UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
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JUL 24 2018

Ms. Linda Culpepper
Interim Director
Division of Water Resources
North Carolina Department of Environmental Quality
1611 Mail Service Center
Raleigh, North Carolina 27699-1611

Dear Ms. Culpepper:

The United States Environmental Protection Agency has completed its review of the State of North Carolina's reclassification of the Lower Cape Fear River (LCFR). In accordance with section 303(c) of the Clean Water Act (CWA) EPA is disapproving these revisions because the documentation provided does not meet the State's existing definition of swamp waters[1] and does not address the technical concerns expressed in the Agency's formal comments to the State in 2015.[2] The Agency's decision on these revisions is detailed in the enclosed *Decision Document of the United States Environmental Protection Agency Determination Under Section 303(c) of the Clean Water Act Review of North Carolina's Reclassification for Lower Cape Fear River.*

The revisions were approved for adoption by the North Carolina Environmental Management Commission on September 10, 2015 and May 12, 2016. The reclassification was then submitted to the Agency for review by letter, dated April 9, 2018, and received on April 19, 2018. The reclassification added the Swamp supplemental classification to a 15-mile segment of the Lower Cape Fear River and included a management strategy.

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[1] The State defines "swamp waters" as "…those waters which are classified by the Environmental Management Commission and which are topographically located so as to generally have very low velocities and other characteristics which are different from adjacent streams draining steeper topography." The State did not provide documentation indicating that the velocities and other characteristics associated with the swamp classification apply to the LCFR. Nor did North Carolina submit velocity information showing that the LCFR segment is different from adjacent streams, or provide alternative dissolved oxygen or pH values that could demonstrate protection of the organisms living in the river, including endangered sturgeon. There is no support in the record for a structured scientific assessment of the waterbody conditions affecting the attainment of the use. Therefore, the requirements of the CWA and 40 CFR Part 131 have not been met.

[2] The EPA's comment letter dated March 2, 2015, suggested that the State provide additional documentation on the waterbody conditions that define swamp waters, such as velocity, to support North Carolina's determination that the swamp classification is appropriate for this segment of the LCFR.

A certification letter from the Senior Deputy Attorney General, dated March 28, 2018, was included in the submission from North Carolina and concludes that the revision was duly adopted pursuant to State law and is valid and enforceable in the State of North Carolina. In accordance with 40 CFR section 131.21(c), new and revised state and tribal water quality standards are not effective for CWA purposes until approved by the EPA. Since the revision added a designated use for this waterbody which was not supported by the record, the revisions were determined to be inconsistent with the goals of section 101(a) of the CWA and the implementing regulations at 40 CFR part 131.

In general, the EPA is supportive of states developing and utilizing site-specific criteria to support designated uses, and will approve site-specific criteria for specific designated uses if found to be protective of such designated uses. If the State would like to pursue the development of a use attainability analysis or site-specific criteria, the Region 4 EPA staff welcomes the opportunity to work closely with the State to ensure consistency with the current regulations and develop a path forward.

If you have any questions, please feel free to contact me at (404) 562-8357, or have your staff contact Ms. Lauren Petter at (404) 562-9272.

Sincerely,

Onis "Trey" Glenn, III
Regional Administrator

Enclosure

cc: Ms. Julie A Grzyb, NC DWR NPDES
Mr. Jeff Manning, NC DWR WQS

Decision Document of the United States Environmental Protection Agency Determination Under Section 303(c) of the Clean Water Act Review of North Carolina's Reclassification for Lower Cape Fear River

Introduction

Section 303 of the Clean Water Act (CWA) requires states to establish water quality standards (WQS) and to submit any new or revised WQS to the EPA for approval or disapproval. In a letter dated April 9, 2018, from Linda Culpepper, Interim Director for the Division of Water Resources for the North Carolina Department of Environmental Quality (NCDEQ), to Trey Glenn, Regional Administrator of the EPA's Region 4 Office, NCDEQ submitted new and revised WQS for review by the EPA pursuant to section 303(c) of the CWA. In a March 28, 2018, letter, North Carolina's Senior Deputy Attorney General certified that the WQS revisions were duly adopted pursuant to North Carolina law. These materials were received by the EPA on April 19, 2018.

