

LEGISLATIVE STUDY COMMISSION
ON WETLANDS



REPORT TO THE
1995 GENERAL ASSEMBLY
OF NORTH CAROLINA
1996 REGULAR SESSION

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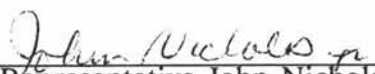
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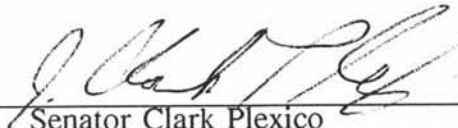
TO THE MEMBERS OF THE 1995 GENERAL ASSEMBLY (REGULAR SESSION 1996):

The Legislative Study Commission on Wetlands submits to you for your consideration its final report. The report was prepared pursuant to G.S. 120-30.17(1).

Respectfully submitted,



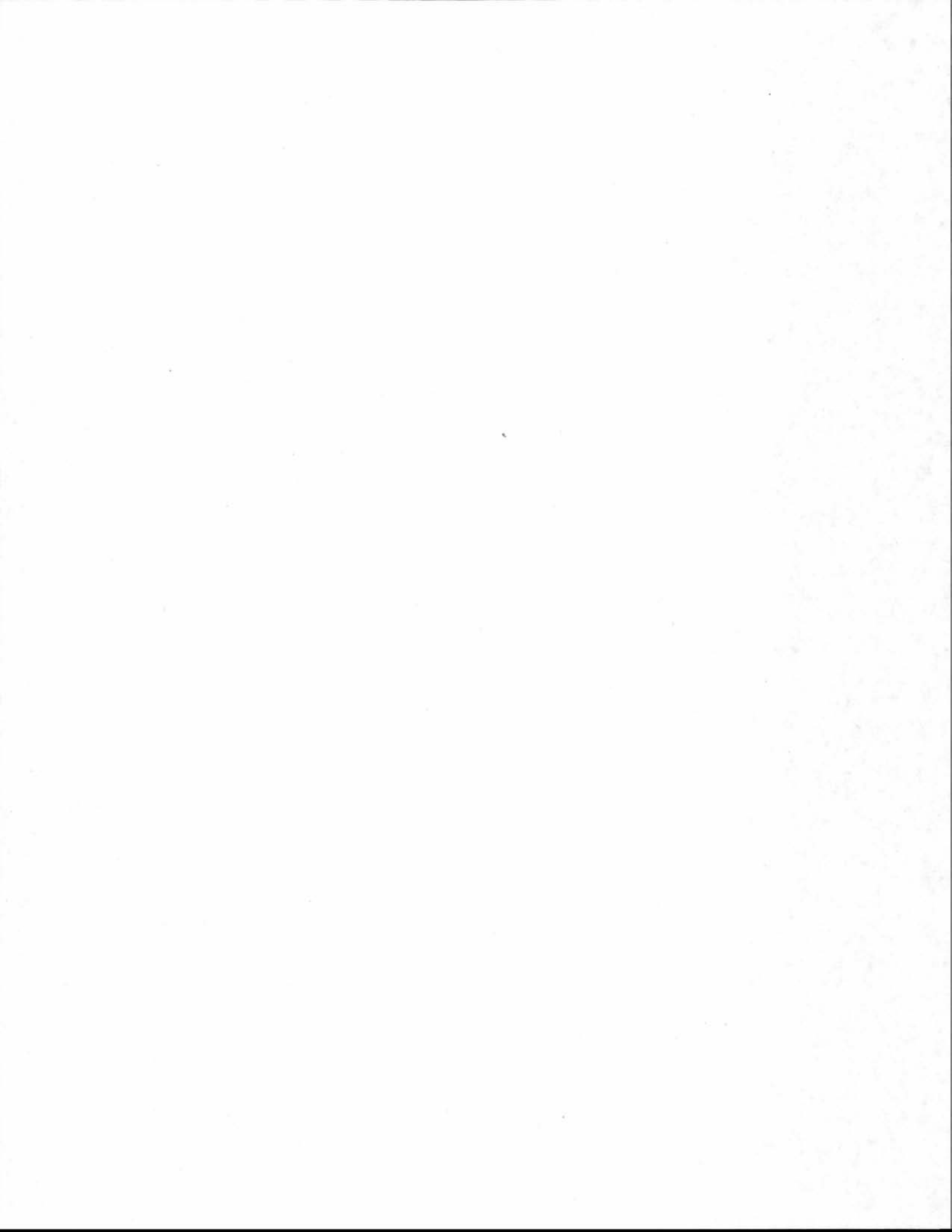
Representative John Nichols



Senator Clark Plexico

Cochairs
Legislative Study Commission
on Wetlands





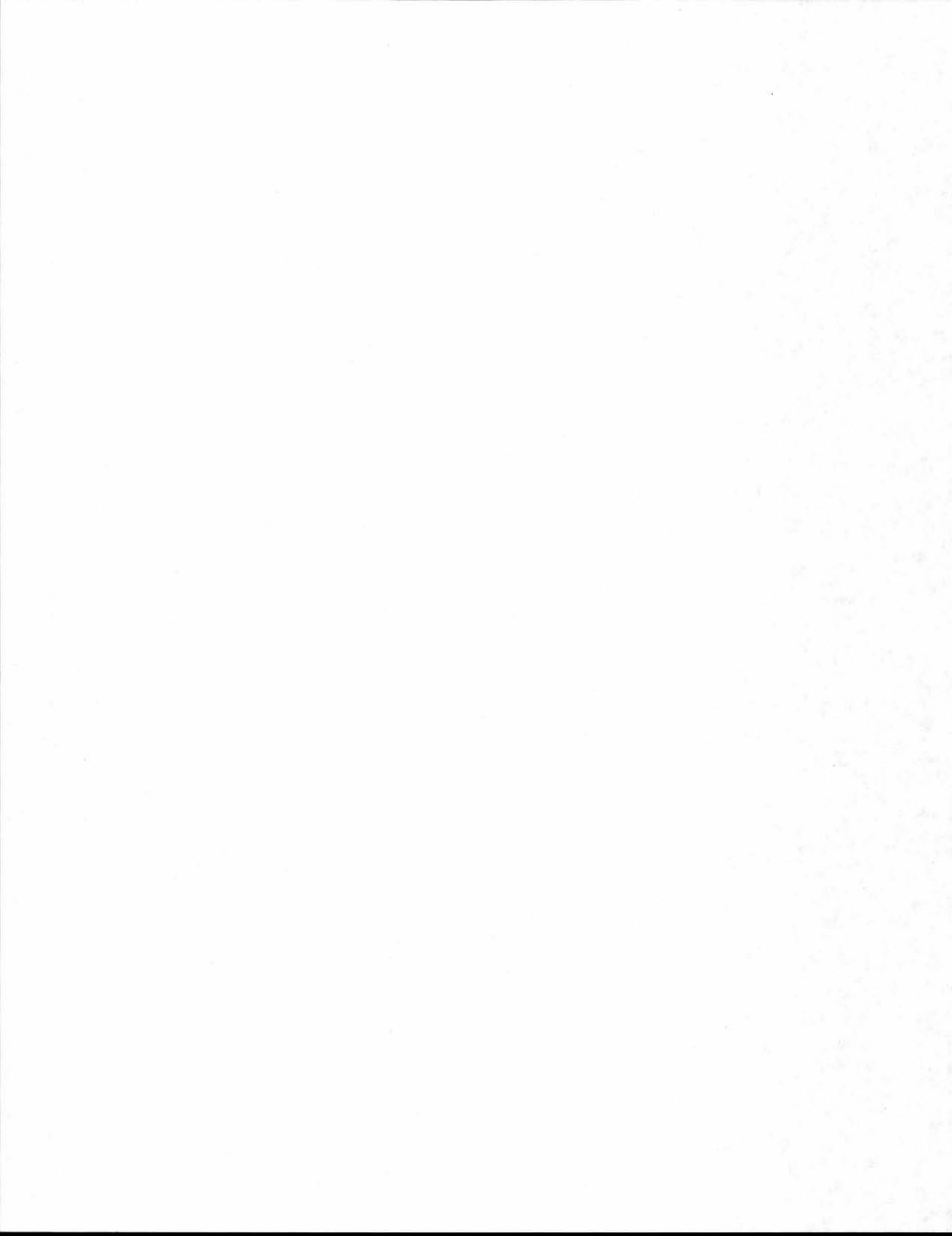
PREFACE

The Legislative Study Commission on Wetlands was established by Section 22.1 of Chapter 542 of the 1995 Session Laws. The Commission was cochaired by Representative John Nichols and Senator Clark Plexico. Fourteen additional members were appointed to serve on the Commission, seven appointed by the Speaker of the House of Representatives and seven appointed by the President Pro Tempore of the Senate.

The charge of the Legislative Study Commission on Wetlands follows:

"The Commission shall study the current wetlands regulatory program including the need to develop a statewide wetlands restoration and mitigation program and mitigation bank. In making its recommendations, the Commission shall balance the need to provide effective rulemaking to protect wetlands with the need to encourage real estate and commercial development of property to enhance the State's economy. This evaluation shall include a review of current wetlands rules and regulations and an assessment of any necessary changes that should be made in exchange for participation in a statewide mitigation bank. The Commission may include in its recommendations, legislation to streamline the regulatory process, mitigation ratios and exemptions from mitigation, a coordinated program for wetlands restoration and enhancement, a Wetlands Mitigation Bank and Restoration Fund, funding for the mitigation bank, and any other issue relating to wetlands."

The relevant portions of Chapter 542, House Bill 886 and Senate Bill 824 are included in Appendix B. The full membership of the Commission is listed in Appendix C of this report. A commission notebook containing the commission minutes and all information presented to the commission is filed in the Legislative Library.



COMMISSION PROCEEDINGS

November 29, 1995

The Wetlands Study Commission held its first meeting. The Commission began to identify the most pressing issues regarding wetlands and to familiarize itself with the earlier debates and discussions held during the 1995 Regular Session of the General Assembly. Issues of particular interest to Commission members included the definition of wetlands, how federal and State law interrelate with regard to the regulation of wetlands, the role of the United States Army Corps of Engineers in regulating the use of wetlands, the need for a wetlands mitigation bank to be established, and the substance and effect of the proposed rules on wetlands being considered by the Environmental Management Commission.

After agreeing to continue to consider these issues at its next meeting the Legislative Study Commission on Wetlands adjourned so that members could attend the Environmental Review Commission meeting to hear a presentation by Dr. David Moreau, Chair of the Environmental Management Commission, on the proposed wetlands rules.

December 5, 1995

Commission members conducted a full day meeting. The morning agenda was devoted to presentations by John Dorney, Environmental Management Division, Department of Environment, Health, and Natural Resources and Roger Schecter, Director, Coastal Management Division, Department of Environment, Health, and Natural Resources. The presentations focused on the following topics: State regulatory

programs and permits, the interrelationship of State wetlands programs and federal requirements, wetlands regulatory requirements under the State's Coastal Area Management Act (CAMA), and the relationship between CAMA permits and permits issued by the United States Army Corps of Engineers.

In the afternoon the Commission continued its task of identifying the issues considered to be most crucial in working out an acceptable compromise with regard to the proposed wetlands rules. Those addressing the Commission were: Paul Wilms, North Carolina Home Builders Association; Bill Holman, North Carolina Chapter of the Sierra Club; Anne Griffith, North Carolina Citizens for Business and Industry; and Tom Bean, North Carolina Wildlife Federation.

Questions from Commission members and discussion followed the presentations. Prior to adjourning, Commission members asked Commission Counsel to meet with the parties interested in the proposed wetlands rules to identify and discuss the points of agreement and disagreement among the parties and to report the findings to the Legislative Study Commission on Wetlands at its next meeting.

January 3, 1996

Legal Counsel for the Legislative Study Commission on Wetlands reported to the members regarding the December 15th Wetlands Study Working Meeting. Areas of concern noted by those attending the meeting included the following:

- (1) Mitigation bank and restoration program.
- (2) The United States Army Corps of Engineers position with regard to a restoration program.
- (3) Funding of a restoration program.
- (4) Mapping component of a restoration program.
- (5) Application and effect of proposed wetlands rules on coastal wetlands.
- (6) Definition of contiguous; definition of intermittent streams.
- (7) One-third acre vs. one acre exemption from wetlands rules.
- (8) Mitigation ratios.
- (9) Vegetative buffers.

Ron Ferrell, Division of Environmental Management, Department of Environment, Health, and Natural Resources summarized the proposed wetlands rules for the Commission and then explained the differences between the rules and the legislation considered by the General Assembly during the 1995 Regular Session.

Linda Rimer, Assistant Secretary Environmental Protection, Department of Environment, Health, and Natural Resources provided a synopsis to the Commission members that described the wetlands restoration program envisioned by the Department and explained how the program would work.

John Dorney, also from the Environmental Management Division, Department of Environment, Health, and Natural Resources provided Commission members with profiles of different types of wetlands and responded to requests for information made by members at the last meeting of the Commission.

January 23, 1996

The purpose of the meeting was to provide a forum for additional comments on the proposed wetlands rules under consideration by the Environmental Management Commission. A number of issues were raised by both Commission members and those attending the Commission meeting. The issues raised included the following: what permit exemptions, if any, are appropriate for areas adjacent to wetlands, particularly those next to bodies of water; the need, if any, for buffers along bodies of water; the use of zoning laws as a tool to control development in wetlands areas; the use of incentives rather than rules to regulate development in wetlands areas; the role of minimization reviews and requirements, the role of mitigation ratios and requirements, and the economic impact of both; the definition of intermittent streams and whether the wetlands rules should apply to wetlands adjacent to intermittent streams.

Both Melvin Shepard and Donald Kirkman, members of the Commission made presentations regarding their thoughts and suggestions regarding the protection and preservation of wetlands for consideration by the other members.

February 14, 1996

Three legislative proposals were presented to the Commission members at this meeting for their review and consideration. Those presenting legislative proposals and comments regarding the proposals were:

- (1) Craig Bromby, North Carolina Citizens for Business and Industry.
- (2) Linda Rimer, Department of Environment, Health, and Natural Resources.
- (3) Tom Bean, North Carolina Wildlife Federation.

The proposal presented on behalf of the North Carolina Citizens for Business and Industry had numerous modifications to the wetlands rules being considered by the Environmental Management Commission, established a wetlands mitigation bank, and established a wetlands restoration fund.

The Department of Environment, Health, and Natural Resources endorsed the wetlands rules being considered by the Environmental Management Commission, thus the proposal presented on the Department's behalf did not address the rules as no modifications were wanted. The Department's proposal established a restoration program to be developed by the Department and also established a wetlands restoration fund.

The proposal presented on behalf of the North Carolina Wildlife Federation was similar to that of the Department of Environment, Health, and Natural Resources, proposing no modifications to the wetlands rules, and establishing a wetlands restoration program and fund. The proposal presented by the Wildlife Federation also included a number of detailed data compilation and reporting requirements.

After quite a lot of discussion by Commission members, a consensus was reached that additional time was needed by the Commission to consider the proposals before them. The members of the Legislative Study Commission on Wetlands were reminded that the Environmental Management Commission had to complete its consideration of the proposed wetlands rules and, if satisfied, adopt those rules by March 20, 1996, or the rules would have to go back to public hearing. The members of the Legislative Study Commission on Wetlands were also informed that the Environmental Management Commission wanted to proceed with its consideration of the proposed wetland rules and to vote by March 20, 1996, on whether to adopt those rules.

After additional discussion, Representative Nichols moved that the request of the Environmental Management Commission be granted by the Wetlands Study Commission with the following understanding: (i) the Wetlands Study Commission reserved the right to continue to review the wetlands rules and to recommend legislation for consideration during the 1996 Regular Session of the General Assembly that would change the rules in any way deemed appropriate by the Wetlands Study Commission; and (ii) the Wetlands Study Commission further requested that if the Environmental Management Commission voted to adopt the proposed wetlands rules, that the Environmental Management Commission also provide that the rules would not be implemented prior to July 1, 1996. The motion passed.

April 16, 1996

Ron Ferrell reviewed the modifications of the wetlands rules as finally approved by the Environmental Management Commission on March 14, 1996. The rules become effective September 1, 1996.

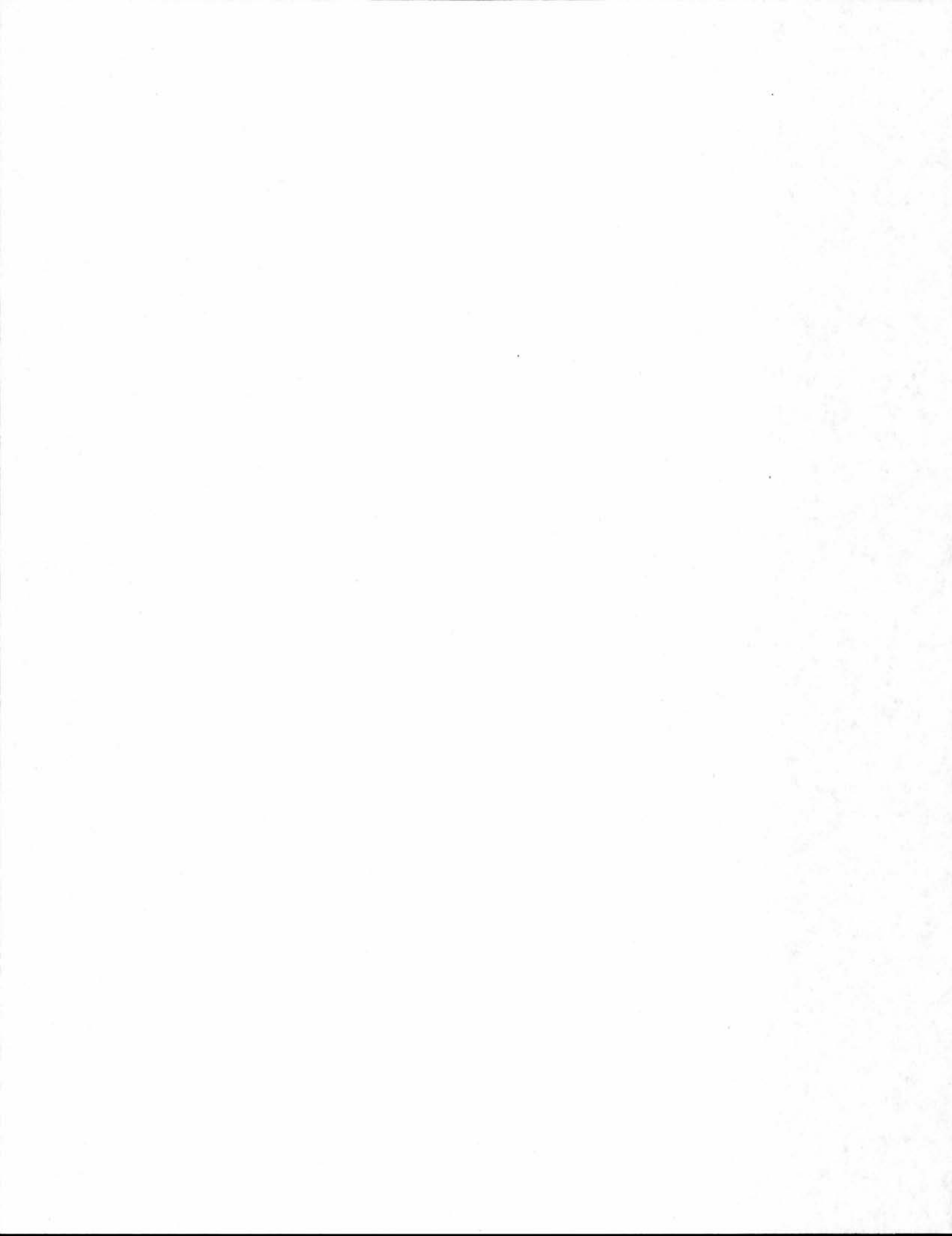
At the request of the Cochairs, Commission Counsel presented two draft bills for consideration by the Commission. The first legislative proposal considered by the Commission established a wetlands restoration program to be developed in accordance with statutory guidelines by the Department of Environment, Health, and Natural Resources. The legislative proposal also established a wetlands restoration fund under the Department of Environment, Health, and Natural Resources.

