



STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS

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January 9, 2020

Jennifer Everett
Environmental Management Commission
Sent via email only to: Jennifer.everett@ncdenr.gov

Re: 15A NCAC 02B .0240 (to be recodified as 15A NCAC 02B .0703)

Dear Ms. Everett:

At its meeting on December 19, 2019, the Rules Review Commission objected to the above-captioned rule in accordance with G.S. 150B-21.10.

The Commission objected to this Rule based on lack of statutory authority. Specifically, certain proposed changes to the Rule, such as in Subparagraph (a)(4), would change standards in other rules, in contravention to Session Laws 2016-94 and 2018-5. The Commission found the agency does not have authority to contravene those laws.

Please respond to this letter in accordance with the provisions of G.S. 150B-21.12. If you have any questions regarding the Commission's action, please let me know.

Sincerely,

Amanda J. Reeder
Commission Counsel

cc: Phillip Reynolds, NC DOJ

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1 15A NCAC 02B .0240 is readopted with changes as published in 33:16 NCR 1671-1717 as follows:

2
3 **15A NCAC 02B .0240.0703 NUTRIENT OFFSET PAYMENTS CREDIT TRADING**

4 ~~(a) The purpose of this Rule is to establish procedures for the optional payment of nutrient offset fees to the NC~~
5 ~~Ecosystem Enhancement Program, subsequently referred to as the Program, or to other public or private parties where~~
6 ~~the Program or such parties implement projects for nutrient offset purposes and accept payments for those purposes,~~
7 ~~and where either of the following applies:~~

- 8 (1) ~~The following rules of this Section allow offsite options or nutrient offset payments toward~~
9 ~~fulfillment or maintenance of nutrient reduction requirements:~~
10 (A) ~~.0234 and .0235 of the Neuse nutrient strategy,~~
11 (B) ~~.0258 of the Tar Pamlico nutrient strategy, and~~
12 (C) ~~applicable rules of the Jordan nutrient strategy, which is described in Rule .0262; and~~
13 (2) ~~Other rules adopted by the Commission allow this option toward fulfillment of nutrient load~~
14 ~~reduction requirements.~~

15 (a) PURPOSE. The purpose of this Rule is to establish standards and procedures applicable to providers for approval
16 of nutrient reduction projects and associated nutrient offset credits that will be transferred to persons or entities subject
17 to nutrient rules of this Subchapter. [Nutrient offset credits represent a compliance option where allowed by nutrient
18 rules of this Subchapter.] Nutrient offset credit is distinct from nutrient accounting for direct compliance with
19 individual nutrient strategy rules, which is not governed by this Rule [rule.] Nutrient accounting includes joint
20 compliance by multiple local governments as authorized in individual nutrient strategy rules. Nutrient offset credits
21 represent a compliance option where allowed by nutrient rules of this Subchapter, including:

- 22 (1) the Neuse Nutrient Strategy as set forth in Rule .0710 of this Section;
23 (2) the Tar-Pamlico Nutrient Strategy as set forth in Rule .0730 of this Section;
24 (3) the Jordan Lake Nutrient Strategy as set forth in Rule .0262 of this Subchapter; and
25 (4) the Falls Lake Nutrient Strategy as set forth in Rule .0275 of this Subchapter.

26 ~~(b) Offset fees paid pursuant to this Rule shall be used to achieve nutrient load reductions subject to the following~~
27 ~~geographic restrictions:~~

- 28 (1) ~~Load reductions shall be located within the same 8 digit cataloguing unit, as designated by the US~~
29 ~~Geological Survey, as the loading activity that is being offset;~~
30 (2) ~~The Division shall track impacts by 10 digit watershed, as designated by the US Geological Survey~~
31 ~~and providers shall locate projects proportional to the location of impacts to the extent that the~~
32 ~~projects would meet the least cost alternative criterion per S.L. 2007 438. The location of load~~
33 ~~reduction projects shall be reviewed during the approval process described in Paragraph (c) of this~~
34 ~~Rule;~~
35 (3) ~~Impacts that occur in the watershed of Falls Lake in the upper Neuse River Basin may be offset only~~
36 ~~by load reductions in the same watershed; Impacts in the Neuse 01 8 digit cataloguing unit below~~

1 the Falls watershed, as designated by the US Geological Survey, may be offset only by load
2 reductions in that same lower watershed;

3 (4) Restrictions established in the Jordan nutrient strategy, which is described in Rule 15A NCAC 02B
4 .0262; and

5 (5) Any further restrictions established by the Commission through rulemaking.

