

August 19, 2015

N.C. Rules Review Commission  
6714 Mail Service Center  
Raleigh, NC 27699-6714

Subject: Consolidated Buffer Mitigation Rule  
Letter of Opposition

**Members of the Commission,**

I am writing to express concerns regarding 15A NCAC 02B .0295 (Consolidated Buffer Mitigation Rule) ("CMB rule"). I request that the CMB rule be reviewed in the upcoming legislative session as set out in N.C.G.S. 150B-21.3. I further request that the rule(s) be subject to a delayed effective date as set out in that same provision.

The CMB rule was originally adopted by the Rules Review Commission ("RRC") on July 1, 2013. Following approval, the RRC received 10 letters of objection to the Rule triggering legislative review. On June 26, 2014, Senate Bill 883 was filed to disapprove the Rule in accordance with G.S. 150B-21.3. Senate Bill 883 was signed into law as S.L. 2014-95 on August 1, 2014. S.L. 2014-95 directed the EMC that:

No later than October 1, 2014, the Environmental Management Commission shall adopt a Mitigation Program Requirements for Protection and Maintenance of Riparian Buffers Rule pursuant to G.S. 150B-21.1. The rule adopted pursuant to this section shall be substantively identical to the recommended rule text contained in the April 10, 2014, Consolidated Buffer Mitigation Rule Stakeholder Report.

Following notice and public comment, the temporary CMB rule was adopted by the EMC on September 30, 2014 and became effective on October 24, 2014. The temporary CMB rule was substantially amended in July 2015 to allow for restoration based mitigation to retroactively generate off-set credits. Previously, the Rule only allowed for alternative mitigation (enhancement, preservation, stormwater BMPs, etc.) to generate credit retroactively. This is a substantive change to the rule and directly contradicts S.L. 2014-95. My concerns with the CMB rule are further detailed below.

**A Substantive change to Retroactive Credit Generation -**

**Background:**

Retroactive credit generation has been an issue of concern with the CMB rule since it was first contemplated. The goal of the Riparian Buffer Rule (15A NCAC 2B .0295) is to protect water quality in the nutrient sensitive waters of North Carolina and retroactive credit generation fundamentally erodes that goal. The mitigation component of the Rule is intended to offset impacts to buffers with newly installed buffers adding wildlife, open space, and water quality improvement to the watershed to replace the buffers impacted.

In the case of retroactive credit generation within the 2015 CMB rule, under review by the RRC, credits would be generated from buffers that already exist and are protected in perpetuated with conservation easements. This scenario would result in no additional buffer being created when existing buffers are impacted. Under this setting, there is no clear way to demonstrate the intent of the rule and benefit to water quality improvements. In some cases, the ecological benefit of a retroactive credit would be based on arbitrary judgment without any documented baseline conditions to prove water quality improvements or any discernible benefit to the public.

Issue at Hand: Substantive change to Retroactive Credit Generation from July 2013 Rule to July 2015 Rule:

In the CBM rule approved July 1, 2013 by the EMC, retroactive credit was included only to allow for credit generation from alternative mitigation options, i.e. enhancement, preservation, and stormwater BMPs, which were not available to applicants or mitigation providers under the original six rules. The alternative methods section of the 2013 rule was developed to insure the CBM Rule was meeting its objective in a cost-effective manner. As stated in Section (k)(1)(B) of the 2013 Rule, retroactive credit was only allowed to be produced through alternative buffer mitigation, and on projects *"that have been constructed and are within the required monitoring period on the effective date of this Rule... Projects that have completed monitoring and have been released by the Division on or before the effective date of this Rule are eligible for use as alternative buffer mitigation for a period of ten years from the effective date of this Rule."*

In the version of the Rule presented to and approved by the EMC on July 9th 2015, retroactive credit generation was made available for traditional restoration projects. This small change in verbiage will have massive fiscal and environmental impacts. In fact, the newly released Second Addendum to the Fiscal Note Analysis, dated June 1, 2015, discusses at length the affects the change would have. Most notably, it references a one-time benefit of \$29.66 million, with \$28.37 million of that benefit accruing to the State's Division of Mitigation Services. No matter one's opinion of retroactive credit generation, this disparity from the recommended rule text contained in the April 10, 2014 Stakeholder Report is substantively very different, directly contradicting S.L. 2014-95.

The State's benefit, represents over 600 acres of new buffers that will never be planted and preserved if the retroactive credit generation part of this rule is allowed. This represents land that will help water quality for the rivers, estuaries and sounds of North Carolina as well as land for wildlife and sportsmen. It is important to note a vast majority of the retroactive credit to be generated by the State would come from projects constructed to satisfy stream mitigation under the state's in-lieu fee program and not riparian buffers, two very different regulated natural resources.

Conclusion

Retroactive credit generation can lead to market abuses and distortions specifically when it benefits one entity over another. Many private businesses invest their money in creating new buffers to offset impacts. To change the Rule and to grant the State such a tremendous advantage (utilizing buffers from old projects that are already planted and protected), will substantially impact private businesses who have invested their money in this market. Over \$28 million dollars will be removed from this market which will essentially kill it for 10+ years. Furthermore, if the Rule is approved the use of retroactive credit would result in over 600 acres of new buffer and wildlife area that will never be created and preserved.

I am opposed to retroactive credit generation and the proposed CMB Rule as it is presented today.

In addition, the Second Addendum to the Fiscal Note Analysis for the CBM rule was released June 1, 2015 and not made available during the public comment period (February 17, 2015 thru April 17, 2015). This Second Addendum specifically details the substantive changes to the CBM and should have been made available during the public comment period. The Note's detailing of the fiscal changes and benefit to the State, is a clear acknowledgement from the State, that the 2015 Rule is substantively different than the 2013 Rule - directly contradicting S.L. 2014-95.

Thank you for your time, consideration, and the opportunity to comment.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Ellis". The signature is fluid and cursive, with the first name "Mark" and last name "Ellis" clearly distinguishable.

August 13, 2015

N.C. Rules Review Commission  
6714 Mail Service Center  
Raleigh, NC 27699-6714

Bonnie M. Duncan  
Watershed Innovations  
7129 Sarahwood Court  
Willow Spring, NC 27592

Subject: Consolidated Buffer Mitigation Rule  
Letter of Opposition

FILED  
2015 AUG 17 AM 11:19  
OFFICE OF ADMIN HEARINGS

**Members of the Commission,**

I am writing to express concerns regarding 15A NCAC 02B .0295 (Consolidated Buffer Mitigation Rule) ("CMB rule"). I request that the CMB rule be reviewed in the upcoming legislative session as set out in N.C.G.S. 150B-21.3. I further request that the rule(s) be subject to a delayed effective date as set out in that same provision.