The second legislative proposal considered by the members of the Commission modified the wetlands rules adopted by the Environmental Management Commission in March, and also provided for the creation of a wetlands mitigation bank and fund.

After a great deal of discussion by the members, the Commission voted to combine the two proposals into one draft bill. The Commission asked Counsel to prepare a new draft bill that combined the wetlands rules changes set out in the second legislative proposal with the provisions in the first legislative proposal establishing the restoration program and fund under the Department of Environment, Health, and Natural Resources. The Commission then voted to recommend that draft bill to the General Assembly at its 1996 Regular Session.

COMMISSION RECOMMENDATION

The Legislative Study Commission on Wetlands recommends the legislation in Appendix A to the 1995 General Assembly for consideration during the 1996 Regular Session. The legislative proposal is followed by an explanation.



APPENDIX A



LEGISLATIVE PROPOSAL

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1995

H/S

D

95-LH-219F

(THIS IS A DRAFT AND NOT READY FOR INTRODUCTION)

Short Title: Wetlands Mitigation and Funds.

(Public)

Sponsors:

Referred to:

1 A BILL TO BE ENTITLED
2 AN ACT TO DIRECT THE APPROPRIATE STATE DEPARTMENTS HOW TO
3 EXERCISE THE STATE'S AUTHORITY UNDER THE CLEAN WATER ACT, TO
4 ESTABLISH THE WETLANDS RESTORATION PROGRAM AND FUND, AND TO
5 APPROPRIATE FUNDS TO IMPLEMENT THE PROGRAM AS RECOMMENDED BY
6 THE LEGISLATIVE STUDY COMMISSION ON WETLANDS.
7 The General Assembly of North Carolina enacts:
8 Section 1. G.S. 143B-282(a)(1) reads as rewritten:
9 "(a) There is hereby created the Environmental Management
10 Commission of the Department of Environment, Health, and Natural
11 Resources with the power and duty to promulgate rules to be
12 followed in the protection, preservation, and enhancement of the
13 water and air resources of the State.
14 (1) Within the limitations of G.S. 143-215.9 concerning
15 industrial health and safety, the Environmental
16 Management Commission shall have the following
17 powers and duties:
18 a. To grant a permit or temporary permit, to
19 modify or revoke a permit, and to refuse to
20 grant permits pursuant to G.S. 143-215.1 and
21 G.S. 143-215.108 with regard to controlling
22 sources of air and water pollution;

- 1 b. To issue a special order pursuant to G.S. 143-
2 215.2(b) and G.S. 143-215.110 to any person
3 whom the Commission finds responsible for
4 causing or contributing to any pollution of
5 water within such watershed or pollution of
6 the air within the area for which standards
7 have been established;
- 8 c. To conduct and direct that investigations be
9 conducted pursuant to G.S. 143-215.3 and G.S.
10 143-215.108(b)(5);
- 11 d. To conduct public hearings, institute actions
12 in superior court, and agree upon or enter
13 into settlements, all pursuant to G.S. 143-
14 215.3;
- 15 e. To direct the investigation of any killing of
16 fish and wildlife pursuant to G.S. 143-215.3;
- 17 f. To consult with any person proposing to
18 construct, install, or acquire an air or water
19 pollution source pursuant to G.S. 143-215.3
20 and G.S. 143-215.111;
- 21 g. To encourage local government units to handle
22 air pollution problems and to provide
23 technical and consultative assistance pursuant
24 to G.S. 143-215.3 and G.S. 143-215.112;
- 25 h. To review and have general oversight and
26 supervision over local air pollution control
27 programs pursuant to G.S. 143-215.3 and G.S.
28 143-215.112;
- 29 i. To declare an emergency when it finds a
30 generalized dangerous condition of water or
31 air pollution pursuant to G.S. 143-215.3;
- 32 j. To render advice and assistance to local
33 government regarding floodways pursuant to
34 G.S. 143-215.56;
- 35 k. To declare and delineate and modify capacity
36 use areas pursuant to G.S. 143-215.13;
- 37 l. To grant permits for water use within capacity
38 use areas pursuant to G.S. 143-215.15;
- 39 m. To direct that investigations be conducted
40 when necessary to carry out duties regarding
41 capacity use areas pursuant to G.S. 143-
42 215.19;
- 43 n. To approve, disapprove and approve subject to
44 conditions all applications for dam

- 1 construction pursuant to G.S. 143-215.28; to
2 require construction progress reports pursuant
3 to G.S. 143-215.29;
4 o. To halt dam construction pursuant to G.S. 143-
5 215.29;
6 p. To grant final approval of dam construction
7 work pursuant to G.S. 143-215.30;
8 q. To have jurisdiction and supervision over the
9 maintenance and operation of dams pursuant to
10 G.S. 143-215.31;
11 r. To direct the inspection of dams pursuant to
12 G.S. 143-215.32;
13 s. To modify or revoke any final action
14 previously taken by the Commission pursuant to
15 G.S. 143-214.1 and G.S. 143-215.107; and
16 t. To have jurisdiction and supervision over oil
17 pollution pursuant to Article 21A of Chapter
18 143.
19 u. To administer the State's authority under 33
20 U.S.C. § 1341(a) of the federal Clean Water
21 Act.

22 Sec. 2. G.S. 143-215.3 is amended by adding the
23 following subsections to read:

24 "(c1) General Exercise of Powers Granted Under Section 401 of
25 the federal Clean Water Act. -- The Commission may require that
26 an applicant for certification pursuant to 33 U.S.C. § 1341 shall
27 include in its application to the Commission data and information
28 necessary to determine compliance with applicable provisions of
29 sections 1311, 1312, 1313, 1316, and 1317 of title 33 of the
30 United States Code, regarding the activity for which a federal
31 license or permit is sought.

32 (c2) Certification of Applications for Certain Permits Under
33 Section 404 of the Clean Water Act. -- For the purpose of
34 subsections (c2), (c3), (c4) and (c5) of this section, the term
35 'certification' shall mean certification pursuant to section 1341
36 of title 33 of the United States Code for applications to the
37 Secretary of the United States Army or the Administrator of the
38 United States Environmental Protection Agency for permits for
39 dredge or fill activities conducted in wetlands, other than
40 coastal wetlands as defined at G.S. 113-229(n)(3), or wetlands
41 within Areas of Environmental Concern established by the Coastal
42 Resources Commission. For the purpose of this section 'wetlands
43 shall mean those areas that are inundated or saturated by an
44 accumulation of surface or groundwater at a frequency and

- 1 duration sufficient to support, and that under normal
2 circumstances do support, a prevalence of vegetation typically
3 adapted for life in saturated soil conditions. Wetlands
4 generally include swamps, marshes, bogs, and similar areas. For
5 the purpose of this section, 'wetlands' shall include only those
6 areas meeting the foregoing definition which also meet the
7 definition of 'waters of the United States' at 33 C.F.R. §328.3.
8 With respect to applications for certification for a federally-
9 issued permit for an activity regulated under 33 U.S.C. § 1344:
- 10 (1) Except as provided in subsection (c3) of this
11 section, the Commission shall consider only whether
12 the discharge to waters of the United States will
13 comply with the applicable provisions of sections
14 1311, 1312, 1313, 1316, and 1317 of title 33 of the
15 United States Code, and shall comply with the
16 provisions of 33 U.S.C. § 1341(a);
- 17 (2) The Commission shall not adopt any criteria which
18 purport to implement 33 U.S.C. § 1344(b)(1), nor
19 shall the Commission condition the issuance of any
20 certification upon a review of guidelines
21 implementing 33 U.S.C. §1344 (b)(1);
- 22 (3) In considering applications for certification, the
23 Commission shall consider only the activity for
24 which the permit under 33 U.S.C. § 1344 is sought;
25 the Commission shall consider each application for
26 certification as a separate activity and shall not
27 aggregate activities except where the District
28 Engineer of the Corps of Engineers has elected to
29 aggregate such activities for the purpose of
30 issuance of a permit, or authorization under a
31 nationwide or general permit, under 33 U.S.C. §
32 1344;
- 33 (4) For the purpose of delineation of wetlands areas,
34 the Commission shall defer to delineations approved
35 or performed by the Corps of Engineers;
- 36 (5) The Commission may issue one certification
37 applicable to all applications for permits under 33
38 U.S.C. § 1344 for which the Secretary of the United
39 States Army has issued a nationwide or general
40 permit pursuant to the provisions of 33 U.S.C. §
41 1344(e);
- 42 (6) The commission shall grant, grant with conditions,
43 or deny certification within 45 days of the date an
44 application is received, except that the Commission

1 and the applicant may agree to extend the review
2 period for additional 30 day periods; in the event
3 the Commission fails to act on a certification
4 application within 45 days, or within the period as
5 extended with applicant's consent, certification
6 shall be deemed to be waived by the Commission.

7 (c3) Exercise of Certification Authority for Activities
8 Eligible for Federal Nationwide or General Permits. -- With
9 respect to an application for certification for an activity
10 eligible for inclusion within a nationwide or general permit
11 issued pursuant to 33 U.S.C. §1344(e), the Commission may
12 condition its certification to require compensatory mitigation
13 for loss of wetlands and wetland function according to the type
14 of wetlands, as described in subsection (c4), which will be lost
15 as a direct result of the permitted activity, in accordance with
16 subsection (c5). Provided however, that, the Commission shall
17 not condition its certification where the District Engineer of
18 the United States Army Corps of Engineers elects to issue an
19 individual permit in lieu of the nationwide or general permit.

20 (c4) Wetland Types. -- Wetland types set forth in subdivisions
21 (1) through (4) of this subsection shall apply to all wetlands
22 except coastal wetlands defined in G.S. 113-229(n)(3) or wetlands
23 within Areas of Environmental Concern established by the Coastal
24 Resources Commission pursuant to G.S. 113A-113. For the purpose
25 of this subsection, 'perennial water body' shall mean a body of
26 navigable waters, as that term is defined at 33 U.S.C. § 1352(7),
27 (i) which has been designated on the most recently published
28 version of the United States Geological Survey 1:24,000 (7.5
29 minute) scale topographic map, (ii) which has an estimated mean
30 annual flow of greater than 0.5 cubic feet per second, and (iii)
31 which has an estimated 7-day, 10-year low flow of greater than
32 0.1 cubic feet per second; provided, that if the water body has
33 been designated as described in (i), it shall be presumed to be a
34 'perennial water body', subject to rebuttal by the applicant upon
35 a showing that either of the criteria set forth in (ii) and (iii)
36 are not satisfied. 'Perennial water body' shall not include man
37 made drainage features or conveyances.

38 (1) 'Type I wetland' means that portion of any wetland
39 contiguous to and located within 50 feet of the
40 mean high water line or normal water level of any
41 perennial water body.

42 (2) 'Type II wetland' means that portion of any wetland
43 contiguous to and located greater than 50 feet but

1 less than 100 feet from the mean high water line or
2 normal water level of any perennial water body.

3 (3) 'Type III wetland' means that portion of any
4 wetland contiguous to and located greater than 100
5 feet but less than 150 feet from the mean high
6 water line or normal water level of any perennial
7 water body.

8 (4) 'Type IV wetland' means any wetland not classified
9 as a Type I, II or III wetland.

10 (c5) Commission Criteria Regarding Issuance of Certification
11 -- The Commission shall adopt rules governing the criteria for
12 issuance of a certification pursuant to 33 U.S.C. § 1341 for
13 federal permits under 33 U.S.C. § 1344. For the purpose of this
14 Section, the term 'compensatory mitigation' shall mean
15 replacement of wetland function lost as a result of the
16 conversion of wetlands pursuant to a proposed permit under 33
17 U.S.C. §1344, and such replacement shall be of functionally
18 similar soil/hydrologic regime, but that aquatic life shall be
19 allowed to develop naturally over time. Compensatory mitigation
20 includes restoration of areas which had previously been converted
21 from wetlands, creation of wetlands, enhancement of degraded
22 wetlands to restore wetland function, and preservation of areas
23 providing wetland function. Compensatory mitigation also
24 includes contributions in cash or in kind to the Wetlands
25 Restoration Program established in G.S. 143-214.8, or to
26 comparable mitigation banks operated privately or by federal or
27 local governments. For the purpose of this subsection,
28 compensatory mitigation shall be calculated on an acre-to-acre
29 basis, acres of wetlands restored, created or enhanced to
30 wetlands converted under the proposed permit under 33 U.S.C.
31 §1344, except that for compensatory mitigation accomplished by
32 preservation, the compensatory mitigation shall be calculated on
33 the basis of one acre converted under the proposed permit under
34 33 U.S.C. §1344 to two acres of wetlands preserved. The rules
35 adopted pursuant to this subsection shall provide:

36 (1) That the Commission shall unconditionally grant the
37 certification for any application for an activity
38 that will cause the loss of less than one acre of
39 any wetlands;

40 (2) That the Commission shall unconditionally grant the
41 certification for any application for an activity
42 that will cause the loss of greater than three
43 acres of wetlands if it determines that the federal

- 1 permit issued under 33 U.S.C. §1344 will comply
2 with the provisions listed in 33 U.S.C. §1341(a);
3 (3) That the Commission shall grant certification for
4 any application for an activity that will cause the
5 loss of between one and three acres of wetlands if
6 it determines that the federal permit issued under
7 33 U.S.C. §1344 will comply with the provisions
8 listed in 33 U.S.C. § 1341(a), if the requirements
9 in this subdivision are met:
- 10 a. For a Type I wetland: the applicant agrees to
11 provide compensatory mitigation for loss of
12 Type I wetlands resulting from the activity
13 permitted under 33 U.S.C. §1344 on a three-to-
14 one ratio, acres mitigated to acres of Type I
15 wetlands lost;
- 16 b. For a Type II wetland: the applicant agrees to
17 provide compensatory mitigation for loss of
18 Type II wetlands resulting from the activity
19 permitted under 33 U.S.C. §1344 on a two-to-
20 one ratio, acres mitigated to acres of Type II
21 wetlands lost;
- 22 c. For a Type III wetland: the applicant agrees
23 to provide compensatory mitigation for loss of
24 Type III wetland resulting from the activity
25 permitted under 33 U.S.C. §1344 on a one-to-
26 one ratio, acres mitigated to acres of Type
27 III wetlands lost, if the Commission finds
28 that the loss of wetlands caused by the
29 activity permitted under 33 U.S.C. §1344 will
30 likely result in a violation of water quality
31 standards.
- 32 d. For a Type IV wetland: the applicant agrees to
33 provide compensatory mitigation for loss of
34 Type IV wetlands resulting from the activity
35 permitted under 33 U.S.C. §1344 on a one-to-
36 one ratio, acres mitigated to acres of Type IV
37 wetlands lost, if the Commission can
38 demonstrate that the loss of wetlands caused
39 by the activity permitted under 33 U.S.C.
40 §1344 will result in a violation of water
41 quality standards;
- 42 (4) The Commission shall unconditionally grant
43 certification for any project that involves dredge
44 or fill activities conducted in any wetlands that:

1 (i) are inadvertently created on or after October
2 18, 1972 through any construction, mining,
3 agricultural, silvicultural, or other activities,
4 and (ii) are subject to the provisions of 33 U.S.C.
5 § 1344.

6 (c6) Commission Rules Regarding Wetlands Classifications. --
7 It is the intent of the General Assembly that projects involving
8 the deposit of dredged or fill material in wetlands which require
9 permits under 33 U.S.C. §1344 shall be certified provided that
10 the provisions of 33 U.S.C. §1341(a) are met. The Commission
11 shall not adopt a separate classification and standards for
12 wetlands under G.S. 143-214.1, except as the classifications and
13 standards are supplementary and pertain to the maintenance of
14 water quality standards in the surface streams downstream of the
15 wetlands and to which the wetlands are tributary.

16 (c7) Coordination with Wetlands Restoration Program. --
17 Applicants required under subsection (c3) to provide compensatory
18 mitigation may satisfy such requirement by donation to the
19 Wetlands Restoration Program established pursuant to G.S. 143-
20 214.8, provided that the Department shall not require
21 participation in the Wetlands Restoration Program for this
22 purpose. Nothing in this subsection nor G.S. 143-214.8 shall
23 prohibit the use or establishment of private mitigation banks or
24 other means of satisfying the requirements for compensatory
25 mitigation established in this subsection."

26 Sec. 3. Article 21 of Chapter 143 of the General
27 Statues is amended by adding the following new sections to read:
28 "§ 143-214.8. Wetlands Restoration Program: established.

29 The Wetlands Restoration Program is established within the
30 Department of Environment, Health, and Natural Resources. The
31 Wetlands Restoration Program shall be developed by the Department
32 as a non-regulatory statewide wetlands restoration program for
33 the acquisition, restoration, enhancement, and creation of
34 wetland and riparian resources that contribute to the protection
35 and improvement of water quality, flood prevention, fisheries,
36 wildlife habitat, and recreational opportunities. The Wetlands
37 Restoration Program shall consist of the following components:

- 38 (1) Restoration of wetlands.
- 39 (2) Development of restoration plans.
- 40 (3) Landowner contact and land acquisition.
- 41 (4) Evaluation of site plans and engineering studies.
- 42 (5) Oversight of construction and monitoring of
43 restoration sites.
- 44 (6) Land ownership and management.

1 (7) Mapping, site identification, and assessment of
2 wetlands functions.

3 "§ 143-214.9. Wetlands Restoration Program: purposes.

4 The purposes of the program are as follows:

5 (1) To restore wetlands functions and values across the
6 State to replace critical functions lost through
7 historic wetlands conversion and through current
8 and future permitted impacts. It is not the policy
9 of the State to destroy upland habitats unless it
10 would further the purposes of the Wetlands
11 Restoration Program.

12 (2) To provide a consistent and simplified approach to
13 address mitigation requirements associated with
14 permits or authorizations issued by the United
15 States Army Corps of Engineers under 33 U.S.C. §
16 1344.

17 (3) To streamline the wetlands permitting process,
18 minimize delays in permit decisions, and decrease
19 the burden of permit applicants of planning and
20 performing compensatory mitigation for wetlands
21 losses.

22 (4) To increase the ecological effectiveness of
23 compensatory mitigation.

24 (5) To achieve a net increase in wetland acres,
25 functions, and values in each major river basin.

26 (6) To foster a comprehensive approach to environmental
27 protection.

28 "§ 143-214.10. Wetlands Restoration Program: development and
29 implementation of basin wide restoration plans.

30 Develop basin wide restoration plans. -- The Department shall
31 develop a basin wide plans for wetlands and riparian area
32 restoration with the goal of protecting and enhancing water
33 quality, flood prevention, fisheries, wildlife habitat, and
34 recreational opportunities within each of the 17 major river
35 basins in the State. Beginning July 1, 1997, the Department
36 shall develop and begin implementing a basin wide restoration
37 plan for each of the 17 river basins in the State in accordance
38 with the basin wide schedule currently established by the
39 Division of Environmental Management.

40 "§ 143-214.11. Wetlands Restoration Program: compensatory
41 mitigation.

42 (a) Definition -- For purposes of this section the term
43 'compensatory mitigation' means the restoration, creation,
44 enhancement, or preservation of wetlands or other areas required

1 as a condition of a Section 404 permit issued by the U.S. Army
2 Corps of Engineers.

3 (b) Department of Environment, Health, and Natural Resources to
4 coordinate compensatory mitigation. -- All compensatory
5 mitigation required by permits or authorizations issued by the
6 United States Army Corps of Engineers under 33 U.S.C. §1344
7 shall be coordinated by the Department consistent with the basin
8 wide plans for wetlands restoration and rules developed by the
9 Environmental Management Commission. All compensatory wetlands
10 mitigation whether performed by the Department or by permit
11 applicants, shall be consistent with the basin wide restoration
12 plans.

13 (c) Mitigation emphasis on replacing ecological function within
14 same river basin. -- The emphasis of mitigation is on replacing
15 functions within the same river basin unless it is demonstrated
16 that restoration of other areas would be more beneficial to the
17 overall purposes of the Wetlands Restoration Program.

