

May 18, 2021

***Via E-mail***

Amanda Reeder  
North Carolina Rules Review Commission  
Office of Administrative Hearings  
1711 New Hope Church Road  
Raleigh, NC 27609  
amanda.reeder@oah.nc.gov

**Re: Letter of Support for Temporary Wetland Rules: 15A N.C. Admin. Code 02H .1301  
(Revision) and 15A N.C. Admin. Code .1400 (.1401 through .1405)**

Dear Commissioners and Commission Staff:

I am submitting these comments in support of the Environmental Management Commission's proposed temporary rules that revise 15A N.C. Admin. Code 2H .1301 and 15A N.C. Admin. Code .1400 (.1401 through .1405). My company, Jennings Environmental PLLC, is a licensed engineering consulting firm based in Asheville, NC. We support wetlands protection and believe the temporary rules are necessary for continuity in the state's wetland permitting program.

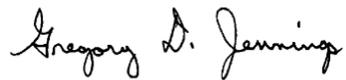
I am a former member of the NC Environmental Management Commission (2002-2005) and a retired Professor of Biological and Agricultural Engineering at NC State University. My entire career has been dedicated to education, research, restoration, and protection of water resources in North Carolina. As an expert in wetland and stream protection, I recognize the significant change that took place with the U.S. EPA and Army Corps of Engineers' 2020 Navigable Waters Protection Rule. The change in federal jurisdiction over wetlands meant that many wetlands that were once covered by both federal and state protections are now only covered by state protections. Because the state's 401 certification process is the primary tool for the Department of Environmental Quality to evaluate and authorize wetland impacts. That process is triggered by a federal permit, so without federal jurisdiction, the state has no permitting process for wetlands that have been regulated by the Environmental Management Commission for decades. The temporary rule provides important continuity, allowing the Department to continue a permitting program similar to what it has done for many, many years.

Although it was clear that the 2020 Navigable Waters Protection Rule would reduce federal jurisdiction for wetlands, the extent of the removal of jurisdiction was not clear until several months after the rule was implemented. Since the rule went into effect, it has become clear that there a significant acreage of wetlands in North Carolina that remain protected by state law but no longer trigger the 401 certification process and, therefore, no impacts can be authorized. The temporary rule is a timely, needed response to this development.

Protecting wetlands is important for the future of our streams and rivers. The temporary rules strike a balance between providing protection for wetlands that have always been regulated by the Environmental Management Commission pursuant to its legislative authority and a permitting process that allows unavoidable impacts to proceed and provides for mitigation of those impacts. We encourage you to approve the temporary wetland rules to provide continuity in the state program until the permanent rules that are being developed are finalized.

Thank you for considering my comments.

Respectfully Submitted,

A handwritten signature in black ink that reads "Gregory D. Jennings". The signature is written in a cursive style with a large, prominent "G" and "J".

Gregory D. Jennings, Ph.D., P.E., President  
Jennings Environmental PLLC

May 18, 2021

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**Re: Letter of Support for Temporary Wetland Rules: 15A N.C. Admin. Code 02H .1301 (Revision) and 15A N.C. Admin. Code .1400 (.1401 through .1405)**

Dear Commissioners and Commission Staff:

Wetland Solutions LLC submits these comments in support of the Environmental Management Commission's proposed temporary rules that revise 15A N.C. Admin. Code 2H .1301 and 15A N.C. Admin. Code .1400 (.1401 through .1405). Wetland Solutions LLC is an environmental consultant providing permitting services to clients throughout North Carolina. We support wetlands protection and believe the temporary rules are necessary for continuity in the state's wetland permitting program.

As experts in wetlands and wetland delineations, we recognize the significant change that took place with the U.S. EPA and Army Corps of Engineers' 2020 Navigable Waters Protection Rule. The change in federal jurisdiction over wetlands meant that many wetlands that were once covered by both federal and state protections are now only covered by state protections. Because the state's 401 certification process is the primary tool for the Department of Environmental Quality to evaluate and authorize wetland impacts. That process is triggered by a federal permit, so without federal jurisdiction, the state has no permitting process for wetlands that have been regulated by the Environmental Management Commission for decades. The temporary rule provides important continuity, allowing the Department to continue a permitting program similar to what it has done for many, many years.

Although it was clear that the 2020 Navigable Waters Protection Rule would reduce federal jurisdiction for wetlands, the extent of the removal of jurisdiction was not clear until several months after the rule was implemented. Since the rule went into effect, it has become clear that there a significant acreage of wetlands in North Carolina that remain protected by state law but no longer trigger the 401 certification process and, therefore, no impacts can be authorized. The temporary rule is a timely, needed response to this development.

Protecting wetlands is important for our streams and rivers. The temporary rules strike a balance between providing protection for wetlands that have always been regulated by the Environmental Management Commission pursuant to its legislative authority and a permitting process that allows unavoidable impacts to proceed and provides for mitigation of those impacts. We encourage you to approve the temporary wetland rules to provide continuity in the state program until the permanent rules that are being developed are finalized.

## NC Conservation Network • Sound Rivers • Waterkeepers Carolina

May 18, 2021

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

**Re: Letter of Support for Temporary Wetland Rules: 15A N.C. Admin. Code 02H .1301 (Revision) and 15A N.C. Admin. Code .1400 (.1401 through .1405)**

Dear Commissioners and Commission Staff:

The NC Conservation Network, Sound Rivers, and Waterkeepers Carolina submit these comments in support of the Environmental Management Commission's (EMC) proposed temporary rules, 15A N.C. Admin. Code 2H .1301 and 15A N.C. Admin. Code .1400 (.1401 through .1405). Our organizations advocate across multiple watersheds in North Carolina for the protection of wetlands, streams, and river systems. We recognize that protection of wetlands and streams requires a balance – neither a total prohibition on impacts nor wholesale deregulation, but rather efficient review that protects neighbors, downstream communities, and the health of the landscape. The proposed temporary rules establish such a system on an interim basis, allowing development projects to proceed that would otherwise be unpermissible under current state law.

