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 Quality (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 the effective date of this Rule and which 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 including but not limited to fill, earth, construction debris and soil.

(b) This Section outlines the application and review procedures for permitting of discharges into isolated wetlands and isolated classified surface waters which have been listed in 15A NCAC 02B .0300. If the US Army Corps of Engineers or its designee determines that a particular water or wetland is isolated and not regulated under Section 404 of the Clean Water Act, then discharges to that water or wetland shall be covered by this Section (15A NCAC 02H .1301 - .1305).

(c) Activities which result in a discharge may be authorized by the issuance of either an Individual Permit or a Certificate of Coverage to operate under a General Permit. 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. Certificates of Coverage for General Permits may be issued for types or groups of discharges resulting from activities that are similar in nature and considered to have minimal impact. General Permits include but are not limited to activities such as maintenance, utility lines, and road crossings. General Permits shall be given public notice at least 45 days before the proposed effective date of the General Permit. These General Permits do not require approval by the U.S. Environmental Protection Agency. 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 as described in 15A NCAC 02H .1304(e).

(d) Discharges resulting from activities which 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 that are described in 15A NCAC 02B .0230;
- (2) Discharges to isolated, man-made ponds or isolated ditches except for those wetlands or waters constructed for compensatory mitigation or for on-site stormwater management;
- (3) Discharges of treated effluent into isolated wetlands and isolated classified surface waters resulting from activities which receive NPDES Permits or State Non-Discharge Permits;
- (4) Discharges for water dependent structures as defined in 15A NCAC 02B .0202(67);
- (5) 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 the effective date of this Rule;
  - (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 the effective date of this Rule;
  - (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 the effective date of this Rule; or
  - (D) The applicant has been authorized for a discharge into isolated wetlands or isolated waters for a project which has established a Vested Right under North Carolina law prior to the effective date of this Rule.

History Note: *Authority G.S. 143-215.1(a)(6); 143-215.3(a)(1); 143-215.3(c);*
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15A NCAC 02H .1302 APPLICATION PROCESS

(a) Application for a Permit. Any person, as defined in G.S. 143, Article 21, desiring issuance of a State Individual Permit or Certificate of Coverage under a General Permit for discharges resulting from activities which affect isolated classified surface waters or isolated wetlands shall file with the Director of the North Carolina Division of Water Quality (Director), an original and six copies of an application for a Permit. The application shall specify:

(1) the date of application;

(2) the name, address, and phone number of the property owner;

(3) if the applicant is a corporation, the state in which it is domesticated, the name and address of the North Carolina process agency, and the name of the individual who shall be primarily responsible for the conduct of the discharge resulting from an activity for which a Permit is sought;

(4) the nature of the discharge including cumulative impacts to isolated and non-isolated wetlands and isolated and non-isolated 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 applicable municipality, 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(e) with a check or money order to be made payable to the North Carolina Division of Water Quality. If payment of a fee is required for a 401 Water Quality Certification, then that fee shall suffice for this Rule; and

(8) the information requested in Subparagraphs (1) through (7) of this Rule must be provided on or attached to the most current version of the North Carolina Division of Water Quality Isolated Wetlands Notification application form.

(b) Maps. There shall be attached to the application form a map(s) with scales and north arrows and of sufficient detail to accurately delineate the boundaries of the lands owned or to be utilized by the applicant in carrying out the discharge; the location, dimensions and type of any structures that affect isolated wetlands or waters for use in connection with the discharge; and the location and extent of the isolated waters (preferably surveyed or located with Global Positioning System equipment) including wetlands within the boundaries of said lands.

(c) Request For Additional Information. The Director may request, in writing within 60 days of receipt of an application and the applicant shall furnish, any additional information that may be found necessary for the proper consideration of the application. Incomplete applications shall be returned to the applicant.

(d) Omissions From Applications. If the applicant believes that it is not feasible or is unnecessary to furnish any portion of the information required by Paragraphs (a), (b) and (c) of this Rule, applicant shall submit a detailed statement explaining the reasons for omission of any such information. The final decision regarding the completeness of the application shall be made by the Division of Water Quality based on the information required in Paragraphs (a), (b) and (c), and any explanation provided by the applicant regarding omitted information provided in Paragraph (e).

(e) Investigations. The staff of the Department of Environment and Natural Resources (Department) shall conduct such investigation as the Director deems necessary and applicant shall cooperate in the investigation to the extent that it shall furnish necessary information, allow the staff access to the lands and facilities of the applicant and lend such assistance as shall be reasonable.

