

COMMENTS BY THE NEUSE RIVER COMPLIANCE ASSOCIATION

FOR PROPOSED CHANGES TO THE NEUSE ESTUARY RULES

AND OTHER 2B AND 2H RULES

November 2, 2017

2B .0200 COMMENTS

2B. 0202. Definitions should apply to all of Subchapter 2B not just to Section .0200.

(54) Toxic substance should be narrowed as it is too speculative and not tied to scientific determinations.

(Former 70) Watershed. Used in nutrient rules and water supply programs. Seems an essential term given new emphasis on "One Water".

2B .0208. Amend the rule to narrow the situations where the broad authority to regulate toxic substances via this narrative standard can be applied. To achieve that result, (1) of the rule should be revised to read:

- (1) Aquatic life standards: the concentration of toxic substances shall not result in chronic toxicity. Any levels in excess of the chronic value shall be considered to result in chronic toxicity. In the absence of direct measurements of chronic toxicity, the concentration of toxic substances shall not exceed the concentration specified by the fraction of the lowest LC50 value that predicts a no effect chronic level (as determined by the use of acceptable acute/chronic ratios). If an acceptable acute/chronic ratio is not available, then that toxic substance shall not exceed one-hundredth (0.01) of the lowest LC50 or if it is affirmatively demonstrated that a toxic substance has a half-life of less than 96 hours the maximum concentration shall not exceed one-twentieth (0.05) of the lowest LC50;

2B .0211(4). Amend to restore the original intent for compliance with the chlorophyll-a standard in Class C waters. To achieve that result, (4) of the rule should be revised to read:

15A

(4) Chlorophyll a (corrected): not greater than 40 ug/l for lakes, reservoirs, and other waters subject to growths of macroscopic or microscopic vegetation not designated as trout waters, and not greater than 15 ug/l for lakes, reservoirs, and other waters subject to growths of macroscopic or microscopic vegetation designated as trout waters (not applicable to lakes or reservoirs less than 10 acres in surface area). For lake and reservoirs not designated as trout waters, the Division will use a seasonal geometric mean based on the mean, spatial aggregation of samples from different stations in geomorphically similar parts of the lake or reservoir for the months between April and October to determine whether the 40ug/L standard is exceeded. The standard is not violated if there is an exceedance of 40 ug/L for one year of every three consecutive years unless there is documented use impairment in the lake or reservoir. Based upon submittal of data and information submitted by any party and collected under a DWR-approved Quality Assurance Project Plan (QAPP), the EMC will consider for adoption a site-specific Chlorophyll a (corrected) standard for specific waterbodies. The EMC will determine if a rulemaking hearing is appropriate based on the submittal and will proceed

in accordance with established procedures to consider adoption of a site-specific standard. The site specific Chlorophyll-a standard shall not be greater than 40 ug/L for non-trout lakes or reservoirs unless there is documentation to support the finding by the Commission that the site specific standard will not result in use impairment of the waterbody. The Commission or its designee may prohibit or limit any discharge of waste into surface waters if the surface waters experience or the discharge would result in growths of microscopic or macroscopic vegetation such that the standards established pursuant to this Rule would be violated or the intended best usage of the waters would be impaired;

2B. 0211(5). Should be amended and limited to exceedance of average samples from waterbody instead of instantaneous. Should also be supported by determinations of impairment of protected uses instead of merely numeric.

(12)(c). Should be consistent with EMC position instead of EPA.

(12)(f). Restore biological confirmation instead of EPA position.

(Prior 22). Restore action levels instead of EPA position.

Same comments for B and A waters.

2H COMMENTS

2H .0127. Amend the General Permits rule to require that the Director provide recognize TMDL and other nutrient sensitive waters attainment plans when setting the conditions for the issuance a certificate of coverage for a facility that will discharge into such waters the pollutants of concern. In proposed 2B .0713(2), the Neuse Estuary limitations for nitrogen loading by point source discharges is limited to "individual NPDES permits." The Director has used that provision to avoid including limits on nitrogen loading from facilities permitted to discharge pursuant to General Permit NC550000. The impact of septic systems converted to sand filter or other discharging septic systems authorized by this general permit is adding to the load of total nitrogen in the Neuse Estuary. The basin, below Falls Dam, should be subjected to the same limits that apply under General Permit NC57000. To avoid this problem, 2H .09127 should be amended in paragraph (c) to add a second sentence: "The water quality standards addressed in the general permit shall be the same as applied to other NPDES dischargers into the same waters, in particular when the waters are subject to nutrient loading reductions."

