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WETLANDS IN NORTH CAROLINA

■ Richard Whisnant

The historical American view of wetlands is not flattering:

“...the horrible desert, the foul damp ascends without ceasing, corrupt the air and render it unfit for respiration...never was rum—that cordial of life—found more necessary than in this dirty place.”¹

Until the middle of the twentieth century, most governmental efforts involving these “foul damp” were aimed at draining them. These efforts were successful enough that by the 1980s, large percentages of the original wetlands in most states were gone (see map). In the 1990s, however, wetlands became widely recognized for performing valuable environmental

Percentage of Wetlands Acreage Lost, 1780's-1980's



Twenty-two states have lost at least 50 percent of their original wetlands. Seven states—Indiana, Illinois, Missouri, Kentucky, Iowa, California, and Ohio—have lost over 80 percent of their original wetlands. Since the 1970's, the most extensive losses of wetlands have been in Louisiana, Mississippi, Arkansas, Florida, South Carolina, and North Carolina. Source: Mitch and Gosselink, *Wetlands*, 2nd Edition, Van Nostrand Reinhold, 1993

functions. Government policy and law began to focus on the protection and improvement of remaining wetlands and, in some cases, the restoration of wetlands that were previously damaged. This new approach has created many obstacles for those involved with land development issues in and around wetlands, and developers continue to dispute the policy shift. The state of wetlands regulation itself has become, in North Carolina as elsewhere, something of a quagmire.

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1. William Byrd, *Histories of the Dividing Line Betwixt Virginia and North Carolina*, ed. William K. Boyd (Raleigh, N.C.: The North Carolina Historical Commission, 1929), 66, 70 (Byrd's comments were written on or around March 15 and 17, 1728).

Wetlands Law: The Scientific and Technical Context

What is a Wetland?

The answer to this question depends on the agency involved. The definition of “wetland” includes three types of criteria whose application historically has differed among the U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency (EPA), the U.S. Fish and Wildlife Service of the Department of the Interior (Fish and Wildlife), and the state of North Carolina.² For most purposes, areas that meet certain criteria relating to hydrology, soil, and plant life are federal jurisdictional wetlands and thus require a federal permit for ditching or draining.³

Hydrology

Water saturation (hydrology) largely determines how soil develops and the types of plant and animal communities living in and on the soil. “Wetlands are areas that *are inundated or saturated by 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.”⁴

To delineate a wetland, it is typically necessary to look at hydrology tables in local soil surveys to see how often certain types of soils are saturated with water within eighteen inches of the surface.

2. The most general state definition of “wetlands” covers “ ‘waters’ as defined by N.C. GEN. STAT. § 143-212(6) (hereinafter G.S.) 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.” 15A NCAC 2B .0202 (1999).

3. *But see* p. 5 (*American Mining* case).

4. Definition of wetlands as used since the 1970s by the U.S. Army Corps of Engineers (The Corps) and the U.S. Environmental Protection Agency (EPA) for regulatory purposes.

Soil

When the upper part of the soil is saturated with water at growing season temperatures, organisms consume the oxygen in the soil and create conditions unsuitable for most plants. Such conditions also cause development of the color and texture characteristic of so-called “hydric soils.”

Plants

Plants that can tolerate hydric soils and the hydrology that accompanies them (hydrophytes) are the third indicator of wetlands.

Wetland Types

Beyond the general jurisdictional question of what constitutes a wetland, scientists (and to an increasing degree, government regulators as well) are also concerned with the types of wetlands. The typology is important because different types of wetlands serve different functions and some types are much scarcer, and thus more valuable, than others. Types of wetlands found in North Carolina include bottomland hardwood, riverine swamp, Atlantic White Cedar, Low Pocosin, High Marsh, Low Marsh, fens, and bogs.⁵

Beneficial Environmental Functions of Wetlands

Some lawmakers have been highly motivated to pass legislation to protect wetlands, as wetlands provide substantial environmental benefits. For example:

- Wetlands and vegetated riparian areas (areas along the margins of streams) act as filters that remove sediment and pollutants from stormwater runoff, thus improving water quality.
- Wetlands store large quantities of water, acting as buffers that mitigate flood damage.
- Wetlands and riparian vegetation stabilize stream banks, again reducing sedimentation and erosion.

5. For a discussion of wetland types from a federal regulatory point of view, see Cowardin, Carter, Golet, and LaRoe, “Classification of Wetlands and Deepwater Habitats of the United States,” (U.S. Fish & Wildlife Service, Dec. 1979), available at <http://www.nwi.fws.gov/classman.html> (accessed Aug. 5, 1999).

