
PUBLIC WORKS

May 18, 2015

NCDENR – DWR
Nonpoint Source Planning Branch
Attn: John Huisman
john.huisman@ncdenr.gov

Mr. Huisman:

On April 20, 2015 the City of Greenville was notified of the 30-day informal comment period regarding the draft revised Tar-Pamlico NSW Rules. The City of Greenville in response to this notification has reviewed the draft revised rules, specifically 02B .0258. Additionally, the City of Greenville has also reviewed 02B .0235. As a result of our review we offer the following feedback and comments.

In regards to rule 02B .0258, the City of Greenville primarily requests clarification on a number of items identified below.

1. The City of Greenville would like to see definitions added to the rule. In some places the word 'development' is used, specifically (c)(1)(D), and it is unclear if this is applicable to new development, redevelopment, or both.
2. Item (c)(1)(G) refers to item (G). We request additional information here so the intent of the item can be reviewed.
3. In consideration of the 10% tolerance for pre/post peak flow of the 1-year, 24-hour storm, the City of Greenville suggests adding language to the rule regarding larger overall common plans of development. We routinely see existing development expand in small (less than half an acre) increments over and over again in order to avoid further stormwater detention and/or treatment. This provision would exacerbate the situation. While individually small increments of improvement are not detrimental their whole can be.

4. The City of Greenville has historically only addressed buffers in regards to compliance for development. We do not issue variances and are not the enforcement authority. Does item (c)(1)(K) change this practice? If so, we have concerns regarding timeframe for implementation as we lack sufficiently funding and trained staff to undertake this particular aspect of buffer protection. In addition there appears to be two item (K)'s.
5. While item (c)(1)(L) addresses Storm EZ (volume match approach) it does not address maintenance of the controls necessary to provide volume match. Will this be outlined in the BMP Manual prior to this revised rule taking effect?
6. Item (d)(3) indicates the annual report shall be provided by October. If the permit cycle still runs to September 30 it is not feasible to provide an annual report on activities by October 1st.
7. Lastly, the City of Greenville requests the exemption of state property from this rule be reconsidered. The Department (DENR) has determined the NSW rule is more stringent than NPDES for post construction controls. This is reflected in the City's NPDES permit. A large portion of Greenville's jurisdiction is state property and is not subject to the same development requirements as municipal or private development.

In addition to clarification there is one concern. In the Summary of Proposed NMS Rule Revisions provided, it is stated on page 4, "**Change:** Added 1 BMP minimum onsite for project not meeting export targets." Is this applicable to both new development and redevelopment? If this change does apply to redevelopment where in the rule is this specified? Additionally, this is a substantial change as redevelopment has historically been able to buy-down all of their nutrients. While some sites may be able to meet this regulation others may not without substantial expense. The City of Greenville does not want to discourage redevelopment and additional stormwater treatment costs would be a hindrance.

In regards to rule 02B .0235, we politely request the time period for comment be extended as some, if not all, added jurisdictions were not notified of their addition to the applicability of the rules. The City of Greenville since 2004 has voluntarily applied the Tar-Pamlico rules across its jurisdiction in the interest of not offsetting development within its boundary. This rule will subject approximately 19% of the jurisdiction to increased development regulations. The City of Greenville also requests further explanation of what factor(s) resulted in the applicability being extended to include the City of Greenville since only a small portion of the population resides within the Neuse River basin. In addition to our objection of being included in the

applicability of this rule, we also have the same concerns as we do with the Tar-Pamlico rules. The City of Greenville requests our comments on the Tar-Pamlico rule also be applied to the Neuse rule and that newly included jurisdictions be properly notified and given additional time to provide comment.

Thank you for the opportunity to participate in the review process and we look forward to additional communication in the near future.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kevin Mulligan', with a long horizontal line extending to the right.

Kevin Mulligan, PE
Public Works Director
City of Greenville

cc: Barbara Lipscomb, City Manager – City of Greenville
Scott Godefroy, PE, City Engineer – City of Greenville
Lisa Kirby, PE, CFM, Senior Engineer – City of Greenville
Amanda C. Boone, PE, Civil Engineer II – City of Greenville

From: Deanna Osmond [mailto:dosmond@ncsu.edu]
Sent: Wednesday, April 22, 2015 9:47 AM
To: Huisman, John; Hester, Joey; gowon.goode@nc.usda.gov; Henshaw, Julie; mitchell_woodward@ncsu.edu; praabe@americanrivers.org; mmonast@edf.org; gmatthis@bellsouth.net; Anne Coan; Barbara Oslund; swlctl@aol.com; Deanna Osmond
Cc: Gannon, Rich; Davis, Amin
Subject: Re: Informal 30 Day public Comment Period Open for Falls Lake Rules Re-adoption

John

I have quickly reviewed the rules and I concur with a number of changes.

1. Repealing the trading rule.
2. Removing language from the agriculture rule regarding the 77% P reduction.

In addition, P coefficients from biosolids are being discussed within the next 2 weeks and we should have these values very soon for inclusion in to PLAT.

Thanks.
Deanna

On 4/20/2015 4:29 PM, Huisman, John wrote:
Falls Lake Watershed Oversight Committee,

This email is to inform you that the 30 day informal public comment period is now open for the draft revised Falls Lake Rules. Comments are due to the Division by May 19th and can be sent directly to me at john.huisman@ncdenr.gov. A stakeholder meeting will be held in May with specific statewide stakeholders identified by the Division Director. Following this process the rules will be revised considering the input received and a formal public comment period and hearing will take place later this year or early 2016.

You are invited to submit your now during the informal comment period and again during the formal comment period to follow. The draft revised rules and a document summarizing the rule changes & effects are posted on the Division website at <http://portal.ncdenr.org/web/wq/ps/csu/rulesreadoption>.

If you have any questions please do not hesitate to call me at (919)-807-6436.

Thank you,

John Huisman
NCDENR – DWR
Nonpoint Source Planning Branch
919-807-6436

Email correspondence to and from this address is subject to the North Carolina Public Records Law and may be disclosed to third parties unless the content is exempt by statute or other regulation

From: Deanna Osmond [mailto:dosmond@ncsu.edu]

Sent: Thursday, April 23, 2015 4:46 PM

To: Huisman, John; Hester, Joey; Henshaw, Julie; brian.loadholt@nc.usda.gov; Larick, Keith; Deanna Osmond; gmatthis@bellsouth.net; Anne Coan; wwks@duke.edu

Cc: Gannon, Rich; Davis, Amin

Subject: Re: Informal 30 Day public Comment Period Open for Neuse Rules Re-adoption

John

I have quickly reviewed the rules and I concur with repealing 5A NCAC 02B .0239NEUSE RIVER BASIN: NUTRIENT SENSITIVE WATERS MANAGEMENT STRATEGY: NUTRIENT MANAGEMENT. Having helped develop materials for this training and watching outcomes, I do not believe it has provided any benefit to water quality.

Thanks.

Deanna

On 4/20/2015 4:30 PM, Huisman, John wrote:
Neuse Basin Oversight Committee,

This email is to inform you that the 30 day informal public comment period is now open for the draft revised Neuse NSW Rules. Comments are due to the Division by May 19th and can be sent directly to me at john.huisman@ncdenr.gov. A stakeholder meeting will be held in May with specific statewide stakeholders identified by the Division Director. Following this process the rules will be revised considering the input received and a formal public comment period and hearing will take place later this year or early 2016.

You are invited to submit your now during the informal comment period and again during the formal comment period to follow. The draft revised rules and a document summarizing the rule changes & effects are posted on the Division website at <http://portal.ncdenr.org/web/wq/ps/csu/rulesreadoption>.

If you have any questions please do not hesitate to call me at (919)-807-6436.

Thank you,

John Huisman
NCDENR – DWR
Nonpoint Source Planning Branch
919-807-6436

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**NORTH CAROLINA
FARM BUREAU FEDERATION, INC.**

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May 18, 2015

Mr. John Huisman
NC Division of Water Resources
Water Planning Section
1611 Mail Service Center
Raleigh, NC 27699-1611

Dear Mr. Huisman,

The North Carolina Farm Bureau Federation (NCFB) is North Carolina's largest general farm organization, representing the interests of farm and rural people in our State. This letter is to comment on the draft agriculture Rules for Nutrient Sensitive Waters. Please note that this letter only addresses the agriculture rules, not all of the NSW rules. We may share concerns with other parts of the NSW rules during this rules review process.

