

Consolidated Buffer Mitigation Rule 15A NCAC 02B .0295



August 14, 2014

Purpose for Proposed Temporary Rule

☞ Required by SL 2014-95

☞ EMC shall adopt a Buffer Mitigation Rule no later than October 1, 2014.

☞ Required by G.S. 143-214.20

☞ EMC to adopt rules concerning “Construction of an alternative measure (of buffer mitigation) that reduces nutrient loading as well as or better than the riparian buffer that is lost.”

Benefits of Proposed Rule



- ❧ Easier to understand
- ❧ Consistent across basins/watersheds
- ❧ Greater flexibility for compliance
- ❧ Increases number of sites and options for buffer mitigation
 - ❧ Provides value to communities, homeowners and developers
- ❧ Consistent with the principles in Executive Order 70 and SB781

History



- œ Process started within DWQ in 2006
- œ Four formal stakeholder meetings in 2009/2010
 - œ February 9, 2009
 - œ December 11, 2009
 - œ April 6, 2010
 - œ April 19, 2010
- œ Several smaller meetings with subsets of stakeholders on specific topics

2009 / 2010 Stakeholders



- ❧ Catawba Riverkeeper Foundation
- ❧ Charlotte Stormwater Services
- ❧ NC DOT
- ❧ Earthmark
- ❧ EBX
- ❧ EEP
- ❧ EMC
- ❧ Environmental Defense Fund
- ❧ Environmental Heritage Investors
- ❧ Hunton and Williams
- ❧ Kilpatrick Stockton
- ❧ Kimley-Horn
- ❧ Louis Berger Group
- ❧ NC Farm Bureau
- ❧ NC League of Municipalities
- ❧ Neuse Riverkeeper Foundation
- ❧ Pamlico-Tar River Foundation
- ❧ PCS Phosphate
- ❧ Restoration Systems
- ❧ Southern Environmental Law Center

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- ❧ Restoration Systems

Timeline



September 2009 to November 2012	Presented at 11 WQC Meetings
November 2012	EMC approved 15A NCAC 02B .0295 and repeal of six existing rules for public notice/comment
January 15, 2013 to March 18, 2013	Public Comment Period
February 6, 2013	Public Hearing in Raleigh
February 12, 2013	Public Hearing in Greenville

Commenter Index



<u>Index Number</u>	<u>Commenter</u>	<u>Representing</u>	<u>Type of comment</u>
1	Abrahm, Mark	Forsite Capital	written
2	Allden, Tara	Restoration Systems, LLC	oral
3	Alvis, Jerry	Self	written
4	Dorney, John	Self	written
5	Ellison, Michael	NCEEP	written
6	Gisler, Geoffrey	Southern Environmental Law Center on behalf of the Pamlico-Tar River Foundation, Haw River Assembly, the Yadkin Riverkeeper, and the North Carolina Conservation Network.	written
7	Hermann, Mike	Watershed Investments NC	written
8	McLawnhorn, Daniel	Neuse River Compliance Association	written
9	Paugh, Leilani	NCDOT	written
10	Smith, Ross	PCS Phosphate Company, Inc.	oral and written
11	Wynia, Erin	NC League of Municipalities	written
12	Zarzecki, Robert	Self	written

Timeline (cont.)



September 2009 to November 2012	Presented at 11 WQC Meetings
November 2012	EMC approved 15A NCAC 02B .0295 and repeal of six existing rules to go out to public notice
January 15, 2013 to March 18, 2013	Public Comment Period
February 6 & 12, 2013	Public Hearings in Raleigh & Greenville
May 9, 2013	EMC adopted Rule 15A NCAC 02B .0295 and repeal of six existing rules

Current Buffer Rules vs. 2013 EMC Rule



Current Mitigation Options



- ❧ Restoration or Enhancement of a “non-forested riparian buffer”
- ❧ Payment of fee to the Riparian Buffer Restoration Fund or approved mitigation bank
- ❧ Donation of Real Property

Long-Term Stewardship



- ∞ Conservation easement in perpetuity
- ∞ Transfer of property to a local land trust, local govt., or state organization (Stewardship, NCWRC, etc.)
- ∞ Non-wasting endowment sufficient to ensure long-term monitoring and maintenance

Mitigation Locational Ratios



	Within 12-digit HUC	Within 8-digit HUC	Adjacent 8-digit HUC
Current	1:1	1:1	N/A
2013 Rule	0.75:1	1:1	2:1

