

Last year, the North Carolina Environmental Management Commission downgraded a section of the Lower Cape Fear River from its previous designation as “tidal salt water” to the less protective “swamp water” classification. This move prevents the state from having to craft needed protections for the Lower Cape Fear, which serves as an essential source of aquatic habitat and drinking water. We object to this new classification, as it is factually inaccurate, in violation of federal law, and creates a roadblock to meaningful action to protect the Lower Cape Fear.

States are required by the federal Clean Water Act to classify rivers and other surface waters within their borders to identify the uses that each water body must support. The Cape Fear River segment at issue was classified as “SC” before this change, meaning that it is “tidal salt water” protected for such uses as fishing, boating, shellfish consumption, and aquatic life survival. By contrast, the new “SC-SW” classification designates a water body as “swamp water” and allows it to meet less stringent water quality criteria, including lower levels of dissolved oxygen and more acidic pH levels. 15A NCAC 02B .0101.

For nearly twenty years, the Lower Cape Fear River—a fifteen-mile stretch of tidal salt water extending southward from Wilmington—has been stuck on North Carolina’s list of impaired waters. *See* Department of Environment and Natural Resources (DENR). 2014. 2014 Draft Category 5 Water Quality Assessments-303(d) List. Raleigh, North Carolina. (Available [here](#).) The problem, it seems, is the pigs. North Carolina’s coastal plain is littered with an extraordinary number of industrial livestock operations—operations that produce an extraordinary amount of toxic and oxygen-depleting wastes. The Lower Cape Fear’s troubles appear to be the result of this pollution. According to the Department of Environmental Quality, the river is currently in violation of the state’s water-quality standards for dissolved oxygen, acidity, arsenic, copper, and nickel. Each of these impairments can be traced to hog manure.

Under the Clean Water Act, North Carolina’s listing of the Lower Cape Fear River as impaired required it to develop a strategy for addressing the waterway’s water-quality problems. In an apparent effort to undermine this process, however, the state’s Environmental Management Commission recently declared the river “swamp water” with naturally low levels of dissolved oxygen. In reaching this decision, the Commission ignored its own regulations, experts’ comments, and the battleship moored along the river’s banks.

First, despite its duty to do so, the Commission did not consider the many statutory factors that govern the classification of waterways, including “[t]he size, depth, surface area covered, volume, direction and rate of flow, stream gradient and temperature of ... [a] water[.]” N.C.G.S. § 143-214.1(d)(1). Second, the Commission also appears to have ignored the regulatory definition of “swamp waters,” which is focused on waterways with “low velocities[.]” 15A NCAC 02B .0101(e)(2); *id.* 02B .0202(62). Third, in concluding that the Lower Cape Fear’s oxygen and acidity issues are the result of the river’s “natural conditions[.]” the Commission failed to acknowledge and assess the pollution that is caused by the watershed’s many large-scale livestock operations. *See* 15A NCAC 02B .0220(5), (12) (dissolved-oxygen and pH standards for “swamp waters” within tidal areas). And fourth, because the Commission “designate[d] a sub-category of ... a use that requires criteria less stringent than previously applicable[.]” it was required to prepare a use-attainability analysis—something it neglected to do. 40 C.F.R. § 131.10(j)(2).

Rep. Billy Richardson introduced a bill during the long session that temporarily halted the reclassification from taking effect. That temporary delay ended with the long session, and the reclassification is now effective at the state level. The reclassification must be approved by the Environmental Protection Agency, however, to be effective at the federal level. DEQ sent the reclassification to EPA for approval earlier this year.