- Wetlands and riparian areas provide important habitats for many plant and animal species.
- Wetlands and riparian areas provide both spawning grounds and nursery areas for many commercially and recreationally valuable fish species.

Basic Contours of Wetlands Regulation

Federal Regulation

The paramount legal authority over wetlands is Section 404 of the Clean Water Act, and the primary agency responsible for Section 404 permitting is the U.S. Army Corps of Engineers (the Corps).⁶ The basic premise of the Section 404 program is that no discharge of dredged or fill material can be permitted if a practicable alternative exists that is less damaging to the aquatic environment or if the nation's waters would be significantly degraded. In other words, permit applicants must show that they have

- taken steps to avoid wetland impacts where practicable;
- minimized potential impacts to wetlands; and
- provided compensation for any remaining unavoidable impacts through activities to restore or create wetlands.

Regulated activities are controlled by a permit review process. An individual permit is usually required for potentially significant impacts. For most discharges that will have only minimal adverse effects the Corps grants up-front "general permits." These may be issued on a nationwide, regional, or state basis for particular categories of activities (for example, minor road crossings, utility line backfill, and bedding) as a means to expedite the permitting process.

Nationwide General Permits

The Corps has created a series of "general" or "nationwide" permits (NWP) that cover many activities, often eliminating the need for an individual permit process. These NWPs came under attack in the 1990s, and in December 1996 the Corps announced its intention to withdraw the most commonly used NWP (Nationwide 26) and to reissue it and others.⁷

6. 33 U.S.C. § 1344.

7. See 63 Fed. Reg. 36,039 (July 1, 1998). See also 63 Fed. Reg. 55,095 (Oct. 14, 1998) (extending date of expiration for NWP 26 to September 15, 1999).

Nationwide permit 26 (NWP 26) covered certain activities in isolated waters and waters above the "headwaters" point on streams. The Corps proposed to issue six new NWPs and modify six existing NWPs to become effective when NWP 26 expired. It also proposed to add one NWP condition and modify six existing NWP conditions that would apply to all existing NWPs as well as the new and modified NWPs. The new NWPs are activity-specific and most are restricted to discharges of dredged or fill material into nontidal United States waters. In addition to improving protection of aquatic resources, the revised NWPs supposedly would ensure that those activities with truly minimal impacts would be authorized efficiently by a general permit. Critics, however, questioned how the Corps would handle the increased workload from the individual permitting of numerous, relatively small projects once covered by NWP 26 and avoid creating long delays for development activities in wetlands.

Activities Exempt under the Clean Water Act, Section 404(f)

Some activities are exempted altogether from Section 404 regulation. These include many ongoing farming, ranching, and silviculture practices, so long as these comply with "best management practices" set out in state and federal law.⁸ Exemptions include:

- established (ongoing) farming, ranching, and forestry activities;
- plowing;
- seeding;
- cultivating;
- harvesting food, fiber, and forest products;
- minor drainage;
- upland soil and water conservation practices;
- maintenance (but not construction) of drainage ditches;⁹
- construction and maintenance of irrigation ditches;
- construction and maintenance of farm or stock ponds;
- construction and maintenance of farm and forest roads, in accordance with best management practices; and

8. See 15A NCAC 2B .0230 (proposed as temporary rule Oct. 14, 1999 by the Environmental Management Commission); 33 U.S.C. § 404(f).

9. The regulation of ditching is discussed in conjunction with the *American Mining* case below at p. 5.

- maintenance of structures, such as dams, dikes, and levees.

These exemptions are subject to several limitations. First, for example, they do not cover the entire area of land that a farmer owns, only parts that historically have been farmed. So one cannot now convert wetlands into new farmland without a permit or some other exemption or exception.¹⁰ Second, there is a “recapture” provision in the Clean Water Act that requires a permit for “[a]ny discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced....”¹¹ Finally, the Swampbuster provisions of the Food Security Act¹² withhold certain federal farm program benefits from farmers who convert or farm on converted wetlands, particularly wetlands converted to agricultural use after December 23, 1985.

EPA’s Role

The EPA also plays a role in federal wetlands regulation. The agency is authorized under Section 404(c) of the Clean Water Act to restrict or prohibit the use of an area as a disposal site for dredged or fill material if the discharge will have unacceptable adverse effects on municipal water supplies, shellfish beds, or fishery, wildlife, or recreational areas.¹³ This far-reaching license is known as the “EPA veto.”

