

## **Regulatory Impact Analysis**

**Rule Citation Number:** 15A NCAC 02B .0304 French Broad River Basin

**Rule Topic:** Proposed Reclassification of the Sandy Bottom Wetlands in Buncombe County from Class WL (Wetland) to Class WL UWL (Unique Wetland)

**DEQ Division:** Division of Water Resources

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**Impact Summary:**

State government:	Minor
NC DOT:	Potential
Local government:	No
Private entities:	Potential
Substantial Impact:	No
Federal government:	No

### **1. Necessity for Rule Change**

The Unique Wetland (UWL) classification is a state designation reserved for wetlands of “exceptional state or national ecological significance which require special protection to maintain existing uses.” Often, these wetlands are documented habitat essential for the conservation of state- or federally-listed threatened or endangered species. In accordance with Rule 15A NCAC 02B .0101(e)(7), the UWL classification provides designated wetlands a degree of regulatory protection from future development that is in addition to the protections already in place for all wetlands.

The currently proposed reclassification is in response to a Petition for Rulemaking received by the North Carolina Department of Environmental Quality, Division of Water Resources on November 20, 2018. The petition requests that the North Carolina Environmental Commission (EMC) amend Rule 15A NCAC 02B .0304 (French Broad River Basin) to add the classification of Unique Wetland to the Sandy Bottom Wetlands in Buncombe County. The EMC granted the petition on March 14, 2019; as such, the EMC is required to initiate rulemaking per NC General Statute 150B-20(c).

### **2. Background**

The purpose of this rule change is to add the supplemental classification of UWL to an approximately 10-acre portion of the Sandy Bottom Wetlands site, which is a 35-acre area of

wetlands in Buncombe County. The Sandy Bottom Wetlands site is located in the floodplain of the French Broad River and is registered by the Natural Heritage Program as a “Significant Natural Heritage Area.” It has been documented as habitat for a diverse assemblage of reptiles, amphibians, and wetland plant species, including five species that are either state or federally listed as species of Special Concern, Threatened, or Species of Greatest Conservation Need.

Approximately 30 acres of the Sandy Bottom Wetlands site is owned by the Board of Trustees for the Endowment Fund of the University of North Carolina at Asheville and is subject to a deed restriction that requires the area to be kept in its natural state in perpetuity with exceptions only for scientific research, stewardship, and maintenance. Approximately 4.55 acres is owned by the non-profit organization Long Branch Environmental Education Center, Inc and is subject to a deed restriction that prohibits use of the property for any commercial purpose in perpetuity. The deed restriction goes on to say that the property shall be used only in an “ecologically sound manner.” The remaining 0.6 acres is owned by a private citizen.

### **3. Regulatory Baseline**

To understand the impact of the proposed rule change, it is necessary to establish a regulatory baseline for comparison. For purpose of this fiscal note, the baseline is comprised of:

- the current version of [Rule 15A NCAC 02B .0304](#) (French Broad River Basin). Under the current rule, the Sandy Bottom Wetlands site is classified as WL (Wetland), but not UWL (Unique Wetland).

Other regulations and legal limitations that alleviate the impact of the proposed rule change include:

- Deed restrictions on all property within the Sandy Bottom Wetlands site that prohibit development;
- [Section 401 of the federal Clean Water Act](#) (33 U.S.C. 1341) – requires N.C. DEQ to certify that a given project will not degrade waters of the State or violate State water quality standards;
- [Section 404 of the federal Clean Water Act](#) (33 U.S.C. 1344) -- requires the U.S. Army Corps of Engineers (ACOE) to issue a permit prior to the discharge of fill material into wetlands. In accordance with federal code [40 CFR 230.10\(a\)](#), the ACOE cannot issue a 404 permit if a practicable alternative exists that would have less adverse impact on the aquatic ecosystem. The quality of a wetland site, which is based on the ACOE’s own criteria, is taken into account as part of their review; and
- [Buncombe County Flood Damage Prevention Ordinance](#) – prohibits development of structures for human habitation in the 100-year floodplain.