(f) Who Must Sign Applications. The application shall be considered a "valid application" only if the application bears the signature of a responsible officer of the company, municipal official, partner or owner. This signature certifies that the applicant has title to the property, has been authorized by the owner to apply for a Permit or is a public entity and has the power of eminent domain. Said official in signing the application shall also certify that all information contained therein or in support thereof is true and correct to the best of his knowledge.

(g) Applications for discharges to Isolated Wetlands and Waters must be made on forms provided or approved by the Division of Water Quality.

(h) Other applications for permitting or certification by a Division of the Department of Environment and Natural Resources shall suffice for application for this Permit as long as the application contains all of the

information specified in Paragraphs (a) and (b) of this Rule and it is clearly specified to the Division by the applicant that authorization is sought under this Rule. This application must be submitted to the Division of Water Quality for review under this Permit.

History Note: *Authority G.S. 143-214.1; 143-215.1(a)(6); 143-215.3(a)(1);*
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15A NCAC 02H .1303 PUBLIC NOTICE AND PUBLIC HEARING

(a) Notice of Publication. Within 30 days of receipt of a complete application, the Director shall decide whether to issue a public notice for an Individual Permit for a project or whether the project is eligible for a General Permit:

(1) Individual Permit. Notice of the Director's intent to issue or deny a complete application for an Individual Permit shall be published one time in a newspaper having general circulation in the county in which the discharge will occur. Publication shall be made at least 30 days prior to proposed final action by the Director on the application. The applicant shall pay to the Department the costs of advertising the public notice for an Individual Permit. The Permit shall not be issued until such costs have been paid as allowed under G.S. 143-215.3(a)(1e). A copy of this notice shall be sent to a subset of individuals on the Wetland Permit Mailing List described in Paragraph (d) of this Rule who request to be notified of these Permits.

(2) General Permit. The Division shall provide public notice for proposed General Permits. This notice shall be sent to all individuals on the Wetland Permit Mailing List described in Paragraph (d) of this Rule and in selected newspapers with general circulation in the geographic areas affected by the proposed General Permit. Publication shall be made at least 30 days prior to proposed final action by the Director.

(b) Contents of Notice. The notice shall set forth the name and address of the applicant; the action requested in the application; the nature and location of the discharge; and the proposed date of final action to be taken by the Director on the application. The notice shall also state where additional information is on file with the Department and may be inspected at any time during normal working hours. Copies of such information on file shall be made available upon request and upon payment of the cost thereof to the Department. Any person who desires a public hearing on an Individual or General Permit application shall so request in writing to the Director within 30 days following the publication of the notice of intent.

(c) Notice of Hearing. Within 30 days of receipt of a request for a public hearing, the Director shall decide whether a public hearing is necessary unless the applicant agrees in writing to an extension. If the Director determines that there is significant public interest in holding a hearing, the Director shall publish notice of the hearing one time in a newspaper having general circulation in the county in which the discharge will occur. In any county in which there is more than one newspaper having general circulation in that county, the Director shall cause a copy of such notice to be published in as many newspapers having general circulation in the county as the Director in his discretion determines may be necessary to assure that such notice is generally available in the county. The notice shall be published at least 30 days prior to the date of the hearing. The notice shall state the time, place and nature of the hearing.

(d) Wetland Permit Mailing List. Any person may request that he or she be mailed copies of all public notices required by this Rule. The Director shall add the name of any such person to a Wetland Permit Mailing List and shall mail copies of notices to all persons on the list.

(e) If other public hearings are being held by Divisions of the Department of Environment and Natural Resources, then any public hearing held for this Rule may be coordinated with those hearings.

History Note: *Authority G.S. 143-215.1(a)(6); 143-215.3(a)(1); 143-215.3(a)(1e); 143-215.3(c);*
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15A NCAC 02H .1304 DECISION ON APPLICATION FOR PERMITS OR CERTIFICATES OF COVERAGE

(a) Not later than 60 days following the publication of the notice of intent or decision to process the project under a General Permit, or within 90 days following a public hearing, the Director shall issue, issue with modifications, or deny the complete Permit application or complete application for Certificate of Coverage. Failure to take action within 60 or 90 days, respectively, shall result in the waiver of the permit requirement by the Director.

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

(c) 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 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 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.

(d) Notification of Unapproved Application. In the event that the Director denies the application for a Permit or Certificate of Coverage or for any reason is unable to approve the application, the Director shall so notify the applicant by certified or registered mail, return receipt requested, specifying in such notification the reasons for the denial or inability to be approved.

