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Subject: FW: NCLM comments re: buffer rules package Date: Wednesday, July 13, 2011 9:40:07 AM

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Sent: Friday, July 08, 2011 5:07 PM

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Subject: NCLM comments re: buffer rules package

Hello Commissioners,

Thank you for accepting these comments regarding the buffer rules package included on next week's Water Quality Committee and full Commission agendas. I will look forward to answering your questions, whether by email or in person at next week's meetings.

1. **NEW FISCAL ANALYSIS REQUIREMENTS.** First, League members appreciate the rulemaking uncertainties that have arisen in response to regulatory reform legislation passed earlier this year. In acknowledgement of those uncertainties, particularly as it relates to the requirements for fiscal analysis of proposed rules, League members ask that you consider the following observations as you deliberate this rule package.

League members stand in support of the analysis offered to you from another group with a majority local government membership, the Neuse River Compliance Association. This analysis suggests that the fiscal note provided to you by DWQ staff is incomplete, especially given the new requirements posed to rulemaking bodies in N.C. Gen. Stat. §143-279.16 and §150B-19.1.

2. **EFFECTS IN NEUSE, TAR-PAM RULES AREAS.** With respect to the consolidated buffer rules, it is easy to understand how certain costs and benefits could be overlooked and result in the incomplete analysis in the fiscal note. This rule consolidates the language of four separate sets of existing buffer rules. Two of them – the Neuse and Tar-Pam rules – are over a decade old. The other two – Jordan Lake and Randleman rules – are more recent and were modeled on the Neuse and Tar-Pam rules. But because DWQ staff used the more recent Jordan Lake buffer rules as the starting template, the differences in rule language for those local governments currently operating under the Neuse or Tar-Pam rules are not shown as new (underlined) or removed (strikethrough) language in the rule package provided to you. Yet please consider that this group of regulated parties will experience more programmatic changes (and potential costs or benefits) than those already subject to the Jordan Lake and Randleman rules.

In a line-by-line comparison of the proposed consolidated buffer rules and the older Neuse

and Tar-Pam rules, League staff identified 110 substantively different provisions. Those differences are not evident by reading the rule language included in this package. **Of those**110 differences between the current and proposed rules, here are some of the most significant changes affecting local governments:

- a. **Exemptions language**: Section .0290(5)(b) does not contain any new (underlined text), yet subsections (i) and (ii) would be new requirements for those regulated entities currently under the Neuse and Tar-Pam rules. This language would limit the exemption of certain activities, including water and sewer line maintenance by local government utilities. If enacted, in one instance, the utility ratepayers in the City of Raleigh would fund the clearing of vegetation in the over 30 miles of utility lines that are currently not regularly maintained. In addition, ratepayers would also fund the additional costs stemming from disputes with property owners in older sections of the city who resist the utility's maintenance efforts. Such disputes have taken place in the past and represent a viable social cost that under the new fiscal note requirements should be accounted for. However, the costs of these changes are not calculated in this rule package.
- b. **Definitions:** Most of the definitions in the new Section .0291 do not appear in the Neuse or Tar-Pam rules. Some of the proposed definitions contain specifics that could give rise to a need for a local government to pay mitigation for the same activity that would not require mitigation under the current rules. For example, the parks departments in many local governments construct greenways. The definition of "greenway" in Section .0291(13) is an entirely new definition for those currently subject to the Neuse and Tar-Pam rules. If a local government decides to construct a greenway meeting this definition, it may have to pay mitigation fees for the activity. Currently, the Neuse and Tar-Pam rules allow construction of greenways to occur without any mitigation requirements. The costs of this change are not quantified in the fiscal note provided with this rule package.
- c. **Table of uses:** The preamble to the table of uses in Section .0292(3) is not treated as new (underlined) language, though it is new to those now subject to the Neuse or Tar-Pam rules. It states that activities outside the buffer, but which impact the buffer, are subject to the prescribed mitigation requirements of the table of uses. Because this is new language for the Neuse and Tar-Pam rules areas, it is possible that activities now allowed without mitigation will become subject to mitigation requirements. The costs and benefits of these changes are not captured in the fiscal note provided with this rule package.
 - i. Drainage ditches, roadside ditches and stormwater conveyances through riparian buffers: In a departure from the Neuse and Tar-Pam rules, the proposed language in this use requires new or altered ditches and outfalls to control for "nutrients." In the Neuse and Tar-Pam rules, regulated entities must only control for nitrogen. If controls must treat for "nutrients" such as nitrogen and phosphorus going forward, this may require additional engineering and design work as well as more costly