18 (d) Compensatory mitigation options available to applicant. --
19 An applicant may satisfy compensatory wetlands mitigation
20 requirements by the following actions, if those actions are
21 consistent with the basin wide restoration plans and also meet or
22 exceed the requirements of the United State Army Corps of
23 Engineers:

- 24 (1) Payment of a fee established by the Department into
25 the Wetlands Restoration Fund established in G.S.
26 143-214.6.
- 27 (2) Donation of land to the Wetlands Restoration
28 Program or to other public or private non-profit
29 conservation organizations as approved by the
30 Department.
- 31 (3) Participation in a private wetlands mitigation
32 bank.
- 33 (4) Preparing and implementing a wetland restoration
34 plan.

35 (e) Payment schedule.--A standardized schedule of per acre
36 payment amounts shall be established by the Environmental
37 Management Commission. The monetary payment shall be based on
38 the ecological functions and values of wetlands permitted to be
39 lost and on the cost of restoring or creating wetlands capable of
40 performing the same or similar functions, including directly
41 related costs of wetland restoration planning, long term
42 monitoring and maintenance of restored areas.

43 "§143-214.12. Wetlands Restoration Program: Wetlands
44 Restoration Fund.

1 (a) Wetlands Restoration Fund. -- The Wetlands Restoration
2 Fund is established as a non-reverting fund within the
3 Department. The Fund shall be treated as a special trust fund
4 and shall be credited with interest by the State Treasurer
5 pursuant to G.S. 147-69.2 and G.S. 147-69.3. The Wetlands
6 Restoration Fund shall provide a repository for monetary
7 contributions and donations or dedications of interests in real
8 property to promote projects for the restoration, enhancement,
9 preservation, or creation of wetlands and riparian areas and for
10 payments made in lieu of compensatory mitigation as described in
11 subsection (b) of this section. No funds shall be expended from
12 this Fund for any purpose other than those directly contributing
13 to the acquisition, enhancement, restoration, or creation of
14 wetlands and riparian areas in accordance with the basin wide
15 plan as described in subsection (a) of this section.

16 (b) Authorized methods of payment.-- A person subject to a
17 permit or authorization issued by the United States Army Corps of
18 Engineers under 33 U.S.C. § 1344, may contribute to the wetlands
19 Wetlands Restoration Program, to comply with conditions to, or
20 terms of, the permit or authorization, if participation in the
21 wetlands restoration program will meet the mitigation
22 requirements of the United States Army Corps of Engineers. The
23 Department shall, at the discretion of the applicant, accept
24 payment into the Wetlands Restoration Fund in lieu of other
25 compensatory mitigation requirements of any authorizations issued
26 by the United States Army Corps of Engineers under 33 U.S.C. §
27 1344 if the contributions will meet the mitigation requirements
28 of the United States Army Corps of Engineers. Payment may be
29 made in the form of monetary contributions according to a fee
30 schedule established by the Environmental Management Commission
31 or in the form of donations of real property provided that the
32 property is approved by the Department as a suitable site
33 consistent with the basin wide wetlands restoration plan.

34 §143-214.13. Wetlands Restoration Program: reporting
35 requirement.

36 The Department of Environment, Health, and Natural Resources
37 shall report annually to the Environmental Review Commission
38 regarding its progress in implementing the Wetlands Restoration
39 Program and its use of the the funds in the Wetlands Restoration
40 Fund. The report shall document statewide wetlands losses and
41 gains and compensatory mitigation performed under G.S. 143-214.8
42 through G.S. 143-214.12. The report shall also provide an
43 accounting of receipts and disbursements of the Wetland
44 Restoration Fund and analysis of the per acre cost of wetland

1 restoration. The Department shall also send a copy of its report
2 to the Fiscal Research Division of the General Assembly."

3 Sec. 4. The Department of Environment, Health, and
4 Natural Resources is directed to negotiate and enter into a
5 Memorandum of Agreement with the United States Army Corps of
6 Engineers regarding the restoration, creation, enhancement, and
7 preservation of wetlands and the compensatory mitigation required
8 of permit applicants under 33 U.S.C. §1344. The purpose of the
9 Memorandum of Agreement is to ensure that the State's
10 implementation of the Wetland Restoration Program with regard to
11 mitigation of wetlands satisfies the United States Army Corps of
12 Engineers and that the standards developed by the State to which
13 the State's and other mitigation banks must adhere is acceptable
14 to the Corps for purposes of Section 404 mitigation requirements.

15 Sec. 5. There is appropriated from the General Fund to
16 the Wetlands Restoration Fund in the Department of Environment,
17 Health and Natural Resources, the sum of two million dollars
18 (\$2,000,000) for the 1996-97 fiscal year. These funds shall be
19 used for the Neuse River Basin. It is the intent of the General
20 Assembly that the sum of two million dollars be appropriated to
21 the Wetlands Restoration Fund each fiscal year for the next 16
22 years so that each of the 17 river basins of the State has a two
23 million dollar appropriation dedicated for use in that particular
24 basin.

25 Sec. 6. There is appropriated from the General Fund to
26 the Department of Environment, Health, and Natural Resources, the
27 sum of seven hundred fifty thousand dollars (\$750,000) in
28 recurring funds for the 1996-97 fiscal year to support ten staff
29 positions and for administrative and other expenses to implement
30 to the Wetlands Restoration Program.

31 Sec. 7. This act becomes effective July 1, 1996.

**LEGISLATIVE PROPOSAL
EXPLANATION
95-LH-219F**

A BILL TO BE ENTITLED

AN ACT TO DIRECT THE APPROPRIATE STATE DEPARTMENTS HOW TO EXERCISE THE STATE'S AUTHORITY UNDER THE CLEAN WATER ACT, TO ESTABLISH THE WETLANDS RESTORATION PROGRAM AND FUND, AND TO APPROPRIATE FUNDS TO IMPLEMENT THE PROGRAM AS RECOMMENDED BY THE LEGISLATIVE STUDY COMMISSION ON WETLANDS.

Background Information on the interrelationship of federal and State law regarding Section 404 permits.

(This information was taken from Wetlands Protection: A Catalog for Wetland Managers. The manual is compiled and published by the North Carolina Department of Environment, Health, and Natural Resources, Division of Environmental Management, Water Quality Section.)

The federal Clean Water Act of 1972 created the Section 404 permit program which is the primary wetland protection program in the United States. The U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) administer the 404 program at the federal level. The Corps has the primary enforcement responsibilities for the program. EPA has the responsibility to review and comment on all 404 permits.

The Corps issues two types of 404 permits: individual and general (nationwide or regional). Based on the application, the Corps determines the types of permit needed.

An individual permit is required for any project not authorized by a general permit or exempt from general permit requirements that involves a discharge of excavation or fill material into wetlands of the United States. General permits are issued by the Corps for wetland activities that are similar in nature and cause only minimal individual and cumulative environmental impacts. These general permits allow certain activities to be authorized more quickly than if the project was evaluated under the individual permit process. General permits are issued on a nationwide or regional basis.

Under Section 401 of the federal Clean Water Act, the North Carolina Division of Environmental Management (DEM) must review all federal permits that result in a discharge to State jurisdictional waters, including those permits issued under Section 404 of the Clean Water Act to determine if the proposed activity will violate the State' water quality standards. All 404 permit applicants must apply to DEM for a 401 Water Quality Certification. DEM will issue the certification if water quality standards are protected. Any conditions imposed by the 401 certifications are binding and automatically become conditions of the 404 permit.

Synopsis of Legislative Proposal

Section one of the legislative proposal amends G.S. 143B-282(a)(1) by adding a new paragraph u. The amendment clarifies that the State's authority to certify projects under Section 401 is delegated to the Environmental Management Commission. (The Environmental Management Commission in turn delegates that responsibility to the Division of Environmental Management.)

Section two of the legislative proposal amends G.S. 143-215.3 by adding subsections (c1) through (c7). Section two of the legislative proposal establishes a statutory State 401 certification program and overrides the "wetlands rules" recently adopted by the Environmental Management Commission.

G.S. 143-215.3(c1) authorizes the Environmental Management Commission to require information and data from applicants for 404 permits who are seeking 401 certification.

G.S. 143-215.3(c2) provides that the State may consider only those projects that have applied for a 404 permit. In determining whether an applicant should receive a 401 water quality certification, the Environmental Management Commission is limited to consideration of the criteria established at the federal level. Under subsection (c2) the State is prohibited from adopting criteria that is different from or in addition to the federal criteria. Subsection (c2) provides that the Corps shall determine whether an area should be delineated as a wetland, not DEM. The subsection also allows "blanket" certification and places a time limit of 45 days on consideration

of a certification request received by DEM. If the applicant agrees, the review period may be extended an additional 30 days.

G.S. 143-215.3(c3) provides that the Environmental Management Commission may require compensatory mitigation only for those projects that are not individually evaluated by the Corps. The ratio of compensatory mitigation that may be required is based on the type of wetland that will be affected by the proposed activity. The types of wetlands are set out in G.S. 143-215.3(c4) and the compensatory mitigation allowed with regard to those wetlands is set out in G.S. 143-215.3(c5).

G.S. 143-215.3(c4) sets out the types of wetlands. The classification types are supplemental classifications rather than primary classifications. Coastal wetlands covered under the Coastal Area Management Act remain covered by CAMA and are not included in the wetlands categories. The subsection also defines the term "perennial water body". The definition has the effect of removing wetlands adjacent to intermittent streams from the category of wetlands that receive the highest level of protection.

G.S. 143-215.3(c5) defines compensatory mitigation as the replacement of wetland function lost as a result of the conversion of wetlands allowed under a Section 404 permit. The compensatory mitigation requirement may be satisfied by making either a cash or "in kind" contribution to the Wetlands Restoration Program or to other established federal or private wetlands mitigation banks that are comparable to the Wetlands Restoration Program.

The subsection creates a scheme of mitigation ratios as follows:

No compensatory mitigation may be required for the following projects. Also, all of the projects listed below must automatically receive the State's 401 water quality certification:

- (1) A project that involves dredge or fill activities conducted in any wetlands that :
 - (i) are inadvertently created on or after October 18, 1972, through any construction, mining, agricultural, silvicultural, or other activities, and
 - (ii) is subject to the provisions of Section 404 of the federal Clean

Water Act. These are projects in wetlands that are inadvertently created by human activities

- (2) A project that will cause the loss of more than three acres of wetlands if the project is to be issued a general or nationwide permit by the Corps and also satisfies the criteria of Section 401(a) of the federal Clean Water Act.

Compensatory mitigation is required under subdivision (3) for a project that involves between 1 and 3 acres of wetlands on a sliding scale, from 3 to 1 to 1. The scale varies depending on the type of wetland that the project affects.

G.S. 143-215.3(c6) prohibits DEM from establishing separate wetlands classifications and standards. Under this legislative proposal wetlands are assigned a supplemental classification based on the classification of the surface waters to which the wetlands are tributary.

G.S. 143-215.3(c7) provides that private mitigation banks or other means may be used to satisfy the compensatory mitigation requirements.

Section three of the bill amends Article 21 of Chapter 143 of the General Statutes to create the Wetlands Restoration Program and Wetlands Restoration Fund by adding as new sections to that Article G.S. 143-214.8 through G.S. 143-214.13.

G.S. 143-214.8 creates the Wetlands Restoration Program within the Department of Environment, Health, and Natural Resources. The Program consists of seven components as outlined in that statute.

G.S. 143-214.9 sets out the purposes of the Program as indicated.

G.S. 143-214.10 provides that beginning July 1, 1997, the Department of Environment, Health, and Natural Resources shall develop and begin implementing basin wide wetlands plans for each of the State's 17 river basins. Those wetlands plans are to be integrated into the State's river basin plans in accordance with the basin wide schedule already set by the Division of

Environmental Management. The schedule is based on a five year plan beginning in July 1, 1997.

G.S. 143-214.11 addresses compensatory mitigation. The term "compensatory mitigation" is defined as wetland restoration, creation, enhancement, or preservation that is required as a condition of Section 404 permit issued by the U.S. Army Corps of Engineers. All compensatory mitigation efforts must be coordinated by the Department and must also be consistent with the basin wide restoration plans that are developed by DEHNR. When mitigation is engaged in as a result of the diminished value or loss of a wetland the mitigation effort must occur within the same basin as the wetland, unless it is demonstrated that the restoration of other areas would be more environmentally beneficial.

The statute lists the compensatory mitigation options available to an applicant. Those options must be consistent with the basin wide plans and must also meet the requirements of the United States Army Corps of Engineers. The list of options includes payment of money into the Wetlands Restoration Fund, donation of land to the Wetlands Restoration Program, participation in a private wetlands mitigation bank, or the applicant may prepare and implement the applicant's own wetland restoration plan subject to the standards and conditions set by the Department's basin wide plans and the Army Corps of Engineers.

The Environmental Management Commission must establish a payment schedule for the first option. Items to be considered in establishing the payment schedule are acreage, ecological functions, and directly related costs of wetland restoration planning, long term monitoring and maintenance of restored areas.

G.S. 143-214.12 creates the Wetlands Restoration Fund. Both monetary and real property may be "paid" into the Wetlands Restoration Fund. Expenditures from the fund are limited to those that directly contribute to the acquisition, enhancement, restoration, or creation of wetlands and riparian areas in accordance with the basin wide plan.

G.S. 143-214.13 requires the Department of Environment, Health, and Natural Resources to report annually to the Environmental Review Commission and to provide a copy of the report to the

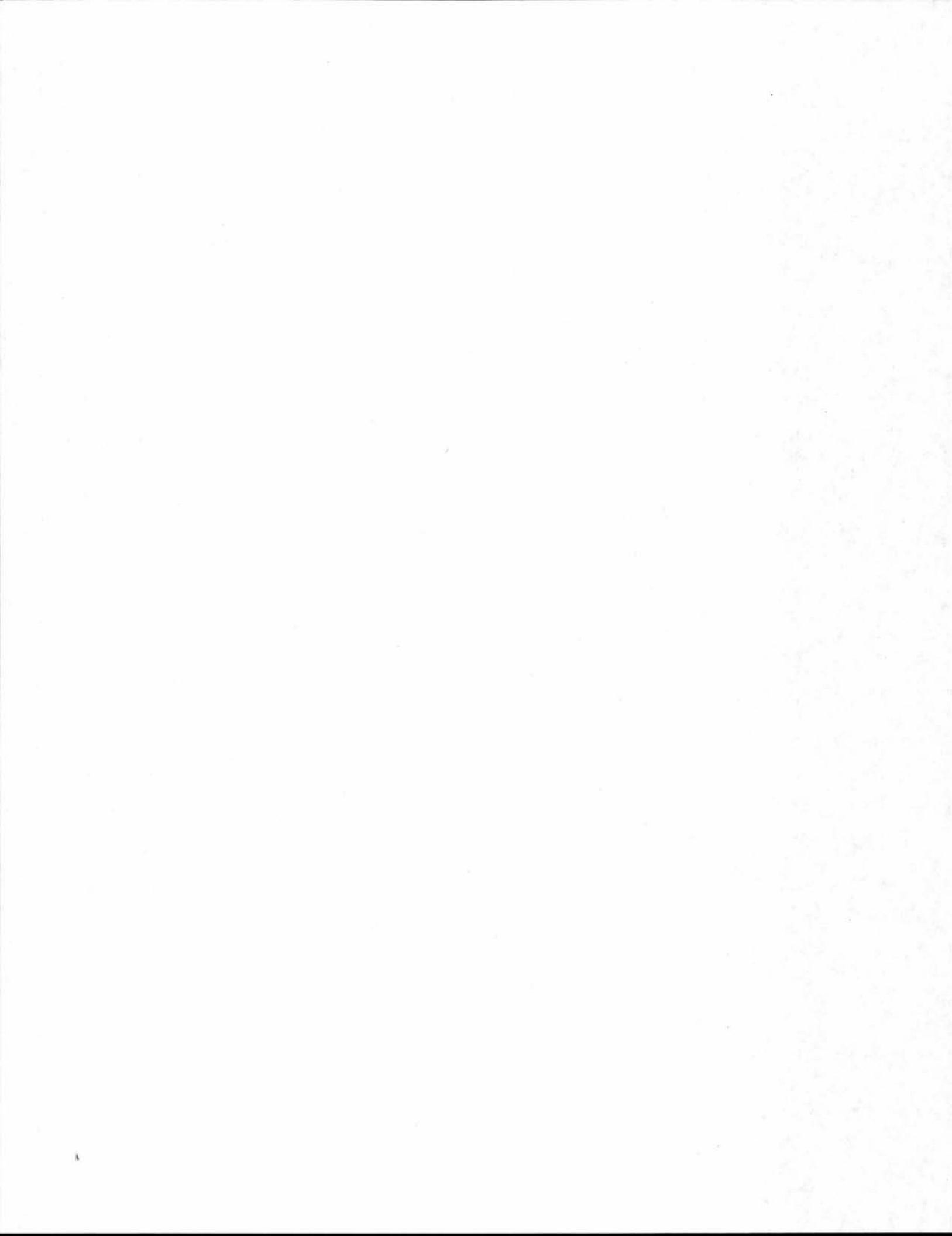
Fiscal Research Division. A list of items to be included in the report is also outlined in the provision.

Section four of the bill directs the Department of Environment, Health, and Natural Resources to negotiate and enter into a Memorandum of Agreement with the United States Army Corps of Engineer. The purpose of the Memorandum of Agreement is to ensure that the mitigation plans developed by the State as part of the restoration program will also satisfy the Corps of Engineers with regard to federal compensatory mitigation requirements.

Sections five and six of the bill are appropriations.

Section seven of the bill is the effective date.

APPENDIX B



CHAPTER 542
HOUSE BILL 898

AN ACT TO AUTHORIZE STUDIES BY THE LEGISLATIVE RESEARCH COMMISSION, TO CREATE AND CONTINUE VARIOUS COMMISSIONS, TO DIRECT STATE AGENCIES AND LEGISLATIVE OVERSIGHT COMMITTEES AND COMMISSIONS TO STUDY SPECIFIED ISSUES, TO MAKE VARIOUS STATUTORY CHANGES, AND TO MAKE TECHNICAL CORRECTIONS TO CHAPTER 507 OF THE 1995 SESSION LAWS.

PART I.-----TITLE

Section 1. This act shall be known as "The Studies Act of 1995".

...
PART XXII.-----LEGISLATIVE STUDY COMMISSION ON WETLANDS
(S.B. 824 - Hoyle; H.B. 886 - Nichols)

Sec. 22.1. (a) There is established the Legislative Study Commission on Wetlands. The Commission shall consist of 16 members appointed as follows:

- (1) Four members of the House of Representatives appointed by the Speaker of the House of Representatives;
- (2) Four Senators appointed by the President Pro Tempore of the Senate;
- (3) Two environmentalists, one appointed by the Speaker of the House of Representatives and one appointed by the President Pro Tempore of the Senate;
- (4) Four persons representing the business community, two appointed by the Speaker of the House of Representatives and two appointed by the President Pro Tempore of the Senate;
- (5) One person representing the commercial fishing industry appointed by the President Pro Tempore of the Senate;
- (6) One scientist appointed by the Speaker of the House of Representatives.

(b) The Speaker of the House of Representatives shall designate one Representative as cochair and the President Pro Tempore of the Senate shall designate one Senator as cochair.

(c) The Commission shall study the current wetlands regulatory program including the need to develop a statewide wetlands restoration and mitigation program and mitigation bank. In making its recommendations, the Commission shall balance the need to provide effective rulemaking to protect wetlands with the need to encourage real estate and commercial development of property to enhance the State's economy. This evaluation shall include a review of current wetlands rules and regulations and an assessment of any

necessary changes that should be made in exchange for participation in a statewide mitigation bank. The Commission may include in its recommendations, legislation to streamline the regulatory process, mitigation ratios and exemptions from mitigation, a coordinated program for wetlands restoration and enhancement, a Wetlands Mitigation Bank and Restoration Fund, funding for the mitigation bank, and any other issue relating to wetlands.

