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DATE: June 26, 2018

RE: 15A NCAC 2B, Rules .0610 and .0714 and supporting Regulatory Impact Analyses

## I. OBJECTION TO REGULATORY IMPACT ANALYSES

In the Regulatory Impact Analyses [hereinafter "RIA"], DEMLR wrongly asserts that the amendments noticed for comments will result in a rule readoption that "will impose a less stringent burden on regulated persons." The agency does not address whether the amendments are "without substantive change." Later in the RIA for 2B .0714, DEMLR acknowledged that the rule changes include "codifying policy." No such acknowledgement was made in the RIA for 2B .0610 despite the addition of numerous new definitions. Pursuant to N.C. Gen. Stat. §150B-18, DEMLR is barred from implementing or enforcing "against any person a policy, guideline, or other interpretative statement that meets the definition of a rule contained in G.S. 150B-2(8a) if the policy, guideline, or other interpretative statement has not been adopted as a rule in accordance with this Article." That express limitation on agency authority was first enacted in 2011. It was a clarification of a prohibition also reflected in the definition of a rule under the Administrative Procedure Act. See *Okale v N.C. HHS*, 153 N.C. App. 475, 478-479 (2002).

The addition of policies being enforced by the agency, without the benefit of a supporting rule or statute, to this rule constitutes a substantive change within the meaning of N.C. Gen. Stat. §150B-21.2A. Consequently, the Regulatory Impact Analyses show that the Environmental Management Commission did not comply with the statutes applicable to the readoption of rules and that this process should be returned to the Commission for appropriate and complete Regulatory Impact Analyses.

In particular, the proposed rules for readoption add at 15A NCAC 2B .0610(16) and 15A NCAC 2B .0714(6) numerous changes to the circumstances that are exempted from the rule's coverage. These circumstances impose substantial and new fiscal burdens on local governments. As the underlined additions to (6)(a) show, the former rule only required that the use have been existing and present in the buffer as of July 22, 1997. The current rule expressly includes utility lines. The proposed rule for readoption adds two requirements; (A) if is now deemed an allowable activity by the revised table of uses in Item (10) of the rule and (B) it was conducted and maintained by pursuant to an Authorization Certificate or Variance issued by the Authority. Raleigh Public Utilities staff documented 84 sewer maintenance projects in the past 36 months, with the need to undertake such work rising. Staff estimates that it will cost between \$1,000 and \$3,000 for each authorization it must obtain.

The impact of these changes is found in two additional changes to the rules. The first set of changes arises from the definitions. The prior definitions did not include the term “(16) Existing utility line maintenance corridor” which now appears in proposed rule 15A NCAC 2B .0610. It adds the important term of limitation that to meet the definition “the vegetation has been mowed, cut or otherwise maintained within the last 10 years.” This limitation on the scope of the exemption was a creature of DEMLR policy, not a prior rule. Sewer lines operate to the extent practicable by gravity. Accordingly, they are located typically in the riparian buffer of streams and other regulated areas under this rule. When a local government utility, including the members of the Neuse River Compliance Association repair or replace a sewer line, the repairs will necessarily occur in the utility easement. Under the Sewer Collection Permit issued by DEQ, sewer utilities are required to immediately repair any breach in a sewer line resulting in a discharge of sewage. The same permit also requires sewer utilities to maintain and repair the lines to avoid failures resulting in overflows of untreated sewage. This proposed rule interferes with and requires, in some instances, mitigation for compliance with the Sewer Collection Permit.

The revised rule makes other substantive changes in Item (10) under the category “Utility – sewer lines.” By those changes, a replacement or rehabilitation of an existing sewer line is for the first time defined to be within the term “New Sewer Line Construction Activities.” The impact of these changes is significant and will have substantial economic impacts on local governments in the Neuse basin. For example, a local government is required to replant the area where an emergency repair occurs within two months with “comparable vegetation.” That does not take into consideration the type or size of the vegetation so it includes fully mature trees, which if even possible will come at staggering costs. Moreover, the local government is required to make application for an Authorization Certificate. This requirement does not arise from the existing rule, instead it was created by DEQ policy in the intervening years since the rule was first adopted in 1999.

