

Neuse River Compliance Association®

P.O. Box 1410
Clayton, N.C. 27528 – 1410

September 6, 2019

Dr. Stan Meiburg
Chair, NC Environmental Management Commission

Assistant Secretary Shelia Holman
NC Department of Environmental Quality

Environmental Management Commissioners

Recording Clerk of the Commission
1611 Mail Service Center
Raleigh, NC 27699-1611

DELIVERY VIA EMAIL

Re: Readoption of 15A NCAC 2B .0234 as 15A NCAC 2B .0713 and .0703

Dear EMC Commissioners and Assistant Secretary Holman:

On behalf of the Neuse River Compliance Association [hereinafter NRCA], I make the following OBJECTIONS to the recommendations of the Department of Environmental Quality regarding the cited proposed rules and to certain recommendations of the Hearing Officers which the NRCA contends violate the Administrative Procedure Act:

1. By its posted PowerPoint presentation, the Department has made untimely comments after the close of the comment period in response to the Hearing Officers' Report in clear violation of the Administrative Procedure Act;
2. The Department's unprecedented recommendations to set aside substantive recommendations by the Hearing Officers will result in substantially different final rules in 15A NACA 2B .0703 and .0713 from the proposed rules in violation of N.C. Gen. Stat. § 150B-21.2;
3. The Department's recommendation that 15A NCAC 2B .0703(j)(4) be amended to change the amount of offset credits required for expanding or new wastewater discharges, **for which allocation is not available**, from 110% to 200% will produce a financial effect of millions of dollars that the members of the NRCA could not reasonably have expected based on the proposed text of the rule; and
4. The Department's recommendations impact the interests of persons in the Falls Lake and Jordan Lake basins who could not have reasonably determined the rule would affect their interest in violation of N.C. Gen. Stat. 150B-21.2.

RESOLUTION OF OBJECTIONS

The NRCA provides a substantive explanation of its objections in the remainder of this document. Being respectful of the time of the EMC members, the NRCA offers this set of recommendations to address its objections while allowing the rules to complete the readoption process consistent with the requirements of N.C. Gen. Stat. §150B-21.3A.

- A. Adopt the recommendations of the Hearing Officers as set forth in their Report; and
- B. Amend the Hearing Officers' recommendations to remove language that amends the Falls Lake rules and the Jordan Lake rules.

A. UNTIMELY DEQ COMMENTS

In the DEQ PowerPoint presentation posted as a part of the Agenda for the September 12, 2019 meeting of the EMC, the Department offers its untimely, comments in response to the recommendations of the Hearing Officers. [DEQ made no comments on the ratio rule. See pp A-22 to A-29 of the Hearing Officers' Report.] We believe this to be the first time that the Department has ever offered comments and recommendations to the EMC which differ in substance from the recommendations of the Hearing Officers. No such comment was made by the Department during the comment period as set forth in the Notice of Proposed Rulemaking. The comments by the Department were made through its Division of Mitigation Services and its Division of Finance -Stewardship Program. [See p A-4 of the Hearing Officers' Report.] The comments and recommendations by the Department in the PowerPoint presentation are untimely and consideration of them by the EMC will constitute a clear violation of the Administrative Procedure Act [APA]. See N.C. Gen. Stat. §150B-21.2(f) and (g).¹

B. VIOLATION OF SUBSTANTIALLY DIFFERENT APA STANDARD

Moreover, if adopted, the comments will cause the EMC to run afoul of other important provisions in the APA and the Session Laws of the General Assembly. The Department's recommended changes to the noticed version of 15A NCAC 2B .0703 (formerly .0240) will differ substantially from the text of the proposed rule published in the North Carolina Register.

The APA sets forth three criteria by which an adopted rule may be determined to be substantially different from a proposed rule. The APA allows that determination if any one of the criteria is applicable.

¹ "(f) An agency must accept comments on the text of a proposed rule that is published in the North Carolina Register and any fiscal note that has been prepared in connection with the proposed rule for at least 60 days after the text is published or until the date of any public hearing held of the proposed rule, whichever is longer."
"(g) . . . Prior to adoption, an agency shall review any fiscal note and consider any public comments received in connection with the proposed rule or the fiscal note." N.C. Gen. Stat. §150B-21.2(f) and (g)

“(g) Adoption--An agency shall not adopt a rule until the time for commenting on the proposed text of the rule has elapsed and shall not adopt a rule if more than 12 months have elapsed since the end of the time for commenting on the proposed text of the rule. Prior to adoption, an agency shall review any fiscal note that has been prepared for the proposed rule and consider any public comments received in connection with the proposed rule or the fiscal note. An agency shall not adopt a rule that differs substantially from the text of a proposed rule published in the North Carolina Register unless the agency publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the proposed different rule for the time set in subsection (f) of this section.