- control options. The costs and benefits of these changes are not captured in the fiscal note provided with this rule package.
- ii. **Greenway:** Under the Neuse and Tar-Pam rules, a greenway was listed as exempt from buffer mitigation requirements. This rule lists greenways as "potentially allowable" or "potentially allowable with mitigation." The change could increase the project costs for some greenway projects and should be included in the fiscal note for this rule package.
- iii. Pedestrian access trails and associated steps leading to the surface water, docks, canoe/kayak access, fishing piers, boat access trails, boat ramps and other water dependent activities: Many of the local governments subject to the Neuse and Tar-Pam rules offer public pedestrian access to the waters running through their jurisdiction for water dependent activities. Yet the current buffer rules in these areas do not prescribe mitigation requirements for those uses. Due to the proliferation of water dependent activities, especially in the eastern areas of the state now subject to the Neuse or Tar-Pam rules, the costs and benefits of requiring mitigation for these uses should be included in the fiscal analysis of this rule package.
- iv. Restoration/enhancement (wetland, stream); utility, electric, aerial, other than perpendicular crossings; utility, electric, underground, other than perpendicular crossings; water wells: Local governments subject to the Neuse and Tar-Pam rules engage in all of these activities: restoring wetlands and streams, maintaining or repairing their municipal-owned electric power systems, or drilling water wells for public water supply. All of these uses are exempt under the Neuse and Tar-Pam rules, but in the proposed rules would be "potentially allowable" or "potentially allowable with mitigation." When engaging in a use that is not in the exempt category, the local government must take additional steps to demonstrate a finding of "no practical alternatives," a process which increases the costs of engaging in that particular activity. In addition, in some cases, the local government may have to pay mitigation costs, whereas they do not currently. The costs and benefits of these additional steps should be included in the fiscal analysis of this rule package.
- 3. CONSOLIDATED BUFFER RULES TABLE OF USES PREFERENCE FOR OPTION 2: In the consolidated buffer rules, League members support "Option 2" under the use of "Utility, non-electric, other than perpendicular crossings." Section .0292(3). This option does not contain the requirement to have conducted maintenance activities in water and sewer utility easements within the past ten years in order to have those maintenance activities exempt from mitigation requirements. Keeping maintenance of these utilities free of any requirements that could dramatically increase the costs of the activity, as proposed in Option 2, makes for smart public policy. Utilities conduct this maintenance in accordance with their wastewater collection system permits, and the maintenance prevents much

more impactful environmental harms, such as sanitary sewer overflows. Allowing utilities to direct their scarce resources toward utility line maintenance rather than mitigation represents a positive environmental trade-off.

4. FLEXIBLE BUFFER MITIGATION RULES – SUPPORT FOR PROVISIONS: In the flexible buffer mitigation rules, League members support maintaining current DWQ practices. For example, in Section .0295(e), League members support Option 2. And in Section .0295(k)(5) ("Accounting for buffer credit, nutrient offset credit and stream mitigation credit"), League members support Option 1 [NOTE: It appears this section is mislabeled as section (k), and instead should be section (I)]. With both of these practices, League members believe DWQ's current approach allows the most flexibility for meeting mitigation obligations in areas where mitigation options may not be readily available. Finally, League members support the alternative buffer mitigation option in Section .0295(k)(2)(D), allowing for narrower buffers on urban streams. Finding buffer mitigation sites in urban settings is very difficult, and by allowing for a narrower buffer, the proposed rule would ensure that more buffer activities can take place in already-developed urban areas.

Thank you, Erin

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