Public Noticed with 3 different options

Credit Accounting



∞ Current:

∞ Allow buffer and stream mitigation with separate accounting on same site

∞ 2013 Rule:

∞ Allow buffer and stream mitigation with separate accounting on same site

Public Noticed with 3 different options

Existing Sanitary Sewer Easements in Proposed Buffer Mitigation Sites



∞ Current:

- ∞ If sewer easement is present in either Zone 1 or 2, the area within the easement is NOT suitable for mitigation

∞ 2013 Rule:

- ∞ If sewer easement is present, no credit within easement for Zone 1.
- ∞ Credit for Zone 2 portion of easement provided that Zone 1 outside easement is restored, Zone 2 is vegetated and diffuse flow maintained

Public Noticed with 2 different options

Alternative Mitigation Options (non-structural/vegetative)

- ❧ Coastal Headwater Stream Mitigation Sites
- ❧ Non-Subject Streams – Buffer Restoration/Enhancement
- ❧ Narrower Buffers on Urban Streams
- ❧ Enhancement of Grazed Forested Riparian Areas
- ❧ Buffer Preservation
 - ❧ Non-Subject Streams – 5:1
 - ❧ Preservation of Subject Streams (Rural) – 10:1*
 - ❧ Preservation of Subject Streams (Urban) – 3:1*

* Public Noticed with 2 different options

Alternative Mitigation Options (structural/BMPs)



- ❧ Restoration or enhancement required to offset footprint of impact prior to using structural options
- ❧ New BMPs or Retrofits/Expansions of existing BMPs required by other rules cannot be used
- ❧ BMP must provide at least 30% total N and 35% total P removal
- ❧ Must follow Stormwater BMP Manual
- ❧ Requires bonding and endowment for long-term monitoring and maintenance

Other Alternatives



- ❧ Considered on a case-by-case basis
- ❧ Must meet or exceed nutrient removal functions of riparian buffer impacted
- ❧ Must meet other requirements related to bonding, O&M and long-term endowment
- ❧ Public notice and comment period
- ❧ DWR presents recommendations to EMC

Retroactive Credit for Alternatives



- ∞ Projects that have been constructed and are within required monitoring period are eligible
- ∞ Projects that have been completed and released from monitoring requirements on or before the effective date of the Rule are eligible for a period of ten years from the effective date of the rule

Public Noticed with 2 different options

Timeline (cont.)



May 9, 2013	EMC adopted Rule 15A NCAC 02B .0295 and repeal of six existing rules
June 19, 2013	RRC meeting
July 18, 2013	RRC approved rule; more than ten letters of objection were received

2013 / 2014 Stakeholder Group



Stakeholder Group



- ❧ After the Rule was objected to, DENR requested DWR to assemble a stakeholder group to resolve the objections to the rule
 - ❧ Stakeholder group included seven members
 - ❧ Met between October 2013 and March 2014
 - ❧ Prepared a stakeholder report which included the group's recommended rule language for 15A NCAC 02B .0295



REFORMS NEEDED IMMEDIATELY IN THE REGULATION OF RIPARIAN BUFFER MITIGATION

- ① Riparian Buffer Mitigation Widths – the Ironclad 50' Standard

DWQ rules state that riparian buffer mitigation projects must be “a minimum width of 50 feet”. DWQ interprets this rule so that no mitigation credits can be generated from buffer restoration or enhancement work that occurs greater than 50' from the watercourse. This interpretation violates the three main tenets of the DENR Mission Statement. Perhaps most egregiously, DWQ staff intentionally ignores the overwhelming body of science that conclusively demonstrates increased water quality benefits with increased buffer widths out to about 200 feet (a fact duly recognized in the nutrient offset rules).

 - ⓐ • Proposed improvement: DWQ should interpret “a minimum of 50 feet” as it is written. Allowing buffer mitigation projects greater than 50 feet from watercourses and recognizing full mitigation credit up to 200 feet is reasonable on most mitigation sites. This improvement will greatly expand the opportunities to improve water quality, reduce costs, and bring consistency between DWQ's riparian buffer and nutrient rules which both have the same goal of improving water quality. This improvement can be made without legislation or rule making.
 - ⓑ • Proposed improvement: The rules should be modified or legislation passed to change the rule to state a “minimum of 30 feet”. Zone 1 (0-30 feet) arguably the most critical buffer protection area for the removal of sediment and nutrients, and also important for channel stability. Allowing mitigation credit to be generated from narrower buffer restoration and enhancement projects will greatly expand project opportunities.

