



Michael F. Easley, Governor

William G. Ross Jr., Secretary
North Carolina Department of Environment and Natural Resources

Coleen H. Sullins, Director
Division of Water Quality

February 25, 2008

MEMORANDUM

TO: 401 Water Quality Certification Mailing List

FROM: John Dorney, Program and Policy Development Unit
Cyndi Karoly, 401 Oversight and Express Permits Unit
Brian Wrenn, Transportation Permitting Unit
John Hennessy, Non-Point Source Assistance and Compliance

RE: Update on permitting programs for Waters of the State administered by the Division of Water Quality

The purpose of this memo is to inform you of several items in relation to surface waters programs administered by the Division of Water Quality (DWQ). If you have any questions regarding specific items, please contact the staff members referenced within each topic.

I. Information concerning the Division's stream and wetland monitoring that relate to the recent US Supreme Court decision in the Rapanos/Carabell case

In response to the recent US Supreme Court case (Rapanos/Carabell) and the release by the EPA and Corps of Engineers of guidance for their field staff to implement this decision, staff of the Division of Water Quality have analyzed recent data collected by DWQ staff on small streams and wetlands in the context of the recently released guidance. Results of that work (Appendix A through E) and a cover letter dated December 18, 2007 sent to Mr. Ken Jolly of the Wilmington District Corps of Engineers and Mr. Tom Welborn of Region 4, Environmental Protection Agency are available as printable documents on DWQ's wetland website in pdf format at http://h2o.enr.state.nc.us/ncwetlands/documents/DWQ_Research_JRD_Memo_2007_10_29-1.pdf and <http://h2o.enr.state.nc.us/ncwetlands/documents/SummaryResearch12-18-07.pdf>. (Note – Appendix A through E is a 95-page document and is not attached to this notice. For citizens without internet access, paper copies are available on request from John Dorney through the contact details listed below. The summary letter forwarded to Mr. Jolly is attached to this notice.) Overall, these analyses support a conclusion that intermittent and small perennial streams are “relatively permanent” and have “significant nexus to downstream waters” in the context of the recent guidance based on their length of flow and presence of aquatic biota. In addition, work on headwater forest wetlands in NC support the conclusion that these wetlands have a “significant nexus to downstream waters” based on their aquatic biota and effects on downstream water chemistry. The Division will continue to collect data on other small streams and wetland types across the state and provide those analyses to the Corps and EPA as well as the public to be used in site evaluations relative to the Rapanos/Carabell decision. Additional information may be obtained from John Dorney at 919-733-9646 or via email at John.Dorney@ncmail.net.

II. Buffer Clarification Memos

The Division of Water Quality has been preparing memoranda relating to specific questions arising over the interpretation of the various Buffer Rules (Neuse, Tar-Pamlico, Catawba and Randleman). The purpose of these memos is to provide clearly articulated, expanded regulatory guidance, usually about specific topics already within the rules. At times, these topics arise from questions specifically listed in the table of uses, or from directives to staff from the Water Quality Committee of the Environmental Management Commission. These memos are typically not intended to establish new processes or to revise prior policies. When a clarification memo may have implications for project planning purposes, an effective date is shown with the memo. These memos are posted under the heading "Buffer Clarifications" on the Riparian Buffer Rules portion of the DWQ website at <http://h2o.enr.state.nc.us/ncwetlands/RiparianBufferRules.htm> . Please visit this site to see the previously prepared memos. These memos will remain posted on the web site, with others to be posted as new issues arise. Currently, these include the following hyperlinks to the following documents:

Buffer Clarifications

[Beaver Impoundments](#)

[Drainage of a Buffered Pond **NEW!**](#)

[Vegetation Replacement for Temporary Roads-modification](#)

[Buffer Mitigation Credits for Stream Restoration](#)

[Wooden Slatted Decks in the Buffer](#)

[Swimming Pools in the Buffer](#)

[Stormwater Ponds in the Buffer](#)

[Vegetation Management for Airport Facilities in the Buffer](#)

[Division of Coastal Management's Buffers](#)

[Acceptable Version of the Soil Survey Maps](#)

[Buffer Mitigation and Mining Industry Policy](#)

[NCDOT Borrow Pits within the Buffer](#)

[Existing Transportation Facility](#)

[Catawba buffer mitigation credit \(effective April 25, 2008\)](#)

[Randleman buffer mitigation credit \(effective April 25, 2008\)](#)

[Pruning in the buffer \(effective April 25, 2008\)](#)

[Restoration vs enhancement for buffer mitigation \(effective April 25, 2008\)](#)

[Restoring the buffer in response to a Notice of Violation \(effective April 25, 2008\)](#)

[Wooden-slatted decks in the buffer \(Modification\) \(effective April 25, 2008\)](#)

Questions related to these memos can be directed to Amy Chapman, Cyndi Karoly or Ian McMillan at (919) 733-1786.