2H .0107(b)(2). The new section allowing the Director to reject an application once "technical review" has begun and to keep the fee is in excess of statutory authority and ambiguous. A timely submitted application serves as an extension of the existing permit while the renewal is processed per GS 150B-3(a). This will cause the renewal application to lose its status as a timely application. In addition, technical review is an undefined term and staff is not limited to denials when it has requested the now necessary information under (1). This section is also inconsistent with 2H .0112(b)((6) which sets out the reasons an application can be denied. It is also in tension, if not conflict, with new (e) of .0112. Note (e)(a) is limited to a "complete application."

2H. 0112(f)(2). This is in excess of statutory authority and expressly violates GS 150B-3(a). The denied permit does not expire until judicial review stage.

2H. 0115(a). Other local government submitted information is protected from public records disclosure for national security reasons.

2H. 0115(c)(4). This is a State law issue. EPA has no authority to make this decision unless it uses CWA authority to withdraw state authority for permit and issue it directly.

2H. 0115(d)(2). In excess of authority. Cannot override the Public Records Act.

2H 0127(c). This rule fails to address water quality impairments and use of General Permit to increase loading of pollutants which are reason for impairment. This violates CWA.

2H 0143. Does not address conflicts between state rules and EPA CFRs except for procedural matters. Should address how substantive conflict will be addressed. (b) in excess of authority and ambiguous by attempt to incorporate unidentified CFRs. Compliance will be required by permit conditions and permittees won't know what are the requirements unidentified other CFRs

2B NUTRIENT RULE REVISIONS INCLUDING NEUSE ESTUARY

.0701 This rule sets out a set of definitions to be applied in the Section, i.e. .0700 only. It does not incorporate by reference the definitions in 2B .0202. Those definitions have applied to all of the nutrient strategy rules as they were developed. It would seem useful to adopt by reference the 2B .0202 definitions as a part of this new Section. In addition, the Neuse and Falls Nutrient Strategy rules will remain in Section .0200 and the terms that are defined are used in those rules.

.0701(28) "Existing utility line maintenance corridor." This definition is not a part of the Neuse Estuary Buffer rule. The new rule limits the definition to "the portion of the right of way in which the vegetation has been mowed, cut or otherwise maintained in the last 10 years." This becomes important in new rule .0714 which regulates riparian buffers in the Neuse Estuary. That rule allows replacement and repair of sewer lines so long as no land grubbing or grading occurs within the 10 feet immediately adjacent to the water, with authorization. However, any deviation from that requires mitigation with authorization.

.0701(57) "Pruning" (i) restricts pruning after storm events to hurricanes and ice storms. This should also be allowed whenever an issue of public safety is caused by a natural event, regardless of the storm intensity. Isolated events can be greatly destructive and yet not be part of any significant area wide storm, much less a hurricane or named storm.

.0703 NUTRIENT OFFSET CREDIT TRADING PROGRAM

In a box insert on page 2 and in the accompanying "Discussion Draft," DWR staff acknowledged that other forms for trading already exist under other rules of the EMC, in particular under the Falls rules and the Neuse Estuary rule for the bubble permit association, the Neuse River Compliance Association. Similar provisions appear in other rules regarding nutrient compliance by waste water treatment facilities. Having so acknowledged, the draft rules make no reference to or declare any exception from

its broad, sweeping and all-encompassing opening rule, “(a) PURPOSE. The purpose of this Rule is to establish standards and procedures for approval of nutrient offset credits and associated nutrient reduction projects.” The definition of “Nutrient offset credit” at (b)(4) of the rule further confirms that the rule applies to any credit “that is generated in compliance with this rule.” It applies to any credit used to “satisfy other nutrient load reduction requirements as described in this Section.” The Section will include the nutrient reduction strategies for every nutrient impaired waterbody in the State including the Neuse Estuary and Falls Lake. So the suggestion in the box is a fiction as the rule will apply to both the identified programs since they are in the same Section as 2B .0703. The Neuse Estuary rules are found at .0710-.0715. In rule .0703(j), the Falls rules are incorporated and made subject to this rule for nutrient credits approved under .0703.