(d) The Commission, while in the discharge of official duties, may exercise all the powers provided for under the provisions of G.S. 120-19 and G.S. 120-19.1 through G.S. 120-19.4. The Commission may meet at any time upon the joint call of the cochairs. The Commission may meet in the Legislative Building or the Legislative Office Building.

(e) Members of the Commission shall receive subsistence and travel expenses at the rates set forth in G.S. 120-3.1 or G.S. 138-5, as appropriate.

(f) The Commission may contract for professional, clerical, or consultant services as provided by G.S. 120-32.02. The Legislative Services Commission, through the Legislative Administrative Officer, shall assign professional staff to assist in the work of the Commission. The House of Representatives' and the Senate's Supervisors of Clerks shall assign clerical staff to the Commission, upon the direction of the Legislative Services Commission. The expenses relating to clerical employees shall be borne by the Commission.

(g) When a vacancy occurs in the membership of the Commission, the vacancy shall be filled by the same appointing officer who made the initial appointment.

(h) The Commission shall make its recommendations and final report to the 1995 General Assembly, Regular Session 1996. Upon filing its report, the Commission shall terminate.

...
PART XXVI.-----EFFECTIVE DATE

Sec. 26.1. This act is effective upon ratification.

In the General Assembly read three times and ratified this the 29th day of July, 1995.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 1995

H

2

HOUSE BILL 886*
Committee Substitute Favorable 6/14/95

Short Title: State Auth./Fed. Clean Water Act.

(Public)

Sponsors:

Referred to:

April 12, 1995

1 A BILL TO BE ENTITLED
2 AN ACT TO DIRECT THE APPROPRIATE STATE DEPARTMENTS HOW TO
3 EXERCISE THE STATE'S AUTHORITY UNDER THE CLEAN WATER ACT
4 AND TO ESTABLISH THE WETLANDS MITIGATION BANK AND
5 WETLANDS RESTORATION FUND.
6 The General Assembly of North Carolina enacts:
7 Section 1. G.S. 143B-282(a)(1) reads as rewritten:
8 "(a) There is hereby created the Environmental Management Commission of the
9 Department of Environment, Health, and Natural Resources with the power and duty
10 to promulgate rules to be followed in the protection, preservation, and enhancement
11 of the water and air resources of the State.
12 (1) Within the limitations of G.S. 143-215.9 concerning industrial
13 health and safety, the Environmental Management Commission
14 shall have the following powers and duties:
15 a. To grant a permit or temporary permit, to modify or revoke
16 a permit, and to refuse to grant permits pursuant to G.S.
17 143-215.1 and G.S. 143-215.108 with regard to controlling
18 sources of air and water pollution;
19 b. To issue a special order pursuant to G.S. 143-215.2(b) and
20 G.S. 143-215.110 to any person whom the Commission finds
21 responsible for causing or contributing to any pollution of
22 water within such watershed or pollution of the air within
23 the area for which standards have been established;

- 1 c. To conduct and direct that investigations be conducted
2 pursuant to G.S. 143-215.3 and G.S. 143-215.108(b)(5);
- 3 d. To conduct public hearings, institute actions in superior
4 court, and agree upon or enter into settlements, all pursuant
5 to G.S. 143-215.3;
- 6 e. To direct the investigation of any killing of fish and wildlife
7 pursuant to G.S. 143-215.3;
- 8 f. To consult with any person proposing to construct, install,
9 or acquire an air or water pollution source pursuant to G.S.
10 143-215.3 and G.S. 143-215.111;
- 11 g. To encourage local government units to handle air pollution
12 problems and to provide technical and consultative
13 assistance pursuant to G.S. 143-215.3 and G.S. 143-215.112;
- 14 h. To review and have general oversight and supervision over
15 local air pollution control programs pursuant to G.S. 143-
16 215.3 and G.S. 143-215.112;
- 17 i. To declare an emergency when it finds a generalized
18 dangerous condition of water or air pollution pursuant to
19 G.S. 143-215.3;
- 20 j. To render advice and assistance to local government
21 regarding floodways pursuant to G.S. 143-215.56;
- 22 k. To declare and delineate and modify capacity use areas
23 pursuant to G.S. 143-215.13;
- 24 l. To grant permits for water use within capacity use areas
25 pursuant to G.S. 143-215.15;
- 26 m. To direct that investigations be conducted when necessary to
27 carry out duties regarding capacity use areas pursuant to
28 G.S. 143-215.19;
- 29 n. To approve, disapprove and approve subject to conditions
30 all applications for dam construction pursuant to G.S. 143-
31 215.28; to require construction progress reports pursuant to
32 G.S. 143-215.29;
- 33 o. To halt dam construction pursuant to G.S. 143-215.29;
- 34 p. To grant final approval of dam construction work pursuant
35 to G.S. 143-215.30;
- 36 q. To have jurisdiction and supervision over the maintenance
37 and operation of dams pursuant to G.S. 143-215.31;
- 38 r. To direct the inspection of dams pursuant to G.S. 143-
39 215.32;
- 40 s. To modify or revoke any final action previously taken by
41 the Commission pursuant to G.S. 143-214.1 and G.S. 143-
42 215.107; ~~and~~
- 43 t. To have jurisdiction and supervision over oil pollution
44 pursuant to Article 21A of ~~Chapter 143~~; Chapter 143; and

1 u. To administer the State's authority under 33 U.S.C. § 1341
2 of the federal Clean Water Act pursuant to G.S. 143-
3 215.3(c1)-(c3) and G.S. 143-215.8 and to adopt rules
4 implementing those sections."

5 Sec. 2. G.S. 143-215.3 is amended by adding the following subsections to
6 read:

7 "(c1) General Exercise of Powers Granted Under Section 401 of the Clean Water
8 Act. -- Except as provided in subsection (c3) of this section, in determining whether
9 to certify a federally issued permit or activity pursuant to 33 U.S.C. § 1341, the
10 Commission shall consider only those provisions listed in 33 U.S.C. § 1341(a). The
11 Commission shall not duplicate the site specific application of any guidelines
12 employed by the United States Army Corps of Engineers in evaluating permit
13 applications under 33 U.S.C. § 1344 and applicable federal regulations.

14 (c2) Classification of Wetlands. -- Classifications of wetlands set forth in
15 subdivisions (1) through (3) of this subsection shall apply to all wetlands except
16 coastal wetlands defined in G.S. 113-229(n)(3) or wetlands within Areas of
17 Environmental Concern established by the Coastal Resources Commission pursuant
18 to G.S. 113A-113.

19 (1) 'Class I wetland' means any wetland located within 150 feet of the
20 mean high waterline or normal water level of any perennial or
21 intermittent water body as designated on the most recently
22 published version of the United States Geological Survey 1:24,000
23 (7.5 minute) scale topographic map.

24 (2) 'Class II wetland' means any wetland located greater than 150 feet
25 but less than 1,000 feet of the mean high waterline or normal water
26 level of any perennial or intermittent water body as designated on
27 the most recently published version of the United States Geological
28 Survey 1:24,000 (7.5 minute) scale topographic map.

29 (3) 'Class III wetland' means any wetland not classified as a Class I or
30 II wetland.

31 (c3) Exercise of Authority Granted Under Federal Law With Regard to Wetlands.
32 -- The Commission shall exercise its authority with regard to the water quality
33 certification for wetlands except coastal wetlands defined in G.S. 113-229(n)(3) or
34 wetlands within Areas of Environmental Concern established by the Coastal
35 Resources Commission pursuant to G.S. 113A-113 as follows:

36 (1) The Commission shall grant the water quality certification for any
37 project that will impact less than one acre of any wetlands. The
38 Commission shall be notified of any project that impacts between
39 one-third and one acre of wetlands in accordance with procedures
40 developed by the Commission.

41 (2) The Commission shall grant the water quality certification for any
42 project that will impact between one and three acres of wetlands if
43 it determines that the project will comply with the provisions listed

1 in 33 U.S.C. § 1341(a) and if the requirements in this subdivision
2 have been met:

3 a. A Class I wetland requires minimization of impacts to
4 wetlands for the protection of water quality and requires
5 that the applicant agree to provide compensatory mitigation
6 for any loss of wetlands resulting from the proposed project.
7 In conducting the minimization analysis required under this
8 sub-subdivision, the Commission may consider: (i) the
9 spatial and dimensional requirements of the project; (ii) the
10 location of any existing structural or natural features that
11 may dictate the placement or configuration of the proposed
12 project; (iii) the purpose of the project and how the purpose
13 relates to placement, configuration, or density; and (iv) the
14 ability of wetlands to continue to support the existing uses
15 after project completion. Mitigation shall be conducted
16 based on the following ratios:

17 1. Five-to-one ratio, acres mitigated to acres lost for any
18 wetlands located within 150 feet of the mean high
19 waterline or normal water level of a perennial water
20 body.

21 2. Three-to-one ratio, acres mitigated to acres lost for
22 any wetlands located within 150 feet of the mean high
23 waterline or normal water level of an intermittent
24 water body.

25 b. A Class II wetland requires that the applicant agree to
26 provide compensatory mitigation for any loss of wetlands
27 resulting from the proposed project based on the following
28 ratios:

29 1. Three-to-one ratio, acres mitigated to acres lost for
30 any wetlands located greater than 150 feet and less
31 than 1,000 feet from the mean high waterline or
32 normal water level of a perennial water body.

33 2. Two-to-one ratio, acres mitigated to acres lost for any
34 wetlands located greater than 150 feet and less than
35 1,000 feet from the mean high waterline or normal
36 water level of an intermittent water body.

37 c. A Class III wetland may require compensatory mitigation for
38 any loss of wetlands resulting from the proposed project on
39 a one-to-one ratio, acres mitigated to acres lost, if the
40 Commission finds that the loss of wetlands will result in a
41 violation of any water quality standards.

42 (3) The Commission shall grant the water quality certification for any
43 project that impacts more than three acres of wetlands if it

1 determines that the project will comply with the provisions listed
2 in 33 U.S.C. § 1341(a).

- 3 (4) The Commission shall grant water quality certification for any
4 project that involves dredge or fill activities conducted in any
5 wetlands that: (i) are inadvertently created on or after January 1,
6 1990, through any construction, mining, or other commercial
7 activities, and (ii) are subject to the provisions of 33 U.S.C. § 1344.
8 The applicant shall provide information to the Commission
9 documenting the date and nature of the activity that resulted in the
10 inadvertent creation of wetlands."

11 Sec. 3. Article 21 of Chapter 143 of the General Statutes is amended by
12 adding a new section to read:

13 "**§ 143-214.8. Wetlands Mitigation Bank.**

14 (a) Policy, Purpose, and Intent. -- The Department shall develop a Wetlands
15 restoration, enhancement, and protection program to promote consistency among
16 projects that utilize the assets of the Wetlands Mitigation Banking Program under
17 subsection (b) of this section by governmental agencies or other persons. The
18 program shall be a statewide program for the acquisition, restoration, enhancement,
19 and creation of wetland and riparian resources that contribute to the protection and
20 improvement of water quality, flood prevention, fisheries, wildlife habitat, and
21 recreational opportunities. The purpose of the program is to restore wetlands
22 functions and values across the State to replace critical functions lost through
23 wetlands conversion and through current and future permitted impacts. The
24 implementation of this program shall include a statewide plan for wetlands
25 restoration to be developed by the Department within the context of the basinwide
26 planning initiatives, with the goal of protecting and enhancing water quality, flood
27 prevention, fisheries, wildlife habitat, and recreational opportunities within each of
28 the 17 major river basins in the State. Further, it is the intent that this program be
29 implemented to streamline the wetlands permitting process, minimize delays in
30 permit decisions, decrease the burden of permit applicants of planning and
31 performing compensatory mitigation for wetlands losses, and increase the ecological
32 effectiveness of compensatory mitigations.

33 (b) Wetlands Mitigation Banking Program. -- There is established within the
34 Department a Wetlands Mitigation Bank. The Wetlands Mitigation Bank is part of
35 the Wetlands Restoration, Enhancement, and Protection Program. It is the intent of
36 this section that all wetlands mitigation shall be coordinated by the Department
37 consistent with the statewide plan for wetlands restoration and rules developed by the
38 Environmental Management Commission unless specifically exempted by the
39 Secretary of the Department. The purpose of the Wetlands Mitigation Bank is to
40 provide a repository for monetary contributions and donations or dedications of
41 interests in real property to promote projects for the restoration, enhancement,
42 preservation, or creation of wetlands. The emphasis of mitigation is on replacing
43 functions within the same river basin unless it has been demonstrated that restoration
44 of other areas could be more environmentally beneficial. Persons subject to permits

1 or authorizations issued by the United States Army Corps of Engineers under 33
2 U.S.C. § 1344, may contribute to the Wetlands Mitigation Bank, on a voluntary basis,
3 to comply with conditions to, or terms of, the permits or authorizations, provided that
4 participation in the Wetlands Mitigation Bank will meet the requirements of
5 mitigation by the United States Army Corps of Engineers.

6 (c) Wetlands Restoration Fund. -- The Wetlands Restoration Fund is established
7 as a nonreverting fund within the Department. The Fund shall be treated as a special
8 trust fund and shall be credited with interest by the State Treasurer pursuant to G.S.
9 147-69.2 and G.S. 147-69.3. The Department shall, at the discretion of the applicant,
10 accept monetary payment into the Wetlands Restoration Fund in accordance with any
11 authorizations established by the United States Army Corps of Engineers under 33
12 U.S.C. § 1344, provided that participation in the Wetlands Mitigation Bank will meet
13 the requirements of mitigation by the United States Army Corps of Engineers. The
14 monetary payment shall be based on the per acre cost of restoring or creating a
15 wetlands capable of performing the same or similar functions. Receipts collected
16 under this section shall be credited to the Fund and shall be used for wetlands and
17 riparian area acquisition, restoration, and mitigation. No funds shall be expended
18 from this Fund for any purpose other than those directly contributing to the
19 acquisition, enhancement, restoration, or creation of wetlands."

20 Sec. 4. There is appropriated from the Highway Fund to the Wetlands
21 Restoration Fund in the Department of Environment, Health, and Natural Resources,
22 the sum of one million dollars (\$1,000,000) for the 1995-96 fiscal year for the
23 Wetlands Mitigation Bank created under Section 3 of this act.

24 Sec. 5. There is appropriated from the General Fund to the Wetlands
25 Restoration Fund in the Department of Environment, Health, and Natural Resources,
26 the sum of two million dollars (\$2,000,000) in recurring funds for the 1995-96 fiscal
27 year and the sum of two million dollars (\$2,000,000) in recurring funds for the 1996-
28 97 fiscal year.

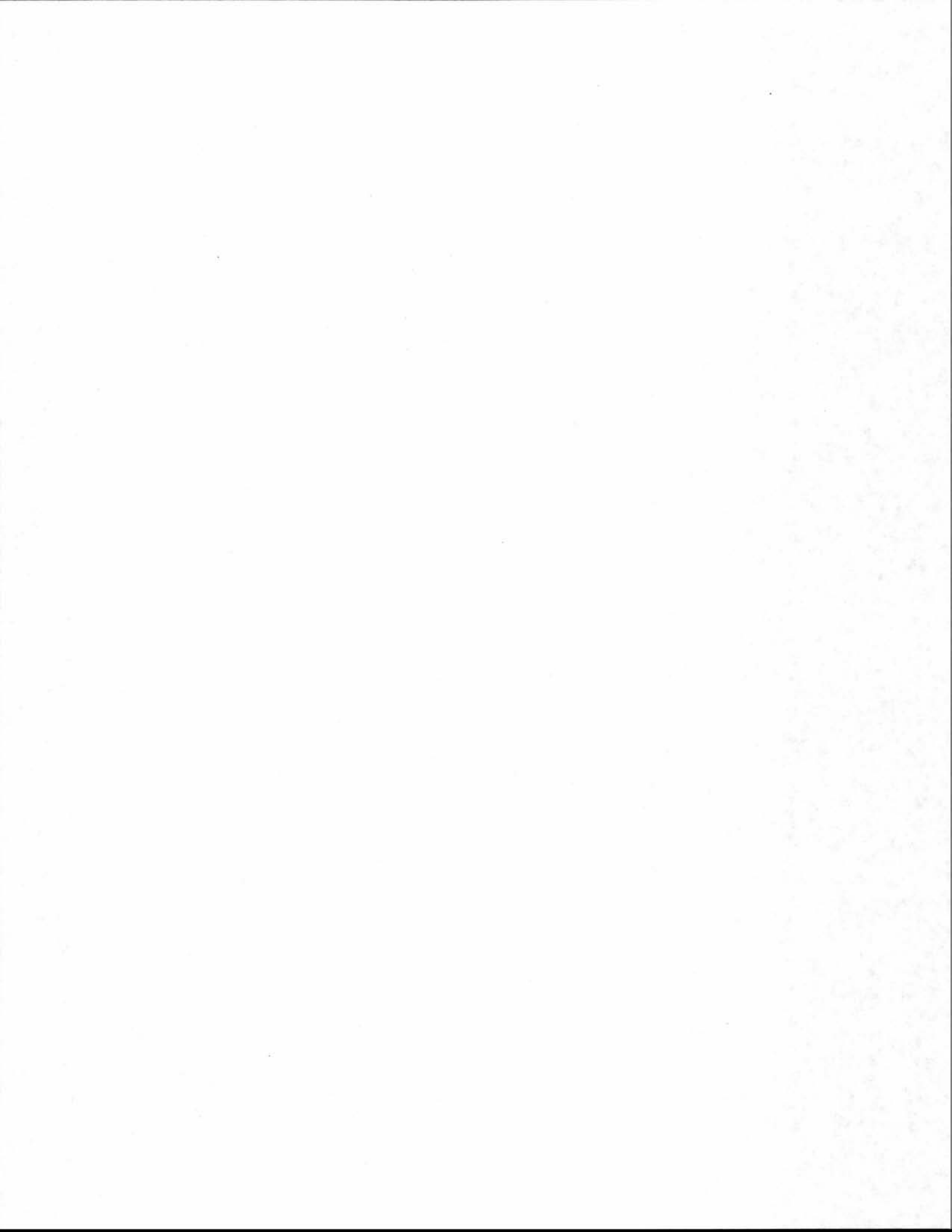
29 Sec. 6. There is appropriated from the General Fund to the Department
30 of Environment, Health, and Natural Resources, the sum of five hundred thousand
31 dollars (\$500,000) in recurring funds for the 1995-96 fiscal year and the sum of five
32 hundred thousand dollars (\$500,000) in recurring funds for the 1996-97 fiscal year for
33 administrative and other expenses to implement the Wetlands Restoration,
34 Enhancement, and Protection Program.

35 Sec. 7. The Department shall prepare a biennial report beginning
36 October 1, 1996, to the Environmental Review Commission on the Wetlands
37 Restoration, Enhancement, and Protection Program and the Wetlands Mitigation
38 Bank. The report shall document the wetlands losses and gains and compensatory
39 mitigation under this act.

40 Sec. 8. The Coastal Resources Commission shall study the effect of
41 impacts to wetlands adjacent to saltwater marshes and, if necessary, shall adopt rules
42 to provide adequate protection to those adjacent wetlands.

43 Sec. 9. This act becomes effective October 1, 1995, provided that the
44 Commission shall initiate rule-making proceedings to implement this act upon

1 ratification. The Commission shall adopt rules to implement this act no later than
2 December 31, 1996.



GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1995

S

2

SENATE BILL 824

Agriculture/Environment/Natural Resources Committee Substitute Adopted 6/1/95

Short Title: State Auth./Fed. Clean Water Act.

