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TO: John Huisman, Nonpoint Source Planning Branch, NC Department of Environment and Natural Resources, Division of Water Resources
FROM: Randall K Cahoon, AICP CZO, Stormwater Administrator
DATE: May 12, 2015
RE: HB74 Nutrient Rules rewrite

Creedmoor (population 4,326) is among several Upper Falls watershed regulated municipalities significantly impacted by the State's adoption and implementation of the Falls Rules affecting the watershed of the Falls Reservoir of the Neuse River.

There are concerns regarding the proposed changes, authored by NCDENR-DWR staff, that the City of Creedmoor feel need to be addressed:

1. The original adopted Falls Water Supply Nutrient Management Strategy (aka "the Falls Rules") failed to explicitly acknowledge the limited data upon which they were based (atmospheric deposition, sediment contribution, limited sampling during unusual weather conditions, etc.). The proposed rewrite fails to acknowledge this shortcoming as well.

2. The definition section (15A NCAC 02B .0276) should be restored. Definitions of terms used relating to the Falls Rules should not be scattered throughout the various rules. The most glaring example of the consequences of incorporating the definitions into individual rules occurs in the New Development Rules (15A NCAC 02B .0277). No definitions appear in this particular section. However, in the Existing Development Rules (15A NCAC 02B .0278), there are specific definitions identified as applying *"for the purposes of this rule."* It is not logical to assume persons interested in definitions found in the Falls Rules will automatically turn to the Existing Development Rules section.

3. At least one term, *"development product"* is not defined anywhere in the Falls Rules rewrite and is not a term previously used in the Nutrient Management Strategy. Leaving terms open to interpretation creates uneven enforcement and calls the legitimacy of the rules into question on a regular basis when discussing any interpretation of the Rules.

4. The rewrite and the current version of the Falls Rules set a land disturbance threshold far below the typical "one acre of disturbance" found in most of the State's environmental regulations. Even after several years of applicability, City staff constantly has to remind developers of the lower land disturbance threshold. The lack of a required Soil Erosion and Sedimentation Control plan for land disturbing activities below the one acre of

Commissioners
Thomas Jackson, Del Mims, Jimmy Minor, Larry Robinson, Herman B. Wilkerson
Mayor Darryl D. Moss | City Manager Thomas H. Mercer | Assistant Manager Korena L. Weichel

disturbance threshold creates confusion and requires stormwater personnel to enforce land disturbing activity requirements without the benefit of the State's backing where violations occur. Either the threshold for land disturbance needs to be increased to match the uniform one-acre standard, or other State environmental standards need to be lowered to match the Falls and Jordan Rules.

5. Under the Falls Rules, new development or redevelopment of each parcel of land, whether under common ownership with neighboring properties or held in separate ownership, requires at least 30 percent of stormwater runoff nutrients to be treated onsite [15A NCAC 02B .0277 (4)(a)] prior to purchasing credits from a compensatory mitigation bank (privately owned) [15A NCAC 02B .0240 (b)]. Owning neighboring parcels with existing BMPs doesn't negate the requirement to install onsite nutrient treatment unless the proposed development is part of a Larger Common Plan of Development. There is no provision that allows regional treatment as an alternative to onsite treatment prior to compensatory credit buy downs for offsite treatment in either case or in lieu of offsite nutrient management.

6. NCGS **§** 143-214.11 (4b) states, *"no site owned by a government entity or unit of local government shall be considered a "private compensatory mitigation bank."* This effectively prevents local governments from engaging in nutrient credit banking or establishing regional stormwater BMP management systems. Since the ultimate financial responsibility for failed BMPs falls to municipalities or counties where the devices are installed, it seems reasonable to allow regional treatment in municipally or county owned devices as a developer option when embarking on new development projects.

7. In municipalities combating historic "sprawl" patterns, infill is encouraged over greenfield development. Opportunities to develop smaller vacant infill parcels are often impractical when there isn't sufficient land available onsite for required nutrient management in addition to the proposed development project.

8. Under both the existing and the rewritten Falls Rules, any <u>City-owned</u> stormwater control device (BMP), installed as a Stage I or Stage II retrofit to address "existing development" that not only achieves its design goals but is designed to exceed presumed nutrient and peak flow capacity (as described in the NCDENR BMP Manual) cannot utilize built-in surplus capacity (i.e. sell the capacity to developers as offsite nutrient credits) as an incentive for attracting infill construction or site redevelopment under the Falls Rules.

9. In a similar fashion, an existing <u>privately-owned</u> BMP couldn't be expanded to take on newly created runoff from new development or redevelopment of adjacent or neighboring parcels unless included in a Larger Common Plan of Development. Existing BMP's can potentially be upgraded or converted to higher efficiencies if existing development on a single parcel is expanded (thereby becoming new development) by ½ acre for residential or 12,000 square feet for commercial, institutional, industrial or multifamily structures; but, improved efficiencies cannot be shared with neighboring parcels of land undergoing new development. This is a disincentive to upgrading existing inefficient devices and improving their capacity.

10. There is no provision in the Falls Rules for peak flow increases to be addressed via buy-down of offsite capacity [15A NCAC 02B .0277 (4)(f)]. Even in the absence of the need to treat stormwater runoff for nutrients, any increase in peak flow exceeding 10% during the 1 year/24 hour storm calculations requires onsite engineered controls to be installed. Creedmoor has numerous examples of new development on a small scale where nutrient runoff is negligible or easily dealt with utilizing LID methods, but excessive peak flow relating to impervious surface has required the installation of engineered stormwater devices.

11. Nutrient credit trading within the framework of Falls Lake Watershed regulated entities is neither permitted nor encouraged within the Falls Rules. Jurisdictions with a lower opportunity cost could provide the most cost-effective implementation of BMPs that could have the greatest impact on water quality if credit trading were permitted within the Falls Rules.