“An adopted rule differs substantially from a proposed rule if it does one or more of the following:

- (1) Affects the interests of persons who, based on the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests.
- (2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.
- (3) Produces an affect that could not reasonably have been expected based on the proposed text of the rule.

N.C. Gen. Stat. § 150B-21.2. Procedure for adopting a permanent rule

The NRCA respectfully submits that the third criterion bars the EMC from adopting the recommendations of the Department, unless and until it sends rules 15A NCAC 2B .0703 and .0713 back to notice as set forth in the statute.

In the Fiscal Note, the effect of the recommendation to change the nutrient credit ratio from 1.1 to 1 to 2 to 1 is set forth. The information is provided in Table 4-5 COSTS TO SECURE NUTRIENT ALLOCATION FOR SCENARIO 1 (70 YEARS, NPV). In actuality, this is the cost difference for a single WWTP to be expanded by 10 MGD. That cost differential is 100% higher than the cost at 1.1 to 1.² No attempt was made to estimate the cost for all WWTPs in the Neuse basin, or to estimate the growth potential needed by those facilities. That \$9,674,958 cost increase is clearly an effect that could not reasonably have been expected based on the proposed text of the rule. The Hearing Officers’ Report also takes note of the lack of information provided by the Fiscal Note: “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.” [P A-25, comment 36

² Cost for Offset Credit for 10 MGD based on 2:1 equals \$19,349, 915. Cost for Offset Credit for 10 MGD based on 1.1:1 equals \$9,674,957.

EMC Commissioners and
Assistant Secretary Holman
September 6, 2019
Page Four

response] In the attached document, the City of Raleigh has calculated the impact of this change on its foreseeable needs, i.e. 27 MGD for the next 20 years of expansion. The Department did not seek or gather such information in the preparation of the Fiscal Note. **The estimated cost to Raleigh by the change will be in excess of \$60 million dollars.**

C. UNAUTHORIZED AMENDMENT OF FALLS AND JORDAN RULES

Rule 15A NCAC 2B .0703 extends the rule to include WWTP expansions and new facilities in the Falls Lake and Jordan Lake rules. See 15A NCAC 2B .0703(a)(3) and (4).³ The Falls Lake rules include provisions that directly regulate new or expanding WWTPs that discharge into Falls Lake. See 15A NCAC 2B .0279(8) and (9). **That rule was not noticed for revision. This is clearly a substantial change impacting local governments and private utilities who could not have reasonably foreseen an impact from the rule as proposed – a clear violation of the first criterion for a substantially different rule.** Moreover, the General Assembly has established a date certain for the consideration of rule changes and readoption of the Falls Lake rules, i.e. December 31, 2024. See Session Law 2016-94, Section 14.13; Session Law 2018-5, Section 13.8(a), (b), and (c). In Session Law 2018-5, Section 13.8(c), the General Assembly modified the due date for local governments to comply with the existing development rule in Falls Lake. This clearly indicates that the sole authority to amend the Falls Lake, and Jordan Lake rules, before readoption is authorized by the General Assembly, resides with the General Assembly. This backdoor attempt to amend the Falls Lake and Jordan Lake rules is in excess of the authority of the EMC.

CONCLUSION

The NRCA is sensitive to and concerned about the potential that these critical rules may expire pursuant to N.C. Gen. Stat. §150B-21.3A. That statute provides in (b) “Automatic Expiration” that any rule which has not completed the review procedure set forth in the statute “shall expire on the date set out in the schedule established by the [Rules Review] Commission pursuant to subsection (d) of this section.” In (c)(3) of the statute, a rule determined to be necessary with substantive public interest “shall be readopted as though the rules were new rules in accordance with this Article.” Assuming that it is determined appropriate and legally necessary to again notice the rule to which objection is lodged, the NRCA is concerned that the rules will lapse and be required to start the rule-making process again. To avoid that potential, the NRCA provided in the opening paragraphs recommended actions that the EMC can take to avoid that situation.

The NRCA appreciates that this has been an arduous process which has involved great effort by the EMC, the DEQ staff, and the stakeholders. We are appreciative of the time and attention given to our concerns. We believe that we have learned much in the 20 years of implementing an important nutrient strategy and that we remain good stewards of the

³ The South Granville Water and Sewer Authority is a member of the NRCA and thus the NRCA is impacted by this rule change.

EMC Commissioners and
Assistant Secretary Holman
September 6, 2019
Page Five

environment. Our members have achieved Total Nitrogen loading reductions that were generally believed to be impossible in 1998. At the same time, we represent local governments who continue to provide important additions to economic expansion of the State and our region. As NPDES permit holders, the EPA mandated permit conditions assure that NRCA members will be required to demonstrate annually their operation within permit limits. The proposed 200% penalty to address uncertainty is a redundancy of the requirements of our NPDES permits.