The (a) PURPOSE rule should be revised to exclude the credit recognition, management, and implementation procedures authorized by the Falls Lake rules with the present designations of 15A NCAC 2B .0278, .0279, .0280, and .0284. In addition, it should be amended to expressly exclude the bubble permit under the Neuse Estuary rules with the present designation 15A NCAC 2B .0234.

The proposed rules, by way of the definition for “Nutrient offset credit,” seek a major change in the program as it has previously been implemented. It limits the recognition of credits to those which provide “permanent nutrient load reductions.”

That limitation is not supported by the enabling legislation at NC Gen. Stat. §143-214.26. In addition, DWR acknowledges its “Discussion Draft” that there is a need and purpose for a temporary credit program. Thus, the limitation violates NC Gen. Stat. §150B-21.9 as it is not reasonably necessary to implement the enabling legislation.

The requirement for a “permanent” nutrient credit is illusory. Later in the rule at (g)(5), the rule excuses a “permanent” nutrient credit from being restored under certain listed conditions. The rule makes no mention of what will be done with the non-wasting endowment funds if that situation occurs. The rule does not address how the loss of the nutrient credit project impacts the person who relies on the nutrient credit to satisfy their regulatory requirement. For Existing Development and for new or expanding WWTPs, the credits must remain active and functioning to meet the regulatory requirements.

A “permanent” nutrient credit source may also be the subject of condemnation. The conservation easement supporting the credit source can be condemned by state or local government. See NC Gen. Stat. §40A-80, et seq. The rule makes no provision for what action must be taken by the entity responsible for the nutrient credit source when it is taken and destroyed as a result of condemnation. There is likewise no provision for a refund of monies paid for a permanent credit, when it is not required to be replaced, to the person who purchased the nutrient credit.

Subsection (c) NUTRIENT CREDIT APPROVAL STANDARD uses vague and ambiguous language likely to be rejected by the Rules Review Commission. The specific terms are “sustained in perpetuity” and “reasonably certain to generate an estimated nutrient load reduction.”

Subsection (c)(2) establishes the means of calculating delivery factors for the credit reductions. It applies to the Section only, so it has no application to the Falls rules which remain in Section .0200 unless it deemed applicable by way of .0703(j).

Subsection (c)(4) allows the temporary use of reductions implemented for mitigation purposes to satisfy other program requirements until the credit is needed for its design purpose. That temporary use of a credit is inconsistent with the definition of “nutrient offset credit” as it is not permanent. For that reason, the two rule provisions are inconsistent and the rule fails to meet the requirement of NC Gen. Stat. §150B-21.9 that the rule be clear and unambiguous.

Subsection (e) applies to “providers” which is not a defined term. It appears that the term extends to include every provider of a credit, except the Division of Mitigation Services. If so, then the term also applies to local governments which build their own nutrient credit projects to meet regulations applicable to them, e.g. existing development reductions under the Falls rules. Under (1) of the subsection, a provider must establish a nutrient offset bank before a project plan can be approved. Absent approval under this rule, local governments cannot meet their regulatory obligations. In Comment A 27, DWR suggests that local governments are governed by another rule, however no such rule is referenced.

Subsection (e)(2)(E) is confusing in the second sentence. The term “will meet this requirement” appears to mean “will be approved.” In addition, this provision ignores recent legislation requiring that credits be approved for Chesapeake approved credits of the same subject. See Session Law 2016-94§14.13(i).

Subsection (f)(3) forbids the approval of a nutrient offset credit “if the project is financed in whole or in part by state or federal grant funding.” This limitation is in excess of the authority conferred by NC Gen. Stat. §143-214.26. In addition, the limitation violates NC Gen. Stat. §150B-21.9 as it is not reasonably necessary to implement the enabling legislation. The federal government has established substantial funding through various programs to stimulate this type of nutrient reduction. This limitation is contrary to the purpose of that federal legislation and will frustrate it being carried forward.

