

HEARING OFFICERS' REPORT

PROPOSED AMENDMENTS TO THE NEUSE & TAR-PAMLICO NUTRIENT STRATEGY RULES

SEPTEMBER 12, 2019 MEETING OF THE NC ENVIRONMENTAL MANAGEMENT COMMISSION



DEQ Division: Division of Water Resources

Hearing Officers: Commissioners J.D. Solomon and Steven P. Keen

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**Hearing Officer's Report following Public Hearings
and Comment Period on the rules cited as 15A NCAC 02B .0701 and
.0703 and readopt with substantive changes the rules cited as 15A
NCAC 02B .0229, .0232, .0234-.0240 and .0255-.0258.
(Neuse and Tar-Pamlico Nutrient Strategy Rules)**

In accordance with G.S. 150B-21.2 and G.S. 150B-21.3A(c)(2)g, the Environmental Management Commission intends to adopt the rules cited as 15A NCAC 02B .0701 and .0703 and readopt with substantive changes the rules cited as 15A NCAC 02B .0229, .0232, .0234-.0240 and .0255-.0258. This package of rules has been proposed by the Environmental Management Commission to meet the requirements of G.S. 150B-21.3A "Periodic Review and Expiration of Existing Rules." N.C. G.S. 150B-21.3A, adopted in 2013, requires state agencies to review existing rules every 10 years.

In developing this report and recommendations, the Hearing Officers have considered the principles of rulemaking required by the North Carolina Administrative Procedures Act, and specifically those requirements contained in N.C.G.S. 150B-19.1(a). In pertinent part, N.C.G.S. 150B-19.1(a) provides:

In developing and drafting rules for adoption in accordance with this Article, agencies shall adhere to the following principles:

- 1) An agency may adopt only rules that are expressly authorized by federal or State law and that are necessary to serve the public interest.
- 2) An agency shall seek to reduce the burden upon those persons or entities who must comply with the rule.
- 3) Rules shall be written in a clear and unambiguous manner and must be reasonably necessary to implement or interpret federal or State law.
- 4) An agency shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed. The agency shall not adopt a rule that is unnecessary or redundant.
- 5) When appropriate, rules shall be based on sound, reasonably available scientific, technical, economic, and other relevant information. Agencies shall include a reference to this information in the notice of text required by G.S. 150B-21.2(c).
- 6) Rules shall be designed to achieve the regulatory objective in a cost-effective and timely manner.

A public comment period for the proposed rules was observed between February 15 and April 16, 2019. Two public hearings were also conducted; the first being held on March 26, 2019, at the Administration Building Auditorium, Lenoir Community College, 231 North Carolina Hwy 58, Kinston, NC 28504. The second public hearing was held on March 28, 2019, at the Council Chambers, Clayton Town Hall, 111 E 2nd Street, Clayton, NC 27520.

DEQ staff assembled the information obtained during the public comment period into 123 comments that potentially required further action or modification of the proposed rules. The most comments were provided by the NC DEQ Division of Mitigation Services and the NC DEQ Division of Finance – Stewardship Program (30 of 123 comments, or 24%). The Hearing Officers have proposed modifications associated with 65 of the 123 comments (53%). It is noted that some of the proposed modifications address more than one comment.

Among the comments received, the Hearings Officers observed at least two major themes; one related to the Fiscal Note, and another related to the proposed credit trading ratio. With regard to the Fiscal Note, the Hearing Officers noted that several comments pertained to analyses and statements contained in the Fiscal Note. The Hearing Officers note that a fiscal note must be reviewed and approved by the Office of State Budget and Management (OSBM) prior to proposed rules being published in the North Carolina Register, and it must also be approved by the EMC at the time the rules are approved for final adoption. Based on the public comments, the Hearing Officers recommended that the Fiscal Note be updated. The recommended updates address three aspects: consideration of the memorandum entitled “Updating the Environmental Protection Agency’s (EPA) Water Quality Trading Policy to Promote Market-Based Mechanisms for Improving Water Quality” issued by the EPA on February 6, 2019; acknowledgement of the expressed concern by the regulated community that credit trading within the Neuse River Compliance Association was not effectively occurring; and recognition of proposed changes in the draft rules that addressed concerns from the NC Division of Mitigation Services and the NC Stewardship Program related to the Fiscal Note.

A second comment theme related to the credit trading ratio. The regulated community has asked for relief with respect to the magnitude of credit ratios currently stated for use in point to non-point nutrient offset credit trading. The Hearing Officers support this request and recommend the EMC adopt the 1.1:1 credit ratio that was approved by the EMC for public comment.

The Hearing Officers cite four primary reasons collectively for this recommendation. First, the current credit trading ratio has been in place for twenty years and has never been used as a matter of routine practice. Second, the Hearing Officers found no direct support that a reduced (or increased) credit ratio and associated payments will result in lessened (or improved) water quality in the subject basins. Third, there is quantifiable evidence that the current ratio creates a meaningful burden on public wastewater system ratepayers and, finally, the EPA does not require a specific credit trading ratio.

One citizen provided a written comment stating that a margin of safety should be used and a 1.1:1 credit ratio is “on low end of what should be considered but is an improvement over what’s currently being used.” In recommending the 1.1:1, the Hearing Officers also cite their general agreement with this comment.

The Hearing Officers acknowledge DWR staff’s continued support of the 2:1 credit ratio. We simply disagree that it is the appropriate ratio for future use in the Neuse and Tar-Pamlico Basins and/or by adoption in the Nutrient Offset Rule for other basins across North Carolina.

While the Fiscal Note and the credit ratio received numerous comments, the proposed rules address a wide range of important issues related to point source dischargers, stormwater, agriculture, mitigation banking, fiscal responsibility, and environmental compliance that also received meaningful comments. And, it is noted that proposed rule 15A NCAC 02B .0703 is intended to apply statewide, not just in the Neuse and Tar-Pamlico basins.

The Hearing Officers appreciate the comments provided by the public and the efforts provided by many individuals and entities over the past several years in the review and readoption of these rules. Consistent with of N.C.G.S. 150B-21.3A and 150B-19.1(a), we provide these proposed rules and Hearing Officer’s report to the full EMC for their consideration.

This is the _____ day of _____, 2019.

Steve Keen, Hearing Officer
North Carolina Environmental Management Commission

J. D. Solomon, Hearing Officer
North Carolina Environmental Management Commission

CHAPTER 2 PUBLIC HEARING & COMMENT PERIOD

The formal rulemaking process began January 2019 when Division staff presented the draft rules to the EMC and received the Commission's approval to take the draft rules to public comment. At that time, two Commission members were designated as Hearing Officers for the public hearings. These designees were J.D. Solomon and Steven P. Keen.

The Notice of Text for public hearings and comment was published on the NC Office of Administrative Hearings website on February 15, 2019 and distributed through DWR stakeholder lists. The 60-day public comment period was open from February 15 through April 16, 2019. Two public hearings were held in March 2019. There were a total of 47 registered participants and 7 speakers at the two public hearings (Table 2-1).

TABLE 2-1. PUBLIC HEARINGS FOR NEUSE / TAR-PAMLICO RULES READOPTION

Hearing	Location	Date/Time	Attendees	Speakers
1	Lenoir Community College – Kinston NC	March 26, 2019 @ 6pm	16	3
2	Clayton Town Hall – Clayton, NC	March 28, 2019 @ 6pm	31	4
			47	7

A total of 40 comment letters with approximately 123 comments were received during the comment period. A list of each party submitting comments and a copy of the comment letters along with a record of the public hearing meeting notes is provided in Appendix (C). More than half of the comment letters received were submitted by local governments subject to the Neuse and Tar-Pamlico wastewater rules. Joint comments were submitted by both the Neuse River Compliance Association and the Tar-Pamlico Basin Association in addition to several the individual member local governments. A list of the members of these discharger associations is provided in Appendix (C). Six hearing officer meetings were held with DWR staff between May and August 2019 to deliberate the public comments. The Hearing Officers' responses to comments are provided in Chapter 3.

TABLE 2-2 SUMMARY OF COMMENT LETTERS RECEIVED BY TYPE

Category	Number of Comment Letters
Wastewater Dischargers	21
Agriculture Interests	7
Stormwater Local Governments	5
Nutrient Offset / Bankers	4
Environmental Groups	1
Private Citizens	2
Total	40

15A NCAC 02B .0713 Neuse Wastewater Rule

Comment ID: 1

Comment: Unlike the other point sources listed in (5)(ii)-(iv), the point sources with permitted flows less than 0.5 MGD are not assigned an individual discharge allocation in their NPDES permits. These sources exceed their collective annual discharge allocation of 138,000 pounds and have become an important source of nitrogen loading as well as creating a substantial inequity for the customers of the NRCA. The NRCA urges the hearing officer to address that inequity by rule amendment as DEQ is unwilling to enforce the current Rule.

Response: *The original strategy deferred regulating the small dischargers. Additional regulation of these dischargers is not recommended as part of this rules package.*

Commenters

Neuse River Compliance Association

Comment ID: 2

Comment: The limits for regulation of point source discharges should be dropped below the current 0.5 mgd amount. Often these smaller operators are the ones that have the highest concentrations of nutrients in their effluent and are least capable of managing their system due to limited resources. The rules should develop a path for bringing all permitted point source dischargers into the regulatory framework. This will improve nutrient inputs into the estuary and will have additional watershed wide benefits for the river systems as a whole.

Response: *The original strategy deferred regulating the small dischargers. Additional regulation of these dischargers is not recommended as part of this rules package.*

Commenters

Sound Rivers

American Rivers

Haw River Assembly

NC Conservation Network

Water Keepers Alliance

Comment ID: 3

Comment: Industrial dischargers should not be exempt from the conditions of .0733(5) based on a demonstration that their waste stream only has nitrogen and phosphorus at or below background levels. Current levels are too high, adding at that background level may exacerbate impairment.

Response: *The current exemption provisions for the Tar-Pam are considered adequate. No changes are recommended on this comment.*

However, the relevant language has been restructured for clarity. The exemption language reads as follows:

(h) Existing wastewater dischargers expanding to greater than 0.5 MGD design capacity may petition the Commission or its designee for an exemption from Sub-Items (a) through (d) and (f) of this Item upon meeting and maintaining all of the following conditions:

(i) The facility has reduced its annual average TN and TP loading by 30 percent from its annual average 1991 TN and TP loading. Industrial facilities may alternatively demonstrate that nitrogen and phosphorus are not part of the waste stream above background levels.

(ii) The expansion does not result in annual average TN or TP loading greater than 70 percent of the 1991 annual average TN or TP load. Permit limits may be established to ensure that the 70 percent load is not exceeded.

Commenters

Sound Rivers
American Rivers
Haw River Assembly
NC Conservation Network
Water Keepers Alliance

Comment ID: 4

Comment: Considering the similarities between watersheds, EMC and the Department should clarify the rationale behind the differing mass load equivalent concentration requirements for new dischargers. The Neuse identifies a 3.5 mg/L nitrogen monthly average limit for new municipal sources, and 3.0 mg/L for the Tar.

Response: *We agree that this inconsistency should be reconciled. We have reconciled the provisions using 3.5 mg/L in both rules.*

Commenters

Sound Rivers
American Rivers
Haw River Assembly
NC Conservation Network

Water Keepers Alliance Mike
Herrmann

Comment ID: 5

Comment: Request revision of 15A NCAC 02B.0713(7)(d)(ii) to provide clarity on the requirements to determine total nitrogen effluent limits for new industrial dischargers. We request DEQ provide clear guidelines on how to demonstrate the best available technology economically achievable in order to clarify the permit application requirements and streamline the permitting process for new industrial dischargers.

Response: *We recommend revising the industrial discharger limits to remove the 3.2 mg/L standard and rely entirely on the BAT provisions. We also recommend making an analogous change in the proposed Tar-Pamlico wastewater rule. We recommend the following language:*

(7)(f)(ii) For facilities treating industrial wastewaters, the mass load equivalent to either the best available technology economically achievable or a discharge concentration of 3.2 mg/L achievable, calculated at the monthly average flow limit in the facility's NPDES permit.

Commenters
Grifols

Comment ID: 6

Comment: Currently, new and expanding dischargers must purchase 30 years of offsets prior to obtaining NPDES permit coverage. The draft rule proposes to reduce the requirements for up front securing of credits from 30 years to 10 years. The 30-year requirement should remain in place. The facilities seeking these types of offsets are not designed around a 10-year time frame of operation. Moreover, DEQ would likely not reject a permit application something like a municipal sewage treatment plant if after 2 NPDES permit renewal cycles there was some delay in securing credits for the next 10 years. We urge the EMC to require the type of longer term thinking that operating these types of facilities requires and retain the original 30-year requirement.

Response: *The commenter's underlying interest in ensuring long-term offsets is further addressed by the proposed allowance of permanent credits in the nutrient offset rule (15A NCAC 02B .0703). When permanent credits are secured for the subsequent ten-year period, they will by definition last forever while allowing dischargers to iteratively increase their permit limits as demand increases. Therefore, this approach reduces the cost of offsets while maintaining key environmental protections.*

Commenters
Sound Rivers
American Rivers
Haw River Assembly
NC Conservation Network
Water Keepers Alliance

Comment ID: 7

Comment: We would particularly like to highlight and commend the proposed changes in proposed rule 02B .0713(7)(b) and request that NCDEQ finalize these changes without further alteration. We believe the proposed rule promotes sustainable economic growth.

Response: *Thank you. No response needed.*

Commenters
Grifols

15A NCAC 02B .0733 Tar-Pam Wastewater Rule

Comment ID: 8

Comment: This rule modification inappropriately modifies the Phase IV TP NSW Agreement by seeking to impose facility specific limitations upon expansion of members facilities. Under the Agreement, no such individual limitation is authorized unless and until the existing load cap allocated to the Association is exceeded. Therefore, the proposed revision should not be adopted as it violates a number of express provisions of the 2015 TP NSW Agreement that is binding between the parties.

Response: *We recommend that the concern be addressed by amending subparagraph 5(b) to ensure limits are the greater of 1) existing allocation plus offset credits or 2) the mass equivalent to technology-based concentration limits. This will prevent individual limits from being reduced for an expanding discharger. It will continue to be the case that a TPBA member facility will not be subject to enforcement of individual nutrient limits if TPBA is beneath its group nutrient caps. The TPBA agreement (page 17) and the TPBA permit (pages 2-3) would remain in force, and no language in these rules contravenes these sources of authority. We recommend the language below. We also recommend analogous changes for expanding dischargers in Rule .0713(8)(f), which do not change the application of that rule but promotes consistency between basins.*

The nitrogen and phosphorus discharge limits for an expanding facility shall not exceed the greater of loads equivalent to its active allocation and offset credit, or the following technology-based mass limits:

(i)For facilities treating municipal or domestic wastewaters, the mass equivalent to a concentration of 3.5 mg/L TN and 0.5 mg/L TP at the monthly average flow limit in the NPDES permit; and

(ii)For facilities treating industrial wastewater, the mass load equivalent to the best available technology economically achievable, calculated at the monthly average flow limit in the facility's NPDES permit.