North Carolina's April 9, 2018, letter transmitted several revisions of the state's regulatory text to incorporate the addition of a supplemental Swamp (Sw) classification to the already existing classifications associated with a 15-mile long section of the Lower Cape Fear River (LCFR), as well as provide details on a companion water quality management strategy. As described more fully below, where the EPA has determined that the amendments to 15A NCAC 02B are themselves, new or revised WQS,[1] the EPA has reviewed and is disapproving those WQS pursuant to section 303(c) of the CWA.

Clean Water Act Requirements

In addition to the requirements of section 303 of the CWA, 33 U.S.C. § 1313, that states establish WQS and submit any new or revised standards to the EPA for review and approval or disapproval, the EPA's implementing regulations require states to specify appropriate water uses to be achieved and protected and to adopt water quality criteria that protect the designated use. See 40 CFR §§ 131.10(a) and 131.11(a). Such criteria must be based on a sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. Id. For waters with multiple use designations, the criteria shall support the most sensitive use. Id. In addition, the EPA's regulations require that in establishing criteria, a state shall consider WQS of downstream waters and shall ensure that its WQS provide for the attainment and maintenance of WQS of downstream waters. See 40 CFR § 131.10(b).

A state's submission of water quality criteria must include (1) the methods used and analyses conducted to support WQS revisions, (2) water quality criteria sufficient to protect the designated uses and (3) a certification by the State Attorney General or other appropriate legal authority within the state that the WQS were duly adopted pursuant to state law. See 40 CFR § 131.6.

As defined in 40 CFR 131.3(g), a use attainability analysis (UAA) is a structured scientific assessment of the factors affecting the attainment of the use which may include physical, chemical, biological, and economic factors as described in §131.10(g). States may designate a use, or remove a use that is *not* an existing use, if the state conducts a UAA as specified in 40 CFR 131.10(j) that demonstrates attaining the use is not feasible because of one of the factors in §131.10(g). A state must conduct a UAA as described in §131.3(g) and §131.10(g) whenever the state wishes to designate a sub-category of such a

[1] The EPA has provided FAQs on "What is a New or Revised Water Quality Standard Under CWA 303(c)(3)?" at http://water.epa.gov/scitech/swguidance/standards/cwa303faq.cfm. The link provides detailed information of such analysis.

use that requires criteria less stringent than previously applicable. See 40 CFR 131.10(j)(2). A state is not required to conduct a UAA whenever the state designates a sub-category of a use specified in section 101(a)(2) of the Act that requires criteria at least as stringent as previously applicable. See 40 CFR 131.10(k)(2).

State Regulatory Process and the Revisions

The revisions addressed in this document were discussed in a public hearing on February 5, 2015, and approved for adoption by the North Carolina Environmental Management Commission on September 10, 2015 and May 12, 2016. The first adoption date relates to the addition of 15A NCAC 02B .0311(t) and 15A NCAC 02B .0227, which were public noticed on January 2, 2015, and associated with the hearing on February 5, 2015. The second adoption date relates to the revisions to 15A NCAC 02B .0227, which were requested by the Rule Review Committee counsel, and were subsequently public noticed on December 15, 2015. No hearing was requested for the 15A NCAC 02B .0227 revisions, although a 60-day comment period was provided. In general, the revisions incorporate the supplemental Sw classification to the existing SC (salt water Class C) classification for the segment described below. The language specifically adopted in 15A NCAC 02B .0311(t) states:

> (t) The Schedule of Classifications and Water Quality Standards for the Catawba River was amended effective ~~[November 1, 2015]~~ August 1, 2016 with the reclassification of a section of 18-(71) from upstream mouth of Toomers Creek to a line across the river between Lilliput Creek and Snows Cut from Class SC to Class SC Sw. A site-specific management strategy is outlined in 15A NCAC 02B .0227.