State Authority: Section 401 and State Law Itself

States have their own “veto” under Section 401 of the Clean Water Act.¹⁴ Section 401 essentially empowers states to refuse to allow an activity to proceed

10. See *U.S. v. Brace*, 41 F.3d 117 (3d Cir. 1994), cert. denied, 515 U.S. 1158 (1995); 33 C.F.R. § 323.4.

11. 33 U.S.C. § 404(f)(2).

12. Food Security Act of 1985, P.L. 99-198, §§ 1221-1223 (codified at 16 U.S.C.A. §§ 3821-3823), as amended by Federal Agricultural Improvement and Reform Act of 1996. See generally D. McBeth, *Wetlands Conservation and Federal Regulation: Analysis of the Food Security Act’s “Swampbuster” Provisions as Amended by the Federal Agriculture Improvement and Reform Act of 1996*, 21 HARV. ENVTL. L. REV. 201 (1996).

13. 33 U.S.C. § 1344(c).

14. *Id.* § 1341.

within their waters even though the activity may be federally permitted.¹⁵ Some states, such as North Carolina, have set up parallel review processes that generate independent judgments on an applicant’s plans to dredge or fill a wetland.¹⁶ The Clean Water Act does not preempt states from enacting their own wetlands regulation.¹⁷

North Carolina explicitly recognizes the propriety of wetlands regulation in its constitution. “It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry, and to this end it shall be a proper function of the State of North Carolina and its political subdivisions to acquire and preserve park, recreational, and scenic areas, to control and limit the pollution of our air and water, to control excessive noise, and in every other appropriate way to *preserve as a part of the common heritage* of this State its forests, *wetlands*, estuaries, beaches, historical sites, openlands, and places of beauty.” N.C. CONST. art. XIV, § 5, Conservation of Natural Resources (emphasis added).¹⁸

The legislature has given explicit authority to the secretary of the Department of Environment and Natural Resources (DENR), acting with the Coastal Resources Commission, to regulate the dredging and

15. The U.S. Supreme Court has broadly construed the scope of activities covered by this state “veto” to include permits involving water *quantity* as well as water quality. See *PUD No. 1 v. Washington Department Of Ecology*, 511 U.S. 700 (1994). *But cf.* *Oregon Natural Desert Ass’n v. Donbeck (ONDA II)*, 151 F.3d 945 (9th Cir. 1998), *opinion withdrawn from bound volume* (application of § 401 to nonpoint source pollution; specifically, grazing on public lands); K. Johnson, *The Mythical Giant: Clean Water Act Section 401 and Nonpoint Source Pollution*, 29 ENVTL. L. 417 (1999).

16. Note that the Clean Water Act permits states to receive delegation of the federal wetlands permitting program, under certain circumstances. 33 U.S.C. § 404. North Carolina has not sought this responsibility; few states have. Other less cumbersome legal mechanisms for transferring or coordinating intergovernmental wetlands permitting responsibility have been developed, such as general permits and memoranda of agreement between federal and state agencies having wetlands responsibilities.

17. See 33 U.S.C. § 1370 (Clean Water Act § 510) and the general statement of policy, 33 U.S.C. § 1251 (§ 101) (“the *primary* responsibilities and rights of States...”) (emphasis added).

18. The history and meaning of this constitutional provision is discussed in MILTON S. HEATH, JR., N.C. ENVIRONMENTAL BILL OF RIGHTS: ORIGINS AND IMPLICATIONS (Institute of Government, The University of North Carolina at Chapel Hill, Jan. 1999, memorandum).

filling of coastal wetlands.¹⁹ But this statute defines “coastal wetlands” as “marshland,” a much narrower classification than in the federal definitions of “wetlands.” The statute considers as “coastal wetlands”

any salt marsh or other marsh subject to regular or occasional flooding by tides, including wind tides (whether or not the tidewaters reach the marshland areas through natural or artificial watercourses), provided this shall not include hurricane or tropical storm tides. Salt marshland or other marsh shall be those areas upon which grow some, but not necessarily all, of the following salt marsh and marsh plant species: Smooth or salt water Cordgrass (*Spartina alterniflora*), Black Needlerush (*Juncus roemerianus*), Glasswort (*Salicornia* spp.), Salt Grass (*Distichlis spicata*), Sea Lavender (*Limonium* spp.), Bulrush (*Scirpus* spp.), Saw Grass (*Cladium jamaicense*), Cattail (*Typha* spp.), Salt-Meadow Grass (*Spartina patens*), and Salt Reed-Grass (*Spartina cynosuroides*).

