

Note from the Codifier: The OAH website includes notices and the text of proposed temporary rules as required by G.S. 150B-21.1(a1). Prior to the agency adopting the temporary rule, the agency must hold a public hearing no less than five days after the rule and notice have been published and must accept comments for at least 15 business days. For questions, you may contact the Office of Administrative Hearings at 984-236-1850 or email oah.postmaster@oah.nc.gov.

TITLE 15A – DEPARTMENT OF ENVIRONMENTAL QUALITY

Notice is hereby given in accordance with G.S. 150B-21.1 that the Environmental Management Commission intends to adopt the rules cited as 15A NCAC 02H .1401-.1405 and amend the rule cited as 15A NCAC 02H .1301.

Codifier of Rules received for publication the following notice and proposed temporary rule on: March 12, 2021.

Public Hearing:

Date: March 30, 2021

Time: 6:00 p.m.

Location: A virtual public hearing will be held by webinar as follows: WebEx Events meeting link: <https://ncdenrits.webex.com/ncdenrits/onstage/g.php?MTID=ed98752d9e2287fc790c0ead218c3f3f7>
Event number (access code): 185 837 0615
Event password: inPh6hrMv88

You may elect to have the system call you, or you may call +1-415-655-0003 US TOLL and enter the access code above.

If you wish to attend the hearing, you must register before 12:00 pm on Tuesday, March 30, 2021.

Registration information can be found on the DEQ Proposed Rule webpage at the following link:

https://forms.office.com/Pages/ResponsePage.aspx?id=3IF2etC5mkSFw-zCbNftGRcM2xmuszROiks3JDQp2_RURUlaVzhKViyzMURGVVFSN1VBNUIPOE9SWS4u

Reason for Proposed Temporary Action: A recent federal regulation, 33 CFR Part 328 and 40 CFR Parts 110, 112, 116, 117, 120, 122, 230, 232, 300, 302 and 401 – Navigable Waters Protection Rule: Definition of "Waters of United States". Effective date: June 22, 2020. The Environmental Management Commission is proposing adoption of temporary rules because as a result of the new Federal Navigable Waters Protection Rule (Federal Rule), certain wetlands are no longer subject to federal Clean Water Act jurisdiction. These wetlands remain protected by the State's Wetland Standards (15A NCAC 02B .0231), but, as a result of the new Federal Rule, the State 401 permitting mechanism is no longer available to authorize impacts. Impacts to these wetlands cannot be authorized by the state's existing Isolated Wetlands permitting program (15A NCAC 02H .1300) because they are not within the scope of those rules. Impacts to these wetlands, which formerly relied on the Federal Rule for a permitting pathway, are prohibited until a state permitting process is in place. To provide a regulatory mechanism to authorize impacts to wetlands that are no longer federally jurisdictional and to provide regulatory certainty, the agency is proposing temporary rulemaking.

Comment Procedures: Comments from the public shall be directed to: Sue Homewood, Division of Water Resources, 450 W. Hanes Mill Rd, Winston-Salem, NC 27105, phone (336)776-9693, email sue.homewood@ncdenr.gov. The comment period begins March 19, 2021 and ends April 12, 2021.

CHAPTER 02 - ENVIRONMENTAL MANAGEMENT

SUBCHAPTER 02H - PROCEDURES FOR PERMITS: APPROVALS

SECTION .1300 – DISCHARGES TO ISOLATED WETLANDS AND ISOLATED WATERS

15A NCAC 02H .1301 SCOPE AND PURPOSE

(a) The provisions of this Section shall apply to Division of Water Resources (Division) regulatory and resource management determinations regarding isolated wetlands and isolated classified surface waters. This Section shall only apply to discharges resulting from activities that require State review after October 22, 2001 and that require a Division determination concerning effects on isolated wetlands and isolated classified surface waters. For the purpose of this Section, "discharge" shall be the deposition of dredged or fill material (e.g. fill, earth, construction debris, soil, etc.).