The above revision became effective on August 1, 2016, and is further described below.

As noted in 15A NCAC 02B .0311(t), there is a management strategy that corresponds to this section. The language specifically adopted in 15A NCAC 02B .0227(2) states:

> (2) A part of the Cape Fear River (Cape Fear River Basin) comprised of a section of Index No.18-(71) from upstream mouth of Toomers Creek to a line across the river between Lilliput Creek and Snows Cut shall be protected by the Class SC Sw standards as well as the following site-specific action: All new individual NPDES wastewater discharges and expansions of existing individual NPDES wastewater discharges shall be required to provide treatment for oxygen consuming wastes as described in Parts (A) through *(C)* of this Subparagraph.
>
> (A) Effluent limitations shall be as follows: *BODs* = 5 mg/l, NH3-N = 1 mg/1 and DO= 6 mg/l, or utilize site-specific best available technology on a case-by-case basis for industrial ~~discharges.~~ discharges in accordance with Rule .0406 (e) of this Subchapter.
>
> (B) Seasonal effluent limits for oxygen consuming wastes ~~[will]~~ shall be considered ~~on a case-by-case basis~~ in accordance with Rule .0404 of this Subchapter.
>
> (C) Any new or expanded permitted pollutant discharge of oxygen consuming waste shall not cause the dissolved oxygen of the receiving water to drop more than 0.1 mg/1 below the modeled in-stream dissolved oxygen at total permitted capacity for all discharges.

The original revision became effective November 1, 2015, with the final language, indicated with the tracked changes shown above, becoming effective on July 1, 2016.

Background

In North Carolina, all tidal salt waters are at least covered by the designated use of Class SC. Class SC waters are protected for aquatic life propagation and maintenance of biological integrity (including fishing and fish), wildlife, secondary recreation and any other usages except for primary recreation or shellfishing. The SC classification is also considered a primary classification. In this instance, the state has added the Sw label as a supplemental classification to the primary classification. The term "swamp waters," which is already part of North Carolina's regulations, is defined as "…those waters which are classified by the Environmental Management Commission and which are topographically located so as to generally have very low velocities and other characteristics which are different from adjacent streams draining steeper topography." They are designated by "Sw" following the water classification.