G.S. 113-229(n)(3).

In 1996 the legislature also created the nonregulatory North Carolina Wetlands Restoration Program (NCWRP) specifically for the restoration of wetlands and stream corridors.²⁰ From 1996 to 1998 the Wetlands Restoration Program prioritized the state’s river basins and sub-basins and is charged with using appropriated funds and funds received from wetlands mitigation requirements to attempt to reestablish critical wetlands.

In 1996 DENR promulgated rules for its review of projects affecting wetlands. These rules were based on general legal authority: G.S.143-214.1, directing and empowering the Environmental Management Commission (EMC) to classify and apply standards to state waters; G.S. 143-215.1, requiring permits for sources of water pollution; and G.S. 143-215.3, the general rulemaking power of the EMC to implement articles of the General Statutes regulating air and water quality. However, a great deal of disagreement about the adequacy of DENR’s legal basis for these rules remains. How this disagreement is resolved has become increasingly important since 1996 due to successful attacks on the federal wetlands regulatory program.²¹

19. G.S. 113-230.

20. *Id.* §§ 143-214.8 to -214.13.

21. For a discussion of the debate over North Carolina authority, see p. 7.

Successful Attacks on Wetlands Regulation at the Federal Level

Several attacks on wetlands regulation in the 1990s raised questions about the sorts of areas and activities that were subject to federal authority. The most pointed of these had North Carolina connections. One widely discussed case arose in the Fourth Circuit, *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997). In reviewing a criminal conviction for knowing discharge of fill and excavated material into wetlands, the majority on the *Wilson* panel held that the federal government cannot regulate “isolated” wetlands that do not “substantially” affect interstate commerce. The opinion suffered from murky reporting due to the fact that the author of the majority opinion included several personal rulings not joined by anyone else on the panel. These personal rulings, including assertions that the federal government does not have the power to regulate wetlands lacking a direct surface connection with United States waters and that the practice of “sidecast” ditching does not constitute illegal wetlands fill, were not binding. But they did contribute to the legal “quagmire.”

The Corps announced that it would comply with *Wilson* by using a slightly different approach to permitting in Fourth Circuit states (including North Carolina). Outside the Fourth Circuit, the Corps’ interpretation of its isolated wetlands authority appeared unchanged.

Another major decision, *American Mining Congress v. U.S. Army Corps of Engineers*, 962 F. Supp. 2 (D.D.C. 1997), invalidated the Corp’s “*Tulloch* Rule.” The *Tulloch* Rule grew out of a settlement agreement in a North Carolina case, *N.C. Wildlife Federation v. Tulloch*, No. C90-713 (E.D.N.C. March 5, 1992). This rule, issued in 1993, prohibited unintended, incidental fallback from ditching activities in wetlands. Thus the removal of all soil material to upland areas still constituted a “discharge” requiring a Section 404 permit. In *American Mining* the district court refused to limit its ruling or stay its decision pending appeal. The appellate court issued a stay of the district court decision on June 27, 1997. The D.C. Circuit denied the U.S. petition for rehearing and the government did not petition for certiorari. Thus the Corps was enjoined from applying the *Tulloch* Rule, with the result that many acres of North Carolina wetlands were drained in 1998 and 1999.

North Carolina's Wetlands Draining Policy

DENR announced a wetlands draining policy in 1999, partly in response to the controversy over federal wetlands jurisdiction. The policy is set out below:

“The wetlands draining policy is intended to protect critical wetlands—many of which are near primary fish nurseries and shellfish areas—from unauthorized draining.

“Wetlands draining activities include both ditching and installation of ground pumping systems. Other activities also covered under this policy include pond construction in wetlands, filling of isolated wetlands and off-site sediment erosion into wetlands.

“When DWQ [the Division of Water Quality in DENR] discovers any such draining activities, it will notify the landowner in writing that their [sic] activity has or is likely to violate the state’s wetlands standards. The landowner will then be given an opportunity to refute the finding. If DWQ determines that a violation has occurred, it can seek enforcement action and require that the natural hydrology or biology be restored.

“The Army Corps of Engineers has informed DWQ that in some instances, the filling of ditches may require the issuance of a federal 404 wetlands fill permit. Both the Corps and DWQ will work diligently to issue any required permits in a timely manner to help restore the area’s natural wetland hydrology.