Over the last two decades, our organizations have participated in multiple rounds of federal rulemaking over the reach of the federal Clean Water Act. The most recent of those rounds reached a provisional conclusion – immediately challenged in court – in the form of the U.S. EPA and Army Corps of Engineers' 2020 Navigable Waters Protection Rule. That final rule reduced federal jurisdiction over wetlands and headwater streams in North Carolina by hundreds of thousands of acres. Yet, those same streams and wetlands remain unambiguously protected under North Carolina's state statutes: they cannot be impacted without a state permit. Since the state's traditional permit process for these impacts piggybacked on the federal 404 wetlands permitting program, that state permit process – the 401 water quality certification process – no longer offers a way to authorize impacts to these wetlands and streams. As a result, projects that have been planned for months or years, and are presumably carrying financing costs, cannot move forward. By establishing a stopgap permitting process for this federal 'coverage gap', the temporary rules provide regulatory relief to these developers and builders.

We note that the process and spatial limit of jurisdiction established by the temporary rule continue, as much as the state can, the status quo that applicants have experienced since 2008 (or earlier). To the extent that the temporary rules change the on-the-ground experience of permitting, they do so by allowing more projects to advance with limited review or lighter mitigation obligations. While we recognize that the Rules Review Commission does not screen rules for their policy choices, we think the continuity reflects the EMC's commitment to using the temporary rule process for its intended purpose: to respond to a federal rule change with a temporary rule that meets a substantial need as efficiently as possible while the agency frames a permanent solution.

Wetlands and headwater streams provide vital functions: hedging against downstream floods, filtering pollutants out of surface drinking water sources, recharging groundwater supplies, and serving as vital nursery habitat for commercial and recreational fisheries. The EMC's temporary rules ensure that development projects will be allowed to proceed while their impacts are minimized and at least partially offset to protect downstream communities and the general public. We encourage you to approve the temporary wetland rules to provide continuity in the state program while the EMC works on permanent rules.

Sincerely,

Heather Deck  
Executive Director  
Sound Rivers  
fiscal sponsor of Waterkeepers Carolina

Grady McCallie  
Policy Director  
NC Conservation Network

Waterkeepers Carolina is a science-based, environmental advocacy group representing nine Waterkeeper groups in North Carolina:

Cape Fear Riverkeeper, Cape Fear Riverwatch  
Catawba Riverkeeper, Catawba Riverkeeper Foundation  
Crystal Coast Waterkeeper, White Oak - New Riverkeeper, Coastal Carolina Riverwatch  
Dan Riverkeeper, Good Stewards of Rockingham  
Haw Riverkeeper, Haw River Assembly  
Lower Neuse Riverkeeper, Upper Neuse Riverkeeper, Pamlico-Tar Riverkeeper, Sound Rivers  
Broad Riverkeeper, French Broad Riverkeeper, Green Riverkeeper, Watauga Riverkeeper, MountainTrue  
Lumber Riverkeeper, Waccamaw Riverkeeper, Winyah Rivers Alliance  
Yadkin Riverkeeper, Yadkin Riverkeeper Foundation

# SOUTHERN ENVIRONMENTAL LAW CENTER

Telephone 919-967-1450

601 WEST ROSEMARY STREET, SUITE 220  
CHAPEL HILL, NC 27516-2356

Facsimile 919-929-9421

May 19, 2021

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

**Re: Letter of Support for Temporary Wetland Rules: 15A N.C. Admin. Code 02H .1301 (Revision) and 15A N.C. Admin. Code 02H .1400 (.1401 through .1405)**

Dear Commissioners and Commission Staff:

The Southern Environmental Law Center submits these comments in support of the Environmental Management Commission's proposed temporary rules: 15A N.C. Admin. Code 02H .1301 (Revision) and 15A N.C. Admin. Code 02H .1400 (.1401 through .1405).

Our organization has a longstanding interest in maintaining and preserving North Carolina's wetlands and advocating for a strong permitting program to authorize and impose requirements on impacts to North Carolina's wetlands. As a result of changes in federal law, many wetlands and headwater streams in North Carolina are no longer being protected by the federal Clean Water Act. These wetlands remain protected under state law as waters of the State and are, therefore, under the jurisdiction of the Environmental Management Commission. But because the State's permitting program is largely dependent on federal permitting, and federal permits are no longer required for activities in these wetlands, there is currently no permitting mechanism available for the North Carolina Department of Environmental Quality to authorize (and impose requirements on the) impacts to the wetlands. We therefore recognize that the Environmental Management Commission's proposed temporary rules fill this unexpected permitting gap.

The temporary rules are well within the authority delegated to the Environmental Management Commission by the General Assembly, they are clear and unambiguous, they are directly necessary due to the changes in federal regulations, and they were adopted in accordance with the procedures required for temporary rulemakings. We therefore support the temporary rules and urge the Rules Review Commission to adopt the rules as written.

## I. Standard of Review

All temporary rules must be reviewed by the Rules Review Commission before they become effective.<sup>1</sup> Upon review, the Rules Review Commission “must approve the temporary rule”<sup>2</sup> if the Commission finds the rule is:

- (1) “within the authority delegated to the agency by the General Assembly”;<sup>3</sup>
- (2) “clear and unambiguous”;<sup>4</sup>
- (3) “reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency”;<sup>5</sup> and
- (4) “adopted in accordance with Part 2 of this Article.”<sup>6</sup>

“Part 2 of [the] Article” requires the Rules Review Commission to find that (1) “adherence to the notice and hearing requirements . . . would be contrary to the public interest”; and (2) “immediate adoption of the rule is required by . . . a recent federal regulation.”<sup>7</sup> Here, the temporary wetland rules must be approved because they are “within the authority delegated to the agency by the General Assembly, ” “clear and unambiguous,” and “necessary”—indeed “required”—by a recent change in federal regulations. Given the gap left by the change in federal law, there is a real urgency to provide a permitting mechanism so that the North Carolina Department of Environmental Quality can authorize and impose requirements on North Carolina’s wetlands; therefore, delaying action until permanent rulemaking is not in the public interest.

## II. The Temporary Rules Simply Create a Different Permitting Program for Impacts to Wetlands that Have Been Regulated by the Environmental Management Commission for at Least 20 Years.