6 (b) GEOGRAPHIC RESTRICTIONS. Nutrient offset credits may be used to satisfy regulatory obligations only when
7 generated by a nutrient reduction project within an allowable geographic area identified in G.S. 143-214.26, as
8 designated by the U.S. Geological Survey, with the following additional restrictions:

9 (1) Nutrient offset credits may be used to satisfy regulatory obligations incurred in the upper Falls
10 watershed only if they were generated by a nutrient reduction project located within the upper Falls
11 watershed, as this geographic area is described in 15A NCAC 02B .0276.

12 (2) Nutrient offset credits may be used to satisfy regulatory obligations incurred in the lower Falls
13 watershed only if they were generated by a nutrient reduction project located within the Falls Lake
14 watershed, as these geographic areas are described in 15A NCAC 02B .0276.

15 (3) Nutrient offset credits may be used to satisfy regulatory obligations incurred in the Jordan Lake
16 watershed only if they were generated by a nutrient reduction project in the same subwatershed of
17 the Jordan Lake watershed, as these geographic areas are described in 15A NCAC 02B .0262.

18 (4) Nutrient offset credits may be used to satisfy regulatory obligations incurred in the Neuse 01 8-digit
19 cataloguing unit, as designated by the U.S. Geological Survey, [below] outside of the Falls Lake
20 watershed only if they were generated by a nutrient reduction project [within the same geographic
21 area] located outside of the Falls Lake watershed.

22 (5) Nutrient offset credits generated by nutrient reduction projects for compliance with an estuarine
23 nutrient strategy shall be generated in an area that is within or drains to:

24 (A) [an assessment unit] surface waters identified for restoration under the applicable nutrient-
25 related TMDL or nutrient [strategy,] strategy; or

26 (B) [an assessment unit] surface waters classified as SA, SB, or SC that fails to meet the
27 chlorophyll-a water quality standard in a subsequent integrated report.

28 ~~(c) The Program and other parties shall obtain Division approval of proposed nutrient offset projects prior to~~
29 ~~construction. Other parties shall sell credits in compliance with approved credit release schedules and with the~~
30 ~~requirements of this Rule. Project approval shall be based on the following standards:~~

31 (1) ~~Load reductions eligible for credit shall not include reductions used to satisfy other requirements~~
32 ~~under the same nutrient strategy;~~

33 (2) ~~The Program and other parties shall agree to provide adequate financial assurance to protect and~~
34 ~~maintain load reductions for the stated duration, including for maintenance, repair and renovation~~
35 ~~of the proposed measure;~~

36 (3) ~~The Program and other parties shall agree that once credits are established for a measure and until~~
37 ~~they are exhausted, they shall provide a credit/debit ledger to the Division at regular intervals;~~

- 1 (4) ~~The Program and other parties shall agree that the party responsible for a measure shall allow the~~
2 ~~Division access to it throughout its lifetime for compliance inspection purposes;~~
- 3 (5) ~~The Program or other party seeking approval shall obtain a site review from Division staff prior to~~
4 ~~Division approval to verify site conditions suitable to achieve the proposed load reductions through~~
5 ~~the proposed measure; and~~
- 6 (6) ~~The Program shall submit a proposal, and other parties shall submit a proposal or a draft banking~~
7 ~~instrument, addressing the following items regarding a proposed load reducing measure:~~
- 8 (A) ~~Identify the location and site boundaries of the proposed measure, the geographic area to~~
9 ~~be served by credits in compliance with the requirements of Paragraph (b) of this Rule,~~
10 ~~existing conditions in the contributing drainage area and location of the measure, and the~~
11 ~~nature of the proposed measure with sufficient detail to support estimates of load reduction~~
12 ~~required in this Paragraph;~~
- 13 (B) ~~Provide calculations of the annual magnitudes of load reductions and identify final credit~~
14 ~~values incorporating any delivery factors or other adjustments required under rules~~
15 ~~identified in Paragraph (a) of this Rule;~~
- 16 (C) ~~Define the duration of load reductions, and provide a conservation easement or similar~~
17 ~~legal mechanism to be recorded with the County Register of Deeds and that is sufficient to~~
18 ~~ensure protection and maintenance of load reductions for the stated duration;~~
- 19 (D) ~~Identify the property owner and parties responsible for obtaining all permits and other~~
20 ~~authorizations needed to establish the proposed measure, for constructing and ensuring~~
21 ~~initial performance of the proposed measure, for reporting on and successfully completing~~
22 ~~the measure, for holding and enforcing the conservation easement, and for ensuring~~
23 ~~protection and maintenance of functions for its stated duration;~~
- 24 (E) ~~Provide a plan for implementing the proposed measure, including a timeline, a commitment~~
25 ~~to provide an as-built plan and report upon establishment of the measure, elements to be~~
26 ~~included in the as-built plan and report, a commitment to provide a bond or other financial~~
27 ~~assurance sufficient to cover all aspects of establishment and initial performance prior to~~
28 ~~the release of any credits, and criteria for successful completion; and~~
- 29 (F) ~~Provide a monitoring and maintenance plan designed to achieve successful completion,~~
30 ~~that commits to annual reporting to the Division until success is achieved, that recognizes~~
31 ~~the Division's authority to require extension or re-initiation of monitoring depending on~~
32 ~~progress toward success, and that commits to a final report upon completion. The final~~
33 ~~report shall reaffirm the party that shall hold and enforce the conservation easement or~~
34 ~~other legal instrument.~~