Commenters

Tar-Pamlico Basin Association	Town of Tarboro
Greenville Utilities	City of Oxford
Town of Pinetops	Town of Louisburg
Town of Robersonville	City of Rocky Mount

Comment ID: 9

Comment: The proposed regulatory action fundamentally alters and undercuts the basic program structure that was established to control nutrients in the Tar-Pamlico Basin by the consent of all parties 28 years ago. The TPBA objects to the inclusion of TPBA members under the proposed rule’s permitting procedures for imposing specific effluent limitations on new and expanding dischargers.

Response: *To synchronize with the Phase IV TPBA Agreement (2015), we propose to modify the rule to delay applicability of the provisions for TPBA members. The TPBA agreement is scheduled to expire on June 1, 2025. We recommend adding the following language to paragraph (2):*

“The rule applies to Tar-Pamlico Basin Association member facilities on or after June 1, 2025. The rule applies to other facilities upon this rule’s effective date.”

Commenters

Tar-Pamlico Basin Association	Town of Tarboro
Greenville Utilities	City of Oxford
Town of Pinetops	Town of Louisburg
Town of Robersonville	City of Rocky Mount

Comment ID: 10

Comment: The proposed provisions directly violate the Association’s agreement with NCDEQ with respect to new and expanding TPBA members that was signed in July 2015.

Response: *To synchronize with the Phase IV TPBA Agreement (2015), we propose to modify the rule to delay applicability of the provisions for TPBA members. The TPBA agreement is scheduled to expire on June 1, 2025. We recommend adding the following language to paragraph (2):*

“The rule applies to Tar-Pamlico Basin Association member facilities on or after June 1, 2025. The rule applies to other facilities upon this rule’s effective date.”

Commenters

Tar-Pamlico Basin Association	Town of Tarboro
Greenville Utilities	City of Oxford
Town of Pinetops	Town of Louisburg
Town of Robersonville	City of Rocky Mount

Comment ID: 11

Comment: The Association has a long-standing Nutrient Sensitive Waters Implementation Strategy that serves as a contractual agreement between NCDEQ and the TPBA regarding multiple aspects of how and whether nutrient reductions apply to Association members. Phase IV of this agreement was signed in July 2015 and ratified by the Environmental Management Commission (EMC). That agreement provides for a “group” TN loading cap applicable to the entire Association and does not establish any individual permit requirements for any Association members new or expanding facilities. That is why the existing regulation found at 15A NCAC 02B .0229.0733 only applies to non-association dischargers in the Basin.

Response: *We concur that the Agreement does not set individual requirements for new and expanding Association facilities. Thus, the rule has been revised to include them due to this lack of a clear regulatory pathway in the current Agreement. The rule is now revised to become effective for Association members following expiration of the current Agreement.*

Commenters

Tar-Pamlico Basin Association	Town of Tarboro
Greenville Utilities	City of Oxford
Town of Pinetops	Town of Louisburg
Town of Robersonville	City of Rocky Mount

Comment ID: 12

Comment: Page 19 of the Agreement specifically addressed the intended requirements for “new and expanding” Non-Association facilities. It noted that the rules at issue would be modified to reflect this Phase IV agreement and only apply to non-Association facilities. (“Any new requirements adopted through the rules re-adoption will be applied to non-Association facilities at that time.”) TP NSW Agreement at 19. For reasons that are not explained anywhere in the rule proposal, the proposed rule modification violated this express understanding and expanded the requirements to Association members as well.

Response: *DWR does not agree that the Phase IV TPBA Agreement (2015) requires that new rules “only apply to non-Association facilities.” The excerpt from the agreement simply reflects the State’s intent in relation to non-TPBA members.*

Commenters

Tar-Pamlico Basin Association	Town of Tarboro
Greenville Utilities	City of Oxford
Town of Pinetops	Town of Louisburg
Town of Robersonville	City of Rocky Mount

Comment ID: 13

Comment: There are specific provisions that govern the addition of new facilities to the Association’s membership (See, TP NSW Agreement at 10, 14 and 19). These provisions do not specify that specific concentration limitations shall be met for any member added to the Association. Association members are only governed by the load reduction caps contained in the agreement, as adopted in the 1991 TMDL (absent some demonstration of localized impacts). So long as these load reduction requirements are met, the Association and its members are in full compliance with water quality-based limitations (See, TP NSW Agreement at 18).

Response: *Delayed implementation of this rule for TPBA members will address any interpretive conflict between this rule and the Phase IV TPBA Agreement (2015).*

We recommend adding the following language to paragraph (2):

“The rule applies to Tar-Pamlico Basin Association member facilities on or after June 1, 2025. The rule applies to other facilities upon this rule’s effective date.”

Commenters

Tar-Pamlico Basin Association	Town of Tarboro
Greenville Utilities	City of Oxford
Town of Pinetops	Town of Louisburg
Town of Robersonville	City of Rocky Mount

Comment ID: 14

Comment: By adding new “antidegradation” based requirements, and, in particular, individual facility specific nutrient concentration limitations that apply regardless of load cap compliance, this rule violates the basic terms of the Agreement.

Response: *Delayed implementation of this rule for TPBA members will address any interpretive conflict between this rule and the Phase IV TPBA Agreement (2015). A TPBA member facility will not be subject to enforcement of individual nutrient limits if TPBA is under its group nutrient caps. The TPBA agreement (page 17) and the TPBA permit (pages 2-3) would remain in force, and no language in these rules contravenes these sources of authority.*

Commenters

Tar-Pamlico Basin Association	Town of Tarboro
Greenville Utilities	City of Oxford
Town of Pinetops	Town of Louisburg
Town of Robersonville	City of Rocky Mount

Comment ID: 15

Comment: Moreover, such “antidegradation” implementation is improper where the facility is under an existing limitation (in this case, a group limitation) and the action (plant expansion) will not result in exceedance of that limitation. So long as a facility is not seeking to increase a load beyond an already authorized permit limitation (which is a specific approval for a level of degradation) then antidegradation rule application is not triggered.

Response: *We address this comment by amending subparagraphs 4(b) and 5(b) to ensure limits are the greater of 1) existing allocation plus offset credits or 2) the mass equivalent to technology-based concentration limits. This will ensure that individual limits will not be reduced for an expanding discharger. A TPBA member facility will not be subject to enforcement of individual nutrient limits if TPBA is under its group nutrient caps. The TPBA agreement (page 17) and the TPBA permit (pages 2-3) would remain in force, and no language in these rules contravenes these sources of authority.*

We recommend the following language for subparagraph 5(b):

The nitrogen and phosphorus discharge limits for an expanding facility shall not exceed the greater of loads equivalent to its active allocation and offset credit, or the following technology-based mass limits:

(i)For facilities treating municipal or domestic wastewaters, the mass equivalent to a concentration of 3.5 mg/L TN and 0.5 mg/L TP at the monthly average flow limit in the NPDES permit; and

(ii)For facilities treating industrial wastewater, the mass load equivalent to the best available technology economically achievable, calculated at the monthly average flow limit in the facility’s NPDES permit.

Commenters

Tar-Pamlico Basin Association	Town of Tarboro
Greenville Utilities	City of Oxford
Town of Pinetops	Town of Louisburg
Town of Robersonville	City of Rocky Mount

Comment ID: 16

Comment: The Division should not seek to adopt a rule that precludes the benefit of being an Association member (no specific NSW-related effluent limitation) or the benefit to the TPBA of allowing a new member (fees that may be received for allowing a new member into the Association).

Response: *Responses and recommended rule changes associated with comments 8 (ensuring individual mass limits will not be reduced for an expanding discharger) and 9 (delayed implementation of the rules for TPBA members) will preclude any conflict with the Phase IV TPBA agreement (2015). Association members will retain the benefit of the group cap and other provisions of the Phase IV TPBA agreement (2015) until its scheduled*

expiration.

We recommend the following language for subparagraphs 4(b) and 5(b):

The nitrogen and phosphorus discharge limits for a [(4)(b): new/(5)(b): expanding facility shall not exceed the greater of loads equivalent to its active allocation and offset credit, or the following technology-based mass limits:

(i)For facilities treating municipal or domestic wastewaters, the mass equivalent to a concentration of 3.5 mg/L TN and 0.5 mg/L TP at the monthly average flow limit in the NPDES permit; and

(ii)For facilities treating industrial wastewater, the mass load equivalent to the best available technology economically achievable, calculated at the monthly average flow limit in the facility’s NPDES permit.

We also recommend adding the following language to paragraph (2):

“The rule applies to Tar-Pamlico Basin Association member facilities on or after June 1, 2025. The rule applies to other facilities upon this rule’s effective date.”

Commenters

Tar-Pamlico Basin Association	Town of Tarboro
Greenville Utilities	City of Oxford
Town of Pinetops	Town of Louisburg
Town of Robersonville	City of Rocky Mount

Comment ID: 17

Comment: The provisions are contrary to Phase IV NPDES permits negotiated with the Department over a one-year period, issued in December 2015. The Division and EMC agreed that these individual NPDES permit requirements (load allocations) were only applicable if the Association, as a whole, exceeded the nutrient load granted to the Association via the approved 1992 TMDL.

Response: *Individual limits are enforceable for TPBA members only if the group limit is exceeded. Responses and recommended rule changes associated with comment 8 ensure that individual limits will not be reduced for an expanding discharger.*

We recommend the following language for subparagraph 5(b):

The nitrogen and phosphorus discharge limits for an expanding facility shall not exceed the greater of loads equivalent to its active allocation and offset credit, or the following technology-based mass limits:

(i)For facilities treating municipal or domestic wastewaters, the mass equivalent to a concentration of 3.5 mg/L TN and 0.5 mg/L TP at the monthly average flow limit in the NPDES permit; and

(ii)For facilities treating industrial wastewater, the mass load equivalent to the best available technology economically achievable, calculated at the monthly average flow limit in the facility’s NPDES permit.

Commenters

Tar-Pamlico Basin Association	Town of Tarboro
Greenville Utilities	City of Oxford
Town of Pinetops	Town of Louisburg
Town of Robersonville	City of Rocky Mount

Comment ID: 18

Comment: Any and all individual loads and facility specific requirements, by definition, only become applicable upon a specific occurrence – a violation of the group load cap, without offset BMP payments sufficient to cure the load exceedance.

Response: *Individual nutrient limits are enforceable for TPBA members only if the group nutrient limit is exceeded.*

Commenters

Tar-Pamlico Basin Association

Comment ID: 19

Comment: The proposed automatic position of new, more restrictive facility specific limitations (concentration or load), upon plant expansion, is therefore, also contrary to the NPDES permit presently applicable to the individual association members. Per federal regulation, water quality-based limitations must be demonstrated “necessary” to meet “applicable water quality standards.” 40 CFR 122.44(d). Moreover, permit limitations must be consistent with any approved TMDL. 40 CFR 122.44(d)(1)(vii)(B). The proposed rule revisions, as applicable to Association members that already have a specific water quality-based limitation for the nutrient pollutants, are more restrictive than necessary to comply with the approved effluent limitations. Therefore, these provisions exceed authority to impose such limitations under federal and state law.

Response: *An expanding TPBA member facility would not be subject to enforcement of individual nutrient limits when TPBA is under its group nutrient caps. The Phase IV TPBA Agreement (2015) (page 17) and the TPBA permit (pages 2-3) would remain in force upon expansion, and no language in these rules contravenes these sources of authority. Along with the clarifications offered in response to comment 5, this approach conforms to the federal rules cited by commenter.*

Commenters

Tar-Pamlico Basin Association	Town of Tarboro
Greenville Utilities	City of Oxford
Town of Pinetops	Town of Louisburg
Town of Robersonville	City of Rocky Mount

Comment ID: 20

Comment: The provisions violate basic principles of the 1991 TPBA Agreement by imposing individual limits on Association members.

Response: *The 1991 TPBA agreement is no longer in force and has been superseded by the Phase IV TPBA Agreement, signed in 2015. Table 3 on page 19 of the Phase IV Agreement lists individual allocations and limits for TPBA members. Delayed implementation of this rule for TPBA members will address any interpretive conflict between this rule and the Phase IV agreement.*

Commenters

Tar-Pamlico Basin Association	Town of Tarboro
Greenville Utilities	City of Oxford
Town of Pinetops	Town of Louisburg
Town of Robersonville	City of Rocky Mount

Comment ID: 21

Comment: By only establishing a single load cap applicable for the entire Association (as opposed to a “doling out” of the cap to each Association member) this allowed smaller communities to avoid high cost improvements that have no demonstrable benefit to system compliance. If any community expanding was automatically forced to provide nutrient removal, the small communities would be forced, over time, into new construction and thereby lose a major benefit of being within the Association. Presently, the program works as “trading” within the group, without the need for monetary compensation. As the load cap approaches, the TPBA will need to make a decision on how to compensate members who treat to higher levels, when others have not. If all members are simply forced to construct additional treatment, this will create a disincentive to having a group at all, and will prevent the implementation of internal trading, which can help the small communities maintain compliance in the most cost-effective manner.

Response: *An expanding TPBA member facility would not be subject to enforcement of individual nutrient limits when TPBA is under its group nutrient caps. The Phase IV TPBA Agreement (2015, page 17) and the TPBA permit (pages 2-3) would remain in force upon expansion.*

As a point of clarification, what is described as “trading” in the comment is better characterized as “joint compliance” or “group compliance.” This regulatory arrangement allows for but does not require allocation “trades” between group members. We agree that this approach provides beneficial operational and financial flexibility for group members while addressing TMDL requirements.

Commenters

Tar-Pamlico Basin Association	Town of Tarboro
Greenville Utilities	City of Oxford
Town of Pinetops	Town of Louisburg
Town of Robersonville	City of Rocky Mount

Comment ID: 22

Comment: The provisions constitute illegal amendment of the 1992 TMDL by establishing individual effluent limitations more restrictive than necessary to meet the TMDL waste load allocation granted to the TPBA. The TP NSW Agreement recognizes that a nutrient TMDL was established for the basin in 1992.

Response: *We do not agree that these provisions constitute an amendment of the TMDL. Responses and recommended rule changes associated with comment 8 ensure that individual limits will not be reduced for an expanding discharger. This change should address the concern about effluent limitations being “more restrictive than necessary.”*

We recommend the following language for subparagraph 5(b):

The nitrogen and phosphorus discharge limits for an expanding facility shall not exceed the greater of loads equivalent to its active allocation and offset credit, or the following technology-based mass limits:

(i)For facilities treating municipal or domestic wastewaters, the mass equivalent to a concentration of 3.5 mg/L TN and 0.5 mg/L TP at the monthly average flow limit in the NPDES permit; and

(ii)For facilities treating industrial wastewater, the mass load equivalent to the best available technology economically achievable, calculated at the monthly average flow limit in the facility’s NPDES permit.

Commenters

Tar-Pamlico Basin Association	Town of Tarboro
Greenville Utilities	City of Oxford
Town of Pinetops	Town of Louisburg
Town of Robersonville	City of Rocky Mount

Comment ID: 23

Comment: The TMDL has yet to be modified to establish any more restrictive limitations. However, since its adoption, the EMC has adopted a series of provisions to promote both point and non-point source reduction. At this point, there is no evidence showing that a more restrictive approach to point source control is necessary to achieve the TMDL load reductions and compliance with the State’s applicable criteria for nutrients. Therefore, the proposed rule, which will effectively place more restrictive requirements on individual members of the Association (e.g., 3.0 mg/l TN for expanding facilities), is a more restrictive requirement and not consistent with the approved TMDL. Because this

new requirement has no demonstrable water quality basis required to attain compliance with the TMDL, it exceeds the requirements of the Clean Water Act, is not consistent with existing state rules and, therefore, should not be adopted.