The CMB rule was originally adopted by the Rules Review Commission ("RRC") on July 1, 2013. Following approval, the RRC received 10 letters of objection to the Rule triggering legislative review. On June 26, 2014, Senate Bill 883 was filed to disapprove the Rule in accordance with G.S. 150B-21.3. Senate Bill 883 was signed into law as S.L. 2014-95 on August 1, 2014. S.L. 2014-95 directed the EMC that:

No later than October 1, 2014, the Environmental Management Commission shall adopt a Mitigation Program Requirements for Protection and Maintenance of Riparian Buffers Rule pursuant to G.S. 150B-21.1. The rule adopted pursuant to this section shall be substantively identical to the recommended rule text contained in the April 10, 2014, Consolidated Buffer Mitigation Rule Stakeholder Report.

Following notice and public comment, the temporary CMB rule was adopted by the EMC on September 30, 2014 and became effective on October 24, 2014. The temporary CMB rule was substantially amended in July 2015 to expand retroactive credit generation from alternative mitigation use (enhancement/preservation) to all types of mitigation (restoration). My concerns with the CMB rule are outlined below.

**A Substantive change to Retroactive Credit Generation:**

Background:

Retroactive credit generation has been an issue of concern with the CMB rule since it was first contemplated. The goal of the Riparian Buffer Rule (15A NCAC 2B .0295) is to protect water quality in the nutrient sensitive waters of North Carolina. The mitigation component of the rule is intended to offset impacts to buffers with newly installed buffers adding wildlife, open space, and water quality improvement to the watershed to replace the buffers impacted. In the case of retroactive credit generation, credits would be generated from buffers that are already in existence and protected, not adding any new buffer when existing buffers are impacted. This should be considered "double dipping" plain and simple. There is also no clear way to demonstrate the intent of the rule and benefit to water quality improvements. In some cases, the ecological benefit of a retroactive credit would be based on arbitrary judgment without any documented baseline conditions to prove water quality

improvements or any discernible benefit to the public. As a previous employee and planning supervisor of the NC Ecosystem Program, which is now Division of Mitigation Services, I am adamantly opposed to retroactive credit generation.

Issue at hand - Substantive change to Retroactive Credit Generation from July 2013 Rule to July 2015 Rule:

In the CBM rule approved July 1, 2013 by the EMC, retroactive credit was included only to allow for credit generation from alternative mitigation options which were not available to applicants or mitigation providers under the original six rules. The new alternative methods were developed to insure the consolidated Rule was meeting its objective in a cost-effective manner. As stated in Section (k)(1)(B) of the 2013 Rule, retroactive credit was only allowed to be produced through alternative buffer mitigation, and on projects *"that have been constructed and are within the required monitoring period on the effective date of this Rule... Projects that have completed monitoring and have been released by the Division on or before the effective date of this Rule are eligible for use as alternative buffer mitigation for a period of ten years from the effective date of this Rule."*

The Addendum 1 to Fiscal Note Analysis, dated May 14, 2013, identified a \$3.4 million, one-time benefit as a result of retroactive credit generation.

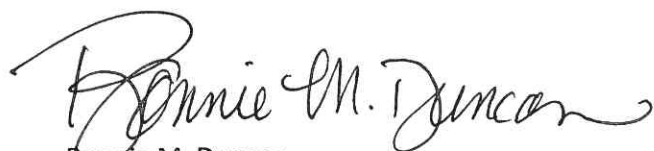
In the version of the Rule presented to the EMC on July 9th 2015, retroactive credit generation is now available for all types of mitigation, including traditional restoration and enhancement. No matter one's opinion of retroactive credit generation, this disparity from the recommended rule text contained in the April 10, 2014, Stakeholder Report is substantively very different. In fact, the newly released Second Addendum to the Fiscal Note Analysis, dated June 1, 2015, goes into great detail about effects of retroactive credit generation. Most notably, it references a one-time benefit of \$29.66 million, with \$28.37 million of that benefit accruing to the State's Division of Mitigation Services. This represents over 600 acres of new buffers that will never be planted and preserved if the retroactive credit generation part of this rule is allowed. This represents land that will help protect and improve water quality for the rivers, estuaries and sounds of North Carolina as well as land for wildlife and tourism.

For nearly two pages, the Second Addendum to the Fiscal Note details the effect the altered text regarding retroactive credit generation would have on the environment. Furthermore, it is important to note a vast majority of the retroactive credit to be generated by the State would come from projects constructed to satisfy stream mitigation under the state's in-lieu fee program.

Furthermore, the Second Addendum to the Fiscal Note Analysis for the CBM rule was released June 1, 2015 and not made available during the public comment period which lasted from February 17, 2015 thru April 17, 2015. This Second Addendum represents a substantial substantive change to the CBM for which the public was not allowed to review and make comment. The substantive change also means the CBM rule is no longer substantively identical to the April 10, 2014 Stakeholder Report.

Thank you for your time, consideration, and the opportunity to comment.

Sincerely,

A handwritten signature in black ink that reads "Bonnie M. Duncan". The signature is fluid and cursive, with the first name being the most prominent.

Bonnie M. Duncan  
Watershed Innovations  
Willow Springs, NC

Tiffani Bylow  
2000 Muirfield Village Way  
Raleigh, NC 27604

August 17, 2015

N.C. Rules Review Commission  
6714 Mail Service Center  
Raleigh, NC 27699-6714

Subject: 15A NCAC 02B .0295 (Consolidated Buffer Mitigation Rule)  
Letter of Opposition

**Members of the Commission,**

I am writing to express concerns regarding 15A NCAC 02B .0295 (Consolidated Buffer Mitigation Rule) ("CMB rule"). I request that the CMB rule be reviewed in the upcoming legislative session as set out in N.C.G.S. 150B-21.3. I further request that the rule(s) be subject to a delayed effective date as set out in that same provision.