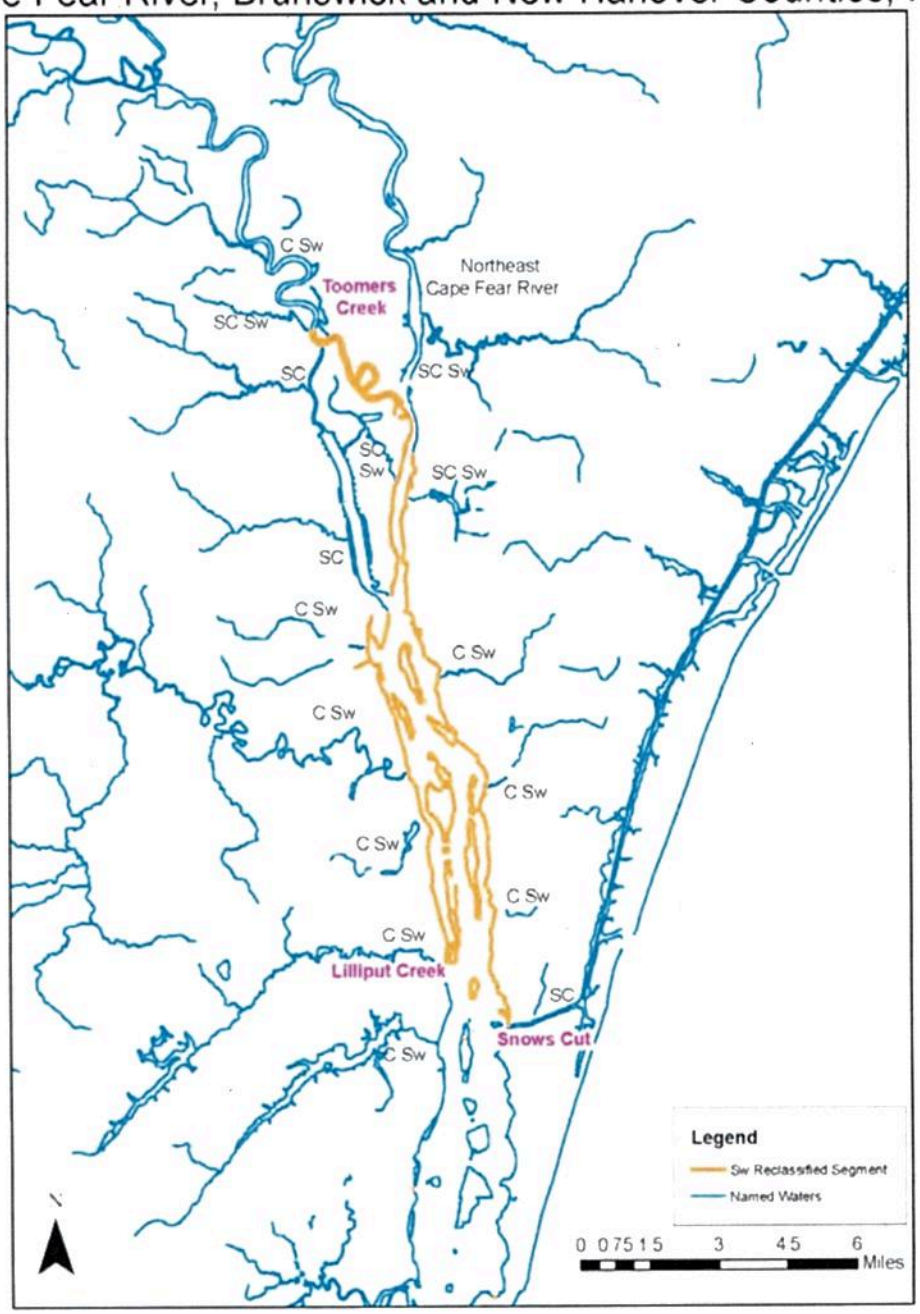
Revising the designated use of the LCFR to add the Sw supplemental classification to the existing SC primary classification allows lower dissolved oxygen and pH criteria than allowed under the SC classification, where lower dissolved oxygen or pH concentrations are caused by natural conditions. In this rulemaking, the state did not simultaneously establish the natural conditions in the river. However, the ability to have lower concentration limits than the previously applicable numeric criteria for pH and dissolved oxygen also results in a potential for lowering of the ambient water quality condition. This ability to have lower criteria is the component that ties the EPA's review to 131.10(j)(2). The following table summarizes the differences associated with the applicable pH and dissolved oxygen criteria before and after the revisions.

Classification	pH	Dissolved Oxygen (DO)
Class SC	6.8 – 8.5	5.0 mg/l
Class SC Sw	6.8 – 8.5, but as low as 4.3 if result of natural conditions	5.0 mg/l, but lower than 5.0 mg/l if caused by natural conditions

In addition to the additional criteria that can be applied to this segment, the state has adopted a water quality management plan to accompany the revisions to the designated uses for this waterbody. As part of the documentation in Enclosure 1, North Carolina indicates that a "water quality management plan is a strategy tailored to protect existing uses or quality of waters in specific waters" and 15A NCAC 02B .0227 specifically provides that: "In implementing the water quality standards to protect the existing uses…of the waters of the state or the water quality which supports those uses, the Commission shall develop water quality management plans on a priority basis to attain, maintain or enhance water quality throughout the state."

In the submission materials, the state provided the following map, which highlights the location associated with the revision, and for additional information, shows which adjacent segments have previously been designated as swamp waters.