Subsection (g) uses the undefined term “perpetual steward.” In addition, it fails to provide any means for the responsibilities assumed by the “perpetual steward” to be transferred to another entity. The concept that the entity first identified to perform the functions of stewardship for a nutrient credit project will be permanent is even more difficult to conceive in reality than the idea that the nutrient credit project itself will be “permanent.” A means should be established for transfer as appropriate subject to the approval by DMS/ DWR of the proposed new steward.

Subsection (g)(3) does not identify the minimum width of the easement that is required for access to the nutrient credit feature to the nearest public right-of-way. In addition, it ends with a sentence which seems at odds with other provisions in the rule. “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.” The purpose of subsection (g) is to establish that the “perpetual steward” is responsible for the nutrient credit project. See (4) of (g). This sentence fails to meet the clear and unambiguous standard in light of its clear conflict with the immediately succeeding paragraph (4).

Subsection (g)(4)(A) makes the project steward responsible for providing an alternate project achieving equal nutrient load reductions “if the approved project cannot be sustained in perpetuity.” It is unclear how this obligation will be funded. The nonwasting endowment is limited to the amount of money required to “cover the cost of perpetual monitoring, maintenance, repair and renovation of a nutrient reductions project.” It does not include the money necessary to build a substitute project. This requirement is thus confusing, if not beyond the required financial capacity of the nonwasting endowment.

Subsection (g)(5) creates problems for those relying on credits previously purchased when the projects are allowed to be abandoned and not replaced. These issues were set forth earlier.

Subsection (j) GEOGRAPHIC RESTRICTIONS in (1) and (2) allow the use of nutrient offset credits [a term defined at .0703(4) as permanent credits] to meet “regulatory obligations” for the Falls rules. Does this amend the Falls rules so that the nutrient offset credits must be permanent, come from a mitigation bank, and otherwise conform to rule .0703? If that is the effect, then the rule is inconsistent with Session Law 2016-94 as it amends the Falls rules in an untimely manner.

This seems especially problematic as to whether the Falls Existing Development program can move forward except under existing rules.

.0705(b)(1). The application should require a statement as to who owns the property and have attached an authorization for the application if the owner is not the applicant.

.0705(b)(3). If the Authority determines that the processing period has been suspended for any of the reasons stated in the rule, then written notice of the suspension including the date and the reason should be sent to the applicant.

.0705(b)(4). It seems unlikely that the Rules Review Commission will approve a rule with such broad discretion to impose conditions “that support the purpose, spirit and intent of the riparian buffer protection program.” The term “spirit” is the most problematic.

.0705(c)(2). This does not provide for any automatic action if the Authority fails to act in contrast to (b)(3) above. Is this intentional?

.0705(c)(3). This does not provide for any automatic action if the Division fails to act in contrast to (b)(3) above. Is this intentional?

2B 0710(e). Correct "over a decade" to correct years. Add that earlier improvements in loading reductions are now replaced by more loading.

(f). Expressly state relationship to overlapping Falls rules.

2B 0711(3). Clarify if exemption applies in Falls. Listing of Falls jurisdictions leaves this confusing despite opening reference to Falls rules. This exemption is new and bound to result in demand for application in Falls.

.0710(f). This amendment will effectively block implementation of the riparian buffer rules and related stormwater requirements from the Neuse Estuary rules in Falls Lake. Revise the provision to read:

“(f) GEOGRAPHIC APPICABILITY. The Neuse nutrient strategy shall apply in all areas draining to waters within the Neuse River Basin unless individual strategy rules for the Neuse nutrient strategy describe other boundaries. The riparian buffer rule at 2B .0714 applies in the Falls watershed of the Neuse basin. The wastewater discharge requirements rule at 2B .0713 apply in the Falls watershed only if the Falls wastewater discharge requirements rule at 2B .0279 is less stringent or inapplicable to a discharger included within 2B .0279.”

.0711(2). This list should be amended to include all Falls Lake jurisdictions implementing stormwater requirements. Creedmoor, Stem, Roxboro, Franklin County, Butner, Hillsborough, Granville County and Person County should all be added to this list. Given the provision in .710(f), this rule is confusing as the Falls Lake strategy presumably would remove Durham, Durham County, and Orange County from coverage by the Neuse Estuary strategy.