35 (c) NUTRIENT OFFSET CREDIT APPROVAL STANDARD. Providers shall demonstrate that a nutrient reduction
36 project is designed, constructed, [implemented] implemented, and sustained in a manner that, according to the best
37 available scientific evidence, [studies] studies, and principles, will generate the estimated nutrient load reduction for

the duration of time for which credits are approved. Nutrient offset credits shall be generated and transferred in accordance with G.S. 143-214.26.

(d) The Program shall establish and revise nutrient offset rates as set out in Rule .0274 of this Section. Offset payments accepted by the Program shall be placed into the Riparian Buffer Restoration Fund administered by the Department pursuant to G.S. 143-214.21

(d) QUANTIFYING NUTRIENT OFFSET CREDITS. The quantity of nutrient offset credits eligible to be generated by a nutrient reduction project shall be determined according to the following provisions:

- (1) Nutrient reduction credit sought on developed lands shall be calculated in relation to load reductions achieved relative to the project site's current loading condition, as determined by the provider and verified by the Division;
- (2) Nutrient load reductions shall be site-specific estimates of decreases in annual mass load of nitrogen ~~and/or-~~ or phosphorus to the nearest receiving surface water feature. Such estimates shall be supported by the weight of evidence from available, current and applicable research, may involve water quality modeling or engineering formulas and calculations, and shall reflect as closely as possible project design specifications.

[Note: The Commission seeks public comment on the following options regarding the generation of nutrient offset credits stream mitigation credits in spatially overlapping areas.]

(3) [OPTION 1: Reductions shall not include those already implemented to satisfy other requirements under the same nutrient strategy; other local, state or federal requirements; or those resulting from state or federal compensatory mitigation requirements. Specifically, a nutrient reduction project shall not generate nutrient offset credits and stream, buffer or wetland mitigation credits in spatially overlapping areas.]

[OPTION 2:] Unless specifically excepted in Rule, reductions shall not include those already implemented to satisfy other requirements under the same nutrient strategy; other local, ~~[state]~~ State or federal requirements; or those resulting from ~~[state]~~ State or federal compensatory mitigation requirements. Specifically, a nutrient reduction project shall not generate nutrient offset credits and buffer or wetland mitigation credits in spatially overlapping areas. However, restored forest buffer areas associated with stream mitigation projects may generate both stream and nutrient offset credits in spatially overlapping areas within 50 feet from the top of the stream bank.

(4) Stream, buffer, or wetland mitigation credit that has not been used to satisfy a mitigation requirement may be converted into nutrient offset credit if the credit-generating project or portion thereof complies with this Rule.

(5) A nutrient reduction project may generate both nitrogen and phosphorus offset credits in the same area.

(6) A nutrient reduction project may be designed to generate permanent nutrient offset credit ~~[and/]~~ or term nutrient offset credit and shall specify which, ~~or both,~~ in the project plan. Permanent nutrient

reduction credits and term nutrient reduction credits shall be maintained ~~[on separate ledgers]~~
~~separately,~~ even if associated with the same nutrient offset ~~[bank or]~~ project.

