

North Carolina needs a state wetlands permitting program

March 2021

The NC Environmental Management Commission (EMC) has proposed a temporary rule to establish a state permitting program to manage impacts to over a million acres of wetlands in North Carolina. Environmental advocates are generally supporting the proposal, with a few modifications. Why?

Key talking points

- Wetlands and small streams reduce flooding downstream. In a time when storms are getting more intense and flooding more frequent, losses in the landscape's natural flood storage capacity translate directly to loss of homes and businesses in the watershed.
- Wetlands and small streams also clean our drinking water, recharge groundwater, and sustain fisheries and wildlife.
- The proposed temporary rule will establish a permitting program to ensure that impacts to wetlands and small streams are better managed to protect neighbors and the public.
- Because the loss of wetlands and streams happens mostly through the proverbial 'death by a thousand cuts' – hundreds of small projects rather than just a few large ones – it's important that the threshold below which projects can proceed with no review be as low as possible.

About the rulemaking

In mid-March, the EMC voted to fast-track a proposed temporary rule to set up a state permitting program for projects that affect wetlands that are protected under state law but not under federal law. The proposal is a response to a 2020 federal rule that eliminated federal protection and permitting for as much as 60% of wetlands and streams in North Carolina. The comment period runs March 19 – April 12, 2021, with a virtual public hearing at 6 pm on Tuesday, March 30, details [here](#). Public comments on the proposed temporary rule can be submitted to PublicComments@ncdenr.gov, with 'Wetlands Rules' in the subject line, by 5 pm on Friday, April 12.

NC Department of Environmental Quality staff and the EMC have announced they will also shortly begin work on a permanent rule that will eventually replace the temporary rule, with more opportunities for public input on that later this year.

Wetlands and small streams are incredibly valuable

Wetlands – undeveloped areas where water makes the soil soggy, seasonally or year-round – are essential for flood control. One acre of floodplain wetland can store upwards of 1 million gallons of water, protecting downstream communities.¹ Beyond flood control, wetlands also recharge groundwater

¹ US EPA, [Wetlands: Protecting Life and Property from Flooding](#), May 2006. See also, Division of Coastal Management, [NC-CREWS: NC Coastal Region Evaluation of Wetland Significance](#), May 1999, at 45-50 (describing multiple factors that determine how much a given wetland can contribute to flood reduction).

supplies (important for the millions of North Carolinians who get their water from wells), clean pollutants out of surface waters, and support our fisheries.²

Small, headwater streams are often surrounded by wetlands and are similarly important. They help avert flooding, and also play a key role as filters, keeping runoff pollution out of larger rivers and surface drinking water sources downstream.³

The proposed temporary rule will manage impacts to wetlands

The purpose of wetlands regulation – federal and state – is not to stop all impacts to wetlands, but to ensure that impacts are avoided if possible, and managed where necessary. So, for example, a developer who fills part of a wetland or stream for a project may be required to compensate by restoring or creating a wetland elsewhere in the watershed. Without that, many new projects would indirectly flood downstream neighborhoods and businesses.

In 2020, the US Environmental Protection Agency and the US Army Corps of Engineers finalized a new ‘Waters of the United States’ (WOTUS) rule interpreting federal jurisdiction very narrowly, eliminating federal oversight for millions of acres of wetlands and small streams.⁴ The Southern Environmental Law Center has estimated the ‘coverage gap’ created by the 2020 federal rule is roughly 900,000 acres in the Cape Fear and Neuse basins alone – much larger statewide.

Wetland types that have lost significant federal coverage under the 2020 federal rule include headwater forests, some bottomland hardwoods, floodplain pools, pine flats, pine savannahs, hardwoods flats, and non-riverine swamp forests.⁵ On both a local and a watershed level, these wetlands and streams are vital for flood control, water quality, groundwater recharge, and fisheries.

Fortunately, North Carolina’s state law still requires a permit before a project can fill or destroy these waters.⁶ North Carolina state rules currently offer a permitting process only for isolated bogs and basin wetlands, which have been excluded from federal jurisdiction for years.⁷ Otherwise, the state has relied on the federal program, without a free-standing state permit process for other wetlands.⁸

This means, in the wake of the new federal rule, that a large acreage of wetlands and streams cannot be touched under state law, even when an applicant has already done their best to minimize impacts. The proposed temporary rule will allow these projects to proceed. It does not assert state oversight over wetlands that haven’t already been regulated by the state for years – it just gives developers a way to legally impact wetlands and streams, so their projects can move forward.

Although advocates want the EMC to adopt the temporary rule, we are concerned about one aspect of the proposal: it allows projects with up to ½ acre of impacts (1/3 acre in the mountains) to proceed with

² US EPA, [Connectivity of streams and wetlands to downstream waters: a review and synthesis of the scientific evidence technical report](#), 2015. EPA/600/R-14/475F, ES9- ES12.

³ US EPA, Connectivity report, ES7- ES9.

⁴ 85 Fed. Reg. 22250, April 21, 2020, [The Navigable Waters Protection Rule](#). The rule took effect in June and was promptly challenged in multiple lawsuits that are working their way through the court system.

⁵ These types are described in detail in the [2010 NC Wetland Assessment Method User Manual](#), the state’s synthesis of the science of identifying the wetland types and their functions, including flood control.

⁶ NCGS 143-215.1 (prohibiting unpermitted discharges into waters of the State).

⁷ 15A NCAC 02H .1300 (authorizing state permits for impacts to isolated bog and basin wetlands).

⁸ 15A NCAC 02H .0500 (applying state 401 water quality certification authority to underlying federal wetland permits).

no review and no mitigation to offset impacts. Since most ongoing loss of wetlands and streams happens from hundreds of small projects rather than a few big projects, the cumulative losses under the ½ acre threshold will be significant. If this is not fixed in the temporary rule, it should be addressed in the permanent rule to follow this Fall.