NCFB has been involved in Nutrient Sensitive Waters issues for decades. NCFB serves on the Basin Oversight Committees charged with implementing the Tar-Pamlico and Neuse Agriculture Rules, and the Watershed Oversight Committees for Jordan and Falls Lakes.

NCFB has several comments about the proposed rules, which are outlined below. Some of these changes seriously undermine agriculture's successful collective compliance approach currently in place in the NSW rules and we are very concerned about the impact of these proposed changes if they are adopted.

Annual Baseline Recalculation:

Each of the agriculture rules requires percentage reductions in loss of nitrogen (and phosphorus in some cases). This reduction is calculated using a baseline load and set of conditions for the particular year or period for each basin. DWR is proposing to require recalculation of agriculture's baseline on an annual basis using the lands currently in agricultural production. This proposed change appears in 2B .0238(1) of the Neuse rule, and similar places in the other agriculture rules. The rules do not explicitly state that there will be an annual baseline recalculation required, but that is what has been stated in DWR documents as the intention of the language. In a meeting with DWR, this was also described as the intention of the proposed change to the rules.

We oppose agriculture having to annually recalculate its baseline. This change would mean that agriculture would be annually comparing its reductions to the crops, fertilization rates, BMPs, etc. in place during the previous year, rather than to the designated baseline currently in the rules. No other source is expected to figure its source reductions compared to what was in place during the previous year. All sources are compared to the baseline year in each basin or watershed.

*Farm Bureau and Agriculture...
We keep North Carolina growing!*

Achieving a reduction, such as a 30 percent N reduction, from the previous year will be impossible for any source, and certainly will be for agriculture.

This change will require additional workload for the Basin Oversight Committees (BOC), the Watershed Oversight Committees (WOC), the Division of Soil and Water Conservation (DSWC) and the Division of Water Resources (DWR), with no environmental benefit. Why does DWR think that this proposed change is necessary, and what is the objective of the proposed change? DWR has not explained the need for this change nor has it clearly stated what it intends to require in the language as proposed. NCFB opposes requiring annual baseline recalculations to the agriculture rules.

County-Level Compliance:

DWR has proposed to require county-level compliance in addition to the basinwide collective compliance approach (see 2B .0238(3)(b) of the Neuse rules). The collective compliance approach was designed to allow agriculture to meet its reduction goals without individual farm-by-farm mandates. Transition to a county level approach goes against the intent of the collective compliance approach that has been successful so far. Collective compliance has always been for the basin, watershed, or sub-watershed, not county-by-county. This change would mean that farmers in each county that is not meeting the newly-mandated county reduction would have to meet individual mandates on every farm. This would be true even if agriculture is meeting the collective mandated reductions in the basin, watershed or subwatershed.

The BOCs and WOCs have set goals for each of the counties, not county-by-county mandates. County level statistics are collected for tracking purposes, not for mandatory compliance at the county level. Several counties now are exceeding their reduction goals. There will be little or no incentive for those counties to continue to exceed those goals if each county has to meet individual county mandates versus contributing towards their collective compliance mandate.

Again this goes against the collective compliance approach that has always been for the all of the counties in the basin or watershed collectively, not county-by-county. NCFB opposes the addition of county level compliance requirements to the agriculture rules.

Goal Maintenance and Commission Recourse:

A specific requirement has been added to the agriculture rules (see 2B .0238(3)(b) in the Neuse rules) for the BOC to seek additional reductions if a county or the basin does not meet its nutrient reduction goal for two consecutive years. The rule then allows the Commission to take specific action if the goal is not met in two additional years. This could result in individual farmers needing to meet individual compliance mandates after only four years.

This four year timeframe is far too short. The two years is too short at the front end and especially too short on the back end. Agricultural cropping changes such as fluctuating prices might be in effect for two years that would trigger a short term exceedance that would even out over a longer period of time, particularly if compliance on a county level is retained. Fluctuations in reductions have happened due to changes in cropping patterns and prices, and those generally take more than two to four years to reverse themselves. This has been the case over many years. Several years are necessary, not just two years, on the front end to allow for an

area to show a definite pattern of not meeting mandated reductions, rather just than a temporary response to a fluctuation in crops and prices.

If a need arises to focus efforts on a particular county or basin, it will take time to direct technical assistance and (very limited) financial resources to that particular area. After farmers request to install additional BMPs, it takes several years for those farms to get the necessary technical assistance and any financial assistance (if available) and then install the BMPs. It will take at least two to three years for the first farms to have the BMPs implemented on individual farms, with additional farms having to wait for the necessary technical assistance. Due to limited technical and any available financial assistance, this installation will take far more than the two years allowed in the rule. As a result, the second two year timeline is not sufficient, and could result in individual farmer compliance for a county or basin.

This approach is very concerning for achieving and maintaining basin collective compliance, and especially if the county level compliance approach is maintained in the rules. NCFB opposes these proposed timeframes. If timeframes are retained, these must be much longer than those proposed.

Local Advisory Committee (LAC) Roles:

DWR has added language that adds responsibilities to the LACs (see 2B .0238(5)(b) in the Neuse rules). In practice, DSWC and the BOCs/WOCs have taken on many of the tasks that the rules propose to assign to the LACs. NCFB encourages DWR to work with DSWC and the BOCs/WOCs to develop revised language that accurately represents the current workload situation and the correct roles of each entity.

The language that specifies LAC membership (see 2B .0238(5)(a) in the Neuse rules) should be clarified to allow central office DSWC staff to serve on the LACs. DSWC central office staff performs much of the calculations and data collection for the annual reports, and are key to the LAC efforts.

PLAT Required for Jordan Lake Animal Operations:

NCFB is concerned by the addition of the Phosphorus Loss Assessment Tool (PLAT) requirement for animal operations in the Jordan Lake watershed (see 2B .0264(6)(d) of the Jordan Lake rules). Why is this new requirement necessary, especially with only a 5% phosphorus reduction needed? The existing rules should be given a chance to work before DWR proposes new requirements.

PLAT is very labor intensive, and requires on-the-ground evaluations of each field. There are tremendous workload issues, including specialized training of personnel and intensive field work that make PLAT implementation extremely difficult. This is an unnecessary requirement, especially with such a small phosphorus reduction mandate in the Jordan watershed. NCFB opposes the addition of PLAT requirements for animal operations to the Jordan Lake agriculture rule.

If the PLAT requirement is retained for animal operations, PLAT requirements for biosolids and surface irrigation facilities should be strengthened in the proposed rules so that DWR can impose

PLAT requirements without further rulemaking once the methodology for those sources is validated. See the language in the existing Jordan Fertilizer Rule (.0272(5)(b)) which spells out this mandate in the current Jordan rule, which is proposed for repeal.

Trading:

It is vital that language remains in the trading rules that require agriculture reduction goals to be met (with an appropriate safety factor) prior to trading nutrient credits. This language is in the existing 2B .0264(6)(c)(i) of the Jordan Lake agriculture rule, and has been proposed for deletion. NCFB opposes the deletion of this language. Further, this language should be added to all basins where trading is allowed.

Allowing trading of credits prior to agriculture goals being achieved will make it more difficult, if not impossible, for agriculture to meet and maintain the reduction requirements. This is especially true in the Jordan and Falls watersheds, where there is less agriculture. The addition of potential county-level compliance requirements would make trading even more complicated. If individual farm-by-farm compliance is mandated, trading would not be possible at all.

NCFB is supportive of the language in 2B .0264(7)(b)(iv) that gives the WOC the authority to determine nitrogen and phosphorus reduction credits for the purposes of trading, and the responsibility for developing the criteria and process for a trading program between agriculture and parties subject to other nutrient strategy rules.

Why is the language in 2B .0264(6)(c)(ii) proposed for deletion? This would allow separate credits for livestock exclusion and buffer establishment, and would allow them to be separated for trading purposes where appropriate. An explanation for the deletion of this language is needed in order for us to provide further comments on this deletion.