(Public)

Sponsors:

Referred to: Appropriations

April 25, 1995

- 1 A BILL TO BE ENTITLED
2 AN ACT TO DIRECT THE APPROPRIATE STATE DEPARTMENTS HOW TO
3 EXERCISE THE STATE'S AUTHORITY UNDER THE CLEAN WATER ACT
4 AND TO ESTABLISH THE WETLANDS MITIGATION BANK AND
5 WETLANDS RESTORATION FUND.
6 The General Assembly of North Carolina enacts:
7 Section 1. G.S. 143B-282(a)(1) reads as rewritten:
8 "(a) There is hereby created the Environmental Management Commission of the
9 Department of Environment, Health, and Natural Resources with the power and duty
10 to promulgate rules to be followed in the protection, preservation, and enhancement
11 of the water and air resources of the State.
12 (1) Within the limitations of G.S. 143-215.9 concerning industrial
13 health and safety, the Environmental Management Commission
14 shall have the following powers and duties:
15 a. To grant a permit or temporary permit, to modify or revoke
16 a permit, and to refuse to grant permits pursuant to G.S.
17 143-215.1 and G.S. 143-215.108 with regard to controlling
18 sources of air and water pollution;
19 b. To issue a special order pursuant to G.S. 143-215.2(b) and
20 G.S. 143-215.110 to any person whom the Commission finds
21 responsible for causing or contributing to any pollution of
22 water within such watershed or pollution of the air within
23 the area for which standards have been established;

- 1 c. To conduct and direct that investigations be conducted
2 pursuant to G.S. 143-215.3 and G.S. 143-215.108(b)(5);
3 d. To conduct public hearings, institute actions in superior
4 court, and agree upon or enter into settlements, all pursuant
5 to G.S. 143-215.3;
6 e. To direct the investigation of any killing of fish and wildlife
7 pursuant to G.S. 143-215.3;
8 f. To consult with any person proposing to construct, install,
9 or acquire an air or water pollution source pursuant to G.S.
10 143-215.3 and G.S. 143-215.111;
11 g. To encourage local government units to handle air pollution
12 problems and to provide technical and consultative
13 assistance pursuant to G.S. 143-215.3 and G.S. 143-215.112;
14 h. To review and have general oversight and supervision over
15 local air pollution control programs pursuant to G.S. 143-
16 215.3 and G.S. 143-215.112;
17 i. To declare an emergency when it finds a generalized
18 dangerous condition of water or air pollution pursuant to
19 G.S. 143-215.3;
20 j. To render advice and assistance to local government
21 regarding floodways pursuant to G.S. 143-215.56;
22 k. To declare and delineate and modify capacity use areas
23 pursuant to G.S. 143-215.13;
24 l. To grant permits for water use within capacity use areas
25 pursuant to G.S. 143-215.15;
26 m. To direct that investigations be conducted when necessary to
27 carry out duties regarding capacity use areas pursuant to
28 G.S. 143-215.19;
29 n. To approve, disapprove and approve subject to conditions
30 all applications for dam construction pursuant to G.S. 143-
31 215.28; to require construction progress reports pursuant to
32 G.S. 143-215.29;
33 o. To halt dam construction pursuant to G.S. 143-215.29;
34 p. To grant final approval of dam construction work pursuant
35 to G.S. 143-215.30;
36 q. To have jurisdiction and supervision over the maintenance
37 and operation of dams pursuant to G.S. 143-215.31;
38 r. To direct the inspection of dams pursuant to G.S. 143-
39 215.32;
40 s. To modify or revoke any final action previously taken by
41 the Commission pursuant to G.S. 143-214.1 and G.S. 143-
42 215.107; and
43 t. To have jurisdiction and supervision over oil pollution
44 pursuant to Article 21A of Chapter 143.

1 u. To administer the State's authority under 33 U.S.C. § 1341
2 of the federal Clean Water Act pursuant to G.S. 143-
3 215.3(c1)-(c3) and G.S. 143-215.8 and to adopt rules
4 implementing those sections."

5 Sec. 2. G.S. 143-215.3 is amended by adding the following subsections to
6 read:

7 "(c1) General Exercise of Powers Granted Under Section 401 of the Clean Water
8 Act. -- Except as provided in subsection (c3) of this section, in determining whether
9 to certify a federally issued permit or activity pursuant to 33 U.S.C. § 1341, the
10 Commission shall consider only those provisions listed in 33 U.S.C. § 1341(a). The
11 Commission shall not duplicate the site specific application of any guidelines
12 employed by the United States Army Corps of Engineers in evaluating permit
13 applications under 33 U.S.C. § 1344 and applicable federal regulations.

14 (c2) Classification of Wetlands. -- Classifications of wetlands set forth in
15 subdivisions (1) through (3) of this subsection shall apply to all wetlands except
16 coastal wetlands defined in G.S. 113-229(n)(3):

17 (1) 'Class I wetland' means any wetland located within 150 feet of the
18 mean high waterline or normal water level of a perennial water
19 body as designated on the most recently published version of the
20 United States Geological Survey 1:24,000 (7.5 minute) scale
21 topographic map.

22 (2) 'Class II wetland' means any wetland located greater than 150 feet
23 but less than 1,000 feet of the mean high waterline or normal water
24 level of a perennial water body as designated on the most recently
25 published version of the United States Geological Survey 1:24,000
26 (7.5 minute) scale topographic map.

27 (3) 'Class III wetland' means any wetland not classified as a Class I or
28 II wetland.

29 (c3) Exercise of Authority Granted Under Federal Law With Regard to Wetlands.
30 -- The Commission shall exercise its authority with regard to the water quality
31 certification for wetlands except coastal wetlands defined in G.S. 113-229(n)(3) as
32 follows:

33 (1) The Commission shall grant the water quality certification for any
34 project that will impact less than one acre of any wetlands.

35 (2) The Commission shall grant the water quality certification for any
36 project that will impact between one and three acres of wetlands
37 based on the following classifications:

38 a. A Class I wetland requires minimization of impacts for the
39 protection of water quality and requires that the applicant
40 agree to provide compensatory mitigation for any loss of
41 wetlands resulting from the proposed project on a five-to-
42 one ratio, acres mitigated to acres lost. In conducting the
43 minimization analysis required under this sub-subdivision,
44 the Commission may consider: (i) the spatial and

1 dimensional requirements of the project; (ii) the location of
2 any existing structural or natural features that may dictate
3 the placement or configuration of the proposed project; (iii)
4 the purpose of the project and how the purpose relates to
5 placement, configuration, or density; and (iv) the ability of
6 wetlands to continue to support the existing uses after
7 project completion.

8 b. A Class II wetland requires that the applicant agree to
9 provide compensatory mitigation for any loss of wetlands
10 resulting from the proposed project on a three-to-one ratio,
11 acres mitigated to acres lost.

12 c. A Class III wetland may require compensatory mitigation for
13 any loss of wetlands resulting from the proposed project on
14 a one-to-one ratio, acres mitigated to acres lost, if the
15 Commission finds that the loss of wetlands will result in a
16 violation of water quality standards.

17 (3) The Commission shall grant the water quality certification for any
18 project that impacts more than three acres of wetlands if it
19 determines that the project will comply with the provisions listed
20 in 33 U.S.C. § 1341(a).

21 (4) The Commission shall grant water quality certification for any
22 project that involves dredge or fill activities conducted in any
23 wetlands that: (i) are inadvertently created through any
24 construction, mining, or other commercial activities, and (ii) are
25 subject to the provisions of 33 U.S.C. § 1344."

26 Sec. 3. Article 21 of Chapter 143 of the General Statutes is amended by
27 adding a new section to read:

28 "**§ 143-214.8. Wetlands Mitigation Bank.**

29 (a) Policy, Purpose, and Intent. -- The Department shall develop a wetlands
30 restoration, enhancement, and protection program to promote consistency among
31 projects that utilize the assets of the wetlands Mitigation Banking Program under
32 subsection (b) of this section by governmental agencies or other persons. The
33 program shall be a statewide program for the acquisition, restoration, enhancement,
34 and creation of wetland and riparian resources that contribute to the protection and
35 improvement of water quality, flood prevention, fisheries, wildlife habitat, and
36 recreational opportunities. The purpose of the program is to restore wetlands
37 functions and values across the State to replace critical functions lost through
38 wetlands conversion and through current and future permitted impacts. The
39 implementation of this program shall include a statewide plan for wetlands
40 restoration to be developed by the Department within the context of the basinwide
41 planning initiatives, with the goal of protecting and enhancing water quality, flood
42 prevention, fisheries, wildlife habitat, and recreational opportunities within each of
43 the 17 major river basins in the State. Further, it is the intent that this program be
44 implemented to streamline the wetlands permitting process, minimize delays in

1 permit decisions, decrease the burden of permit applicants of planning and
2 performing compensatory mitigation for wetlands losses, and increase the ecological
3 effectiveness of compensatory mitigations.

4 (b) Mitigation Banking Program. -- There is established within the Department a
5 Wetlands Mitigation Bank. The wetlands mitigation bank is part of the Wetlands
6 Restoration, Enhancement, and Protection Program. It is the intent of this section
7 that all wetlands mitigation shall be coordinated by the Department consistent with
8 the statewide plan for wetlands restoration and rules developed by the Environmental
9 Management Commission unless specifically exempted by the Secretary of the
10 Department. The purpose of the mitigation bank is to provide a repository for
11 monetary contributions and donations or dedications of interests in real property to
12 promote projects for the restoration, enhancement, preservation, or creation of
13 wetlands. The emphasis of mitigation is on replacing functions within the same river
14 basin unless it has been demonstrated that restoration of other areas could be more
15 environmentally beneficial. Persons subject to permits or authorizations issued by the
16 United States Army Corps of Engineers under 33 U.S.C. § 1344, may contribute to
17 the Wetlands Mitigation Bank, on a voluntary basis, to comply with conditions to, or
18 terms of, the permits or authorizations, provided that participation in the Wetlands
19 Mitigation Bank will meet the requirements of mitigation by the United States Army
20 Corps of Engineers.

21 (c) Wetlands Restoration Fund. -- The Wetlands Restoration Fund is established
22 as a nonreverting fund within the Department. The Fund shall be treated as a special
23 trust fund and shall be credited with interest by the State Treasurer pursuant to G.S.
24 147-69.2 and G.S. 147-69.3. The Department shall, at the discretion of the applicant,
25 accept monetary payment into the Wetlands Restoration Fund in accordance with any
26 authorizations established by the United States Army Corps of Engineers under 33
27 U.S.C. § 1344, provided that participation in the Wetlands Mitigation Bank will meet
28 the requirements of mitigation by the United States Army Corps of Engineers. The
29 monetary payment shall be based on the per acre cost of restoring or creating a
30 wetlands capable of performing the same or similar functions. Receipts collected
31 under this section shall be credited to the Fund and shall be used for wetlands and
32 riparian area acquisition, restoration, and mitigation. No funds shall be expended
33 from this Fund for any purpose other than those directly contributing to the
34 acquisition, enhancement, restoration, or creation of wetlands."

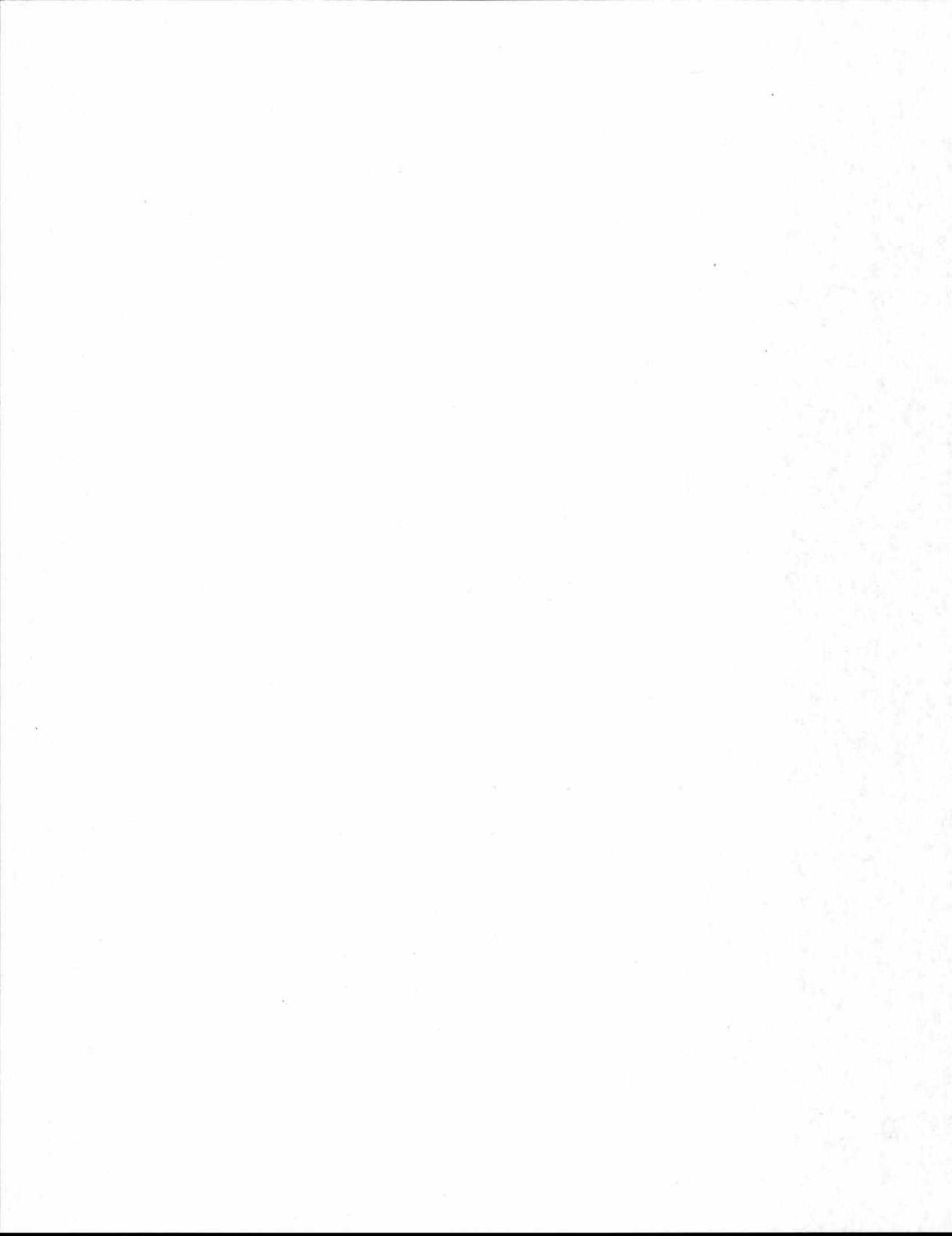
35 Sec. 4. There is appropriated from the Highway Fund to the Wetlands
36 Restoration Fund in the Department of Environment, Health, and Natural Resources,
37 the sum of one million dollars (\$1,000,000) for the 1995-96 fiscal year for the
38 mitigation bank created under Section 3 of this act.

39 Sec. 5. There is appropriated from the General Fund to the Wetlands
40 Restoration Fund in the Department of Environment, Health, and Natural Resources,
41 the sum of two million dollars (\$2,000,000) in recurring funds for the 1995-96 fiscal
42 year and the sum of two million dollars (\$2,000,000) in recurring funds for the 1996-
43 97 fiscal year.

1 Sec. 6. There is appropriated from the General Fund to the Department
2 of Environment, Health, and Natural Resources, the sum of five hundred thousand
3 dollars (\$500,000) in recurring funds for the 1995-96 fiscal year and the sum of five
4 hundred thousand dollars (\$500,000) in recurring funds for the 1996-97 fiscal year for
5 administrative and other expenses to implement the Wetlands Restoration,
6 Enhancement, and Protection Program.

7 Sec. 7. This act becomes effective October 1, 1995, provided that the
8 Commission shall initiate rule making proceedings to implement this act upon
9 ratification. The Commission shall adopt rules to implement this act no later than
10 December 31, 1996. Section 2 of this act applies to any wetlands inadvertently
11 created on or after the effective date of this act.

APPENDIX C



**LEGISLATIVE STUDY COMMISSION ON WETLANDS
MEMBERSHIP
1995 - 1996**

President Pro Tempore Appointments

Sen. J. Clark Plexico, Cochair
319 North Whitted Street
Hendersonville, NC 28739
(704) 696-9435

Sen. Patrick J. Ballantine
PO Box 473
Wilmington, NC 28402
(910) 763-0673

Mr. Joseph E. Harwood
Duke Power Company
422 South Church Street, PB05D
Charlotte, NC 28242-0001

Sen. David W. Hoyle
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Gastonia, NC 28053
(704) 867-0822

Sen. Luther H. Jordan, Jr.
PO Box 701
Wilmington, NC 28402
(910) 763-2441

Mr. Melvin Shepard
140 Charles Creek Road
Sneads Ferry, NC 28460

Mr. Lonnie Pridgen
PO Box 907
New Bern, NC 28563

Mr. I. Clark Wright, Jr.
PO Box 867
New Bern, NC 28563-0867

Staff:

Ms. Emily Johnson
Bill Drafting Division
(919) 733-6660

Speaker's Appointments

Rep. John M. Nichols, Cochair
c/o CTX Mortgage Company
PO Box 15268
New Bern, NC 28561
(919) 638-6811

Dr. Ernest A. Carl
6230 Pigfish Lane
Wilmington, NC 28409

Rep. Arlie F. Culp
8521 US Highway 64 East
Ramseur, NC 27316
(910) 824-2218

Mr. John T. Dowd
PO Box 43
Edenton, NC 27932

Mr. Donald A. Kirkman
PO Box 825
Morehead City, NC 28557

Dr. Russ Lea
North Carolina State University
PO Box 7003
Raleigh, NC 27695-7003

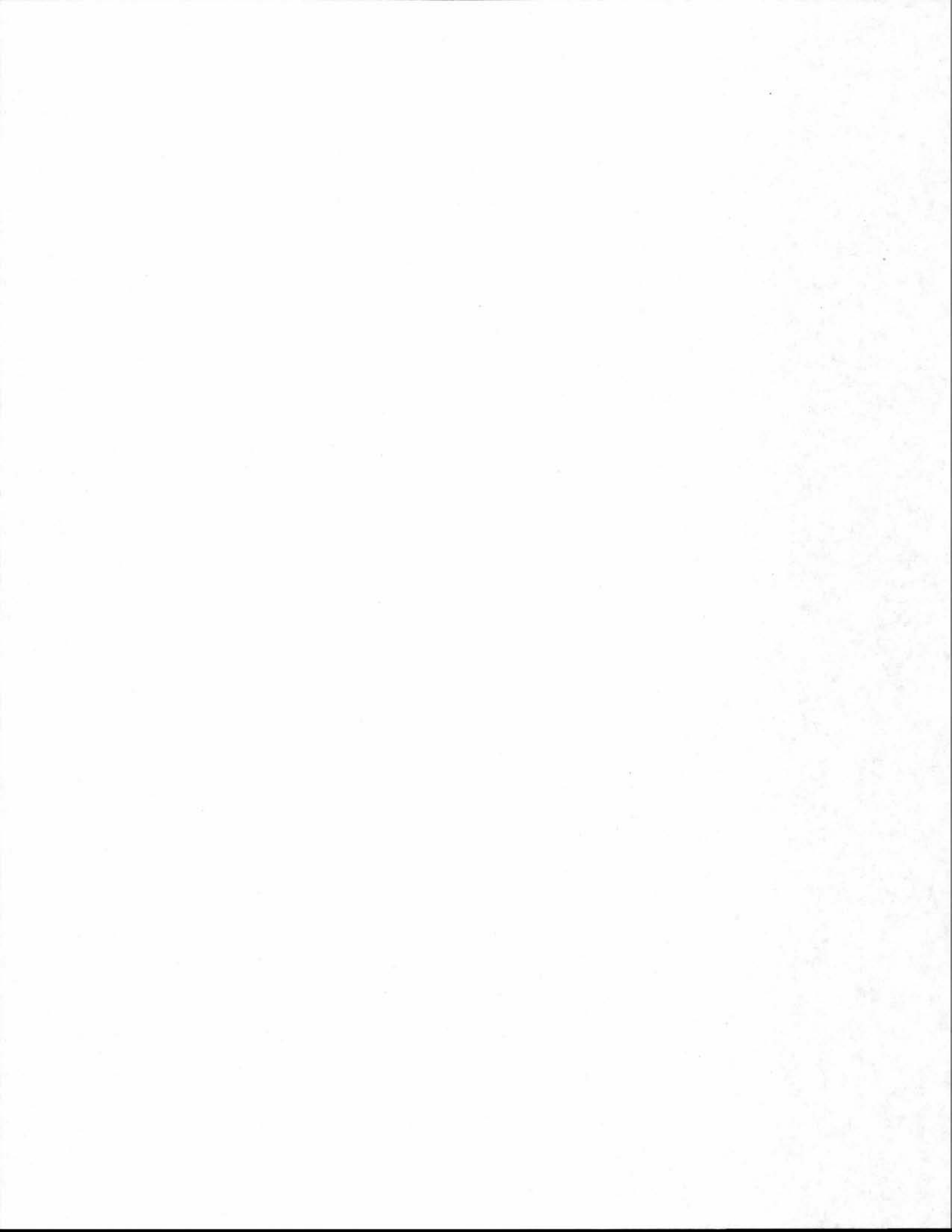
Rep. E. Norris Tolson
Route 1, Box 222
Pinetops, NC 27864
(919) 827-4639

Rep. John Hugh Weatherly
142 Quail Hollow Drive
Kings Mountain, NC 28086
((704) 487-0039

Clerk:

Beth LeGrande
(919) 715-5036

APPENDIX D



**RULES AS PROPOSED FOR ADOPTION:
WETLANDS AND 401 CERTIFICATION PROCEDURES**

MARCH 1996

15A NCAC 2B .0101 is proposed for amendment as follows:

SUBCHAPTER 2B - SURFACE WATER AND WETLAND STANDARDS: ~~MONITORING~~

SECTION .0100 - PROCEDURES FOR ASSIGNMENT OF WATER QUALITY STANDARDS

.0101 GENERAL PROCEDURES

(a) The rules contained in Sections .0100, .0200 and .0300 of this Subchapter which pertain to the series of classifications and water quality standards shall be known as the "Classifications and Water Quality Standards Applicable to the Surface Waters and Wetlands of North Carolina."