Response: *Prior comment responses should clarify that no increased restrictions will apply to TPBA members as a result of this rulemaking. Responses and recommended rule changes associated with comment 8 ensure that individual limits will not be reduced for an expanding discharger.*

We recommend the following language for subparagraph 5(b):

The nitrogen and phosphorus discharge limits for an expanding facility shall not exceed the greater of loads equivalent to its active allocation and offset credit, or the following technology-based mass limits:

(i)For facilities treating municipal or domestic wastewaters, the mass equivalent to a concentration of 3.5 mg/L TN and 0.5 mg/L TP at the monthly average flow limit in the NPDES permit; and

(ii)For facilities treating industrial wastewater, the mass load equivalent to the best available technology economically achievable, calculated at the monthly average flow limit in the facility’s NPDES permit.

Commenters

Tar-Pamlico Basin Association	Town of Tarboro
Greenville Utilities	City of Oxford
Town of Pinetops	Town of Louisburg
Town of Robersonville	City of Rocky Mount

Comment ID: 24

Comment: Economic Cost of the Proposal is Not Presented and Benefit Is Negligible. As part of the rule amendment an economic evaluation of the cost and benefit of increased nutrient removal from non-point and stormwater sources was noted. However, there is no apparent evaluation of the cost of forcing all (new or expanding) Association members to implement a 3 mg/l TN reduction requirement. The costs of this requirement would be rather extreme for the smaller communities that presently lack nutrient reduction facilities and considerable for the larger facilities that would have to significantly enhance their operations. Because the TMDL already sets the required target for point sources, and the Association is meeting that target, there is no additional ecological “benefit” achieved for this considerable cost. Therefore, the imposition of this additional cost cannot be justified.

Response: *The economic evaluation proposed by the commenter was not included because a more stringent application of the rule was not intended. Responses and recommended rule changes associated with comment 8 ensure that individual limits will not be reduced for an expanding discharger. A cost scenario for a new discharger under this rule was included in the fiscal note.*

We recommend the following language for subparagraph 5(b):

The nitrogen and phosphorus discharge limits for an expanding facility shall not exceed the greater of loads equivalent to its active allocation and offset credit, or the following technology-based mass limits:

(i)For facilities treating municipal or domestic wastewaters, the mass equivalent to a concentration of 3.5 mg/L TN and 0.5 mg/L TP at the monthly average flow limit in the NPDES permit; and

(ii)For facilities treating industrial wastewater, the mass load equivalent to the best available technology economically achievable, calculated at the monthly average flow limit in the facility's NPDES permit.

Commenters

Tar-Pamlico Basin Association	Town of Tarboro
Greenville Utilities	City of Oxford
Town of Pinetops	Town of Louisburg
Town of Robersonville	City of Rocky Mount

Comment ID: 25

Comment: NCWQA questions why Rule .0733 removes all references to the Tar-Pamlico Basin Association, or why the section does not include the same language as in .0713 that grants a facility's nutrient allocation to another facility that accepts all of the first facilities wastewater? We assume the allocation would be dealt with by contract between the two entities and then the contractual reallocation addressed in both entities respective NPDES permits.

Response: *References to the Association in rule .0733 are removed to provide a clear regulatory pathway for any facility in the Tar-Pamlico basin to expand. A rule is not necessary to permit a transfer of allocation associated with regionalization.*

Commenters

North Carolina Water Quality Association

Comment ID: 26

Comment: Rule .0733 requires 1.1:1 credit purchase for unmonitored nonpoint sources for new facilities but omits the same requirement for expanding facilities. It is unclear what this omission means, given that Rule .0703(j)(4) generally requires 1.1:1 ratio for credits obtained from unmonitored nonpoint sources. Although it is preferable that this particular discrepancy be corrected for the sake of clarity, discrepancies like these only emphasize that the nutrient strategy rules for the different basins could use consolidation to facilitate consistency.

Response: *We agree that consolidation of the rules makes them easier to understand and implement, and we have sought to do so where appropriate. The point-to-nonpoint source trading ratio was used as an example of potential consolidation. The nutrient offset rule already applies to all nutrient strategies in the state with respect to the generation and transaction of nutrient offset credits. Therefore, we proposed a single point-to-nonpoint source trading ratio that applies across all strategies, and for both new and expanding facilities, by referencing the nutrient offset rule (.0703) where appropriate.*

Commenters

North Carolina Water Quality Association

Comment ID: 27

Comment: Discrepancy between .0713 and .0733 where .0733 allocates to “facilities treating industrial waste waters the lesser of its allocation and offset credits, the BAT, or 3.2 mg/L N and .5 Mg/L P.

Response: *We recommend removing the 3.2 mg/L standard and relying entirely on the BAT provisions for industrial dischargers. We also recommend making an analogous change in the proposed Tar-Pamlico wastewater rule. We recommend the following language in (7)(f)(ii) of the Neuse Wastewater Rule and (4)(b)(ii) and (5)(b)(ii) of the Tar-Pamlico Wastewater Rule:*

For facilities treating industrial wastewater, the mass load equivalent to the best available technology economically achievable, calculated at the monthly average flow limit in the facility's NPDES permit.

Commenters

North Carolina Water Quality Association

Comment ID: 28

Comment: This comment was consolidated with comment #26 above.

Response: No response needed

Commenters

N/A

Comment ID: 29

Comment: We are glad to see that the Director shall now “establish more stringent limits for nitrogen or phosphorus upon finding that such limits are necessary to protect water quality standards in localized areas” for both existing and new dischargers in both the Neuse and Tar-Pamlico. Should the rules on a whole leave gaps where localized water quality impairments exist, this backstop is a critical tool to addressing those potential problems.

Response: *Thank you. No response necessary.*

Commenters

Sound Rivers
 American Rivers
 Haw River Assembly
 NC Conservation Network
 Water Keepers Alliance

15A NCAC 02B .0703 – Nutrient Offset Rule (Trading Ratio Comments)

Comment ID: 30

Comment: We support the revisions to offset requirement for new and expanding facilities of 1.1 to 1.0 ratio and the 10-year planning window. Wastewater facilities in the NRCA have demonstrated, through state-of-the-art biological nutrient removal facilities, its commitment to complying with the objective of the strategy and economic growth. In addition, EPA has recently stated its strong support for this type of nutrient management strategy through a memo issued on February 6, 2019 “Updating The Environmental Protection Agency’s (EPA) Water Quality Trading Policy to Promote Market-Based Mechanisms for Improving Water Quality”.

Response: *Thank you for your comment. The 1.1:1 ratio and 10-year window is recommended by the hearing Officers.*

Commenters

Neuse River Compliance Association	City of Goldsboro
City of Apex	Grifols
Town of Clayton	City of New Bern
CMSD	City of Wilson
Johnston County	

Comment ID: 31

Comment: DEQ has adopted a number of nutrient reduction practices related to non-point source reduction requirements and those are allowed at a 1 to 1 basis. The non-point to point ratio of 1.1 to 1 is appropriate. These credits are essential to providing wastewater service in the future while still achieving reduction in nutrients.

Response: *Thank you for your comment. 1.1:1 is recommended by the Hearing Officers.*

Commenters

Upper Neuse River Basin Association

Comment ID: 32

Comment: Research shows agricultural conservation practice effectiveness ranges from negative to 100%. The Agriculture community uses a margin of safety factor for calculation of expected results and have consistently dropped agriculture's reduction percentage based on updated scientifically available information. The proposed 1:1 Nutrient credit trading ratio will fail to account for this uncertainty and will over-credit conservation practices and reduce real-world water quality protection.

Response: *Thank you for your comment. The Hearing Officers recommend a 1.1:1 credit ratio, and not 1:1.*

Commenters

Division of Soil & Water Conservation

Comment ID: 33

Comment: Item (j)(4) – I support the inclusion of a margin of safety the rules. To my knowledge, there's no commonly accepted number. The 10% used here is on the low end of what should be considered but is an improvement over what's currently being used.

Response: *Thank you for your comment. The Hearing Officers agree.*

Commenters

Private Citizen: Mike Herrmann

Comment ID: 34

Comment: We are asking the EMC to retain the trading ratios incorporated into the existing markets created under the Neuse and Tar-Pamlico nutrient management strategies. The current Neuse rules effectively incorporate a 2:1 point-nonpoint source trading ratio. The Tar-Pamlico rules effectively incorporate a 2.1:1 trading ratio. We are concerned that by drastically relaxing the trading ratios, the EMC is disregarding laws designed to protect against the weakening of existing water quality protections, especially when those protections are part of a federally-approved strategy to restore designated uses.

Trading ratios must be designed to ensure that the level of reductions required from a point source are offset with a commensurate level of reductions from nonpoint source practices. EPA cautions that, "In developing point source–nonpoint source trading programs and associated NPDES permits, extra care should be taken to ensure that nonpoint source load reduction uncertainty is addressed." Appropriate trading ratios account for the variability in effectiveness of practices used to generate offsets as well

as the uncertainty regarding whether and when such practices will result in water quality benefits. According to the EPA's National Center for Environmental Economics, "the most common trading ratio for programs that are trading nutrients between point and non-point sources is 2 to 1." Indeed, the vast majority of jurisdictions with established trading ratios for point-nonpoint source nutrient trading ratios have set them at or above 2:1, with multiple jurisdictions setting the ratio at 3:1.

Response: *Water quality data has not been provided to support that lowering (or raising) the credit ratio will harm (or benefit) basin water quality. USEPA does not require a specific credit trading ratio. More current information related to USEPA's credit trading policy is provided in their February 2019 memorandum.*

Commenters

Sound Rivers

American Rivers

Haw River Assembly

NC Conservation Network

Water Keepers Alliance

Comment ID: 35

Comment: In environmental markets where buyers want to minimize the price of purchasing an offset credit, and sellers want to minimize the cost of producing them, the likelihood that a transaction improves water quality depends on the design and enforcement of trading rules by the regulating agency. In contrast to the measurable, technological reductions achieved by point sources, there is a considerable risk of overestimating nonpoint source reductions when authorizing a trade. Trading ratios provide a mechanism to manage uncertainty associated with the effectiveness of nonpoint source controls.

Response: *Thank you for your comment.*

Commenters

Sound Rivers

American Rivers

Haw River Assembly

NC Conservation Network

Water Keepers Alliance

Comment ID: 36

Comment: The ratios proposed in this rule package will have impact on other nutrient impaired waterways that are or may be subject to trading including Jordan Lake and potentially other future waterbodies. The restructuring of the rules so that .0703 is now explicitly inclusive and is designed to create a single reference for trading programs for any North Carolina waterbody raises the stakes for getting this right.

Response: *The rule has been returned, in part, to its original form by specifically naming the waterways that are specifically part of .0703. Inclusion of future waterbodies will require a rule modification to ,0703, and specific public discussion, in order for the rule to be applicable to another specific waterbody. The Hearing Officers were also concerned that the Fiscal Note was titled and directed only to the Neuse and Tar-Pamlico Basins, and did not consider fiscal impacts related to .0703 related to other waterbodies.*

Commenters

Sound Rivers

American Rivers

Haw River Assembly

NC Conservation Network

Water Keepers Alliance

Comment ID: 37

Comment: The EMC proposes a 1.1:1 ratio if the nonpoint source reductions are not monitored and 1:1 ratio when using “monitored nonpoint source reductions” to generate offsets. These low ratios not only represent a sharp departure from the national norm; they inadequately account for the uncertainty associated with practices intended to reduce nonpoint source pollution, and threaten the ultimate effectiveness of North Carolina’s nutrient management strategies.

The EMC’s proposed ratios place far too much faith in the effectiveness of nonpoint source monitoring to confirm loading reductions. It is often difficult to evaluate the effectiveness of nonpoint sources controls through monitoring. For instance, nonpoint source pollution is highly weather-driven.¹⁸ Yet, the proposed rules make no attempt to address this seasonality through monitoring requirements.¹⁹ Nonpoint source pollution reductions can also take years to manifest as changes in instream water quality, cautioning against over-reliance on monitoring to confirm effective implementation.²⁰

We recommend use of at least a 2:1 trading ratio.

Response: *Thank you for your comment. The Hearing Officers recommend a 1.1:1 ratio.*

Commenters

Sound Rivers
 American Rivers
 Haw River Assembly
 NC Conservation Network
 Water Keepers Alliance

Comment ID: 38

Comment: For Rule .0713, NCWQA supports DEQ's decision to allow monitored nonpoint source reductions to be purchased at a 1:1 ratio, and to allow unmonitored nonpoint source reductions to be purchased at a 1.1:1 (10% premium) to address uncertainty. This approach is consistent with EPA's latest trading recommendations.

Response: *Thank you for your comment. The Hearing Officers recommend a 1.1:1 ratio.*

Commenters

North Carolina Water Quality Association

Comment ID: 39

Comment: There are members of the NRCA (due to issuance of nitrogen allocations in 1997), that are now presented with the inability to project growth because of exceeding their allocation with no other owner of allocations willing to make long term leases or sell nitrogen allocations.

Response: *In response to this comment, we have supplemented the Fiscal Note with the following additional information regarding the liquidity of the allocation trading market:*

"This update is also provided in response to commenters' concerns regarding the liquidity of the allocation trading market, particularly in the Neuse River Basin. As noted in comments, some wastewater permittees have actively sought to purchase nutrient allocation from other parties, have not been successful, and have concluded that none is available. While conceptually, room for allocation trading would appear to exist within the basin as indicated by the consistent magnitude of group performance below the group cap, the choice to sell or lease allocation in the nutrient market would always be made by individual facilities in relation to their individually-permitted nutrient limits based on their assessments of risk and benefit. Whether privately owned or government operated, individual facilities have expressed that their future growth needs would need to be assured before selling credit permanently. In particular, domestic (local government) facilities have a host of complex socioeconomic factors to take into account including population growth, economic recruitment, and political considerations.

Several factors suggest to DWR that potential for allocation trading may yet exist within the Neuse basin. First, several classes of dischargers appear to have substantial

unnneeded allocation relative to any foreseeable projections, and would thus be well-positioned to potentially sell or lease allocation. These classes include Falls Lake dischargers with presently unusable Neuse allocation, industrial dischargers operating well below caps, and municipalities with low or zero growth population projections. The Neuse River Compliance Association also holds allocation not associated with any individual facility, which might be assigned or sold to individual members to enable wastewater expansions.

The analysis in the preceding chapter suggests that nutrient allocation could be priced much higher than done to date and yet remain more competitive than nutrient offset credits. DWR understands that a recent auction with multiple bidders valued permanent allocation at \$500 per pound, a price well below that necessary to secure offset credits. It is possible that higher offers could induce new allocation sellers to enter the market. However, oral comments associated with this rule package also suggest that some jurisdictions would not consider a credit sale at any cost, representing a potential market failure.

This evaluation demonstrates that both allocation trading and offset credit trading bring about a host of specific market considerations, including practical challenges like the ones described above. To the extent that nutrient offset credits are secured using the proposed 1.1 to 1 point-to-nonpoint trading ratio, both cost savings for wastewater facilities and relative nutrient loading increases would occur in comparison to the nutrient offset rule as it currently exists.”