Ditch Maintenance and Creation

“Ditch maintenance is allowed as long as written documentation can be provided on the ditch’s original height and width dimensions. Both DWQ and the Division of Land Resources will review such activities. Additions beyond maintenance, however, are considered new activities and are subject to this policy.

“Ditches created for forestry purposes are allowed if they are designed, constructed and maintained properly to retain the natural wetland hydrology. These water management ditches can be used to temporarily drain the wetland during planting, early tree growth for up to three years and at harvest. Any alterations to the natural plant and animal life of the wetland, however, must maintain the wetland’s biological integrity.

“Conversion of a wet pine flat to a pine plantation would be acceptable since both of these wetlands have similar plant and animal life. Conversion of a pocosin to a pine plantation, though, would be in violation of this standard

because the flora and fauna of these systems are quite different.

“Increasing water flow, such as stormwater, to a wetland will not be considered a violation as long as the natural plants and animals are maintained.

“DWQ also has the authority to review specific wetlands draining projects that began prior to March 1, 1999. In these instances, the Division will determine whether the draining activities impaired downstream water quality such as dissolved oxygen, turbidity and salinity standards. The Division of Land Resources will check various projects to make sure they have complied with Sedimentation and Erosion Control Plans.

Compliance and Enforcement

“The Department of Environment and Natural Resources is using a multi-agency approach to implement the draining policy, to seek compliance and to pursue enforcement. In addition to DWQ and Land Resources, involved DENR agencies include Forest Resources, Soil and Water Conservation, and Coastal Management. The U.S. Natural Resources Conservation Service will also participate.

“When violations are found, regulators can seek injunction relief to cease the draining activity and to restore the wetlands on-site, civil penalties of up to \$10,000 per day and possible prosecution.

“The Division of Forest Resources is flying reconnaissance missions, with various regulatory personnel, to identify and assess draining sites. Satellite imagery is also to be used to target problem areas. To further assist in wetlands protection, the public is encouraged to report possible sites where illegal draining has occurred.”

DENR in fact issued several notices of violation and assessed penalties against developers who drained wetlands in 1998 and 1999 and who hoped to take advantage of the regulatory gap apparently left by the *Wilson* and *American Mining* cases. These enforcement proceedings have the potential to determine both the adequacy of DENR’s legal basis for its wetland rules and the extent to which other state environmental laws, such as the Sedimentation Pollution Control Act,²² can be used to govern wetlands activities.

22. G.S. 113A-50 to -66.

The Argument over Authority for North Carolina's Wetlands Rules

DENR's stance on wetlands and wetlands draining derived, at least in part, from state rules adopted by the EMC in 1996. The rules assign water quality classifications to wetlands and set out procedures for evaluating applications for Section 401 water quality certifications.²³ These rules were challenged by a number of business and industry interests in *North Carolina Home Builders Assn. v. North Carolina Environmental Management Commission*, 96-CVS-13108 (Wake County). The court dismissed the lawsuit on procedural grounds and no appeal was taken. Thus the state rules remained in effect and undisturbed by federal level attacks on wetlands regulation.

However, on June 25, 1999 (later refiled to extend the time for the EMC to respond), the same coalition of four industry groups (the North Carolina Home Builders Association, North Carolina Citizens for Business & Industry, North Carolina Aggregates Association and the North Carolina Farm Bureau Federation) and two individual developers petitioned the EMC to declare the current wetland rules invalid. The petition revisited the adoption of the rules in 1996 and claimed the EMC lacked statutory authority to pass the rules. The petition also asserted that the EMC failed to follow proper procedure. The EMC refused to invalidate its rules²⁴ and on November 5, 1999 the industry groups filed suit in Wake County Superior Court.

The core of the argument against the authority of the EMC to promulgate wetlands rules comes from differences in various definitions of the phrase "waters" in unrelated parts of the General Statutes. The definition in the Oil Pollution and Hazardous Substances Control Act expressly includes "wetlands" in a litany of things that count as "waters."

(18) "Waters" shall mean any stream, river, creek, brook, run, canal, swamp, lake, sound, tidal estuary, bay, reservoir, waterway, wetlands, or any other body or accumulation of water, surface or underground, public or private, natural or artificial, which is contained within, flows through, or borders

23. See 15A NCAC 2B .0231, 15A NCAC 2H .0506 and 15A NCAC 2H .0507, as well as amendments to rules 15A NCAC 2B .0101, -.0103, -.0201, -.0202, 2H.0501, -.0502, -.0503, and -.0504.