Pasture Points Compliance for the Tar-Pamlico Basin:

Language that requires accounting for nutrient reductions on pasture-based operations (pasture points) has been added to the Tar-Pam basin rules (see 2B .0256(d)(3)(F)). Nutrient reductions from agricultural land have been met in the Tar-Pamlico Basin, so additional requirements are not needed. There is not much pasture land in the Tar-Pamlico basin, and as a result, this condition could result in a tremendous amount of work for the BOC and the DSWC with little or no environmental benefit. This change could greatly increase the possibility that counties or the basin would have to have mandatory individual farmer compliance, even though the entire basin is meeting the mandatory reductions through its cropland reductions. We oppose this change.

PTAC elimination:

The language requiring establishment of the Phosphorus Technical Advisory Committee (PTAC) has been removed from the Tar-Pamlico agriculture rule (see existing 2B .0256(f)(2)(C)). This language should remain in the rules, but be updated to reflect the PTAC's ongoing work. The ongoing work of the PTAC is necessary and is still referenced elsewhere in the Tar-Pamlico rules and in the other agriculture rules. The PTAC should remain in these rules.

Membership of BOCs and WOCs:

In many of the rules, the BOC/WOC membership has been amended to add environmental interests (see 2B .0238(3)(4)(a) in the Neuse rule for an example). In the Tar-Pamlico, a farming interest has been removed from that BOC. Non-agency farming interests should be added to at least match or exceed the number of environmental interests in these rules. Strong agricultural input on the BOCs and WOCs is very important to the success of the implementation of the agriculture rules, and should be maintained, not reduced or diluted in number.

Practice Standards:

Language requiring that BMPs conform to NRCS or SWCC standards has been added to all four agriculture rules. What is the reason for this addition? An explanation of this change is needed in order for us to comment on this proposed addition.

Delivered Loads:

Language requiring the WOCs to determine, where feasible, delivered loads to streams has been added to or expanded in the Jordan and Falls rules (see 2B .0264(7)(b)(iii) in the Jordan rules). Currently this language references accounting methods. Why was this language revised? Delivered loads are not necessary to compute agriculture's compliance, as compliance is based on edge-of-management-unit compliance. Determining delivered loads is not the WOC's area of expertise and will require a great deal of research by the research community, without commensurate benefit to determining agricultural compliance.

Fertilizer and Nutrient Management Rules:

NCFB supports the repeal of the Jordan Fertilizer rule (2B .0272) and the Neuse and Tar-Pam Nutrient Management rules (2B. 0239 and 2B .0257). The training portions of these rules were successfully completed. In its summary document of the proposed rule changes DWR indicates that the requirement to apply fertilizer at specific rates on agricultural land is generally considered to be unenforceable. Therefore retaining this rule would have little environmental benefit. (Note that there are separate requirements for application of nutrients at animal operations in the 02T rules, and in animal operation permits.)

Falls Lake Phosphorus Reduction Goal:

NCFB supports the repeal of the phosphorus reduction goal in the Falls Lake Agriculture Rule. In lieu of percentage reductions, the Falls WOC tracks phosphorus reduction indicators such as median soil test phosphorus, acreage of conservation tillage, cropland conversion, and vegetated buffers, among others. This methodology has been approved by the Environmental Management Commission for agricultural compliance measurement of phosphorus contributions by agriculture. There is no assessment tool available to translate these phosphorus reductions to percentage reductions across the watershed. Therefore, there is no way to determine compliance with the specific phosphorus reduction goal of 77%, and the Commission recognized this when it approved the current methodology.

The Phosphorus Loss Assessment Tool measures phosphorus loss at the edge of a management unit, such as a field, but does not measure delivered load to surface waters. A 2010 survey of PLAT results conducted in the watershed indicates that the average PLAT rating for agriculture land in the Falls Lake watershed is very low (<0.35 lbs/ac/yr) meaning potential contributions

from agricultural land to waters in the Falls Lake watershed are likely very low. The WOC will continue to track the phosphorus loss indicators and evaluate trends in the annual reports as required by the methodology approved by the Commission in the separate agriculture rule.

Conclusion

NCFB is very concerned about the proposed changes to the agriculture NSW rules. These changes could mean loss of support for the nutrient reduction rules by farmers, if they are faced with individual mandates as would be much more likely under these proposed rule changes.

Thank you for your consideration of these comments. NCFB may have additional concerns, but these are the major questions and concerns identified based on our review of the agriculture rules to date. NCFB looks forward to working with you throughout the stakeholder process on revisions and improvements to the rules.

If you have questions, please contact us.

Sincerely,



Keith Larick
Special Projects Director

From: Grady McCallie [<mailto:grady@ncconservationnetwork.org>]

Sent: Friday, April 10, 2015 8:07 AM

To: Gannon, Rich; Huisman, John

Cc: Andrew Sachs; Peter Raabe (praabe@americanrivers.org)

Subject: RE: April NSAB Meeting - Agenda

Rich –

I had hoped to attend today, but between the legislative session (with Crossover 3 weeks away), and being one person down (our new Policy Analyst starts late April), I can't pull away from legislative work today. Peter Raabe is out on parental leave, so environmental NGOs will be unrepresented – I'm sorry. I'll call to check in later today or on Monday.

In the meantime, I've read the materials. The floating wetlands looks good – though I've little expertise to evaluate the numbers.

The trading rule concepts look great, and if I were there, I'd emphasize three points (please feel free to share if it is useful for the discussion):

- The policy that “unlike compensatory mitigation, any public or private party may develop a nutrient offset bank” is smart and I strongly support it. That will increase flexibility and alternatives. It also means meaningful reporting to and close oversight by DENR will be especially important, to ensure that ‘bad’ credits – from cheap but ineffective projects by fly-by-night operators – don't undercut well-designed and more expensive credits.
- In general, it makes sense to allow a lot of flexibility and experimentation, BUT that makes reporting of ‘as built’ and effectiveness and maintenance data particularly important – needs to be available to DENR, but ideally, in form that is easily available to other interested parties (like river advocates) with a minimum of extra effort by DENR, the cities, or the consultant. Some kind of standard online reporting could be really helpful.
- I strongly endorse the need for financial and legal measures to sustain the practices for their intended duration – and especially non-wasting endowments for permanent practices.

Overall, this looks like a really strong concept. I'll look forward to catching up after the meeting.

Best,
Grady

From: Barbara Oslund [mailto:bloqresources@gmail.com]

Sent: Tuesday, May 19, 2015 5:48 PM

To: Huisman, John

Cc: Sue Gray

Subject: Re: Informal 30 Day public Comment Period Open for Falls Lake Rules Re-adoption

The NC Horse Council (NCHC) is the voice of the North Carolina equine industry, serving over 50,000 equine operations in the state. We represent the equine agricultural industry on both the Falls and Jordan Lake Watershed Oversight Committees (WOC). We offer the following comments on the draft revised agricultural rules affecting the watersheds of Falls Lake, Jordan Lake, the Tar-Pamlico River and the Neuse River.

Animal thresholds

We continue to oppose the threshold of 5 equines in three of the four agricultural rules, and recommend all the agricultural rules adopt the 20 equine threshold currently in the Tar-Pamlico rule. There is no nutrient-related basis for the equine number being low in comparison to the other species identified. The more stringent equine threshold is not solely supported by nutrient contribution. The use of thresholds in general and specifically for equines is overly simplistic and does not account for the size and management variability between equine livestock and other livestock produced for food. Adopting the 20 equine threshold in all the agricultural rules would encompass operations that potentially release more nutrients to the watershed. These larger operations may also have better eligibility for cost share funds and to match those funds through their business practices, compared to a small farm/owner of five horses.

Practice Standards

Language requiring that BMPs conform to NRCS or SWCC standards has been added to all four agriculture rules. The NRCS requirements are over-scaled and costly for equine agriculture. This is particularly punishing to equine agriculture since most operations would self-finance BMPs due to limited NC agricultural cost share funds and no federal funding.

Membership of WOCs

In many of the rules, the WOC membership has been amended to add environmental interests. We believe that (non-agency) farming interests should at least match or exceed the number of environmental interests in these rules. Agricultural input on the WOCs is critical to the success of the agriculture rule.