Cape Fear River, Brunswick and New Hanover Counties, NC



EPA's Analysis of the Revisions

Before proceeding to the discussion of individual provisions, the EPA's review includes an analysis of whether or not a provision is a new or revised water quality standard. The Agency, using the decision criteria referenced in footnote 1, has determined that some of the provisions adopted by the state are not subject to the EPA's review under section 303(c). In those instances, the discussion will be brief and indicate that was the EPA's conclusion. When a provision is determined to be a new or revised water quality standard, there will be additional discussion regarding the provisions' consistency with statutory and regulatory requirements.

15A NCAC 02B .0311(t)

> (t) The Schedule of Classifications and Water Quality Standards for the Catawba River was amended effective ~~[November 1, 2015]~~ August 1, 2016 with the reclassification of a section of 18-(71) from upstream mouth of Toomers Creek to a line across the river between Lilliput Creek and Snows Cut from Class SC to Class SC Sw. A site-specific management strategy is outlined in 15A NCAC 02B .0227.

The revision at 15A NCAC 02B .0311(t) includes two sentences. The first sentence is the primary regulatory location where the state added a Sw supplemental classification to the specified segment of the LCFR and is further discussed below. The EPA determined that the second sentence is not a new or revised WQS and therefore is not subject to review under section 303(c) of the CWA.

Since North Carolina's Sw supplemental classification is considered a designated use change, the requirements at 40 CFR § 131.10(a) ("each state must specify appropriate water uses to be achieved and protected") and section 303(c)(2)(A) ("such standards shall be established taking into consideration their use and value for…propagation of fish and wildlife…") were considered for this provision. Pursuant to 40 CFR § 131.6(b), a state's WQS submission must include "methods used and analyses conducted to support water quality standards revisions." In addition, 40 CFR 131.10(j)(2) requires a state to conduct a UAA as described in §131.3(g) and §131.10(g) whenever the state wishes to designate a sub-category of such a use that requires criteria less stringent than previously applicable. The following summarizes the EPA's review of the first sentence of 15A NCAC 02B .0311(t) relative to these regulatory and statutory requirements.

For its review of the first sentence, the EPA considered the available information that North Carolina provided to support the designated use revision. A significant consideration was whether the record supported the designated use change, the sub-category of swamp waters, as defined by the state. Based on the documentation provided by the state, the record does not provide adequate justification that this segment meets the state's definition of "swamp waters." The state did not provide documentation indicating that the velocities and other characteristics associated with the Sw classification apply to the LCFR. Nor did North Carolina submit any velocity information showing that the LCFR segment is different from adjacent streams. The EPA's comment letter dated March 2, 2015, suggested that the state provide this additional documentation to support North Carolina's determination that the Sw classification is appropriate for this segment of the LCFR.

A Southern Environmental Law Center comment letter, dated February 12, 2016, included a quote from a representative of the National Oceanographic and Atmospheric Administration indicating DO levels below 5.0 mg/L and pH of 4.3 "would be problematic for sturgeons of either species" in the river because "[f]undamentally, sturgeons are adapted for life in big, well-flowing rivers..." This statement, which speaks to both the presence of sturgeon and their habitat requirements, serves to further highlight that identifying this segment as swamp waters is inconsistent with both the common interpretation of swamp and the state's own definition of swamp waters. Additionally, while the state has indicated that the surrounding tributaries are also designated as swamp waters and therefore influencing the water quality in the 15-mile segment affected by this revision, the state has not sufficiently demonstrated that this riverine stretch of the LCFR exhibits the same swamp water characteristics of these smaller tributaries. Therefore, for the reasons described above the EPA concludes that North Carolina has not demonstrated that the subject water is "topographically located so as to generally have very low velocities and other characteristics which are different from adjacent streams draining steeper topography."