There is no question that the temporary rules are within the Environmental Management Commission’s authority—the Commission has regulated impacts to the wetlands covered by the rule for decades. That authority is well grounded in state statute, the North Carolina constitution, and case law.

The North Carolina General Assembly declared it to be the public policy of the State to provide for the conservation of the State’s water resources, and has acknowledged the State’s responsibility for the preservation and development of those resources in the best interests of all its citizens.<sup>8</sup> Waters of the State include:

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<sup>1</sup> N.C. GEN. STAT. §§ 150B-21.1(b), 21.8(b).

<sup>2</sup> N.C. GEN. STAT. § 150B-21.1(b).

<sup>3</sup> N.C. GEN. STAT. § 150B-21.9(a)(1).

<sup>4</sup> N.C. GEN. STAT. § 150B-21.9(a)(2).

<sup>5</sup> N.C. GEN. STAT. § 150B-21.9(a)(3).

<sup>6</sup> N.C. GEN. STAT. § 150B-21.9(a).

<sup>7</sup> N.C. GEN. STAT. § 150B-21.1(a); *see* N.C. GEN. STAT. § 150B-21(a)(4) and (b).

<sup>8</sup> *See* N.C. GEN. STAT. § 143-211.

any stream, river, brook, swamp, lake, sound, tidal estuary, bay, creek, reservoir, waterway, or *other body or accumulation of water*, whether surface or underground, public or private, or natural or artificial, that is contained in, flows through, or borders upon any portion of this State, including any portion of the Atlantic Ocean over which the State has jurisdiction.<sup>9</sup>

The General Assembly directs that waters of the State be regulated in a manner:

to protect human health, to prevent injury to plant and animal life, to prevent damage to public and private property, to insure the continued enjoyment of the natural attractions of the State, to encourage the expansion of employment opportunities, to provide a permanent foundation for healthy industrial development and to secure for the people of North Carolina, now and in the future, the beneficial uses of these great natural resources.<sup>10</sup>

These policies reaffirm and implement the North Carolina constitutional mandate that the State protect its wetlands. Article XIV, section 5 of the North Carolina Constitution, establishes the policy of the State to conserve and protect its land and waters and explicitly states that it is the policy of the State “*in every other appropriate way to preserve* as a part of the common heritage of this State its forests, *wetlands*, estuaries, beaches, historical sites, openlands, and places of beauty.”<sup>11</sup>

The Environmental Management Commission’s authority to adopt wetlands regulations and protect wetlands as waters of the State, including the wetlands covered by this rule, has been litigated and decided. In 2002, the North Carolina Court of Appeals ruled wetlands are waters of the State and fully upheld the Commission’s statutory authority—indeed duty—to regulate activities impairing or destroying wetlands.<sup>12</sup> It is, therefore, beyond question that the Environmental Management Commission has authority over the wetlands subject to the temporary rules.

For many years, North Carolina has worked in partnership with the federal government to protect the State’s wetlands. North Carolina’s Department of Environmental Quality works cooperatively with the United States Army Corps of Engineers to protect the State’s wetlands and authorize impacts to them. The State relies on the Army Corps to identify wetlands considered “waters of the United States,” for which impacts cannot occur without obtaining a Clean Water Act § 404 permit from the Army Corps and a Clean Water Act § 401 certification from the North Carolina Department of Environmental Quality. As part of these processes, applicants must employ methods of avoiding and mitigating impacts to federally protected wetlands. Applicants must also provide compensatory mitigation, where necessary, to replace impacted wetlands by restoring or enhancing wetlands or ensuring the preservation of other

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<sup>9</sup> N.C. GEN. STAT. § 143-212(6) (emphasis added).

<sup>10</sup> N.C. GEN. STAT. § 143-211(c).

<sup>11</sup> N.C. CONST. art. XIV, § 5 (emphasis added).

<sup>12</sup> *In re Request for Declaratory Ruling by Env’t Mgmt Comm’n*, 155 N.C. App. 408, 409, 413 (N.C. Ct. App. 2002).

existing wetlands that serve similar ecological functions. Where state wetlands fall outside the federal definition of “waters of the United States,” state authorization (permitting) is required.

In 2014, the North Carolina General Assembly established a set of impact thresholds for isolated wetlands that have been the subject of dispute under federal law.<sup>13</sup> In 2015, the North Carolina General Assembly limited the application of the Environmental Management Commission’s existing isolated wetlands regulations to “Basin Wetlands” and “Bogs.”<sup>14</sup> Neither the 2014 nor the 2015 session laws applied to the wetlands at issue here, which were clearly waters of the United States at that time and, therefore, part of the federal regulatory program.

Importantly, the legislation only directed the Environmental Management Commission to revise the existing wetlands regulations—it did not repeal the Commission’s authority to authorize or permit activities in wetlands, nor did it alter state law or regulations defining wetlands as waters of the State and requiring protection of the State’s wetlands. It did not affect the Commission’s then-applicable water quality certification rules<sup>15</sup> governing impacts to the wetlands subject to the temporary rule.

The question here is not whether the Environmental Management Commission has the authority to regulate these wetlands. It has done so for decades under the State’s water quality certification rules in 15A N.C. Administrative Code 02H. 0506. The only question is whether the Commission can regulate them differently. The temporary rules are more permissive than the rules that have been in place for decades or the status quo, which is a complete prohibition of impacts not otherwise approved through the federal program. That prohibition of impacts is detrimental to the regulated community. Because the Environmental Management Commission has for decades had authority to regulate impacts to these wetlands, it can do so now to fill the gap in wetland permitting left by changes in federal law.

### III. Due to the Change in Federal Law, and Absent this Temporary Rule, the North Carolina Department of Environmental Quality Does Not Have the Authority to Approve Any Impacts to Non-Isolated State Wetlands.

The temporary rules set up a state permitting program for projects that affect wetlands that require protection under North Carolina law but are no longer being protected by federal agencies under the federal Clean Water Act. Or, in other words, it regulates wetlands that have been covered by Environmental Management Commission rules for decades in a different manner as a result of the change in federal law.

