

**MEMORANDUM FOR JANUARY 9, 2020 ENVIRONMENTAL MANAGEMENT COMMISSION
(EMC) MEETING**

SUBJECT: Proposed Removal of EPA Disapproved Swamp Designation and Portion of Management Plan from Cape Fear River (New Hanover & Brunswick Counties)

The Division of Water Resources (DWR) is requesting that the Environmental Management Commission (EMC) grant staff permission to proceed to public notice with the proposed removal of the Swamp classification and part of a management strategy for a portion of the Lower Cape Fear River, which EPA disapproved in July 2018. This proposal is the result of EMC in July 2019 granting a petition for rulemaking from the Cape Fear River Watch and Waterkeeper Alliance in care of the Southern Environmental Law Center; thus, this proposal serves the public interest per Executive Order #70 and complies with G.S. 150B, the Administrative Procedures Act (APA). The petition requests that the EMC "...remove the supplemental swamp waters classification from the lower Cape Fear River." DWR staff have concluded that the removal of the Swamp designation from a section of the Lower Cape Fear River in 15A NCAC 02B .0311 would impact the management strategy for that same section of the river in 15A NCAC 02B .0227 that accompanied the Swamp designation during the reclassification process for it. At its July 2019 meeting, EMC approved the initiation of rulemaking to remove the EPA disapproved Sw designation from 15A NCAC 02B .0311 and to remove the EPA disapproved portion of the management strategy from 15A NCAC 02B .0227.

In 2014, the Lower Cape Fear River Program had requested that a segment of the lower Cape Fear River below Lock & Dam 1 in New Hanover and Brunswick Counties be reclassified from Class SC to Class SC Sw. The reclassification request stated that "...the DO standard of 5 mg/l for the Lower Cape Fear River Estuary is not appropriate since it is not achieved a significant portion of the time as a result of natural drainage from riverine wetlands and salt marshes." The Sw classification allows, if caused by natural conditions, the pH of the subject waters to reach as low as 4.3 and the DO to be lower than 5 mg/l. In addition, a water quality management plan associated with the Swamp classification helps to implement the current permitting policy for new wastewater discharges and expansions of existing wastewater discharges to the subject waters, with effluent limits for oxygen consuming wastes that are similar to the same limits for High Quality Waters (HQWs). The Swamp classification and management plan became effective in 2017 in the North Carolina Administrative Code, providing a path forward for discharges and communities. However, as mentioned above, EPA disapproved of the Swamp classification and a portion of the management plan in July 2018.

The subject waters are comprised of a portion of the Cape Fear River from the upstream mouth of Toomers Creek to a line across the river between Lilliput Creek and Snows Cut, where the Intracoastal Waterway (ICW) meets the river. Wetlands, mixed with developed lands, other open waters, forest lands, and shrub/scrub lands exist directly adjacent to the proposed waters. In these waters, there are several tidal saltwater species, including the federally endangered shortnose sturgeon and Atlantic sturgeon, and the Marine Fisheries Commission designation of Primary Nursery Area, or PNA, which received HQW designation. In addition, during the rulemaking for the reclassification and management plan, there were eight NPDES permitted wastewater discharges, no known planned new NPDES wastewater discharges, and one planned expansion of an existing NPDES wastewater discharge that met the requirements of the classification and management plan but had not been permitted; since then, the one planned expansion got permitted, and currently there are eight NPDES permitted wastewater discharges and no known planned new NPDES wastewater discharges to these waters. Lastly, there are no plans for expansions of existing NPDES wastewater discharges that require permitting.

A fiscal analysis for the Swamp reclassification and management plan revealed no quantifiable cost or benefit, and thus, removal of that reclassification and a portion of that management plan does not result in a quantifiable cost or benefit. In addition, at its November 2019 meeting, WQC approved moving forward the proposed rulemaking to EMC. Staff recommends sending this item to the EMC in January 2020 for approval to send the proposed rulemaking out to public notice. The estimated effective date of this rulemaking is November 1, 2020.