

1 15A NCAC 02R .0101 is repealed as published in 32:04 NCR 177 as follows:

2

3 **15A NCAC 02R .0101 PURPOSE**

4

5 *History Note: Authority G.S. 143-214.8; 143-214.9; 143-215.3;*

6

Eff. August 1, 1998;

7

Amended Eff. July 3, 2008.

8

Repealed Eff. March 1, 2018.

REQUEST FOR TECHNICAL CHANGE

AGENCY: Environmental Management Commission

RULE CITATION: 15A NCAC 02R .0102

DEADLINE FOR RECEIPT: Thursday, February 8, 2018

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

Line 5 – show the delete comma as follows: ~~phrases,~~ phrases

Line 10 – do you mean “may” or “shall”? If “may,” what standards, factors, or circumstances govern whether riparian wetlands will include the listed ecosystems?

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Jason Thomas
Commission Counsel
Date submitted to agency: Thursday, January 25, 2018

1 15A NCAC 02R .0102 is readopted as published in 32:04 NCR 177 as follows:

2

3 **15A NCAC 02R .0102 DEFINITIONS**

4 The definition of any word or phrase used in this Subchapter shall be the same as given in G.S. 143, Article 21. The
5 following words and phrases, ~~which are not defined by statute,~~ shall be interpreted as follows mean:

6 (1) ~~"Mitigation bank" means a site where wetlands or other aquatic resources are restored, created,~~
7 ~~enhanced, or preserved expressly for the purpose of providing compensatory mitigation in advance~~
8 ~~of authorized impacts to similar resources.~~ "Aquatic resources" means wetlands, streams, lakes,
9 rivers, springs, seeps, reservoirs, ponds, groundwater, riparian areas, and the fauna that reside within
10 them. Aquatic resources may include permanent, seasonal, flowing, standing, natural, or man-made
11 water bodies.

12 (2) "Non-riparian wetlands" means Class WL wetlands as defined in 15A NCAC 2B .0101(c)(8) whose
13 major source of water is precipitation. ~~Wetland types generally considered to be~~ Examples of non-
14 riparian wetlands include wet flats, ~~poecosins~~ pocosins, and ephemeral wetlands.

15 (3) "Riparian area" means an area that does not meet the definition of wetlands found at 15A NCAC
16 2B .0202 and that is located within 300 feet of any perennial or intermittent water body as shown
17 by the most recently published version of the United States Geological Survey 1:24,000 (7.5 minute)
18 scale topographic map (available at <http://viewer.nationalmap.gov>) or other site-specific data.

19 (4) "Riparian wetlands" means Class WL wetlands as defined in 15A NCAC 2B .0101(c)(8) whose
20 ~~major~~ primary source of water is ground water or surface water. ~~Wetland types generally considered~~
21 ~~to be riparian~~ Examples of riparian wetlands include freshwater marshes, swamp forests, bottomland
22 hardwood forests, headwater forests, bog forests, mountain ~~bogs~~ bogs, and seeps.

23

24 *History Note: Authority G.S. 143-214.8; 143-214.9; 143-214.11;143-215.3;*

25 *Eff. August 1, 1998.*

26 *Readopted Eff. March 1, 2018.*

27

1 15A NCAC 02R .0201 is repealed as published in 32:04 NCR 177 as follows:

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3 **15A NCAC 02R .0201 PURPOSE**

4

5 *History Note: Authority G.S. 143-214.10; 143-215.3;*

6

Eff. August 1, 1998;

7

Amended Eff. July 3, 2008.

8

Repealed Eff. March 1, 2018.

REQUEST FOR TECHNICAL CHANGE

AGENCY: Environmental Management Commission

RULE CITATION: 15A NCAC 02R .0202

DEADLINE FOR RECEIPT: Thursday, February 8, 2018

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

Lines 12 and 14 – begin these lines with “an”

Lines 13 and 15 – do you mean “goals of the” or “goals identified in the”?