Falls Lake Phosphorus Reduction Goal

We support the repeal of the phosphorus reduction goal in the Falls Lake Agriculture Rule, particularly because there is no assessment tool available to translate phosphorus reductions to percentage reductions across the watershed. As a result, there is no way to determine compliance with the phosphorus reduction goal.

Annual Baseline Recalculation

We oppose agriculture having to annually recalculate its baseline. This change would mean that agriculture in general would be annually comparing its reductions to the crops, fertilization rates, BMPs, etc. in place during the previous year, rather than to the designated baseline currently in the rules. This is practically impossible for equine agriculture as there are essentially no data collected, setting up our members for passive non-compliance. We recommend that all nutrient sources are compared to the baseline year in each basin or watershed.

County-Level Compliance

We do not support county-level compliance in addition to the basin-wide collective compliance. The collective compliance approach was designed to allow agriculture to meet its reduction goals without individual farm by-farm mandates. This change would mean that farmers in a county not meeting the county reduction would have to meet an individual mandate, even if the collective mandated reductions in the basin, watershed or sub-watershed are being met.

BLOQ Resources, PLLC
Barbara L. Oslund, P.E.
(919) 454-8162

From: Will Hendrick [mailto:whendrick@selcnc.org]
Sent: Wednesday, June 10, 2015 5:08 PM
To: Gannon, Rich; Huisman, John
Cc: Manning, Jeff
Subject: Comments re: Proposed Revision of Nutrient Management Strategies

Dear Mr. Gannon and Mr. Huisman,

Thank you for the opportunity to provide comments on the proposed revisions to the nutrient management rules. I am writing to submit comments on behalf of Sound Rivers, the Haw River Assembly, and the Southern Environmental Law Center. We reviewed the proposed changes and have these following suggestions. Consistent with the manner in which those changes were presented at the DWR stakeholder meeting, our comments are organized by topic. Thanks for your thoughtful consideration of these suggestions and for your service to the people of North Carolina. Please let me know if you have any questions about the recommendations made below.

Best,
Will Hendrick

Selected Goose Creek Rules (15A NCAC 2B .0601-.0604)

We have no objections to the proposed changes to the Goose Creek Rules discussed at the stakeholder meeting (i.e., 15A NCAC 2B .0601 through .0604), and support technical corrections designed to reflect, for instance, the repeal of 15A NCAC .0609 and the reorganization of DWR.

We do recommend, however, a minor clarifying change in 15A NCAC 02B .0604. Pursuant to that rule, “[f]or any direct or indirect discharge that may cause ammonia toxicity to the Carolina heelsplitter freshwater mussel, action shall be taken to reduce ammonia (NH₃-N) inputs to achieve 0.5 milligrams per liter or less of total ammonia based on chronic toxicity defined in [Rule .0202 of this Subchapter].” Rule .0202 defines “chronic toxicity to aquatic life,” so it might be clearer to reference the defined phrase. Also, it should be clear that the goal is to *avoid* chronic toxicity to these mussels. Please consider revising the quoted language to read “. . . action shall be taken to reduce (NH₃-N) inputs to achieve 0.5 milligrams per liter ~~or less~~ of total ammonia or less a lower concentration where necessary to prevent chronic toxicity to aquatic life based on chronic toxicity as defined in [Rule .0202 of this Subchapter].”

“Goals” Rules (15A NCAC 2B .0275, .0262., & .0232)

15A NCAC 2B .0275

Generally speaking, we support DWR’s stated goal of recodifying relevant definitions to make them “easier to find.” Care should be exercised, however, not to define words or phrases in ways that will increase the very confusion the Division seeks to avoid. For instance, in the proposed .0275(2)(a), the Falls nutrient strategy should not be defined to include 15A NCAC 02B .0282 if, as is currently the case, DWR proposes to repeal 2B .0282. Also, we understand that DWR intends to increase clarity by referencing, where possible, the general definitions of terms provided in 2B .0202. Again, we generally support the goal of additional clarity that might be attained by having a single definition of a word or phrase repeated throughout Subchapter 2B. However, DWR should exercise caution before simply substituting the 2B .0202 definitions. For instance, the definition of “existing development” in .0202 (which is proposed for amendment to essentially reference only activities permitted prior to August 3,

1992) is very different than the Falls-specific definition of existing development provided in the current 2B .0276 (which references activities that do not require a permit, and states different relevant time periods for activities that do). As such, elimination of the definition specific to Falls Lake may be unwise and ultimately lessen clarity in existing regulations. In instances such as this, we recommend retention of definitions that include language specific to a particular nutrient management strategy.

We question DWR's justification for the proposed deletion of numerically defined allowable loads to the Falls reservoir in (the new) subsection (4). According to DWR, removing this language would eliminate the "need for rule revisions in response to more accurate future supplemental monitoring." However, DWR's proffered justification would apply with equal force to the "estimated" requirement of 40% reduction in nitrogen and 77% reduction in phosphorus loads to meet existing water quality standards, as it is equally conceivable that "supplemental modeling" would suggest alteration of these estimates. Indeed, this is implicitly recognized in DWR's proposed revisions to (the new) subsection (6)(f)(iv) that would, as amended, specifically contemplate rulemaking to revise reduction goals in response to supplemental modeling. Rather than eliminate clear rules to accommodate hypothetical future modeling (or academic studies, or scientific discoveries, or statutory changes, etc.), we recommend that DWR instead amend rules when, and only when, a legitimate reason to do so actually materializes. Regulatory specificity should not be sacrificed solely to avoid procedural requirements, and regulatory flexibility may not be desirable when achieved by lessening clarity or public input.

We also recommend against the proposed deletion, in (the new) subsection (6)(a), of the requirement for DWR to assess "attainment of nutrient related water quality standards downstream of Highway NC 98 crossing of Falls Reservoir no later than January 15, 2016." Similarly concerning was the proposed amendment of (the new) subsection (6)(B) to delay the report currently required to be submitted in January 2016 (to the EMC *and the public*) until January 2021. It is not clear that DWR has conducted the attainment study or reported to the EMC and the public as would otherwise be required next year. Both actions were presumably contemplated to provide updates, in 2016, on the effects of implemented portions of the Falls Rules and new developments in relevant science, to inform next steps. As amended, .0275 would not require any progress reports until January 2021, when the Rules contemplate full achievement of Stage I goals. It seems imprudent to forego evaluation of progress toward a stated goal and instead merely evaluate, at the deadline, whether the goal was achieved. Doing so would eliminate opportunity for corrective action that could increase the likelihood of attaining the stated goal. As such, we recommend retention of the assessment and reporting language identified above.

15A NCAC 02B .0262

We support the proposed recodification of Jordan-specific definitions from 2B .0263 to this Rule to accommodate DWR's proposed use of 2B .0263 as the default NMS Definition rule. However, as discussed above, we recommend against conflating definitions of "existing development," as that term tends to be defined in the strategy rules with reference to watershed-specific dates and qualifiers. Once again, we object to the proposal to strip another nutrient strategy of all specificity with regard to total allowable loads, point source wasteload allocations, or nonpoint source allocations and instead simply reference reduction "goals." DWR again claims this amendment is designed to avoid rulemaking motivated by supplemental modeling. This logic remains flawed. The agency should not forego precision for fear of future rulemaking.

Inexplicably, DWR also proposes to eliminate (the current) subsection 9, which notes that the Rules do not account for atmospheric nitrogen deposition. The subsection continues to state that, as scientific

understanding of the impacts and practical limitations of atmospheric nitrogen improves, the EMC *may* undertake rulemaking to limit these sources as part of an overall nutrient strategy. In other words, as written, the rule essentially just says “this strategy might have a few holes, and the EMC can fill them later if/when it learns better how to do so.” Recognition of the limitations, and the opportunity to remove limitations, in a management strategy is important, and we encourage DWR to retain the language currently in subsection (9). This is particularly true where atmospheric deposition of nitrogen is a significant source of nitrogen enrichment and the Rules are designed to in part to reduce nitrogen loading to the reservoir. Yet, DWR makes no attempt to justify the removal of this language (and notably did not propose to repeal substantially similar language in 2B .0275(1)). We are therefore reluctant to endorse this change without additional explanation of its perceived necessity.