III. Jurisdictional Calls for Waters of the State (Intermittent and Perennial start points) by DWQ staff

Guidance on the applicability of jurisdictional calls by the U.S. Army Corps of Engineers and DWQ within the context of the programs administered by DWQ was provided in DWQ's public notice issued October 12, 2007 (which remains posted on the DWQ web site at <http://h2o.enr.state.nc.us/ncwetlands/documents/MailingListMailoutOctober2007AML-1.doc>). The following additional information is provided for further clarification:

- If the Corps identifies a feature as a "linear wetland" and not a stream, DWQ will not claim that system as a stream within the footprint of the 404 jurisdictional wetland area, even if it otherwise meets the criteria for the definition of a stream within DWQ's stream identification manual (available at http://h2o.enr.state.nc.us/ncwetlands/intermittent_perennial.html).
- Where the Corps confirms that a system is a stream, and further determines whether the stream is intermittent or perennial, or important versus unimportant, DWQ's intermittent and perennial start points may differ from the Corps' in accordance with DWQ's stream identification manual. Therefore, an applicant (or consultant) would need to have DWQ staff confirm the mapped locations of intermittent and perennial streams for applications for 401 Water Quality Certifications, Buffer Authorizations, and Isolated Wetlands Permits.

Questions may be directed to Cyndi Karoly at (919) 733-9721 or Cyndi.Karoly@ncmail.net .

IV. Express Review Forms Updated

The Express Review Initial Interest Form and the Stormwater Management Application Form have been updated for 2008 and are now available on our website. Please utilize these new forms when applying for Express Review.

The Initial Interest Form may be found at: <http://h2o.enr.state.nc.us/ncwetlands/IntialInterestFormV5.rtf>

The Stormwater Management Application may be found at:
<http://h2o.enr.state.nc.us/ncwetlands/documents/SWMAv2.pdf>

Please address questions regarding these revised forms to Lia Myott (Lia.Myott@ncmail.net) or Joseph Gyamfi (Joseph.Gyamfi@ncmail.net) at (919) 733-1786.

V. Hardcopy Soil Survey Map Dates

A table has been posted on the Riparian Buffer Rules portion (under Helpful Links) of the DWQ website at (<http://h2o.enr.state.nc.us/ncwetlands/RiparianBufferRules.htm>) outlining the most recent version date of the hardcopy soil survey maps for each buffered county. A hard copy of this document, named SoilSurveyDates, is also attached to this notice. The “most recent version of the soil survey map” is a requirement per 15A NCAC 2B.0233(3) and 15A NCAC 2B.0259(3). Use of the hardcopy version of the soil survey maps instead of using the internet version of the soil survey maps was decided by the Environmental Management Commission on January 11, 2007. Questions regarding this topic can be directed to Amy Chapman, Cyndi Karoly, Ian McMillan or John Dorney at 919-733-1786.

VI. Variance Applications

- The Division has created a specific Catawba variance application form pursuant to the Catawba Buffer Rules (15A NCAC 2B.0243(9)). This application is for prohibited actions in Zones One and Two of the protected Catawba buffers per the table of uses in 15A NCAC 2B.0243(6).
- The Division has revised the minor and major variance application forms for the Neuse and Tar-Pamlico buffered basins. The two applications have been consolidated into one application.

Both of the above referenced applications can be downloaded from the Riparian Buffer Rules portion (under Buffer Variance Forms and Documents) of the DWQ website at <http://h2o.enr.state.nc.us/ncwetlands/RiparianBufferRules.htm> .

VII. Riparian Buffer Brochure

The Division has created a riparian buffer brochure entitled *Buying Property and the State's Riparian Buffer Rules*. This brochure can be downloaded from the Riparian Buffer Rules portion of the DWQ website at <http://h2o.enr.state.nc.us/ncwetlands/documents/BufferPamphlet.pdf> .

Topics discussed in the brochure include: what a riparian buffer is, diffuse flow, how to measure zones one and two of the buffer, what application forms are required for each category of use in the table of uses of the buffer rules, benefits of the riparian buffer and contact information at the Division. The target audience for this document will primarily be private property owners who are not routinely exposed to buffer regulatory topics. Hard copies of the brochure can be requested from the Division by calling staff within the 401 Oversight and Express Permits Unit at 919-733-1786.