Commenters

Neuse River Compliance Association	City of Goldsboro
City of Apex	City of New Bern
Town of Clayton	City of Wilson
CMSD	
Johnston County	

Comment ID: 40

Comment: Given the ongoing changes to the agriculture community’s reporting requirements and the proposed transition to a 1:1 credit trading ratio, we recommend a reassessment of the nutrient credit being granted for buffer practices on agricultural lands.

Response: *Thank you for this comment. While nutrient credit for restored buffers is not established in this rule package or any rule, this is an issue we have identified for further review in the future.*

Commenters

Division of Soil & Water Conservation

Comment ID: 41

Comment: The EMC’s proposed ratios place far too much faith in the effectiveness of nonpoint source monitoring to confirm loading reductions. It is often difficult to evaluate the effectiveness of nonpoint sources controls through monitoring. For instance, nonpoint source pollution is highly weather-driven. Yet, the proposed rules make no attempt to address this seasonality through monitoring requirements. Nonpoint source pollution reductions can also take years to manifest as changes in instream water quality, cautioning against over-reliance on monitoring to confirm effective implementation.

Relying on monitoring is particularly unjustified when the relevant rules fail to clarify the nature of monitoring that is required. We are concerned that, although the proposed rule refers to “monitored nonpoint source controls” the use of which can reduce the trading ratio, they are silent as to the requisite monitoring frequency, location, and duration. The rules also do not specify monitoring standards. Ultimately, this creates considerable confusion regarding the type of monitoring sufficient to relax the trading ratio. The EMC cannot confidently assert that monitoring accounts for uncertainty when the rules fail to articulate the requisite monitoring.

Response: [The hearing officers recommend a 1.1:1 ratio with no reduction in the ratio for monitoring.](#)

Commenters

Sound Rivers

American Rivers

Haw River Assembly

NC Conservation Network

Water Keepers Alliance

Comment ID: 42

Comment: When authorizing water quality trades, uncertainty is not the only factor that can or should inform trading ratios. For instance, we recommend consideration, particularly in the context of point-nonpoint source trading, of equivalency ratios adjusting for the fact that the composition of point and nonpoint sources discharges can differ with respect to the forms of the nutrients discharged.

As observed by EPA, for nutrients, the effect on water quality is related to the percent of the nutrient that is biologically available in the source’s discharge. Biologically available nutrients are readily available for uptake by the biota. Nutrients can be present in forms that are immediately biologically available and in forms that are less accessible to the biota. Excess biologically available nutrients contribute to eutrophication and degradation of water quality. Those forms of nutrients that are not immediately biologically available can become accessible to the biota (biologically available) through different biological and chemical cycling mechanisms. Hence, nutrients can be present as readily biologically available or bound to sediment, and depending on environmental factors, such as climate, apparent geology, residence time, and so on, have different effects on the waterbody of concern. The relative biological

availability of nutrients in the trading sources' discharges should be incorporated into the equivalency ratio.

Response: *TMDLs and TMDL alternatives in North Carolina are presently established for total nitrogen or total phosphorus rather than for specific nitrogen or phosphorus compounds. Changes that incorporate various species of nutrients are not recommended as part of the rules review and readoption.*

Commenters

Sound Rivers

American Rivers

Haw River Assembly

NC Conservation Network

Water Keepers Alliance

15A NCAC 02B .0703 Nutrient Offset Rule – Credit Stacking Options

Comment ID: 43

Comment: Of the options proposed in this rulemaking, we would support option 1. In other words, we do not support any caveats to the requirement that “reductions shall not include those already implemented to satisfy other requirements under the same nutrient strategy; other local, state or federal requirements; or those resulting from state or federal compensatory mitigation requirements. “The ability to essentially double dip for credit generation on the same spatial area would undermine the full ecosystem benefits intended for various credit and mitigation schemes. The consequence of any such caveat would be to limit the net loading reduction required under these rules. Moreover, were the EMC to permit such credit stacking, it would exacerbate our concerns about the failure to account for uncertainty in proposed point-nonpoint source trading ratios. Various types of mitigation and offset credits should be generated by practices and areas dedicated solely to a single program.

Response: *After consideration of these comments and the analysis contained in the fiscal note, we recommend the use of option 2, the current policy, which allows stacking of stream and nutrient credits in overlapping areas.*

The following language is proposed for subparagraph (d)(3):

Unless specifically excepted in Rule, reductions shall not include those already implemented to satisfy other requirements under the same nutrient strategy; other local, state or federal requirements; or those resulting from state or federal compensatory mitigation requirements. Specifically, a nutrient reduction project shall not generate nutrient offset credits and buffer or wetland mitigation credits in spatially overlapping areas. However, restored forest buffer areas associated with stream mitigation projects may generate both stream and nutrient offset credits in spatially overlapping areas within 50 feet from the top of the stream bank.

Commenters

Sound Rivers
 American Rivers
 Haw River Assembly
 NC Conservation Network
 Water Keepers Alliance

Comment ID: 44

Comment: The NRCA supports Option 2 in .0703(d)(3). Restored forest riparian buffers are identified as one of the most cost effective and enduring forms of nutrient control and removal from loading. In the Fiscal Note, the practice is the example given of the form of SCM which does not need to be replaced if damaged once mature. The EMC should incentivize this important recovery technique for the nutrient impaired waters of the State.

Response: *After consideration of these comments and the analysis contained in the fiscal note, we recommend the use of option 2, the current policy, which allows stacking of stream and nutrient credits in overlapping areas.*

The following language is proposed for subparagraph (d)(3):

Unless specifically excepted in Rule, reductions shall not include those already implemented to satisfy other requirements under the same nutrient strategy; other local, state or federal requirements; or those resulting from state or federal compensatory mitigation requirements. Specifically, a nutrient reduction project shall not generate nutrient offset credits and buffer or wetland mitigation credits in spatially overlapping areas. However, restored forest buffer areas associated with stream mitigation projects may generate both stream and nutrient offset credits in spatially overlapping areas within 50 feet from the top of the stream bank.

Commenters

Neuse River Compliance Association

Comment ID: 45

Comment: For Rule .0703, NCWQA appreciates the option for temporary credits. NCWQA also believes that forest buffer areas associated with stream mitigation projects should be allowed to generate both stream and nutrient offset credits in spatially overlapping areas. This position is also supported by the 2019 Ross Memo, which encourages allowing a single project to generate credits for multiple markets.

Response: *After consideration of these comments and the analysis contained in the fiscal note, we recommend the use of option 2, the current policy, which allows stacking of stream and nutrient credits in overlapping areas.*

The following language is proposed for subparagraph (d)(3):

Unless specifically excepted in Rule, reductions shall not include those already implemented to satisfy other requirements under the same nutrient strategy; other local, state or federal requirements; or those resulting from state or federal compensatory mitigation requirements. Specifically, a nutrient reduction project shall not generate nutrient offset credits and buffer or wetland mitigation credits in spatially overlapping areas. However, restored forest buffer areas associated with stream mitigation projects may generate both stream and nutrient offset credits in spatially overlapping areas within 50 feet from the top of the stream bank.

Commenters

North Carolina Water Quality Association

Comment ID: 46

Comment: Regarding (d)(3) and the generation of nutrient offset credits and stream, buffer, or wetland mitigation credits in spatially overlapping areas we support Option 1 as described in the proposed rule. It makes sense to be able to use a restored forest buffer to generate an environmental credit that can be applied as stream mitigation or nutrient offset. The conflict is when the environmental credit for a specific unit of buffer restoration is sold twice. It is currently possible in NC to restore a buffer and do no other restoration work and literally sell that buffer restoration unit twice, once as stream mitigation and once as nutrient offset under two different environmental permitting programs.

Response: *After consideration of these comments and the analysis contained in the fiscal note, we recommend the use of option 2, the current policy, which allows stacking of stream and nutrient credits in overlapping areas.*

The following language is proposed for subparagraph (d)(3):

Unless specifically excepted in Rule, reductions shall not include those already implemented to satisfy other requirements under the same nutrient strategy; other local, state or federal requirements; or those resulting from state or federal

compensatory mitigation requirements. Specifically, a nutrient reduction project shall not generate nutrient offset credits and buffer or wetland mitigation credits in spatially overlapping areas. However, restored forest buffer areas associated with stream mitigation projects may generate both stream and nutrient offset credits in spatially overlapping areas within 50 feet from the top of the stream bank.

Commenters
Restoration Systems

Comment ID: 47

Comment: Regarding (d)(3) and the generation of nutrient offset credits and stream, buffer, or wetland mitigation credits in spatially overlapping areas we support Option 1 as described in the proposed rule. This allows nutrient or buffer credits to be generated in the first 50 feet of a stream restoration project, which is what DWR and the USACE have allowed/approved in the past due to 404/401 permitting process and overlapping impacts.

Response: *After consideration of these comments and the analysis contained in the fiscal note, we recommend the use of option 2, the current policy, which allows stacking of stream and nutrient credits in overlapping areas.*

The following language is proposed for subparagraph (d)(3):

Unless specifically excepted in Rule, reductions shall not include those already implemented to satisfy other requirements under the same nutrient strategy; other local, state or federal requirements; or those resulting from state or federal compensatory mitigation requirements. Specifically, a nutrient reduction project shall not generate nutrient offset credits and buffer or wetland mitigation credits in spatially overlapping areas. However, restored forest buffer areas associated with stream mitigation projects may generate both stream and nutrient offset credits in spatially overlapping areas within 50 feet from the top of the stream bank.

Commenters
Water & Land Solutions

Comment ID: 48

Comment: Regarding (d)(3) and the generation of nutrient offset credits and stream, buffer, or wetland mitigation credits in spatially overlapping areas prefer Option 1 as described in the proposed rule. Most compensatory mitigation projects are designed beyond federal requirements and credit generation should be allowed for the portion of compensatory mitigation projects that exceed minimum Federal project criteria. For example, buffers may extend beyond the required 50 feet from stream channel. In such cases where

projects exceed requirements, nutrient reductions credits should be allowed but not when overlapping with buffer.

Response: *After consideration of these comments and the analysis contained in the fiscal note, we recommend the use of option 2, the current policy, which allows stacking of stream and nutrient credits in overlapping areas.*

*The following language is proposed for subparagraph (d)(3):
Unless specifically excepted in Rule, reductions shall not include those already implemented to satisfy other requirements under the same nutrient strategy; other local, state or federal requirements; or those resulting from state or federal compensatory mitigation requirements. Specifically, a nutrient reduction project shall not generate nutrient offset credits and buffer or wetland mitigation credits in spatially overlapping areas. However, restored forest buffer areas associated with stream mitigation projects may generate both stream and nutrient offset credits in spatially overlapping areas within 50 feet from the top of the stream bank.*

Commenters

Private Citizen: Mike Hermann

15A NCAC 02B .0703 Nutrient Offset Trading Rule - Other

Comment ID: 49

Comment: The NRCA is concerned that the proposed rules create an obstacle which will make it impossible for any of its members, other than the City of Raleigh, to be able to use the nutrient credit opportunity provided in 15A NCAC 2B .0240 .0703(l). By that addition to the Nutrient Offset Credit Trading rule, WWTPs are supposed to be able to generate their own nutrient credits for use in expanding existing plants or adding new plants. This problem arises from two sources; (1) N.C. Gen. Stat. 143-214.26 is the sole statute setting forth authority of the EMC to regulate nutrient offset projects for the purpose of generating nutrient offset credits and (2) the proposed rule, as explained in the current fiscal note will require the WWTPs to establish a nutrient bank.

Response: *We agree with the premise that local government members of the NRCA should be able to generate nutrient offset credits to offset increasing wastewater dischargers. DWR's interpretation of relevant statutes and regulations allows local governments to establish nutrient offset banks for this purpose.*

NRCA expresses concern that statutes might be read to prohibit local governments from creating offset banks. They propose that they meet fewer regulatory requirements (no instrument or financial assurances) when self-generating credits to avoid meeting the definition of a bank that would become subject to G.S. 143-214.26. However, the nutrient offset statute provides only two avenues to generate nutrient offset credits:

“participation in a nutrient offset bank” or “payment of a nutrient offset fee”. The option proposed by the commenter does not exist.

Commenters

Neuse River Compliance Association
Upper Neuse River Basin Association

Comment ID: 50

Comment: Request that the EMC allow for documentation of the site conditions with the best available information to show the baseline conditions. In 15A NCAC 2B .0240 .0703(e)(2)(D), an applicant for a nutrient credit project is required to provide “Documentation of the condition of the site during the baseline period of the applicable nutrient strategy.” The ability to establish the site conditions for the Neuse Estuary in the early 1990s is very limited. To the extent that records existed, they are being regularly retired or destroyed. The rule should be amended to allow the use of best professional judgment based on the available information.

Response: *The burden should rest with the party seeking certification of nutrient offset credits to ensure compliance with baseline conditions. DWR staff has confirmed that state orthoimagery files are available as far back as 1993, which can be used to evaluate land use characteristics. However, we appreciate the need for flexibility and propose the following language for subparagraph (e)(2)(D):*

“Documentation of the condition of the site during the baseline period of the applicable nutrient strategy unless excepted by subparagraph (d)(1). The Division may accept more recent documentation if it determines such documentation establishes the probable loading condition of the site during the baseline period.”

Commenters

Neuse River Compliance Association

Comment ID: 51

Comment: We also are concerned with the requirement in (e)(2)(D) to provide “Documentation of the condition of the site during the baseline period of the applicable nutrient strategy.” While this may be a slightly easier task in Falls than in the Lower Estuary area, both are high hurdle. There needs to be some language allowing latitude on this factor.

Response: *The burden should rest with the party seeking certification of nutrient offset credits to ensure compliance with baseline conditions. DWR staff have confirmed that state orthoimagery files are available as far back as 1993, which can be used to evaluate land use characteristics. However, we appreciate the need for flexibility and propose the following language for subparagraph (e)(2)(D):*

“Documentation of the condition of the site during the baseline period of the applicable nutrient strategy unless excepted by subparagraph (d)(1). The Division may accept more recent documentation if it determines such documentation establishes the probable loading condition of the site during the baseline period.”

Commenters

Neuse River Compliance Association

Comment ID: 52

Comment: What temporal criteria should be used for allowing qualified reductions? Consider adding an Item on to clarify the temporal criteria used to qualify sites. For example, should farmland created after the baseline of a strategy be eligible for land conversion to a lower loading land use? I would suggest that it should as long as it has been in that use for a nominal period of time (e.g., 10 years). This temporal criterion can become restrictive if qualified reductions are based on the baseline period and the strategy is 30 years old. You would not, however, want to encourage deforesting sites to make them immediately eligible for increased nutrient offset reductions.

Response:

A shorter look-back period like the one proposed could serve to protect important baseline requirements while limiting market gamesmanship and reducing administrative burdens. Draft versions of this concept proposed by DWR were not approved to move forward by the Water Quality Committee, and in deference to their review we do not propose to renew them here. However, the proposed revisions to (e)(2)(D) provide some flexibility in recognition of this comment.

“Documentation of the condition of the site during the baseline period of the applicable nutrient strategy unless excepted by subparagraph (d)(1). The Division may accept more recent documentation if it determines such documentation establishes the probable loading condition of the site during the baseline period.”