The replacement and any necessary upsizing of sewer lines is likewise required by the Sewer Collection Permit issued by DEQ. To meet the proposed requirements for those projects, sewer utilities are required to leave vegetative root systems and stumps in place. If the disturbed area is more than 150 linear feet, mitigation is required to be provided by the local sewer utility. If the disturbed area is wider than 20 linear feet, mitigation is required as well. Larger trunk lines require a minimum trench width of 30 feet. Any impact not within the deemed allowable criteria in the revised rule also requires mitigation.

The Regulatory Impact Analyses are fatally flawed. The process set forth in N.C. Gen. Stat. §150B-21.4(b) was ignored. The objections set forth above were regularly raised in prior comment periods during the stakeholder process and before the rules were approved for notice and comment by the Environmental Management Commission. The rule will clearly “affect the expenditures or revenues of a unit of local government,” yet no fiscal note was provided to the North Carolina League of Municipalities. Consequently, the proposed rules were not eligible for notice and publication in the North Carolina Register.

In the Regulatory Impact Analyses, the Impact Summary shows no impact on local government. In the summary, it is asserted that the proposed rule “will impose a less stringent burden on regulated persons.” This summary ignores the impacts on local governments and the duty to comply with N.C. Gen. Stat. §150B-21.4(b). The agency has failed to meet the requirement set forth in N.C. Gen. Stat. §150B-21.3A(d)(2): “If a rule is readopted without substantial change or if the rule is amended to impose

a less stringent burden on regulated persons, the agency is not required to prepare a fiscal note as provided in G.S. 150B-21.4.” The proposed rules contain substantive change and they will impact the use of local funds.

Should the Environmental Management Commission restore the rules to a no impact status consistent with exemption language in the current rule, then this objection will be met and the rule readoption will be consistent with the statute.

## II. 15A NCAC 2B .0610 MANAGING ACTIVITIES WITHIN RIPARIAN BUFFERS: DEFINITIONS

The NRCA objects to (16) “Existing utility line maintenance corridor.” The definition makes a significant change to the existing rule which is proposed to replace, i.e. 15A NCAC 2B .0233 NEUSE RIVER BUFFER: NUTRIENT MANAGEMENT STRATEGY: PROTECTION AND MAINTENCE OF EXSITING RIPARIAN BUFFERS. The current rule, being readopted, does not contain the definition nor the substance of the new requirement that requires the buffer to have been “mowed, cut or otherwise maintained within the last 10 years.” Rather the current rule merely requires that the use have been in place by July 22, 1997 and that lawns be “maintained.” In contrast, there is no requirement that a utility line be “maintained.” See 15A NCAC 2B .0233(3)(b)(i) which reads in pertinent part: “A use shall be considered existing if it was present within the riparian buffer as of July 22, 1997. Existing uses shall include, but not be limited to, agriculture, buildings, industrial facilities, commercial areas, transportation facilities, maintained lawns, utility lines and on-site sanitary sewage systems.” [Emphasis supplied]

Because this will constitute a significant change and impact local governments by additional costs, the Commission is without authority to adopt the proposed rule change unless and until it submits a fiscal note, with appropriate notifications, and publishes the proposed rule thereafter in the Register. Local governments in the Neuse basin have thousands of miles of utility lines in the riparian buffers. Raleigh alone has over 2600 miles of sewer lines with most located in a riparian buffer. The combined total of sewer lines maintained by NRCA members is in excess of 5,000 miles. The requirement to actively maintain those lines by vegetation maintenance necessarily imposes a negative fiscal impact on the members of the NRCA. The RIA for rule .0610(6) wrongly states this duty, first codified in the proposed rule amendments, has no economic impact.