15A NCAC 02B .0232

We recommend changing “and” to “or” in the proposed amendment of subsection (b). This minor revision would recognize that failure to meet the requirements of *any* of the Neuse Rules could result in the imposition of enforcement measures.

New Development Stormwater (15A NCAC 02B .0277, .0265, .0258, .0235)

15A 02B .0277

We recommend defining the term “development products” if DWR intends to use that phrase to replace reference to “development projects,” as doing so would help clarify when the rule applies. (Note: this recommendation also applies to 2B .0265, in which DWR also proposes to reference “products” where the rule currently references “projects”).

We understand that all local governments subject to this rule have submitted, and received EMC approval of, stormwater management plans. However, DWR should afford local governments the flexibility to submit, and seek EMC approval of, new stormwater management plans if/when they so desire. Instead, DWR proposes to codify reference to the “plans approved by the Commission in January 2012.” If that language is adopted, rulemaking might be necessary to reference any subsequently approved stormwater management plans that supersede those approved in January 2012. Given DWR’s stated reluctance to engage in rulemaking, we recommend revision of the relevant language to state “Local governments shall implement stormwater management programs according to plans approved by the Commission that include the following elements and standards contained in Item (4) of this Rule.” Alternatively, borrowing from proposed language in subsection (5), the suggested revision might read “. . . plans approved by the Commission in January 2012 or any subsequent modifications to those plans approved by the Director . . .,” especially given DWR’s proposal, in (5)(b), to require approval by the Director of “any significant modifications to a local government’s program.” That said, we are concerned by the absence of opportunity for public comment on major modifications if only approval by the Director is required. As such, we would prefer approval by the EMC or, alternatively, recommend additional language contemplating notice and the opportunity for public comment before Director approval of significant plant modifications.

DWR proposes to move, and slightly amend, language currently in subsection (4)(a) to a new subsection (4)(b). The new paragraph would retain reference to the “loading calculation method called for in Sub-Item (5)(a) or equivalent method acceptable to the Division.” Currently, (5)(a) talks about DWR’s creation of a model stormwater program including “a tool that will allow developers to account for nutrient loading from development lands and loading changes due to BMP implementation to meet the requirements of Items (3) and (4) of this Rule.” However, DWR proposes to amend “Sub-Item (5)(a)” to

delete that language. If amended as proposed, (5)(a) would make no reference whatsoever to any loading calculation method. As such, we that recommend that the proposed language in (4)(b) be amended to reference a “loading calculation method approved by the Commission or the Division.”

We are very concerned by the proposal to allow new development to cause up to a 10% net increase in peak flow leaving the site in the 1-year, 24-hour storm event. (NOTE: this recommendation against the 10% allowance applies to similar proposals to allow an increase in peak flow leaving the site elsewhere in the Falls Rules, e.g., 15A NCAC 02B .0281(3)(a)(v), as well as similar proposals under the Jordan Rules, 15A NCAC 2B.0265(3)(v) & 15A NCAC 2B .0271(5)(a)(iii), Tar-Pamlico Rules, 15A NCAC 2B .0258(c)(1)(I) (as proposed for addition), and the Neuse Rules, 15A NCAC 2B .0235(3)(a)(vi) (as proposed for amendment)). Currently, no increase in peak flow is permitted, so as “to ensure that the integrity and nutrient processing function of receiving water and associated riparian buffers are not compromised by erosive flows.” 15A NCAC 2B .0277(4)(f). Indeed, in some jurisdictions, erosion caused by anticipating only the 1-year, 24-hour storm event instead of planning for the impacts of a larger storm (e.g., 5-year or 10-year, 24-hour storm event) ultimately motivated a return to more preventative measures (Example: the City of Greenville went through a year-long stakeholder process before ultimately returning to consideration of the 5-year and 10-year, 24-hour storm event after the initial Tar-Pam rules lowered the standard to require consideration of only the 1-year, 24-hour storm event and subsequent development resulted in numerous erosion issues.). Yet, DWR claims that the 10% allowance is intended to afford flexibility where “existing site conditions provide for necessary flow attenuation.” If that is the case, the rule should make that clear by requiring confirmation of necessary flow attenuation before the 10% allowance is granted. This confirmation should include documentation of the flow attenuation measures in place as well as evidence that the contemplated increase in peak flow leaving the site will not result in additional nutrient loading caused by increased erosion attributable to additional flow (indeed, current rules prohibiting peak flow increases for the 1-year, 24 hour storm event are described as “minimum” steps necessary to ensure that “new development shall not cause erosion of surface water conveyances.” See 15A NCAC 2B .0258(c)(1)(C)) . Without these common-sense limitations, we fear that the 10% allowance will become the development default, regardless of whether “existing site conditions” mitigate associated environmental risk, and that erosion and or buffer impacts will lead to increase nutrient loading in the basin, thereby frustrating the very purpose for which the nutrient management strategies were adopted. .

15A NCAC 2B.0265

We understand that all local governments subject to this rule have submitted, and received EMC approval of, stormwater management plans. However, DWR should afford local governments the flexibility to submit, and seek EMC approval of, new stormwater management plans if they so desire. Instead, DWR proposes to codify reference to the “plans approved by the Commission in May and September 2012.” If that language is adopted, rulemaking might be necessary to reference any subsequently approved stormwater management plans that supersede those approved in September 2012. We recommend a revision to reference “programs as approved by the Commission in May and September 2012 or any subsequent modifications to those plans approved by the Director . . .,” especially given DWR’s proposal, in (4)(b), contemplating approval by the Director of “any significant modifications to a local government’s program.” However, we are concerned by the absence of opportunity for public comment on major modifications if only approval by the Director is required. As such, we would prefer approval by the EMC or, alternatively, recommend additional language contemplating notice and the opportunity for public comment before Director approval of significant plant modifications.

In the new proposed nutrient trading rule, DWR proposes to delete the requirement that new developers meet onsite reduction requirements enumerated in 2B .0265 before obtaining offsite credit. We do not understand it to be DWR's intent that "buyers" in the new trading regime no longer meet these onsite reduction requirements, given the inclusion, in the new 2B .0273, of language limiting trading as part of nutrient strategies "to the extent allowed by those rules" and additional reference to general "buyer responsibilities." However, 2B .0265 does not mention "trades" or "trading," so we recommend the addition of language in the new 2B .0265(x) clarifying that a developer cannot make a "trade" under 2B .0273 (or an offset payment under 2B .0240, which should be clear given existing reference to "offset options," "offsetting measures," and "offsetting reductions") without first meeting minimal onsite reductions. (NOTE: This recommendation for clarification that onsite reductions are required before offsetting via "trading" as described in 2B .0273 can occur applies equally to the Falls Rules (see the proposed 2B .0277(c)), the Tar-Pamlico Rules (see 2B .0258(c)(1)(D)), and the Neuse Rules (see the proposed 2B .0235(3)(a)(iii)).

15A NCAC 2B.0258

We support DWR's proposal to add 9 local governments to the list of those to which the Tar-Pamlico Rules apply. Yet, in the same rulemaking, DWR proposes to delete the language in (b)(3) acknowledging the EMC's authority to "designate additional local governments as subject to this Rule by amending this Rule based on the potential for those jurisdictions to contribute significant nutrient loads to the Tar-Pamlico River." Also proposed for deletion is language stating relevant factors that must be considered before making such additional designations (these factors are important, as we heard at the stakeholder meeting, to explain to newly added jurisdictions why the agency felt it necessary to regulate them). DWR's recommended expansion of the scope of affected local governments demonstrates that additional designations may be necessary to achieve the nutrient management goals of these Rules, so we recommend against eliminating the language in (b)(3).

Many of the local governments subject to this rule have submitted, and received EMC approval of, stormwater management plans. However, DWR should afford local governments the flexibility to submit, and seek EMC approval of, new stormwater management plans if they so desire. Instead, DWR proposes to codify reference to the "plans approved by the Commission in March 2004." This is particularly problematic given the proposed addition of new local governments to the list of those to which the Tar-Pamlico rules apply, as they presumably did not submit plans for EMC approval in 2004. If the proposed language is adopted, rulemaking might be necessary to reference any subsequently approved stormwater management plans that supersede those approved in March 2004, or any plans approved for newly-added jurisdictions. We recommend, at minimum, a revision to reference "programs as approved by the Commission or any subsequent modifications to those plans approved by the Director . . .," especially given DWR's proposal, in (d)(4), contemplating approval by the Director of "any significant modifications to a local government's program." However, we are concerned by the absence of opportunity for public comment on major modifications if only approval by the Director is required. As such, we would prefer approval by the EMC or, alternatively, recommend additional language contemplating notice and the opportunity for public comment before Director approval of significant plant modifications.