## 4. Cost-Benefit Analysis

### 4.1 Private Entities

#### 4.1.1 *Costs*

The non-profit Long Branch Environmental Education Center (“Long Branch”) is one of two private entities that could be affected by the proposed adoption of the UWL classification. The adoption of the supplementation UWL classification will not require Long Branch to take any action or change its current operation in any way; as such, there should be no immediate direct cost.

If Long Branch pursues development on their property in the future that requires a 404 permit/401 certification, [Rule 15A NCAC 02H .0506](#) (401 Water Quality Certification Review of Applications) would require them to demonstrate a public need for the project, whereas they would not be required to do so without the UWL classification. This should not result in additional costs, however, since the work involved in applying for the 401 certification would already be included in a fee for consulting services.

If they are unable to demonstrate a public need and are therefore denied a permit to fill a wetland on their property, there would be an opportunity cost associated with the lost development opportunity. In turn, this could result in a lost opportunity to provide additional environmental education. The likelihood of this cost being realized is very low since there are already deed restrictions in place which prohibit use of the property for any commercial purpose and requires that the property be used only in an “ecologically sound manner.”

DWR staff contacted Long Branch to inquire about their future plans for the site. Long Branch staff informed DWR that they currently have no plans to build on the site. They did, however, inquire about whether the UWL classification would prohibit possible future development of a small caretaker residence. The caretaker residence would allow monitoring of the property to protect from poaching of threatened or endangered plant species and illegal hunting.

DWR-Asheville Regional Office staff stated that the UWL designation should not prohibit the construction of a caretaker residence as long as it is demonstrated that it serves a public need. The development of the caretaker residence would more likely be restricted by the Buncombe County Flood Damage Prevention Ordinance which prohibits construction of a structure intended for human habitation in the 100-year floodplain. A large portion of the Sandy Bottom wetland area is in the 100-year floodplain. Construction of the residence could be allowed by the County if built in the flood fringe outside the floodway.

Similar to Long Branch, the private citizen who owns 0.6 acres of the wetland site will not be required to take any action and should not have any immediate direct cost. There could be some future cost due to the fact that the UWL classification would prohibit them from developing their property unless for a public purpose. This potential impact would

be reduced, however, by the restrictions of the Buncombe County Flood Damage Prevention Ordinance and the 404 permit/401 certification.

#### 4.1.2 *Benefits*

Long Branch relies, in part, on grant funding to support its operation. The adoption of the UWL classification may provide a benefit to Long Branch in the grant application process. Depending on the specific grant being sought, it is possible that a site that has been recognized by the State as ecologically unique may score higher than a site that hasn't been recognized as such. This could result in the Long Branch being awarded a larger grant or being awarded a grant it may have otherwise been denied. The amount of grant money being awarded and the number and quality of applications in each grant cycle is highly variable; as such, this potential benefit could be monetized.

Long Branch has provided in writing their support of this proposed reclassification.

### 4.2 Local Government

Buncombe County is the only local government with jurisdiction in the proposed UWL area. The adoption of the UWL classification will not require Buncombe County to revise their existing permitting procedures or to procure additional staff; as such, there should be no economic benefit or cost to the County.

### 4.3 State Government

#### 4.3.1 *DEQ*

DWR anticipates the only cost to the State implementing agency, DEQ, will be a one-time cost of about \$400 for DWR to update its UWL Geographic Information Systems (GIS) data layer, as required by Rule 15A NCAC 02B .0304(s). This cost was estimated using a mid-range salary and benefits for an Environmental Program Consultant plus 25% overhead costs:

$$[8 \text{ hrs of staff time}] \times [\$42.81 \text{ staff cost per hr}] = [\$342.48] + [\$85.62 \text{ overhead}] = [\$428.10], \text{ rounded down to } \$400.$$

#### 4.3.2 *UNC-Asheville*

The adoption of the UWL classification should not affect the future ability of this public university to develop their land since it is presumed that a development project would satisfy the 401 permitting requirement that it demonstrates a public need. The more limiting factor will continue to be the existing deed restrictions on the majority of their property that contains the wetland. The Board of Trustees for the Endowment Fund of UNC-Asheville has provided in writing their support of this proposed reclassification.

