

July 12, 2011

Via Electronic Mail

NC EMC Members

Dear Commissioners,

Please accept the following comments from the Pamlico-Tar River Foundation, Environmental Defense Fund, and Neuse Riverkeeper Foundation regarding the consolidated buffer rules under consideration at this week's EMC meetings.

Due to the recent legislative changes regarding rulemaking and continued concerns by numerous stakeholders, it is our recommendation that the EMC strongly consider tabling the consolidated buffers rules. Our concerns are further heightened by the recent loss of DENR staff and resources coupled with the mandated Neuse and Tar-Pamlico Buffer Rules study required in Session Law 2011-394. We believe that the existing buffer rules continue to provide adequate water quality protection and that moving forward with the consolidated buffer rule package is not the best use of limited staff resources at this time.

If, however, the EMC chooses to move forward with the consolidated buffer rules, we have included comments below regarding several items of concern.

Summary

The comments below provide greater detail for our recommendations for the following:

- Require written documentation of the no practical alternatives analysis;
- Extend the buffer protection rules to include coastal headwater drainages and unmapped streams;
- Include wetlands when calculating buffer mitigation requirements;
- Support option 3 regarding buffer, nutrient offset and stream mitigation credit .0295(l)(5) (listed as (k) incorrectly in draft rules);
- Support of Option 1 to delete the General Major Variance provision in 15A NCAC 02B.0292(6)(f);
- Amend variance section to include existing Tar-Pamlico and Neuse River basin buffer rules wording.

Ensure Proper Avoidance

The purpose of the riparian buffer rules are to "protect and maintain existing riparian buffers." 15A NCAC 02B.0290(1). That purpose is reflected in the "no practical alternatives" requirement, which is intended to ensure that buffer impacts be avoided if at all possible. Under current rules and carried forward in the draft consolidated buffer rules, the no practical alternative language does not require DWQ to adequately document alternatives (or the lack thereof) and is not applied to all buffers that are currently providing water quality benefits (specifically those buffers in coastal headwater drainages and unmapped buffers.) These weaknesses can be rectified by requiring greater documentation of alternatives to a proposed project and extending the protection of buffer rules to all buffers that are eligible to be used for mitigation credit.

A) Documentation of Alternatives

To better clarify the no practical alternatives process we recommend the following amendments to Section .0292(5)(c):

Within 60 days of receipt of a complete application that addresses Sub-Item (5)(b) of this Rule, the Authority shall review the entire project and make written findings of fact as to whether the criteria in Sub-Item (5)(a) have been met. The findings of fact shall identify the alternatives considered and briefly describe why each

alternative was not practical. A finding of “no practical alternatives” shall result in issuance of an Authorization Certificate if the applicant satisfies other applicable requirements. The findings of fact shall be attached as an exhibit to the Authorization Certificate.

B) Provide Protection to coastal headwater drainages and unmapped streams

As currently written, the buffer rules do not provide protection to all buffers that are currently providing water quality benefits. However, the consolidated rules would allow for mitigation credit for restoration of buffers not protected by the rule, including buffers along coastal headwater streams and buffers on streams that do not appear on maps. Riparian buffers that provide water quality functions that merit mitigation credit when restored also warrant protection in their natural state. DWQ has determined that for mitigation purposes these systems are identifiable and provide a water quality benefit. By not protecting them, the consolidated rules ensure that the water quality benefits they provide will be lost without compensation.

Therefore, we recommend amending section 15A NCAC 02B.0290(3)(a) to read:

This Rule shall apply to activities conducted within, or outside of with hydrologic impacts upon, 50-foot wide riparian buffers directly adjacent to surface waters in the listed river basins or watershed (coastal headwater drainages, intermittent streams, perennial streams, lakes reservoirs and ponds), excluding wetlands.

Then the use of additional information within the Randleman Reservoir watershed in section .0290(3)(c)(iv) should be expanded to all watersheds regulated by the rule.

Additionally, if there is site specific evidence other than Sub-Items (i) through (iii) that indicates to the Authority the presence of waters, those waters shall be subject to this rule.

Include Wetlands in Buffer Mitigation Calculations

The current draft rules eliminate the requirement for mitigation of the function of wetlands within buffers (see 15A NCAC 02B .0295(d)(3)). As such, this rule change ensures that more square footage of buffers will be lost and water quality will continue to decline. Under this rule change, a wetland within the 50-foot buffer could be destroyed and then mitigated with wetlands that are not adjacent to rivers, thereby losing the protective filtering capacity of the buffer that was destroyed. The current Neuse and Tar-Pamlico Water Quality Plans correctly point out that nonpoint source pollution is a significant threat to our North Carolina’s waterways, and riparian buffers are an essential and cost-effective tool in protecting and improving water quality.

Avoid Credit Stacking

To avoid credit stacking, we support option #3 regarding buffer, nutrient offset and stream mitigation credit under .0295(l)(5) (listed as (k) incorrectly in draft rules). When calculating stream or buffer mitigation credit, a single square foot of land should not yield both stream and buffer credit. If a buffer is required to obtain stream credit to compensate for the loss of a stream at a given project, that buffer cannot also be used to compensate for loss of a buffer at another project. In that scenario, the buffer cannot mitigate for both impacts and a net environmental loss occurs.

Delete General Major Variance Provision

Riparian buffers in a watershed have the greatest water quality benefit when they are widespread and continuous. Even small breaks in a buffer can degrade water quality. The General Major Variance provision is a significant loophole that would impede efforts to maintain and protect riparian buffers throughout the watersheds that are covered by the rules. Significant and widespread activities in the buffer are already

categorized as exempt, allowable, or allowable with mitigation in the Table of Uses. In addition, the variance procedures provide an outlet for those few landowners who would be genuinely and significantly disadvantaged by the rules. Finally, DWQ's enforcement of the Coastal General Major Variance has been lax and the agency has issued variances for applications that violate the variance requirements. There is no reason to believe that DWQ would more rigorously enforce a future General Major Variance. Therefore we support option #1 which deletes the General Major Variance provision in 15A NCAC 02B.0292(6)(f).

Variance Language

An additional substantial change to the Neuse and Tar-Pamlico buffer rules can be found in the consolidated variance language. The draft variance section excludes an important provision, that "The applicant did not purchase the property after the effective date of this Rule, and then request an appeal." We strongly recommend that this language be included in the draft consolidated rules.

We appreciate your consideration of our comments.

Sincerely,
/s/

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