The NRCA proposes that the rule be revised to say: “(16) ‘Existing utility maintenance corridor’ means the portion of a utility right of way in which vegetation has been mowed, cut or otherwise maintained within 10 years of the effective date of this rule.” In the RIA, the agency wrongly asserted the changes merely moved existing definitions from existing rules and made clarifying and simplifying language.

The definitions rule does not include a definition for the term “utility line corridors” which is substituted for the former line “utility lines.” See 15A NCAC 2B .0714(6)(b). In (6)(c) of the same rule, the exemption continues to be limited to the “footprint of the existing use.” For utility lines, it is unclear if the term refers to the width of the inground pipe or the width of the easement which contains the utility line. The ambiguity is further complicated by the limitation in the Table of Uses in 15A NCAC 2B .0714(10) for “Utility – sewer lines.” That limits the area that can be disturbed to 20 feet in width. Larger capacity sewer lines require a trench of 30 feet and are placed within sewer easements of a 30 foot width. The failure to address this term by definition creates both an ambiguous rule and a new and

significant impact by limiting the disturbed area for line replacement and repair to a 20 foot width. For both reasons, this rule should not move forward as noticed.

III. 15A NCAC 2B .0714 NEUSE RIVER BASIN: NUTRIENT SENSITIVE WATERS MANAGEMENT STRATEGY: PROTECTION AND MAINTENACE OF EXISTING RIPARIAN BUFFERS

The NRCA objects to this rule as it was amended and expanded to include policies of DEQ which have never been adopted as rules and which cause the prior rule to have significant change. In particular, the NRCA objects to changes made in (6) of the rule, a subsection titled "EXEMPTION WHEN EXISTING USES ARE PRESENT AND ONGOING."

The current rule, 15A NCAC 2B .0233(3)(b) provides:

- (b) EXEMPTION WHEN EXISTING USES ARE PRESENT AND ONGOING. This Rule shall not apply to portions of the riparian buffer where a use is existing and on going according to the following:
- (i) A use shall be considered existing if it was present within the riparian buffer as of July 22, 1997. Existing uses shall include, but not be limited to, agriculture, buildings, industrial facilities, commercial areas, transportation facilities, maintained lawns, utility lines and on-site sanitary sewage systems. Only the portion of the riparian buffer that contains the footprint of the existing use is exempt from this Rule. Activities necessary to maintain uses are allowed provided that no additional vegetation is removed from Zone 1 except that grazed or trampled by livestock and existing diffuse flow is maintained. Grading and revegetating Zone 2 is allowed provided that the health of the vegetation in Zone 1 is not compromised, the ground is stabilized and existing diffuse flow is maintained.
  - (ii) At the time an existing use is proposed to be converted to another use, this Rule shall apply. An existing use shall be considered to be converted to another use if any of the following applies:
    - (A) Impervious surface is added to the riparian buffer in locations where it did not exist previously.
    - (B) An agricultural operation within the riparian buffer is converted to a non-agricultural use.
    - (C) A lawn within the riparian buffer ceases to be maintained.

The proposed rule, 15A NCAC 2B .0714(6) reads:

~~(b)(6)~~ EXEMPTION WHEN EXISTING USES ARE PRESENT AND ONGOING. This Rule shall not apply to portions of the riparian buffer where a use is existing and ~~ongoing according to the following:~~ ongoing.

- ~~(b)(a)~~ A use shall be considered existing ~~if if:~~
- (i) ~~it~~ It was present within the riparian buffer as of July 22, ~~1997.~~ 1997 and has continued to exist since that time;
  - (ii) It was a deemed allowable activity as listed in Item (10) of this Rule; or
  - (iii) It was conducted and maintained pursuant to an Authorization Certificate or Variance issued by the Authority.
- (b) Existing and ongoing uses shall include, but not be limited to, agriculture, buildings, industrial facilities, commercial areas, transportation facilities, maintained ~~lawns,~~ lawns (i.e. can be mowed without a chainsaw or bush-hog), maintained (i.e. vegetation management has