The temporary rules are in direct response to recent federal rules finalized in 2020 that eliminated Clean Water Act protection and permitting for at least 900,000 acres of wetlands in North Carolina’s Cape Fear and Neuse River basins alone.<sup>16</sup> Because these wetlands are waters of the State, they are *required* to be protected under the North Carolina Constitution and statutory law. But because no federal or state permitting program currently exists for authorizing

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<sup>13</sup> N.C. Sess. Law 2014-120, § 54 (setting impact thresholds for review and mitigation under the state program).

<sup>14</sup> N.C. Sess. Law 2015-286, § 4.18(a).

<sup>15</sup> 15A N.C. Admin. Code 02H.0506.

<sup>16</sup> Decl. of Jovian Sackett at 8-9, *South Carolina Coastal Conservation League v. Wheeler*, No. 2:20-cv-01687-BHH (D.S.C. July 10, 2020), ECF No. 58-50 (Attachment A).

impacts to these wetlands, the temporary wetlands rules are needed. It is critical to note that these wetlands are not “isolated” wetlands as that term has been used historically. Federal jurisdiction over these wetlands was not in dispute until the 2020 rules were promulgated.

A. Federal Clean Water Act Rollbacks Created a Permitting Gap for the Majority of North Carolina’s Wetlands.

Under the Clean Water Act, the discharge of pollutants into “navigable waters,” defined as “waters of the United States,”<sup>17</sup> is prohibited in the absence of a federal permit.<sup>18</sup> Section 401 of the Clean Water Act provides states and tribes with an important tool (certification authority) to impose conditions to limit pollution and protect waters and wetlands within their boundaries from destructive projects that require a federal license or permit.<sup>19</sup> Under this system of cooperative federalism, states like North Carolina—unless hamstrung by their own legislatures, agencies, or resource constraints—are able to provide additional safeguards to the waters within their boundaries while the Clean Water Act serves as a federal backstop.

Between the late-1970s and early 2000s, federal courts and agencies applied the Clean Water Act broadly to protect many kinds of water bodies, including wetlands. Beginning in 1985, the United States Supreme Court recognized that the Clean Water Act appropriately extended jurisdiction over waters and wetlands that “have significant effects on water quality and the aquatic ecosystem.”<sup>20</sup> However, the late 1990s brought a series of cases that created uncertainty about the jurisdictional reach of the statute.<sup>21</sup> Despite this uncertainty, federal agencies for decades have protected streams and wetlands with a “significant nexus” to traditional navigable waters as “waters of the United States.”<sup>22</sup> A water has a “significant nexus,” if it, or its functions, “significantly affect the chemical, physical, and biological integrity” of traditional navigable waters.<sup>23</sup>

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<sup>17</sup> 33 U.S.C. § 1362(7).

<sup>18</sup> 33 U.S.C. §§ 1311(a), 1342, 1344, 1362(12).

<sup>19</sup> 33 U.S.C. § 1341(d).

<sup>20</sup> *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134–35 & n.9 (1985).

<sup>21</sup> *See, e.g., Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 167 (2001) (“*SWANCC*”) (holding the federal government could not regulate an isolated, abandoned gravel pit); *United States v. Wilson*, 133 F.3d 251, 258 (4th Cir. 1997) (holding the federal government cannot regulate wetlands that “are [not] connected closely to [either] interstate [or] navigable waters” and “which do not otherwise substantially affect interstate commerce”).

<sup>22</sup> *See* Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217, 41,250–51 (Nov. 13, 1986); 33 C.F.R. § 328.3(a) (1987); 40 C.F.R. § 232.2 (1988); Clean Water Rule: Definition of “Waters of the U.S.,” 80 Fed. Reg. 37,054 (June 29, 2015); Definition of “Waters of the U.S.”—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5,200 (Feb. 6, 2018); Final Rule, Definition of “Waters of the U.S.”—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019); U.S. Env’t Prot. Agency & U.S. Army Corps of Eng’rs, Clean Water Act Jurisdiction following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States*, 1, 8, 12 (2008).

<sup>23</sup> *Rapanos v. United States*, 547 U.S. 715, 759, 779–80, 787 (Kennedy, J., concurring) (quoting 33 U.S.C. § 1251(a)).

In 2020, the Environmental Protection Agency took a series of controversial actions: (1) defining waters protected under the Clean Water Act to exclude many, if not most, wetlands;<sup>24</sup> and (2) restricting state certification authority so that it does not extend to most wetlands.<sup>25</sup>

First, the so-called Navigable Waters Protection Rule abandoned the longstanding “significant nexus” test, unlawfully excluding countless essential wetlands and streams from federal Clean Water Act protections. Second, the 401 Certification Rule limited state certification authority to imposing conditions on a discharge (from a “point source” into “waters of the United States,” as that term is now restricted by the Navigable Waters Protection Rule) rather than on the “applicant” (or the activity as a whole), as the Clean Water Act requires.<sup>26</sup> Both rules have been challenged in federal courts around the country. In addition to several states, the North Carolina Department of Environmental Quality asked a federal district court to enjoin the Navigable Waters Protection Rule (*i.e.*, stop it from being applied) nationwide. But, the court unexpectedly denied that request on June 19, 2020, allowing implementation of the rule and its effect of creating the North Carolina permitting gap to go forward.<sup>27</sup>

The changes in these federal rules created the current situation where federal permits are now not required to destroy many wetlands, including countless acres of North Carolina’s headwater forests, Carolina Bays, pocosins, bottomland hardwoods, floodplain pools, pine flats, pine savannahs, hardwoods flats, and non-riverine swamp forests. Because there are now no federal permits required, the State is currently unable to use its water quality certification to meet its obligation to protect these wetlands as waters of the State. The Environmental Management Commission has relied on the water quality certification rules to regulate impacts to the wetlands covered by the temporary rule for decades. North Carolina’s current wetlands regulations, however, do not separately authorize activities in these wetlands in the absence of a water quality certification.<sup>28</sup>

But North Carolina law is clear: these wetlands that the Environmental Protection Agency has now determined are no longer protected by the Clean Water Act remain protected under state law. And without the temporary wetlands rules, the Department of Environmental Quality cannot issue permits for impacts in most of the State’s wetlands.