(b) The Environmental Management Commission, prior to classifying and assigning standards of water quality to any waters of the state, will proceed as follows:

- (1) The Commission, or its designee, will determine waters to be studied for the purpose of classification and assignment of water quality standards on the basis of user requests, petitions, or the identification of existing or attainable water uses, as defined by 15A NCAC 2B .0202, not presently included in the water classification.
- (2) After appropriate studies of the identified waters to obtain the data and information required for determining the proper classification of the waters or segments of water are completed, the Commission, or its designee, will make a decision on whether to initiate proceedings to modify the classifications and water quality standards of identified waters. In the case of the Commission's designee deciding to initiate said proceedings, the designee will inform the Commission of the decision prior to scheduling a public hearing.
- (3) In the case of a petition for classification and assignment of water quality standards according to the requirements of General Statute 150B-20, the Director will make a preliminary recommendation on the appropriate classifications and water quality standards of the identified waters on the basis of the study findings or information included in the petition supporting the classification and standards changes.
- (4) The Commission will make a decision on whether to grant or deny a petition in accordance with the provisions of General Statute 150B-20 based on the information included in the petition and the recommendation of the Director. The Commission may deny the petition and request that the Division study the appropriate classifications and water quality standards for the petitioned waters in accordance with Subparagraph (b)(2) of this Rule.
- (5) The Director will give due notice of such hearing or hearings in accordance with the requirements of General Statute 143-214.1 and G.S. 150B, and will appoint a hearing officer(s) in consultation with the chairman of the Commission.
- (6) The hearing officer(s) will, as soon as practicable after the completion of the hearing, submit a complete report of the proceedings of the hearing to the Commission. The hearing officer(s) shall include in the report a transcript or summary of testimony presented at such public hearing, relevant exhibits, a summary of relevant information from the stream studies conducted by the technical staff of the Commission, and final recommendations as to classification of the designated waters and the standards of water quality and best management practices which should be applied to the classifications recommended.
- (7) The Commission, after due consideration of the hearing records and the final recommendations of the hearing officer(s), will adopt its final action with respect to the assignment of classifications, and any applicable standards or best management practices applicable to the waters under consideration. The Commission will publish such action, together with the effective date for the application of the provisions of General Statute 143-215.1 and 143-215.2, as amended, as a part of the Commission's official rules.
- (8) The final action of the commission with respect to the assignment of classification with its accompanying standards and best management practices shall contain the Commission's conclusions relative to the various factors given in General Statute 143-214.1(d), and shall specifically include the

class or classes to which such specifically designated waters in the watershed or watersheds shall be assigned on the basis of best usage in the interest of the public.

(c) Freshwater Classifications.

- (1) Class C; freshwaters protected for secondary recreation, fishing, aquatic life including propagation and survival, and wildlife; all freshwaters are classified to protect these uses at a minimum;
- (2) Class B; freshwaters protected for primary recreation which includes swimming on a frequent or organized basis and all Class C uses;
- (3) Class WS-I; waters protected as water supplies which are essentially in natural and undeveloped watersheds; point source discharges of treated wastewater are permitted pursuant to Rules .0104 and .0211 of this Subchapter; local programs to control nonpoint sources and stormwater discharges of pollution are required; suitable for all Class C uses;
- (4) Class WS-II; waters protected as water supplies which are generally in predominantly undeveloped watersheds; point source discharges of treated wastewater are permitted pursuant to Rules .0104 and .0211 of this Subchapter; local programs to control nonpoint sources and stormwater discharges of pollution are required; suitable for all Class C uses;
- (5) Class WS-III; waters protected as water supplies which are generally in low to moderately developed watersheds; point source discharges of treated wastewater are permitted pursuant to Rules .0104 and .0211 of this Subchapter; local programs to control nonpoint sources and stormwater discharges of pollution are required; suitable for all Class C uses;
- (6) Class WS-IV; waters protected as water supplies which are generally in moderately to highly developed watersheds; point source discharges of treated wastewater are permitted pursuant to Rules .0104 and .0211 of this Subchapter; local programs to control nonpoint sources and stormwater discharges of pollution are required; suitable for all Class C uses;
- (7) Class WS-V; waters protected as water supplies which are generally upstream of and draining to Class-IV waters; no categorical restrictions on watershed development or treated wastewater discharges are required; however, the Commission or its designee may apply appropriate management requirements as deemed necessary for the protection of downstream receiving waters (15A NCAC 2B .0203); suitable for all Class C uses.
- (8) Class WL; waters that meet the definition of wetlands found at 15A NCAC 2B .0202 except those designated as Class SWL.

(d) Tidal Salt Water Classifications.

- (1) Class SC; saltwaters protected for secondary recreation, fishing, aquatic life including propagation and survival, and wildlife; all saltwaters are classified to protect these uses at a minimum;
- (2) Class SB; saltwaters protected for primary recreation which includes swimming on a frequent or organized basis and all Class SC uses;
- (3) Class SA; suitable for commercial shellfishing and all other tidal saltwater uses.
- (4) Class SWL; waters that meet the definition of coastal wetlands as defined by NCGS 113-229(n) (3), and which are landward of the mean high water line, and wetlands contiguous to estuarine waters as defined by NCGS 113A-113(b)(2).

(e) Supplemental Classifications.

- (1) Trout waters (Tr); freshwaters protected for natural trout propagation and survival of stocked trout;
- (2) Swamp waters (Sw); waters which have low velocities and other natural characteristics which are different from adjacent streams;
- (3) Nutrient Sensitive Waters (NSW); waters subject to growths of microscopic or macroscopic vegetation requiring limitations on nutrient inputs;
- (4) Outstanding Resource Waters (ORW); unique and special waters of exceptional state or national recreational or ecological significance which require special protection to maintain existing uses;
- (5) High Quality Waters (HQW); waters which are rated as excellent based on biological and physical/chemical characteristics through Division monitoring or special studies, native and special native trout waters (and their tributaries) designated by the Wildlife Resources Commission, primary nursery areas (PNA) designated by the Marine Fisheries Commission and other functional nursery areas designated by the Wildlife Resources Commission, critical habitat areas designated by the Wildlife Resources Commission or the Department of Agriculture, all water supply watersheds which are either classified as WS-I or WS-II or those for which a formal petition for reclassification as WS-I or WS-II has been received from the appropriate local government and accepted by the Division of Environmental Management and all Class SA waters.
- (6) Unique wetland (UWL); wetlands of exceptional state or national ecological significance which require special protection to maintain existing uses. These wetlands could include wetlands that have been

documented to the satisfaction of the Commission as habitat essential for the conservation of state or federally listed threatened or endangered species.

(f) In determining the best usage of waters and assigning classifications of such waters, the Commission will consider the criteria specified in General Statute 143-214.1(d) and all existing uses as defined by 15A NCAC 2B .0202. In determining whether to revise a designated best usage for waters through a revision to the classifications, the Commission will follow the requirements of 40 CFR 131.10(b),(c),(d) and (g) which are hereby incorporated by reference including any subsequent amendments and editions. This material is available for inspection at the Department of Environment, Health, and Natural Resources, Division of Environmental Management, Water Quality Planning Branch, 512 North Salisbury Street, Raleigh, North Carolina. Copies may be obtained from the U.S. Government Printing Office, Superintendent of Documents, Washington, DC 20402-9325 at a cost of thirteen dollars (\$13.00).

(g) When revising the classification of waters, the Division will collect water quality data within the watershed for those substances which require more stringent control than required by the existing classification. However, such sampling may be limited to only those parameters which are of concern. If a revision to classifications involves the removal of a designated use, the Division will conduct a use attainability study as required by the provisions of 40 CFR 131.10(j) which are hereby incorporated by reference including any subsequent amendments and editions. This material is available for inspection at the Department of Environment, Health, and Natural Resources, Division of Environmental Management, Water Quality Planning Branch, 512 North Salisbury Street, Raleigh, North Carolina. Copies may be obtained from the U.S. Government Printing Office, Superintendent of Documents, Washington, DC 20402-9325 at a cost of thirteen dollars (\$13.00).

*History Note: Statutory Authority G.S. 143-214.1; 143-215.3(a)(1);
Eff. February 1, 1976;
Amended Eff. February 1, 1993; August 3, 1992; August 1, 1990; October 1, 1989.*

15A NCAC 2B .0103 is proposed for amendment as follows:

.0103 ANALYTICAL PROCEDURES

(a) **Chemical/Physical Procedures.** Tests or analytical procedures to determine conformity or non-conformity with standards will, insofar as practicable and applicable, conform to the guidelines by the Environmental Protection Agency codified as 40 CFR, Part 136, which are hereby incorporated by reference including any subsequent amendments and editions or such other methods as may be approved by the Director. This material is available for inspection at the Department of Environment, Health, and Natural Resources, Division of Environmental Management, Water Quality Planning Branch, 512 North Salisbury Street, Raleigh, North Carolina. Copies may be obtained from the U.S. Government Printing Office, Superintendent of Documents, Washington, DC 20402-9325 at a cost of thirteen dollars (\$13.00).

(b) **Biological Procedures.** Biological tests to determine conformity or non-conformity with standards will be based on methods published by the U.S. Environmental Protection Agency as outlined in "Methods for Measuring the Acute Toxicity of Effluents to Freshwater and Marine Organisms, Fourth Edition" (1991; Report No. EPA/600/4-90/027) or subsequent versions, "Short-term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Freshwater Organisms, Second Edition" (1989; Report No. EPA/600/4-89/001) or subsequent versions, and "Short-term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Marine and Estuarine Organisms" (Report No. EPA/600/4-87/028) or subsequent versions, or methods published by the North Carolina Department of Environment, Health, and Natural Resources, as outlined in "Standard Operating Procedures: Biological Monitoring" (1990; Division of Environmental Management, Water Quality Section) or subsequent versions, or such other methods as approved by the Director.

(c) **Wetland Evaluation Procedures.** Evaluations of wetlands for the presence of existing uses will be based on methods or guidance approved by the Director. Copies of previously approved methods or guidance may be obtained by submitting a written request to NCDDEM, Water Quality Section, Wetlands Group, P.O. Box 29535, Raleigh, NC 27626-0535.

*History Note: Statutory Authority G.S. 143-214.1; 143-215.3(a)(1);
Eff. February 1, 1976;
Amended Eff. February 1, 1993; October 1, 1989; January 1, 1985; September 9, 1979.*

15A NCAC 2B .0109 is proposed for repeal as follows:

.0109 WATERS AFFECTED BY DREDGE AND FILL ACTIVITIES (REPEALED)

~~Projects that alter the reach and extent of a freshwater wetland will not be considered as removing existing uses of the wetland in violation of the Antidegradation Policy [pursuant to 15A NCAC 2B .0201(b)] if the alteration protects all existing and designated uses of all waters of the state. In making this determination, the Director will be guided by 40 CFR Part 230, Subparts A through F.~~

*History Note: Statutory Authority G.S. 143-214.1;
Eff. October 1, 1989.*

15A NCAC 2B .0201 is proposed for amendment as follows:

SECTION .0200 - CLASSIFICATIONS AND WATER QUALITY STANDARDS APPLICABLE TO SURFACE WATERS AND WETLANDS OF NORTH CAROLINA

.0201 ANTIDegradation POLICY

(a) It is the policy of the Environmental Management Commission to maintain, protect, and enhance water quality within the State of North Carolina. Pursuant to this policy, the requirements of 40 CFR 131.12 are hereby incorporated by reference including any subsequent amendments and editions. This material is available for inspection at the Department of Environment, Health, and Natural Resources, Division of Environmental Management, Water Quality Planning Branch, 512 North Salisbury Street, Raleigh, North Carolina. Copies may be obtained from the U.S. Government Printing Office, Superintendent of Documents, Washington, DC 20402-9325 at a cost of thirteen dollars (\$13.00). These requirements will be implemented in North Carolina as set forth in Paragraphs (b), (c) and (d), ~~(e) and (f)~~ of this Rule.

(b) Existing uses, as defined by Rule .0202 of this Section, and the water quality to protect such uses shall be protected by properly classifying surface waters and having standards sufficient to protect these uses. In cases where the Commission or its designee determines that an existing use is not included in the classification of waters, a project which will affect these waters will not be permitted unless the existing uses are protected.

(c) The Commission shall consider the present and anticipated usage of waters with quality higher than the standards, including any uses not specified by the assigned classification (such as outstanding national resource waters or waters of exceptional water quality) and will not allow degradation of the quality of waters with quality higher than the standards below the water quality necessary to maintain existing and anticipated uses of those waters. Waters with quality higher than the standards are defined by Rule .0202 of this Section. The following procedures will be implemented in order to meet these requirements:

- (1) Each applicant for an NPDES permit or NPDES permit expansion to discharge treated waste will document an effort to consider non-discharge alternatives pursuant to 15A NCAC 2H .0105(c)(2).
- (2) Public Notices for NPDES permits will list parameters that would be water quality limited and state whether or not the discharge will use the entire available load capacity of the receiving waters and may cause more stringent water quality based effluent limitations to be established for dischargers downstream.
- (3) The Division may require supplemental documentation from the affected local government that a proposed project or parts of the project are necessary for important economic and social development.
- (4) The Commission and Division will work with local governments on a voluntary basis to identify and develop appropriate management strategies or classifications for waters with unused pollutant loading capacity to accommodate future economic growth.

Waters with quality higher than the standards will be identified by the Division on a case-by-case basis through the NPDES permitting and waste load allocation processes (pursuant to the provisions of 15A NCAC 2H .0100). Dischargers affected by the requirements of Paragraphs (c)(1) through (c)(4) of this Rule and the public at large will be notified according to the provisions described herein, and all other appropriate provisions pursuant to 15A NCAC

2H .0109. If an applicant objects to the requirements to protect waters with quality higher than the standards and believes degradation is necessary to accommodate important social and economic development, the applicant can contest these requirements according to the provisions of General Statute 143-215.1(e) and 150B-23.

(d) The Commission shall consider the present and anticipated usage of High Quality Waters (HQW), including any uses not specified by the assigned classification (such as outstanding national resource waters or waters of exceptional water quality) and will not allow degradation of the quality of High Quality Waters below the water quality necessary to maintain existing and anticipated uses of those waters. High Quality Waters are a subset of waters with quality higher than the standards and are as described by 15A NCAC 2B .0101(e)(5). The following procedures will be implemented in order to meet the requirements of this part:

- (1) New or expanded wastewater discharges in High Quality Waters will comply with the following:
 - (A) Discharges from new single family residences will be prohibited. Those that must discharge will install a septic tank, dual or recirculating sand filters, disinfection and step aeration.
 - (B) All new NPDES wastewater discharges (except single family residences) will be required to provide the treatment described below:
 - (i) Oxygen Consuming Wastes: Effluent limitations will be as follows: $BOD_5 = 5 \text{ mg/l}$, $NH_3\text{-N} = 2 \text{ mg/l}$ and $DO = 6 \text{ mg/l}$. More stringent limitations will be set, if necessary, to ensure that the cumulative pollutant discharge of oxygen-consuming wastes will not cause the DO of the receiving water to drop more than 0.5 mg/l below background levels, and in no case below the standard. Where background information is not readily available, evaluations will assume a percent saturation determined by staff to be generally applicable to that hydroenvironment.
 - (ii) Total Suspended Solids: Discharges of total suspended solids (TSS) will be limited to effluent concentrations of 10 mg/l for trout waters and PNA's, and to 20 mg/l for all other High Quality Waters.
 - (iii) Disinfection: Alternative methods to chlorination will be required for discharges to trout streams, except that single family residences may use chlorination if other options are not economically feasible. Domestic discharges are prohibited to SA waters.
 - (iv) Emergency Requirements: Failsafe treatment designs will be employed, including stand-by power capability for entire treatment works, dual train design for all treatment components, or equivalent failsafe treatment designs.
 - (v) Volume: The total volume of treated wastewater for all discharges combined will not exceed 50 percent of the total instream flow under 7Q10 conditions.
 - (vi) Nutrients: Where nutrient overenrichment is projected to be a concern, appropriate effluent limitations will be set for phosphorus or nitrogen, or both.
 - (vii) Toxic substances: In cases where complex wastes (those containing or potentially containing toxicants) may be present in a discharge, a safety factor will be applied to any chemical or whole effluent toxicity allocation. The limit for a specific chemical constituent will be allocated at one-half of the normal standard at design conditions. Whole effluent toxicity will be allocated to protect for chronic toxicity at an effluent concentration equal to twice that which is acceptable under design conditions. In all instances there may be no acute toxicity in an effluent concentration of 90 percent as measured by the North Carolina "Pass/Fail Methodology for Determining Acute Toxicity in a Single Effluent Concentration". Ammonia toxicity will be evaluated according to EPA guidelines promulgated in the Ammonia Criteria Development Document (1986); EPA document number 440/5-85-001; NTIS number PB85-227114; July 29, 1985 (50 FR 30784).
 - (C) All expanded NPDES wastewater discharges in High Quality Waters will be required to provide the treatment described in part (1)(B) of this Rule, except for those existing discharges which expand with no increase in permitted pollutant loading.
- (2) Development activities which require an Erosion and Sedimentation Control Plan in accordance with rules established by the NC Sedimentation Control Commission or local erosion and sedimentation control program approved in accordance with 15A NCAC 4B .0218, and which drain to and are within one mile of High Quality Waters (HQW) will be required to control runoff from the one inch design storm as follows:
 - (A) Low Density Option: Developments which limit single family developments to one acre lots and other type developments to 12 percent built-upon area, have no stormwater collection system as defined in 15A NCAC 2H .1002(13), and have built-upon areas at least 30 feet from surface waters will be

deemed to comply with this requirement, unless it is determined that additional runoff control measures are required to protect the water quality of High Quality Waters necessary to maintain existing and anticipated uses of those waters, in which case more stringent stormwater runoff control measures may be required on a case-by-case basis. Activities conforming to the requirements described in 15A NCAC 2H .1003(a) [except for Subparagraphs (2) and (3) which apply only to waters within the 20 coastal counties as defined in 15A NCAC 2H .1002(9)] will also be deemed to comply with this requirement, except as provided in the preceding sentence.

- (B) High Density Option: Higher density developments will be allowed if stormwater control systems utilizing wet detention ponds as described in 15A NCAC 2H .1003(i), (k) and (l) are installed, operated and maintained which control the runoff from all built-upon areas generated from one inch of rainfall, unless it is determined that additional runoff control measures are required to protect the water quality of High Quality Waters necessary to maintain existing and anticipated uses of those waters, in which case more stringent stormwater runoff control measures may be required on a case-by-case basis. The size of the control system must take into account the runoff from any pervious surfaces draining to the system.
- (C) All waters classified WS-I or WS-II and all waters located in the 20 coastal counties as defined in Rule 15A NCAC 2H .1002(9) are excluded from this requirement since they already have requirements for nonpoint source controls.