(e) Permit or Certificate of Coverage renewals shall require a new application and payment of a fee to the Division of Water Quality unless the applicant requests and is granted an extension in writing which shall be granted for a time period not to exceed one additional year provided that the construction has commenced or is under contract to commence.

(f) Contested Case Hearing for Applicant. An applicant whose Permit or Certificate of Coverage is denied or granted subject to unacceptable conditions, shall have the right to seek a contested case hearing pursuant to the provisions of G.S. 143-215.1(e) by filing a petition under G.S. 150B-23 within 30 days after the Director notifies the applicant or permittee of its decision in writing.

History Note: Authority G.S. 143-215.1(a)(6); 143-215.1(b); 143-215.3(a)(1); 143-215.3(c);
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15A NCAC 02H .1305 REVIEW OF APPLICATIONS

(a) In evaluating requests for an Individual Permit or Certificate of Coverage under a General Permit based on the procedures outlined in Paragraphs (c) through (d) of this Rule, the Director shall determine if the proposed discharge resulting from an activity has the potential to remove or degrade those existing uses in 15A NCAC 02B .0231(a) and (b) which are present in the isolated wetland or listed in the classification for classified isolated surface water. Discharges resulting from activities which would not remove or degrade existing uses shall be reviewed according to the procedures found in Subparagraphs (c)(2) through (c)(6) or (d)(2) through (d)(6) of this Rule. An applicant may also demonstrate that designated uses are not present at a particular site using a wetland evaluation procedure approved by the Director according to the criteria found in 15A NCAC 02B .0103(c); otherwise the designated uses as outlined at 15A NCAC 02B .0231(a) and (b) are assumed to exist, and the appropriate review procedures shall be undertaken. An Individual Permit or Certificate of Coverage under a General Permit shall be issued where the Director determines water quality standards will be met, including protection of existing uses.

(b) Discharges from Activities Deemed to be Permitted: Discharges resulting from activities in isolated wetlands or waters that are below the thresholds described in Subparagraphs (c)(2) and (d)(2) of this Rule, are deemed to be permitted as long as they fully comply with conditions listed below and may proceed without review procedures outlined in Subparagraphs (c)(1) through (c)(6) and (d)(1) through (d)(6) of this Rule. However, the Director may require that any discharge resulting from an activity obtain an Individual Permit or Certificate of Coverage under a General Permit if the Director determines that the discharge

would result in a violation of water quality or wetland standards listed in 15A NCAC 02B .0200. This determination shall be made based on existing or projected environmental impacts. Conditions which must be met for projects deemed to be permitted:

(1) Erosion and sediment control practices shall equal or exceed those required by the N.C. Division of 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;

(2) All erosion and sediment control practices placed in isolated wetlands or isolated classified surface waters must be removed and the original grade restored within two months after the Division of Land Resources or local delegated program determines that the land disturbance project is completed and the file is closed out;

(3) Live or fresh concrete shall not come into contact with surface water until the concrete has hardened; and

(4) Measures shall be taken to ensure that the hydrology of any remaining isolated wetland or isolated classified surface waters is not affected by the discharge.

(c) The Director shall issue an Individual Permit or Certificate of Coverage under a General Permit upon determining that existing uses are not removed or degraded by a discharge to isolated classified surface waters for a discharge resulting from an activity which:

(1) has no practical alternative under the criteria outlined in Paragraph (e) of this Rule;

(2) will minimize adverse impacts to the isolated classified surface waters under criteria outlined in Paragraph (f) of this Rule, or impacts less than or equal to 1/3 acre of isolated classified surface waters or less than or equal to 150 linear feet of isolated streams for the entire project;

(3) does not result in the violation of groundwater standards, or water quality standards in the remaining surface waters;

(4) does not result in cumulative impacts which are 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, and that cause or will cause a violation of downstream water quality standards;

(5) provides for protection of downstream water quality standards through the use of on-site stormwater control measures; and

(6) provides for replacement of existing uses through mitigation with the following provisions:

(A) Impacts to all surface waters on the site which total less than one acre of surface waters or less than 150 linear feet of streams do not require compensatory mitigation;

(B) Mitigation shall be at a 2:1 ratio of acreage of waters or length of isolated stream of mitigation to the acreage of waters or length of isolated stream;

(C) Mitigation for impacts to waters shall be conducted within the same river basin and physiographic province when practical; and

(D) In-kind mitigation will be required unless other forms of mitigation provide greater water quality or aquatic life benefit.