Generally, we support the idea of requiring attainment of minimal on-site nutrient load reductions before becoming eligible to use offset payments. However, given the goal of these rules, we believe it important to attain a minimum phosphorus export rate, rather than only a minimum nitrogen export rates. Also, it appears that the reference, in the new subsection (c)(1)(G) , to "(G) of this subparagraph"

was meant to reference section (H) of this subparagraph. If so, a minor revision would correct this oversight.

We question the decision to eliminate implementation timelines instead of altering them to ensure progress by the 9 jurisdictions DWR proposes to require to implement stormwater management programs. Under the current rule, local governments were given 18 months after the Commission's approval of a model local stormwater program to adopt and implement an approved local stormwater program of their own. Given that the EMC model program exists, we recommend retention of language in subsection (d)(3) stating that "within 18 months of a local government's later designation pursuant to (b)(3), subject local governments shall adopt and implement their approved local stormwater management plan."

We recommend retention of language in subsection (e) stating that failure to implement an approved local program "shall" require administration of stormwater requirements through the NDPEs municipal stormwater permitting program. The proposal to change "shall" to "may" decreases the incentive to implement plans, and appears to grant the Division discretion to refuse to undertake necessary protective measures.

15A NCAC 2B .0235

We support DWR's proposal to add 13 local governments to the list of those to which the Neuse Rules apply. Yet, in the same rulemaking, DWR proposes to delete the language in subsection (3) acknowledging the EMC's authority to "designate additional local governments by amending this Rule based on their potential to contribute significant nutrient loads to the Neuse River." DWR's recommended expansion of the scope of affected local governments demonstrates that additional designations may be necessary to achieve the nutrient management goals of these Rules, so we recommend against eliminating the language in (3). Indeed, we recommend addition of language, such as that currently in 2B. 0258(b)(3) stating relevant factors that must be considered before making such designations.

Many of the local governments subject to this rule have submitted, and received EMC approval of, stormwater management plans. However, DWR should afford local governments the flexibility to submit, and seek EMC approval of, new stormwater management plans if they so desire. Instead, DWR proposes to codify reference to the "plans approved by the Commission in March 2001." This is particularly problematic given the proposed addition of new local governments to the list of those to which the Neuse rules apply, as they presumably did not submit plans for EMC approval in 2001. If the proposed language is adopted, rulemaking might be necessary to reference any subsequently approved stormwater management plans that supersede those approved in March 2001, or any plans approved for newly-added jurisdictions. We recommend a revision to reference "programs as approved by the Commission or any subsequent modifications to those plans approved by the Director . . .," especially given DWR's proposal, in (4)(e), contemplating approval by the Director of "any significant modifications to a local government's program." Again, however, we believe it important, if approving significant modifications, for the Director to afford opportunity for public notice and comment prior to making a final decision.

We recommend the addition of implementation timelines to ensure progress is made by the 13 new jurisdictions DWR proposes to require to implement stormwater management programs. Given that an approved EMC model program exists, we recommend addition of language stating that "within 18 months of a local government's designation pursuant to (b)(3), the local government shall adopt and

implement a local stormwater management plan approved by the Commission, including any modifications approved by the Director.”

Existing Development Stormwater (15A NCAC 02B .0266, .0278)

15A NCAC 02B .0266

We support the flexibility afforded under newly proposed section (12) to enable cooperative cross-jurisdictional approaches to nutrient management.

15A NCAC 02B .0278

While we understand proposed revisions to delay implementation of the Jordan Rules, given the legislative mandate to do so, we object to DWR’s decision to delay implementation of provisions in the Falls rules, especially given the absence of legislative commandment. The Division was required (under the existing Rule) to submit a Stage I model local program to the EMC in July 2013. DWR failed to meet the deadline, and now proposes to wait until March 2017. Obviously the EMC does not intend to impose consequences for this delay, but moving the deadline unnecessarily relieves any immediate pressure on DWR to complete the work that is now almost 2 years overdue. Similarly, we object to the proposals to delay the dates by which local governments must take action to develop programs and track measures to reduce nutrient loads. Progress toward implementation of a nutrient strategy is far less likely when deadlines are ignored or pushed back when they are violated. At an absolute minimum, we recommend retention of the current January 2021 deadline for implementation of the local government Stage II load reduction programs.

State and Federal Entities

15A NCAC 02B .0271

(see comments above objecting to the allowance for 10% increase in peak flow)

15A NCAC 02B .0281

(see comments above objecting to the allowance for 10% increase in peak flow)

We believe it important to regularly evaluate the accuracy of accounting methods used to determine applicable loading reductions. Currently, the rule requires this evaluation every 5 years, beginning in 2016. DWR proposes to “periodically” (i.e., “no less frequently than every 10 years”) conduct this review. We recommend retention of the 5-year review cycle, and clarification of when the first review is required.

Definitions

15A NCAC 02B .0263

Given the proposed repeal of 2B .0276, and continued reference to “atmospheric nitrogen” in various nutrient strategies, we support the addition of the definition of that term (as currently stated in .0276) in 02B .0263.

Trading and Nutrient Offset

15A NCAC 02B .0273

We recommend omission of the word “all” in the last sentence of the proposed section (1)(b). Nutrient trading under 2B .0273 should be available as an option to offset the cost of excess reductions achieved

through load reducing activities, and those achieving such reductions should be entitled to trade resulting credits even when unable to find a trading partner willing/able to purchase “all credits” achieved through that practice. Indeed, to maximize the incentive to achieve additional credits, DWR should encourage trading where identification of multiple trade partners would enable additional cost recovery. (NOTE: Relatedly, we question the definition of “nutrient offset” proposed in 2B .0240 insofar as it would seem to call a “trade” something different simply because multiple trade partners were identified by a seller subject to nutrient reduction rules).

We support the availability of trading as an option to meet nutrient reduction goals, but recommend retention of language in (the current) section (1) stating prerequisites for certain potential traders (and revision as necessary to reference applicable rules outside of the Jordan nutrient strategy). Persons engaged in agricultural operations or new development and/or proposing new or expanding discharge of wastewater should at least be required to take minimal steps to reduce nutrient loading caused by their activity before qualifying for nutrient trading, and elimination of reference to those steps in 2B. 0273 should only occur to the extent these qualifying steps are clearly stated in other Rules. The ambiguous reference to “any prerequisite conditions established in the nutrient rules” is insufficient to identify precisely which steps must be taken before engaging in nutrient trading.

We are concerned by the elimination of certain language recognizing the need for accurate accounting when engaging in nutrient trading (DWR literally proposes to delete every mention of the word “accounting” in the current Rule). Perhaps the intent is to allow for the creation of different accounting tools under various nutrient strategies; if so, that should be clearly stated through reference to the appropriate accounting tool rather than general reference to “requirements of the nutrient rules.” Regardless, sellers should provide for “accounting and tracking methods that ensure genuine, accurate, and verifiable achievement” of appropriate nutrient reduction (see current 2B .0273(3)). This should include submission of information accounting for “relative uncertainties in reduction needs estimates and excess loading reduction estimates” (see current 2B. 0273(2)(d)).

Generally, we support efforts to enable nutrient trading by agricultural operations. However, we are concerned by the proposal to allow the rules governing such trades to escape public notice and comment procedures that would normally precede such regulation. The reference in the proposed section (7) to “trading provisions” established in strategy agriculture rules is somewhat misleading, as those rules merely contemplate creation of unspecified trading criteria and processes by a separate entity (i.e., a Watershed Oversight Committee or Basin Oversight Committee).

15A NCAC 2B .0240

We recommend against defining “nutrient offset” by reference to a sale “to more than one person,” particularly if, as is currently proposed, “trading” is defined to contemplate only a sale of “all” credits to a single buyer.

We support the provision of additional language requiring specific documentation of financial, structural, and legal measures to ensure sustainability of reductions.