24. See James Eli Shiffer, "Panel Retains Ban on Draining Wetlands," *Raleigh News & Observer*, September 10, 1999.

upon this State, or any portion thereof, including those portions of the Atlantic Ocean over which this State has jurisdiction.

G.S. 143-215.77 (emphasis added).²⁵ In contrast, the definition of "waters" applicable to the statutory authority cited by DENR for its wetlands rules does not expressly include "wetlands."

(6) "Waters" means any stream, river, brook, swamp, lake, sound, tidal estuary, bay, creek, reservoir, waterway, or other body or accumulation of water, whether surface or underground, public or private, or natural or artificial, that is contained in, flows through, or borders upon any portion of this State, including any portion of the Atlantic Ocean over which the State has jurisdiction.

G.S. 143-212. By the statutory construction principle that an expression of one thing is the exclusion of another, the petitioners argue that the EMC has no authority over wetlands in general (other than with regard to the discharge of oil and hazardous substances) because such wetlands are not "waters" that the state regulates.

This is a reasonable legal argument on its face, but not a dispositive one. A comparison of all the differences in the various definitions of "waters" in North Carolina environmental law more easily suggests sloppy drafting rather than carefully considered exclusion.²⁶ The petitioners' argument would have more force, were it not for the general savings clauses in all the definitions of "waters": "...or other body or accumulation of water, whether surface or underground, public or private, or natural or artificial, that is contained in, flows through, or borders upon any portion of this State."²⁷ The legislature clearly intended the list of types of waters of the state in G.S. 143-212 to be *illustrative* rather than *exclusive*. As wetlands are, by

25. The same list, including "wetlands" expressly, occurs in the Dry-Cleaning Solvent Cleanup Act, G.S. 143-215.104B.

26. Note, for example, the inclusion in the later-drafted G.S. 143-215.77 of words like "shall" and "any"; the earlier provision's use of "whether" and an extra "or"; the re-ordering of "creek" and the omission in G.S. 143-212 of "runs" and "canals." The provisions read more easily as the work of two separate drafters, with the second drafter borrowing from the first drafter's text, than as the considered differences of the legislature.

27. G.S. 143-212.

definition in North Carolina,²⁸ places in which water accumulates close to the surface of the ground, they appear to be covered by the general clause in G.S. 143-212. Further, the list specifically includes “swamps,” a type of wetland, in each of its manifestations. Finally, the legislature expressly empowered the EMC to carry out the provisions of Section 401 of the Clean Water Act.²⁹ Of course, this grant of power begs the equally contentious question of the limits of authority for Section 401. At most, Section 401 only grants authority for the state to act in instances in which there is federal jurisdiction under the Clean Water Act; otherwise, there would be no “applicant for a Federal license or permit” to trigger Section 401.³⁰

The Rules Review Commission considered these arguments in a confusing meeting in 1996.³¹ The wetland rules were among the last to pass through the Commission before it gained a veto over rules, a provision added to the Administrative Procedures Act in 1995. The wetlands rules, however, were not subject to this new provision, as they were created before the time period for which the veto would be effective. The Commission originally voted to object to the rules on grounds of ambiguity; later it amended its objection

and added the grounds of “lack of statutory authority.” Thus the rules were codified with an objection noted as to their authority. If the current group of petitioners can surmount the procedural difficulties they faced before, as well as whatever additional procedural hurdles arise from previously having dropped the case, the courts eventually may rule on the question of the EMC’s authority to regulate wetlands.

The stakes in this dispute are much higher in 1999 than they were in 1996. Given the successful attacks on federal wetlands jurisdiction, the scope of federal authority (at least in the Fourth Circuit Court of Appeals, including the state of North Carolina) is significantly smaller. The state and its Environmental Management Commission may or may not have filled the regulatory gap these successful federal attacks have created. If adequate legal authority for the state’s wetlands rules exists, then the state agency charged with regulatory responsibility for the state’s waters has the rules in place to fill the gap. If that authority is found to be lacking, the debates over the costs and benefits of wetlands regulation which began in the 1990s may well continue in legislatures of the new millennium.

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28. See note 2.

29. See G.S. 143B-282(u).

30. See 33 U.S.C. § 1341.

31. A transcript is on file with the author, who served as general counsel of DENR at the time and who in that capacity argued for the existence of adequate authority to support the rules.

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