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Jason Thomas
Commission Counsel
Date submitted to agency: Thursday, January 25, 2018

1 15A NCAC 02R .0202 is readopted as published in 32:04 NCR 177 as follows:

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3 **15A NCAC 02R .0202 COMPONENTS**

4 (a) ~~The Each Basinwide Restoration Plans Plan~~ for each of the 17 major river basins shall consist of the following
5 components conducted by DMS staff and contractors:

- 6 (1) an assessment of the ~~existing wetlands and riparian area~~ baseline aquatic resources resource
7 functions within each ~~basin; 8-digit cataloging unit;~~
8 (2) an assessment of the ~~existing needs of the river~~ potential functional improvement of aquatic
9 resources within each basin 8-digit cataloging unit; ~~as identified by the Department with input from~~
10 ~~other state and federal agencies, local governments, institutions of higher learning, non-profit~~
11 ~~organizations and the general public;~~
12 (3) identification of aquatic resource areas that have the potential, if restored or enhanced, to contribute
13 to the functional goals of the Basinwide Restoration Plans;
14 (4) identification of ~~wetland and riparian~~ aquatic resource areas that have the potential, if preserved, to
15 contribute to the functional goals of the Basinwide Restoration Plans;
16 (5) a summary of the 8-digit cataloging unit characteristics, identification of priority ecosystem
17 functions that have been degraded or lost, and opportunities for functional improvement;
18 ~~prioritization of the areas identified in Subparagraphs (3) and (4) of this Paragraph based on the~~
19 ~~area's ability to contribute to the specific goals of the Basinwide Restoration Plans and the needs of~~
20 ~~each 8-digit sub-basin river basin as identified in Subparagraph (2) of this Paragraph; and~~
21 (6) an outline of the specific goal goals to be accomplished through implementation of the Basinwide
22 Restoration Plan.

23 (b) ~~During the period July 1, 1997 through June 30, 2002, the Department may develop and implement Basinwide~~
24 ~~Restoration Plans that include only the following information:~~

- 25 (1) ~~an assessment of the existing needs of the river basin as identified by the Department with input~~
26 ~~from other state and federal agencies, local governments, institutions of higher learning, non-profit~~
27 ~~organizations and the general public;~~
28 (2) ~~identification of areas that have the potential, if restored or enhanced, to contribute to the specific~~
29 ~~goals of the Basinwide Restoration Plans;~~
30 (3) ~~prioritization of the areas identified in Subparagraph (2) of this Paragraph based on the area's ability~~
31 ~~to contribute to the goals of the Basinwide Restoration Plans and the needs of each river basin as~~
32 ~~identified in Subparagraph (b)(1) of this Rule;~~
33 (4) ~~identification of wetland and riparian areas that have the potential, if preserved, to contribute to the~~
34 ~~goals of the Basinwide Restoration Plans; and~~
35 (5) ~~an outline of the specific goals to be accomplished through implementation of the Basinwide~~
36 ~~Restoration Plan.~~

- 1 *History Note:* *Authority G.S. 143-214.10; 143-215.3; 143-214.9*
- 2 *Eff. August 1, 1998.*
- 3 *Readopted Eff. March 1, 2018.*

1 15A NCAC 02R .0203 is readopted as published in 32:04 NCR 177 as follows:

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3 **15A NCAC 02R .0203 PUBLIC INVOLVEMENT; AVAILABILITY**

4 (a) The ~~Secretary~~, Secretary or the Secretary's ~~designee~~, designee shall provide interested parties an opportunity to
5 review and comment on the proposed Basinwide Restoration Plans.

6 (b) The Basinwide Restoration Plans shall be available for review through the ~~Ecosystem Enhancement Program's~~
7 Division of Mitigation Services' website at ~~www.nceep.net~~<http://deq.nc.gov/about/divisions/mitigation-services>.

8

9 *History Note: Authority G.S. 143-214.10; 143-215.3;*

10 *Eff. August 1, 1998;*

11 *Amended Eff. July 3, 2008;*

12 *Readopted Eff. March 1, 2018.*

13

REQUEST FOR TECHNICAL CHANGE

AGENCY: Environmental Management Commission

RULE CITATION: 15A NCAC 02R .0301

DEADLINE FOR RECEIPT: Thursday, February 8, 2018

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

Line 6 – show the deleted comma as follows: ~~1344,~~ 1344

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Jason Thomas
Commission Counsel
Date submitted to agency: Thursday, January 25, 2018

1 15A NCAC 02R .0301 is readopted as published in 32:04 NCR 177 as follows:

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3 **15A NCAC 02R .0301 GENERAL**

4 All projects implemented for the purpose of satisfying compensatory mitigation requirements of certifications issued
5 by the Department under 33 USC¹ U.S.C. Section 1341; 1341 and permits or authorizations issued by the United
6 States Army Corps of Engineers (Corps) under 33 USC¹ U.S.C. Section 1344, shall be consistent with the Basinwide
7 Restoration Plan for the appropriate river basin. A project ~~is~~ shall be consistent with the Basinwide Restoration Plan
8 if the project is ~~located within an area that is identified as a priority for restoration in the Basinwide Restoration Plan;~~
9 ~~or is located at a site that is otherwise consistent with the goals outlined in the Basinwide Restoration Plan for the~~
10 ~~appropriate river basin;~~ demonstrates that it advances the functional improvement goals identified in the Basinwide
11 Restoration Plan or is ~~approved~~ determined to be consistent by the United States Army Corps of Engineers.

12

13 *History Note: Authority G.S. 143-214.11; 143-214.12; 143-215.3;*

14 *Eff. August 1, 1998.*

15 *Readopted Eff. March 1, 2018.*

16

REQUEST FOR TECHNICAL CHANGE

AGENCY: Environmental Management Commission

RULE CITATION: 15A NCAC 02R .0302

DEADLINE FOR RECEIPT: Thursday, February 8, 2018

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

Line 5 – replace “must” with “shall”

Line 5 – delete the comma after “Secretary”

Line 10 – replace the semicolon with a comma and delete “or”

Line 11 – replace the semicolon with a comma

Lines 12 and 16 – delete both commas in these lines

Line 17 – replace “the above guidance” with “33 CFR Part 332” if that CFR cite describes the Banking Instrument.

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Jason Thomas
Commission Counsel
Date submitted to agency: Thursday, January 25, 2018

1 15A NCAC 02R .0302 is readopted as published in 32:04 NCR 177 as follows:

2

3 **15A NCAC 02R .0302 MITIGATION BANKS**

4 (a) All sponsors of mitigation banks that submit a prospectus to the United States Army Corps of Engineers
5 after the effective date of this Rule must provide the Secretary, or the Secretary's designee documentation
6 that the proposed mitigation bank is consistent with the approved Basinwide Restoration Plan for the
7 appropriate river basin and meets the requirements of G.S. 143-214.11(f). A mitigation bank is consistent
8 with the Basinwide Restoration Plans if the mitigation bank ~~is located within an area that is identified as a~~
9 ~~priority for restoration~~ demonstrates that it advances the functional improvement goals identified in the
10 Basinwide Restoration Plan; or is located at a site that is otherwise consistent with the goals outlined in the
11 Basinwide Restoration Plan for the appropriate river basin; or is approved by the United States Army Corps
12 of Engineers. The Secretary, or the Secretary's designee, shall provide comments concerning this
13 documentation through participation on the Mitigation Bank Interagency Review Team in accordance with
14 33 CFR Part 332 Compensatory Mitigation for Losses of Aquatic Resources "Federal Guidance for the
15 Establishment, Use and Operation of Mitigation Banks," found in Volume 60, Number 228 of the Federal
16 Register, November 28, 1995. The signature of the Secretary, or the Secretary's designee, on the Mitigation
17 Banking Instrument, described in the above guidance, shall be considered as a finding by the Department
18 that the mitigation bank is consistent with the Basinwide Restoration Plan.

19 (b) ~~Each credit in a proposed mitigation bank must include a minimum of one acre of restoration or creation as~~
20 ~~defined in 15A NCAC 2H .0506(h)(4).~~

21

22 *History Note: Authority G.S. 143-214.11; 143-214.12; 143-215.3;*

23 *Eff. August 1, 1998.*

24 *Readopted Eff. March 1, 2018.*

25

1 15A NCAC 02R .0401 is repealed as published in 32:04 NCR 177 as follows:

2

3 **15A NCAC 02R .0401 PURPOSE**

4

5 *History Note: Authority G.S. 143-214.11; 143-214.12; 143-215.3;*

6 *Eff. August 1, 1998;*

7 *Amended Eff. July 3, 2008.*

8 *Repealed Eff. March 1, 2018.*

REQUEST FOR TECHNICAL CHANGE

AGENCY: Environmental Management Commission

RULE CITATION: 15A NCAC 02R .0402

DEADLINE FOR RECEIPT: Thursday, February 8, 2018

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

Line 10 – add a colon after “been”

