September 17, 2014

DENR Rule Comments
1601 Mail Service Center
Raleigh, NC 27699

RE: Amend the 15 NCAC 02R rules to incorporate market-based pricing, improve prioritization and focus on stream and wetland functions.

Dear Review Committee:

The North Carolina Ecosystem Enhancement Program (EEP) is a nationally recognized model for stream and wetland mitigation. EEP has contracted with private entities for over $500 million in mitigation projects, supporting both private development and public infrastructure improvements by providing an efficient way to comply with the federal Clean Water Act.

These comments outline ways to further improve EEP by amending the 15 NCAC 02R rules to:

- Put a stronger focus on replacing stream and wetland functions.
- Plan and prioritize mitigation projects based on ecosystem functional needs.
- Modify EEP's fee structure to incorporate market-based pricing to better reflect the actual cost of mitigation and encourage competition among mitigation providers.

Purpose of the Basinwide Restoration Plan (2R.0201)

Over the past decade EEP has shifted from a focus on designing and building mitigation projects to the more appropriate role of ensuring private mitigation providers and mitigation banks result in functional improvement for streams and wetlands. Therefore, the existing stated purpose in 2R.0201, "the purpose of the Basinwide Restoration Plans is to identify wetlands and riparian areas..." is outdated and should be amended to focus on setting mitigation goals and priorities based on the functional needs (i.e. hydrologic, hydraulic, geomorphic, physiochemical and biological needs) of each river basin.

The Basinwide Restoration Plans continue to be a vitally important tool for EEP to identify functional improvement priorities in each river basin. Amending the purpose of Basinwide Restoration Plans will give private mitigation providers greater flexibility while still

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ensuring that mitigation projects provide the water quality and ecosystem functions required by the federal Clean Water Act.

Components of a Basinwide Restoration Plan (2R.0202)

The components of a Basinwide Restoration Plan should also change to reflect the new purpose of the plans as discussed above. Specifically, the "identification of areas that have the potential..." (0202(a)(3)) and the "identification of wetland and reparian [sic] areas..." (0202(a)(4)) should be replaced with components requiring the identification of ecosystem needs and opportunities for functional uplift. The major component of the Basinwide Restoration Plans should be identification of functional improvement priorities for each river basin.

EEP should not duplicate DWR's assessment of water quality in the Basinwide Restoration Plans. To the extent the Division of Water Resources' water quality river basin plans continue to provide a comprehensive assessment of water quality conditions and identify sources of water quality impairment, EEP can rely on those plans as the foundation for prioritizing water quality needs. Additional planning for other ecosystem functions should be undertaken by EEP or other DENR agencies as needed to complete a Basinwide Restoration Plan.

Since Basinwide Restoration Plans would no longer be focused on identifying specific sites in a river basin for restoration, enhancement or preservation projects, 2R .0202 (a) (3), (4) and (5) can be deleted. Similarly, 2R .0202(b) is outdated and can be repealed.

Compensatory Mitigation – General. (2R.0301)

The rule should be revised to change what it means to be "consistent" with a Basinwide Restoration Plan. If the purpose of the Basinwide Restoration Plan changes as recommended above, a mitigation project would no longer be found consistent with the plan based on its location "in an area that is identified as a priority for restoration". That language should be deleted from the rule. A proposed mitigation project should be evaluated based on the project's ability to effectively address functional improvement goals and mitigation priorities identified in the Basinwide Restoration Plan.

Note: 2R.0302 and 2R.0403 contain language about consistency with the Basinwide Restoration Plan that is similar to the language currently in 2R. 0301 and would need conforming changes.

The EMC should add language to 2R.0301 that links mitigation credit to the effectiveness in replacing stream or wetland function (e.g. biological, physiochemical, hydrologic function). Mitigation credits should be calculated based on the amount of functional improvement created by a given practice or activity, not just on the number of wetland acres or linear stream feet restored. Determining 'functional feet' requires an assessment of the different stream functions (e.g. biology, physicochemical, hydrology, etc.) based on measurements of certain parameters, rather than a simple quantitative measure of feet or acres. Shifting to a function based crediting system will create new opportunities for adoption of innovative, flexible and more efficient mitigation practices.

Schedule of Fees (2R.0402)

The current practice of setting specific fee amounts in the rule does not allow compensatory mitigation fees to accurately reflect market-based costs. Without a responsive schedule of fees, EEP's pricing model undercuts private mitigation providers and mitigation banks.

The law authorizing the compensatory mitigation program, G.S. 143-214.11, directs the EMC to adopt a schedule of fees based on "the ecological functions and values of wetlands and streams permitted to be lost *and on the cost of restoring or creating wetlands and streams capable of performing the same or similar functions, including directly related costs of wetland and stream restoration planning, long-term monitoring, and maintenance of restored areas.*"

The state's Administrative Procedures Act requires fees to be established by rule, but a fee can be "established" (as in the case of the nutrient offset fees) by adopting a rule that creates a formula based on statutory factors and sets a schedule for updating the fees to reflect current cost data. The EMC's fee rule for the nutrient offset program (15A NCAC 2B.0274) takes that approach -- establishing a formula for calculation of fees and a schedule for regular updates to make the fees more responsive to market forces and changing conditions.

The EMC should amend the compensatory mitigation fee rule using the nutrient offset fee rule as a model. The result would be a fee schedule that better meets the intent of G.S. 143-214.11 by accurately reflecting the costs of restoring or creating streams and wetlands.

Donation of Property (2R.0403)

It isn't clear that the donation rule is necessary. If the rule remains, a donation of property should be evaluated under the same criteria for consistency with the Basinwide Restoration Plan applied to other mitigation proposals. A donation of property should also be given mitigation credit based on functional ecosystem benefits rather than the monetary value of the property.

We appreciate the opportunity to comment on the rules governing the Ecosystem Enhancement Program and the Basinwide Restoration Plans. We look forward to discussing these comments with EMC members and Agency staff.

Signed,

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