



North Carolina Department of Environment and Natural Resources

Division of Water Quality
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December 11, 2009

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 Unit

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 water programs administered by the Division of Water Quality (DWQ). For details regarding specific topics, please follow the appropriate web links or contact the staff members referenced within each heading. Note that where deadlines are posted for submission of written comments, comments sent by regular mail must be *received by* DWQ staff contacts by the posted date, not *mailed by* the commenter by that date. Therefore, last-minute submittals should be relayed by email rather than regular mail.

I. Implications of Session Law 2009-406 (Senate Bill 831) for 401 Certifications, Non-404/Isolated Wetlands Permitting, and Buffer Rules

What it is:

Senate Bill 831, An Act to Extend Certain Government Approvals Affecting the Development of Real Property Within the State, may be cited as the "Permit Extension Act of 2009" and has also been informally referred to as the "Permit Tolling Bill." In consultation with DENR General Counsel, DWQ has been advised as to how this bill affects the regulatory programs administered by the various regulatory units. This memorandum relates specifically to the two 401 permitting units (401 Oversight and Express Permits Unit and Transportation Permitting Unit). These units administer three broad categories of programs:

1. 401 Water Quality Certifications pursuant to the Wetlands Rules (15A NCAC 2H .0500),
2. Jurisdictional stream determinations for the purposes of the Buffer Rules, Buffer Authorizations, and Minor and Major Variances to the Neuse, Catawba, Tar-Pamlico, Goose Creek, Jordan Lake, and Randleman Buffer Rules, and
3. Isolated/Non-404 Wetlands Permits pursuant to the Isolated Wetlands Rules (15A NCAC 2H .1300).

What it does and doesn't cover:

It should be noted that some of the terminology in the bill differs from the terms used in implementation of these three programs, leading to confusion with interpretation. The following clarifications of definitions of development approvals included within SB 831 are provided to ensure proper interpretation:

- Section 3 (1)(i) *Any stream origination certifications* – This refers to jurisdictional stream determinations (also referred to as stream origin calls) made by DWQ for the purposes of the various Buffer Rules. This definition also captures Buffer Authorizations, Minor Variances and Major Variances approved by DWQ Staff or the Water Quality Committee of the Environmental Management Commission. Even though these approval types are not explicitly mentioned anywhere in SB 831, they are included by virtue of this definition. Note that the term “certification” is never used within the explicit context of the Buffer Rules, and that this reference was intended to refer to the various types of approvals issued under the Buffer Rules.
- Section 3(1)(j) *Any water quality certification* – This refers to the Isolated Wetlands/Non-404 Permits administered and issued only by the State of North Carolina, and not tied to a Federal Permit. Isolated Wetlands Permits are often mistakenly referred to as “Isolated Wetlands Certifications” when in fact they are not Certifications at all, but rather State Permits.
- Actual 401 Water Quality Certifications are not explicitly mentioned in SB 831. In fact, they are excluded from this bill in Section 5, which states *This act shall not be construed or implemented to (1) Extend any permit or approval issued by the United States or any of its agencies or instrumentalities, and (2) Extend any permit or approval for which the term or duration of the permit or approval is specified or determined pursuant to federal law.* By issuing a 401 Certification, the state is certifying that a Federal 404 Permit will meet water quality standards. DWQ never includes an explicit expiration date on a 401 Certification; rather, the 401 is written such that it will remain effective as long as the 404 Permit is valid. The U.S. Army Corps of Engineers therefore determines the expiration date of the 401 Certification/404 Permit. If the Corps extends a 404 Permit, the 401 Certification is automatically extended with no further consultation with DWQ required, provided that the project is in compliance and the impacts have not been changed.

What it means:

Section 4 of SB 831 says that *For any development approval that is current and valid at any point during the period beginning January 1, 2008 and ending December 31, 2010, the running of the period of the development approval and any associated vested right under G.S. 153A-344.1 or G.S. 160A-385.1 is suspended during the period beginning January 1, 2008, and ending December 31, 2010.* A common misperception is that any permit that would otherwise expire during this three-year period is extended until December 31, 2010, expiring January 1, 2011. That is not the case. Actually, the three-year period is a tolling period, hence the other name “Permit Tolling Bill.” Throughout this tolling period, for any valid authorization administered by the State (not linked to a Federal Permit), the clock stops ticking altogether, resuming ticking on January 1, 2011. Since state authorizations administered by these units are typically valid for five years, most approvals issued between January 1, 2003 and December 31, 2007 will have three full calendar years added to shelf life. All five-year approvals issued within the tolling period will remain valid from the issuance date until five years past the tolling period, so they will expire on January 1, 2016. Understandably, this may lead to some confusion, particularly where DWQ has issued a single approval letter wherein several types of approvals were bundled, such as a combined 401 Certification/Buffer Authorization. A table attached to this notice provides some example scenarios. If you have questions related to how this bill affects a specific authorization,