VIII. Request for Public Comments – Draft Policy Guidance on “Determining Appropriate Compensatory Mitigation Credit for Dam Removal Projects in North Carolina”, Version 7.1, dated February 13, 2008.

A task force consisting of various state and federal wetland permitting and commenting agencies has been working on a revised guidance for determining mitigation credit for dam removal projects in NC based on the previous guidance dated March 22, 2004. A revised guidance dated February 13, 2008 (Version 7.1) is now available for downloading of the 22-page document from our website at http://h2o.enr.state.nc.us/ncwetlands/rd_pub_not.html , bundled with this notice on the “Current Public Notices” page. The US Army Corps of Engineers will also be sending out a public notice on this guidance in the near future. This document is available for public review as of the date of this notice, and comments can be sent within the next 60 days (deadline 5:00 p.m. on Friday April 25, 2008) to Mr. John

Dorney, Wetland Program Development Unit, NC Division of Water Quality, 2321 Crabtree Blvd, Raleigh, NC 27604 via hard copy or via email at john.Dorney@ncmail.net . Comments should also be sent to Ms. Jean Manuele, Raleigh Field Office Chief, 3331 Heritage Trade Drive, Suite 105, Wake Forest, North Carolina 27587. After that time, the state and federal agencies that developed the guidance will meet to address all the comments received and develop a final guidance document.

IX. Policy for Compensatory Mitigation in Adjacent Cataloging Units

On June 21, 2005, the Division distributed a public notice regarding a proposed policy of the Program Assessment and Consistency Group (PACG) with respect to using compensatory stream and wetland mitigation sites in adjacent cataloging units in order to provide mitigation for impacts outside that cataloging unit. That guidance was approved by the PACG on May 20, 2005. This policy was intended to provide the public with guidance as to the meaning of DWQ's 401 Certification rules (15A NCAC 2H .0506 (g)(8) and 15A NCAC 2H .1305 (g)(8), respectively) which require mitigation for impacts to wetlands to be within the same river basin and physiographic province when practical. The intent of this guidance is to provide an explanation for the phrase "when practical" so the regulated public and mitigation providers can understand and comply with this portion of the rules. In a June 2005 public notice (which remains available at

<http://h2o.enr.state.nc.us/ncwetlands/documents/AdjacentCUcovermemo.doc>), we stated that the policy would be used immediately. The Guidance on the Use of Compensatory Mitigation in Adjacent Cataloging Units also remains available at

<http://h2o.enr.state.nc.us/ncwetlands/documents/PACGconcurrencyonAdjCU.doc>)

Recently DWQ has discovered that we neglected to provide a public notice stating that that policy is still in effect. Therefore, effective 60 days from today (which is February 25, 2008, so April 25, 2008 gives 60 days notice), that policy will be in effect for mitigation projects that require DWQ approval. Also please be aware that we are working with the US Environmental Protection Agency and US Army Corps of Engineers to update that policy especially in the context of private mitigation banks. Until that policy is noticed and comments are addressed, the May 20, 2005 policy will be in effect. If you have any questions concerning this policy, please contact John Dorney at 919-733-9646.

Attachments (also available by download as noted in this memo):

DWQ letter to the Corps and EPA dated December 18, 2007: Summary of NC Division of Water Quality's research related to 1) relatively permanent flow, and 2) significant nexus to traditionally navigable water (TNW)

Table: Latest Hardcopy Soil Survey Map Book Date

Other recent documents not attached, available via internet download:

Duration of Flow in Headwater Streams in NC, Appendix A through E:

http://h2o.enr.state.nc.us/ncwetlands/documents/DWQ_Research_JRD_Memo_2007_10_29-1.pdf

Buffer Clarifications: <http://h2o.enr.state.nc.us/ncwetlands/RiparianBufferRules.htm>

Buffer Pamphlet: <http://h2o.enr.state.nc.us/ncwetlands/documents/BufferPamphlet.pdf>

Dam Removal Guidance, Version 7.1, 2/13/08: http://h2o.enr.state.nc.us/ncwetlands/rd_pub_not.html

Adjacent Cataloging Unit Cover Memo:

<http://h2o.enr.state.nc.us/ncwetlands/documents/AdjacentCUcovermemo.doc>

Adjacent Cataloging Unit Guidance:

<http://h2o.enr.state.nc.us/ncwetlands/documents/PACGconcurrencyonAdjCU>