**B. North Carolina Needs the Temporary Wetlands Rules to Fill the Regulatory Gap Left by Federal Rollbacks to the Clean Water Act.**

The Department of Environmental Quality has appropriately concluded that, if no federal permits are required to destroy North Carolina’s wetlands and the Department of Environmental

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<sup>24</sup> See The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22,250 (Apr. 21, 2020).

<sup>25</sup> Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,210 (July 13, 2020) (“401 Certification Rule”).

<sup>26</sup> 33 U.S.C. § 1341(d).

<sup>27</sup> *California v. Wheeler*, 467 F. Supp. 3d 864, 877 (N.D. Cal. 2020) (denying the request for an injunction made by the North Carolina Department of Environmental Quality, the City of New York, the District of Columbia, and following states: California, Connecticut, New York, Illinois, Maine, Maryland, Massachusetts, Michigan, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Virginia, Washington, and Wisconsin).

<sup>28</sup> 15A N.C. Admin. Code 2H .1301(b) (applying State’s isolated wetlands permitting regulations to “Basins Wetlands” and “Bogs”).

Quality cannot issue water quality certifications or permits, the Department has no choice under state law except to prohibit all activities in these wetlands. The temporary rules would not be necessary if the Environmental Protection Agency had not redefined waters protected under the Clean Water Act to exclude protections for many of North Carolina's wetlands or limited the State's 401 certification authority.

This expedited rulemaking does not create additional requirements under state or federal law. In requesting that the Rules Review Commission approve the temporary rules, the Environmental Management Commission only seeks to restore a state permitting program for activities in wetlands that now do not require federal permits or certifications. The temporary rules will promptly provide a permitting mechanism for the regulated community so that the Department can authorize unavoidable impacts to these wetlands. And without the temporary rules, all proposed projects that need to impact these wetlands will be unable to do so because there is no applicable permitting mechanism in place.

#### IV. A Temporary Rule is Appropriate Under These Circumstances.

North Carolina is the ninth most populous state in the United States, but only 29th largest by land area.<sup>29</sup> The United States Census Bureau projected that between 2010 and 2020 North Carolina would gain more than one million new residents, reaching a population of nearly 10.6 million. This projection likely underestimates actual growth going forward. A significant portion of that growth is occurring in areas with a large percentage of wetlands. For example, one study has projected growth of up to 18% between 2010 and 2020 in the coastal plain counties of Currituck, Dare, Pitt, Carteret, Duplin, Cumberland, Onslow, Pender, New Hanover, and Brunswick.<sup>30</sup> This rapid growth makes development in and around wetlands all the more likely. In the absence of federal regulation, we need a state wetlands permitting program applicable to the State's non-isolated wetlands to ensure that this growth occurs with the necessary measures to protect these valuable resources. And without a state wetlands permitting program applicable to the State's non-isolated wetlands, no development in the wetlands can occur under state law. *See* Section II. This urgent need for a state permitting mechanism weighs against delaying all action for permanent rulemaking. In fact, it is in the public interest for the Rules Review Commission to approve the temporary rules as written.

#### V. Conclusion

North Carolina's rapid pace of growth is expected to continue for the foreseeable future. That is why, in the absence of federal regulation, we need stringent state wetlands regulations to ensure that North Carolina's growth can occur with necessary measures to protect these valuable waters of the State. We support the Environmental Management Commission's temporary wetlands rules because they are needed to fill the immediate permitting gap left by recent changes to federal law. We respectfully request that the Rules Review Commission fully adopt the temporary rules as written.

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<sup>29</sup> Comments of the North Carolina Department of Environmental Quality and the Office of the North Carolina Attorney General on Proposed Revised Waters of the United States ("WOTUS") Rule at 3 (April 15, 2019), <https://www.regulations.gov/comment/EPA-HQ-OW-2018-0149-4362>.

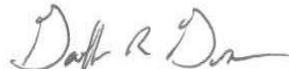
<sup>30</sup> *Id.*

Thank you for considering these comments. Please contact us at 919-967-1450 if you have any questions regarding this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Kelly F. Moser". The signature is fluid and cursive, with a prominent initial "K" and a long horizontal flourish at the end.

Kelly F. Moser  
Senior Attorney

A handwritten signature in black ink, appearing to read "Geoffrey R. Gisler". The signature is cursive and somewhat stylized, with a large initial "G" and a long horizontal flourish.

Geoffrey R. Gisler  
Senior Attorney

# Attachment A

# Exhibit 47



4. In my role as Director of Geospatial Science, I am responsible for the management of SELC's Geospatial Team and data; the design and implementation of geospatial projects (both analytical and cartographic); and the application of, interpretation of, and communication about geographic data. In other words, I oversee both the production of geospatial deliverables based on geographic data (usually maps, but summary statistics and data visualizations too) and the reading and critique of third-party maps and geographic data with respect to environmental law and policy. I have had similar responsibilities since joining the Southern Environmental Law Center in 2007.

5. Geographers, like myself, are generally integrative scientists, meaning our expertise is in the study of the connections and relationships throughout the earth (ex. climate and society, or land development and ecosystem function). I have experience with geographic information systems (GIS) as a tool for measuring and studying human/environment interactions and cartography as a tool for depicting the significant connections between earth objects. My expertise allows me to understand the difference between the abstracted lines on maps and their absolute and discrete reality on earth. I then coach environmental attorneys and decision makers about how to best apply the geographic data (field notes, instruments readings, photography and sensors) available.

### **Analysis Background**

6. For the present case, I used available science about hydrology/geomorphology and geospatial data about wetlands to approximate the wetland acreage by water regime in the entire contiguous United States as well as in selected watersheds. Water regime is a characteristic to describe the duration and completeness with which wetlands hold water in any given year. The analyzed watersheds and primary corresponding states were: VA – Potomac

River,<sup>1</sup> Rappahannock River, James River; NC – Cape Fear River, Lake Norman (Catawba River), Neuse River; SC – Charleston Harbor, Congaree River, Saluda River; GA/AL – Chattahoochee River.

