

**G.S. 150B-21.3A Report for 15A NCAC Subchapter 02R, ECOSYSTEM ENHANCEMENT PROGRAM**

Agency - Environmental Management Commission

Comment Period - 7/11/2014 to 9/17/2014

Date Submitted to APO - Filled in by RRC staff

Rule Section	Rule Citation	Rule Name	Date and Last Agency Action on the Rule	Agency Determination [150B-21.3A(c)(1)a]	Implements or Conforms to Federal Regulation [150B-21.3A(d1)]	Federal Regulation Citation	Public Comment Received [150B-21.3A(c)(1)]	Agency Determination Following Public Comment [150B-21.3A(c)(1)]
<b>SECTION .0100 - PURPOSE AND DEFINITIONS</b>	15A NCAC 02R .0101	PURPOSE	Amended Eff. July 3, 2008	Necessary with substantive public interest	Yes If yes, include the citation to the federal law	40 CFR § 230.98 33 CFR §332.8	No	Necessary with substantive public interest
	15A NCAC 02R .0102	DEFINITIONS	Eff. August 1, 1998	Necessary with substantive public interest	Yes If yes, include the citation to the federal law	40 CFR § 230.98 33 CFR §332.8	Yes	Necessary with substantive public interest
<b>SECTION .0200 - BASINWIDE RESTORATION PLANS</b>	15A NCAC 02R .0201	PURPOSE	Amended Eff. July 3, 2008	Necessary with substantive public interest	Yes If yes, include the citation to the federal law	40 CFR § 230.98 (c) 33 CFR §332.8 (c)	Yes	Necessary with substantive public interest
	15A NCAC 02R .0202	COMPONENTS	Eff. August 1, 1998	Necessary with substantive public interest	Yes If yes, include the citation to the federal law	40 CFR § 230.98 (c) 33 CFR §332.8 (c)	Yes	Necessary with substantive public interest
	15A NCAC 02R .0203	PUBLIC INVOLVEMENT; AVAILABILITY	Amended Eff. July 3, 2008	Necessary with substantive public interest	Yes If yes, include the citation to the federal law	40 CFR § 230.98 (c) 33 CFR §332.8 (c)	No	Necessary with substantive public interest
<b>SECTION .0300 - COMPENSATORY MITIGATION</b>	15A NCAC 02R .0301	GENERAL	Eff. August 1, 1998	Necessary with substantive public interest	Yes If yes, include the citation to the federal law	40 CFR § 230.98 33 CFR §332.8	Yes	Necessary with substantive public interest
	15A NCAC 02R .0302	MITIGATION BANKS	Eff. August 1, 1998	Necessary with substantive public interest	Yes If yes, include the citation to the federal law	40 CFR § 230.98 33 CFR §332.8 60 FR 228 (Nov. 28, 1995)	No	Necessary with substantive public interest
<b>SECTION .0400 - ECOSYSTEM RESTORATION FUND</b>	15A NCAC 02R .0401	PURPOSE	Amended Eff. July 3, 2008	Necessary with substantive public interest	Yes If yes, include the citation to the federal law	40 CFR § 230.98 33 CFR §332.8 33 U.S.C. § 1344	No	Necessary with substantive public interest
	15A NCAC 02R .0402	SCHEDULE OF FEES	Amended Eff. July 18, 2008	Necessary with substantive public interest	Yes If yes, include the citation to the federal law	40 CFR § 230.98 33 CFR §332.8 33 U.S.C. § 1341 33 U.S.C. § 1344	Yes	Necessary with substantive public interest
	15A NCAC 02R .0403	DONATION OF PROPERTY	Eff. August 1, 1998	Necessary with substantive public interest	Yes If yes, include the citation to the federal law	40 CFR § 131.10(a) - (g) 33 U.S.C. § 1341 33 U.S.C. § 1344	Yes	Necessary with substantive public interest

**15A NCAC 02R Comments Received by NCEEP per General Statute 150B-21.3A**

15A NCAC 02R .0102 DEFINITIONS

**Comment (Karla Knotts):**

Do I agree with the Agency's determination? Yes

I would determine this rule's classification as: undefined

Do I want to submit a written comment on this rule? Yes

My comment type on this rule is: An objection to the rule

Do I want to enter a comment, or submit a file? Enter a comment

My Comment Text: 15A NCAC 02R.0102 requires that the definitions match GS143 Article 21, yet 'Non-Riparian wetlands' and 'Riparian wetlands' definitions exceeds State authority (not matching GS143 Article 21) by referring to 15A NCAC 02B.101 (c) (8) (which further refers to 02B.0202). 02B.0202 specifically restricts waters of the state as MATCHING waters of the US. These definitions must not include any lands not defined as Waters of the US

**Agency Response:** This comment will be addressed during the re-adoption process.

**Comment (William McDow, Environmental Defense Fund):**

Do I agree with the Agency's determination? Yes

I would determine this rule's classification as: undefined

Do I want to submit a written comment on this rule? Yes

My comment type on this rule is: Another type of comment

Do I want to enter a comment, or submit a file? Enter a comment

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

**Agency Response:** This comment will be addressed during the re-adoption process.

**Comment (William McDow, Environmental Defense Fund):**

Do I agree with the Agency's determination? Yes

I would determine this rule's classification as: undefined

Do I want to submit a written comment on this rule? Yes

My comment type on this rule is: Another type of comment

Do I want to enter a comment, or submit a file? Enter a comment

My Comment Text: 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 reparation [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.

**Agency Response:** This comment will be addressed during the re-adoption process.

**Comment (William McDow, Environmental Defense Fund):**

Do I agree with the Agency's determination? Yes

I would determine this rule's classification as: undefined

Do I want to submit a written comment on this rule? Yes

My comment type on this rule is: Another type of comment

Do I want to enter a comment, or submit a file? Enter a comment

My Comment Text: 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: 2R0302 and 2R0403 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 2R0301 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.

**Agency Response:** This comment will be addressed during the re-adoption process.

**Comment (William McDow, Environmental Defense Fund):**

Do I agree with the Agency's determination? Yes

I would determine this rule's classification as: undefined

Do I want to submit a written comment on this rule? Yes

My comment type on this rule is: Another type of comment

Do I want to enter a comment, or submit a file? Enter a comment

My Comment Text: 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 (ISA 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. 1432.14.11 by accurately reflecting the costs of restoring or creating streams and wetlands.

**Agency Response:** This comment will be addressed during the re-adoption process.

**Comment (William McDow, Environmental Defense Fund):**

Do I agree with the Agency's determination? Yes

I would determine this rule's classification as: undefined

Do I want to submit a written comment on this rule? Yes

My comment type on this rule is: Another type of comment

Do I want to enter a comment, or submit a file? Enter a comment

My Comment Text: 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.

**Agency Response:** This comment will be addressed during the re-adoption process.



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

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 riparian [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,



William McDow  
Habitat Markets Manager



David Kelly  
Senior Analyst