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Mr. Jeffery T. Hyde, Chairman  
Rules Review Commissioners  
N. C. Rules Review Commission  
1711 New Hope Church Road  
Raleigh, N. C. 27609-6700

RE: 15A NCAC 2B .0240/.0703, Submitted via email  
December 12, 2019

Dear Chairman Hyde and RRC Commissioners:

I am providing this comment on behalf of the Upper Neuse River Basin Association (hereinafter "UNRBA") in opposition to the readoption of 15A NCAC 2B .0240 by the N.C. Environmental Management Commission (hereinafter "EMC") as 15A NCAC 2B .0703.

The UNRBA is a member organization based on cooperation regarding water quality management and water resource planning within the 770-square-mile Falls Lake watershed. Six municipalities, six counties, a water and wastewater public utility, and local Soil and Water Conservation Districts voluntarily formed the Association. Shortly after the Falls Lake rules were adopted, the UNRBA decided to invest millions of dollars to collect and analyze data that can be used to improve existing approaches to the management of point and non-point impacts in the watershed and Falls Lake. The General Assembly has directed that the data developed by the UNRBA shall be considered by the EMC before the Falls rules go through the readoption process in 2024.

This comment by the UNRBA is focused on "(a) PURPOSE" of (that revised rule), in particular the inclusion at (a)(4) of the Falls Lake Nutrient Strategy within the rule and the consequent requirement found in (j) of the rule whereby the EMC has established a new requirement increasing the minimum amount of nutrient credits required to enlarge an existing wastewater treatment facility or to construct a new wastewater treatment facility in the Falls Lake basin. That requirement imposes an additional 50% cost on local governments.

The UNRBA comments that the inclusion of the Falls Lake Nutrient Strategy in 15A NCAC 2B .0703 is inconsistent with the Administrative Procedure Act, and should be the subject of an objection by the RRC for the following reasons:

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1. This provision is in excess of the authority of the EMC as limited by Session Law 2016-94, Section 14.13; Session Law 2018-5, Section 13.8(a), (b), and (c);
2. This provision is in excess of the authority of the EMC for the failure to comply with the prerequisite requirements as set forth in N.C. Gen. Stat. §143-215.1(c5); and
3. This provision is in conflict with the Falls rules and creates, at best ambiguity, if not a direct conflict with 15A NCAC 2B .0282(3).

The UNRBA requests that the RRC resolve these comments by directing the EMC to remove this provision from the (cited rule) and by amendment of (j) of 15A NCAC 2B .0703 to exclude the Falls Lake Reservoir from the rule's coverage for that new substantive requirement. The proposed amendments to 15A NCAC 2B .0703 are:

- A. Strike (a)(4) which reads: "the Falls Lake Nutrient Strategy as enumerated in Rule .0275 of this Subchapter."
- B. Revise (j)(4) by the addition of another sentence at the end to read: "This ratio is not applicable to offset credits used to meet NPDES wastewater discharge requirements under 15A NCAC 2B .0279 and .0282."

#### VIOLATION OF LEGISLATIVE MORATORIUM

The rules before the Rules Review Commission were brought forward in response to the rules readoption process enacted in 2013. While the legislation generally confers power in the RRC to set the deadline for rules readoption, the General Assembly adopted Session Law 2016-94, § 14.13(d) which establishes a specific timeline for the review and readoption of the Falls Lake and Jordan Lake rules. As amended by Session Law 2018-5, §13.8(b), the Environmental Management Commission (EMC) cannot move forward with the rules review process for the Falls Lake rules until the legislatively required studies have been completed or December 31, 2024 at the earliest. The Legislature directed the N.C. Collaboratory to complete the required studies by December 31, 2023. The Session Law includes the following:

"The Environmental Management Commission shall begin rule adoption for the Falls Water Supply Nutrient Strategy on the earlier of the following: (i) upon receipt of the completed study and final recommendations prepared in response to subsection (c) of this section and any monitoring or modeling study conducted pursuant to existing regulations for nutrient management in Falls Lake or (ii) December 31, 2024."