(b) This Section outlines the application and review procedures for permitting of discharges into isolated wetlands and isolated classified surface waters that have been listed in 15A NCAC 02B .0300. If the U.S. Army Corps of Engineers or its designee determines that a particular water is not regulated under Section 404 of the Clean Water Act, and the water meets the definition of isolated waters in Paragraph (f) of this Rule, then discharges to that water ~~or wetland~~ shall be covered by this Section. If the U.S. Army Corps of Engineers or its designee determines that a particular wetland is not regulated under Section 404 of the Clean Water Act ~~Act~~, that wetland meets the definition of isolated waters in Paragraph (f) of this Rule, and that wetland is a Basin Wetland or Bog as described in the North Carolina Wetland Assessment User Manual prepared by the North Carolina Wetland Functional Assessment Team, version 4.1 October 2010 (available online at: <https://deq.nc.gov/about/divisions/water-resources/water-quality-permitting/401-buffer-permitting-branch/401-isolated>), ~~<https://deq.nc.gov/about/divisions/water-resources/water-resources-data/water-quality-program-development/newam-manual>~~, then discharges to that wetland shall be covered by this Section. The Division shall verify the determination, extent, and location of isolated wetlands and isolated 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).

(c) Activities that result in a discharge may be deemed permitted as described in Rule .1305 ~~(b)~~(a) of this Section or authorized by the issuance of either an individual permit or a Certificate of Coverage to operate under a general permit:

- (1) Individual permits shall be issued on a case-by-case basis using the procedures outlined in this Section. These Individual permits do not require approval by the U.S. Environmental Protection Agency.
- (2) General permits may be developed by the Division and issued by the Director for types or groups of discharges resulting from activities that are similar in nature and considered to have minimal impact. General permits do not require approval by the U.S. Environmental Protection Agency. All activities that receive a Certificate of Coverage under a general permit from the Division shall be covered under that general permit. When written approval is required in the general permit, the application and review procedures for requesting a Certificate of Coverage under a general permit from the Division for the proposed activity are the same as the procedures outlined in this Section for individual permits.

(d) Discharges resulting from activities that receive an individual permit or Certificate of Coverage under a general permit pursuant to this Section shall not be considered to remove existing uses of the isolated wetland or isolated surface waters.

(e) The following are exempt from this Section:

- (1) Activities described in 15A NCAC 02B .0230;
- (2) Discharges to isolated man-made ~~ponds~~ ponds, isolated man-made wetlands, or isolated man-made ditches constructed for erosion control or stormwater management purposes;
- (3) Discharges to any man-made isolated pond;
- (4) Discharges to any isolated wetland not regulated under Section 404 of the Clean Water Act that is not a Basin Wetland or Bog as described in the North Carolina Wetland Assessment User Manual prepared by the North Carolina Wetland Functional Assessment Team, version 4.1 October 2010 (available online at: <https://deq.nc.gov/about/divisions/water-resources/water-resources-data/water-quality-program-development/ncwam-manual>);
- (5) Discharges of treated effluent into isolated wetlands and isolated classified surface waters resulting from activities that receive NPDES Permits or State Non-Discharge Permits;
- (6) Discharges for water dependent structures as defined in 15A NCAC 02B .0202; and
- (7) A discharge resulting from an activity if:
 - (A) The discharge resulting from the activity requires a 401 Certification and 404 Permit and these were issued prior to October 22, 2001;
 - (B) The project requires a State permit, such as landfills, NPDES discharges of treated effluent, Non-Discharge Permits, land application of residuals and road construction activities, that has begun construction or are under contract to begin construction and have received all required State permits prior to October 22, 2001;
 - (C) The project is being conducted by the N.C. Department of Transportation and they have completed 30% of the hydraulic design for the project prior to October 22, 2001; or
 - (D) The applicant has been authorized for a discharge into isolated wetlands or isolated waters for a project that has established a Vested Right under North Carolina law prior to October 22, 2001.

(f) The terms used in this Section shall be as defined in G.S. 143-212 and G.S. 143-213 and as follows:

- (1) "Class SWL wetland" means the term as defined at 15A NCAC 02B ~~.0101~~ .0231(a).
- (2) "Class UWL wetland" means the term as defined at 15A NCAC 02B ~~.0101~~ .0231(a).
- (3) "Cumulative impact" means environmental impacts resulting from incremental effects of an activity when added to other past, present, and reasonably foreseeable future activities, regardless of what entities undertake such other actions.
- (4) "Director" means the Director of the Division.
- (5) "Division" means the Division of Water Resources of the North Carolina Department of Environmental Quality.
- (6) "Isolated Wetland" means:
 - (A) a wetland confirmed to be isolated by the USACE prior to June 22, 2020; or
 - (B) a wetland that has been determined to be non-jurisdictional by the USACE after June 22, 2020 and for which an evaluation confirmed by the Division documents that a significant nexus is not present pursuant to the Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States memorandum dated December 02, 2008 (available online at: <https://deq.nc.gov/about/divisions/water-resources/water-quality-permitting/401-buffer-permitting-branch/401-isolated>).
- (7) "Isolated Waters" means:
 - (A) a surface water confirmed to be isolated by the USACE prior to June 22, 2020; or
 - (B) a surface water that has been determined to be non-jurisdictional by the USACE after June 22, 2020 and for which an evaluation confirmed by the Division documents that a significant nexus is not present pursuant to the Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States memorandum dated December 02, 2008 (available online at: <https://deq.nc.gov/about/divisions/water-resources/water-quality-permitting/401-buffer-permitting-branch/401-isolated>).
- ~~(8)~~ "Secondary impact" means indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable to the applicant or the Division.
- ~~(7)~~(9) "Wetland" means the term as defined in 15A NCAC 02B .0202.

SECTION .1400 – DISCHARGES TO FEDERALLY NON-JURISDICTIONAL WETLANDS AND FEDERALLY NON-JURISDICTIONAL CLASSIFIED SURFACE WATERS

15A NCAC 02H .1401 SCOPE AND PURPOSE

(a) The provisions of this Section shall apply to Division of Water Resources (Division) regulatory and resource management determinations regarding federally non-jurisdictional wetlands and federally non-jurisdictional classified surface waters. For the purpose of this Section, "discharge" shall be the deposition of dredged or fill material (e.g. fill, earth, construction debris, soil, etc.). Isolated Wetlands and Isolated Waters as defined in Rule .1301 of this Subchapter shall be regulated pursuant to Section .1300 of this Subchapter.

(b) This Section outlines the application and review procedures for permitting of discharges into federally non-jurisdictional wetlands and federally non-jurisdictional classified surface waters that have been listed in 15A NCAC 02B .0300. If the U.S. Army Corps of Engineers or its designee determines that a particular water or wetland is not regulated under Section 404 of the Clean Water Act, and the particular water or wetland is not an isolated wetland or isolated water as defined in Rule .1301 of this Subchapter, then discharges to that water or wetland shall be covered by this Section. 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).

(c) Activities that result in a discharge may be deemed permitted as described in Rule .1405(a) of this Section or authorized by the issuance of either an individual permit or a Certificate of Coverage to operate under a general permit:

- (1) Individual permits shall be issued on a case-by-case basis using the procedures outlined in this Section. These Individual permits do not require approval by the U.S. Environmental Protection Agency.
- (2) General permits may be developed by the Division and issued by the Director for types or groups of discharges resulting from activities that are similar in nature and considered to have minimal impact. General permits do not require approval by the U.S. Environmental Protection Agency. All activities that receive a Certificate of Coverage under a general permit from the Division shall be covered under that general permit. When written approval is required in the general permit, the application and review procedures for requesting a Certificate of Coverage under a general permit from the Division for the proposed activity are the same as the procedures outlined in this Section for individual permits.

(d) Discharges resulting from activities that are deemed permitted as described in Rule .1405(a) of this Section, or that receive an individual permit or Certificate of Coverage under a general permit pursuant to this Section shall not be considered to remove existing uses of the wetland or classified surface waters.

(e) The following are exempt from this Section:

- (1) Activities described in 15A NCAC 02B .0230;
- (2) Discharges to federally non-jurisdictional man-made ponds, federally non-jurisdictional man-made wetlands, or federally non-jurisdictional man-made ditches constructed for erosion control or stormwater management purposes;
- (3) Discharges to any federally non-jurisdictional man-made pond;
- (4) Discharges of treated effluent into federally non-jurisdictional wetlands or federally non-jurisdictional classified surface waters resulting from activities that receive NPDES Permits or State Non-Discharge Permits; and
- (5) Discharges for water dependent structures as defined in 15A NCAC 02B .0202.

(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.

Authority G.S. 143-215.1(a)(6); 143-215.1(b)(3); 143-215.3(a)(1); 143-215.3(c).