Agriculture (15A NCAC 02B .0238, .0256, .0264, & .0280)

15A NCAC 02B .0238

Under the current regime, regulated agricultural operations can either agree to implement “their portion” of a “county nitrogen reduction plan” or instead implement specified BMPs. This approach

prevents free-riders by requiring some contribution to nutrient reduction by all regulated operations. It also ensures that those contributions are made in a timely fashion. Moreover, the current rules specify “standard” BMPs that could be implemented by those foregoing the collective compliance option.

We are concerned that, in contrast to the current regime, DWR’s proposed rule revisions would decrease specificity, enable free-riders, and potentially delay required nutrient reduction by agricultural operations. Under the proposal, individual agricultural operations would literally have no specified reduction nutrient reduction requirements. Instead, DWR proposes to eliminate existing *reduction* requirements in exchange for *reporting* requirements. While the stated goal would still be 30% reduction of collective agricultural nutrient contributions, the proposed rule focuses on documenting progress toward that goal rather than actually requiring steps to achieve it.

First, the proposed rule language lacks a clear consequence for failure by agricultural operations to meet the 30% nutrient loading reduction goal. Indeed, in the proposed (3)(b), the assumption is that reports will “demonstrate maintenance or exceedance” of the requirements. Only if county-level data repeatedly demonstrates collective failure to meet reduction goals in a county, despite the fact that “agriculture has achieved the reductions called for,” would the BOC “seek reduction actions” and report on their efforts. The rule is silent as to what happens if agriculture *has not* achieved the reductions called for. We recommend that additional reduction actions be required in that instance. Notably, under the proposed rule, only if *continued* county-level non-compliance is reported would the EMC seek “a more specific implementation plan from the BOC.” And only pursuant to BOC recommendations, and at the EMC’s discretion, would specific requirements be imposed on agricultural operations (note: In contrast, if the BOC/LOC fails to issue the required reports, then the EMC “shall” require BMP implementation, underscoring the focus on reporting). In sum, the rule assumes general compliance and does not contemplate specific measures to correct non-compliance until years of data demonstrate a need for corrective action. At bare minimum, the rule should impose consequences when a report submitted by a BOC or LOC shows that agriculture collectively failed, at the county level, to attain nutrient reduction goals for that sector.

We recommend removal of reference to “up to” two environmental seats on the Basin Oversight Committee, as we are confident that at least 2 qualified representatives of environmental interests will be nominated and suited for service, and believe it important to increase representation of those interests on the Committee. Similarly, we recommend addition of language requiring representation of environmental interests on Local Advisory Committees.

We recommend retention of language requiring the LOC’s annual report to include reference to “increases or decreases in nitrogen loading resulting from changes in land use or modified agricultural related activity.” The proposed substitution of reference to “crop acres and fertilization rates” would not capture increases or decreases in nutrient loading from other relevant activity.

Finally, we recommend against removing language identifying best management practices for reducing nitrogen loading by agricultural operations in the basin. Instead, requiring implementation of these BMPs would be a reasonable response to data showing collective failure of agricultural operations to meet reduction goals. After all, these BMPs were initially designed as measures to be taken by those not engaged in the collective compliance efforts, as a backstop to ensure all operations were doing their part. If county-level data says that, collectively, all operations are not doing their part (or if agricultural efforts have proven insufficient to reduce nitrogen loading), it would make more sense to require

implementation of well-established, fully fleshed out, BMPs rather than asking the BOC to seek undefined “reduction actions.”

15A NCAC 02B .0256

We object to the removal of language recognizing that the current nutrient strategy fails to account for atmospheric emissions of ammonia. This is particularly true given that deposition of nitrogen is a significant source of nitrogen enrichment and agricultural expansion has led to increasing ammonia emission/deposition.

We recommend changing the applicability threshold under (b)(3) to be consistent with other nutrient management strategies for agriculture. First, we recommend revising the rule to ensure its applicability to anyone engaged in the production or management of “5 or more” horses (excluding young). The current rule puts the threshold at “20 or more horses.” However, the Falls and Jordan rules utilize the five horse threshold, and DWR proposes to add that threshold to the Neuse Rules. Similarly, we recommend revision to ensure applicability to one engaged in the production or management of “20 or more swine not kept in a feedlot, or 150 or more swine kept in a feedlot.” As written, the rule only applies to those raising “150 or more swine” regardless of where the animals are kept. Here again, the Falls and Jordan rules set the threshold at “20 or more swine not kept in a feedlot, or 150 or more swine kept in a feedlot.”, and DWR proposes to add that threshold to the Neuse Rules. We recommend the necessary amendments in the Tar-Pam rules to make them applicable to the same scope of agricultural operations as other nutrient management strategies.

Even as amended, the Rule would state a goal of “no increase in phosphorus loading from 1991 levels.” As such, we are concerned that, under proposed rules addressing “maintenance of goal,” there is no mention of the phosphorus goal and instead exclusive focus on reporting progress toward nitrogen reduction goal attainment. (Similarly, the rule stating the required contents of annual reports submitted by LACs makes no mention of phosphorus and only references nitrogen losses and reductions). We believe that the rule should include language enabling DWR to track and ensure consistent attainment of phosphorus loading goals. Relatedly, we are concerned by the shift from requiring quantitative data about phosphorus loading (the current rules require the BOC to quantify both the baseline P loads from agricultural operations and provide for “quantification of changes in nutrient loading”) to the far less precise qualitative evaluation of “broader trends in indicators of phosphorus loss.” This is particularly objectionable given that DWR’s proposed amendments enabling the trade of nutrient reduction credits clearly contemplates the ability to quantify phosphorus reductions. If, as this amendment implicitly concedes, phosphorus reductions can be quantified for the purpose of trading, then phosphorus reductions can also be quantified for the purpose of evaluating compliance. And because it is possible to quantify progress toward the stated phosphorus reduction goal, we believe DWR should require the most accurate measure of tracking compliance. (Note: The proposed rule states that the method used to evaluate “trends in indicators of phosphorus loss” should reference “factors affecting agricultural phosphorus loss as identified by the phosphorus technical advisory committee established under Rule .0256(f)(2)(c) of this Rule.” We recommend that reference be made to specific factors affecting agricultural phosphorus loss, especially because DWR proposes to delete “Rule .0256(f)(2)(c) in its entirety.)

We recommend removal of reference to “up to” two environmental seats on the Basin Oversight Committee, as we are confident that at least 2 qualified representatives of environmental interests will be nominated and suited for service, and believe it important to increase representation of those

interests on the Committee. Similarly, we recommend addition of language requiring representation of environmental interests on Local Advisory Committees.

In addition we recommend amending the role of the Local Advisory Committee to include tracking, modeling, and reporting not only nitrogen loss reductions but also phosphorus loss reductions. The proposed section (e)(3) would entirely ignore the phosphorus component of the overall nutrient strategy in the basin.

Finally, we are concerned with the proposed shift in regulatory focus from ensuring some effort on the part of the agricultural community to reduce nutrient loading to instead simply requiring reports that might, at some unspecified time, in an unspecified way, require future reductions. As discussed above regarding the Neuse Agriculture rule, the proposal says nothing about what specifically should happen if required county-wide reductions by agricultural operations *are not* attained. We believe such data should give rise to immediate requirements for additional nutrient reduction actions. Instead, the rule proposed would, in the face of county-wide failure to meet nutrient goals, require years of data showing continued county-wide problems before even contemplating a possible requirement of additional reduction actions by agricultural operations.

15A NCAC 02B .0264

The Jordan rules were designed to achieve a 5% reduction in P loading in the Upper New Hope and Haw River arms and maintenance of current P loads in the Lower New Hope arm of the reservoir. 15A NCAC 2B .0262. The Watershed Oversight Committee was tasked with developing “tracking and accounting methods for nitrogen and phosphorus loss.” 15A NCAC 2B 0264. The new (5)(c) should reference a “nitrogen or phosphorus loss reduction target.” As proposed, it references a “nitrogen or pasture loss reduction target.”

We support the addition of language in the new (6)(d) requiring certain permittees in the Jordan watershed to take specific steps to minimize the potential for nutrient loading to surface waters.

We object to the reduction in representation of “environmental interests” on the WOC from three seats to two.