The CMB rule was originally adopted by the Rules Review Commission ("RRC") on July 1, 2013. Following approval, the RRC received 10 letters of objection to the Rule triggering legislative review. On June 26, 2014, Senate Bill 883 was filed to disapprove the Rule in accordance with G.S. 150B-21.3. Senate Bill 883 was signed into law as S.L. 2014-95 on August 1, 2014. S.L. 2014-95 directed the EMC that:

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Following notice and public comment, the temporary CMB rule was adopted by the EMC on September 30, 2014 and became effective on October 24, 2014. The temporary CMB rule was substantially amended in July 2015 to allow for restoration based mitigation to retroactively generate off-set credits. Previously, the Rule only allowed for alternative mitigation (enhancement, preservation, stormwater BMPs, etc.) to generate credit retroactively. This is a substantive change to the rule and directly contradicts S.L. 2014-95. My concerns with the CMB rule are further detailed below.

**A Substantive change to Retroactive Credit Generation -**

**Background:**

Retroactive credit generation has been an issue of concern with the CMB rule since it was first contemplated. The goal of the Riparian Buffer Rule (15A NCAC 2B .0295) is to protect water quality in the nutrient sensitive waters of North Carolina and retroactive credit generation fundamentally erodes that goal. The mitigation component of the Rule is intended to offset impacts to buffers with newly installed buffers adding wildlife, open space, and water quality improvement to the watershed to replace the buffers impacted.

In the case of retroactive credit generation within the 2015 CMB rule, under review by the RRC, credits would be generated from buffers that already exist and are protected in perpetuated with conservation easements. This scenario would result in no additional buffer being created when existing buffers are impacted. Under this setting, there is no clear way to demonstrate the intent of the rule and benefit to water quality improvements. In some cases, the ecological benefit of a retroactive credit would be based on arbitrary judgment without any documented baseline conditions to prove water quality improvements or any discernible benefit to the public.

Issue at Hand: Substantive change to Retroactive Credit Generation from July 2013 Rule to July 2015 Rule:



In the CBM rule approved July 1, 2013 by the EMC, retroactive credit was included only to allow for credit generation from alternative mitigation options, i.e. enhancement, preservation, and stormwater BMPs, which were not available to applicants or mitigation providers under the original six rules. The alternative methods section of the 2013 rule was developed to insure the CBM Rule was meeting its objective in a cost-effective manner. As stated in Section (k)(1)(B) of the 2013 Rule, retroactive credit was only allowed to be produced through alternative buffer mitigation, and on projects *“that have been constructed and are within the required monitoring period on the effective date of this Rule... Projects that have completed monitoring and have been released by the Division on or before the effective date of this Rule are eligible for use as alternative buffer mitigation for a period of ten years from the effective date of this Rule.”*

In the version of the Rule presented to and approved by the EMC on July 9th 2015, retroactive credit generation was made available for traditional restoration projects. This small change in verbiage will have massive fiscal and environmental impacts. In fact, the newly released Second Addendum to the Fiscal Note Analysis, dated June 1, 2015, discusses at length the affects the change would have. Most notably, it references a one-time benefit of \$29.66 million, with \$28.37 million of that benefit accruing to the State’s Division of Mitigation Services. No matter one’s opinion of retroactive credit generation, this disparity from the recommended rule text contained in the April 10, 2014 Stakeholder Report is substantively very different, directly contradicting S.L. 2014-95.

The State’s benefit, represents over 600 acres of new buffers that will never be planted and preserved if the retroactive credit generation part of this rule is allowed. This represents land that will help water quality for the rivers, estuaries and sounds of North Carolina as well as land for wildlife and sportsmen.

### Conclusion

Retroactive credit generation can lead to market abuses and distortions specifically when it benefits one entity over another. Many private businesses invest their money in creating new buffers to offset impacts. To change the Rule and to grant the State such a tremendous advantage (utilizing buffers from old projects that are already planted and protected), will substantially impact private businesses who have invested their money in this market. Over \$28 million dollars will be removed from this market which will essentially kill it for 10+ years. Furthermore, if the Rule is approved the use of retroactive credit would result in over 600 acres of new buffer and wildlife area that will never be created and preserved.

I am opposed to retroactive credit generation and the proposed CMB Rule as it is presented today.

In addition, the Second Addendum to the Fiscal Note Analysis for the CBM rule was released June 1, 2015 and not made available during the public comment period (February 17, 2015 thru April 17, 2015). This Second Addendum specifically details the substantive changes to the CBM and should have been made available during the public comment period. The Note’s detailing of the fiscal changes and benefit to the State, is a clear acknowledgement from the State, that the 2015 Rule is substantively different than the 2013 Rule - directly contradicting S.L. 2014-95.

Thank you for your time, consideration, and the opportunity to comment.

Sincerely,

A handwritten signature in blue ink, appearing to read "Tiffani Bylow", with a stylized flourish at the end.

Tiffani Bylow

John Preyer  
214 Glenburnie St.  
Chapel Hill, NC 27514

August 17, 2015

N.C. Rules Review Commission  
6714 Mail Service Center  
Raleigh, NC 27699-6714

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Letter of Opposition

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**A Substantive change to Retroactive Credit Generation -**

Background:

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In the case of retroactive credit generation within the 2015 CMB rule, under review by the RRC, credits would be generated from buffers that already exist and are protected in perpetuated with conservation easements. This scenario would result in no additional buffer being created when existing buffers are impacted. Under this setting, there is no clear way to demonstrate the intent of the rule and benefit to water quality improvements. In some cases, the ecological benefit of a retroactive credit would be based on arbitrary judgment without any documented baseline conditions to prove water quality improvements or any discernible benefit to the public.

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The State’s benefit, represents over 600 acres of new buffers that will never be planted and preserved if the retroactive credit generation part of this rule is allowed. This represents land that will help water quality for the rivers, estuaries and sounds of North Carolina as well as land for wildlife and sportsmen.

Conclusion

Retroactive credit generation can lead to market abuses and distortions specifically when it benefits one entity over another. Many private businesses invest their money in creating new buffers to offset impacts. To change the Rule and to grant the State such a tremendous advantage (utilizing buffers from old projects that are already planted and protected), will substantially impact private businesses who have invested their money in this market. Over \$28 million dollars will be removed from this market which will essentially kill it for 10+ years. Furthermore, if the Rule is approved the use of retroactive credit would result in over 600 acres of new buffer and wildlife area that will never be created and preserved.

I am opposed to retroactive credit generation and the proposed CMB Rule as it is presented today.

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Thank you for your time, consideration, and the opportunity to comment.