#### 4.3.3 *NC Department of Transportation (NCDOT)*

As of the drafting of this analysis, NCDOT is in the scoping phase of a highway-widening project near the Sandy Bottom Wetlands site. It is early in the project development process; as such, their preferred route as well as the viability of the project have not yet been determined. For the purposes of this analysis, however, we are assuming that the project will move forward and the preferred route will have some

impact on the Sandy Bottom Wetlands site.

If the project moves forward, NCDOT will be required to apply for a federal 404 permit from the Army Corps of Engineers (ACOE) and a 401 certification from the State. As part of the application process, NCDOT will be required to consider alternatives to their preferred route. Their 404 permit application will be reviewed by the ACOE for the least environmentally damaging practicable alternative.

The administration of the federal 404 program by the ACOE is at least as protective as the State's UWL classification in terms of protecting ecologically unique wetlands areas. With that being said, there might be some opportunity cost associated with the UWL classification on an NCDOT road project in that they may be less likely to consider the UWL site as a practicable alternative because of the site's high environmental value. This could result in the consideration of a higher cost alternative that will have less or no impact on the Sandy Bottom Wetlands site.

Once the UWL classification is in effect, the project would be subject to Rule 15A NCAC 02H .0506(e) which requires the demonstration of a public need for an impact to a UWL wetland. Because they are a public agency and the project is a publicly-owned road, it is assumed they would satisfy this requirement without incurring any additional costs. Further, if NCDOT chooses an alternative route that impacts the Sandy Bottom Wetlands site, they would likely be required to acquire the property using "eminent domain." Eminent domain is allowed to be used only for public projects, further minimizing the potential effect of the UWL classification. It is our understanding that NCDOT would not be bound by the deed restrictions already in place on most of the wetland site.

#### 4.4 Environment

The adoption of the UWL classification will provide the Sandy Bottom Wetlands area an additional layer of regulatory protection in that future development would need to demonstrate a public need in order to get a 404/401 permit. Secondary benefits resulting from actions taken to protect the existing wetlands include maintaining aquatic habitat for threatened and endangered species. The impact of this additional protection is expected to be minimal, however, because of the deed restrictions already in place that largely prohibit development.

Perhaps the more significant consequence of the UWL classification will be increased awareness of the unique value of the Sandy Bottom Wetlands area. It is possible that the formal recognition of this wetlands as "unique" will result in increased wetland education and stewardship opportunities. While these environmental benefits could be significant, we found that they are not readily quantifiable; as such, they could not be monetized.

### **5. Total Economic Impact**

The agency anticipates that if the UWL classification is adopted as proposed, there would be a one-time cost of about \$400 to the State for updating a GIS layer. There are no other quantifiable economic costs or benefits associated with this proposed rulemaking.

Unquantified costs include potential opportunity costs to the Long Branch Environmental Education Center and a small private property from lost development opportunities. The likelihood of these costs being realized is very low as development is already limited by deed restrictions and a local floodplain ordinance. There are also potential opportunity costs to NCDOT in that they may be required to consider higher cost alternatives for future road projects in the Sandy Bottom wetland area. These costs should be limited by the fact that public projects are not subject to the same restrictions as non-public projects under the proposed rule. Significant unquantified benefits to the environment could be realized from the additional protection of the wetlands, which serve as habitat for threatened and endangered aquatic species, as well as from increased awareness and stewardship.

The agency does not expect the unquantified impacts of the proposed rulemaking to meet or exceed the \$1,000,000 threshold for substantial economic impact as defined in G.S. 150B-21.4.