.0711(3). There is no 5% exemption in the Falls rules so this is in conflict with that strategy. When is the “of record” exemption date to qualify for the exemption?

.0711(4). These local government requirements are not consistent with the Falls rules for jurisdictions in that part of the Neuse Basin. The rule fails to include the Falls model program and only directs compliance with the Neuse 2001 approved program.

.0711(5)(a). The allowed loading factors are lower in the Falls. As was done in (b), add language to state that the loading factors in 2B .0277 superseded the requirements of this Item for jurisdictions for projects subject the Falls Reservoir Nutrient Strategy.”

.0711(5)(b). Cross reference to .0751 is not a rule shown for adoption in the 2B rules. The cross reference should be to the 2B .0277, the existing Falls new development rule.

.0711(6). This should address separately the requirements for local governments in the Falls Basin. Add to (a) of the rule: “The schedule for Falls Basin local governments to implement a stormwater management program is set out in 2B .0277 for new development and in 2B .0278 for existing development. Those schedule supersede any provisions of this Item otherwise applicable to Falls Lake local governments.”

.0712. In the introduction, the Falls Agricultural rule should be declared to supersede this rule in the Falls Basin. These rules are much less strict than 2B .0280.

.0712(3)(b). This new rule provision, in conjunction with the repeal of the individual requirements should a basin fail to meet its goal, essentially strips this rule of any function and authority to require individual compliance when Basin Oversight Committee plan fails. Rather than maintain the individual standards at former (8), the new rule simply tells the Oversight Committee to notify the EMC to develop new enforceable requirements. There is no useful purpose, other than complete disabling of the rules, by this circuitous solution. The present standards are designed to define with certainty the standards

applicable to each individual should there be a failure in the basin. This is a very bad and destructive policy choice in the rule revision. (8) should be restored.

.0713(2). This rule should be revised to expressly declare that the Falls Reservoir rules apply to dischargers in that part of the Neuse Basin.

.0713(3). Several definitions are not moved to .0701, but the terms are still used in the rule. The definitions that are not moved are "Nitrogen wasteload allocation," "Nitrogen estuary allocation," "Nitrogen discharge allocation," and "Nitrogen TMDL."

Nitrogen wasteload allocation and Nitrogen TMDL are both used in (4).

Nitrogen discharge allocation is used in (5).

Estuary allocation is used in (5)(a).

.0713(4). This rule should be expanded to allow individual permit holders to achieve credits from nonpoint source flow reductions achieved by the installation of retrofit BMPs within their individual jurisdiction so long as the permit holder retains responsibility for the maintenance and operation of the BMPs and certifies their performance. Proposed language to achieve that change is provided below:

- (7) This Item specifies nutrient controls for new facilities.
- (a) New facilities proposing to discharge wastewater shall evaluate all practical alternatives to surface water discharge, pursuant to 15A NCAC 02H .0105(c)(2), prior to submitting an application to discharge.
- (b) New facilities submitting an application shall make every reasonable effort to obtain estuary allocation for the proposed wastewater discharge from existing dischargers. If estuary allocation cannot be obtained from the existing facilities, new facilities may purchase a portion of the nonpoint source load allocation for a ~~period of 30 years at a rate of 200 percent of~~ the cost as set in 15A NCAC 02B .0240 to implement practices designed to offset the loading created by the new facility. If the purchased allocation is not for a permanent allocation, then payment ~~Payment~~ for each 30-year at least a 10-year portion of the nonpoint source load allocation shall be made prior to the ensuing permit issuance. In addition, local governments have the option of using credits created from the retrofit of existing development with stormwater controls to meet their reduction needs from NPDES dischargers. At the time of application, the local government must provide, as a part of the application, a copy of contract(s) for the construction of the stormwater controls and the credits from the stormwater controls must be approved before the authorization to construct can be issued. The authorization to construct will be limited to the nitrogen loading capacity available from all sources including the stormwater controls. The local governments must show annually the value of the reductions from the stormwater controls to meet the nutrient controls applicable to the new facilities.
- (c) No application for a new discharge shall be made or accepted without written documentation demonstrating that the requirements of Sub-Items (a) and (b) of this Item have been met.