Sincerely,



John Preyer



George Howard  
2713 Lochmore Drive  
Raleigh, NC 27608

August 17, 2015

N.C. Rules Review Commission  
6714 Mail Service Center  
Raleigh, NC 27699-6714

Subject: 15A NCAC 02B .0295 (Consolidated Buffer Mitigation Rule)  
Letter of Opposition

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Thank you for your time, consideration, and the opportunity to comment.

Sincerely,



George Howard

Worth Creech  
1101 Canterbury Rd.  
Raleigh, NC 27607

August 17, 2015

N.C. Rules Review Commission  
6714 Mail Service Center  
Raleigh, NC 27699-6714

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#### **Background:**

Retroactive credit generation has been an issue of concern with the CMB rule since it was first contemplated. The goal of the Riparian Buffer Rule (15A NCAC 2B .0295) is to protect water quality in the nutrient sensitive waters of North Carolina and retroactive credit generation fundamentally erodes that goal. The mitigation component of the Rule is intended to offset impacts to buffers with newly installed buffers adding wildlife, open space, and water quality improvement to the watershed to replace the buffers impacted.

In the case of retroactive credit generation within the 2015 CMB rule, under review by the RRC, credits would be generated from buffers that already exist and are protected in perpetuated with conservation easements. This scenario would result in no additional buffer being created when existing buffers are impacted. Under this setting, there is no clear way to demonstrate the intent of the rule and benefit to water quality improvements. In some cases, the ecological benefit of a retroactive credit would be based on arbitrary judgment without any documented baseline conditions to prove water quality improvements or any discernible benefit to the public.

Issue at Hand: Substantive change to Retroactive Credit Generation from July 2013 Rule to July 2015 Rule:

In the CBM rule approved July 1, 2013 by the EMC, retroactive credit was included only to allow for credit generation from alternative mitigation options, i.e. enhancement, preservation, and stormwater BMPs, which were not available to applicants or mitigation providers under the original six rules. The alternative methods section of the 2013 rule was developed to insure the CBM Rule was meeting its objective in a cost-effective manner. As stated in Section (k)(1)(B) of the 2013 Rule, retroactive credit was only allowed to be produced through alternative buffer mitigation, and on projects *“that have been constructed and are within the required monitoring period on the effective date of this Rule... Projects that have completed monitoring and have been released by the Division on or before the effective date of this Rule are eligible for use as alternative buffer mitigation for a period of ten years from the effective date of this Rule.”*

In the version of the Rule presented to and approved by the EMC on July 9th 2015, retroactive credit generation was made available for traditional restoration projects. This small change in verbiage will have massive fiscal and environmental impacts. In fact, the newly released Second Addendum to the Fiscal Note Analysis, dated June 1, 2015, discusses at length the affects the change would have. Most notably, it references a one-time benefit of \$29.66 million, with \$28.37 million of that benefit accruing to the State’s Division of Mitigation Services. No matter one’s opinion of retroactive credit generation, this disparity from the recommended rule text contained in the April 10, 2014 Stakeholder Report is substantively very different, directly contradicting S.L. 2014-95.

The State’s benefit, represents over 600 acres of new buffers that will never be planted and preserved if the retroactive credit generation part of this rule is allowed. This represents land that will help water quality for the rivers, estuaries and sounds of North Carolina as well as land for wildlife and sportsmen.

Conclusion

Retroactive credit generation can lead to market abuses and distortions specifically when it benefits one entity over another. Many private businesses invest their money in creating new buffers to offset impacts. To change the Rule and to grant the State such a tremendous advantage (utilizing buffers from old projects that are already planted and protected), will substantially impact private businesses who have invested their money in this market. Over \$28 million dollars will be removed from this market which will essentially kill it for 10+ years. Furthermore, if the Rule is approved the use of retroactive credit would result in over 600 acres of new buffer and wildlife area that will never be created and preserved.

I am opposed to retroactive credit generation and the proposed CMB Rule as it is presented today.

In addition, the Second Addendum to the Fiscal Note Analysis for the CBM rule was released June 1, 2015 and not made available during the public comment period (February 17, 2015 thru April 17, 2015). This Second Addendum specifically details the substantive changes to the CBM and should have been made available during the public comment period. The Note’s detailing of the fiscal changes and benefit to the State, is a clear acknowledgement from the State, that the 2015 Rule is substantively different than the 2013 Rule - directly contradicting S.L. 2014-95.

Thank you for your time, consideration, and the opportunity to comment.

Sincerely,



Worth Creech

Raymond Holz  
4114 Earl Gray Court  
Raleigh, NC 27612

August 17, 2015

N.C. Rules Review Commission  
6714 Mail Service Center  
Raleigh, NC 27699-6714

Subject: 15A NCAC 02B .0295 (Consolidated Buffer Mitigation Rule)  
Letter of Opposition

**Members of the Commission,**

I am writing to express concerns regarding 15A NCAC 02B .0295 (Consolidated Buffer Mitigation Rule) ("CMB rule"). I request that the CMB rule be reviewed in the upcoming legislative session as set out in N.C.G.S. 150B-21.3. I further request that the rule(s) be subject to a delayed effective date as set out in that same provision.

The CMB rule was originally adopted by the Rules Review Commission ("RRC") on July 1, 2013. Following approval, the RRC received 10 letters of objection to the Rule triggering legislative review. On June 26, 2014, Senate Bill 883 was filed to disapprove the Rule in accordance with G.S. 150B-21.3. Senate Bill 883 was signed into law as S.L. 2014-95 on August 1, 2014. S.L. 2014-95 directed the EMC that:

No later than October 1, 2014, the Environmental Management Commission shall adopt a Mitigation Program Requirements for Protection and Maintenance of Riparian Buffers Rule pursuant to G.S. 150B-21.1. The rule adopted pursuant to this section shall be substantively identical to the recommended rule text contained in the April 10, 2014, Consolidated Buffer Mitigation Rule Stakeholder Report.

Following notice and public comment, the temporary CMB rule was adopted by the EMC on September 30, 2014 and became effective on October 24, 2014. The temporary CMB rule was substantially amended in July 2015 to allow for restoration based mitigation to retroactively generate off-set credits. Previously, the Rule only allowed for alternative mitigation (enhancement, preservation, stormwater BMPs, etc.) to generate credit retroactively. This is a substantive change to the rule and directly contradicts S.L. 2014-95. My concerns with the CMB rule are further detailed below.