The NRCA remains committed to improving water quality in the Neuse Estuary. The NRCA does not understand why its members are singled out for disproportionate treatment and an unbalanced burden for improving water quality. No other source of new total nitrogen loading to the Neuse Estuary is having to pay a price for uncertainty, but all those new sources of loading use nonpoint source nitrogen removal to achieve their regulatory requirements.

Thank you for your attention to this very important set of issues.

Sincerely,



Daniel F. McLawhorn
Chair, Neuse River Compliance Association

CC: Linda Culpepper, Director of DWR
John Huisman, DWR
Haywood Phthisic, Ex. Director, NRCA
T.J. Lynch, President, NC Water Quality Association
Forrest Westall, Ex. Director, UNRBA
Paul Calamita, Esquire

Cost of Nutrient Offset Requirements in the Lower Neuse Basin



The population for CORPUD's service area is projected to double within the next 20 years. Associated wastewater discharges from CORPUD's wastewater treatment facilities into the Neuse River Basin will increase by 27 million gallons per day (mgd) by year 2040.



NC WASTEWATER DISCHARGE REQUIREMENTS RULE (15 NCAC 02B.0234)

The rule establishes the nitrogen wasteload allocation assigned to wastewater treatment plants in the Neuse River Basin. This allocation represents the maximum allowable load of total nitrogen in wastewater discharged to the estuary.

Treatment plants discharging more than the nitrogen load allocation stipulated in their National Pollutant Discharge Elimination System (NPDES) permit are required to purchase nitrogen credits.

The current rule results in prohibitive costs for purchasing nitrogen credits and is not financially sustainable. A regulatory change is therefore proposed to emphasize a balance between environmental stewardship, social equity and economic strength. If implemented, this change will lead to substantial savings in customers' money while still protecting the environment.

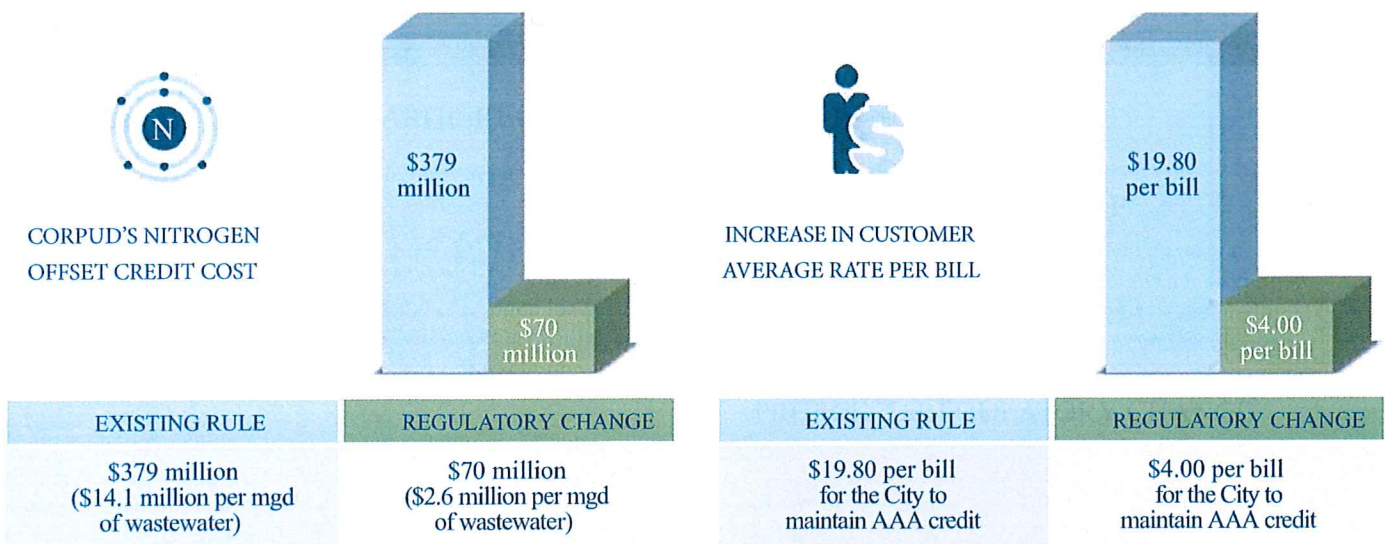
EXISTING NC STATE RULE

Prior to receiving a permit, new WWTPs need to purchase total nitrogen offset credits for a period of 30 years at a rate of 200% of the total cost of the credits, which is currently set at \$21.98 per pound of nitrogen.

PROPOSED REGULATORY CHANGE

This regulatory change would reduce the purchase period to 10 years (instead of 30 years) using a rate of 110% (instead of 200%).

IMPACTS OF PROPOSED RULE CHANGES



Nitrogen offset credit costs exclude land and capital costs for construction of new or expanded facilities.