15A NCAC 02H .1402 FILING APPLICATIONS

(a) Any person needing issuance of an individual permit or Certificate of Coverage under a general permit for discharges resulting from activities that affect federally non-jurisdictional wetlands or federally non-jurisdictional classified surface waters shall file with the Director, at 1617 Mail Service Center, Raleigh, North Carolina, 27699-1617, or 512 N Salisbury Street, Raleigh, NC 27604, an original and one copy of an application for a Permit or submit one complete copy of an application electronically via the following website: [https://edocs.deq.nc.gov/Forms/DWR Wetlands Online Submittal Page](https://edocs.deq.nc.gov/Forms/DWR_Wetlands_Online_Submittal_Page). The application shall be made on a form provided or approved by the Division, available electronically via the following website: <https://deq.nc.gov/about/divisions/water-resources/water-quality-permitting/401-buffer-permitting-branch/application>. The application shall include at a minimum the following:

- (1) the date of application;
- (2) the name, address, and phone number of the property applicant. If the applicant is not the property owner(s), name, address, and phone number of the property owner(s);
- (3) if the applicant is a corporation, the name and address of the North Carolina process agency, and the name, address, and phone number of the individual who is the authorized agent of the corporation and responsible for the activity for which certification is sought. The corporation must be registered with the NC Secretary of State's Office to conduct business in NC;
- (4) the nature of the discharge, including cumulative impacts to all wetlands and waters (isolated wetlands, isolated classified surface waters, federally non-jurisdictional wetlands, federally non-jurisdictional classified surface waters, jurisdictional wetlands and jurisdictional waters) that cause or will cause a violation of downstream water quality standards resulting from an activity to be conducted by the applicant;
- (5) whether the discharge has occurred or is proposed;

- (6) the location and extent of the discharge, stating the municipality, if applicable, the county; the drainage basin; the name of the nearest named surface waters; and the location of the point of discharge with regard to the nearest named surface waters;
- (7) an application fee as required by G.S. 143-215.3D. If payment of a fee is required for a 401 Water Quality Certification, then that fee shall suffice for this Rule;
- (8) a map(s) with scales and north arrows that is legible to the reviewer and of sufficient detail to delineate the boundaries of the lands owned or proposed to be utilized by the applicant in carrying out the discharge; the location, dimensions, and type of any structures that affect federally non-jurisdictional wetlands or federally non-jurisdictional classified surface waters for use in connection with the discharge; and the location and extent of the federally non-jurisdictional wetlands or federally non-jurisdictional classified surface waters the boundaries of said lands; and
- (9) a signature by the applicant or an agent authorized by the applicant. If an agent is signing for the applicant, an agent authorization letter shall be provided. In signing the application, the applicant certifies that all information contained therein or in support thereof is true and correct to the best of their knowledge.

(b) The Division may request in writing, and the applicant shall furnish, any additional information 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.

(c) If the applicant believes that it is not feasible or is unnecessary to furnish any portion of the information required by Paragraphs (a) and (b) of this Rule, then the applicant shall submit an explanation detailing the reasons for omission of the information. The final decision regarding the completeness of the application shall be made by the Division based upon the information required in Paragraphs (a) and (b) of this Rule, and any explanation provided by the applicant regarding omitted information provided in this Paragraph.

(d) 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. 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.

(e) Other applications for permitting or certification by a division of the Department shall suffice for application for this Permit as long as the application contains all of the information specified in this Rule and it is specifically requested to the Division by the applicant that authorization is sought under this Rule. This application shall be submitted by the applicant to the Division for review under this Permit.

Authority G.S. 143-214.1; 143-215.1(a)(6); 143-215.3(a)(1).

15A NCAC 02H .1403 PUBLIC NOTICE AND PUBLIC HEARING

(a) The Division shall provide public notice for proposed general permits. This notice shall be sent to all individuals on the mailing list described in Paragraph (g) of this Rule and posted on the Division's website: <https://deq.nc.gov/about/divisions/water-resources/water-quality-permitting/401-buffer-permitting-branch/public-notices>. Notice shall be made at least 30 calendar days prior to issuance of the general permit by the Division. Public notice shall not be required for those activities covered by Certificates of Coverage under a general permit.