**A Substantive change to Retroactive Credit Generation -**

Background:

Retroactive credit generation has been an issue of concern with the CMB rule since it was first contemplated. The goal of the Riparian Buffer Rule (15A NCAC 2B .0295) is to protect water quality in the nutrient sensitive waters of North Carolina and retroactive credit generation fundamentally erodes that goal. The mitigation component of the Rule is intended to offset impacts to buffers with newly installed buffers adding wildlife, open space, and water quality improvement to the watershed to replace the buffers impacted.

In the case of retroactive credit generation within the 2015 CMB rule, under review by the RRC, credits would be generated from buffers that already exist and are protected in perpetuated with conservation easements. This scenario would result in no additional buffer being created when existing buffers are impacted. Under this setting, there is no clear way to demonstrate the intent of the rule and benefit to water quality improvements. In some cases, the ecological benefit of a retroactive credit would be based on arbitrary judgment without any documented baseline conditions to prove water quality improvements or any discernible benefit to the public.

Issue at Hand: Substantive change to Retroactive Credit Generation from July 2013 Rule to July 2015 Rule:

In the CBM rule approved July 1, 2013 by the EMC, retroactive credit was included only to allow for credit generation from alternative mitigation options, i.e. enhancement, preservation, and stormwater BMPs, which were not available to applicants or mitigation providers under the original six rules. The alternative methods section of the 2013 rule was developed to insure the CBM Rule was meeting its objective in a cost-effective manner. As stated in Section (k)(1)(B) of the 2013 Rule, retroactive credit was only allowed to be produced through alternative buffer mitigation, and on projects *“that have been constructed and are within the required monitoring period on the effective date of this Rule... Projects that have completed monitoring and have been released by the Division on or before the effective date of this Rule are eligible for use as alternative buffer mitigation for a period of ten years from the effective date of this Rule.”*

In the version of the Rule presented to and approved by the EMC on July 9th 2015, retroactive credit generation was made available for traditional restoration projects. This small change in verbiage will have massive fiscal and environmental impacts. In fact, the newly released Second Addendum to the Fiscal Note Analysis, dated June 1, 2015, discusses at length the affects the change would have. Most notably, it references a one-time benefit of \$29.66 million, with \$28.37 million of that benefit accruing to the State’s Division of Mitigation Services. No matter one’s opinion of retroactive credit generation, this disparity from the recommended rule text contained in the April 10, 2014 Stakeholder Report is substantively very different, directly contradicting S.L. 2014-95.

The State’s benefit, represents over 600 acres of new buffers that will never be planted and preserved if the retroactive credit generation part of this rule is allowed. This represents land that will help water quality for the rivers, estuaries and sounds of North Carolina as well as land for wildlife and sportsmen.

Conclusion

Retroactive credit generation can lead to market abuses and distortions specifically when it benefits one entity over another. Many private businesses invest their money in creating new buffers to offset impacts. To change the Rule and to grant the State such a tremendous advantage (utilizing buffers from old projects that are already planted and protected), will substantially impact private businesses who have invested their money in this market. Over \$28 million dollars will be removed from this market which will essentially kill it for 10+ years. Furthermore, if the Rule is approved the use of retroactive credit would result in over 600 acres of new buffer and wildlife area that will never be created and preserved.

I am opposed to retroactive credit generation and the proposed CMB Rule as it is presented today.

In addition, the Second Addendum to the Fiscal Note Analysis for the CBM rule was released June 1, 2015 and not made available during the public comment period (February 17, 2015 thru April 17, 2015). This Second Addendum specifically details the substantive changes to the CBM and should have been made available during the public comment period. The Note’s detailing of the fiscal changes and benefit to the State, is a clear acknowledgement from the State, that the 2015 Rule is substantively different than the 2013 Rule - directly contradicting S.L. 2014-95.

Thank you for your time, consideration, and the opportunity to comment.

Sincerely,

A handwritten signature in black ink, appearing to read "Raymond H.", with a stylized flourish at the end.

Raymond Holz



August 13, 2015

N.C. Rules Review Commission  
6714 Mail Service Center  
Raleigh, NC 27699-6714

Subject: Consolidated Buffer Mitigation Rule  
Letter of Opposition

**Members of the Commission,**

I am writing to express concerns regarding 15A NCAC 02B .0295 (Consolidated Buffer Mitigation Rule) ("CMB rule"). I request that the CMB rule be reviewed in the upcoming legislative session as set out in N.C.G.S. 150B-21.3. I further request that the rule(s) be subject to a delayed effective date as set out in that same provision.

The CMB rule was originally adopted by the Rules Review Commission ("RRC") on July 1, 2013. Following approval, the RRC received 10 letters of objection to the Rule triggering legislative review. On June 26, 2014, Senate Bill 883 was filed to disapprove the Rule in accordance with G.S. 150B-21.3. Senate Bill 883 was signed into law as S.L. 2014-95 on August 1, 2014. S.L. 2014-95 directed the EMC that:

No later than October 1, 2014, the Environmental Management Commission shall adopt a Mitigation Program Requirements for Protection and Maintenance of Riparian Buffers Rule pursuant to G.S. 150B-21.1. The rule adopted pursuant to this section shall be substantively identical to the recommended rule text contained in the April 10, 2014, Consolidated Buffer Mitigation Rule Stakeholder Report.

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**A Substantive change to Retroactive Credit Generation -**

Background:

Retroactive credit generation has been an issue of concern with the CMB rule since it was first contemplated. The goal of the Riparian Buffer Rule (15A NCAC 2B .0295) is to protect water quality in the nutrient sensitive waters of North Carolina and retroactive credit generation fundamentally erodes that goal. The mitigation component of the Rule is intended to offset impacts to buffers with newly installed buffers adding wildlife, open space, and water quality improvement to the watershed to replace the buffers impacted.

In the case of retroactive credit generation within the 2015 CMB rule, under review by the RRC, credits would be generated from buffers that already exist and are protected in perpetuated with conservation easements. This scenario would result in no additional buffer being created when existing buffers are impacted. Under this setting, there is no clear way to demonstrate the intent of the rule and benefit to water quality improvements. In some cases, the ecological benefit of a retroactive credit would be based on arbitrary judgment without any documented baseline conditions to prove water quality improvements or any discernible benefit to the public.