7. For the purpose of this analysis, I focused on wetland water regimes as described by the U.S. Fish and Wildlife Service (FWS) National Wetlands Inventory (NWI) using the well-established Cowardin Classification System. Developed by Cowardin, et al., during the mid-to-late 1970s the system was intended to “provide basic data on the characteristics and extent of the Nation’s wetlands and deepwater habitats and should facilitate the management of these areas on a sound, multiple-use basis.”<sup>2, 3</sup> More importantly though, that mandate was driven by a need to update a previous nationwide system of wetlands inventory from the 1950s in order to document natural and anthropogenic changes and collect more refined information due to “federal legislation...passed to protect wetlands.”<sup>4</sup> The National Wetlands Inventory exists as a direct result of the need to better understand and plan for management of the nation’s water resources, as part of the Clean Water Act of 1972. It is fitting that the most recent version of the NWI continues to inform decision making about the Clean Water Act today.

8. The National Wetlands Inventory was designed to provide a consistent classification of wetlands as ecological mapping units for use by FWS.<sup>5</sup> Furthermore, NWI provides a detailed classification of the water regime of each wetland type it maps.

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<sup>1</sup> The Potomac River watershed also includes portions of West Virginia, Maryland, Pennsylvania, and the District of Columbia.

<sup>2</sup> Documents in the administrative record contain the prefix EPA-HQ-OW-2018-0149 followed by the Docket Document ID. See Administrative Record Index (Doc. No. 54-1, Ex. 1). In citing to documents in the administrative record, Plaintiffs have omitted the prefix and cite only to the author, title of the document, its date, and the Administrative Record Docket Document ID (“AR”).

<sup>3</sup> Cowardin, L. M., et al., Classification of Wetlands and Deepwater Habitats of the United States, U.S. Fish and Wildlife Service (AR 11626) at 2 (1979), <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-11626> (“Cowardin”).

<sup>4</sup> Id.

<sup>5</sup> Dahl, T.E., J. Dick, J. Swords, and B.O. Wilen, Data Collection Requirements and Procedures for

9. I focused on wetlands where surface water is rarely or only temporarily present: Temporarily Flooded (A), Seasonally Saturated (B), Continuously Saturated (D), and Intermittently Flooded (J) water regime modifiers of the NWI.<sup>6</sup> These modifiers refer to water regimes that are non-tidal, primarily in palustrine (wetland) systems, but also some lacustrine (lake) and riverine (river) systems.<sup>7</sup> This analysis only focused on palustrine systems, since that is where the majority of these water regimes are represented.

10. Cowardin describes temporarily/intermittently flooded wetlands as including seasonally flooded basins and flats, including wet meadows.<sup>8</sup> For example, despite being “largely controlled by precipitation and evapotranspiration,” Carolina and Delmarva bays experience “nearly continuous shallow ground-water recharge” and periodic shallow ground-water discharge, resulting in periods with no surface water.<sup>9</sup>

11. Saturated wetlands include bogs, pocosins, fens, and similar wetland types.<sup>10</sup> Fens are a kind of slope wetland<sup>11</sup> that is groundwater driven, while bogs and pocosins typically collect precipitation.<sup>12</sup> These wetland types are not typically flooded by perennial or intermittent streams, but rather “temporarily hold water and then slowly release it to downstream waters.”<sup>13</sup>

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Mapping Wetland, Deepwater and Related Habitats of the United States. Division of Habitat and Resource Conservation (version 2) at 6 (2015), <https://www.fws.gov/wetlands/documents/Data-Collection-Requirements-and-Procedures-for-Mapping-Wetland-Deepwater-and-Related-Habitats-of-the-United-States.pdf>. (“Dahl”).

<sup>6</sup> The capital letters used to represent water regime modifiers in NWI are reassigned from the letters used in Cowardin, et. el. (1979).

<sup>7</sup> Federal Geographic Data Committee, Wetlands Subcommittee, Classification of Wetlands and Deepwater Habitats of the United States, Docket ID No. FGDC–STD-004-2013, Second Edition (AR 11629) at 38 (August 2013), <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-11629>. (“NWI Metadata”).

<sup>8</sup> Cowardin at 13.

<sup>9</sup> EPA Office of Res. & Dev., Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (AR 11691) at B-5, <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-11691> (“Science Report”).

<sup>10</sup> Cowardin at 28.

<sup>11</sup> Science Report at 4-20.

<sup>12</sup> Science Report at 4-21.

<sup>13</sup> See U.S. Environmental Protection Agency & U.S. Army Corps of Engineers, Technical Support Document for the Clean Water Rule: Definition of Waters of the United States (see AR 11460, document 285) at 340 (May 27, 2015), <https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-20869>.

12. Cowardin illustrates the position of these water regimes, with respect to others, across a landscape matrix of palustrine and upland systems, as copied here in Figure 1:<sup>14</sup>