Stakeholder Discussion List



- ❧ The “Ironclad” 50’ standard
- ❧ Conducting restoration/enhancement on unmapped streams
- ❧ Conducting restoration/enhancement on ephemeral streams
- ❧ Conducting restoration/enhancement on ditches
- ❧ Stream calls on mapped streams
- ❧ Restoration success criteria – native hardwood trees
- ❧ Restoration success criteria – planted stems
- ❧ Restoration and enhancement criteria – measuring density
- ❧ Diffuse flow across entire buffer
- ❧ Existing stormwater outfalls
- ❧ Requiring no practical alternative demonstration for alternative mitigation
- ❧ Physiographic province definition
- ❧ Locational ratios
- ❧ Donation language

Summary of Changes from EMC's 2013 Rule



Anticipated Costs and Benefits



- ⌘ Per G.S. 150B-21.4, a fiscal note is required only when adopting a permanent rule
 - ⌘ An analysis of the anticipated costs and benefits of this temporary rulemaking was not performed
- ⌘ Anticipate adopting a permanent rule to replace this temporary rule
 - ⌘ Fiscal analysis will be performed in conjunction with the permanent rulemaking

No Substantive Changes



∞ The following paragraphs had no changes other than fixing punctuation or updating citations:

(a) Purpose

(c) Application Requirements, Mitigation Site Requirements and Mitigation Options

(d) Area of Impact

(g) Geographic Restrictions on Location of Mitigation

(j) Purchase of Buffer Mitigation Credits from a Private or Public Mitigation Bank

(k) Payment to the Riparian Buffer Restoration Fund

(n) Accounting for Buffer Credit, Nutrient Offset Credit and Stream Mitigation Credit

(b) Definitions



- œ Removed definitions no longer in the Rule
 - œ “Off-site”
 - œ “On-site”
 - œ “Physiographic province”

- œ Added definition for “riparian buffer mitigation unit”

(e) Area of Mitigation Required
on Zonal Mitigation Ratios
and
(f) Area of Mitigation Required
on Locational Mitigation Ratios

☞ Split out Zonal and Locational ratios into their own paragraphs

☞ Converted paragraph text to a table

(h) Riparian Buffer Mitigation Units

- ∞ Consolidated the various mitigation ratios that were spread throughout the rule
- ∞ Converted paragraph text to a table
- ∞ Changed the enhancement ratio from 3:1 to 2:1

(i) Riparian Buffer Restoration or Enhancement



- œ Consolidated and converted paragraph text to a table
- œ Clarified mitigation credits beyond 50-feet
- œ Clarified requirements for existing stormwater conveyances
- œ Reduced the number of tree species from five to four
- œ Clarified that mitigation providers provide ledgers to DWR

Buffer Mitigation Widths



Current Rule and 2013 Rule:

Buffer width (ft.)	Percentage of Full Credit
50-100	100%
101-200	25% for area > 100 ft.

Stakeholder Rule:

Urban Areas		Non-Urban Areas	
Buffer width (ft)	Proposed % of Full Credit	Buffer width (ft)	Proposed % of Full Credit
Less than 20	0 %	Less than 20	0 %
20-29	75 %	20-29	0 %
30-100	100 %	30-100	100 %
101-200 ^A	50 % ^A	101-200 ^A	50 % ^A

^A The area of the mitigation site beyond 100 linear feet from the top of bank shall comprise no more than 10% of the total area of mitigation.

(1) Donation of Property



- ❧ Clarified that donated property could be suitable for restoration, enhancement or preservation
- ❧ Cleaned up language to allow for restoration, enhancement or preservation
- ❧ Clarified who the title/easement shall be donated to
- ❧ Changed requirement for a title certificate to a complete attorney's report on title

(m) Alternative Buffer Mitigation Options

- ❧ Removed requirement to demonstrate no practical alternative to traditional buffer mitigation
- ❧ Split out requirements for restoration/enhancement on non-subject streams from preservation requirements
- ❧ Cleaned up language for preservation
- ❧ Removed paragraph for narrower buffers on urban streams as this is now in Paragraph (i) of the Rule
- ❧ Changed requirement for BMP annual reports to a Certificate of Completion