- occurred within the last ten years) utility lines—line corridors and on-site sanitary sewage systems—systems, any of which involve either specific periodic management of vegetation or displacement of vegetation by structures or regular activity.
- (c) Only the portion of the riparian buffer that contains the footprint of the existing and ongoing use is exempt from this Rule.
- (d) Change of ownership through purchase or inheritance is not a change of use.
- (e) Activities necessary to maintain existing and ongoing uses are allowed provided that no additional vegetation is removed from Zone 1 except that grazed or trampled by livestock the site remains similarly vegetated, no built upon area is added within the riparian buffer where it did not exist prior to July 22, 1997, and the site is in compliance with Item (9) of this Rule. existing diffuse flow is maintained. Grading and revegetating Zone 2 is allowed provided that the health of the vegetation in Zone 1 is not compromised, the ground is stabilized and existing diffuse flow is maintained.
- (f) This Rule shall apply at the time an existing and ongoing use is changed to another use. Change of use shall involve the initiation of any activity not defined as existing and ongoing in Sub-Items (6)(a) through (6)(e) of this Rule.
- (ii) ~~At the time an existing use is proposed to be converted to another use, this Rule shall apply. An existing use shall be considered to be converted to another use if any of the following applies:~~
- (A) ~~Impervious surface is added to the riparian buffer in locations where it did not exist previously.~~
  - (B) ~~An agricultural operation within the riparian buffer is converted to a non-agricultural use.~~
  - (C) ~~A lawn within the riparian buffer ceases to be maintained.~~

The highlighted portion of the proposed rule shows the substantive changes made which reduce the scope of the exemption as it applied to sewer lines in existences as of July 22, 1997. These changes are significant and therefore required notice to the appropriate representatives of local governments, as set out in N.C. Gen. Stat. §150B-21.4, and the preparation of a Regulatory Impact Analysis.

The NRCA proposes that the rule be revised to read:

(6) EXEMPTION WHEN EXISTING USES ARE PRESENT AND ONGOING. This Rule shall not apply to portions of the riparian buffer where a use was present an ongoing on July 22, 1997 and the use has continued to exist since that time. Existing uses ongoing on July 22, 1997 shall include, but not be limited, agriculture, buildings, industrial facilities, commercial areas, transportation facilities, maintained lawns, utility lines within the easement including replacement and rehabilitation and on-site sanitary sewage systems. Only the portion of the riparian buffer that contains the footprint of the existing use is exempt from this Rule. Activities necessary to maintain uses are allowed provided that no additional vegetation is removed from Zone 1 except that grazed or trampled by livestock or that removed to allow for the replacement or rehabilitation of utility lines and existing diffuse flow is maintained. Grading and revegetating Zone 2 is allowed provided that the health of the vegetation in Zone 1 is not compromised, the ground is stabilized and existing diffuse flow is maintained. This Rule shall apply at the time an existing and ongoing use is changed to another use.

The NRCA objects to (10) Table of Uses as it is proposed to apply to the maintenance of existing and ongoing utility lines in the riparian buffer. The present rule does not contain the following:  
“(including replacement/rehabilitation that does not meet the criteria of existing use in Item (6) of this

Rule).” See New Sewer Line Construction Activities in proposed rule 2B .0714(10). The additional restriction is in conflict with the Exemption provision in (6) of the rule, as it does not exclude from the exemption the replacement or rehabilitation of the existing sewer line. Instead, it merely bars the addition of new impervious surface in the utility line corridor: “no built upon area is added within the riparian buffer where it did not exist prior to July 22, 1997.” At 2B .0610(5), “built upon area” is defined to by the statute at N.C. Gen. Stat.§143-214.7(b2). The term built upon area is restricted to new impervious surface of certain specific qualities. A replacement or rehabilitation sewer line does not include any new impervious surface, so accordingly it is exempted by (6)(e) of the rule, and then added to the rule by (10) Table of Uses, New Sewer Line Construction Activities. These two provisions in the same rule are at best ambiguous and unclear, if not directly in conflict. This conflict in the rule provisions should be removed by deleting the phrase “(including replacement/rehabilitation that does not meet the criteria of existing use in Item (6) of this Rule)”. Nowhere in Item (6) is replacement/rehabilitation of a sewer line recognized as an exemption.