Commenters

Private Citizen: Mike Herrmann

Comment ID: 53

Comment: In (g)(5), a SCM can be replaced by natural ecological processes under certain circumstances. This brings forward a couple of questions. How will the nutrient credit values be established for compliance purposes when that change occurs and is allowed to stay in place instead of being replaced by a SCM? Will the funds put into the non-wasting endowment be allowed to be adjusted to the new needs for protection vs the cost of replacement of the SCM that was destroyed? The Fiscal Note comments on this

issue and addresses a narrow set of SCMs but allows all SCMs to avoid replacement. This provision should be revised.

Response: Subparagraph (g)(5) does not apply to stormwater SCMs, it applies to “Projects designed to restore a natural ecological community”.

Commenters

Neuse River Compliance Association
Upper Neuse River Basin Association

Comment ID: 54

Comment: We believe that the revised language provided in the last two sentences of .0703(a) provides protection of the nutrient trading and compliance provisions of the Falls Lake Rules. The UNRBA generally supports the inclusion of this language and believes it preserves the provision in session law that delays changes in the Falls Lake Rule until the UNRBA has completed its Falls Lake Nutrient Management Strategy reexamination.

Response: *Thank you. No response necessary.*

Commenters

Neuse River Compliance Association

Comment ID: 55

Comment: Recommend Item (4) be amended to read as “Nutrient offset credits may be used to satisfy regulatory obligations in the Neuse 01 8-digit cataloging unit, as designated by the U.S. Geologic Survey, outside of the Falls Lake watershed only if they were generated by a nutrient reduction project located outside of the Falls Lake watershed”. This language follows the intent of the rules while allowing the statute to govern. If the statute is changed with the intent to provide relief for the Neuse 01 wastewater dischargers there will be no conflict with the related rules. If the statute does not change there will be no conflict with the rules.

Response: *S.L. 2019-86 amended the nutrient offset statute, G.S. 143-214.26, to expand the allowable trading area for NPDES-permitted wastewater discharges. We agree with this comment and recommend the following change from the proposed rule text:*

(4) Nutrient offset credits may be used to satisfy regulatory obligations incurred in the Neuse 01 8-digit cataloging unit, as designated by the U.S. Geological Survey, ~~below~~ outside of the Falls Lake watershed only if they were generated by a nutrient reduction project within that same geographic area located outside of the Falls Lake watershed.

Commenters

Upper Neuse River Basin Association

Comment ID: 56

Comment: Item (b)(5) – While it may be desirable to allow sub-items (A) and (B), it's unclear what constitutes an “assessment unit” and the area draining to it.

Response: *The term “assessment unit” is not presently defined in rule or legislation, but it is a common working term used in the water quality standards and assessment context. We recommend against defining this term in rule in this rulemaking package because the implications of that definition should be considered within the primary context of water quality standards and assessments. To preclude the need for definition, we propose replacing the term “assessment unit” with “surface waters.” The phrase “surface waters” is further described in the rule in a manner that allows delineation of a geographic trading area both within the estuary and on lands draining to the estuary. We recommend the following change from the proposed rule text:*

(5)(A) ~~an assessment unit~~ surface waters identified for restoration under the applicable nutrient-related TMDL or nutrient strategy, or

Commenters

Private Citizen: Mike Herrmann

Comment ID: 57

Comment: Item (f)(2) – Consider alternative language to “until they are exhausted” for when ledgers are required to be submitted to DEQ. Maybe “until bank closure”. I could foresee providers closing a bank prior to exhausting credits. For instance, if nutrient offset requirements are stripped by legislative action and the provider no longer wants to maintain its ledgers in disgust.

Response: *We can accommodate this proposed rule change and recommend the following changes from the proposed rule as suggested by commenter. Note this language also includes recommended changes in response to other comments.*

(f)(2) Once credits are released for a ~~project~~ nutrient offset bank and until ~~they are exhausted~~ bank closure, nutrient offset bank providers ~~except for DMS~~ shall provide a credit/debit ledger to the Division at regular intervals no less frequently than quarterly.

Commenters

Private Citizen: Mike Herrmann

Comment ID: 58

Comment: Item (f)(3) – Restrictions under this item seem like they could be overly broad. Would existing Ag cost-share funding of exclusionary fencing (i.e., state funding) preclude a streamside reforestation project from being eligible for offset credit generation? Could a similarly funded 20-ft buffer be expanded to 100-ft? Maybe changing the wording to “The Division shall not release any credits for a project if those credits were generated”

Response: *In each of the proposed examples, two different projects would occur. In the first example, nutrient reductions associated with exclusionary fencing supported by state funds would be attributed to agricultural producers under the applicable agriculture rules. A subsequent and adjacent streamside reforestation project would be eligible to generate nutrient offset credits for further nutrient reductions achieved.*

In the second buffer example, two different projects would occur again. First would be the twenty-foot buffer supported by cost share funds, with reductions attributed to agricultural producers. The second would be an enhanced buffer, from 21-100 feet, which would be eligible to generate nutrient offset credits.

Commenters

Private Citizen: Mike Herrmann

Comment ID: 59

Comment: Item (j)(5) – Specific to the Jordan Strategy, I believe the use of delivery factors does not to enhance the strategy and I support their elimination. Generally, they encourage offsets to be generated closer to the reservoir at the expense of watershed investments upstream closer to where the impacts may have occurred. This deprives upstream communities of much of the nutrient strategy benefits. The factors also add complexity to the offset transaction and accounting process. Further, existing factors used in Jordan have been contradicted in subsequent studies raising the question over whether they are accurate.

Response: *Thank you for your comment. Delivery factors associated with the Jordan Lake Strategy are not presently under review in this rule package.*

Commenters

Private Citizen: Mike Herrmann

Comment ID: 60

Comment: Throughout this section and the rules, “DMS” should be replaced by “nutrient offset in-lieu fee programs.”

Response: *By the nutrient offset statute, the Division of Mitigation Services is the only in-lieu fee program to which these rules apply because it is the administrator of the Riparian Buffer Restoration Fund. We believe it is important to retain this language. Use of the more direct and succinct term “DMS” promotes clarity and understanding for those not well-versed in this regulatory area. To address the concern for greater program specificity within DMS, the requested specification will be added as a definition for the purposes of this rule. We recommend the following change from the proposed rule text for the definition of DMS in Rule .0701:*

(15) "DMS" means the N.C. Division of Mitigation Services or its successor. DMS, as administrator of the Riparian Buffer Restoration Fund, is the only in-lieu fee program to which rules of this section apply.

Commenters

Division of Mitigation Services

Comment ID: 61

Comment: The terms “Estuarine nutrient strategy” is not defined in the rule

Response: *We recommend the term be defined as follows:*

“Estuarine Nutrient Strategy” means the Neuse Nutrient Strategy as enumerated in Rule .0710 of this Section and the Tar-Pamlico Nutrient Strategy as enumerated in Rule .0730 of this Section.

Commenters

Division of Mitigation Services

Comment ID: 62

Comment: Geographic Restrictions: Language in (b)(5) is unclear as written. As currently written the rules appears to create new mitigation service areas in Neuse 03020204 and the Tar-Pamlico 03020104 and 03020105 cataloging units. Recommend the entire paragraph of (b)(5) be rewritten to convey the intent of the language is to address mitigation projects located in estuarine waters rather than land-based projects.

Response: *In comparison to the current rule, the language limits the installation of nutrient offset projects in portions of the coastal cataloguing units referenced but it does not create “new and separate service areas.” A map of allowable project areas was included in the fiscal note on page 72, and upon rule passage maps and associated geographic information files will be distributed to providers and published on the DEQ website.*

Commenters

Division of Mitigation Services

Comment ID: 63

Comment: Quantifying Nutrient Offset Credits: Language in (d)(6) should be modified to state the term and permanent credits be tracked “separately” as opposed to “separate ledgers” since it may be necessary to show conversion transactions and all sites credits in a single form.

Response: *DMS tracks projects using databases while nutrient offset bank credits are tracked using ledgers. We agree with this comment and recommend the following text change:*

Permanent nutrient reduction credits and term nutrient reduction credits shall be maintained ~~on separate ledgers~~ separately, even if associated with the same nutrient offset ~~bank or~~ project.

Commenters

Division of Mitigation Services

Comment ID: 64

Comment: Nutrient Offset Banking Instrument: DMS reference is unnecessary as edits to .0701 (33) will adequately define who seeks approval for nutrient offset banks. As a result the language in (e)(1) should be modified to read as “Providers ~~except DMS~~ seeking approval of a nutrient offset bank...”

Response: *We agree with this comment. Recommended changes to the term “nutrient offset bank” in comment 83 make this reference unnecessary. We recommend the following change from the proposed language in (e)(1):*

Providers ~~except DMS~~ seeking approval of a nutrient offset bank shall submit their draft nutrient offset banking instrument to the Division prior to seeking approval of project plans.

Commenters

Division of Mitigation Services

Comment ID: 65

Comment: Financial Assurances: There are supplementation requirements specific to in-lie fee requirements in another section and DMS is not a provider with a mitigation bank instrument. The Language in (e)(3) should be modified to say “Providers with mitigation instruments except DMS shall provide the financial assurance...”

Response: *We agree that this language could be improved but do not recommend the exact language proposed. To create analogous language to the related requirements in (e)(1), DWR recommends the following language to begin subparagraph (e)(3):*

Providers ~~except DMS~~ seeking approval of a nutrient offset bank shall provide the financial assurance...

Commenters

Division of Mitigation Services

Comment ID: 66

Comment: Release and Accounting For Nutrient Offset Credits: Since only providers with mitigation bank instruments have buffer and nutrient credit releases: Replace “providers” with “with mitigation banking instruments” in (f)(1). Delete reference to DMS and replace “providers” with “providers with mitigation banking instruments” in (f)(2). Revise the following sentence to read “The Division shall release nutrient offset credits from an approved ~~project~~ nutrient offset bank in the following manner”

Response: *Upon rule adoption, DMS and nutrient offset banks will both be subject to credit releases. However, the implications of those releases are different because DMS operates an in-lieu fee program. Unlike nutrient offset banks, DMS may receive payment to generate nutrient offset credits before credits are released. We recommend defining the term “release” in 15A NCAC 02B .0701 as follows:*

“Release” of nutrient offset credits means the Division of Water Resources approves and acknowledges the generation of nutrient offset credits. Nutrient offset bank providers may sell, transfer, or use credits upon release. DMS may debit credits upon project institution but will still be subject to final approval and release of credits by DWR.

Commenters

Division of Mitigation Services

Comment ID: 67

Comment: An endowment historically has been purposed for long-term monitoring and to ensure that the appropriate conservation easements are protected and enforced. The language here implies that the primary purpose of the endowment is to create future funds to perform maintenance activities. This type of endowment should be limited to project types that require perpetual maintenance. Nearly every nutrient reduction project implemented to date has been to riparian buffer systems that do not require maintenance.

Response: *It is appropriate to require permanent stewardship and a stewardship endowment for permanent offset projects regardless of whether periodic project maintenance will be required. Stewards agree to perform monitoring in perpetuity and, if necessary, initiate corrective actions with the responsible party. No changes are recommended in response to this comment.*

Commenters

Division of Mitigation Services

Comment ID: 68

Comment: DMS recommends that this section be split into two parts with each having language directly focused on the long-term requirements of each type separately. By having them mixed together, the rule is confusing as to what is required for each type. DMS recognizes that subparagraph (5) in this section partly addresses these issues, but the rule language is misleading by implying that the maintenance standards are universal when they are not.

Response: *We agree that the distinction between “active” and “passive” nutrient offset practices is meaningful, i.e., the distinction between projects that require periodic maintenance and restoration in perpetuity versus those that do not. In response to this and other comments, we have made recommendations to clarify roles and responsibilities of providers, stewards, easement holders and land owners. However, a rule is not necessary to address the distinction between active and passive practices. We recommend the following change from the proposed rule text:*

(g) MAINTAINING PERMANENT NUTRIENT OFFSET CREDITS. All permanent nutrient offset projects shall comply with the following requirements:

- (1) A provider shall transfer responsibility for oversight of a completed permanent project to a perpetual steward in accordance with this Paragraph and the approved project plan. A perpetual steward may also transfer responsibility to another perpetual steward in accordance with the terms of this Paragraph, subject to DWR approval. Perpetual stewards may not assume project maintenance or restoration responsibilities. The provider shall ensure that the following mechanisms are in place to ensure that load reductions are sustained in perpetuity:

- (2) The provider shall create and transfer to the perpetual steward a non-wasting endowment or other dedicated financial surety to provide for the oversight of the completed permanent project. The endowment amount shall be proportionate to the duties accepted by the perpetual steward.
- (3) For projects utilizing conservation easements, the provider shall acquire and then transfer a conservation easement to a perpetual steward in accordance with 16 U.S.C. 170(h) and the Conservation and Historic Preservation Agreements Act, G.S. 121-34 et seq. The terms of the conservation easement shall be consistent with a Division-approved template or be approved by the Division. Non-governmental perpetual stewards shall be accredited by the Land Trust Accreditation Commission or approved by the Division.

Commenters

Division of Mitigation Services

Comment ID: 69

Comment: (g) (1) Clarify that the endowment amount paid to the steward is based on the duties accepted by the steward and not the landowner, who may ultimately be responsible. (g)(1) “The provider shall create and transfer to the perpetual steward a non-wasting endowment or other dedicated financial surety to provide for the oversight of the project’s load reductions. The endowment amount shall be proportionate to the duties accepted by the steward.”

Response: *We agree with this comment and recommend the change as suggested.*

Commenters

Division of Mitigation Services

Comment ID: 70

Comment: (4) DMS recommends that DWR speak with the DEQ Stewardship program regarding the significant increase in liability the rules will force upon the Department’s stewardship program. The Department’s stewardship program is not a maintenance and restoration operation. As currently written, there may be a significant increase in the costs of endowments to ensure that maintenance and possible project replacement costs are covered. Also, the significant risk this language imposes upon a potential steward will greatly limit stewards that will accept such obligations. This will in-turn negatively impact a provider’s ability to protect the mitigation assets. If stewardship entities refuse to take on such liability, it is likely that providers may also be unwilling to take on these liabilities.

Response: *Comments have been received from the DEQ Stewardship Program and are addressed herein. We recommend the inclusion of the following language to subparagraph (g)(1) to clarify the role of the permanent steward and their associated responsibilities:*

Perpetual stewards serve a monitoring and enforcement role and may not assume project maintenance or restoration responsibilities.

Commenters

Division of Mitigation Services

Comment ID: 71

Comment: (4) – Impacts to an approved nutrient offset project should result in the impactor paying fees sufficient to cover the costs of replacing lost functions. These actions are either a permitted activity which would require mitigation or a regulatory action against an impactor.

Response: *We agree with this statement. In addition to the scenarios provided, project degradation could occur for some project types due to a lack of maintenance. While invalidating credits would likely be a last course of action, the Clean Water Act does not allow for the complete transfer of liability from NPDES wastewater permittees to providers in the same way it does for stream and wetland impacts (See 2003 EPA Water Quality Trading Policy at p 10).*

This rule seeks to mitigate against risks that projects will not be sustained over time, but it cannot completely eliminate them. Therefore, if damaged or degraded offset projects are not restored, offset credits may be suspended. No change in rule language was suggested in response to this comment and no changes are recommended.

Commenters

Division of Mitigation Services

Comment ID: 72

Comment: (h) RENEWING TERM NUTRIENT OFFSET CREDITS - DMS recommends replacing “proof” with “documentation.”