Issue at Hand: Substantive change to Retroactive Credit Generation from July 2013 Rule to July 2015 Rule:

In the CBM rule approved July 1, 2013 by the EMC, retroactive credit was included only to allow for credit generation from alternative mitigation options, i.e. enhancement, preservation, and stormwater BMPs, which were not available to applicants or mitigation providers under the original six rules. The alternative methods section of the 2013 rule was developed to insure the CBM Rule was meeting its objective in a cost-effective manner. As stated in Section (k)(1)(B) of the 2013 Rule, retroactive credit was only allowed to be produced through alternative buffer mitigation, and on projects *"that have been constructed and are within the required monitoring period on the effective date of this Rule... Projects that have completed monitoring and have been released by the Division on or before the effective date of this Rule are eligible for use as alternative buffer mitigation for a period of ten years from the effective date of this Rule."*

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The State's benefit, represents over 600 acres of new buffers that will never be planted and preserved if the retroactive credit generation part of this rule is allowed. This represents land that will help water quality for the rivers, estuaries and sounds of North Carolina as well as land for wildlife and sportsmen. It is important to note a vast majority of the retroactive credit to be generated by the State would come from projects constructed to satisfy stream mitigation under the state's in-lieu fee program and not riparian buffers, two very different regulated natural resources.

Conclusion

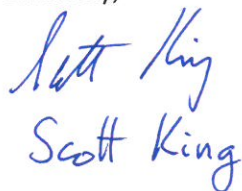
Retroactive credit generation can lead to market abuses and distortions specifically when it benefits one entity over another. Many private businesses invest their money in creating new buffers to offset impacts. To change the Rule and to grant the State such a tremendous advantage (utilizing buffers from old projects that are already planted and protected), will substantially impact private businesses who have invested their money in this market. Over \$28 million dollars will be removed from this market which will essentially kill it for 10+ years. Furthermore, if the Rule is approved the use of retroactive credit would result in over 600 acres of new buffer and wildlife area that will never be created and preserved.

I am opposed to retroactive credit generation and the proposed CMB Rule as it is presented today.

In addition, the Second Addendum to the Fiscal Note Analysis for the CBM rule was released June 1, 2015 and not made available during the public comment period (February 17, 2015 thru April 17, 2015). This Second Addendum specifically details the substantive changes to the CBM and should have been made available during the public comment period. The Note's detailing of the fiscal changes and benefit to the State, is a clear acknowledgement from the State, that the 2015 Rule is substantively different than the 2013 Rule - directly contradicting S.L. 2014-95.

Thank you for your time, consideration, and the opportunity to comment.

Sincerely,

  
Scott King



August 7, 2015

N.C. Rules Review Commission  
6714 Mail Service Center  
Raleigh, NC 27699-6714

Subject: Consolidated Buffer Mitigation Rule  
Letter of Opposition

**Members of the Commission,**

I am writing to express concerns regarding 15A NCAC 02B .0295 (Consolidated Buffer Mitigation Rule) ("CMB rule"). I request that the CMB rule be reviewed in the upcoming legislative session as set out in N.C.G.S. 150B-21.3. I further request that the rule(s) be subject to a delayed effective date as set out in that same provision.

The CMB rule was originally adopted by the Rules Review Commission ("RRC") on July 1, 2013. Following approval, the RRC received 10 letters of objection to the Rule triggering legislative review. On June 26, 2014, Senate Bill 883 was filed to disapprove the Rule in accordance with G.S. 150B-21.3. Senate Bill 883 was signed into law as S.L. 2014-95 on August 1, 2014. S.L. 2014-95 directed the EMC that:

No later than October 1, 2014, the Environmental Management Commission shall adopt a Mitigation Program Requirements for Protection and Maintenance of Riparian Buffers Rule pursuant to G.S. 150B-21.1. The rule adopted pursuant to this section shall be substantively identical to the recommended rule text contained in the April 10, 2014, Consolidated Buffer Mitigation Rule Stakeholder Report.

Following notice and public comment, the temporary CMB rule was adopted by the EMC on September 30, 2014 and became effective on October 24, 2014. The temporary CMB rule was substantially amended in July 2015 to expand retroactive credit generation from alternative mitigation use (enhancement/preservation) to all types of mitigation (restoration). My concerns with the CMB rule are outlined below.

**A Substantive change to Retroactive Credit Generation:**

Background:

Retroactive credit generation has been an issue of concern with the CMB rule since it was first contemplated. The goal of the Riparian Buffer Rule (15A NCAC 2B .0295) is to protect water quality in the nutrient sensitive waters of North Carolina. The mitigation component of the rule is intended to offset impacts to buffers with newly installed buffers adding wildlife, open space, and water quality improvement to the watershed to replace the buffers impacted. In the case of retroactive credit generation, credits would be generated from buffers that are already in existence and protected, not adding any new buffer when existing buffers are impacted. There is also no clear way to demonstrate the intent of the rule and benefit to water quality improvements. In some cases, the ecological benefit of a retroactive credit would be based on arbitrary judgment without any documented baseline conditions to prove water quality improvements or any discernible benefit to the public. Furthermore, retroactive credit generation can lead to market abuses and distortions specifically when it benefits one entity over another. Many private businesses invest their money in creating new buffers to offset

impacts and to have the rules change to allow the state to utilize buffers from old projects that are already planted and protected, will substantially impact private businesses who have invested their money in this market. Over \$28 million dollars will be removed from this market which will essentially kill it for 10+ years. I am opposed to retroactive credit generation.

Issue at hand - Substantive change to Retroactive Credit Generation from July 2013 Rule to July 2015 Rule:

In the CBM rule approved July 1, 2013 by the EMC, retroactive credit was included only to allow for credit generation from alternative mitigation options which were not available to applicants or mitigation providers under the original six rules. The new alternative methods were developed to insure the consolidated Rule was meeting its objective in a cost-effective manner. As stated in Section (k)(1)(B) of the 2013 Rule, retroactive credit was only allowed to be produced through alternative buffer mitigation, and on projects *"that have been constructed and are within the required monitoring period on the effective date of this Rule... Projects that have completed monitoring and have been released by the Division on or before the effective date of this Rule are eligible for use as alternative buffer mitigation for a period of ten years from the effective date of this Rule."*

The Addendum 1 to Fiscal Note Analysis, dated May 14, 2013, identified a \$3.4 million, one-time benefit as a result of retroactive credit generation.