(b) Notice of each pending application for an individual permit shall be sent to all individuals on the mailing list described in Paragraph (g) of this Rule and shall be posted on the Division's website. Notice shall be made at least 30 calendar days prior to proposed final action by the Division on the application.

(c) The notice shall set forth:

- (1) the name and address of the applicant;
- (2) the action requested in the application;
- (3) the nature and location of the discharge; and
- (4) the proposed date of final action to be taken by the Division on the application.

The notice shall also state where additional information is available online and on file with the Division. Information on file shall be made available upon request between 8:00 am and 5:00 pm, Monday through Friday, excluding State holidays, and copies shall be made available upon payment of the cost thereof to the Division pursuant to G.S. 132-6.2.

(d) This public notice requirement for an individual permit as described in Paragraph (b) of this Rule may be satisfied by a joint notice with the Division of Coastal Management (15A NCAC 07J .0206), the U.S. Army Corps of Engineers according to their established procedures, by a joint notice by the Division for an individual certification in accordance with Rule .0503 of this Subchapter, or by a joint notice by the Division for an individual permit in accordance with Rule .1303 of this Subchapter.

(e) Any person who desires a public hearing on a general permit or an individual permit application shall so request in writing to the to the Division at the address listed in Rule .1402 of this Section. The request shall be received by the Division within 30 calendar days following the public notice.

(f) If the Director determines that there is significant public interest in holding a hearing, based upon such factors as the reasons why a hearing was requested, the nature of the project, and the proposed impacts to waters of the State, the Division shall notify the applicant in writing that there will be a hearing. The Division shall also provide notice of the hearing to all individuals on the mailing list as described in Paragraph (g) of this Rule and shall post the notice on the Division's website. The notice shall be published at least 30 calendar days prior to the date of the hearing. The notice shall state the time, place, and format of the hearing. The notice can be combined with the notice required under Paragraph (c) of this Rule. The hearing shall be held within 90 calendar days following date of notification to the applicant. The record for each hearing held under this Paragraph shall remain open for a period of 30 calendar days after the public hearing to receive public comments.

(g) Any person may request that he or she be emailed copies of all public notices required by this Rule. The Division shall add the email address of any such person to an email listerv and follow procedures set forth in Rule .0503(g) of this Subchapter.

(h) Any public hearing held pursuant to this Rule may be coordinated with other public hearings held by the Department or the U.S. Army Corps of Engineers.

Authority G.S. 143-215.1(a)(6); 143-215.3(a)(1); 143-215.3(a)(1e); 143-215.3(c).

15A NCAC 02H .1404 DECISION ON APPLICATION FOR PERMITS OR CERTIFICATES OF COVERAGE

(a) The Director shall issue the permit or Certificate of Coverage, deny the application, provide notice of hearing pursuant to Rule .1403 of this Section, or request additional information within 60 calendar days after receipt of the application. When the Director requests additional information, the 60-day review period restarts upon receipt of all of the additional information requested by the Director. Failure to issue the permit or Certificate of Coverage, deny the application, provide notice of hearing, or request additional information within 60 calendar days shall result in the waiver of the permit requirement by the Director, unless:

- (1) The applicant agrees, in writing, to a longer period;
- (2) The final decision is to be made pursuant to a public hearing;
- (3) The applicant refuses the staff access to its records or premises for the purpose of gathering information necessary to the Director's decision; or
- (4) Information necessary to the Director's decision is unavailable.

(b) The Director shall issue the permit or Certificate of Coverage, deny the application, or request additional information within 60 calendar days following the close of the record for the public hearing. Failure to take action within 60 calendar days shall result in the waiver of the permit requirement by the Director, unless Subparagraphs (a)(1), (3), or (4) of this Rule apply.

(c) Any permit or Certificate of Coverage issued pursuant to this Section may contain such conditions as the Director shall deem necessary to ensure compliance with this Section, including written post-discharge notification to the Division.

(d) Modification or Revocation of permit or Certificate of Coverage:

- (1) Any permit or Certificate of Coverage issued pursuant to this Section may be subject to revocation or modification by the Director for violation of conditions of the permit or Certificate of Coverage; and
- (2) Any permit or Certificate of Coverage issued pursuant to this Section may be subject to revocation or modification by the Director upon a determination that information contained in the application or presented in support thereof is incorrect or if the Director finds that the discharge has violated or may violate a downstream water quality standard.

