisdictional Wetlands subject to CWA



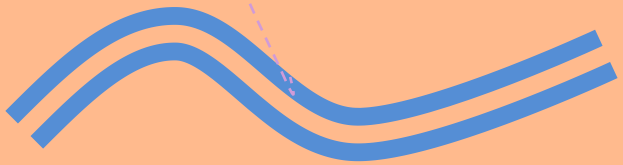
Connected by Jurisdictional Stream

Impacts permitted by NC through 15A NCAC 02H .0500 (401 cert)

Not changing

Federally Non-Jurisdictional Wetlands
Not subject to CWA

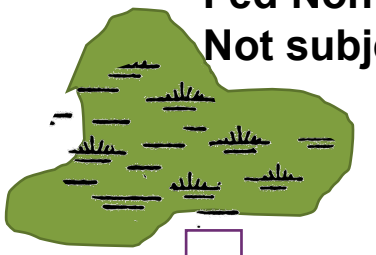
Connected by
Non-Jurisdictional Channel
Passes significant nexus test



~~Impacts cannot be permitted by NC because no state permitting mechanism~~

15A NCAC 02H .1401 – 1405 Discharges to Federally Non-Jurisdictional Wetlands and Classified Surface Waters

Isolated Wetlands
Fed Non - Jurisdictional
Not subject to CWA



Non-channelized, diffuse, overland sheet flow

Does not pass significant nexus test

Impacts permitted by NC through 15A NCAC 02H .1300 (IWP)

Not changing

Public Comment and Hearing

- Proposed Temporary Rules were published on the Office of Administrative Hearings Website on March 17, 2021 and on DWR's website on March 15, 2021. Email sent to the DWR 401 Listserv.
- Public comment period: March 17-April 12, 2021. Virtual Public Hearing on March 30, 2021.
- Seventeen people registered to attend the public hearing and one person registered to speak, however they did not attend the hearing.
- 550 written comments were received by the Division
  - 523 comments were one of two form emails
  - 547 comments were in favor of adoption of temporary rules
    - Comments that wetland protection is important/essential
    - Comments that the regulated community needs a permitting mechanism as quickly as possible
  - Three comments were opposed to the rules
    - Will hinder economic development
    - Unnecessary – DEQ misinterpreting existing rules

Public Comment and Hearing

- General comments
  - Most common comment was a concern that the thresholds for “deemed permitted” activities was too high
  - Many commenters provided additional information for consideration during permanent rule development
- Rule Specific Comments
  - Request to change specific requirements or language
  - Indication that rule language was unclear
  - Typographical/citation errors
- Comments are summarized with Division responses in the Hearing Officer’s Report
- Changes made to the rule text in response to the comments are highlighted in the amended rules in Appendix 5

Rule Changes After Comment Period

- 15A NCAC 02H .1401(b)

  Comment: The regulated community should have the ability to appeal determinations made by DWR

The Division shall verify the determination, extent, and location of federally non-jurisdictional wetlands and federally non-jurisdictional classified surface waters using the U.S. Army Corps of Engineers Wetland Delineation Manual (Technical Report Y-87-1) and subsequent regional supplements and the Division publication, Methodology for Identification of Intermittent and Perennial Streams and Their Origins (v.4.11, 2010). Any disputes by the applicant or landowner over on-site wetland or stream determinations shall be referred to the Director in writing within 60 calendar days of written notification from the Division. The Director's determination is subject to review as provided in Article 3 of G.S. 150B.

Rule Changes After Comment Period

- 15A NCAC 02H .1402(d)

  Comment: If the Division requires access to sites, they should be required to provide three days notification to applicants

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

Rule Changes After Comment Period

- 15A NCAC 02H .1404(g)

  Comment: Clarification is needed that requirements for renewals apply to both Individual Permits and Certificates of Coverage for General Permits.

(g) Individual permit ~~Permit~~ or Certificate of Coverage renewals shall require a new complete application. The applicant may request in writing that the Division grant an extension before the permit expires.

Rule Changes After Comment Period

- 15A NCAC 02H .1405(a)(1), (a)(2), (a)(3)

  Comment: Citation error

> Discharges resulting from activities that impact less than or equal to one acre of federally non-jurisdictional wetlands for the entire project in the coastal region, less than or equal to one-half acre of federally non-jurisdictional wetlands for the entire project in the piedmont region, and less than or equal to one-third acre of federally non-jurisdictional wetlands for the entire project in the mountain region are deemed to be permitted provided they fully comply with the conditions listed in Subparagraph ~~(b)(4)~~ (a)(4) of this Rule…

Rule Changes After Comment Period

- 15A NCAC 02H .1405(a)(1)

  Comment: “surface waters” should be clarified as not including wetlands which are covered in (a)(3)

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

Rule Changes After Comment Period

- 15A NCAC 02H .1405(a)(1), (a)(2), (a)(3)

  Comment: Need to define "project"

15A NCAC 02H .1401(f) The terms used in this Section shall be as defined in G.S. 143-212, G.S. 143-213, and Rule .1301 of this Subchapter.

15A NCAC 02H .1301(f) added definition:

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

Rule Changes After Comment Period

- 15A NCAC 02H .1405(a)(3)(D)

  Comment: The rule should include specific information regarding submitting a report to the Division (when applicable)

The landowner shall submit the soil report to the supervisor of the 401 & Buffer Permitting Branch of the Division of Water Resources for review. Soil series that occur in North Carolina have been categorized by the Natural Resources Conservation Service of the US Department of Agriculture as defined in Rule .1306 of this Subchapter.

Rule Changes After Comment Period

- 15A NCAC 02H .1405(a)(4)(A)

  Comment: It is unclear what specifications are being cited.

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

Rule Changes After Comment Period

- 15A NCAC 02H .1405(a)(4)(B)

  Comment: This should be specific to the drainage area within the project.

> All erosion and sediment control practices placed in federally non-jurisdictional wetlands or federally non-jurisdictional classified surface waters shall be removed and the original grade restored within two months after the Division of Energy, Mineral, and Land Resources or local delegated program has released the specific drainage area within the project;

Rule Changes After Comment Period

- 15A NCAC 02H .1405(a)(4)(E)

  Comment: The term hydrology is not defined. The term should be "hydrologic function" as defined in 15A NCAC 02B .0231 – Wetland Standards.

  Comment: The word adversely should be inserted before "affected by the discharge."

Measures shall be taken to ensure that the ~~hydrology~~ hydrologic functions of any remaining federally non-jurisdictional wetland and federally non-jurisdictional classified surface waters are not adversely affected by the discharge.

Proposed Schedule

Temporary Rule

Date	Action
May 13, 2021	HO report / EMC temporary rule adoption
May 20, 2021	RRC review and approve rule adoption
May 28, 2021	**Temporary rule effective date** (expires 270 days from effective date)

Permanent Rule

Date	Action
April/May 2021	Stakeholder involvement process / development of permanent rule & regulatory impact analysis
July 2021	WQC approval to forward permanent rule to EMC
Sept 2021	EMC approval to initiate public notice/hearing process
Sept – Nov 2021	Permanent rule public notice/hearing process
Jan 2022	Permanent rule adoption by EMC

Request

The Division requests that the EMC approve the Hearing Officer's Report and Adopt the Temporary Rules 15A NCAC 02H Section 1400 "Discharges to Federally Non-Jurisdictional Wetlands and Federally Non-Jurisdictional Classified Surface Waters" (.1401 through .1405), and Temporary Rule Amendments to 15A NCAC 02H .1301 "Discharges to Isolated Wetlands and Isolated Waters: Purpose and Scope"