(7) Permanent nutrient offset credits may be utilized for temporary compliance purposes. ~~If so, for~~ ~~[For]~~
each pound of annual term compliance credit received, 1/30th of one pound of permanent nutrient
offset credit shall be utilized and retired by removal from the applicable ledger. ~~[This conversion]~~
~~shall also be subject to other applicable trading ratios.]~~

(8) Nutrient offset credits that were approved prior to the adoption of this Rule may make application
to be reclassified. The Division shall approve the application ~~[of]~~ associated with any ~~[bank]~~ nutrient
~~offset project~~ to reclassify credits as permanent ~~[which]~~ ~~that~~ meet the requirements for permanent
credits at the time of the application to be reclassified. Other nutrient offset credits that were
approved prior to the adoption of this Rule or that were conditionally approved pursuant to a
mitigation banking instrument or other agreement with DEQ prior to the adoption of this ~~[rule,]~~
~~Rule, [are]~~ shall be considered term credits and may be transferred between term and permanent
ledgers at a ratio of 30 years of term nutrient offset credit to one permanent nutrient offset credit.

(9) Term nutrient offset credits shall be associated with the calendar year or years in which the
associated nutrient load reductions are generated.

~~(e) Persons who seek to pay nutrient offset fees under rules of this Section shall do so in compliance with such rules,~~
~~the requirements of Paragraph (b) of this Rule, and the following:~~

(1) A non-governmental entity shall purchase nutrient offset credit from a party other than the Program
if such credit is available in compliance with the criteria of this Rule at the time credit is sought, and
shall otherwise demonstrate to the permitting authority that such credit is not available before
seeking to make payment to the Program;

(2) Offset payments made to the Program shall be contingent upon acceptance of the payment by the
Program. The financial, temporal and technical ability of the Program to satisfy the mitigation
request will be considered to determine whether the Program will accept or deny the request;

(3) Where persons seek to offset more than one nutrient type, they shall make payment to address each
type;

(4) The offset payment shall be an amount sufficient to fund 30 years of nutrient reduction.

(5) Persons who seek offsets to meet new development stormwater permitting requirements shall
provide proof of offset credit purchase to the permitting authority prior to approval of the
development plan; and

(6) A wastewater discharger that elects to purchase offset credits for the purpose of fulfilling or
maintaining nutrient reduction requirements shall submit proof of offset credit acquisition or a letter
of commitment from the Program or third party provider with its request for permit modification.
Issuance of a permit that applies credits to nutrient limits shall be contingent on receipt of proof of
offset credit acquisition. A discharger may propose to make incremental payments for additional
nutrient allocations, contingent upon receiving a letter of commitment from the Program or third

1 party provider to provide the offset credit needed for permit issuance. In that event the Division may
2 issue or modify that permit accordingly, and shall condition any flow increase associated with that
3 incremental purchase on payment in full for the additional allocation. Offset responsibility for
4 nutrient increases covered under this Paragraph shall be transferred to the Program or third party
5 provider when it has received the entire payment.

6 (e) PROJECT APPROVAL STANDARDS. Providers shall comply with the following requirements to request
7 approval from the Division to implement a nutrient reduction project for the purpose of generating nutrient offset
8 credits.

9 (1) NUTRIENT OFFSET BANKING INSTRUMENT. Providers [except DMS] seeking approval of a
10 nutrient offset bank shall submit their draft nutrient offset banking instrument to the Division prior
11 to seeking approval of project plans. A nutrient offset banking instrument shall provide legal and
12 financial assurances that a provider will implement, maintain, and sustain nutrient reduction projects
13 as proposed in subsequent project plans and associated nutrient reduction practice design
14 specifications.

15 (2) PROJECT PLAN REQUIREMENTS. Prior to initiating a nutrient reduction project, providers shall
16 submit a project plan proposal to the Division for review and approval that includes the following
17 elements:

18 (A)[Site] A site location and site boundaries of the proposed project.

19 (B) The geographic area eligible to be served by nutrient offset credits in accordance with
20 Paragraph (b) of this Rule [and] or in compliance with in-lieu fee nutrient offset [applicable
21 mitigation permit] requirements applicable at the time an in-lieu fee payment was accepted.

22 (C) Documentation of the conditions of the site at the time of the submittal of the project plan.

23 (D) Documentation of the condition of the site during the baseline period of the applicable
24 nutrient [strategy-] strategy, unless excepted by Subparagraph (d)(1) of this Paragraph. The
25 Division may accept more recent documentation if it determines such documentation
26 establishes the probable loading condition of the site during the baseline period.