- (d) The nitrogen discharge allocation for a new facility treating municipal or domestic wastewaters shall not exceed the mass equivalent to a concentration of 3.5 mg/L at the maximum monthly average flow limit in the facility's NPDES permit.
 - (e) The nitrogen discharge allocation for a new facility treating industrial wastewaters shall not exceed the mass equivalent of either the best available technology economically achievable or a discharge concentration of 3.2 mg/L at the maximum monthly average flow limit in the facility's NPDES permit, whichever is less.
 - (f) New dischargers must meet a monthly average total phosphorous limit of 1 mg/L.
 - (g) The director shall establish more stringent limits for nitrogen or phosphorus upon finding that such limits are necessary to protect water quality standards in localized areas.
- (8) This Item specifies nutrient controls for expanding facilities.
- (a) Expanding facilities shall evaluate all practical alternatives to surface water discharge, pursuant to 15A NCAC 02H .0105(c)(2), prior to submitting an application to discharge.
 - (b) Facilities submitting an application for increased discharge shall make every reasonable effort to minimize increases in their nitrogen discharges, such as reducing sources of nitrogen to the facility or increasing the nitrogen treatment capacity of the facility; or to obtain estuary allocation from existing dischargers. Facilities which have been allowed to increase discharge since the permitted flow was established for the facility may make application for an increased nitrogen discharge limit when the need for an additional discharge limit arises.
 - (c) No application for an expanding facility shall be made or accepted without written documentation demonstrating that the requirements of Sub-Items (a) and (b) of this Item have been met.
 - (d) If these measures do not produce adequate estuary allocation for the expanded flows, facilities may purchase a portion of the nonpoint source load allocation for ~~a period of 30 years at a rate of 200 percent of~~ the cost as set in 15A NCAC 02B .0240 to implement practices designed to offset the loading created by the new facility. If the purchased allocation is not for a permanent allocation, then payment ~~Payment~~ for each 30-year at least a 10-year of the nonpoint source load allocation shall be made prior to the ensuing permit issuance. In addition, local governments have the option of using credits created from the retrofit of existing development with stormwater controls to meet their reduction needs from NPDES dischargers. At the time of application, the local government must provide, as a part of the application, a copy of contract(s) for the construction of the stormwater controls and the credits from the stormwater controls must be approved before the authorization to construct can be issued. The authorization to construct will be limited to the nitrogen loading capacity available from all sources including the stormwater controls. The local governments must show annually the value of the reductions from the stormwater controls to meet the nutrient controls applicable to the new facilities.
 - (e) The nitrogen discharge allocation for an expanded facility treating municipal or domestic wastewaters shall not exceed the mass equivalent to

a concentration of 3.5 mg/L at the maximum monthly average flow limit in the NPDES permit, or its existing allocation, whichever is greater.

- (f) The nitrogen discharge allocation for expanding facilities of an industrial nature shall not exceed the mass equivalent to the best available technology economically achievable or a concentration of 3.2 mg/L at the maximum monthly average flow limit in the facility's modified NPDES permit, whichever is less. If the resulting mass is less than the facility's existing discharge allocation, the existing discharge allocation shall not be reduced.
- (g) Expanding facilities must meet a monthly average total phosphorous limit of 1 mg/L unless they are a member in good standing of a group compliance association described in Item (9) of this Rule, in which case they must meet a quarterly average total phosphorus limit of 2 mg/L.

.0713(5)(a)(ii). Should the allocation to the Falls Lake less than .05 MGD dischargers be reduced in light of the Fall Lake budget? Will this trigger a need for the Commission to revise the load and make allocations among existing dischargers per (b) of this rule?

.0713(6)(d). Should the TP limit be changed to be consistent with the Falls rules? "All existing facilities above Falls Lake Dam with permitted flows greater than or equal to ~~0.05~~ 0.01 MGD shall meet a quarterly average total phosphorous limit ~~of 2 mg/L~~ as set by 2B .0279."

Comment on Note following .0713(6)(d). The NRCA strongly supports this proposal. In addition, the NRCA observes that under the existing rule, those same dischargers had individual discharge allocations assigned under (5)(a)(v) of the rule for the past twenty years. With those known discharge limits and no bubble permit for those smaller WWTPs, why isn't enforcement already occurring based on the individual limits?