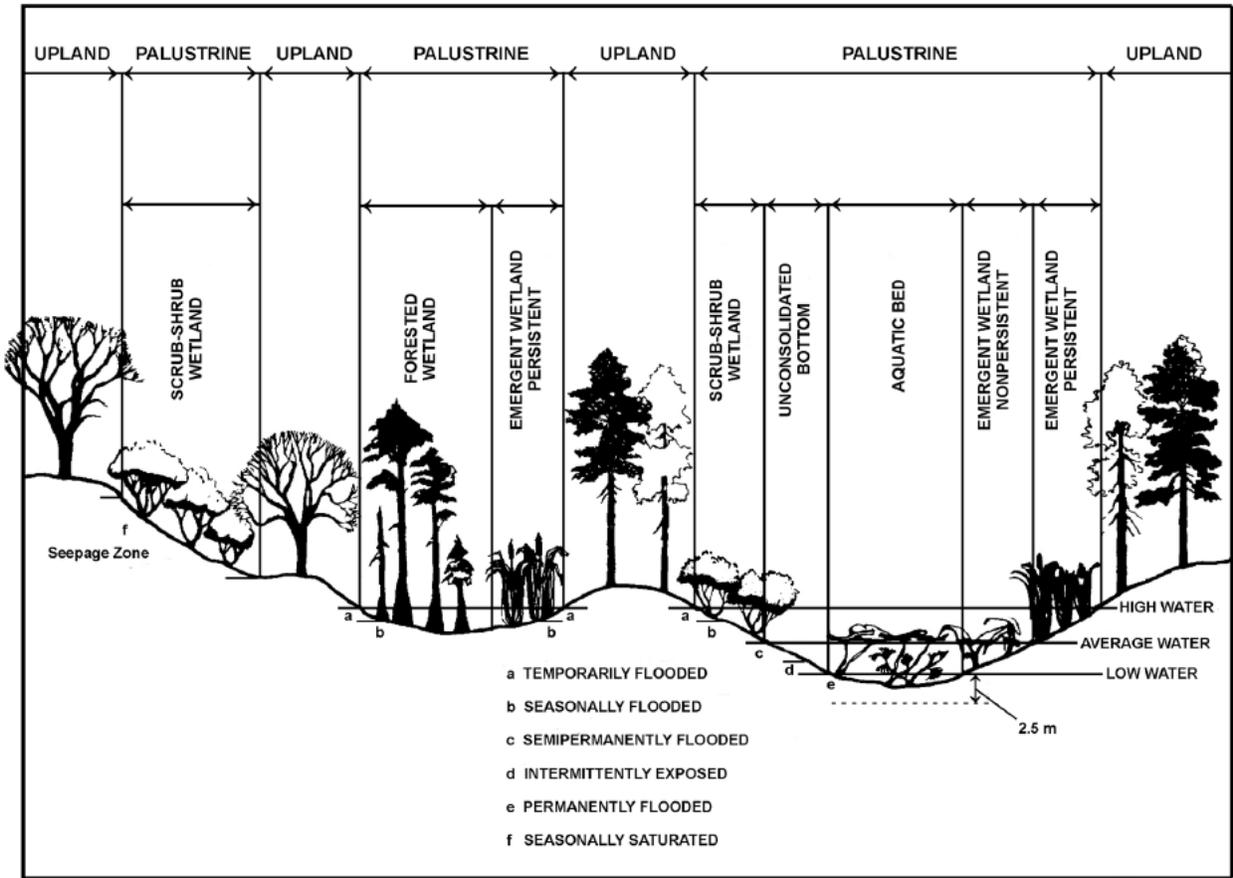


Figure 1

13. In their Economic Analysis for the Navigable Waters Protection Rule: Definition of “Waters of the United States” (2020), the Environmental Protection Agency and Corps of Engineers cited the NWI metadata pertaining to water regime modifiers. Specifically, the agencies noted that Temporarily Flooded wetlands only have surface water for “a few days to a few weeks” during the growing season and Intermittently Flooded wetlands may have years

<sup>14</sup> Cowardin at 13.

between periods of inundation.<sup>15</sup> In addition, Seasonally Saturated wetlands typically do not have surface water for longer than “a few days after heavy rain and upland runoff.”<sup>16</sup> In Continuously Saturated wetlands, “widespread surface inundation is rare.”<sup>17</sup>

14. In sum, the presence of surface water in these wetland regimes is sporadic and most often due to elevated vertical (groundwater) or temporal (precipitation).<sup>18</sup> To the extent these wetlands receive overflow from a perennial or intermittent river or stream, that flooding is also sporadic and short-lived.<sup>19</sup> Therefore, these water regimes are the most likely to be excluded from the new “waters of the United States” definition. They are collectively referred to below as the “target” water regimes.

### **Technical Analysis**

15. To complete this analysis, I used Esri ArcGIS Pro v.2.4.2 for geospatial tasks, R v3.5.1 for generating summary statistics, and Microsoft Excel 2019 for combining and presenting results.

16. Data collection was the first phase of the study. Although there is no single dataset that maps all the nation’s streams, wetlands, and watersheds systematically, there are best available nationwide data approximating streams, wetlands, and watersheds published by the mapping divisions of U.S. government agencies. Those data are published for helping understand the complexities and inter-relationships of human-environment interactions, as it relates to natural resource management and policy. My intent was to create both a nationwide

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<sup>15</sup> U.S. Environmental Protection Agency & U.S. Army Corps of Engineers, Economic Analysis for the Navigable Waters Protection Rule: Definition of “Waters of the United States (AR 11572) at 101 (Jan. 22, 2020) (“Economic Analysis”).

<sup>16</sup> Id.

<sup>17</sup> Id.

<sup>18</sup> Science Report at 1-4–1-7.

<sup>19</sup> Id.

dataset of wetlands, classified by water regime, and to have that dataset subdivided by both ecological (watersheds) and political (county/state) geographic units.<sup>20</sup> Geospatial data for 12-digit hydrologic units (watersheds) came from the U.S. Geological Survey (USGS) Watershed Boundaries Dataset (WBD), 4<sup>th</sup> edition, “to ensure the digital geographic data are usable with other related” geospatial data.<sup>21</sup> The geospatial dataset for wetlands, the FWS’s NWI v.2, affirms its applicability to this type of analysis, “[t]he information collected using these requirements and procedures are intended to support the decision-making process.”<sup>22, 23</sup> From their metadata, I knew neither of these datasets were designed to represent jurisdictional determinations but are intended to map the nation’s waters and wetlands using uniform national mapping standards developed by U.S governmental agencies. The NWI applies the Cowardin Classification System, designed to provide a consistent classification of wetlands as ecological mapping units for use by FWS.<sup>24</sup>

17. In order to compile NWI data for the contiguous United States, SELC hired and I supervised Esri, a geospatial software and services company, to download and process the source data with computing power much greater than what SELC possesses. Esri downloaded all the source data for each state from FWS, and produced enhanced geodatabases of the contiguous United States, with wetlands aggregated by state and county geography in one database and 12-

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<sup>20</sup> Geospatial data for county and state boundaries, were from the U.S. Census Bureau, and although built into the final data through analysis, were not included in any of my results, in order to focus solely on the ecological side of the impacts.

<sup>21</sup> U.S. Geological Survey and U.S. Department of Agriculture, Natural Resources Conservation Service, Federal Standards and Procedures for the National Watershed Boundary Dataset (WBD) at 1 (2013), <http://pubs.usgs.gov/tm/tm11a3/>.