12. *Larger Common Plan of Development* (NCDENR-DEMLR terminology that appears in numerous locations within the *North Carolina Division of Water Quality Stormwater Best Management Practices Manual*), in terms of the time frame of duration, is unclear under the Falls Rules. The implied time limit within the rules is tied to vesting (two years by North Carolina General Statute 160A-385.1 unless extended one additional year by the governing board). In the current economy – particularly in smaller jurisdictions – locally extended "phasing" of commercial development is not uncommon with commercial and multifamily sites not fully building out for up to a decade. Restricting "grandfathered" projects to those ongoing at the time of the adoption of the New Development programs (July 12, 2012) seems unfair and places upper Falls jurisdictions at a competitive disadvantage when trying to entice commercial developers to select sites within the jurisdiction.

May 29, 2015

Mr. John Huisman
NCDENR – DWR
Nonpoint Source Planning Branch
512 N. Salisbury St.
Raleigh, NC 27604

Dear Mr. Huisman:

The jurisdictions of Person County, Granville County, City of Creedmoor, Town of Butner, and Town of Stem, all located in the Falls Lake Watershed, participate in a cooperative multi-jurisdictional stormwater program known as Granville-Person Stormwater Services (the "Utility"). These comments regarding the proposed revisions to the Falls Lake Nutrient Management Strategy are submitted by the utility services manager on behalf of the five jurisdictions as a group. Please take this submittal under consideration during relevant portions of DWR's rulemaking process to readopt 15A NCAC 02B.

Definitions (.0276)

- Reconsolidate definitions in a single section . If definitions for multiple rules are contained in the same section, as proposed, please ensure that use of the definitions within the Falls Rules is carefully reviewed since the Nutrient Management Strategies were written at different times and potentially reflect nuances of meaning. We recommend that specific definitions not be pulled into individual rules since it provides the potential for interpretation issues.
- The terms "development activities" and "development" are used in the current rule. "Development activities" has been replaced in the new development rule by "development products." Either revert back to the use of "development activities," which is a clearer and more widely understood term or include a definition for "development products," which is a new phrase introduced in this proposed version of the Rules.[1]
- If "development activities" is abandoned as a term, revise the definition of "existing development," which still includes the term "development activities,"[2] to be consistent with the rest of the document.
- Define "development" (previously defined in the rule) and "subwatershed."[3]

New Development (.0277)

- At present, nutrient credits are priced for purchase by developers based on a 30 year treatment time frame. We understand the impetus for the new language inserted "Offsetting reductions shall be perpetual in nature." Without changes to the mitigation banking program, however, the requirements set forth in .0277(4)(d) are not achievable.

[1] .0277
[2] .0278 (3)(a)
[3] .0278 (7)(a)

- Subsections that described the development and implementation of the new development program have been deleted (since the timeline occurred in the past). Provide language that ensures that newly incorporated jurisdictions could develop and implement programs.
- Clarify "significant" where it is used in "significant modification to a local government's program shall be submitted to the Director for approval."[4]
- Add new additional subsection to enable a jurisdiction to develop and maintain off-site stormwater treatment for 100% of a development's nutrient load that would serve as an alternative, if available, to developers treating 30 or 50% onsite and the remainder offsite.
- Jurisdictions need greater flexibility with regard to disturbance thresholds for residential development. Consider changing the disturbance threshold for residential development such that it increases with an increased lot size and allows for a maximum allowable disturbance that is greater than the current ½ acre. We recommend that this based on a non-linear scale and is capped at a certain land disturbance.
- We support the change in language at the new 4 (f) of the rule : "Stormwater systems shall be designed to control and treat at a minimum the runoff generated by one inch of rainfall from all surfaces ~~in the project area~~ draining to the BMP. ~~by one inch of rainfall.~~"
- We support the change in language at the new 4 (g) of the rule: "To ensure that the integrity and nutrient processing functions of receiving waters and associated riparian buffers are not compromised by erosive flows, at a minimum, ~~the new development shall not result in a net increase in peak flow leaving the site from pre-development conditions for the one-year, 24-hour storm event;~~ net increase in peak flow leaving the site from the predevelopment condition for the 1-year, 24-hour storm shall not exceed 10 percent;"

Existing Development (.0278)

- Revert to the previous interpretation of development. As written, "structures and other land modifications"[5] is more nebulous than the current definition, incorporated by reference.
- Because there has been an extended delay prior to Stage I implementation, the deadline for achieving Stage I load reductions should be shifted back similarly. Rather than maintain the calendar year 2020 deadline,[6] the deadline should be stated as "five years from the date of local load reduction program implementation" to keep with the original Stage I timeframe.
- Rather than require that jurisdictions meet the load reduction or spending in the highest single year of implementation of Stage I,[7] retain the option for jurisdictions to average their load reduction and spending over three years or the entire Phase I time frame if it is less than three years.

Agriculture (.0280)

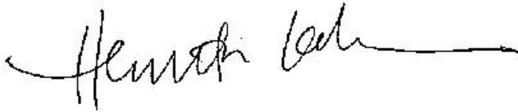
- Please take into account our inquiries contained in the February 5, 2015 e-mail from Jim Wrenn, attorney for the Utility to John Huisman and others. A copy of this e-mail is attached hereto and incorporated herein by reference. An understanding of these issues, and particularly DWR's interpretation of these issues, is needed prior to the Utility providing additional comments on

[4] .0277 (5)(b)
[5] .0277 (3)(a)
[6] .0278 (4)
[7] .0278 (4)(b)(ii)

the Agriculture Rule. In addition, discussion and better understanding is needed concerned agriculture-related development that may be exempt from the zoning ordinances under which our jurisdictions implemented the Falls Lake Rules. We request a meeting with DWR staff and other relevant parties in the near future to discuss these issues. We reserve the right to make additional comments on this subject.

Thank you very much for your consideration. We would welcome the opportunity to discuss these comments in more detail with you.