27 (E)[Description] A description of the proposed project [with sufficient detail to] that supports
28 [support] compliance with the standard in Paragraph (c) of this Rule. Projects conforming
29 to minimum design criteria for stormwater control measures in 15A NCAC 02H .1050
30 through .1062 [meet] shall be deemed as meeting this requirement. Design criteria for
31 stormwater control measure variants and additional nutrient reduction practices established
32 in the Division's Catalog of Nutrient Reduction Practices also meet this requirement.

33 (F) Nutrient credit calculations determined in conformance with Paragraph (d) of this Rule.

34 (G) Identification of the property owner and parties responsible for obtaining all permits and
35 other authorizations needed to:

36 (i) establish the proposed [project,]project:

37 (ii) construct and ensure initial performance of the [project,]project:

- (iii) report on and successfully complete the ~~[project,]~~ project by completing all crediting milestones;
- (iv) hold and enforce all easement or other protection ~~[mechanisms,]~~mechanisms; and
- (v) ensure maintenance of the project for its credited duration.
- (H) ~~[Description]~~ A description of how the project will be implemented, which shall include a timeline and a commitment to provide an as-built report upon the full project construction or installation.
- (I) ~~[Description]~~ A description of how the project will be maintained and monitored after it has been installed and for its duration.
- (J) ~~[Description]~~ A description of how the project will be sustained for its credited life, including a commitment to repair and renovate it as needed to maintain its performance, to keep records of all such operation, maintenance, monitoring, repair and renovation, and to notify the Division of any significant performance remediation needs and plans.
- (K) Identification of federal or ~~[state]~~ State grant funding contributing to project implementation.
- (3) FINANCIAL ASSURANCES. Providers ~~[except DMS]~~ seeking approval of a nutrient offset bank shall provide the financial assurance that a project plan will be ~~[completed]~~constructed as proposed. The financial assurance shall be in the form of a completion bond, credit insurance, letter of credit, escrow, or other vehicle acceptable to the ~~[Division,]~~ Division in accordance with this Subparagraph, payable to, or for the benefit of, the Division, to ensure the involved property is secured in fee title or by easement and that planting or construction, monitoring ~~[and/or]~~ or maintenance are completed as necessary to meet the requirements of the project plan.
- (4) PROJECT PLAN APPROVAL. The Division shall approve the provider's project plan proposal after verifying the provider's compliance with Subparagraphs ~~[(e)(1),]~~ (1), (2) and (3) of this ~~[Rule]~~ Paragraph and completing an onsite review to verify that preconstruction site conditions are suitable to generate the credits proposed by the project plan. However, the Division may partially or fully waive these requirements for term practices or projects if it determines that the burden of compliance is disproportionate to the value of the credits being generated and alternative means are used to satisfy the basic credit approval standard set forth in Paragraph (c) of this Rule.
- ~~(f) Credits associated with load reducing activities funded under this Rule shall be awarded exclusively to the person, municipality, discharger, or group of dischargers who paid the offset fee.~~
- (f) RELEASE AND ACCOUNTING FOR NUTRIENT OFFSET CREDITS. The Division shall release nutrient offset credits from an approved project in the following manner:
- (1) The Division shall release credits to providers upon confirmation that project-specific milestones reflected in the project plan's credit release schedule have been met. Project-specific milestones for permanent nutrient offset credits shall conform to the following requirements:

- (A) Credits shall not be released until the property is secured in fee title or by easement and financial assurance is posted for planting or construction of the project.
- (B) No more than 50 percent of the credits shall be released for a project until financial assurance is provided for monitoring and maintenance activities lasting until project completion.
- (C) No more than 80 percent of the credits shall be released for a project until the provider complies with the requirements of Paragraph (g).
- (2) Once credits are released for a [project] nutrient offset bank and until [the are exhausted] bank closure, nutrient offset bank providers [except for DMS] shall provide a credit/debit ledger to the Division at [regular] intervals no less frequently than quarterly.
- (3) The Division shall not release any credits for a project if that project is financed in whole or in part by [state] State grant funding or federal grant funding.
- (g) MAINTAINING PERMANENT NUTRIENT OFFSET CREDITS. [A provider shall transfer responsibility for oversight of a completed permanent project to a perpetual steward in accordance with this Paragraph and the approved project plan. A perpetual steward may also transfer responsibility to another perpetual steward in accordance with the terms of this Paragraph, subject to DWR approval. The provider shall ensure that the following mechanisms are in place to ensure that load reductions are sustained in perpetuity:] All permanent nutrient offset projects shall comply with the following requirements:
- (1) A provider shall transfer responsibility for oversight of a completed permanent project to a perpetual steward in accordance with this Paragraph and the approved project plan. A perpetual steward may also transfer responsibility to another perpetual steward in accordance with the terms of this Paragraph, subject to DWR approval. [The provider shall ensure that the following mechanisms are in place to ensure that load reductions are sustained in perpetuity:] Perpetual stewards may not assume project maintenance or restoration responsibilities.
- (2) The provider shall create and transfer to the perpetual steward a non-wasting endowment or other dedicated financial surety to provide for the oversight of the [project's load reductions.] completed permanent project. The endowment amount shall be proportionate to the duties accepted by the perpetual steward.
- (3) For projects utilizing conservation easements, the provider shall acquire and then transfer a conservation easement to a perpetual steward in accordance with [46] 26 U.S.C. 170(h) and the Conservation and Historic Preservation Agreements Act, G.S. [421-34 et seq.] 121, Article 4. The terms of the conservation easement shall be consistent with a Division-approved template or be approved by the [Division.] Division as conforming to Paragraph (c) of this Rule. Non-governmental perpetual stewards shall be accredited by the Land Trust Accreditation [Commission.] Commission or approved by the Division.
- (4) For projects utilizing [stormwater control measures (SCMs), SCMs] SCMs, they shall be placed in and protected by recorded drainage easements with recorded access easements to the nearest public

right-of-way for purposes of operation and maintenance. These easements shall be granted in favor of the person or entity responsible for operating and maintaining the structures, with a note as to the responsible person or entity. ~~Structure operation and maintenance shall be the responsibility of the landowner or easement holder unless the Division gives written approval for another person or entity.~~ Easements shall be of sufficient width for inspection and maintenance of the project.

(4) The Division may temporarily or permanently invalidate permanent credits generated by an SCM if it determines that the ~~bank or project~~ SCM has been impacted due to failure to comply with the terms of an associated project plan, nutrient offset banking instrument, easement, maintenance agreement, ~~or~~ other protective agreement, or this Rule.

(5) ~~Notwithstanding the other requirements of this Paragraph, a permanent project~~ Projects designed to restore a natural ecological community at the project site, which are completed and then damaged by natural causes, may be passively restored exclusively through natural ecological processes. ~~processes after project completion if:~~

(A) ~~it is damaged by natural causes that could not have been prevented by the exercise of foresight or caution, and~~

(B) ~~the practice employed is designed to restore a natural ecological community at the project site.~~

(h) RENEWING TERM NUTRIENT OFFSET CREDITS. Expiring term nutrient offset credits may be renewed by the provider upon providing documentation to the Division that the project meets the ~~basic~~ credit approval standard set forth in Paragraph (c) of this Rule for the duration of the renewal period.

(i) ADDITIONAL PROVISIONS REGARDING THE DIVISION OF MITIGATION SERVICES.

(1) DMS shall establish and revise nutrient offset rates as set out in 15A NCAC 02R .0602. Offset payments accepted by DMS shall be placed into the Riparian Buffer Restoration Fund administered by the Department pursuant to G.S. 143-214.21.

(2) On or before November 30 of each year, DMS shall provide an annual report to the Division concerning the nutrient in-lieu fee program that includes a requirement ledger. The requirement ledger shall include all nutrient offset credit requirements paid by 8-digit ~~service area~~ cataloguing unit or for each geographic area identified in ~~Paragraph (b),~~ Paragraph (b) of this Rule, the date by which the requirement shall be satisfied by a project, ~~the requirement due date,~~ and the projects and credits that have been applied to all requirements.

(3) Subject to the geographic restrictions in ~~Paragraph (b),~~ Paragraph (b) of this Rule, DMS may accept payments for nutrient offset credits prior to initiating projects. After accepting payment, DMS shall construct projects that, upon completion as described in the approved project plan, will generate nutrient offset credits sufficient to fulfill all new requirements generated by these payments. ~~Such projects~~ Projects shall be instituted before the end of the first full ~~state~~ State fiscal year after DMS receives payment and constructed before the end of the third full ~~state~~ State fiscal year after DMS

receives payment. DMS may also acquire credits from another provider to apply toward its requirements.