(e) The Division shall notify the applicant of the final action to issue or deny the application. In the event that the Director denies the application, the Director shall specify the reasons for the denial.

(f) Individual permits and Certificates of Coverage for general permits shall be issued for a period of five years, after which time the Permit shall be void, unless the discharge is complete or an extension is granted pursuant to Paragraph (g) of this Rule. The permit shall become enforceable when issued.

(g) 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. An extension may be granted by the Division based on the new complete application for a time period of one additional year, provided that the construction has commenced or is under contract to commence before the permit expires.

(h) The issuance or denial is a final agency decision that is subject to administrative review pursuant to G.S. 150B-23.

Authority G.S. 143-215.1(a)(6); 143-215.1(b); 143-215.3(a)(1); 143-215.3(c).

15A NCAC 02H .1405 REVIEW OF APPLICATIONS

(a) DISCHARGES FROM ACTIVITIES DEEMED TO BE PERMITTED. The following activities shall be deemed to be permitted:

- (1) Discharges resulting from activities that impact less than 1/2 acre of federally non-jurisdictional classified surface waters for the entire project are deemed to be permitted provided they fully comply with the conditions listed in Subparagraph (b)(4) of this Rule, and it shall not be necessary for the Division to issue permits for these activities.
- (2) Discharges resulting from activities that impact less than a total of 150 linear feet of federally non-jurisdictional classified intermittent and perennial streams for the entire project are deemed to be permitted provided they fully comply with the conditions listed in Subparagraph (b)(4) of this Rule, and it shall not be necessary for the Division to issue permits for these activities.
- (3) 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) of this Rule, and it shall not be necessary for the Division to issue permits for these activities. For purposes of implementing this Subparagraph, the coastal, piedmont and mountain regions shall be as follows:

(A) "Coastal Region" includes Beaufort, Bertie, Bladen, Brunswick, Camden, Carteret, Chowan, Columbus, Craven, Cumberland, Currituck, Dare, Duplin, Edgecombe, Gates, Greene, Halifax, Harnett, Hertford, Hoke, Hyde, Johnston, Jones, Lee, Lenoir, Martin, Moore, Nash, New Hanover, Northampton, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Pitt, Richmond, Robeson, Sampson, Scotland, Tyrrell, Washington, Wayne, and Wilson Counties;

(B) "Piedmont Region" includes Alamance, Alexander, Anson, Burke, Cabarrus, Caldwell, Caswell, Catawba, Chatham, Cleveland, Davidson, Davie, Durham, Forsyth, Franklin, Gaston, Granville, Guilford, Iredell, Lincoln, Mecklenburg, Montgomery, Orange, Person, Polk, Randolph, Rockingham, Rowan, Rutherford, Stanly, Stokes, Surry, Union, Vance, Wake, Warren, Wilkes, and Yadkin Counties;

(C) "Mountain Region" includes Alleghany, Ashe, Avery, Buncombe, Cherokee, Clay, Graham, Haywood, Henderson, Jackson, Macon, Madison, McDowell, Mitchell, Swain, Transylvania, Watauga and Yancey Counties.

(D) When a landowner believes their property is not in the correct region for purposes of this Rule, they may have a soil scientist conduct a site-specific evaluation to determine the soil series. The soil scientist shall be an individual who is currently licensed or authorized to practice soil science under G.S. 89F by the North Carolina Board for Licensing of Soil Scientists. The landowner shall submit the soil report to 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.

(4) Conditions which shall be met for projects deemed to be permitted:

(A) Erosion and sediment control practices shall equal at a minimum those required by the N.C. Division of Energy, Mineral, and Land Resources or its local delegated program for the Sedimentation Pollution Control Act and shall be in full compliance with all 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;

(B) 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 area within the project;

(C) Uncured or curing concrete shall not come into direct contact with waters of the State; and

(D) All work in or adjacent to federally non-jurisdictional intermittent or perennial streams shall be conducted so that the flowing stream does not come in contact with the disturbed area. Approved best management practices from the NC Sediment and Erosion Control Manual, or the NC DOT Construction and Maintenance Activities Manual shall be used to minimize excavation in flowing water.