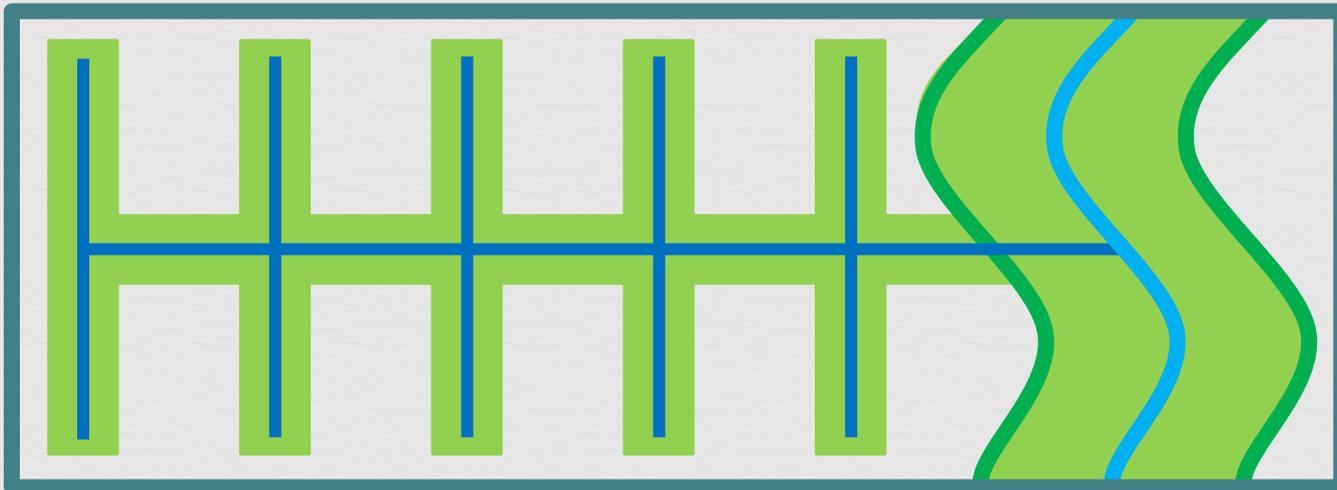
(m) Alternative Buffer Mitigation Options

- ∞ Added an alternative for mitigation on ephemeral channels
 - ∞ Defined ephemeral channel for this Rule
 - ∞ Defined criteria:
 - ∞ Area proposed for mitigation must drain to ephemeral channel
 - ∞ Must be directly connected to a stream
 - ∞ Must be contiguous with rest of mitigation site
 - ∞ Must be part of conservation easement
 - ∞ Cannot be more than 25% of the total area of mitigation

(m) Alternative Buffer Mitigation Options

- ❧ Added an alternative for restoration/enhancement on ditches
 - ❧ Defined ditch for this Rule
 - ❧ Defined criteria:
 - ❧ Must be directly connected & draining towards a stream
 - ❧ Must be contiguous with rest of mitigation site
 - ❧ Must be part of conservation easement
 - ❧ Ditch must have been in place prior to buffer rule
 - ❧ Width of restoration/enhancement must be between 30 and 50 feet
 - ❧ Watershed draining to ditch shall be four times greater than the mitigated area along the ditch

Watershed draining to ditch shall be four times greater than the mitigated area along the ditch



Temporary Rulemaking Schedule



Aug. 14, 2014	EMC Meeting – request to public comment
Aug. 22, 2014	Rule and Notice of Hearing published online
Aug. 28, 2014	Public Hearing in Raleigh
Sept. 12, 2014	Public Comment Period ends
Sept. 30, 2014	EMC meeting – request adoption of temporary rule
Oct. 16, 2014	RRC Meeting
Oct. 31, 2014	Effective date of temporary rule
Nov. 17, 2014	Temporary rule published in Register
Aug. 14, 2015	Expiration of Temporary Rule

Permanent Rulemaking Schedule



Fall 2014	DWR work on fiscal note
Nov. 2014	WQC – info item on permanent rule?
Jan. 2015	WQC – request approval to go to EMC
March 2015	EMC – request to public comment with rule and fiscal note
April to June 2015	Public Comment Period
May 2015	Public Hearing on permanent rule
July 2015	EMC adopts permanent rule; submit to RRC
Sept. 2015	Permanent rule becomes effective

Request



œ DWR requests permission to proceed to public notice and public hearing with the proposed temporary *Mitigation Program Requirements for the Protection and Maintenance of Riparian Buffers* Rule (15A NCAC 02B .0295)