Sincerely,



Henrietta Locklear, MPA
Stormwater Utility Services Manager
Granville-Person Cooperative Stormwater Services

Henrietta Locklear

From: Jim Wrenn <jcw@hopperhickswrenn.com>
Sent: Thursday, February 05, 2015 5:47 PM
To: Huisman, John (john.huisman@ncdenr.gov); Gannon, Rich
Cc: mike.randall@ncdenr.gov; bradley.bennett@ncdenr.gov; whisnant@sog.unc.edu; Forrest Westall; McLawhorn, Dan; Henrietta Locklear

Subject: Questions concerning the Falls Lake Agriculture Rule

Gentlemen:

As some of you know, I represent Granville County, Person County, the City of Creedmoor, the Town of Butner and the Town of Stem (the "Jurisdictions") with respect to the Falls Lake Rules. All of the Jurisdictions either adopted the Falls Model Stormwater Ordinance for New Development ("Model Ordinance") with only minor changes or incorporated the majority of the provisions of the Model Ordinance into their ordinances. Each of the Jurisdiction's ordinance provisions concerning stormwater were reviewed by the Division of Water Quality and approved by the Environmental Management Commission.

At least one of the Jurisdictions has been asked if a landowner can clear (clear cut, stump, and grade) approximately forty acres to place the land into agricultural production. It is not known whether the agricultural use of the land will meet the agricultural thresholds under 15A NCAC 02B .0280(4) (15A NCAC 02B .0280 is hereafter referred to as the "Agriculture Rule"). The Falls Lake Rules define "development" as "any land disturbing activity which adds to or changes the amount of impervious or partially impervious cover on a land area ***or which otherwise decreases the infiltration of precipitation into the soil***." See 15A NCAC 02B .0276(a)(5) (emphasis added) (incorporating by reference the definition of development found in 15A NCAC 02B .0202(23)).

The Model Ordinance contains the following language: "*Development* that is exempt from permit requirements of Section 404 of the federal Clean Water Act as specified in 40 CFR 232 (primarily, ongoing farming and forestry activities) are exempt from the provisions of this ordinance." Model Ordinance, xx-105(B). Federal law exempts "[n]ormal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices . . . ." 40 CFR 232.3(c)(1)(i). To fall under this exemption, the activities described above "must be part of an established (i.e., ongoing) farming, silviculture, or ranching operation, and must be in accordance with" the definitions found in 40 CFR 232.3(d). 40 CFR 232.3(c)(1)(ii)(A). "Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation." Id. It is important to note that "[a]ctivities which bring an area into farming, silviculture or ranching use are not part of an established operation. An operation ceases to be established when the area in which it was conducted has been converted to another use or was laying idle so long that modifications to the hydrological regime are necessary to resume operation." 40 CFR 232.3(c)(1)(ii)(B) ***As a result, it appears that the Model Ordinance language defines any land clearing activities intended to bring new agricultural lands into production as development that is subject to the Falls Lake New Development Rule.***

Based upon that analysis, I have two questions and one additional area of rule application I would request the agency address:

1. Does the Agriculture Rule preclude labeling as "development" land clearing that brings land into production for an agricultural use that qualifies under 15A NCAC 02B .0280(4)?

The Agriculture Rule contains the following language:

> This Rule shall apply to all persons engaging in agricultural operations in the Falls watershed, including those related to crops, horticulture, livestock, and poultry . . . . For the purposes of this Rule, agricultural operations are activities that relate to any of the following pursuits:
>
> (a) The commercial production of crops or horticultural products other than trees. As used in this Rule, commercial shall mean activities conducted primarily for financial profit.
> (b) Research activities in support of such commercial production.
> (c) The production or management of any of the following number of livestock or poultry at any time, excluding nursing young:
> (i) Five or more horses;
> (ii) 20 or more cattle;
> (iii) 20 or more swine not kept in a feedlot, or 150 or more swine kept in a feedlot;
> (iv) 120 or more sheep;
> (v) 130 or more goats;
> (vi) 650 or more turkeys;
> (vii) 3,500 or more chickens; or
> (viii) Any single species of any other livestock or poultry, or any combination of species of livestock or poultry that exceeds 20,000 pounds of live weight at any time.

15A NCAC 02B .0280(4).

If the land clearing activity brings the land into production for one of these "agricultural" uses, there appears to be a strong argument that the activity is exempt from the New Development Rule because it is specifically included as an "agricultural application" under the Agriculture Rule. If this is the case, this interpretation directly conflicts with the Model Ordinance with respect to new areas brought into production. On the other hand, one could read the Agriculture Rule to apply only to existing agricultural uses. In that event, the person clearing the land would have to obtain a stormwater permit and treat for nutrients and peak flow to the extent required by the Rules.

2. Regardless of the answer to question 1 above, does land cleared for an ostensible agricultural use that does not meet the definition of an "agricultural application" under the Agriculture Rule constitute "development" as defined in the Falls Lake Rules?

Land clearing for an agricultural use that does not meet the definition of an "agricultural application" under the Agriculture Rule seems to meet the definition of "development" in that it removing trees or other leafy vegetation and removing roots and/or stumps "otherwise decreases the infiltration of precipitation into the soil." 15A NCAC 02B .0202(23). This type of activity is often undertaken in conjunction with low density residential development. Further, there seems to be no other category into which this type of land clearing activity falls under the Falls Lake Rules.

Finally, the situation I have described also raises the question of consistent nutrient reduction accounting. Based on DWR's description of how it developed the current reduction requirements for Stage II, the modeled loading reduction required to meet the chlorophyll a standard in the entire Lake was based on reduction to the entire loading directly to the Lake, including those areas that were not identified as ether existing development or agriculture in 2006. To address this, the agency increased the necessary reductions for "controlled" land use (regulated under the Rules) so that the total modeled reduction levels would be met with full implementation of Stage II. This means that the required reduction of the loading from the land that was

classified as "uncontrolled" use in 2006 was administratively "assigned" by the Rules to the jurisdiction in which these type lands exist. If that category of land is subsequently developed or modified for other type use that requires regulation under the Rules/Ordinances, how is nutrient load accounting for this converted land addressed?