Further, the Agency considered whether the state met the requirements of 40 CFR § 131.10. As part of the 2015 regulatory revisions to Part 131, the regulations clarify that a UAA is required when a state redesignates a use to one with criteria less stringent than the previously applicable use. Since the criteria for pH and DO can be lowered in the case of natural conditions, the addition of the Sw water designated use does not require criteria at least as stringent as the previously applicable SC use. Given the lack of support in the record for a structured scientific assessment of the §131.10(g) factors affecting the attainment of the use, the Sw designated use change is not appropriate.

Based on the EPA's analysis, the Agency concludes that the requirements at 40 CFR § 131.10 and section 303(c)(2)(A) have not been met and the revision to include a Sw classification for the LCFR is disapproved. Because the EPA's disapproval removes a supplemental classification, no further action is required by the EPA, since the default Class SC designation remains in place. Therefore, North Carolina should continue to utilize the criteria associated with the Class SC designated use for all CWA purposes.

In general, the EPA is supportive of states developing and utilizing site-specific criteria to support designated uses, and will approve site-specific criteria for specific designated uses if the criteria are found to protect such designated uses. If the state would like to pursue the development of a UAA or site-specific criteria, the Region 4 EPA staff would be happy to work closely with the state to ensure consistency with the current regulations and a path forward.

15A NCAC 02B .0227(b)(2)

> (2) A part of the Cape Fear River (Cape Fear River Basin) comprised of a section of Index No.18-(71) from upstream mouth of Toomers Creek to a line across the river between Lilliput Creek and Snows Cut shall be protected by the Class SC Sw standards as well as the following site-specific action: All new individual NPDES wastewater discharges and expansions of existing individual NPDES wastewater discharges shall be required to provide treatment for oxygen consuming wastes as described in Parts (A) through *(C)* of this Subparagraph.

The revision at 15A NCAC 02B .0227(b)(2) includes two sentences. The first sentence is the secondary regulatory location where the state added a Sw supplemental classification to the specified segment of the LCFR and is further discussed below. The EPA determined that the second sentence is not a new or revised WQS and therefore is not subject to review under section 303(c) of the CWA.

For the same reasons described in the analysis of the first sentence of 15A NCAC 02B .0311(t), the first sentence of 15A NCAC 02B .0227(b)(2) is disapproved and no further action is required by the EPA, since the default Class SC remains in place. Therefore, North Carolina should continue to utilize the criteria associated with the Class SC designated use for all CWA purposes.

15A NCAC 02B .0227(b)(2)(A)

> (A) Effluent limitations shall be as follows: *BODs* = 5 mg/l, NH3-N = 1 mg/1 and DO= 6 mg/l, or utilize site-specific best available technology on a case-by-case basis for industrial ~~discharges.~~ discharges in accordance with Rule .0406 (e) of this Subchapter.

The EPA determined that the sentence at 15A NCAC 02B .0227(b)(2)(A) is not a new or revised WQS and therefore is not subject to review under section 303(c) of the CWA.

15A NCAC 02B .0227(b)(2)(B)

> (B) Seasonal effluent limits for oxygen consuming wastes ~~[will]~~ shall be considered ~~on a case by case basis~~ in accordance with Rule .0404 of this Subchapter.

The EPA determined that the sentence at 15A NCAC 02B .0227(b)(2)(B) is not a new or revised WQS and therefore is not subject to review under section 303(c) of the CWA.

15A NCAC 02B .0227(b)(2)(C)

> (C) Any new or expanded permitted pollutant discharge of oxygen consuming waste shall not cause the dissolved oxygen of the receiving water to drop more than 0.1 mg/1 below the modeled in-stream dissolved oxygen at total permitted capacity for all discharges.

The revision at 15A NCAC 02B .0227(b)(2)(C) allows a lowering of 0.1 mg/l from the specified condition of "the modeled in-stream dissolved oxygen at total permitting capacity for all discharges." Since this revision impacts the allowable DO concentration in the waterbody, it is a new or revised water quality standard subject to the EPA's review.