<sup>22</sup> NWI v.2 represents the methodologies of Dahl et.al. Within the version numbers, actual data are updated more frequently, and this analysis used data, associated with the October 2019 release, the most recently available at the time.

<sup>23</sup> Dahl, et. al. at 5.

<sup>24</sup> Dahl, et. al. at 6.

digit HUC watersheds in another.<sup>25</sup> I verified Esri’s process and reformatted the summary tables they provided.

18. At this stage, I brought an additional team member, Libbie Weimer, geospatial analyst, in to help work with the data. The geodatabases created by Esri were incredibly large, and therefore difficult to summarize with the GIS software, ArcGIS Pro. Ms. Wiemer used the statistical programming language, R, to create more workable summary tables of data that estimated the number of acres of wetlands assigned to each NWI wetland classification across the contiguous United States.

19. This table (Table 1) shows the HUC codes corresponding to each watershed selected for in-depth analysis:

Table 1

<b>Watershed</b>	<b>All 12-digit HUCs comprising these larger 6-,8-,10-digit HUCs</b>
Potomac	020700
Rappahannock	02080103, 02080104
James	020802
Neuse	030202
Cape Fear	030300
Lake Norman (Catawba River)	0305010111, 0305010112
Saluda	03050109
Congaree	03050110
Charleston Harbor	03050201, 03050202, 03050209
Chattahoochee	03130001, 03130002, 03130003, 03130004

20. In their data processing, Esri isolated the water regime modifier from the full Cowardin code in NWI, using the Wetlands Decoder Table, which “*provides a crosswalk from U.S. Fish and Wildlife Service, National Wetlands Inventory (NWI) wetlands data, as defined by*

<sup>25</sup> Esri (2020). NWI Data Processing Steps.

*the Federal Wetland Mapping Standard, to the complete wetland definitions, as defined by the Federal Wetlands Classification Standard.”<sup>26</sup>*

21. In order to estimate wetland types by target water regime, I utilized the summary tables for water regime codes of the NWI dataset, those created in R, within the watersheds of interest listed in Table 1.

22. After creating a new row of values for the select watersheds, based on their HUC code, I then summarized the results in Excel. A single pivot table was created to show columns for wetland acres in each target water regime and rows for each watershed. The values of the pivot tables were the total acres of wetlands classified by each water regime for each Table 1 watershed. Some values were zero.

## **Results**

23. As shown in Table 2, and based on my analysis, I estimate that 45,103,442 acres of wetlands in the contiguous United States are classified as Temporarily Flooded, Seasonally Saturated, Continuously Saturated, or Intermittently Flooded. Table 2 also contains the results for the selected watersheds analysis:

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<sup>26</sup> U.S. Fish and Wildlife Service, Wetland Classification Codes (2019), <https://www.fws.gov/wetlands/Data/Wetland-Codes.html> (downloaded Feb. 3, 2020).

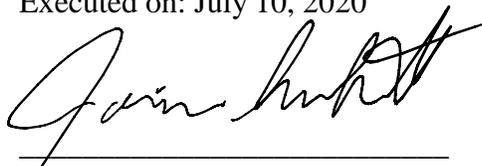
Table 2

Analysis Area		Temporarily Flooded (A)	Seasonally Saturated (B)	Continuously Saturated (D)	Intermittently Flooded (J)	Total
Target Watershed	Potomac	66,079	7,142	7,142	253	80,616
	Rappahannock	14,021	9,723		5	23,750
	James	70,364	14,750	5,184	1	90,299
	Neuse	167,544	197,042			364,586
	Cape Fear	141,801	385,195			526,996
	Lake Norman	783	12			796
	Saluda	16,679	3,852			20,531
	Congaree	29,144	13,762			42,906
	Charleston Harbor	76,626	81,148			157,774
	Chattahoochee	147,076	15,073			162,149
<b>Contiguous U.S.</b>		<b>25,214,419</b>	<b>11,530,268</b>	<b>7,749,017</b>	<b>609,738</b>	<b>45,103,442</b>

24. The results of my analysis estimate the acreage for a subset of wetlands that less frequently have surface water and are therefore likely to be excluded by the new waters of the United States definition. This vulnerable subset includes waters classified as Temporarily Flooded, Seasonally Saturated, Continuously Saturated, and Intermittently Flooded. Estimating the exact amount of any type of wetlands that lose jurisdiction under the Rule would require on-the-ground, site-specific analysis. However, the analysis described above provides estimates based on the most complete nationwide geospatial data, while honoring the limitations of scale and the data's intended use.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on: July 10, 2020



Jovian Sackett

## Burgos, Alexander N

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**Subject:** FW: [External] support of the Environmental Management Commission's proposed temporary rules - 15A NCAC 02H .1301, .1401-.1405

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**From:** Kevin Martin <[kmartin@sandec.com](mailto:kmartin@sandec.com)>

**Sent:** Wednesday, May 19, 2021 3:57 PM

**To:** rrc.comments <[rrc.comments@oah.nc.gov](mailto:rrc.comments@oah.nc.gov)>

**Subject:** [External] support of the Environmental Management Commission's proposed temporary rules - 15A NCAC 02H .1301, .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](#).

The purpose of this email is to state the reasons why the proposed temporary rules comply with the statutory grounds for the RRC's review set out in G.S. 150B-21.1 and G.S. 150B-21.9. I am a former member and vice Chair of the Environmental Management Commission (2002-2017). This temporary rule because adherence to the notice and hearing requirements of G.S. 150B-21.2 would be contrary to the public interest and immediate adoption of the rule is required because of a recent federal regulation. The NCDEQ-DWR's reasons for the length of time it took to bring these rules forward have been explained in comments submitted to the commission and by your staff. The regulated public has been in need of and has been asking for these rules for almost a year, the failure of these to come before you within the stipulated time should not be used to prevent the RRC from providing regulatory relief to the public. I encourage you to grant the waiver required for these rules to go into effect.

The Environmental Management Commission clearly has the authority to adopt such rules since they first adopted isolated wetland rules in 2002 and they again readopted said rules with revisions in 2019 with eth RRC's concurrence each time. Thank you for your attention to this pressing matter.

**Kevin C. Martin**

Principal

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