As these issues are likely to affect other jurisdictions containing lands that were characterized as contributing loading but were classified as "uncontrolled" by DWR in the baseline year (2006) and later converted after 2012, consistent understanding and interpretation in the watershed is very important. We would appreciate your thoughts on these matters and request that DWR provide guidance to the jurisdictions on how to deal with this type of activity. We would also request that if the agency believes that Rule modification is needed to clarify this situation that you would engage the jurisdictions in the watershed through the UNRBA to consider how the Rules may need to be revised.

Thanks for your consideration of these matters. As you know, the Rules are the subject of significant local attention. I look forward to being able to give our local citizen a timely response to his inquiry concerning his land clearing activities.

Sincerely,

Jim

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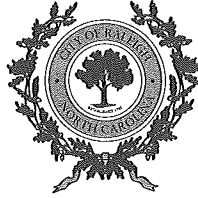
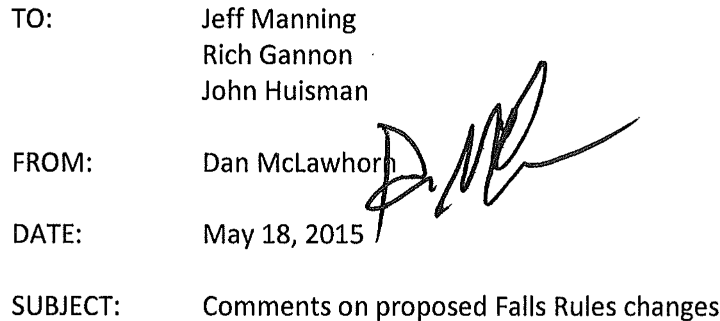


CITY ATTORNEY'S OFFICE

City Of Raleigh

NORTH CAROLINA

TO: Jeff Manning
Rich Gannon
John Huisman



FROM: Dan McLawhorn

DATE: May 18, 2015

SUBJECT: Comments on proposed Falls Rules changes

As the initial rule-making showed, the Falls Lake rules are a matter of policy that the Raleigh City Council has reserved to itself. Accordingly, its staff for the Falls Lake rules consulted with the City Council at its May 5th session to determine what comments to make on the proposed changes to the Falls Lake rules. The City Council directed staff to:

1. Request an extension of time to offer comments until after the close of the 2015 Session of the General Assembly; and

2. To make appropriate inquiry so that staff questions about the purpose and impact of the proposed changes can be fully understood when comment is appropriate.

City Council is concerned that bills pending before the 2015 General Assembly will have drastic impacts on the Falls rules as they presently apply. In particular, House Bill 760 proposes major changes in the protections afforded to Falls Lake, and the Neuse Estuary, by greatly reducing the value and benefit of the riparian buffers. Riparian buffers are commonly acknowledged to be the most cost effective means of reducing the impacts of nutrient loading from stormwater on 303(d) impaired waters, such as Falls Lake and the Neuse Estuary. There is a long history of riparian buffers in the Neuse Basin dating from 1997. The slashing of the value of the riparian buffers proposed in House Bill 760 will change dramatically the nutrient reduction value derived from the current Falls Lake strategy adopted by the EMC. Unless and until those impacts are known, it is not possible to understand how and where additional measures need to be added to the Falls Lake rules to compensate for the lost value from the present system of riparian buffers.

To better understand the proposed changes, the City requests that DWR provide it information on the questions set out below:

.0263 Definitions. Why is the caption left so that it identifies the definitions as only applicable to Jordan?

- ~~(6) "Development".~~ Why is this definition deleted as it does not appear in the statute and its definition in 2B .0202 does not apply here, but the term is key to two primary rules?

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- (5) "Discharge" is defined in GS 143-213. In light of the introductory sentence, which definition is applicable to the rules? Should the term that is defined be "discharge allocation" instead? (10) Load allocation should be in quotation marks.
- (14) "Nutrient" Why is the term to this section when it is applied in the Falls Lake rules? Should the definition be revised to delete "of this section"?
- (24) "Transport Factor" Why is this term limited to use in approved TMDL strategy rules? This means it cannot be applied in the Falls rules.

.0275 Falls Water Supply Nutrient Strategy: Purpose and Scope.

- Why omit .0276? Should .0276 be amended instead of deleted so that it directs users of the rules to the definitions in .0263?
- (2) Should the definitions apply to .0275 to .0282 and .0315 instead of just to rule .0275?
- (4) Why are the allowable loads for Stage II being removed? Aren't those allowable loads necessary for setting the WLAs and LAs?
- (6)(iii) Why is the directive to set allowable loads for Falls Lake itself and the watersheds of its 5 primary subbasins being removed from the relook process? How does this strategy comply with the Clean Water Act's requirements for addressing 303(d) non-attainment waters without setting allowable loads? Is the mere setting of reduction goals a legally sufficient response to the Clean Water Act for a strategy to restore impaired waters?

.0276 Definitions. Why not amend this to become a cross reference to the definitions in .0263? The caption cannot be removed and thus the rule will engender confusion as to whether there are any definitions applicable to the Falls rules?

.0277 New Development.

- Why is there no definition for "development"?
- (4)(a) and (c) Does the new term "new development product" require a definition? Was the term meant to be "new development project"?
- (d) Why do the offsetting reductions have to be perpetual? Can that standard be met if the purchased credits are from a bank that relies on shorter term reductions, but that assures credits will always cover the need?

.0278 Existing Development.