Several other states in Region 4 have adopted provisions which allow a very limited ("0.1mg/L") lowering of ambient DO concentration from a natural background condition. These provisions have typically been adopted by states because of the variable nature of DO and require a demonstration of a natural dissolved oxygen concentration before allowing the deviation of 0.1 mg/L to occur. In this instance, the provision allows DO to deviate from a condition associated with the total permitted capacity for all discharges. The technical documents used by the EPA[2] to support 0.1 mg/L lowering provisions in other states is very specific to natural conditions, not to total permitted capacity. The EPA's comment letter to North Carolina, dated March 2, 2015, suggested that the state provide additional documentation to support this provision. Pages 12-13 of North Carolina's Report of Proceedings Document provides the following response to comments from the state related to this provision:

> Point Sources
> i. The petition seems to indicate that point sources will have waste load allocations developed for them.
> ii. The management plan should include the means by which the 0.1 mg/L cap on lowered DO will be determined. Important details to establish and get reviewed by stakeholders include the model to be used, input parameters, season to be modeled, location of compliance, and whether compliance is to be based on instantaneous versus average conditions.
> iii. How will prohibition against causing DO decreases be enforced it at all?
> iv. Replace "Any" with "All" (at the start of the last sentence of the proposed management plan) so that the cumulative impact of all additional permitted oxygen consuming waste is a diminishment of less than 0.1mg/L.
> v. Shouldn't allow any discharges to drop the DO levels; require whatever necessary to prevent that. 10 discharges could drop it 1 mg/l.

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[2] U.S. Environmental Protection Agency's Ambient Water Quality Criteria for Dissolved Oxygen. EPA 440/5-86-003. (April 1986).

Section 4, Precision and Bias, of the Membrane Electrode Method in *Standard Methods for the Examination of Water and Wasterwater*

vi. Need to set limits on industrial facilities' discharges as with non-industrial discharges.

• **Response:** The language within the following response is not proposed to be incorporated into the rule, but to provide information on how the dissolved oxygen impact from new or expanding discharges will most likely be assessed by the Division.

The model to be used will be the most currently available three dimensional water quality model, which at this time, is the Lower Cape Fear dissolved oxygen model, http://portal.ncdenr.org/c/document_library/get_file?uuid=a84477db-4d83-4cc0-a9b9-f7da7a6a51f9&groupId=38364. The model was finalized on October 2009 by the Division of Water Quality (now known as the Division of Water Resources). The model is calibrated to 2004 observed data and meteorological conditions. Model inputs are described in the report. The most critical season when dissolved oxygen is expected to be impacted is April-October, and this season will be the focus for model comparison.

The model will first be run with all existing discharges at full permitted capacity. This run will establish a baseline model for comparison. The baseline model will then be run with the addition of the proposed new or expanding discharge. Results from the two model runs will then be evaluated to determine the impact of a new or expanding discharge, and the entire area that is impacted by the discharge will be evaluated. If at any time there is a difference between these two model runs greater than 0.1 mg/L, the discharge will not be allowed. So, this approach will basically be a time-series comparison based on model output, and prohibition against causing DO decreases will be enforced via permit requirements stated in the proposed water quality management plan.

When modeling is conducted for a new or expanded discharge (as described directly above), the term "total permitted capacity" as stated in the proposed water quality management plan is to include all existing discharges as operating at their full permit limits plus the new or expanded discharge operating at its full permit limits. Rather than making the suggested language replacement as noted in the above fourth comment regarding point sources, DWR proposes to provide clarity to this issue by adding the following phrase to the end of the last sentence of the management plan: "for all discharges." Thus, the final sentence of the management plan would read as follows: "Any new or expanded permitted pollutant discharge of oxygen consuming waste shall not cause the DO of the receiving water to drop more than 0.1 mg/l below the modeled in-stream DO at total permitted capacity for all discharges."