In the version of the Rule presented to the EMC on July 9th 2015, retroactive credit generation is now available for all types of mitigation, including traditional restoration and enhancement. No matter one's opinion of retroactive credit generation, this disparity from the recommended rule text contained in the April 10, 2014, Stakeholder Report is substantively very different. In fact, the newly released Second Addendum to the Fiscal Note Analysis, dated June 1, 2015, goes into great detail about effects of retroactive credit generation. Most notably, it references a one-time benefit of \$29.66 million, with \$28.37 million of that benefit accruing to the State's Division of Mitigation Services. This represents over 600 acres of new buffers that will never be planted and preserved if the retroactive credit generation part of this rule is allowed. This represents land that will help water quality for the rivers, estuaries and sounds of North Carolina as well as land for wildlife and sportsmen. Again, this is money removed from the private mitigation market which truly offsets impacts with new buffer areas as well as over 600 acres of new buffer and wildlife area that will never be created and preserved.

For nearly two pages, the Second Addendum to the Fiscal Note details the effect the altered text regarding retroactive credit generation would have on the environment and private mitigation providers. Furthermore, it is important to note a vast majority of the retroactive credit to be generated by the State would come from projects constructed to satisfy stream mitigation under the state's in-lieu fee program.

Furthermore, the Second Addendum to the Fiscal Note Analysis for the CBM rule was released June 1, 2015 and not made available during the public comment period which lasted from February 17, 2015 thru April 17, 2015. This Second Addendum represents a substantial substantive change to the CBM for which the public was not allowed to review and make comment. The substantive change also means the CBM rule is no longer substantively identical to the April 10, 2014 Stakeholder Report.

Thank you for your time, consideration, and the opportunity to comment.

Sincerely,

  
Shawn D. Wilkerson  
Charlotte, NC





## North Carolina Wildlife Federation

*Affiliated with the National Wildlife Federation*

1346 St. Julien St .  
Charlotte, NC 28205  
(704) 332-5696

1024 Washington St.  
Raleigh, NC 27605  
(919) 833-1923

Amanda Reeder, Counsel  
N.C. Rules Review Commission  
Amanda.reeder@oah.nc.gov

August 14, 2015

Subject: Letter of Opposition Consolidated Buffer Mitigation Rule

I am writing on behalf of the North Carolina Wildlife Federation to express concerns regarding 15A NCAC 02B .0295 (Consolidated Buffer Mitigation Rule, CMB).

NCWF is a statewide conservation organization formed in 1945 and dedicated to the protection, conservation and restoration of North Carolina wildlife and habitat. Our vision is for a collective stewardship that will result in a North Carolina with bountiful and diverse wildlife, including all species of wild flora and fauna, that is valued by its citizens and elected officials, and sustainably managed for future generations. On behalf of our tens of thousands of outdoor enthusiasts and wildlife conservation members, supporters and chapter and affiliate constituents we offer these comments.

NCWF requests that the CMB Rule be reviewed in the upcoming legislative session as set out in N.C.G.S. 150B-21.3. We further request that the rule be subject to a delayed effective date as set out in that same provision.

The temporary CMB rule, which became effective on October 24, 2014, was substantially amended in July 2015 to expand retroactive credit generation from alternative mitigation use (enhancement/preservation) to all types of mitigation. The new alternative methods were developed to insure the consolidated rule was meeting resource conservation objectives effectively.

The Riparian Buffer Rule was developed to protect water quality in the nutrient sensitive waters of North Carolina. The purpose of the mitigation component of the rule is to offset new impacts to extant buffers with new buffers that offset the impacted buffers. As a result there is likely a net wildlife and water quality improvement within the watershed. In the case of retroactive credit generation, credits would be generated from buffers that are already in existence and protected, thus adding no new buffers and no additional resource conservation.

Allowance of retroactive credits for all types of mitigation, rather than for alternative mitigation options not available to providers in 2013, will be disruptive to private businesses engaged in providing mitigation services. Such disruption will likely lead to a reduction in future mitigation projects, thus impacting the conservation of those resources the rule for which the rule was developed.

Thank you for considering these comments.

Tim Gestwicki  
Chief Executive Officer



August 3, 2015

N.C. Rules Review Commission  
c/o Amanda Reeder, Commission Counselor  
6714 Mail Service Center  
Raleigh, NC 27699-6714

Subject: Objection/Request for Legislative Review of Rule 15A NCAC 02B .0295  
Mitigation Program Requirements for Protection and Maintenance of Riparian  
Buffers

Dear Members of the Commission:

I request that the above rule(s) be reviewed in the upcoming legislative session as set out in N.C.G.S. 150B-21.3. I further request that the rule(s) be subject to a delayed effective date as set out in that same provision.

While the Division of Water Resources has done a commendable job to consolidate and streamline the State's buffer rules, I must object to the rules as they are currently written. The rule approved by the EMC at their July meeting allows for the use of retro-active crediting of buffer sites in 15A NCAC 02B .0295(1)(6) that gives excessive latitude to use credits funded for different purposes and under different rules and would result in a net environmental loss.

The main reason for this position is that buffer impacts were not regulated or mitigated prior to rule existence. Without accounting for the loss of streamside forest on pre-buffer rule permits, there is no understanding whether pre-rule projects have accounted for those losses.

I suggest that either of the following conditions be satisfied prior to allowing use of retroactive credits:

1. A statement within the approved Bank Parcel Development Plan or a letter from the Authority prior to the project's implementation that state's the Authority will allow buffer credits from the site, if any exist, for prospective rules. Even with such a letter, I'd advocate that these credits should sunset 10 years after project implementation if such rules are not in place; or
2. Sites where retro-active are sought should have a conservation easement on the site which has been enacted within a defined time prior to the rules effectiveness. Three years seems to be an appropriate window. In addition to meeting that time frame, the site should clearly demonstrate that the existing conditions on the sight warrant the awarding of such credit by the authority.

While these comments were submitted to NC DENR, insufficient action was taken by the agency to address them in the rule approved by the EMC in July. Consequently, I'm filing this objecting and requesting that the rules be sent to the legislature for their review.

Thank you,

Mike Herrmann



August 7, 2015

N.C. Rules Review Commission  
6714 Mail Service Center  
Raleigh, NC 27699-6714

Subject: Consolidated Buffer Mitigation Rule  
Letter of Opposition

**Members of the Commission,**

I am writing to express concerns regarding 15A NCAC 02B .0295 (Consolidated Buffer Mitigation Rule) ("CMB rule"). I request that the CMB rule be reviewed in the upcoming legislative session as set out in N.C.G.S. 150B-21.3. I further request that the rule(s) be subject to a delayed effective date as set out in that same provision.

