



North Carolina  
Coastal Federation  
*Working Together for a Healthy Coast*

***By E-mail only***

July 19, 2018

N.C. Department of Environmental Quality  
[15ANCAC02B\\_TriRev\\_Rule\\_Comments@ncdenr.gov](mailto:15ANCAC02B_TriRev_Rule_Comments@ncdenr.gov)

**Re: 2018 Triennial Review of Clean Water Rules**

Dear Sir or Madam:

On behalf of the North Carolina Coastal Federation (federation), please accept the following comments on the North Carolina Environmental Management Commission (EMC)'s proposed changes to North Carolina's surface water quality standards (triennial review). For reasons presented in this letter, we urge the Department of Environmental Quality (DEQ) to take this opportunity to remove the supplemental "swamp water" classification of the part of the Lower Cape Fear River, comprised of a section of Index No.18-(71) from the upstream mouth of Toomers Creek to a line across the river between Lilliput Creek and Snows Cut and return it to its previous designation as "tidal salt water" (SC).

The federation is a state based non-profit organization dedicated to protecting and enhancing coastal water quality and habitat. Our organization represents 16,000 supporters. For the past 36 years, the federation has been taking an active role in the protection of North Carolina's coastal water quality, habitat and public beach access. Since 1982, the federation has been working with coastal communities and other partners to improve and protect coastal water quality and natural habitats, which are intricately tied to our coastal economy. By focusing primarily, but not exclusively on natural and productive estuarine shorelines, oyster and marsh restoration, coastal management and cleaning the estuaries of marine debris, we strive to support and enhance the coastal natural environment. The proposed re-classification of the Lower Cape Fear River poses impacts that are not compatible with the federation's priorities and efforts, and weakens existing legal protections and requirements for DEQ to address the existing water quality issues.

The federation represents thousands of North Carolinians who drink, fish, swim, and paddle the state's waters, including the Cape Fear River. These users place a high value on the quality of North Carolina's water resources, and will be adversely affected by the lowering of regulatory protections that will result from these proposed changes to the surface water quality standards, and the subsequent further degradation of water quality in the Cape Fear River. Earlier this year, the federation adopted the *Lower Cape Fear River Blueprint*, which is a collaborate effort to focus on the river's estuarine and riverine natural resources. Pressures from historic alterations, short-sighted development, unregulated industrial uses, conflicting water uses, and changes associated with climate alterations have affected drinking, surface and groundwater water supplies and quality, as well as ecosystem health. Through the unified approach outlined in the *Lower Cape Fear River Blueprint*, the federation aims to protect and restore the lower, coastal

Cape Fear River to maintain a healthy, productive, and resilient coast. The reclassification of the Lower Cape Fear River as a “swamp water” is in direct conflict of these strategies and inconsistent with long-term restoration efforts.

North Carolina is required by the Clean Water Act (CWA) to review its water quality standards and classifications every three years (the triennial review), and to make any modifications necessary to protect the waters of the state. Because waterbody classifications are water quality standards, the regulation reclassifying the Lower Cape Fear River as a “swamp water” – 15A NCAC 02B .0311(t) – can be addressed as part of triennial review.

The reclassification of the Lower Cape Fear River fails to provide the region’s endangered Atlantic sturgeon with the protections required under state and federal law. In its water quality rules, the EMC has acknowledged the importance of maintaining water quality conditions that sustain and recover federally-listed threatened and endangered aquatic animal species, and has required DEQ to develop site-specific management strategies for waters relied upon by imperiled aquatic species. On August 17, 2017, the National Marine Fisheries Service designated the Lower Cape Fear River as critical habitat for the endangered Carolina population of Atlantic sturgeon.<sup>1</sup> In doing so, the agency emphasized the importance of dissolved oxygen to the species, noting that “[t]he physical features essential for the conservation of Atlantic sturgeon” include “[w]ater quality conditions ... with ... oxygen values that support ... [l]arval, juvenile, and subadult growth, development, and recruitment.”<sup>2</sup> According to the agency, while “[a]ppropriate temperature and oxygen values will vary interdependently, and depending on salinity in a particular habitat[,]” a concentration of “6.0 mg/L dissolved oxygen or greater likely supports juvenile rearing habitat, whereas dissolved oxygen less than 5.0 mg/L for longer than 30 days is less likely to support rearing when water temperature is greater than 25 °C.”<sup>3</sup>

Because the reclassification of the Lower Cape Fear River as swamp water is designed to allow dissolved-oxygen levels in the river to drop below 5.0 mg/L, it fails to provide for the “[m]aintenance and recovery of the water quality conditions required to sustain and recover” the region’s Atlantic sturgeon population and therefore should be reversed.<sup>4</sup> In addition, the segment of the Lower Cape Fear River in question has been designated as a Primary Nursery Area by the NC Division of Marine Fisheries.<sup>5</sup> State law requires that nursery areas be maintained, as much as possible, in their natural state, allowing fish populations “to develop in a normal manner with as little interference from man as possible.”<sup>6</sup>

---

<sup>1</sup> Nat’l Marine Fisheries Serv., Final Rule, Designation of Critical Habitat for the Endangered New York Bight, Chesapeake Bay, Carolina and South Atlantic Distinct Population Segments of Atlantic Sturgeon and the Threatened Gulf of Maine Distinct Population Segment of Atlantic Sturgeon, 82 Fed. Reg. 39,160 (Aug. 17, 2017).

<sup>2</sup> Id. at 39,239-40 (codified at 50 C.F.R. § 226.225(b)).

<sup>3</sup> Id.; see also Report of Proceedings at a-102 (U.S. FWS comments on reclassification proposal) (citing “references demonstrating adverse effects to fish early lifestages at DO concentrations less than the standard of 5 mg/L”).

<sup>4</sup> See 15A N.C. Admin. Code 02B .0110.

<sup>5</sup> See 15A N.C. Admin. Code 03R .0103.

<sup>6</sup> See 15A N.C. Admin. Code 10C .0501.

North Carolina Coastal Federation

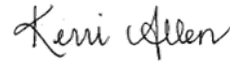
The EMC adopted the water quality management plan for this segment of the Lower Cape Fear River before the critical habitat designation.<sup>7</sup> Taking this new information into account, to avoid violating both the Endangered Species Act and state law, we urge the Commission to abandon the “SC-SW” reclassification and return the Lower Cape Fear River to a “SC” classification. The triennial review provides a unique opportunity to reverse course on a decision that arbitrarily and unlawfully reclassifies the Lower Cape Fear River as “swamp water,” arbitrarily ignores the pollution caused by the region’s industrial livestock operations, fails to protect an endangered population of Atlantic Sturgeon, and violates the antidegradation requirements of state and federal law.

Thank you for taking our comments under consideration.

Sincerely,



Todd Miller  
Executive Director



Kerri Allen  
Coastal Advocate

---

<sup>7</sup> See 15A NCAC 2B .0227(b)(2).