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In response to comments filed by the Lower Neuse Basin Association on September 7, 2017, the Division of Water Resources declined to make a change in these proposed rules as requested in the comments. The requested change was to make clear that the proposed rule on the delivery factors for nutrient credits would not be applied to the Falls rules. DWR explained that it could not make the change “due to the legislatively-mandated delay in readopting them [the Falls and Jordan rules].”<sup>1</sup>

The amendment of the Falls rules through a re adoption of the nutrient rules violates the legislative limitation on how and when the Falls rules can be re adopted. The EMC must wait for the studies being done by the Collaboratory and the UNRBA to be completed before it can undertake the re adoption of the Falls rules or until December 31, 2024. Accordingly, the cited provisions of 15A NCAC 2B .0703 are in excess of the EMC’s authority.

#### AMENDMENT OF FALLS RULE TO ADD 50% COST INCREASE

The EMC is amending 15A NCAC 2B .0279 of the Falls rules through the newly added provisions of 15A NCAC 2B .0703, in particular subsections (a)(4) and (j)(4). Currently, the Falls rules do not require a ratio for uncertainty when new or expanded capacity is added to wastewater treatment. The controlling rule is 15A NCAC 2B .0279(8)(a)(ii) and (9)(a)(ii). Under the new rule, local governments discharging treated wastewater into Falls Lake will be required to pay a 50% increased cost to purchase nutrient credits. That amendment creates a conflict with the existing Falls rule and should be refused as an impermissible change in the Falls rules.

The EMC created a separate rule for nutrient load offsets in Falls Lake. 15A NCAC 2B .0282. Within

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<sup>1</sup> “11. Subsection (c)(2) establishes the means of calculating delivery factors for the credit reductions. It applies to the Section only, so it has no application to the Falls rules which remain in Section .0200 unless it deemed applicable by way of .0703(j).

“[DWR response] Subsection (d)(2) does refer to the section only, potentially omitting the Jordan and Falls watersheds temporarily due to the legislatively-mandated delay in readopting them. Amended language will be proposed in subsequent drafts to ensure coverage for all nutrient strategies.”

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that rule, the EMC referenced the provisions of 15A NCAC 2B .0240 for **only** the procedural requirements of the rule. 15A NCAC 2B .0282(3) provides that parties using nutrient credits for offset must comply with 15A NCAC 2B .0282 and "shall otherwise meet the requirements of Rule .0240 of this Section, **which establishes procedural requirements for nutrient offset payments.**"

The reference in the Falls Rule to 2B .0240 does not require a party using credits to follow the offset ratio requirements of 2B .0240 (readopted as rule 2B .0703). The specifics of any offset credit transaction defer to 2B .0282 under the old text of 2B .0240, but the new text of 2B .0703 sets aside the provisions of the Falls trading provision in 2B .0282. The revised version of Rule 2B .0240 adds the substantive requirement for a 150% ratio for credits trading. That addition takes it outside the scope of procedural requirements and constitutes a substantive addition to the Falls Lake rules without the supporting documentation required by S.L. 2018-5, §13.8(b) and prior to December 31, 2024. Accordingly, the changes to the Falls Lake rules are in excess of the authority of the EMC and should be struck from 15A NCAC 2B .0703.

#### CONCLUSION

The UNRBA respectfully requests that the Rules Review Commission reject 15A NCAC 2B .0703 as filed for the reasons stated above. The UNRBA further requests that the RRC remand the rule to the Environmental Management Commission for amendments required to overcome the objections set forth above.

The UNRBA requests the opportunity to appear before the Rules Review Commission on December 19, 2019 when this rule revision is considered. I will be appearing on behalf of the UNRBA and Mr. Don O'Toole, Deputy City Attorney, City of Durham will assist with our verbal comments to the Commission. If you have any questions, please let me know. My email and phone are included in the letterhead.

Sincerely,



Forrest Westall, Executive Director

CC: Sig Hutchinson, Chair, UNRBA  
Jennifer Everett, Rules Coordinator, DEQ  
Phillips Reynolds, Counsel to the EMC  
Amanda Reeder, Counsel to the RRC