(E) Measures shall be taken to ensure that the hydrology of any remaining federally non-jurisdictional wetland and federally non-jurisdictional classified surface waters are not affected by the discharge.

(b) EVALUATION. The Division shall issue an Individual Permit or a Certificate of Coverage under a General Permit upon determining that the proposed activity will comply with State water quality standards, which includes designated uses, numeric criteria, narrative criteria and the State's antidegradation policy, as defined in the rules of 15A NCAC 02B .0200 and the rules of 15A NCAC 02L .0100 and .0200. In assessing whether the proposed activity will comply with water quality standards, the Division shall evaluate if the proposed activity:

(1) has no practical alternative. A lack of practical alternatives may be shown by demonstrating that, considering the potential for a reduction in size, configuration or density of the proposed project and all alternative designs, that the basic project purpose cannot be practically accomplished in an economically viable manner, which would avoid or result in less adverse impact to federally non-jurisdictional wetland and federally non-jurisdictional classified surface waters;

(2) has avoided and minimized impacts to federally non-jurisdictional wetland and federally non-jurisdictional classified surface waters to ensure any remaining surface waters or wetlands, and any surface waters or wetlands downstream, continue to support existing uses during and after project completion;

(3) would not cause or contribute to a violation of water quality standards;

(4) would not result in secondary or cumulative impacts that cause or contribute to, or will cause or contribute to, a violation of downstream water quality standards; and

(5) provides for replacement of existing uses through compensatory mitigation as described in Paragraph (c) of this Rule.

(c) MITIGATION. Replacement or mitigation of unavoidable losses of existing uses in federally non-jurisdictional wetland and federally non-jurisdictional classified surface waters shall be reviewed in accordance with all of the following guidelines:

(1) The Division shall coordinate mitigation requirements with other permitting agencies that are requiring mitigation for a specific project;

(2) Mitigation requirements for impacts to federally non-jurisdictional wetlands shall only apply to the amount of impact that exceeds the threshold set out in Subparagraph (b)(3) of this Rule. The mitigation ratio for impacts exceeding the threshold for the entire project shall be 1:1. Impacts to non-jurisdictional wetlands shall not be combined with the project impacts to 404 jurisdictional wetlands or isolated wetlands for the purpose of determining when impact thresholds that trigger a mitigation requirement are met;

(3) Total impacts to less than 300 linear feet of federally non-jurisdictional perennial streams for the entire project shall not require compensatory mitigation. For linear publicly owned and maintained transportation projects that the U.S. Army Corps of Engineers determines are not part of a larger common plan of development, impacts to less than 300 linear feet per stream shall not require compensatory mitigation. The mitigation ratio for federally non-jurisdictional stream impacts shall be 1:1;

(4) The required area or length of mitigation required shall be multiplied by 1 for restoration, 1.5 for establishment, 2 for enhancement and 5 for preservation. These multipliers do not apply to approved mitigation sites where the Interagency Review Team has approved other ratios;

(5) Mitigation shall comply with the requirements set forth in G.S. 143-214.11. Mitigation projects implemented within waters or wetlands that are regulated under Section 404 of the Clean Water Act or Section .1300 of this Subchapter may be used to satisfy the requirements of this Paragraph;

- (6) Acceptable methods of mitigation as defined in 33 CFR Part 332 available free of charge on the internet at: http://water.epa.gov/lawsregs/guidance/wetlands/wetlandsmitigation_index.cfm, include restoration, including both re-establishment and rehabilitation, establishment (creation), enhancement and preservation. No more than 25 percent of the mitigation required by Subparagraph (2) or (3) of this Paragraph may be met through preservation, unless the Director determines that the public good would be better served by a higher percentage of preservation;
- (7) Mitigation for impacts to federally non-jurisdictional wetland and federally non-jurisdictional classified surface waters shall be conducted in North Carolina within the same river basin and in accordance with 33 CFR Part 332, available free of charge on the internet at: http://water.epa.gov/lawsregs/guidance/wetlands/wetlandsmitigation_index.cfm, unless otherwise approved by the Director; and
- (8) In-kind mitigation is required unless the Director determines that other forms of mitigation would provide greater water quality or aquatic life benefit.

Authority G.S. 143-211(c); 143-214.7C; 143-215.1(a)(6); 143-215.3(a)(1); 143-215.3(c).