- Why is the new start date to track measures June 2017 when the schedule under (8) does not require a local program to be in place until no earlier than approximately December 2017 [March submission to EMC + 2 months for EMC decision + 6 months to submit local program]
- (3)(a)(i) Is it confusing to refer to the implementation date collectively of the local programs instead of to "the local new development stormwater program implemented under Rule .0277 for the jurisdiction where project is located"?
- (3)(a)(iii) What is the basis of this exception to being included in the existing development inventory?
- (3)(b) What is the meaning of "development" in the term "new development" as the term in not defined in the Falls rules?
- (4) Now that we are 4 years into implementation, has DWR determined how to establish the 2006 jurisdictional base load and the 2012 reduction load in the absences of data showing the loading for each jurisdiction? If not, why maintain this system for reducing the loading for Existing Development? Is it time to switch to another means of establishing reduction

responsibilities that can be more easily established and measured such as reductions based on a percentage of the inventories previously submitted pursuant to .0278(4)(d) or a percentage increase of the stormwater utility budget of the jurisdiction? [(8)(b) suggests that this information will not be available to local governments any earlier than March 2017 as a part of the model program. This is simply an inadequate time for making this critical determination.]

- (4)(b)(i) Why is this requirement changed to the highest year of load reductions or expenditures when there is no certainty of more than one year of performance at best? [The schedule in (8) suggests that the earliest the local programs will become effective is July, 2019.]
- (4)(b)(ii) Why is the Stage II reduction goal the same regardless of whether the Stage I reductions are achieved? Doesn't this discourage achieving the Stage I reductions and punish the local governments who do achieve it?
- (5)(j) and deleted (m) and (n). Why is the local government limited to practices and program elements approved by DWR instead of having the continued opportunity to demonstrate reductions not yet approved by the Director?
- (5)(m) Does the removal of this section of the rule effectively bar local governments from receiving credits for the removal or remedy of illegal discharges that contributed to the local government's existing development budget, but are not caused by the local government?
- (7)(a) What is the definition of a "subwatershed" ? If a jurisdiction is in more than one subwatershed, can it work with the county that is also in the same two subwatersheds?
- (8)(d) Two months for local governments to make changes to their programs, which are contemplated to be adopted by ordinances, is simply unworkable. Local governments using their planning powers have to provide more than 2 months' notice alone. Why is only two months provided for these adjustments when DWR will have by then taken more than 6 years to construct the model program?

.0279 WWTPs

- (2) Applicability. Why does DWR still allow this rule to prevent discharging septic tanks and sand filters from being required to achieve nutrient loading reductions?
- (3) Definitions. (b) and (g) should be revised so the defined terms are "Active allocation" and "Reserve allocation" instead of just the first words of each term. Since neither term is used in the rule itself, why are the terms included in the definitions? Should a sentence be added in (1) of the rule that uses the terms? Will it be clear that the active allocation is limited to the poundage necessary to support the maximum flow rate in the permit?
- (4) Initial Nutrient Allocations. What is the relationship between this rule which sets Stage I and Stage II allocations for WWTPs when rule .0275 is being amended to delete the Stage II WLAs?
- (5)(b) Does the deletion of the WLAs from .0275 trigger a relook at apportionment among dischargers under this section?
- (7)(c) How will DWR enforce the collective mass limit for the dischargers in this category? Isn't it necessary to include the mass limit in the permits of the facilities with a requirement that they collectively achieve it or they will be found in non-compliance?
- (8)(a)(ii) If the discharger seeks permit renewal at the end of 30 years, how will it be required to show that it has the necessary offsets for its load?
- (9)(a)(ii) If the discharger seeks permit renewal at the end of 30 years, how will it be required to show that it has the necessary offsets for its expanded load?
- (10)(c) Is this an appropriate place to use the term "active allocation" in the rule?

.0280 Agriculture

- (5) Method for Rule Implementation. Why is the phosphorous goal of 40 percent reduction in Stage I removed from (a)? Why is the phosphorous reporting removed from (c)? The phosphorous loading reduction requirement generally remains in the introductory paragraph and the Purpose section (1) of this rule. It also seems to be maintained per (7)(c) of the rule.
- (6) Why is the registration requirement struck from this part of the rule? How will the rule be applied absent individual permits should the general reduction method fail?
- (7)(b)(v) What is the basis for exempting this form of credit decision from NSAB and Water Quality Committee review and approval?

.0281 State and Federal Entities

- (3) Why does DWR believe it has the authority to pre-empt local stormwater programs applicable to state and federal entities in the watershed when GS. 160A-459 expressly authorizes local governments to regulate state and federal entities within their respective jurisdictions? (iii) Why does DWR exempt state and federal entities from compliance with more stringent local ordinances in favor of the State criteria set forth in rules? (b) Does DWR have the authority to make a state or federal agencies fund in perpetuity offsite offset measures or may it merely require that such entities acquire offsets from entities with such a mechanism in place?
- (5)(m)(ii) and (iii) Why is there any reason to include an evaluation of landowner acceptance or incentive and education option for improving landowner acceptance when this program will be implemented by the state or federal entity which owns the property?
- (7)(a) Should this provision be limited to local governments where the state or federal entity owns land within the territorial area of the local government which will be combined with the lands of the local government?
- (9)(b)(ii) Do non-DOT state and federal entities own discharging sand filter systems or malfunctioning septic systems in the basin? Should this language be deleted?

.0273 Nutrient Trading

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- (d)(1)(A) Does DWR have a set of values for each type of land use at the time for the baseline adequate or each loading condition to allow determination of reductions for the credit program?
- (d)(1)(B) When will the stakeholders have access to the May 29, 2015 guidance?
- (d)(1)(C) Does this provision bar local governments from using credits from nutrient reduction projects that address illegal discharges which were counted as a part of the baseline for their Existing Development jurisdictional load? What is the incentive to tackle those illegal discharges if no value for trades or other credits?
- (d)(2) How will this provision apply to a local government that operates a trading bank if its trade project is part of a MS4 NPDES permitted system and thus required to be maintained by permit?
- (f) What is the definition of a "non-governmental entity"? Does "government entity" have the same meaning as provided in GS 143-216.11?