Moreover, the effect of this significant change in the rule is to subject the ongoing and existing use of sewer lines which require rehabilitation or replacement in the riparian buffer to the mitigation requirements of the riparian buffer rule. Raleigh’s sewer system is constantly undergoing rehabilitation and replacement lines to accommodate growth and redevelopment of areas previously provided sewer service. It is physically impossible to move these lines outside of Zone 1 of the riparian buffer and thus mitigation will likely be required. This is an important new fiscal impact that will first appear in the rules by this proposed change. Accordingly, the RIA wrongly asserts no economic impact from this rule change.

The NRCA also objects to provisions in (10) Table of Uses for Utility -sewer lines which will frustrate or give rise to mitigation for addressing sewer overflows that are caused by roots. Raleigh had 20 overflows caused by root intrusion in the past 7 years. Two provisions create problems; the requirement for a disturbed area to be “replanted with comparable vegetation” and the requirement to “leave vegetative root systems and stumps are left intact to maintain the soil integrity except in the trench when trees are cut.” “Comparable vegetation” is not a defined term in 2B .0610.

The removed vegetation may be inappropriate to restore in particular if it caused or contributed to a sewer line rupture or it is simply too burdensome. For example, bamboo and willow both infiltrate the sewer lines with roots. A repeated line break from roots is subject to civil penalty or other enforcement action under the Sewer Collection System permit. It would be inconsistent with that DEQ program to replant with a plant which is known to contribute to spills. A preferable term would be “appropriate vegetation for control of stormwater runoff.” That term will achieve the underlying purpose of the rule while avoiding mitigation demands for actions necessary to comply with the Collection System permit.

Likewise, the requirement to leave in place root systems and stumps for species which will regenerate and again penetrate and open the sewer lines to spills is inconsistent with the preventive measures required by the Collection System permit. Those provisions should be removed.

The Table of Uses in the present rule for sewer lines, and other non-electric utility lines, is one line long: “Non-electric utility lines.” In the proposed rule, the text is one page long and makes numerous additions to the rule. It requires mitigation if the Zone 1 impact are 2,500 square feet or greater and any grubbing or grading to replace an existing and ongoing use utility line comes within 10

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feet of the adjacent surface water. While these provisions may result for the codification of existing policies, the provisions are new to the rules and thus constitute a significant change within the meaning of N.C. Gen. Stat. §150B-21.3A.

Clearly, these are significant changes and thus the proposed rule was wrongly sent to notice in the Register. The agency has failed to comply with the procedures set forth in the Administrative Procedure Act. The attempt to add the exception to the Exemption in the body of the Table of Uses must be removed if this rule is to move forward in compliance with the Administrative Procedure Act.

## Neuse River Compliance Association Membership

Town of Apex, N.C.

Town of Benson, N.C.

Town of Cary, N.C.

Town of Clayton, N.C.

Contentnea Metropolitan Sewer District, Grifton, N.C.

Town of Farmville, N.C.

Dupont-Kinston, Kinston, N.C.

City of Goldsboro, N.C.

Town of Havelock, N.C.

Johnston County, N.C.

Craven County, N.C.

Town of LaGrange, N.C.

City of New Bern, N.C.

Duke Energy - Progress

City of Raleigh, N.C.

City of Wilson, N.C.

City of Kinston, N.C.

Aqua, North Carolina

South Granville Water and Sewer Authority, Butner, N.C.

Utilities, Inc., Charlotte, N.C.

CWS Systems, Charlotte, N.C.