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**A Substantive change to Retroactive Credit Generation:**

Background:

Retroactive credit generation has been an issue of concern with the CMB rule since it was first contemplated. The goal of the Riparian Buffer Rule (15A NCAC 2B .0295) is to protect water quality in the nutrient sensitive waters of North Carolina. In the case of retroactive credit generation, there is no sure way to demonstrate the intent of the rule and benefit to water quality improvements. In some cases, the ecological benefit of a retroactive credit would be based on arbitrary judgment without any documented baseline conditions to prove water quality improvements or any discernible benefit to the public. Furthermore, retroactive credit generation can lead to market abuses and distortions specifically when it benefits one entity over another. I am opposed to retroactive credit generation.

Issue at hand - Substantive change to Retroactive Credit Generation from July 2013 Rule to July 2015 Rule:

In the CBM rule approved July 1, 2013 by the EMC, retroactive credit was included only to allow for credit generation from alternative mitigation options which were not available to applicants or mitigation providers under the original six rules. The new alternative methods were developed to insure the consolidated Rule was meeting its objective in a cost-effective manner. As stated in Section (k)(1)(B) of the 2013 Rule, retroactive credit was only allowed to be produced through alternative buffer mitigation, and on projects *"that have been constructed and are within the required monitoring period on the effective date of this Rule... Projects that have completed monitoring and have been released by the Division on or before the effective date of this Rule are eligible for use as alternative buffer mitigation for a period of ten years from the effective date of this Rule."*

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For nearly two pages, the Second Addendum to the Fiscal Note details the effect the altered text regarding retroactive credit generation would have on the environment and private mitigation providers. Furthermore, it is important to note a vast majority of the retroactive credit to be generated by the State would come from projects constructed to satisfy stream mitigation under the state's in-lieu fee program.

Furthermore, the Second Addendum to the Fiscal Note Analysis for the CBM rule was released June 1, 2015 and not made available during the public comment period which lasted from February 17, 2015 thru April 17, 2015. This Second Addendum represents a substantial substantive change to the CBM for which the public was not allowed to review and make comment. The substantive change also means the CBM rule is no longer substantively identical to the April 10, 2014 Stakeholder Report.

Thank you for your time, consideration, and the opportunity to comment.

Sincerely,

  
John Hutton

August 7, 2015

N.C. Rules Review Commission  
6714 Mail Service Center  
Raleigh, NC 27699-6714

Subject: Consolidated Buffer Mitigation Rule  
Letter of Opposition

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No later than October 1, 2014, the Environmental Management Commission shall adopt a Mitigation Program Requirements for Protection and Maintenance of Riparian Buffers Rule pursuant to G.S. 150B-21.1. The rule adopted pursuant to this section shall be substantively identical to the recommended rule text contained in the April 10, 2014, Consolidated Buffer Mitigation Rule Stakeholder Report.

Following notice and public comment, the temporary CMB rule was adopted by the EMC on September 30, 2014 and became effective on October 24, 2014. The temporary CMB rule was substantially amended in July 2015 to expand retroactive credit generation from alternative mitigation use (enhancement/preservation) to all types of mitigation (restoration). My concerns with the CMB rule are outlined below.

**A Substantive change to Retroactive Credit Generation:**

Background:

Retroactive credit generation has been an issue of concern with the CMB rule since it was first contemplated. The goal of the Riparian Buffer Rule (15A NCAC 2B .0295) is to protect water quality in the nutrient sensitive waters of North Carolina. In the case of retroactive credit generation, there is no sure way to demonstrate the intent of the rule and benefit to water quality improvements. In some cases, the ecological benefit of a retroactive credit would be based on arbitrary judgment without any documented baseline conditions to prove water quality improvements or any discernible benefit to the public. Furthermore, retroactive credit generation can lead to market abuses and distortions specifically when it benefits one entity over another. I am opposed to retroactive credit generation.

Issue at hand - Substantive change to Retroactive Credit Generation from July 2013 Rule to July 2015 Rule:

In the CBM rule approved July 1, 2013 by the EMC, retroactive credit was included only to allow for credit generation from alternative mitigation options which were not available to applicants or mitigation providers under the original six rules. The new alternative methods were developed to insure the consolidated Rule was meeting its objective in a cost-effective manner. As stated in Section (k)(1)(B) of the 2013 Rule, retroactive credit was only allowed to be produced through alternative buffer mitigation, and on projects *"that have been constructed and are within the required monitoring period on the effective date of this Rule... Projects that have completed monitoring and have been released by the Division on or before the effective date of this Rule are eligible for use as alternative buffer mitigation for a period of ten years from the effective date of this Rule."*

The Addendum 1 to Fiscal Note Analysis, dated May 14, 2013, identified a \$3.4 million, one-time benefit as a result of retroactive credit generation.

In the version of the Rule presented to the EMC on July 9th 2015, retroactive credit generation is now available for all types of mitigation, including traditional restoration and enhancement. No matter one's opinion of retroactive credit generation, this disparity from the recommended rule text contained in the April 10, 2014, Stakeholder Report is substantively very different. In fact, the newly released Second Addendum to the Fiscal Note Analysis, dated June 1, 2015, goes into great detail about effects of retroactive credit generation. Most notably, it references a one-time benefit of \$29.66 million, with \$28.37 million of that benefit accruing to the State's Division of Mitigation Services.

For nearly two pages, the Second Addendum to the Fiscal Note details the effect the altered text regarding retroactive credit generation would have on the environment and private mitigation providers. Furthermore, it is important to note a vast majority of the retroactive credit to be generated by the State would come from projects constructed to satisfy stream mitigation under the state's in-lieu fee program.

Furthermore, the Second Addendum to the Fiscal Note Analysis for the CBM rule was released June 1, 2015 and not made available during the public comment period which lasted from February 17, 2015 thru April 17, 2015. This Second Addendum represents a substantial substantive change to the CBM for which the public was not allowed to review and make comment. The substantive change also means the CBM rule is no longer substantively identical to the April 10, 2014 Stakeholder Report.

Thank you for your time, consideration, and the opportunity to comment.

Sincerely,

A handwritten signature in black ink, appearing to read "Tim Morris".

Tim Morris,  
Raleigh NC