CC: Mayor Nancy McFarlane, UNRBA Lead Delegate from Raleigh
Ruffin Hall, City Manager
Tansy Hayward, Assistant City Manager
Forrest Westall, Executive Director, UNRBA
Kenny Waldroup, CORPUD Assistant Director and Alternate to UNRBA
Carolyn Bachl, Associate City Attorney and Second Alternate to UNRBA
Robert Massengill, CORPUD Director
Blair Hinkle, Stormwater Program Manager

Notes on Falls Rules changes

.0263 Definitions. Why is the caption left so that it identifies the definitions as only applicable to Jordan?

- ~~(6) “Development”.~~ Why is this definition deleted as it does not appear in the statute and its definition in 2B .0202 does not apply here, but the term is key to two primary rules?
- (5) “Discharge” is defined in GS 143-213. In light of the introductory sentence, which definition is applicable to the rules? Should the term that is defined be “discharge allocation” instead? (10) Load allocation should be in quotation marks.
- (14) “Nutrient” Why is the term to this section when it is applied in the Falls Lake rules? Should the definition be revised to delete “of this section”?
- (24) “Transport Factor” Why is this term limited to use in approved TMDL strategy rules? This means it cannot be applied in the Falls rules.

.0275 Falls Water Supply Nutrient Strategy: Purpose and Scope.

- Why omit .0276? Should .0276 be amended instead of deleted so that it directs users of the rules to the definitions in .0263?
- (2) Should the definitions apply to .0275 to .0282 and .0315 instead of just to rule .0275?
- (4) Why are the allowable loads for Stage II being removed? Aren’t those allowable loads necessary for setting the WLAs and LAs?
- (6)(iii) Why is the directive to set allowable loads for Falls Lake itself and the watersheds of its 5 primary subbasins being removed from the relook process? How does this strategy comply with the Clean Water Act’s requirements for addressing 303(d) non-attainment waters without setting allowable loads? Is the mere setting of reduction goals a legally sufficient response to the Clean Water Act for a strategy to restore impaired waters?

.0276 Definitions. Why not amend this to become a cross reference to the definitions in .0263? The caption cannot be removed and thus the rule will engender confusion as to whether there are any definitions applicable to the Falls rules?

.0277 New Development.

- Why is there no definition for “development”?
- (4)(a) and (c) Does the new term “new development product” require a definition? Was the term meant to be “new development project”?
- (d) Why do the offsetting reductions have to be perpetual? Can that standard be met if the purchased credits are from a bank that relies on shorter term reductions, but that assures credits will always cover the need?

.0278 Existing Development.

- Why is the new start date to track measures June 2017 when the schedule under (8) does not require a local program to be in place until no earlier than approximately December 2017 [March submission to EMC + 2 months for EMC decision + 6 months to submit local program]
- (3)(a)(i) Is it confusing to refer to the implementation date collectively of the local programs instead of to "the local new development stormwater program implemented under Rule .0277 for the jurisdiction where project is located"?
- (3)(a)(iii) What is the basis of this exception to being included in the existing development inventory?
- (3)(b) What is the meaning of "development" in the term "new development" as the term in not defined in the Falls rules?
- (4) Now that we are 4 years into implementation, has DWR determined how to establish the 2006 jurisdictional base load and the 2012 reduction load in the absences of data showing the loading for each jurisdiction? If not, why maintain this system for reducing the loading for Existing Development? Is it time to switch to another means of establishing reduction responsibilities that can be more easily established and measured such as reductions based on a percentage of the inventories previously submitted pursuant to .0278(4)(d) or a percentage increase of the stormwater utility budget of the jurisdiction? [(8)(b) suggests that this information will not be available to local governments any earlier than March 2017 as a part of the model program. This is simply an inadequate time for making this critical determination.]
- (4)(b)(i) Why is this requirement changed to the highest year of load reductions or expenditures when there is no certainty of more than one year of performance at best? [The schedule in (8) suggests that the earliest the local programs will become effective is July, 2019.]
- (4)(b)(ii) Why is the Stage II reduction goal the same regardless of whether the Stage I reductions are achieved? Doesn't this discourage achieving the Stage I reductions and punish the local governments who do achieve it?
- (5)(j) and deleted (m) and (n). Why is the local government limited to practices and program elements approved by DWR instead of having the continued opportunity to demonstrate reductions not yet approved by the Director?
- (5)(m) Does the removal of this section of the rule effectively bar local governments from receiving credits for the removal or remedy of illegal discharges that contributed to the local government's existing development budget, but are not caused by the local government?
- (7)(a) What is the definition of a "subwatershed" ? If a jurisdiction is in more than one subwatershed, can it work with the county that is also in the same two subwatersheds?
- (8)(d) Two months for local governments to make changes to their programs, which are contemplated to be adopted by ordinances, is simply unworkable. Local governments using their planning powers have to provide more than 2 months' notice alone. Why is only two months provided for these adjustments when DWR will have by then taken more than 6 years to construct the model program?