do not hesitate to contact DWQ staff in the Central or Regional offices. Staff contact information is available at http://h2o.enr.state.nc.us/ws/ncwetlands_contacts.htm and http://h2o.enr.state.nc.us/ncwetlands/documents/DOT_nonDOT_ExpressContacts_112408.pdf.

On another note, if a valid authorization reliant upon a buffer stream origin call that had expired prior to the tolling period, the authorization itself still remains in effect per SB 831.

For a complete listing of other types of DWQ Permits affected by SB 831, visit <http://h2o.enr.state.nc.us/PermitExtensionsAct2009.htm>.

II. Description of Recent Changes to the 401 Stormwater Provisions

In response to comments received during the Public Notice period, the DWQ has made a few minor modifications to two documents that were put to Public Notice on August 14, 2009. These documents are: *Stormwater Provisions for Revised 401 General Certifications and Protocol for 401 Stormwater Management Plan (SMP) Approval and Implementation*. They are available at: http://h2o.enr.state.nc.us/ncwetlands/stormwater_management_plans.html.

The purpose of these changes was to increase the clarity of the documents that support the 401 Stormwater program. These documents will go into effect on February 8, 2010 (60 calendar days from this notice), although applicants are welcome to use these changes prior to that date if they choose.

The modifications to *Stormwater Provisions for Revised 401 General Certifications* are as follows:

- Part B was clarified to explain that applicants should use the version of the protocol that is in place on the date of SMP submittal.
- Part B(i)(a)(4) was modified to increase clarity and reduce redundancy.
- In Part B(i)(b)(2), was reworded to increase clarity.
- Part B(i)(b)(3) was clarified to explain that applicants should use the version of the BMP Manual that is in place on the date of SMP submittal
- In Part (B)(ii), the term "Setback" was used instead of "Buffer" to avoid confusion between this requirement and the Riparian Buffer Protection Rules.
- In Part (B)(iii), the requirement to discharge at non-erosive velocities was extended to streams (in addition to wetlands). The authority to implement this requirement is already codified in 15A NCAC 2H .0506.

The modifications to *Protocol for 401 Stormwater Management Plan Approval and Implementation* are as follows:

- In Part A(iii)(c), language was added to clarify that DWQ needs a copy of the proposed SMP in order to issue a conditional 401 Certification.
- In Part B(iv)(a), the language was updated to reflect that the Low Impact Development Guidebook for North Carolina has now been published.
- Part C(iv) was added to codify the existing requirement to submit a Certificate of Completion.

III. Proposed Regulatory Guidance for the Calculation of Stream and Buffer Mitigation Credit for Buffer Widths Different From Standard Minimum Widths, Version 4.4.

The Interagency Review Team (IRT) which consists of members from the Division of Water Quality, Division of Coastal Management, US Army Corps of Engineers, US Environmental Protection Agency, US Fish and Wildlife Service and NC Wildlife Resources Commission have been working on written guidance to determine the amount of stream and buffer mitigation available on mitigation sites when the wooded buffers exceed or are less than the standard widths (50 feet in the coastal plain and piedmont and 30 feet in the mountains). The IRT has been working on this guidance to help the mitigation community better understand the 2003 Joint Federal-State Stream Mitigation Guidelines which state that buffer widths greater or narrower than the standard widths will receive more or less credit, respectively. However, the 2003 Guidelines do not present any method to determine this additional or reduced credit which has led to confusion in the mitigation community. The proposed guidance establishes a process for this determination. The draft guidance is available on the Division's website at <http://h2o.enr.state.nc.us/ncwetlands/mitigation.html> and will soon be posted on the Corps of Engineers web site for comment as well. Please send any comments on this Draft Guidance to the attention of John Dorney (john.dorney@ncdenr.gov) by 5:00 pm on Friday February 12, 2010. Comments may also be sent via regular mail to John Dorney at 2321 Crabtree Blvd., Suite 250, Raleigh, NC, 27604. All comments received will be shared with all the IRT members in development of the final guidance document. Any questions about the guidance can be addressed to John Dorney at 919-733-9646 or Eric Kulz at 919-715-9050.