The provision adopted by North Carolina raises both technical and legal concerns. Technically, the state also has not documented how allowing a deviation of 0.1 mg/L from the condition described in the provision (modeled in-stream DO at total permitted capacity for all discharges) protects the designated uses. Independent of that, the provision does not appear to be consistent with past provisions adopted in other Region 4 states, which allow deviations of DO up to 0.1mg/L from natural background conditions as recommended in EPA guidance. Legally, as written, the provision allows a different DO criterion expectation for National Pollutant Discharge Elimination System (NPDES) facilities which are new or expanding. Criteria must apply for all purposes under the CWA, and cannot be implemented for only some purposes under the CWA, such as NPDES permitting. Because of these concerns, the Agency concludes that the requirements of 40 CFR § 131.11 and section 303(c)(2)(A) have not been met.

Therefore, the EPA is disapproving this sentence and North Carolina should continue to utilize the criteria associated with the Class SC designated use for all CWA purposes.

Should North Carolina revise the designated use for this segment of the LCFR in the future, two possible options are available for North Carolina to address the EPA's disapproval of these revised WQS. The options include either developing a scientific record that supports the deviation of 0.1 mg/L from the total permitted capacity for all discharges or making the provision more akin to the natural conditions deviation language of other states. If the latter option is chosen for a future revision by the state, it is the EPA's recommendation that the state define in regulation what the natural condition of the LCFR is, at the same rulemaking time, in order to facilitate the use of such a provision.

Endangered Species Act

Section 7(a)(2) of the Endangered Species Act requires federal agencies, in consultation with the Fish and Wildlife Service or the National Marine Fisheries Service, to ensure that their actions are not likely to jeopardize the continued existence of federally listed species or result in the destruction or adverse modification of designated critical habitat of such species. However, the EPA Region 4 office concluded that there is no action to consult on since the revisions are either being disapproved or are not new or revised WQS.

Conclusion

Based on the reasons outlined above, it is our conclusion that the requirements of the CWA and 40 CFR part 131 have not been met for the revised use classification and the accompanying water quality management strategy revisions, which were subject to our review, and are therefore disapproved.

JUL 24 2018

Date

Onis "Trey" Glenn, III
Regional Administrator

Executive Summary of Regulatory Decision

On April 19, 2018, the North Carolina Department of Environmental Quality transmitted several revisions to the state's water quality standards including a supplemental Swamp classification to a portion of the Lower Cape Fear River (LCFR), and a companion water quality management strategy. As described more fully below, the Environmental Protection Agency (EPA) has reviewed and is disapproving three specific revisions pursuant to section 303(c) of the Clean Water Act (CWA).

Two of the three provisions identify the subject segment of the LCFR as having a Swamp classification, which results in a modification to the state's designated use for this segment. For its review, the EPA considered the available information that North Carolina provided to support the designated use revision. Based on the documentation provided by the state, the record was insufficient in two ways. First, it did not provide adequate justification that the segment meets the state's definition of "swamp waters." Second, as part of the 2015 regulatory revisions to Part 131, the regulations clarify that a structured scientific assessment is required and since the state did not provide such an assessment, the Swamp designated use change is not appropriate. Therefore, the Agency concludes that the requirements at 40 CFR § 131.10 and section 303(c)(2)(A) have not been met and the revisions to include a Swamp classification for the LCFR are disapproved. Because the EPA's disapproval removes a supplemental classification, no further action is required by the EPA, since the default tidal salt water designation remains in place.

The third provision, which is part of the companion water quality management strategy, provides for a deviation from the dissolved oxygen criterion when certain conditions are met. The state did not provide the necessary documentation to show that the provision protects the designated uses and therefore, the requirements at 40 CFR § 131.11 and section 303(c)(2)(A) have not been met and the provision is disapproved. As with the other provisions, the EPA's disapproval removes a supplemental component to the previously existing regulatory requirements so no further action is required by the EPA.

The remainder of this document outlines the full detail of the EPA's review of the revisions received on April 19, 2018.