If an applicant objects to the requirements to protect high quality waters and believes degradation is necessary to accommodate important social and economic development, the applicant can contest these requirements according to the provisions of G.S. 143-215.1(e) and 150B-23.

(e) Outstanding Resource Waters (ORW) are a special subset of High Quality Waters with unique and special characteristics as described in Rule .0216 of this Section. The water quality of waters classified as ORW shall be maintained such that existing uses, including the outstanding resource values of said Outstanding Resource Waters, will be maintained and protected.

(f) Activities regulated under Section 404 of the Clean Water Act (33 U.S.C. 1344) which require a water quality certification as described in Section 401 of the Clean Water Act (33 U.S.C. 1341) shall be evaluated according to the procedures outlined in 15A NCAC 2H .0500. Activities which receive a water quality certification pursuant to these procedures will not be considered to remove existing uses. The evaluation of permits issued pursuant to G.S. 143-215.1 that involve the assimilation of wastewater or stormwater by wetlands will incorporate the criteria found at 15A NCAC 2H .0506(c)(1)-(5) in determining the potential impact of the proposed activity on the existing uses of the wetland per 15A NCAC 2H .0220.

*History Note: Statutory Authority G.S. 143-214.1; 143-215.1; 143-215.3(a)(1);
Eff. February 1, 1976;
Amended Eff. February 1, 1993; April 1, 1991; August 1, 1990; October 1, 1989.*

15A NCAC 2B .0202 is proposed for amendment as follows:

.0202 DEFINITIONS

The definition of any word or phrase used in these rules shall be the same as given in Article 21, Chapter 143 of the General Statutes of North Carolina. The following words and phrases, which are not defined in this article, will be interpreted as follows:

- (1) Acute toxicity to aquatic life means lethality or other harmful effects sustained by either resident aquatic populations or indicator species used as test organisms in a controlled toxicity test due to a short-term exposure (relative to the life cycle of the organism) to a specific chemical or mixture of chemicals (as in an effluent). Short-term exposure for acute tests is generally 96 hours or less. Acute toxicity will be determined using the following procedures:
 - (a) for specific chemical constituents or compounds, acceptable levels will be equivalent to a concentration of one-half or less of the Final Acute Value (FAV) as determined according to "Guidelines for Deriving Numerical Water Quality Criteria for the Protection of Aquatic Life and its Uses" published by the Environmental Protection Agency and referenced in the Federal Register (50 FR 30784, July 29, 1985).

- (b) for specific chemical constituents or compounds for which values described under Subparagraph (1)(a) of this Rule can not be determined, acceptable levels will be equivalent to a concentration of one-third or less of the lowest available LC50 value.
 - (c) for effluents, acceptable levels are defined as no statistically measurable lethality (99 percent confidence level using Students t test) during a specified exposure period. Concentrations of exposure will be determined on a case-by-case basis.
 - (d) in instances where detailed dose response data indicate that levels of acute toxicity are significantly different from those defined in this Rule, the Director may determine on a case-by-case basis an alternate acceptable level through statistical analyses of the dose response curve.
- (2) Acute to Chronic Ratio (ACR) means the ratio of acute toxicity expressed as an LC50 for a specific toxicant or an effluent to the chronic value for the same toxicant or effluent.
 - (3) Agricultural uses include the use of waters for stock watering, irrigation, and other farm purposes.
 - (4) Approved treatment, as applied to water supplies, means treatment accepted as satisfactory by the Division of Environmental Health or Division of Environmental Management.
 - (5) Average (except bacterial) means arithmetical average and includes the analytical results of all samples taken during the specified period; all sampling shall be done as to obtain the most representative sample under prevailing conditions:
 - (a) Daily Average for dissolved oxygen, shall be of at least four samples;
 - (b) Weekly Average means the average of all daily composite samples obtained during the calendar week; if only one grab sample is taken each day, the weekly average is the average of all daily grab samples; a minimum of three daily grab samples is needed to calculate a weekly average;
 - (c) Monthly Average means the average of all daily composites (or grab samples if only one per day) obtained during the calendar month.

The definitions in this Paragraph do not affect the monitoring requirements for NPDES permits but rather are to be used by the Division along with other methodologies in determining violations of water quality standards. Arithmetical averages as defined by this Rule, and not confidence limits nor other statistical descriptions, will be used in all calculations of limitations which require the use of averages pursuant to this Rule and 40 CFR 122.41(l)(4)(iii).

- (6) Best Management Practice (BMP) means a structural or nonstructural management-based practice used singularly or in combination to reduce nonpoint source inputs to receiving waters in order to achieve water quality protection goals.
- (7) Best usage of waters as specified for each class means those uses as determined by the Environmental Management Commission in accordance with the provisions of Article 21, Chapter 143-214.1, General Statutes of North Carolina.
- (8) Bioaccumulation factor (BAF) is a unitless value that describes the degree to which substances are taken up or accumulated into tissues of aquatic organisms from water directly and from food or other ingested materials containing the accumulated substances, and is usually measured as a ratio of a substance's concentration in tissue versus its concentration in water in situations where exposure to the substance is occurring from both water and the food chain.
- (9) Bioconcentration factor (BCF) is a unitless value that describes the degree to which substances are absorbed or concentrated into tissues of aquatic organisms from water directly and is usually measured as a ratio of substance's concentration in tissue versus its concentration in water in situations where exposure to the substance is occurring from water only.
- (10) Biological integrity means the ability of an aquatic ecosystem to support and maintain a balanced and indigenous community of organisms having species composition, diversity, population densities and functional organization similar to that of reference conditions.
- (11) Buffer means a natural or vegetated area through which stormwater runoff flows in a diffuse manner so that the runoff does not become channelized and which provides for infiltration of the runoff and filtering of pollutants. The buffer is measured landward from the normal pool elevation of impounded structures and from the bank of each side of streams or rivers.
- (12) Built-upon area means that portion of a development project that is covered by impervious or partially impervious cover including buildings, pavement, gravel roads, recreation facilities (e.g. tennis courts), etc. (Note: Wooden slatted decks and the water area of a swimming pool are considered pervious.)

- (13) Chronic toxicity to aquatic life means any harmful effect sustained by either resident aquatic populations or indicator species used as test organisms in a controlled toxicity test due to long-term exposure (relative to the life cycle of the organism) or exposure during a substantial portion of the duration of a sensitive period of the life cycle to a specific chemical substance or mixture of chemicals (as in an effluent). In absence of extended periods of exposure, early life stage or reproductive toxicity tests may be used to define chronic impacts.
- (14) Chronic value for aquatic life means the geometric mean of two concentrations identified in a controlled toxicity test as the No Observable Effect Concentration (NOEC) and the Lowest Observable Effect Concentration (LOEC).
- (15) Concentrations are the mass of a substance per volume of water and for the purposes of this Section will be expressed as milligrams per liter (mg/l), micrograms per liter (ug/l), or nanograms per liter (ng/l).
- (16) Contiguous refers to those wetlands landward of the mean high water line or normal water level and within 575 feet of classified surface waters which appear as solid blue lines on the most recently published versions of U.S.G.S. 1:24,000 (7.5 minute) scale topographic maps.
- (16) (17) Critical area means the area adjacent to a water supply intake or reservoir where risk associated with pollution is greater than from the remaining portions of the watershed. The critical area is defined as extending either 1/2 mile from the normal pool elevation of the reservoir in which the intake is located or to the ridge line of the watershed (whichever comes first); or 1/2 mile upstream from and draining to the intake (or other appropriate downstream location associated with the water supply) located directly in the stream or river (run-of-the-river), or to the ridge line of the watershed (whichever comes first). Since WS-I watersheds are essentially undeveloped, establishment of a critical area is not required. Local governments may extend the critical area as needed. Major landmarks such as highways or property lines may be used to delineate the outer boundary of the critical area if these landmarks are immediately adjacent to the appropriate outer boundary of 1/2 mile. The Commission may adopt a different critical area size during the reclassification process.
- (17) (18) Critical habitat areas are defined for the purposes of the rules of this Section as those waters which are considered to be essential for the continued existence of an endangered or threatened species, and which are so designated by the NC Wildlife Resources Commission for animals or the NC Department of Agriculture for plants.
- (18) (19) Designated Nonpoint Source Agency means those agencies specified by the Governor in the North Carolina Nonpoint Source Management Program, as approved by the Environmental Protection Agency.
- (19) (20) Development means any land disturbing activity which adds to or changes the amount of impervious or partially impervious cover on a land area or which otherwise decreases the infiltration of precipitation into the soil.
- (20) (21) Discharge is the addition of any man-induced waste effluent either directly or indirectly to state surface waters.
- (21) (22) Division means the Division of Environmental Management or its successors.
- (22) (23) Domestic wastewater discharge means the discharge of sewage, non-process industrial wastewater, other domestic wastewater or any combination of these items. Unless excepted by the Director, domestic wastewater includes liquid waste generated by domestic water using fixtures and appliances, from any residence, place of business, or place of public assembly even if it contains no sewage. Examples of domestic wastewater include once-through non-contact cooling water, seafood packing facility discharges and wastewater from restaurants.
- (23) (24) Effluent channel means a discernable confined and discrete conveyance which is used for transporting treated wastewater to a receiving stream or other body of water as provided in Rule .0215 of this Section.
- (24) (25) Existing development, for the purposes of these Rules, shall be defined as those projects that are built or those projects that at a minimum have established a vested right under North Carolina zoning law as of the effective date of the local government water supply ordinance, or such earlier time that an affected local government's management plans and ordinances shall specify, based on at least one of the following criteria:
- (a) substantial expenditures of resources (time, labor, money) based on a good faith reliance upon having received a valid local government approval to proceed with the project, or
 - (b) having an outstanding valid building permit in compliance with G.S. 153A-344.1 or G.S. 160A-385.1, or

- (c) having expended substantial resources (time, labor, money) and having an approved site specific or phased development plan in compliance with G.S. 153A-344.1 or G.S. 160A-385.1.
- (25) (26) Existing uses mean uses actually attained in the water body, in a significant and not incidental manner, on or after November 28, 1975, whether or not they are included in the water quality standards, which either have been actually available to the public or are uses deemed attainable by the Environmental Management Commission. At a minimum, uses shall be deemed attainable if they can be achieved by the imposition of effluent limits and cost-effective and reasonable best management practices (BMPs) for nonpoint source control.
- (26) (27) Fishing means the taking of fish by sport or commercial methods as well as the consumption of fish or shellfish or the propagation of fish and such other aquatic life as is necessary to provide a suitable environment for fish.
- (27) (28) Freshwater means all waters that under natural conditions would have a chloride ion content of 500 mg/l or less.
- (28) (29) Hazardous material means any substance listed as such in: Superfund Amendments and Reauthorization Act (SARA) Section 302 Extremely Hazardous Substances (42 USC 11000 et seq.), Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) Hazardous Substances (42 USC 9601 et seq.) or Section 311 of the Clean Water Act (CWA), as amended (33 USC 1251 et seq.; oil and hazardous substances) hereby incorporated by reference including any subsequent amendments and editions. This material is available for inspection at the Department of Environment, Health, and Natural Resources, Division of Environmental Management, 512 North Salisbury Street, Raleigh, North Carolina. Copies of SARA and CERCLA may be obtained as a single package from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402-9325 at a cost of one hundred and one dollars (\$101.00). Copies of CWA may be obtained from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402-9325 at a cost of fifty dollars (\$50.00).
- (29) (30) Industrial discharge means the discharge of industrial process treated wastewater or wastewater other than sewage and includes:
- (a) wastewater resulting from any process of industry or manufacture, or from the development of any natural resource;
 - (b) wastewater resulting from processes of trade or business, including wastewater from laundromats and car washes, but not wastewater from restaurants;
 - (c) stormwater will not be considered to be an industrial wastewater unless it is contaminated with industrial wastewater; or
 - (d) wastewater discharged from a municipal wastewater treatment plant requiring a pretreatment program.
- (30) (31) LC50 means that concentration of a toxic substance which is lethal (or immobilizing, if appropriate) to 50 percent of the organisms tested during a specified exposure period. The LC50 concentration for toxic materials shall be determined for sensitive species as defined by Subparagraph (43) of this Rule under aquatic conditions characteristic of the receiving waters.
- (31) (32) Local government means a city or county in singular or plural as defined in G.S. 160A-1(2) and G.S. 158A-10.
- (32) (33) Lower piedmont and coastal plain waters mean those waters of the Catawba River Basin below Lookout Shoals Dam; the Yadkin River Basin below the junction of the Forsyth, Yadkin, and Davie County lines; and all of the waters of Cape Fear, Lumber, Roanoke, Neuse, Tar-Pamlico, Chowan, Pasquotank, and White Oak River Basins; except tidal salt waters which are assigned S classifications.
- (33) (34) MF is an abbreviation for the membrane filter procedure for bacteriological analysis.
- (34) (35) Mixing zone means a region of the receiving water in the vicinity of a discharge within which dispersion and dilution of constituents in the discharge occurs and such zones shall be subject to conditions established in accordance with 15A NCAC 2B .0204(b).
- (35) (36) Mountain and upper piedmont waters mean all of the waters of the Hiwassee; Little Tennessee, including the Savannah River drainage area; French Broad; Broad; New; and Watauga River Basins; and those portions of the Catawba River Basin above Lookout Shoals Dam and the Yadkin River Basin above the junction of the Forsyth, Yadkin, and Davie County lines.

- (36) (37) Nonpoint source pollution means pollution which enters waters mainly as a result of precipitation and subsequent runoff from lands which have been disturbed by man's activities and includes all sources of water pollution which are not required to have a permit in accordance with G.S. 143-215.1(c).
- (37) (38) Non-process discharge means industrial effluent not directly resulting from the manufacturing process. An example would be non-contact cooling water from a compressor.
- (38) (39) Nutrient sensitive waters mean those waters which are so designated in the classification schedule in order to limit the discharge of nutrients (usually nitrogen and phosphorus). They are designated by "NSW" following the water classification.
- (39) (40) Offensive condition means any condition or conditions resulting from the presence of sewage, industrial wastes or other wastes within the waters of the state or along the shorelines thereof which shall either directly or indirectly cause foul or noxious odors, unsightly conditions, or breeding of abnormally large quantities of mosquitoes or other insect pests, or shall damage private or public water supplies or other structures, result in the development of gases which destroy or damage surrounding property, herbage or grasses, or which may cause the impairment of taste, such as from fish flesh tainting, or affect the health of any person residing or working in the area.
- (40) (41) Primary Nursery Areas (PNAs) are tidal saltwaters which provide essential habitat for the early development of commercially important fish and shellfish and are so designated by the Marine Fisheries Commission.
- (41) (42) Primary recreation includes swimming, skin diving, skiing, and similar uses involving human body contact with water where such activities take place in an organized or on a frequent basis.
- (42) (43) Protected area means the area adjoining and upstream of the critical area in a WS-IV water supply in which protection measures are required. The boundaries of the protected areas are defined as extending five miles upstream and draining to water supply reservoirs (measured from the normal pool elevation) or to the ridge line of the watershed (whichever comes first); or 10 miles upstream and draining to the intake located directly in the stream or river (run-of-the-river), or to the ridge line of the watershed (whichever comes first). Local governments may extend the protected area. Major landmarks such as highways or property lines may be used to delineate the outer boundary of the protected area if these landmarks are immediately adjacent to the appropriate outer boundary of five or 10 miles. In some cases the protected area will encompass the entire watershed. The Commission may adopt a different protected area size during the reclassification process.
- (43) (44) Residential development means buildings for residence such as attached and detached single family dwellings, apartment complexes, condominiums, townhouses, cottages, etc. and their associated outbuildings such as garages, storage buildings, gazebos, etc.
- (44) (45) Secondary recreation includes wading, boating, other uses not involving human body contact with water, and activities involving human body contact with water where such activities take place on an infrequent, unorganized, or incidental basis.
- (45) (46) Sensitive species for aquatic toxicity testing is any species utilized in procedures accepted by the Commission or its designee in accordance with Rule .0103 of this Subchapter, or the following genera:
- (a) Daphnia;
 - (b) Ceriodaphnia;
 - (c) Salmo;
 - (d) Pimephales;
 - (e) Mysisidopsis;
 - (f) Champia;
 - (g) Cyprinodon;
 - (h) Arbacia;
 - (i) Penaeus;
 - (j) Menidia;
 - (k) Notropis;
 - (l) Salvelinus;
 - (m) Oncorhynchus;
 - (n) Selenastrum.

Other genera may be accepted by the Commission or its designee on a case-by-case basis.

- (46) (47) Shellfish culture includes the use of waters for the propagation, storage and gathering of oysters, clams, and other shellfish for market purposes.
- (47) (48) Sludge/residuals means any solid or semisolid waste generated from a wastewater treatment plant, water treatment plant or air pollution control facility permitted under the authority of the Environmental Management Commission.
- (48) (49) Source of water supply for drinking, culinary or food-processing purposes means any source, either public or private, the waters from which are used for human consumption, or used in connection with the processing of milk, beverages, food, or other purpose which requires water suitable for human consumption.
- (49) (50) Swamp waters mean those waters which are classified by the Environmental Management Commission and which are topographically located so as to generally have very low velocities and certain other characteristics which are different from adjacent streams draining steeper topography. They are designated by "Sw" following the water classification.
- (50) (51) Tidal salt waters mean all tidal waters which are classified by the Environmental Management Commission which generally have a natural chloride ion content in excess of 500 parts per million and include all waters assigned S classifications.
- (51) (52) Toxic substance or toxicant means any substance or combination of substances (including disease-causing agents), which after discharge and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, has the potential to cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions or suppression in reproduction or growth) or physical deformities in such organisms or their offspring.
- (52) (53) Trout waters are those waters which have conditions which will sustain and allow for trout propagation and survival of stocked trout on a year-round basis. These waters are classified by the Commission after considering the requirements of Rule .0101(b) and (c) of this Subchapter and include all waters designated by "Tr" in the water classification.
- (53) (54) Waste disposal includes the use of waters for disposal of sewage, industrial waste or other waste after approved treatment.
- (54) (55) Water dependent structures are those structures for which the use requires access or proximity to or siting within surface waters to fulfill its basic purpose, such as boat ramps, boat houses, docks and bulkheads. Ancillary facilities such as restaurants, outlets for boat supplies, parking lots and commercial boat storage areas are not water dependent structures.
- (55) (56) Water quality based effluent limits and best management practices are limitations or best management practices developed by the Division for the purpose of protecting water quality standards and best usage of surface waters consistent with the requirements of General Statutes G.S. 143-214.1 and the Federal Water Pollution Control Act as amended.
- (56) (57) Waters with quality higher than the standards means all waters for which the determination of waste load allocations (pursuant to Rule .0206 of this Section) indicates that water quality is sufficiently greater than that defined by the standards such that significant pollutant loading capacity still exists in those waters.
- (57) (58) Watershed means the entire land area contributing surface drainage to a specific point. For the purposes of the water supply protection rules (15A NCAC 2B .0211) local governments may use major landmarks such as highways or property lines to delineate the outer boundary of the drainage area if these landmarks are immediately adjacent to the ridgeline.
- (59) Wetlands are "waters" as defined by G.S. 143-212(6) and are areas that are inundated or saturated by an accumulation of surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas. Wetlands classified as waters of the state are restricted to waters of the United States as defined by 33 CFR 328.3 and 40 CFR 230.3.