Response: *The word “documentation” was used in the public comment version of this rule. Therefore, no change is necessary to address this comment.*

Commenters

Division of Mitigation Services

Comment ID: 73

Comment: Additional Provisions Regarding The Division of Mitigation Services - The section should be relabeled as “Provisions Regarding Nutrient Offset In-Lieu Fee Programs.” The rules are directed to the operation of in-lieu fee programs. Although DMS currently operates the only nutrient offset in-lieu fee program, there are no assurances there will not be additional ones in the future nor that DMS will remain as the agency tasked with operation of the existing state program.

Response: *If DMS’s name is changed, this rule could be amended to reflect that change pursuant to G.S. 150B-21.5(a)(2) without the need for notice or hearing. If more substantive legislative changes arise in the future, they will be addressed at that time.*

Commenters

Division of Mitigation Services

Comment ID: 74

Comment: (i)(2). Remove clause “the requirement due date,” as it is synonymous with the preceding clause.

Response: *We agree with this comment and recommend the following change from the proposed rule language:*

The requirement ledger shall include all nutrient offset credit requirements paid by 8-digit service area or for each geographic area identified in Paragraph (b), the date by which the requirement shall be satisfied by a project, ~~the requirement due date,~~ and the projects and credits that have been applied to all requirements.

Commenters

Division of Mitigation Services

Comment ID: 75

Comment: In (1) Replace “project’s load reductions” with “project conservation easement”. The language in the rule switches from *oversight of a completed permanent project* in the preceding paragraph to *oversight of the projects load reductions* in this subparagraph. This is confusing and conflates the role of the perpetual steward with the role of the project owner. The oversight of a project’s load reductions is the responsibility of the project owner and the regulatory agency; these responsibilities are not conveyed in a conservation easement.

Response: *We agree with this comment to the extent that it should not imply a steward’s responsibility for attaining or maintaining a monitored water quality result. However, as described in (g)(3), permanent projects are envisioned that do not require a “conservation easement.” We propose addressing this change as follows:*

provide for the oversight of the ~~project’s load reductions-completed permanent project.~~

Commenters

Division of Mitigation Services

Comment ID: 76

Comment: In (3) Delete “or easement holder”. In this context the drainage easement holder does not operate or maintain the SCM. The SCM is operated and maintained by a property owner. In fact, the current DWR-approved conservation easement specifically states the easement holder “...shall not be responsible for any costs or liability of any kind related to the ownership, operation, insurance, upkeep, or maintenance of the property...” (DWR conservation easement template Article VI Miscellaneous E. Obligations of Ownership).

Response: *The sentence from which this phrase is excerpted is unnecessary because “Division approval” of all parties necessary to sustain permanent projects is already required in (e)(2)(g). Therefore, we propose deleting this entire sentence:*

~~Structure operation and maintenance shall be the responsibility of the landowner or easement holder unless the Division gives written approval for another person or entity.~~

Commenters

Financial Services Division - Stewardship Program

Comment ID: 77

Comment: In (4) This deviates from the current understanding and practice of mitigation credits/assets delivery and management. Upon the closeout of a mitigation project the mitigation credits are fully released, the provider is released from credit maintenance responsibilities, and the easement holder initiates long-term oversight of the conservation easement terms, conditions, and restrictions. The easement holder has no legal obligation to maintain the mitigation credits.

Response: *The referenced language does not specify who would be held “responsible” in this situation; legal obligations would be determined by the various documents listed in this subparagraph (“an associated project plan, nutrient offset banking instrument, easement, maintenance agreement, or other protective agreement”).*

We recommend the following change to (g)(2) to ensure the easement holder is not obligated to maintain nutrient offset credits:

The provider shall create and transfer to the perpetual steward a non-wasting endowment or other dedicated financial surety to provide for the oversight of the ~~project’s load reductions~~ completed permanent project.

Commenters

Financial Services Division - Stewardship Program

Comment ID: 78

Comment: In (5) Delete items (A) and (B). These qualifiers are inconsistent with current understanding and practice of mitigation credits/assets delivery and management. If a completed project is restored passively then, by definition, the site is being maintained by natural ecological processes. A landowner should not be obligated to “exercise foresight or caution” in preventing site damage caused natural ecological processes.

Response: *We agree with this comment. We recommend rephrasing this subparagraph to read as follows:*

Projects designed to restore a natural ecological community at the project site, which are completed and then damaged by natural causes, may be passively restored exclusively through natural ecological processes.

Commenters

Financial Services Division - Stewardship Program

15A NCAC 02B .0701 Definitions

Comment ID: 79

Comment: Regarding Rule .0701, the proposed rule contains definitions for the chapter that refer to the definitions made in Rule .0202. We object to Rule .0701, which refers to Rule .0202 for the definition of “industrial discharge(s),” which incorrectly includes “wastewater discharged from a municipal wastewater treatment plant requiring a

pretreatment program.” NCWQA believes that the definitions in .0701 should be defined separately .0202.

Response: *We recommend a definition of industrial discharge that only applies to the nutrient strategy rules in the .0700 Section be defined in .0701 as follows:*

For the purpose of the nutrient strategy rules of this Section, industrial discharge means the discharge of industrial process treated wastewater or wastewater other than sewage. Stormwater shall not be considered to be an industrial wastewater unless it is contaminated with industrial wastewater. Industrial discharge includes:

(a) wastewater resulting from any process of industry or manufacture, or from the development of any natural resource; or

(b) wastewater resulting from processes of trade or business, including wastewater from laundromats and car washes, but not wastewater from restaurants.

Commenters

North Carolina Water Quality Association

Comment ID: 80

Comment: Suggest revising the definition of “Nutrient Offset Bank” to mean a site at which a nutrient reduction project that is implemented by a provider except DMS and approved by the Division for the purpose of generating nutrient offset credit. through execution of a nutrient offset banking instrument.

Response: *We agree that this term should be redefined to better reflect both common and legal usage. We recommend the following changes, which are similar to those suggested by the commenter:*

15A NCAC 02B .0701 (31) “Nutrient Offset Bank” is a ~~nutrient reduction project that is implemented by a provider except DMS and approved by the Division for the purpose of generating nutrient offset credit.~~ is a site at which a nutrient offset project is implemented by a provider and approved for nutrient offset credit by the Division through execution of a nutrient offset banking instrument. This term does not include nutrient offset projects associated with an in-lieu fee program.

Commenters

Division of Mitigation Services

Comment ID: 81

Comment: Suggest revising the definition of “Nutrient Offset Project” to mean a nutrient reduction project that is implemented by DMS and approved by the Division for the purpose of generating nutrient offset credit. ~~for the purpose of generating nutrient offset credit.~~

Response: *We agree with this comment.*

In response to comments 80 and 81, we agree these related terms should be redefined to better reflect both common and legal usage. However, the redefinition of these terms must also be reconciled with the nutrient offset rule language using these terms. Therefore, we recommend the following rule amendments to proposed 15A NCAC 02B .0703:

- *(d)(6) “... nutrient offset ~~bank or~~ project”*
- *(d)(8) “The Division shall approve the application of any bank associated with any nutrient offset project to reclassify credits as permanent which...”*
- *(e)(1) Providers ~~except DMS~~ seeking approval... (language not necessary because an in-lieu fee program is not a bank as redefined above).*
- *(f)(2) “Once credits are released for a ~~project~~ nutrient offset bank and until they ~~are exhausted~~ bank closure, nutrient offset bank providers shall provide a credit/debit ledger to the Division at regular intervals no less frequently than quarterly.*
- *(g)(4) “... if it determines that the ~~bank or~~ nutrient offset project has been impacted...”*

Commenters

Division of Mitigation Services

Comment ID: 82

Comment: Clarify definition of “Nutrient reduction practice” so it more clearly states that it includes all nutrient offset projects and any “type of programmatic effort...”

Response: *The definition includes the phrase “type of programmatic effort.”*

Commenters

Division of Mitigation Services

Comment ID: 83

Comment: Remove definition of “Nutrient reduction project”. This definition is unnecessary and can be deleted. All nutrient offset projects are site-specific.

Response: *For clarity, it is important to distinguish between projects that are done to generate nutrient offset credits (offset projects) and those of the same type that may be done to satisfy requirements of other nutrient rules. Both nutrient offset projects and projects done in direct compliance with other nutrient strategy rules are nutrient reduction projects.*

Commenters

Division of Mitigation Services

Comment ID: 84

Comment: Suggest revising the definition of “Provider” to mean public or private person or entity that implements a nutrient reduction project and seeks nutrient offset credit for sale, lease, or conveyance in exchange for remuneration, including in-lieu fee programs DMS. Persons or entities other than DMS All providers other than in-lieu fee programs that seek to become a provider of nutrient offset credits become so upon approval of a must have an approved nutrient offset banking instrument by the Division.

Response: *We recommend retaining the first sentence without the proposed changes to promote rule clarity. With the amended definitions to “nutrient offset bank,” the second sentence is no longer necessary because this requirement is addressed in .0703(e)(1) and (e)(4). Therefore, we recommend the following rule amendments to proposed 15A NCAC 02B .0701:*

(39) “Provider” means any public or private person or entity that implements a nutrient reduction project and seeks nutrient offset credit for sale, lease, or conveyance in exchange for remuneration, including DMS. Persons or entities other than DMS that seek to become a provider of nutrient offset credits become so upon approval of a nutrient offset banking instrument by the Division.

Commenters

Division of Mitigation Services

Comment ID: 85

Comment: The proposed definition of a “Non-wasting endowment” does not conform with the current definition of and practice associated with non-wasting endowments for these types of projects. The current use of stewardship endowments is to fund regular monitoring and enforcement of easement terms and conditions. As currently practiced

the stewardship of an easement does not include the perpetual maintenance, repair and/or renovation of a conservation easement or the project protected by that easement. Suggest revising the definition of “Non-wasting endowment”. Historically, the definition of stewardship did not require the perpetual repair and renovation of a nutrient reduction project. The rule specifies that naturally sustaining systems do not require perpetual repair and renovation, but that is missing from this definition and should be included. Repair and renovation are specific to non-sustaining systems such as stormwater BMPs.

Response: *We recommend the following amendments to the proposed rule:*

"Non-wasting endowment" is a fund that generates enough interest to cover the cost of perpetual monitoring and enforcement ~~monitoring, maintenance, repair and renovation~~ of a nutrient reduction ~~project.~~ project by a perpetual steward.

Commenters

Division of Mitigation Services
Financial Services Division - Stewardship Program

Comment ID: 86

Comment: No definition is provided for “Perpetual Steward”. As proposed in (g) the rule does not define “oversight” or “perpetual steward”. It is commonly understood that a perpetual steward (a.k.a. conservation easement holder) is responsible for the oversight and enforcement of conservation easement terms and conditions.

Response: *To clearly differentiate between the responsibilities of perpetual stewards and other parties responsible for sustaining nutrient offset projects, we propose to define the term perpetual steward in 15A NCAC 02B .0701 as follows:*

“Perpetual Steward” means an entity that provides oversight for a permanent nutrient offset project. Oversight in this context includes monitoring and enforcement responsibilities assumed by the steward and approved by the Division as a condition of granting permanent nutrient offset credit.

We also propose adding the following substantive restriction in paragraph (g) to preclude potential or apparent conflicts of interest for perpetual stewards with enforcement responsibilities:

Perpetual stewards may not assume project maintenance or restoration responsibilities.

Commenters

Financial Services Division - Stewardship Program

Comment ID: 87

Comment: No definition is provided for “Site Stewardship”

Response: *The phrase “site stewardship” does not appear in the proposed rule text.*

Commenters

Financial Services Division - Stewardship Program

15A NCAC 02B .0710 & .0730 Purpose & Scope Rules

Comment ID: 88

Comment: NRCA Supports the addition to the Purpose & Scope rule for the Neuse Estuary of and Adaptive Management Strategy.

Response: *Thank you. No response needed.*

Commenters

Neuse River Compliance Association

Comment ID: 89

Comment: It may be appropriate to address the difference in loading between organic and inorganic sources of nitrogen in this iteration of the TMDL strategy.

Response: *TMDLs and TMDL alternatives in North Carolina are presently established for total nitrogen or total phosphorus rather than for specific nitrogen or phosphorus compounds. Changes that incorporate various species of nutrients are not recommended as part of the rules review and re adoption.*

Commenters

Neuse River Compliance Association

Comment ID: 90

Comment: We're pleased to see several things in this rules package that we support and hope will help put the implementation of these rules on the path towards improving conditions in the Neuse and Tar-Pamlico basins.

Response: *Thank you. No response necessary.*

Commenters

Sound Rivers

American Rivers

Haw River Assembly

NC Conservation Network

Water Keepers Alliance

Comment ID: 91

Comment: The biggest improvement in this rules package is the upfront acknowledgement of the failure of these rules to achieve the nutrient reductions needed to restore the health of both basins, and the discussion of steps towards fixing that through adaptive management identified in .0730(4) and .0710(e). We strongly support the recognition that the rules as currently implemented aren't doing what is needed to see true lasting water quality improvement in the basins, and support the Department in doing sufficient analysis to determine what management changes can be made to get there.

Response: *Comment received. No response necessary.*

Commenters

Sound Rivers

American Rivers

Haw River Assembly

NC Conservation Network

Water Keepers Alliance

Comment ID: 92

Comment: Since Department staff and the rule language already acknowledge that there is an ongoing problem and that current modeling does not forecast meeting nutrient reduction levels, we urge the EMC to shorten the time frame for delivery of analysis and recommendations by the Department from 3 years to a sooner date, and change "shall seek to complete" to "shall complete" on page 4 line 10 and page 34 line 38 of the proposed rule package to ensure that the analysis and recommendations are completed. The nutrient rules went into effect in 1997, it is now 22 years later and it is urgent that we get things on track to fix the problem.

Response: *We agree with the second recommended change and propose revising the language to “shall complete.” However, a three-year period is necessary to provide time for an initial in-depth study of these issues and develop management options for the EMC’s consideration. Subsequent biannual reports proposed for both Neuse and Tar-Pamlico strategies will ensure continuous iterative and adaptive study of these issues.*

Commenters

Sound Rivers

American Rivers

Haw River Assembly

NC Conservation Network

Water Keepers Alliance

15A NCAC 02B .0711 & .0731 New Development Stormwater Rules

Comment ID: 93

Comment: Regarding Rule .0711, the proposed rule would require municipalities to implement stormwater management programs “throughout their corporate limits and extraterritorial jurisdictions within the basin.” Similarly, counties must manage stormwater “throughout their territorial jurisdictions within the basin.” Although such municipality-wide requirements may be acceptable for stormwater management programs addressing development projects (assuming they can be governed by applicable building codes), any requirement of a municipality or county to take actions relating to or otherwise regulate stormwater outside of their respective municipal separate storm sewer system (MS4) areas goes beyond federal requirements.

Response: *This rule includes state stormwater regulation in areas not within the geographic scope of federal stormwater requirements and is predicated on the EMC’s authority and duty to establish state stormwater rules pursuant to G.S. 143-214.7.*

Commenters

North Carolina Water Quality Association

Comment ID: 94

Comment: To further delineate between the requirements for the agriculture community and the stormwater requirements, the language in the applicability section of these

rules .0711(2) and .0731(b) should be revised to include the statement that lands subject to the agriculture rule are excepted from the stormwater rules.