- (4) If DMS fails to meet deadlines associated with project institution or construction as specified in Subparagraph ~~[(i)(3) of this Rule,]~~ (3) of this Paragraph, then DMS shall develop an action strategy to include in the annual report specified in Subparagraph ~~[(i)(2) of this Rule,]~~ (2) of this Paragraph.

Action strategies shall include all of the following:

- (A) a list of factors resulting in delays or deficiencies in procurement, project ~~[implementation]~~ ~~implementation, [and/or] or [construction,]~~ construction;
- (B) specific actions and a timeline planned by DMS to satisfy outstanding credit requirements such that a project will be instituted before the end of the first full state fiscal year after the action strategy is submitted to the Division in the annual report and constructed before the end of the third full state fiscal year after the action strategy is submitted to the Division in the annual report, unless otherwise specified in the action ~~[strategy,]~~ strategy;
- (C) the anticipated date by which all outstanding nutrient offset credit requirements will be ~~[satisfied,]~~ satisfied; and
- (D) an evaluation of current progress in relation to any prior action strategies ~~[strategies if applicable,]~~

(j) NUTRIENT OFFSET CREDIT TRANSACTIONS. Parties who seek to acquire nutrient offset credits under rules of this Subchapter shall do so in compliance with ~~[such]~~ those rules, the requirements of Paragraph (b) of this ~~[rule,]~~ Rule, G.S. 143-214.26, and the following:

- (1) Offset payments made to DMS shall be contingent upon acceptance of the payment by DMS. DMS shall consider its financial, ~~[temporal]~~ temporal, and technical ability to satisfy the request to make its determination.
- (2) Where persons seek to satisfy regulatory obligations for more than one nutrient type, they shall acquire nutrient reduction credits to address each type.
- (3) Projects shall be approved and the associated offset credits released by the Division before they may be utilized for NPDES wastewater permit compliance purposes.
- (4) For offset credits used to meet ~~[the]~~ NPDES wastewater discharge requirements, the applicant shall provide ~~[40]~~ 50 percent additional credits to address the uncertainty factor for using unmonitored nonpoint source reductions to meet point source discharge limits. ~~[For offset credits used to meet the discharge requirements, the applicant shall provide no additional credits to address the uncertainty factor for using monitored nonpoint source reductions to meet point source discharge limits.]~~ Application of this ratio is in addition to other ratios that may be applied, including delivery or transport factors where applicable.
- (5) Delivery factors shall be applied to estimate nutrient reductions to an impaired water body subject to a nutrient strategy if required under rules of this Subchapter for that strategy.

(6) Term credits may be utilized for compliance only during the year in which they are generated and as described in Subparagraph (d)(2) of this Rule. They may not be cumulatively banked for future years.

(k) DEVELOPER-RESPONSIBLE NUTRIENT OFFSET PROJECTS. A developer subject to new development stormwater requirements of this Subchapter may satisfy its nutrient reduction obligations by generating its own offsite credits. It may do so by establishing a nutrient offset bank and generating credits in accordance with this ~~rule~~ Rule. Alternatively, the developer shall comply with all provisions of this ~~rule~~ Rule governing the generation of nutrient offset credits by a provider with the following modifications:

(1) Instead of a credit release schedule, credit for the project may be assigned upon construction of the project and submission to the Division of the as-built report as described in the project plan;

(2) Credit shall be assigned at a 50 percent rate based on the design specifications of the fully completed project(s); and

(3) Liability for the generation of credits as described in the project plan remains with the developer until the completion of all milestones associated with the project.

(l) NPDES WASTEWATER PERMITTEE-RESPONSIBLE NUTRIENT OFFSET PROJECTS. A locality, authority, utility, or sanitation district operating a permitted wastewater facility subject to wastewater rules of this Subchapter may generate nutrient offset credits by installing projects in accordance with this ~~rule~~ Rule. Any credits generated may then be utilized for compliance purposes as if acquired from another provider.

*History Note: Authority G.S. 143-214.1; 143-214.20; 143-214.21; 143-214.26; [S.L. 1995, c. 572; S.L. 2007, c. 438; S.L. 2009, c. 337; S.L. 2009, c. 484; S.L. 2009, c. 486;]
Eff. August 1, 1998;
Amended Eff. August 1, 2006;
Amended Eff. September 1, 2010.
Readopted Eff. January 1, 2020.*