*History Note: Statutory Authority G.S. 143-214.1; 143-215.3(a)(1);
 Eff. February 1, 1976;
 Amended Eff. February 1, 1993; August 3, 1992; August 1, 1990; October 1, 1989.*

15A NCAC 2B .0220 is proposed for adoption as follows:

.0220 WETLAND STANDARDS

(a) General. The water quality standards for all wetlands are designed to protect, preserve, restore and enhance the quality and uses of wetlands and other waters of the state influenced by wetlands. The following are wetland uses:

- (1) Storm and flood water storage and retention and the moderation of extreme water level fluctuations;
- (2) Hydrologic functions including groundwater discharge that contributes to maintain dry weather streamflow and, at other locations or times, groundwater recharge that replenishes the groundwater system;
- (3) Filtration or storage of sediments, nutrients, toxic substances, or other pollutants that would otherwise adversely impact the quality of other waters of the state;
- (4) Shoreline protection against erosion through the dissipation of wave energy and water velocity and stabilization of sediments;
- (5) Habitat for the propagation of resident wetland-dependent aquatic organisms including, but not limited to fish, crustaceans, mollusks, insects, annelids, planktonic organisms and the plants and animals upon which these aquatic organisms feed and depend upon for their needs in all life stages;
- (6) Habitat for the propagation of resident wetland-dependent wildlife species, including mammals, birds, reptiles and amphibians for breeding, nesting, cover, travel corridors and food; and

(b) The following standards shall be used to assure the maintenance or enhancement of the existing uses of wetlands identified in Paragraph (a) of this rule:

- (1) Liquids, fill or other solids or dissolved gases may not be present in amounts which may cause adverse impacts on existing wetland uses;
- (2) Floating or submerged debris, oil, deleterious substances, or other material may not be present in amounts which may cause adverse impacts on existing wetland uses;
- (3) Materials producing color, odor, taste or unsightliness may not be present in amounts which may cause adverse impacts on existing wetland uses;
- (4) Concentrations or combinations of substances which are toxic or harmful to human, animal or plant life may not be present in amounts which individually or cumulatively may cause adverse impacts on existing wetland uses;
- (5) Hydrological conditions necessary to support the biological and physical characteristics naturally present in wetlands shall be protected to prevent adverse impacts on:
 - (A) Water currents, erosion or sedimentation patterns;
 - (B) Natural water temperature variations;
 - (C) The chemical, nutrient and dissolved oxygen regime of the wetland;
 - (D) The movement of aquatic fauna;
 - (E) The pH of the wetland; and
 - (F) Water levels or elevations.
- (6) The populations of wetland flora and fauna shall be maintained to protect biological integrity as defined at 15A NCAC 2B .0202.

History Note: Statutory Authority G.S. 143-214.1; 143-215.3(a)(1);

15A NCAC 2H .0501 is proposed for adoption as follows:

SUBCHAPTER 2H - PROCEDURES FOR PERMITS: APPROVALS

SECTION .0500 - WATER QUALITY CERTIFICATION

.0501 PURPOSE

(a) The provisions of this section shall apply to all division regulatory, planning, resource management, liaison and financial aid determinations that affect surface waters and wetlands as defined by 15A NCAC 2B .0202. This section shall only apply to specific activities which require state review after the effective date of this Rule and which require a Division determination concerning effects on surface waters or wetlands. Activities that are described in Section 404(f)(1)(A-F) of the Clean Water Act (33 U.S.C. 1344) are exempt from this Rule.

(b) These Rules outline the application and review procedures for activities that require water quality certifications (certifications) pursuant to Section 401 of the Clean Water Act (33 U.S.C. 1341). Certifications are required whenever construction or operation of facilities will result in a discharge into navigable waters as described in 33 CFR Part 323. The federal definition of navigable waters includes wetlands as defined at 33 CFR 328.3 and 40 CFR 230.3.

(c) Certifications may be issued for individual activities (individual certifications) or issued for specific types or groups of activities (general certifications).

- (1) Individual certifications are issued on a case-by-case basis and the procedures outlined in the following rules are required for each individual certification.
- (2) General certifications are issued for specific types or groups of activities that are similar in nature and considered to have minimal impact. The application and review procedures for requesting concurrence from the Division that the general certification can be used for the proposed activity are the same as the procedures outlined in the following rules for individual certifications unless specifically stated otherwise in the general certification.

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

15A NCAC 2H .0502 recodified from .0501 is proposed for amendment as follows:

.05012 APPLICATION

(a) Application for Certification. Any person, as defined in Article 21, Chapter 143, North Carolina General Statutes, desiring issuance of the state certification or coverage under a general certification required by Section 401 of the Federal Water Pollution Control Act as amended shall file with the Director of the North Carolina Division of Environmental Management (director), at the office in Raleigh, North Carolina, an original and six copies of an application for certification, and the director shall mail one copy of the application to the North Carolina Director of the Division of Marine Fisheries; one copy to the North Carolina Board of Health; one copy to the North Carolina Wildlife Resources Commission; one copy to the appropriate federal licensing or permitting agency; and one copy to the Environmental Protection Agency. Submission of an application to the Division of Coastal Management for permits to develop in North Carolina's coastal area shall suffice as an application for certification. The application shall specify:

- (1) the date of application;
- (2) the name, address, and principal place of business of the applicant and phone number of the property owner;
- (3) if the applicant is a corporation, the state in which it is domesticated, the name of its principal officers, and 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 activity for which certification is sought;
- (4) the name of the individual who shall be primarily responsible for conduct of the activity for which certification is sought (plant manager or other person responsible for facility operation);
- (5) (4) the nature of the activity to be conducted by applicant;
- (6) (5) whether the discharge is occurring has occurred or is proposed;
- (7) (6) the location of the discharge, stating the municipality, if applicable; the county; the drainage basin; the name of the receiving waters; and the location of the point of discharge with regard to the receiving waters;

- (8) ~~(7)~~ the nature a description of the receiving waters, including type (creek, river, swamp, canal, lake, or pond or estuary) if applicable; nature (fresh, brackish or salt); and direction of flow wetland classification;
- (9) ~~(8)~~ description of the type of waste treatment facilities if applicable; if any, that will receive the wastewater before discharge into the receiving waters;
- (10) ~~the type of discharge, including chemical composition; quantity, expressed as gallons per unit of time; frequency; temperature; and kinds and quantities of pollutants or contaminants;~~
- (11) ~~projected future variations in the nature of the discharge;~~
- (12) ~~the type, diameter or cross-section and length of the conduit conveying the discharge;~~
- (13) ~~names and addresses of adjoining riparian owners.~~

(b) Maps. There shall be attached to the application a map(s) or sketch(es) of sufficient detail to accurately delineate the boundaries of the lands owned or to be utilized by the applicant in carrying out its activity; the location, dimensions and type of any structures erected or to be erected on said lands for use in connection with the activity; ~~the location or proposed location of the conduit conveying the discharge;~~ and the location and extent of the receiving waters including wetlands within the boundaries in the vicinity of said lands. ~~Maps and sketches shall be on sheets approximately 8 1/2 by 11 inches in size.~~

(c) Power to Request Additional Information. The Director may request, and the applicant shall furnish, any additional information that may be found necessary for the proper consideration of the application.

(d) Omissions From Applications. If the applicant considers that it is not feasible or is unnecessary to furnish any portion of the information required by Subdivisions (a) and (b) of this Regulation Rule, applicant shall submit a detailed statement explaining the reasons for omission of any such information.

(e) Investigations. The staff of the Department of Natural Resources and Community Development Environment, Health, 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 safe access to the lands and facilities of the applicant and lend such assistance as shall be reasonable.

(f) Who Must Sign Applications. The application will 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 certification 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) An application form may be obtained from the Division of Environmental Management, the Division of Coastal Management, or the U.S. Army Corps of Engineers, Wilmington District, Regulatory Branch.

History Note: Statutory Authority G.S. 143-215.3(a)(1);143-215(c);
Eff. February 1, 1976;
Amended Eff. December 1, 1984, January 1, 1979.

15A NCAC 2H .0503 recodified from .0502 is proposed for amendment as follows:

.05023 PUBLIC NOTICE

(a) Notice by Publication. Notice of each pending application for an individual certification shall be published one time in a newspaper having general circulation in the county in which the discharge will occur, or as provided in Paragraph (c) of this Rule. Publication shall be made at least 15 days prior to proposed final action by the Director upon the application and not more than 20 days after acceptance of a completed application.

(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 upon the application. The notice shall also state that 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 will be made available upon request and upon payment of the cost thereof to the department.

(c) The public notice requirement may also be satisfied by a joint notice with the Division of Coastal Management (15A NCAC 7J .0206) or the U.S. Army Corps of Engineers according to their established procedures.

(e) ~~(d)~~ Notice of Hearing. If the Director determines that a hearing should be held concerning the granting or denial of the application, 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. 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)~~ (e) Environmental Water Quality Certification 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 an environmental a water quality certification mailing list and shall mail copies of notices to all persons on the list.

~~(e) — Notice to Other Persons. The Director shall give written notice to such other persons.~~

(f) Payment of Costs of Public Notice. The applicant shall pay to the department the costs of advertising public notice required by Paragraphs (a) and ~~(e)~~ (d) of this Regulation Rule. Certification shall be withheld until such costs have been paid.

History Note: Statutory Authority G.S. 143-215.3(a)(1); 143-215.3(c);
Eff. February 1, 1976;
Amended Eff. December 1, 1984; September 1, 1984.

15A NCAC 2H .0504 recodified from .0503 is proposed for amendment as follows:

.05034 HEARING

(a) Public Hearing on Certification. If the Director determines that it is in the public interest that a public hearing for the purpose of reviewing public comment and additional information be held prior to granting or denying certification, the Director shall so notify the applicant by registered or certified mail, return receipt requested, and shall publish and give notice as required by Paragraphs ~~.0502(e) and (d)~~ .0503 (d) and (e) of this Section. Such hearing will be held within 90 days following date of notification. The record of each hearing held under this Paragraph shall remain open for a period of 30 days.

(b) Hearing for Applicant Upon Certification Denial. An applicant whose certification is denied or granted subject to unacceptable conditions, shall have the right to a contested case hearing pursuant to the provisions of G.S. 150B-23.

History Note: Statutory Authority G.S. 143-215.3(a)(1);143-215.3(c);
Eff. February 1, 1976;
Amended Eff. July 1, 1988; December 1, 1984.

15A NCAC 2H .0506 is proposed for adoption as follows:

.0506 REVIEW OF APPLICATIONS

(a) In evaluating requests for certification based on the procedures outlined in Paragraphs (b) through (e) of this Rule, the Director shall determine if the proposed activity has the potential to remove or degrade those significant existing uses which are present in the wetland or surface water. Activities which would not remove or degrade existing uses shall be reviewed according to the procedures found in Subparagraphs (c)(2)-(5) of this Rule. Those activities covered by general certifications (15A NCAC 2H .0501(c)(2)) which do not require written concurrence from the Division will be deemed certified if the conditions of the certification are followed and may proceed without the review procedures outlined in Paragraphs (b) through (e) of this Rule. An applicant may also demonstrate that designated uses are not present at a particular site using a wetland ecological evaluation method approved by the Director; otherwise the designated uses as outlined at 15A NCAC 2B .0220(a)(1)-(6) are assumed to exist in all classes of wetlands, and the appropriate review procedures shall be undertaken. Certification shall be issued where the Director determines water quality standards are met, including protection of existing uses.

(b) The Director shall issue a certification upon determining that existing uses are not removed or degraded by a discharge to classified surface waters for an activity which:

- (1) has no practical alternative under the criteria outlined in Paragraph (f) of this Rule;
- (2) will minimize adverse impacts to the surface waters based on consideration of existing topography, vegetation, fish and wildlife resources, and hydrological conditions under the criteria outlined in Paragraph (g) of this Rule;
- (3) does not result in the degradation of groundwaters or surface waters;

- (4) does not result in cumulative impacts, based upon past or reasonably anticipated future impacts, 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 under U.S. Army Corps of Engineers requirements, or as described at Subparagraphs (h)(1) of this Rule.

(c) The Director shall issue a certification upon determining that significant existing uses are not removed or degraded by a discharge to Class WL wetlands as defined at 15A NCAC 2B .0101(c)(8), for an activity which:

- (1) has no practical alternative as described in Paragraph (f) of this Rule, or impacts less than three acres of Class WL wetlands;
- (2) will minimize adverse impacts to the wetland based on consideration of existing topography, vegetation, fish and wildlife resources, and hydrological conditions under the criteria outlined in Paragraph (g) of this Rule or impacts less than one acre of wetland within 150 feet (including less than one-third acre of wetland within 50 feet), of the mean high water line or normal water level of any perennial or intermittent water body as shown by the most recently published version of the United States Geological Survey 1:24,000 (7.5 minute) scale topographical map or other site-specific data;
- (3) does not result in the degradation of groundwaters or surface waters;
- (4) does not result in cumulative impacts, based upon past or reasonably anticipated future impacts, 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 under U.S. Army Corps of Engineers requirements or as described in Subparagraph (h)(1)-(8) of this Rule.

(d) The Director shall issue a 401 Water Quality Certification upon determining that significant existing uses are not removed or degraded by a discharge to Class SWL wetland as defined at 15A NCAC 2B .0101(d)(4), wetlands that are contiguous to waters designated as ORW, HOW, SA, WS-I, WS-II or Trout, or wetlands that are contiguous to rivers designated as a North Carolina or National Wild and Scenic River, for an activity which satisfies Subparagraphs (c)(2)-(5) of this Rule, and:

- (1) for wetlands classified as coastal wetlands pursuant to 15A NCAC 7H .0205, has no practical alternative as described in Paragraph (f) of this Rule, and;
- (2) for wetlands classified as coastal wetlands pursuant to 15A NCAC 7H .0205, is water dependent and requires access to water as a central element of its basic function, although projects funded by government agencies may be exempted from this requirement ; and,
- (3) provides for replacement of existing uses through wetland mitigation under U.S. Army Corps of Engineers requirements, or as described in Subparagraphs (h)(1)-(7) and (9) of this Rule.

(e) The Director shall issue a certification upon determining wetlands of exceptional state or national ecological significance including but not limited to Class UWL wetlands, and wetlands that have been documented to the satisfaction of the Director as habitat essential for the conservation of state or federally listed threatened or endangered species, provided that the wetlands have been so classified or designated prior to the date of application for certification or a draft environmental impact statement has been submitted to the Director, for an activity which satisfies Subparagraphs (c)(2)-(5) and (d)(1)-(2) of this Rule, and:

- (1) the wetland impacts are necessary for the proposed project to meet a demonstrated public need; and
- (2) provides for replacement of existing uses through wetland mitigation under U.S. Army Corps of Engineers requirements, or as described in Subparagraphs (h)(1)-(7) and (10) of this Rule.

(f) 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 activity and all alternative designs the basic project purpose cannot be practically accomplished in a manner which would avoid or result in less adverse impact to surface waters or wetlands.

(g) Minimization of impacts may be demonstrated by showing that the surface waters or wetlands are able to continue to support the existing uses after project completion, or that the impacts 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.
- (h) Replacement or mitigation of unavoidable losses of existing uses 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. Mitigation required by the U.S. Army Corps of Engineers shall be considered to constitute the mitigation required by that certification unless the Director determines that the mitigation proposal does not meet the criteria established in Subparagraph (6) if this Paragraph.
 - (2) Mitigation shall not be required for impacts to Class WL wetlands of less than 1 acre.
 - (3) Participation in wetland restoration programs coordinated by the Department of Environment, Health and Natural Resources shall be preferred to individual project mitigation 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. Mitigation sites approved by the U.S. Army Corps of Engineers shall be deemed to be consistent with the Department's restoration plan.
 - (4) Acceptable methods of wetlands mitigation are listed below in the order of preference:
 - (A) Restoration: the re-establishment of wetland hydrology and vegetation in an area where it previously existed.
 - (B) Creation: the construction of a wetland in an area where wetlands did not exist in the recent past.
 - (C) Enhancement: increasing one or more of the functions of an existing wetland by manipulation of vegetation or hydrology.
 - (D) Preservation: protection of wetlands through purchase, donation or conveyance of a conservation easement to an appropriate government or non-profit agency for management.
 - (5) Restoration is the preferred method of wetlands mitigation. The other methods may be utilized if the applicant can demonstrate that restoration is not practical or that the proposed alternative is the most ecologically viable method of replacing the lost functions and values.
 - (6) All mitigation proposals shall provide for the replacement of wetland acres lost due to the proposed 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 the public good would be better served by other types of mitigation.
 - (7) Wetlands mitigation shall be conducted based on the following ratios (acres mitigated to acres lost): 4:1, for wetlands located within 150 feet of the mean high water line or normal water level of any perennial or intermittent water body as shown by the most recently published version of the United States Geological Survey 1:24,000 (7.5 minute) scale topographical map; 2:1, for wetlands located between 150 feet and 1000 feet from the mean high water line or normal water level of any perennial or intermittent water body as shown by the most recently published version of the United States Geological Survey 1:24,000 (7.5 minute) scale topographical map; and 1:1, for all other wetlands. For linear projects which impact less than 3 acres of wetlands the ratio shall be 2:1 regardless of the distance from surface waters. The above ratios apply only to restoration. The acres of required mitigation for the other types of mitigation shall be determined by multiplying the above ratios by 1.5 for creation, 2 for enhancement, and 5 for preservation. The above ratios do not apply to approved mitigation sites where the state and federal review agencies have approved credit/debit ratios. This subparagraph shall not apply to general certifications until the Department has established a wetlands restoration program or until January 1, 1997, whichever occurs first.
 - (8) Mitigation for impacts to wetlands designated in Paragraph (c) of this Rule shall be conducted within the same river basin and physiographic province when practical. Unavoidable losses of wetlands adjacent to waters classified as WS-III shall be replaced within the water supply watershed when practical.
 - (9) Mitigation for impacts to wetlands designated in Paragraph (d) of this Rule shall be of the same wetland type and located within the same river sub-basin when practical. Mitigation for impacts to

wetlands adjacent to waters classified as WS-I or WS-II shall be replaced within the water supply watershed when practical.

(10) Mitigation for impacts to wetlands designated in Paragraph (e) of this Rule shall be of the same wetland type and within the same watershed when practical.

(i) The Director shall not duplicate the site-specific application of any guidelines employed by the United States Army Corps of Engineers in evaluating permit applications under 33 U.S.C. 1344 and applicable federal regulations.

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

15A NCAC 2H .0507 recodified from .0504 is proposed for amendment as follows:

.05047 ISSUANCE OF CERTIFICATION

(a) Time Limit for Final Action on Certification Application. All applications for certification shall be granted or denied within ~~130~~ 60 days after receipt at the offices of the Director in Raleigh, North Carolina, ~~unless: Failure to take final action within 60 days will result in a waiver of the certification requirement by the Director, unless:~~

- (1) The applicant agrees, in writing, to a longer period;
- (2) Final decision is to be made pursuant to a public hearing;
- (3) Applicant fails to furnish information necessary to the Director's decision;
- (4) Applicant refuses the staff access to its records or premises for the purpose of gathering information necessary to the Director's decision;
- (5) Information necessary to the Director's decision is unavailable.

(b) Time Limit for Final Action on Certification Application After Hearing. All applications for certification shall be granted or denied within ~~130~~ 60 days after public hearing. Failure to take final action within 60 days will result in a waiver of the certification requirement by the Director unless the applicant otherwise agrees in writing, or unless Subdivision Subparagraphs (a)(3), (4), or (5) of this Regulation Rule shall apply.

(c) Conditions of Certification. Any certification issued pursuant to this Rule may contain such conditions as the Director shall deem necessary to insure compliance with Sections 301, 302, 303, 306, and 307 of the Federal Water Pollution Control Act Amendments.

(d) Modification or Revocation of Certification

- (1) Any certification issued pursuant to this Rule is subject to revocation or modification for violations of conditions of 301, 302, 303, 306, and 307 of the Federal Water Pollution Control Act Amendments.
- (2) Any certification issued pursuant to this Rule is subject to revocation or modification upon a determination that information contained in the application or presented in support thereof is incorrect or if conditions under which the certification was made have changed.

(e) Notification of Unapproved Application. In the event that the Director denies the application for certification 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 approve; and a copy of the notification shall be mailed to the appropriate federal licensing or permitting agency and EPA.

History Note: Statutory Authority G.S. 143-215.3(a)(1);143-215.3(c);
Eff. February 1, 1976;
Amended Eff. July 1, 1988; December 1, 1984