.0713(7). Revise to read: "This Item specifies nutrient controls for new facilities with discharges below the Falls Lake Dam. Nutrient controls for new facilities above the Falls Lake Dam shall comply with the requirements of the Falls Reservoir Nutrient Strategy rules."

.0713(8). Revise to read: "This item specifies nutrient controls for expanding facilities facilities with discharges below the Falls Lake Dam. Nutrient controls for new facilities above the Falls Lake Dam shall comply with the requirements of the Falls Reservoir Nutrient Strategy rules."

.0713(8). Revise (d) to read: "If these measures do no produce adequate estuary allocation for the expanded flows, facilities may use either of the following alternatives or a combination of the alternatives:

"(1) Purchase a portion of the nonpoint source load allocation for a period of 30 years at a rate of 200 percent of the cost as set in 15A NCAC 2B .0240 to implement practices designed to offset the loading created by the new facility. Payment for each 30 year portion of the nonpoint source load allocation shall be made prior to the ensuring permit issuance.

“(2) Establish nonpoint source best management practices for existing development within the individual permit holder’s service territory which result in nutrient reduction credits to be used as a part of the permit compliance by the facility. The permit holder shall annually establish and verify the value of the nutrient credits from such best management practices and demonstrate that the best management practices remain under the operational control and maintenance responsibility of the facility.”

.0713(9). Revise to read: ~~Beginning in calendar year 2003, if~~ If an association does not meet its estuary allocation limit from the total pounds of nitrogen released from its member facilities after application of any offsets created pursuant to 8(d)(2), it shall make offset payments for nonpoint source controls no later than May 1 of the following year at the rate set in 15A NCAC 2B .0240.”

.0714(2). Revise to read: “APPLICABILITY. This rule applies to all landowners and other persons including local governments, state and federal entities conducting activities within the riparian buffers as described in Item (3) of this Rule in the Neuse River Basin, including the Falls Reservoir Basin.”

The Neuse Estuary rules have some other provisions that apply in the Falls Lake basin and it is useful to the public to have express identification of which rules apply in these overlapping nutrient strategy basins.

.0714(b). The proposed rule adds as a key term “activities.” That term is not defined. The term “development” is defined, but limited to the GS 214.7 definition for purposes of the stormwater program implemented by DEQ. Does this term include more than “development”? The rule, as written, does not reflect the implementation by DWR. It only applies the riparian buffer protections to blue line streams and not to other surface waters, in particular intermittent streams.

.0714(3)(g). The term “clearing” is not defined. It apparently means something other than “grading.”

.0714(5). The onsite determination makes no reference to a blue line stream, yet that is the key means of implementation by DWR.

.0714(6). The new last sentence of the introductory paragraph is confusing. It reads as if each of the criteria listed in the rule must be met for the situation to be an exemption. Some of the criteria are contradictory. This is particularly true for sewer lines in Zone 1 that were installed prior to July 22, 1997 and require maintenance or replacement. (b) reads as if it should be a part of (a). No sewer line in Zone 1 is “a deemed allowable activity as listed in Item (10) of this Rule.” That criterion should not be universally applied. Is (c) a new requirement? Has there historically been an Authorization Certificate or Exception issued by the Authority for exemptions including sewer lines in Zone 1? If not, this new criteria should only be applied to those sites for which such a certificate was issued. (d) is unclear in its last clause. What is “displacement of vegetation by structures or regular activity”? Does it include the replacement of a sewer line in Zone 1? (e) is too limited in its scope and has been a persistent item for which municipalities have sought more clarity. The footprint of a sewer line is not wide enough to allow for its replacement or repair. The footprint of the easement might be adequate, and that concept is used in Item 10 for vegetation maintenance, but it is Allowable Upon Authorization and not Deemed

Allowable. (g) provides for maintenance, but it forbids no built upon area being added within the riparian buffer. It is impossible to maintain a sewer by use of excavation equipment without more built upon area, even though it is temporary and will be restored as vegetated area. In Item 10, replacement of a sewer line that pre-existed in Zone 1 apparently will require mitigation if more than 2500 square feet are disturbed. This is objectionable and inconsistent with the permits for maintenance of sewer lines. It is impossible to move them from the pre-existing Zone 1 locations.