Response: *We agree and an explicit exclusion for activities subject to the strategy agriculture rules is added in a reorganized Item (4), Development Excluded, which captures and adds to exemptions previously found in several locations in the rule, and reads in part:*

(4) DEVELOPMENT EXCLUDED. The Following development activities shall not be subject to this rule:

(f) Activities subject to requirements of the Neuse Agriculture rule 15A NCAC 02B .0712

Commenters

North Carolina Farm Bureau

Comment ID: 95

Comment: It appears the exemption provided in Item (3) on the Neuse Stormwater Rule is to exempt very low density individual single-family developments, but it doesn't exclude the possibility of multiple homes on the same 5-acre parcel (think "extended family compound" or main owner's home with additional rental homes).

Response: *The content of Sub-Item (3)(b) has been revised to address the issue identified in this comment. The revised content of Sub-Item (3)(b) has been relocated to a new Sub-Item (4)(b) in the Neuse Rule. This language change has also been made to the Tar-Pam rule.*

(4) DEVELOPMENT EXCLUDED. The following development activities shall not be subject to this rule:

(b) Development of an individual single-family or duplex residential lot that;

(i) Is not part of a larger common plan of development or sale; and

(ii) Does not result in greater than five percent built upon area of the lot;

Commenters

City of Durham

Comment ID: 96

Comment: In Sub-Item (5)(f) of Development Project Requirements the term “preexisting” is used in reference to built-upon area. Where is this term defined?

Response: *The term “preexisting” has been removed from the rule. The language in former Sub-Item (5)(f) has been clarified to refer to “existing built-upon area” and moved to the new Sub-Item (5)(a). We recommend the following language:*

(5)(a) The project, as defined in state stormwater rule 15A NCAC 02H .1002, shall meet either a nitrogen loading rate target of 3.6 pounds/acre/year or the definition of runoff volume match found in that rule. Proposed development projects that would replace or expand existing structures and would result in a net increase in built-upon area shall meet one of these options for the project less any existing built-upon area.

Commenters
City of Durham

Comment ID: 97

Comment: Why is the one-year peak flow requirement being eliminated? The City will be left without a stream bank protection standard as a result.

Response: *The change reflects recommendations of the DEMLR Stormwater Permitting Unit, which provided input that evidence has grown indicating that the 1 yr. 24 hr. peak match requirement can result in bankful flows being sustained for longer time intervals than those that occurred under pre-development conditions, counterintuitively hastening streambank degradation rather than protecting streambanks.*

The State Stormwater Rules codify minimum design criteria (MDCs) for SCMs and include erosion protection standards for all SCMs in rule 15A NCAC 02H .1050, which states that “The outlets of SCMs shall be designed so that they do not cause erosion downslope of the discharge point during peak flow from the 10-year storm event as shown by engineering calculations.” There are also additional receiving stream protection standards for individual SCMs. The MDCs for wet ponds and dry ponds (15A NCAC 02H .1053 and .1062) require that they “shall discharge the runoff from the one-year, 24-hour storm in a manner that minimizes hydrologic impacts to the receiving channel.” NCDEMLR is working with researchers at NCSU to develop more technical guidance on this subject to be included in future updates to the Stormwater Design Manual.

Commenters
City of Durham

Comment ID: 98

Comment: In Sub-Item (5)(c) of Development Project Requirements the rule is not as clear as past iterations regarding requiring every project over 24% impervious area requiring an primary SCM before an offsite nutrient buydown payment can be used.

Response: *To address this clarity concern, requirements for onsite treatment are now found in a wholly reorganized Sub-Item (5)(b), and explanatory descriptions of referenced rules have been added:*

(5)(b) Regarding stormwater treatment and other onsite post-construction elements, projects not subject to more stringent standards under one of the following state stormwater rules or a local ordinance shall meet state stormwater rule 15A NCAC 2H .1003, which includes specifications for low- and high-density designs, vegetated setbacks and stormwater outlets for all projects. Such projects shall use a high density treatment threshold of twenty four percent and greater built-upon area, and a storm depth of one inch for SCM design:

(i) Water Supply Watershed Protection rules, 15A NCAC 02B .0620 - .0624;

(ii) Coastal Counties stormwater rule 02H .1019; or

(iii) Non-Coastal County HWQs and ORWs rule 02H .1021.

Commenters
City of Raleigh

Comment ID: 99

Comment: In Sub-Item (5)(d) of Development Project Requirements the section states that projects must submit loading calculations for phosphorus removal even though the Neuse NSW rules only require treatment for nitrogen.

Response: *The comment is valid, and the reference to phosphorus in the tool criteria has been removed. The revised language now reads:*

(i) Provides site-scale estimates of annual precipitation-driven total nitrogen load;

Commenters
City of Raleigh

Comment ID: 100

Comment: In Sub-Item (5)(d) of Development Project Requirements clarity is needed to know whether all projects above 24% impervious are now subject regardless of exemption status. Specifically, are projects under the one-acre disturbance threshold now subject to the NSW rules in the states view.

Response: *Item (4) has been reworked to clarify, among other things, that projects below the disturbance thresholds are not subject to the rule with the exception of below-threshold disturbances that result in cumulatively exceeding 24% impervious cover for the lot.*

(4) DEVELOPMENT EXCLUDED. The following development activities shall not be subject to this Rule:

(a) Projects disturbing less than:

(i) one acre for single family and duplex residential property and recreational facilities; and

(ii) one-half acre for commercial, industrial, institutional, multifamily residential, or local government land uses with the following exception. Such below half-acre projects that would replace or expand existing structures on a parcel, resulting in a cumulative built-upon area for the parcel exceeding twenty-four percent, would be subject to the requirements of Item (5) of this Rule;

Commenters

City of Raleigh

Comment ID: 101

Comment: Shouldn't Lenoir County should be a listed County in the Neuse Stormwater Rule? OSBM estimates 2020 Greene County population at 21,301 while Lenoir is 57,004. The former is included as subject to this rule while the latter isn't.

Response: *Lenoir County does not meet the annual population growth rate criteria that was used, and on that basis was not added to the rule.*

Commenters

Private Citizen: Mike Hermann

Comment ID: 102

Comment: Granville County meets neither the total population nor the population growth criteria within the Tar-Pamlico Basin and should not be subject to the Stormwater Rule. The Fiscal Note appears to use the population of the entire jurisdiction as of 2010 rather than the population within the Tar-Pamlico Basin. It is not appropriate to consider population or other characteristics of the County outside the basin of interest in determining application of the Tar-Pamlico Stormwater Rule. DWR does not disclose its methodology for determining the population within the basin for Granville County. Text is not explicit on whether population growth is limited within the basin. DWR's analysis represents a decade of quite abnormal from those preceding and following it. The population growth experienced in 2010 is not ongoing. Actual development permit data prove that only a small amount of growth is occurring within the Tar-Pam basin; not enough to trigger the population growth thresholds.

Response: *We agree and have removed Granville County from the proposed rule revisions to the Tar- Pamlico New Development Stormwater Rule.*

Commenters

Granville County

Comment ID: 103

Comment: As a tier 1, rural, economically challenged county, we feel inclusion into the stringent stormwater rules will have a significant impact on our development., will create a substantial unfunded mandate on the county, and will create cost barriers for development in our county. If the analysis looked at the growth rate beyond 2010, it would indicate a negative growth rate as overall population of the county has declined since 2010. We do not have stormwater staff for the purpose of implementing the rule.

Response: *We agree and have removed Vance County from the proposed rule revisions to the Tar- Pamlico New Development Stormwater Rule.*

Commenters

Vance County

Comment ID: 104

Comment: The proposed rule does away with the 6- & 10-pound offsite threshold requirement for nitrogen loading and replace it with the 24% BUA rule, where if site is over 3.6lb/ac but under 24% BUA then they can buy down the nitrogen. If over the 24% and over 3.6 lb/ac then a primary SCM would be required. Under the old 6/10 rule if over the 6/10 then an SCM was required and sized so that it would treat enough nitrogen to bring it back under the threshold and the rest could be bought down. Under this new proposed rule, how would the pond be sized? Big enough to treat down to whatever the loading would be for 24% of the site, and then buy down the rest to 3.6?

Response: *For clarification SCM design and sizing requirements are identified in Sub-Item (5)(b), which points to state stormwater rule 15A NCAC 02H .1003 and the Minimum Design Criteria for SCMs incorporated by reference through 15A NCAC 02H .1050 through .1062.*

According to sizing requirements of Rule 02H .1050, SCMs should be sized to take into account runoff at build out from all surfaces draining to the system, and the combined design volume of all SCMs on the project shall be sufficient to handle the required storm depth. If the SCM does not treat the site down to the required export rate of 3.6/lbs/acre/year, the remainder of the reduction need can be achieved through either additional treatment via oversizing or adding SCMs, or by obtaining nutrient offsets through an offset bank or in lieu fee payment to DMS.

Commenters
City of Wilson

Comment ID: 105

Comment: When looking at the peak flow portion of a site it is proposed to do away with the site not exceeding the predevelopment runoff of a 1yr/24hr storm. There are currently two exemptions to peak flow which are: less than 10% increase from pre-post development or less than 15% BUA. If either of these apply then the site is exempt from peak flow. Is the BUA changing to 24% or staying at 15% under the new rule?

Response: *The 1 year 24-hour peak rate match requirement has been removed from both Neuse & Tar-Pamlico Stormwater Rules. The change reflects recommendations of the DEMLR Stormwater Permitting Unit, which provided input that evidence has grown indicating that the 1 yr. 24 hr. peak match requirement can result in bankful flows being sustained for longer time intervals than those that occurred under pre-development conditions, counterintuitively hastening streambank degradation rather than protecting streambanks. Exemptions from the peak rate match requirements will no longer be needed and local programs will need to be updated to reflect this and other rule changes.*

Commenters
City of Wilson

Comment ID: 106

Comment: (5)(f) Why are local linear projects not treated the same as NCDOT linear projects, we would prefer to have using NCDOT's BMP toolbox as a compliance option. Also, it appears this would allow future city streets built by private developers to utilize this as well. It may be worth clarifying whether privately built streets that will be taken over by a local government for maintenance are able to comply with the rules through just an offsite mitigation buydown.

Response: *There are no requirements specific to DOT projects in this rule. Also, the DOT Toolbox does not address nutrients and would provide no basis for judging compliance with this rule. With respect to private development streets, the provision in Sub-Item (5)(e) only applies to new development undertaken by a local government developing public road expansions or public sidewalks and projects subject to the Jurisdiction of the Surface Transportation Board. We believe the language is sufficiently clear that it does not apply to streets built by private developers or privately developed roads that are eventually taken over by local governments for maintenance, where more latitude exists to design in treatment for roads as well as the development they serve.*

Commenters
City of Raleigh

Comment ID: 107

Comment: Sub-Item (5)(e), this section is unclear on how sites with existing impervious can be permitted. Can this section be clarified, City Staff believes the language will lead to inconsistent interpretation without clarification. The city has been utilizing a state approved method for dealing with sites with existing impervious being developed, this method is the "Apportioning Method". We are happy to provide the state with some examples of this method if that is needed.

Response: *The language in Item (5) has been reorganized to improve clarity regarding how existing impervious area is addressed. The Model program that will be developed to provide guidance for implementing the stormwater rule requirements will be updated to address apportioning methods approaches used by local governments. We recommend the following rule language:*

(5) DEVELOPMENT PROJECT REQUIREMENTS. A proposed development project not excluded under Item (4) of this Rule shall be approved by a subject local government for the purpose of this Rule when the applicable requirements of Item (3) of this Rule and the following criteria are met.

(a)The project, as defined in state stormwater rule 15A NCAC 02H .1002, shall meet either a nitrogen loading rate target of 3.6 pounds/acre/year or the definition of runoff volume match found in that rule. Proposed development projects that would replace or expand existing structures and would result in a net increase in built-upon area shall meet one of these options for the project less any existing built-upon area.

Commenters
City of Raleigh

Comment ID: 108

Comment: A continuing oversight of the rule is its ability to address existing development's stormwater impact. At a minimum the Local Program should require that incentives be developed for implementing projects in already developed areas on both public and private property that would reduce contributions of stormwater pollution from those landscapes

Response: *This rule revision did not attempt to regulate existing developed lands through requirements on local governments, nor to provide an incentive structure for local programs to offer to developers, and state statute Chapter 143-214.7(a2) prohibits state stormwater rules from requiring stormwater controls on existing impervious during redevelopment of existing developed lands.*

Commenters
Sound Rivers
American Rivers
Haw River Assembly
NC Conservation Network
Water Keepers Alliance

15A NCAC 02B .0712 & .0732 Agriculture Rules

Comment ID: 109

Comment: Request removing the words “a county or” from .0712(1)(a) and .0732(a)(1). The requirements of the collective compliance approach outlined in these rules applies to the basins as a whole, not individual counties. These items should be revised to reflect the rule requirements.

Response: *We have revised the rule language in both .0712(1)(a) and .0732(a)(1) to remove the reference to “a county”. While the proposed revision in addresses compliance, the accounting method requirements in both rules still include accounting at the county level which is aggregated in the annual reports to show compliance at the basin scale. We recommend the following language:*

(1)(a) PROCESS. This Rule requires farmers in the Basin to implement land management practices that collectively, on a ~~county~~ or watershed basis, will achieve the nutrient goals.

(5)(a) The nitrogen method shall estimate baseline and annual total nitrogen losses from agricultural operations in each county and for the entire Neuse Basin.

Commenters

Division of Soil & Water Conservation
North Carolina Farm Bureau

Comment ID: 110

Comment: Under the rules the Agriculture Sector does not get credit for DMS or private mitigation bank practices implemented on agriculture lands but those lands are still reported under the collective compliance strategy which aggregates data at the county level.

Response: *The collective compliance approach provides agriculture 100% reduction credit for any lands that go out of production. In addition to lands lost to development, or taken out of rotation and left fallow, lands taken out of production, whether for purposes of entering into a private voluntary contract or agreement with DMS or a private bank, or placed into a conservation practice by a producer, are reflected as reductions in crop acres in subsequent annual agricultural accounting.*

Commenters

Division of Soil & Water Conservation
North Carolina Farm Bureau

Comment ID: 111

Comment: Annual recalculation of agriculture’s baseline will impact agriculture’s ability to meet and maintain its nitrogen loss reductions and result in increased workload for the BOC, WOC, LAC and DSWC for little or no environmental benefit. This ongoing uncertainty will also indefinitely complicate or even preclude nutrient trading opportunities with other regulated entities. There is not an accurate way to calculate exactly which lands should be removed from baseline totals. Without an agreed upon standardized method to accurately calculate land that is actively under production, we do not know what implications this change will have and we cannot predict the impact of such a reporting change on our ability to meet our nitrogen loss reduction goals in the future. A moving baseline is almost impossible to calculate due to the amount of agricultural land lost each year. By enforcing a moving baseline, the requirements would implement unproportionable restrictions on the remaining producers. At time of establishing the baseline, County LA’s and field staff were committed to ensure that the baseline figures of each report were as accurate as possible, and this rule change requires that we revisit those figures and revise our target each year. Local staff will not have the time or the resources to provide this information yearly.