IV. FAQ Document about the Buffer Rules

DWQ has posted a Frequently Asked Questions (FAQ) document about the Buffer Rules at the following web address: <http://h2o.enr.state.nc.us/ncwetlands/RiparianBufferRules.htm>. This is intended to be a living document and DWQ will consider adding additional questions of general interest. Suggestions for additional questions can be emailed to Amy.Chapman@ncdenr.gov (after February 15, 2010), Cyndi Karoly@ncdenr.gov, or Ian.Mcmillan@ncdenr.gov.

V. Jordan Lake Minor and Major Buffer Variance Application

An application form to apply for Minor and Major Buffer Variances within the Jordan Lake Watershed has been posted to the DWQ web site at <http://h2o.enr.state.nc.us/ncwetlands/RiparianBufferRules.htm> under the heading "Buffer Variance Forms and Documents." This form is to be used in the Jordan Lake Watershed for prohibited impacts in the protected riparian buffer. The form is available in Word and Adobe formats.

VI. Buffer Clarification Memo #2009-003, DWQ's stance on the location of buffer mitigation for restoration and enhancement credit

The referenced buffer clarification memo has been posted on the DWQ web site at <http://h2o.enr.state.nc.us/ncwetlands/RiparianBufferRules.htm>. This memo is for information only.

VII. Buffer Clarification Memo #2009-004, relating to greenway/hiking trails

The referenced buffer clarification memo has been posted on the DWQ web site at <http://h2o.enr.state.nc.us/ncwetlands/RiparianBufferRules.htm> . This memo is for information only.

VIII. Buffer Clarification Memo #2009-005, relating to utility line maintenance corridors

The referenced buffer clarification memo has been posted on the DWQ web site at <http://h2o.enr.state.nc.us/ncwetlands/RiparianBufferRules.htm> . This memo is for information only.

IX. Draft Buffer Clarification Memo #2009-006, Determination of Buffer Mitigation Credit Where Sewer Line Easements Occur within Zones 1 and 2 of the Protected Riparian Buffers

The draft version of the referenced buffer clarification memo has been posted on the DWQ web site at <http://h2o.enr.state.nc.us/ncwetlands/RiparianBufferRules.htm> under the heading "Buffer Clarifications." This memo clarifies riparian buffer mitigation credit that can be obtained when a sewer line is within the 50-foot protected riparian buffers. DWQ is soliciting comments regarding the clarity of this memo. Comments related to this memo must be received by Cyndi Karoly in the DWQ Central Office via regular mail at 2321 Crabtree Blvd., Suite 200, Raleigh, NC, 27604 or email at Cyndi.Karoly@ncdenr.gov by Friday, February 12, 2010 (over 60 calendar days from the date of this public memorandum).

X. Greenway and Hiking Trails in North Carolina's Riparian Buffer Protection Areas

DWQ has created a two page handout entitled ***Greenway and Hiking Trails in North Carolina's Riparian Buffer Protection Areas***. This document is intended to help the regulated community understand DWQ's permitting process for greenways and hiking trails in the protected riparian buffers. It can be viewed or printed from the DWQ web site at <http://h2o.enr.state.nc.us/ncwetlands/documents/Greenways-Hiking.pdf> .

XI. North Carolina Sea Level Rise Science Forum

Date: January 14-15, 2010
Location: Hilton North Raleigh, Raleigh, NC
Cost: None

The N.C. Department of Environment and Natural Resources is hosting a Science Forum on Sea Level Rise in North Carolina. The forum will feature distinguished speakers from North Carolina, as well as invited speakers from other states. The forum will be the vehicle through which the N.C. Coastal Resources Commission (CRC) will release a preliminary report on the current and projected rates of sea level rise in North Carolina. The report will project sea level rise ranges in 25-year intervals through 2100. The CRC, as well as other DENR agencies, can use these metrics as the foundation for policy development and adaptation planning. Anyone is welcome to register, including state and local officials, resource managers, emergency

managers, planners, infrastructure providers (e.g., transportation and utilities), conservationists, private sector, and other interested parties. Registration information is posted at <http://www.nccoastalmanagement.net/slr.html> .

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