.0279 WWTPs

- (2) Applicability. Why does DWR still allow this rule to prevent discharging septic tanks and sand filters from being required to achieve nutrient loading reductions?
- (3) Definitions. (b) and (g) should be revised so the defined terms are "Active allocation" and "Reserve allocation" instead of just the first words of each term. Since neither term is used in the rule itself, why are the terms included in the definitions? Should a sentence be added in (1) of the rule that uses the terms? Will it be clear that the active allocation is limited to the poundage necessary to support the maximum flow rate in the permit?
- (4) Initial Nutrient Allocations. What is the relationship between this rule which sets Stage I and Stage II allocations for WWTPs when rule .0275 is being amended to delete the Stage II WLAs?
- (5)(b) Does the deletion of the WLAs from .0275 trigger a relook at apportionment among dischargers under this section?
- (7)(c) How will DWR enforce the collective mass limit for the dischargers in this category? Isn't it necessary to include the mass limit in the permits of the facilities with a requirement that they collectively achieve it or they will be found in non-compliance?
- (8)(a)(ii) If the discharger seeks permit renewal at the end of 30 years, how will it be required to show that it has the necessary offsets for its load?
- (9)(a)(ii) If the discharger seeks permit renewal at the end of 30 years, how will it be required to show that it has the necessary offsets for its expanded load?
- (10)(c) Is this an appropriate place to use the term "active allocation" in the rule?

.0280 Agriculture

- (5) Method for Rule Implementation. Why is the phosphorous goal of 40 percent reduction in Stage I removed from (a)? Why is the phosphorous reporting removed from (c)? The phosphorous loading reduction requirement generally remains in the introductory paragraph and the Purpose section (1) of this rule. It also seems to be maintained per (7)(c) of the rule.
- (6) Why is the registration requirement struck from this part of the rule? How will the rule be applied absent individual permits should the general reduction method fail?
- (7)(b)(v) What is the basis for exempting this form of credit decision from NSAB and Water Quality Committee review and approval?

.0281 State and Federal Entities

- (3) Why does DWR believe it has the authority to pre-empt local stormwater programs applicable to state and federal entities in the watershed when GS. 160A-459 expressly authorizes local governments to regulate state and federal entities within their respective jurisdictions? (iii) Why does DWR exempt state and federal entities from compliance with more stringent local ordinances in favor of the State criteria set forth in rules? (b) Does DWR have the authority to make a state or federal agencies fund in perpetuity offsite offset measures or may it merely require that such entities acquire offsets from entities with such a mechanism in place?

- (5)(m)(ii) and (iii) Why is there any reason to include an evaluation of landowner acceptance or incentive and education option for improving landowner acceptance when this program will be implemented by the state or federal entity which owns the property?
- (7)(a) Should this provision be limited to local governments where the state or federal entity owns land within the territorial area of the local government which will be combined with the lands of the local government?
- (9)(b)(ii) Do non-DOT state and federal entities own discharging sand filter systems or malfunctioning septic systems in the basin? Should this language be deleted?

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A RESOLUTION REQUESTING A CHANGE TO THE STATE'S REQUIREMENTS FOR STORMWATER REGULATION

WHEREAS, Person County, pursuant to state requirements, has enacted a stormwater regulation ordinance; and,

WHEREAS, most of the land regulated in Person County is utilized for low impact activities; and,

WHEREAS, the Person County geographic area is located at least 15 miles from the Falls Lake impoundment area; and,

WHEREAS, present stormwater rules requires compliance with the rules when there is a minimum area of land disturbance of one-half acre; and,

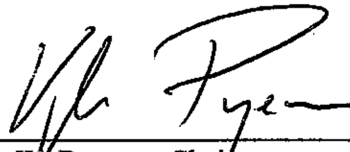
WHEREAS, any land disturbance of less than one acre in Person County is not likely to have an adverse effect on water quality

NOW THEREFORE BE IT RESOLVED by the Person County Board of County Commissioners that the state stormwater regulations affecting Person County be amended by the appropriate state agency so as not to require that land disturbance of one acre or less for residential purposes be subject to the stormwater regulations.

BE IT FURTHER RESOLVED that copies of this regulation be provided to:

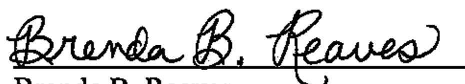
1) The members of the General Assembly representing Person County,
2) The Secretary of the NC Department of Water Resources, and
3) The Upper Neuse River Basin Association (UNRBA)

Adopted this the 4th day of May 2015.



Kyle W. Puryear, Chairman
Person County Board of Commissioners

Attest:



Brenda B. Reaves
Clerk to the Board

ORANGE COUNTY

Department of Environment,
Agriculture, Parks & Recreation

DATE: June 19, 2015

TO: John Huisman
Division of Water Resources
Nonpoint Source Planning Branch

FROM: Tom Davis
Water Resources Coordinator
Department of Environment, Agriculture, Parks & Recreation

RE: Falls Lake Nutrient Management Strategy comments

These comments were compiled by the staff of various Orange County departments tasked with implementing provisions of the Falls Lake Rules.

The potential for trading to satisfy the anticipated need for nutrient credits in the future appears to be a topic of increasing interest, especially here in the Falls Lake watershed. We encourage the Division of Water Resources (DWR) to consider revising the Falls Lake Rules, and possibly the existing boards (the Nutrient Scientific Advisory Board (NSAB) and the Falls Lake Watershed Oversight Committee (WOC)), to increase the possibility of establishing a viable nutrient trading program in the watershed. The overall success of the Falls Lake Rules likely depends on all stakeholders working together to facilitate trading. Increasing interaction and communication among all the interested parties should go a long way toward achieving a viable trading program. Given the number of issues that remain to be resolved by the stakeholders in the Falls Lake watershed, in addition to the water quality benefits and the financial implications of the Falls Lake Nutrient Management Strategy, some means of improving interaction amongst the various stakeholder groups that are currently working independently needs to be pursued. As many stakeholders have already heard, there appear to be serious obstacles to establishing an effective nutrient trading program in the Falls Lake watershed. Furthering the current isolated approach for each stakeholder group does not seem to be the best means of fostering continued progress.