Response: *The proposed rule language “Baseline losses and relative loss reduction progress shall be adjusted as frequently as can be supported by available data to account for lands permanently removed from agricultural control through development” has been removed and is not intended to change the current practice. The proposed language now reads as follows in both basin’s agriculture rules:*

(a) The nitrogen method shall estimate baseline and annual total nitrogen losses from agricultural operations in each county and for the entire Neuse Basin

Commenters

Division of Soil & Water Conservation
 North Carolina Farm Bureau
 Wake County Soil & Water
 Orange County Local Advisory Committee
 Franklin County Local Advisory Committee

Comment ID: 112

Comment: Additional BMPs should be added to the calculation of nutrient reduction. There are many nitrogen and phosphorus reducing BPS that are not given credit in the current reporting system such as field borders, grass waterways, nutrient management etc...

Response: *We agree that additional Ag BMPs should be considered where sufficient studies and scientific data support their inclusion. The process of adding BMPs is addressed by an established panel of university and other experts, the NLEW subcommittee of the Basin Oversight Committee. No revisions were made to the rules to prevent or limit that collaborative process.*

Commenters

Wake County Soil & Water
North Carolina Farm Bureau

Comment ID: 113

Comment: Fully support proposed method for submitting the annual report to DWR versus having to be the only stakeholders required to present a report to the EMC each year.

Response: *Annual reporting remains an important component of this rule, and as proposed in the Neuse and Tar-Pam Purpose and Scope Rules (.0710 & .0730) the Division plans to provide biannual reports to the WQC on implementation progress from all sectors under the respective nutrient management strategies to better inform the adaptive implementation of the rules.*

Commenters

Wake County Soil & Water

Comment ID: 114

Comment: The animal thresholds in the Tar-Pamlico Agriculture Rule come directly from SL 2001-235 and therefore cannot be removed or revised.

Response: *The animal thresholds in the Tar-Pamlico Agriculture rule will remain as provided for in SL 2001-355.*

Commenters

Division of Soil & Water Conservation
North Carolina Farm Bureau

Comment ID: 115

Comment: Collectively, agriculture should achieve a 30% reduction of the N loading from existing agricultural operations. Conversion of agriculture land to urban development shouldn't be sufficient for meeting reduction goals. Research supports this comment. A USGS study of nutrient flows to the Neuse River found that Bear Creek, a largely agricultural waters in Green, Wayne, and Lenoir counties contributed disproportionately to nitrogen loads to the estuary (Spruill et al., 2004). A separate study published in by Lebo and Paerl in 2012 found the Trent River, a largely agricultural watershed in Jones County to disproportionately contribute nutrient pollution to the Neuse Estuary with an increasing trend. If ag sources of pollution continue under the status quo, it will be difficult to achieve nutrient load reduction goals.

Response: *The proposed rule language "Baseline losses and relative loss reduction progress shall be adjusted as frequently as can be supported by available data to account for lands permanently removed from agricultural control through development" has been removed and is not intended to change the current practice. The proposed language now reads as follows in both basin's agriculture rules:*

(a) The nitrogen method shall estimate baseline and annual total nitrogen losses from agricultural operations in each county and for the entire Neuse Basin

Commenters

Private Citizen: Mike Hermann

Comment ID: 116

Comment: Although rules in both the Neuse and the Tar-Pamlico nutrient management strategies purport to address contributions from various types of agriculture, in practice their application is limited to cropland agriculture, meaning they fail to account for the proliferation of industrial animal agriculture and the resulting water quality impacts. The EMC's failure to effectively regulate large sources of nutrients dooms nutrient management strategies in the Neuse and Tar-Pamlico to failure. We cannot expect the targeted improvements in water quality to be achieved until the agency gets serious about targeting these sources of nutrient loading.

Response: *Comment noted.*

Commenters

Sound Rivers

American Rivers

Haw River Assembly

NC Conservation Network

Water Keepers Alliance

Comment ID: 117

Comment: A substantial and growing body of scientific evidence demonstrates that animal feeding operations contribute significant nutrient loads to water bodies in Eastern North Carolina. Indeed, DWR basin planners have consistently observed that industrial animal operations “are having a significant negative impact on the Neuse River water quality” and repeatedly noted the adverse impact of these operations on water quality in the Tar-Pamlico watershed. A nutrient management strategy has no hope of reducing loading that is effectively ignored. We urge the EMC to conduct a long overdue analysis of the contributions of industrial swine and poultry operations to nutrient loading in the Neuse and Tar-Pamlico watersheds.

The EMC cannot improve water quality in the Neuse or the Tar-Pamlico basin without meaningful evaluation and reduction of pollution from industrial animal agriculture. We urge the agency to acknowledge its failure to do so, and to take steps to collect and evaluate data to inform overdue action on that front rather than continue to rely on a paper exercise focused solely on row crop agriculture.

Response: *Comment noted.*

Commenters

Sound Rivers
 American Rivers
 Haw River Assembly
 NC Conservation Network
 Water Keepers Alliance

Comment ID: 118

Comment: Ignoring animal agriculture compounds the inherent limitation stemming from the failure to consider atmospheric deposition of nitrogen when developing these nutrient management strategies. Approximately 80% of ammonia emissions in the country originate from livestock waste. Nutrients from animal waste can enter surface waters through atmospheric deposition following manure spraying or spreading. Yet, despite a sizable number of large hog and poultry operations in both the Neuse and Tar-Pamlico watersheds, there is no attempt to evaluate, much less regulate, ammonia emissions or their impacts on chlorophyll-*a* levels.

Response: *Comment noted.*

Commenters

Sound Rivers
 American Rivers
 Haw River Assembly
 NC Conservation Network

Water Keepers Alliance

Fiscal Note Comments

Comment ID: 119

Comment: The Fiscal note should be amended to incorporate and address the 2019 EPA Trading Policy Memo.

Response: *The 2019 EPA Trading Policy Memorandum was released after the EMC and OSBM approval of the fiscal note. The fiscal note has been supplemented to discuss the 2019 EPA Trading Memo. The referenced memorandum can be found at the following link: <https://www.epa.gov/nutrient-policy-data/water-quality-trading-memos>.*

Commenters

Neuse River Compliance Association
City of Apex
Town of Clayton
CMSD
Johnston County

City of Goldsboro
Grifols
City of New Bern
City of Wilson

Comment ID: 120

Comment: The Fiscal Note went to great lengths to undermine the EMC’s proposed rule change for the nutrient credit ratio to be applied when new or expanding WWTPs rely on nutrient credits. That information should be deleted.

Response: *Comment noted.*

Commenters

Neuse River Compliance Association

Comment ID: 121

Comment: The Fiscal Note asserts that adequate capacity exists in the basin from nutrient allocations to support the growth needs of the upper basin jurisdictions. Despite a showing by NRCA members that there is no capacity available for sale or lease to support these needs, the EMC approved the Fiscal Note. This inaccurate information should be removed or, at a minimum amended to show that multiple jurisdictions have been unsuccessful in finding capacity to meet their needs for the expansion or addition of NPDES facilities.

Response: The fiscal note has been amended to describe that multiple jurisdictions have been unsuccessful in finding capacity to meet their needs for the expansion or addition of NPDES facilities.

Commenters

Neuse River Compliance Association
City of Apex
Town of Clayton
CMSD
Johnston County

City of Goldsboro
Grifols
City of New Bern
City of Wilson

Private Citizen: Steve Tedder

Comment ID: 122

Comment: The success of the proposed Nutrient Offset Rule (.0703) is dependent upon the establishment and effective financial management of a non-wasting endowment for every permanent credit project installed under the proposed rule. The Fiscal Note does not discuss the criteria for establishing an endowment nor does it analyze the factors influencing the calculation of an endowment for any of the potential project types.

Response: *No changes to endowment requirements were intentionally proposed in this rule, and therefore this analysis was not provided. Revisions to the Offset Rule and Definitions Rule clarify that no new responsibilities are required of permanent steward and therefore no additional endowment costs will be incurred. These recommended rule revisions include:*

Adding the following substantive restriction in .0703 paragraph (g) to preclude potential or apparent conflicts of interest for perpetual stewards with enforcement responsibilities:

Perpetual stewards may not assume project maintenance or restoration responsibilities.

Revise to .0703 (g)(2) to ensure the easement holder is not obligated to maintain nutrient offset credits:

The provider shall create and transfer to the perpetual steward a non-wasting endowment or other dedicated financial surety to provide for the oversight of the project's load reductions completed permanent project.

And delete this sentence in .0703 (g)(4)

~~Structure operation and maintenance shall be the responsibility of the landowner or easement holder unless the Division gives written approval for another person or entity.~~

Define the terms "Perpetual Steward" and "Non-wasting endowment" in Items (29) and (39) of .0701 as follows to clearly differentiate between the responsibilities of perpetual stewards and other parties responsible for sustaining nutrient offset projects, we propose to

"Perpetual Steward" means an entity that provides oversight for a permanent nutrient offset project. Oversight in this context includes monitoring and enforcement responsibilities assumed by the steward and approved by the Division as a condition of granting permanent nutrient offset credit.

"Non-wasting endowment" is a fund that generates enough interest to cover the cost of perpetual monitoring and enforcement monitoring, maintenance, repair and renovation of a nutrient reduction project. project by a perpetual steward.

Commenters

Financial Services Division - Stewardship Program

Comment ID: 123

Comment: The Fiscal Note references a previously published fiscal note entitled *Fiscal Analysis for Proposed Nutrient Strategy for Falls of Neuse Reservoir dated June 14, 2010*. The costs of planning, design, and construction of select SCMs are presented however no cost data is provided for the operation, maintenance, repair, or renovation of these measures. If a non-wasting endowment is intended to cover the full costs of

construction, operation, maintenance and renovation of a measure **for perpetuity** then it stands to reason that the financial impact would be analyzed for this proposed rule. The Fiscal Note does not adequately analyze all financial impacts of the rule, leaving all parties, developer, owner, and perpetual steward, at significant financial and legal risk if an inadequate endowment is established for a permanent offset project.

Response: *No changes to endowment requirements were intentionally proposed in this rule, and therefore this analysis was not provided.*

Nutrient stormwater rules have always required permanent maintenance of onsite SCMs. Proposed amendments to those rules will require permanent nutrient offsets rather than thirty years' worth. The fiscal note briefly addressed this issue in section 6.3.6 and concluded that no costs are projected. The fiscal note has been updated to supplement and clarify this analysis.

Revisions to the Offset Rule and Definitions Rule clarify that no new responsibilities are required of permanent steward and therefore no additional endowment costs will be incurred. These recommended rule revisions include:

Adding the following substantive restriction in .0703 paragraph (g) to preclude potential or apparent conflicts of interest for perpetual stewards with enforcement responsibilities:

Perpetual stewards may not assume project maintenance or restoration responsibilities.

Revise to .0703 (g)(2) to ensure the easement holder is not obligated to maintain nutrient offset credits:

The provider shall create and transfer to the perpetual steward a non-wasting endowment or other dedicated financial surety to provide for the oversight of the project's load reductions completed permanent project.

And delete this sentence in .0703 (g)(4)

~~*Structure operation and maintenance shall be the responsibility of the landowner or easement holder unless the Division gives written approval for another person or entity.*~~

Define the terms "Perpetual Steward" and "Non-wasting endowment" in Items (29) and (39) of .0701 as follows to clearly differentiate between the responsibilities of perpetual stewards and other parties responsible for sustaining nutrient offset projects, we

propose to

“Perpetual Steward” means an entity that provides oversight for a permanent nutrient offset project. Oversight in this context includes monitoring and enforcement responsibilities assumed by the steward and approved by the Division as a condition of granting permanent nutrient offset credit.

“Non-wasting endowment” is a fund that generates enough interest to cover the cost of perpetual monitoring and enforcement ~~monitoring, maintenance, repair and renovation~~ of a nutrient reduction ~~project.~~ project by a perpetual steward.

Commenters

Financial Services Division - Stewardship Program

Comment ID: 124

Comment: The *Fiscal Analysis for Proposed Nutrient Strategy for Falls of Neuse Reservoir dated June 14, 2010* specifically states BMPs (SCMs) require maintenance to continue to work effectively, including establishing desired vegetation, removing undesirable species, removing accumulated sediment, repairing control structures, repairing erosion and other activities. BMP types discussed in the Fiscal Note include:

- Stormwater wetland
- Bioretention
- Wet Detention
- Extended Dry Detention
- Grassed Swale
- Filter Strip/Level Spreader
- Infiltration Devices
- Buffer w/ Level Spreader
- Sand Filter

The note goes on to say developers would not be responsible for maintenance, rather maintenance would be the responsibility of the property owner. This is in direct conflict with the proposed rule language where it suggests operation and maintenance of the BMP would be the responsibility of the perpetual steward.

Response: *No changes to endowment requirements were intentionally proposed in this rule, and therefore this analysis was not provided. Revisions to the Offset Rule and Definitions Rule clarify that no new responsibilities are required of permanent steward and therefore no additional endowment costs will be incurred. These recommended rule revisions include:*

Adding the following substantive restriction in .0703 paragraph (g) to preclude potential or apparent conflicts of interest for perpetual stewards with enforcement responsibilities:

Perpetual stewards may not assume project maintenance or restoration responsibilities.

Revise to .0703 (g)(2) to ensure the easement holder is not obligated to maintain nutrient offset credits:

The provider shall create and transfer to the perpetual steward a non-wasting endowment or other dedicated financial surety to provide for the oversight of the project's load reductions completed permanent project.

And delete this sentence in .0703 (g)(4)

~~Structure operation and maintenance shall be the responsibility of the landowner or easement holder unless the Division gives written approval for another person or entity.~~

Define the terms "Perpetual Steward" and "Non-wasting endowment" in Items (29) and (39) of .0701 as follows to clearly differentiate between the responsibilities of perpetual stewards and other parties responsible for sustaining nutrient offset projects, we propose to

"Perpetual Steward" means an entity that provides oversight for a permanent nutrient offset project. Oversight in this context includes monitoring and enforcement responsibilities assumed by the steward and approved by the Division as a condition of granting permanent nutrient offset credit.

"Non-wasting endowment" is a fund that generates enough interest to cover the cost of perpetual monitoring and enforcement ~~monitoring, maintenance, repair and renovation~~ of a nutrient reduction project. project by a perpetual steward.

Commenters

Financial Services Division - Stewardship Program

Comment ID: 125

Comment: The word “endowment” appears once in the Fiscal Note, on page 74, where it is suggested the amount of funding necessary for a non-wasting endowment by the provider is somehow reduced because DWR will not require a buffer to be replanted in the event of damage sustained by a natural disaster. The Fiscal Note does not discuss this same scenario in the context of engineered SCMs.

Response: *The fiscal note did not evaluate engineered SCMs associated with the provisions of .0703(g)(5)(B) because they are not included in the suite of practices that are “designed to restore a natural ecological community,” the context referenced above. The fiscal note did not evaluate replacement costs for SCMs because their use for offset purposes was not projected by DWR to be a viable option within a foreseeable time horizon under this rule.*

Commenters

Financial Services Division - Stewardship Program

APPENDIX A: TEXT OF PROPOSED RULES

APPENDIX B: UPDATED FISCAL NOTE

APPENDIX C: PUBLIC COMMENTS RECEIVED

APPENDIX D: PROPOSED STORMWATER COMMUNITY POPULATION DATA

APPENDIX E: NOTICE OF TEXT