Lines 20-23 – consider listing as follows:

- (d) Payment rates shall be developed for stream, freshwater wetland, and coastal wetland credits:
- (1) Streams shall consist of classified surface waters other than wetlands as defined in 15A NCAC 02B .0202.
 - (2) Freshwater wetlands shall consist of Class WL wetlands as defined in 15A NCAC 02B .0101(c)(8) and shall include riparian and non-riparian wetlands.
 - (3) Coastal wetlands shall consist of Class SWL wetlands as defined in 15A NCAC 07H .0205.

Line 22 – in any event, replace “includes” with “shall include”

Page 2, line 9 – revise as follows: “Construction Cost Index, incorporated by reference including subsequent”

Page 2, line 13 – what does “average annual percentage change” mean – change of what?

Page 2, line 22 – what does “proportionally adjusted” mean?

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Jason Thomas
Commission Counsel
Date submitted to agency: Thursday, January 25, 2018

1 15A NCAC 02R .0402 is readopted as published in 32:04 NCR 177 with changes as follows:

2
3 **15A NCAC 02R .0402 ~~SCHEDULE OF FEES~~ RATE SCHEDULE- STREAM AND WETLAND RATES**
4 **FOR THE NC DIVISION OF MITIGATION SERVICES**

5 (a) For the purposes of this Rule:

6 (1) "cost" or "costs" shall mean the NC Division of Mitigation Services In-Lieu Fee Mitigation
7 Program's costs associated with stream or wetland projects in a given rate area, as described in this
8 Rule; and

9 (2) "credit" or "credits" shall mean the number of credits of stream or wetland compensatory mitigation
10 that have been

11 (A) requested by the applicant; and

12 (B) specified in the approved certifications issued by the Department and in the permits or
13 authorizations issued by the United States Army Corps of Engineers pursuant to 33 U.S.C.
14 Section 1344.

15 (b) The in-lieu fee shall be calculated by multiplying the rate, as established in this Rule, by the total number of
16 credits.

17 (c) The Program shall calculate and publish general statewide stream and wetland payment rates and premium stream
18 and wetland rates for watersheds as identified in Paragraph (d) of this Rule. Rates shall be published on the Division's
19 website (<https://deq.nc.gov/about/divisions/mitigation-services>).

20 (d) Payment rates shall be developed for stream, freshwater wetland, and coastal wetland credits. Streams shall
21 consist of classified surface waters other than wetlands as defined in 15A NCAC 02B .0202, freshwater wetlands shall
22 consist of Class WL wetlands as defined in 15A NCAC 02B .0101(c)(8) and includes riparian and non-riparian
23 wetlands, and Coastal wetlands shall consist of Class SWL wetlands as defined in 15A NCAC 07H .0205.

24 (e) Premium Watershed Rate. The Program shall apply premium watershed rates for the following areas:

25 (1) Any 8-digit cataloging unit (as defined by the United States Geological Survey), mitigation service
26 area, or smaller watershed where costs are 33 percent greater than the general statewide rate shall
27 have a surcharge equal to the difference between the general statewide rate and the actual cost of
28 mitigation in that mitigation service area.

29 (2) The initial coastal wetland rate shall be ~~eight hundred twenty five thousand dollars \$825,000~~ five
30 hundred sixty thousand dollars (\$560,000) per credit.

31 (f) Rate Adjustment Frequency. Initial rates shall be effective as of the effective date of this Rule. They shall be
32 calculated and adjusted on July 1 of each year and shall become effective on those dates. Rate adjustments shall be
33 published on the Program's website two weeks prior to the effective date. The rate shall be adjusted within two
34 business days if the Program suspends acceptance of payments at the current rate.