NATURAL and CULTURAL RESOURCES DIVISION
Orange County Department of Environment, Agriculture, Parks & Recreation
PO Box 8181, Hillsborough, NC 27278
Phone: (919) 245-2510 Fax: (919) 644-3351

02B .0280 Agriculture

Section (4)(c) lists thresholds for the number of animals present at an agricultural operation, above which operators become subject to the Falls Lake Rules. Instead of these thresholds, it seems more appropriate to use animal density as the basis for the regulation of agricultural operations. Differences in animal density can significantly change nutrient runoff from pastures and other animal confinements. The number of animals present on an agricultural operation alone may not necessarily be the most accurate indicator of potential water quality impact. Facilities with a greater number of animals, including CAFOs, are permitted and inspected regularly by DWR. Smaller farms with fewer animals are typically not permitted or inspected and could in fact produce a larger negative water quality impact than a larger farm. The practices utilized at each individual farm are probably more relevant with regard to water quality than just the size of the operation. Thus, animal density may more accurately reflect the practices in use at an agricultural facility instead of the number of animals present.

In addition, some means of identifying and informing owners of non-commercial "hobby farms", including horse farms, of the Falls Lake Nutrient Management Strategy requirements is needed. Currently, these types of sites can "slip through the (regulatory) cracks" since county staff who regularly interact with agricultural producers may not necessarily possess any information regarding the presence of these operations.

Section (5)(c) includes requirements for riparian buffers on both pasture and cropland, but does not discuss existing (or new) buffers that are greater than 20 feet in width. There should be a means to specify additional credits for buffers wider than 20 feet. Further clarity should also be added to the sentence that states "with criteria further defined by the Watershed Oversight Committee."

Consideration should also be given to the fact that agricultural activities in each individual field may vary from year to year, or even from season to season; for instance the crops that are grown can vary, as could the accompanying type, amount, timing and even the means of fertilizer application. Fields may even be fallow for periods of time, only to be utilized again in the future. These factors, and there are likely others, make tabulating nutrient sources from agricultural operations at any discrete point in time, such as a baseline year, very difficult. Perhaps a three- or five-year running average or some other measure may be a more accurate indicator of net agricultural activity.

Since the requirement for reducing phosphorus loss from agricultural lands is proposed for removal from the Falls Lake Rules, remaining references to phosphorus throughout the agricultural rules should be removed. In addition, Section (6)(c) should specify "Stage 1 nitrogen objectives".

As discussed above, the duties assigned to the WOC in Sections (7)(b)(iv) and (v) and (7)(c) should be examined and considered to somehow include all parties affected by the Falls Lake Rules in the development and oversight of a true nutrient trading program. Further isolation of the involved committees and boards is likely to continue the lack of interaction that currently exists.

.0277 New Development

Section (5)(c) concerning on-site wastewater includes the following: "Should research quantify significant loading…" This should specify peer-reviewed research, published in a professional journal. In addition, what is considered "significant loading"?

We encourage DWR to revise the Falls Rules to include opportunities for regional BMPs to address stormwater runoff from new and existing development, especially for densely-developed areas. Orange County is currently investing considerable resources in developing multiple Economic Development Districts (EDDs) in the Falls Lake watershed. Allowing the utilization of regional-BMPs in these EDDs instead of smaller BMPs on each site could be extremely beneficial.

Finally, new development disturbance thresholds should increase the further a site is from Falls Lake. This seems reasonable given the findings to date of the UNRBAs Path Forward process concerning transport factors and nutrient trapping in the watershed.

.0278 Existing Development

Section (5)(f) stipulates that a load reduction program shall estimate load reductions "using methods provided for in Sub-Item (6)(a)". This reference does not appear to be correct.

Clarification of responsibility for stormwater oversight on lands located in extraterritorial jurisdiction (ETJ) areas is needed (section (5)(d)). Orange County holds general "police powers" for ETJ areas in Orange County, but does not maintain zoning authority in these areas. Orange County's stormwater ordinance is included in the County's zoning code, as a result, the stormwater ordinance does not apply to the ETJ areas.

Section (2) states that the Falls Rules are applicable to areas within "the planning jurisdiction of a municipality or county…" In Orange County, the Towns of Hillsborough and Mebane maintain inspection authority and responsibility for stormwater best management practices (BMPs) within ETJ areas in the Falls Lake watershed, while the

County is responsible for planning oversight. As a result, responsibility for nutrient loading emanating from ETJ areas is currently unclear, leading to confusion and potentially frustration amongst affected parties. Section .0278 (5)(d) could be revised from excluding land within a jurisdictional boundary to including land within the planning jurisdiction (i.e., from corporate boundary to ETJ).

With regard to on-site wastewater, if DWR is truly interested in reducing nutrient loading from on-site systems, then the permitting, inspection, and enforcement responsibilities for surface spray, surface drip, and minor NPDES systems should be delegated to local health departments, along with the authority to collect fees for permits and inspections. If the State does not have the resources to perform all of these important tasks adequately, then oversight authority should be delegated to local governments. Currently, septic systems in Orange County with permits issued by DHHS are effectively inspected by the County according to a schedule mandated by the state. However, the County has no authority to inspect on-site systems with DENR-issued permits unless a citizen complaint is received. It is highly likely that local governments would be much more efficient, and as a result effective, at overseeing all on-site wastewater systems within their jurisdictions, instead of relying on DWR staff to spend numerous hours traveling to potentially remote locations to perform inspections on a piecemeal basis.

.0273 Nutrient Trading

We encourage DWR to minimize the use of "it" and "its" in Section (4) for the sake of clarity. Similarly, in the first sentence in Section (5) it is unclear whether "they" refers to the person or the credit.

Is the intent of Section (6) for the buyer to assume responsibility for the maintenance of the practice once the reduction is fully paid for, as opposed to the seller as this section currently states?

Cc: Dave Stancil, DEAPR Director
Rich Shaw, DEAPR, Land Conservation Manager
Howard Fleming, Planning and Inspections
James Bryan, Office of the County Attorney
Anne Marie Tosco, Office of the County Attorney
Gail Hughes, Orange County SWCD
Alan Clapp, Environmental Health
Pam Hemminger, Chair, UNRBA