.0714(9)(a)(2). This standard is ambiguous. In what context does it refer to “new flow [that] does not result in the need to alter the conveyance,” especially as it relates to flooding events?

.0714(9)(b)(ii). The 3.6 pounds of nutrient loading reflects the Neuse Estuary standard, but not the Falls Lake standard. The rule should be revised to include both standards.

.0714(9)(b)(iii)-(viii). These are all indicated to be new uses allowable upon authorization. Is that correct for each new use per the Falls Lake rules as well as the Neuse Estuary rules?

.0714(10)(b). The rule uses the term “potential new uses.” How does that apply to replacement sewer lines or major maintenance of existing sewer lines within the riparian buffer?

.0714(10)(b) Greenways, trails, sidewalks or linear pedestrian/bicycle transportation system. The deemed allowable use does not include construction of such facilities which comply with the American Disabilities Act. Paved trails within Zone 2 should be added to deemed allowable category with appropriate stormwater runoff protection.

.0714(10)(b) Pedestrian access trail and associated steps leading to a surface water, dock, canoe or kayak access, fishing pier, boat ramp or other water dependent structure. Such access features should be made deemed allowable when the built upon area is added to comply with the American Disabilities Act.

.0714(10)(b) Protection of existing structure and facilities when this requires additional disturbance of the riparian buffer. The term “facilities” is not defined. It should be defined to include protection of existing sewer lines and left as deemed allowable.

.0714(10)(b) Stormwater Control Measure. Not a defined term in .0702.

.0714(10)(b) Temporary roads. Does this include roads used for the pathway to replace or maintain a sewer line in Zone 1? If so, then the requirement for restoration of a wooded buffer should exclude the maintenance easement area for the sewer line so the permit holder can comply with collection system permit requirements.

.0714(10)(b) Temporary sediment and erosion control devices. Does this include such devices deployed to control erosion and sedimentation in the replacement or substantial maintenance of existing sewer lines in Zone 1? If so, the restoration of a wooded buffer should exclude the maintenance easement area for the sewer line so the permit holder can comply with collection system permit requirements.

Does this requirement apply if the devices are deployed in conjunction with an exemption involving maintenance or repair?

.0714(10)(b) Utility Sewer Lines. Construction activities is not a defined term in .0702. It appears that it includes the replacement or repair of sewer lines which disturb more than 150 linear feet. In addition, the part labeled "Impacts other than perpendicular crossings" forbid the disturbance of the area within 10 feet of the adjacent water. The utility installed many of these lines before any buffer requirement existed. In addition, it is impossible to know where the stream will meander in the long time between installation and the need to replace or upgrade a sewer line. These same lines are subject to needs for emergency repairs, yet any disturbance in the 20 foot zone (10 feet per side) of the stream and the stream bed results in the application of "Allowable with Mitigation upon Authorization." It is mandatory that such lines be both immediately repaired when they fail and that they be kept in good repair under the NPDES permit for the treatment facility and under the collection system permit issued by the State. Complying with those legal requirements for pre-existing sewer lines in the riparian buffer should not include a requirement for mitigation, in particular as an obstacle to emergency repair needs. This is covered by the catch all "Impacts to Zone 1 other than noted above." Per the comment, mitigation will be required if the impact in Zone 1 is above 2500 sq ft. Since the easement for the utility line is 20 feet wide at minimum, especially during construction, this results in a requirement for mitigation to repair or replace a pre-existing line that is longer than 125 feet. That is an unreasonable burden when the utility is confronted with the high cost of replacement and repair of such lines. The damage can be restored and restoration should be the only requirement, not mitigation. Why are sewer lines limited to a vegetation maintenance area 20 feet wide when other non-sewer utility lines can maintain a vegetation maintenance area of 30 feet? Sewer lines should also be allowed up to 30 feet.

.0714(10)(b) Vegetation Maintenance. In the removal of individual trees provision, the term structures is used, but not defined at .0703. It should include sewer lines when an individual tree is at risk of causing the sewer line to be damaged.

.0714. Prior (8) Determination of No Practical Alternatives shows a comment saying it was moved into (10) above. Where is it in (10)? Was it moved to .0705 per (11)(a)?