(d) The Director shall issue an Individual Permit or Certificate of Coverage under a General Permit upon determining that existing uses are not removed or degraded by a discharge to isolated wetlands for a discharge resulting from an activity which:

(1) has no practical alternative as described in Paragraph (e) of this Rule;

(2) will minimize adverse impacts to the isolated wetlands under Paragraph (f) of this Rule on consideration of existing topography, vegetation, fish and wildlife resources, and hydrological conditions or impacts less than or equal to 1/3 acre of isolated wetlands east of I-95 and less than or equal to 0.1 acre of isolated wetlands west of I-95 for the entire project;

(3) does not result in the violation of groundwater standards, or wetland standards in the remaining wetlands;

(4) does not result in cumulative impacts which are described in Subparagraph (c)(4) of this Rule and that cause or will cause a violation of downstream water quality standards;

(5) provides protection for downstream water quality standards through the use of on-site stormwater control measures; and

(6) provides for replacement of existing uses through wetland mitigation as described in Subparagraphs (g)(1) through (g)(9) of this Rule.

(e) 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 isolated classified surface waters or isolated wetlands.

(f) Minimization of discharges may be demonstrated by showing that any remaining isolated classified surface waters or wetlands are able to continue to support the existing uses after project completion, or that the discharges are required due to:

(1) The spatial and dimensional requirements of the project; or

(2) The location of any existing structural or natural features that may dictate the placement or configuration of the proposed project; or

(3) The purpose of the project and how the purpose relates to placement, configuration or density.

(g) Replacement or mitigation of unavoidable losses of existing uses in isolated wetlands shall be reviewed in accordance with the following guidelines:

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

(2) Mitigation shall not be required for discharges resulting from activities that impact a total of less than one acre of isolated and other wetlands.

(3) Participation in wetland restoration programs coordinated by the Department of Environment and Natural Resources or approved mitigation banks (those mitigation banks which have been approved by the United States Army Corp of Engineers through the Mitigation Banking Review Team process) shall be required whenever the Director finds that such participation is available and satisfies the other requirements of this Paragraph, unless the applicant can demonstrate that participation in these restoration programs is not practical.

(4) Acceptable methods of wetlands mitigation are listed below:

(A) Restoration: Re-establishment of hydrology to the natural or reference condition which are sites within a specific geographic region that are chosen, for the purposes of functional assessment or mitigation, to encompass the known variation of a group or class of wetlands, including both natural and disturbance variations and is in an area that contains hydric soils. Vegetation must also be re-established if it differs from the natural or reference condition;

(B) Creation: Construction of wetlands in an area where wetlands did not exist in the past;

(C) Enhancement: Increasing one or more of the functions of an existing wetland by manipulation of vegetation or hydrology; and

(D) Preservation: Protection of wetlands through purchase, donation or conveyance of a conservation easement to a government or non-profit agency for management.

(5) Restoration or creation shall be the required method of wetland mitigation. The other methods may be utilized if the applicant can demonstrate that restoration or creation is not practical or that the proposed alternative is the most ecologically viable method of replacing the lost functions and values.

(6) For all discharges resulting from activities which impact, in total, more than one acre of isolated and other wetlands, the mitigation ratio shall be 2:1 acres of mitigation to the acreage impacted. This mitigation must include at least a 1:1 ratio of restoration or creation except as outlined in Subparagraph (g)(7) of this Rule. The acres of required mitigation for other types of mitigation shall be determined by multiplying the 2:1 ratio by 1.5 for creation, 2 for enhancement, and 5 for preservation. The multiplier ratios

listed in this Paragraph do not apply to mitigation sites where the state and federal review agencies have approved credit/debit ratios.

(7) All mitigation proposals shall provide for the replacement of wetland acres lost due to the proposed discharge resulting from an activity at a minimum of a 1:1 ratio through restoration or creation prior to utilizing enhancement or preservation to satisfy the mitigation requirements, unless the Director determines that other forms of mitigation would provide greater water quality or aquatic life benefit.

(8) Mitigation for impacts to isolated wetlands designated in Paragraph (b) of this Rule shall be conducted within the same river basin and physiographic province when practical.

(9) In-kind mitigation is required unless other forms of mitigation provide greater water quality or aquatic life benefit.

History Note: *Authority G.S. 143-215.1(a)(6); 143-215.3(a)(1); 143-215.3(c);*
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