To ensure consistency in strategies, we recommend retention of the BOC/LAC model in the Jordan Rules. Under the current rule, an LAC would not be created unless a county fails to meet its nitrogen goal. (Note: We believe failure to meet the phosphorus goal in a county should also warrant formation of an LAC) Although the EMC found that N & P goals were met “through calendar year 2010,” there is no justification offered by DWR for the assumption that this will remain true in perpetuity. As other nutrient management strategies recognize, the creation of an LAC is useful option to enable the BOC to implement necessary nutrient reductions when goals are not attained. DWR should leave that option available, even if there is no current need to exercise it, to enable prompt response in any future instance of noncompliance. That said, both here and elsewhere, we would like to see language contemplating additional involvement by DWR/EMC if the BOC/LAC model is incapable of implementing necessary aspects of the broader nutrient management strategy (for instance, due to comparative lack of funding, personnel, or technical support).

Unlike the Neuse and Tar-Pam rules, the Jordan Rules contemplate action if data demonstrates failure to meet the agriculture nutrient reduction goal in a subwatershed. We support this common sense recognition of the need for rules to clarify consequences when goals are not met. That said, we remain

concerned by the delayed response when, despite agricultural nutrient reductions, a county still fails to meet N or P goals. We remain concerned that, as in the Neuse and Tar-Pam rules, DWR proposes to wait up to 4 years before the EMC would impose “implementation requirements on operations.”

15A NCAC 2B.0280

We strongly recommend removal of language in Section (4) stating that this rule does not apply to “dedicated land application sites permitted under 15A NCAC 02T .1100.” This limitation is not included in any other nutrient management strategy and risks exempting agricultural operations that contribute significant nutrient loads to the watershed. At minimum, DWR should clarify that the exemption is not available for activities “deemed permitted” under 2T .1103.

We strongly oppose the proposed elimination of provisions measuring or requiring progress toward attainment of the phosphorus goal. The rule would still ostensibly seek “to achieve and maintain the percentage reduction objectives defined in 15A NCAC 02B Rule .0275 of this Section for the collective agricultural loading of nitrogen and phosphorus from their respective 2006 baseline levels.” 15A NCAC 02B .0280(1). However, DENR proposes to eliminate the existing requirement of a “40 percent reduction in phosphorus loading relative to the 2006 baseline by 2020” and a 77% reductions by 2035. By eliminating these goals from (5)(a) and (5)(b), DWR also relieves the LAC of the requirement to report on “agriculture’s success in complying with the load reductions described” therein. Moreover, DWR proposes to eliminate rules requiring responses when phosphorus goals are not met. Removing the phosphorous reduction requirement from 15A NCAC 02B .0280(5) places an unfair burden on nonagricultural entities to achieve the required phosphorus loading reductions and is contrary to the stated goal of the overall nutrient strategy. DWR should not ignore agriculture’s contribution to phosphorus loading in the watershed by refusing to measure or report it.

(Note: The proposed rule states that the method used to evaluate “trends in indicators of phosphorus loading” should reference “factors affecting agricultural phosphorus loss as identified by the phosphorus technical advisory committee established under Rule .0256(f)(2)(c) of this Rule.” We recommend that reference be made to specific factors affecting agricultural phosphorus loss, especially because DWR proposes to delete Rule .0256(f)(2)(c) in its entirety.).

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From: Gray Jernigan [<mailto:gjernigan@waterkeeper.org>]
Sent: Friday, May 22, 2015 4:31 PM
To: Gannon, Rich; Huisman, John
Cc: Matthew Starr
Subject: Comments on Nutrient Sensitive Water Strategy Rules Readoption

Dear Mr. Gannon and Mr. Huisman,

On behalf of Waterkeeper Alliance and the Upper Neuse Riverkeeper, thank you for the opportunity to comment during the rules readoption stakeholder process. We offer these limited comments related to certain provisions of the Nutrient Sensitive Water Strategy Rules. Our primary objection relates to removal of phosphorous reduction requirements for agriculture located in the Falls Reservoir Water Supply referenced at 15A NCAC 02B .0280(5). Removal of this requirement is wholly inconsistent with the purpose of the rule, which is "to achieve and maintain the percentage reduction objectives defined in 15A NCAC 02B Rule .0275 of this Section for the collective agricultural loading of nitrogen **and phosphorus** from their respective 2006 baseline levels." 15A NCAC 02B .0280(1) (emphasis added).

There is no defensible justification for this abrupt policy change. Concerns expressed by DENR staff at the stakeholder meeting on May 19, 2015, cited the difficulty of modeling phosphorus movement from agriculture operations. While it may be true that modeling phosphorus loss or determining agriculture's contribution to phosphorus loading in the watershed will be hard work, the fact that it is often difficult to control pollution does not mean it should be ignored or exempted from state laws. It is entirely feasible to calculate reliable loadings using scientifically proven methods and a number of scientifically valid models are available. However, since DENR is aware that phosphorus from agricultural sources are contributing to the water quality problems, the more immediate, reasonable and scientifically sound approach would be to limit land application of fertilizer and animal manure to the amount of phosphorus needed to grow crops. Currently, animal feeding operations are allowed to apply animal manure to land far in excess of the amount needed for crop growth and soil phosphorus levels have been allowed to build up to unsafe levels. This fact can be easily documented by a basic review of soil test results accessible to DENR. This practice is contributing, and will contribute for many years, to downstream water quality problems. There is no legitimate agricultural reason to allow phosphorus application in excess of crop need, and it must stop now if DENR ever hopes to address phosphorus related water quality problems, as it is very difficult and takes many years to reduce soil phosphorus levels once they are allowed to become excessive.

DENR should require animal feeding operations to limit land application to the standard agronomic crop requirements published by North Carolina State University and others. This would directly reduce phosphorus loading from animal feeding operations. According to the North Carolina Department of Agriculture and Consumer Services document entitled Understanding Your Soil Test Report, <http://www.ncagr.gov/agronomi/pdffiles/ustr.pdf>, no crop response to phosphorus application is expected once soil phosphorus levels are reach high levels (a PI of 51 or greater). For fields with a high P-I (51-100), the manure application rate should be limited to phosphorus removal from the site in the harvested crop, and for fields with a very high P-I (over 100), no phosphorus application should be permitted.

Additionally, NCDENR must require operations covered by the rule as defined at 15A NCAC 02B .0280(4) to conduct a survey using the Phosphorus Loss Assessment Tool (PLAT) and report the results to the Watershed Oversight Committee (WOC). The compiled results would give an a usable quantification of phosphorus loading from agriculture and would identify areas to focus loss reduction efforts. This is imperative as phosphorus is usually the limiting nutrient in freshwater aquatic systems, and adequate regulation of phosphorus loss is necessary to prevent further eutrophication.

This approach is consistent with 15A NCAC 02B .0280(6), which requires that “animal waste application . . . to lands within the Falls watershed be done in a manner that minimizes the potential for nitrogen and phosphorus loading to surface waters by . . . apply[ing] phosphorus in compliance with guidance established in the most recent version of North Carolina Agricultural Research Service's Technical Bulletin 323, ‘North Carolina Phosphorus Loss Assessment: I Model Description and II. Scientific Basis and Supporting Literature’ developed by the Department of Soil Science and Biological and Agricultural Engineering at North Carolina State University. The Division shall modify all existing permits for affected lands to include these requirements upon their next renewal after effective date, and shall include these requirements in all new permits issued after effective date. Permittees shall be required to comply with this condition upon permit issuance or renewal as applicable.”

Furthermore, simply removing the phosphorus reduction requirement from 15A NCAC 02B .0280(5) places an unfair and costly burden on municipal and other permitted point source dischargers that will shoulder the impossible responsibility for achieving the entire phosphorus reduction goal in the watershed and will require significant investments in technologies and infrastructure. Without holding agriculture accountable for its contribution to phosphorus loading in the watershed, the stated goal of the rules may never be achieved, and to effectively ignore agriculture’s contribution by refusing to measure or model it runs counter to the Division’s mandated duties.

Thank you for your time and consideration.

Sincerely,

Gray Jernigan, Waterkeeper Alliance
Matthew Starr, Upper Neuse Riverkeeper

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