35 (g) Payment rates for streams and wetlands shall be determined for a rate area using the following equation and
36 presented in per-credit values:

$$ActualCostRate = 1.43 \frac{ActualProjectCosts_{PresentDay}}{ActualCredits_{PresentDay}}$$

Where:

(1) “Actual Project Costs_{PresentDay}” means the sum of all full delivery project and mitigation bank credit purchase costs, adjusted for inflation, as described in this Paragraph. Only the costs of full delivery and mitigation bank credit purchase projects that were contracted within the last three years, including completed projects, terminated projects, and projects in process, shall be included in the calculation of Actual Project Costs. At the time the rate is calculated, all contracts and expenditures shall be adjusted to present-day values using the annual composite USACE Civil Works Construction Cost Index. This document is hereby incorporated by reference, including subsequent amendments and editions. A copy of this document may be obtained at no cost at http://www.publications.usace.army.mil/Portals/76/Publications/EngineerManuals/EM_1110-2-1304.pdf. If the USACE Civil Works Construction Cost Index is not available, it shall be calculated using the average annual percentage change over the last three-year period;

(2) “Project costs” means the total costs associated with development of stream or wetland compensatory mitigation projects including identification, land acquisition, project design, project construction, monitoring, maintenance, and long-term stewardship;

(3) The “cost for projects in process” means the sum of expenditures of project contracts to date, contracted cost to complete existing contracts, and the projected cost of future contracts needed to complete those projects required to fulfill Program obligations in the rate area;

(4) “Actual Credits_{PresentDay}” means the total number of credits from Actual Project Costs_{PresentDay} at the time of calculation. If the Actual Credits_{PresentDay} for an existing or completed project is reduced, the Actual Costs_{PresentDay} for that existing or completed project shall be proportionally adjusted.

~~(a) The amount of payment into the Fund necessary to achieve compliance with compensatory mitigation requirements shall be determined in accordance with Subparagraphs (1) through (7) of this Paragraph. The fee shall be based on the acres and types of compensatory mitigation specified in the approved certifications issued by the Department under 33 USC 1341; and permits or authorizations issued by the United States Army Corps of Engineers under 33 USC 1344. Payments shall be rounded up in increments of linear feet for streams and in 0.25 acre increments for wetlands, e.g. for streams, 520.3 linear feet of compensatory mitigation would be considered as 521 feet, and for wetlands, 2.35 acres of required compensatory mitigation would be considered as 2.5 acres for the purpose of calculating the amount of payment.~~

~~(b) Payments made pursuant to Subparagraphs (3) through (6) of this Paragraph are subject to separate fees determined by which 8 digit hydrologic unit (as defined by the United States Geological Survey) the permitted impact is located. Fees are assessed according to the location of the permitted impact and mitigation type as follows:~~

~~(1) Fees in Subparagraphs (3) and (4) shall be applied to the following 8 digit hydrologic units organized by river basin: Broad: 03050105; Cape Fear: 03030002, 03030004, 03030005, 03030007; Catawba: 03050101, 03050102, 03050103; French Broad: 06010106, 06010105, 06010108; Hiwassee:~~

~~06020002; Little Tennessee: 06010202, 06010203, 06010204; Lumber 03040207; Neuse: 03020201; New: 05050001; Roanoke: 03010107; Savannah: 03060101, 03060102; Tar Pamlico: 03020101; Watauga: 06010103; White Oak: 03030001, 03020106; Yadkin: 03040102, 03040103, 03040105, 03040202~~

~~(2) Fees in Subparagraphs (5) and (6) shall be applied to all other 8 digit hydrologic units not listed in Subparagraph (1).~~

~~(3) Classified surface waters other than wetlands as defined in 15A NCAC 02B .0202. The payment shall be three hundred and twenty three dollars (\$323.00) per linear foot of stream.~~

~~(4) Class WL wetlands as defined in 15A NCAC 02B .0101(c)(8). The payment shall be:~~

~~(A) Forty three thousand dollars (\$43,000) per acre for non riparian wetlands.~~

~~(B) Fifty nine thousand and six hundred dollars (\$59,600) per acre for riparian wetlands.~~

~~(5) Classified surface waters other than wetlands as defined in 15A NCAC 02B .0202. The payment shall be two hundred and forty four dollars (\$244.00) per linear foot of stream.~~

~~(6) Class WL wetlands as defined in 15A NCAC 02B .0101(c)(8). The payment shall be:~~

~~(A) Twenty two thousand one hundred and thirteen dollars (\$22,113) per acre for non riparian wetlands.~~

~~(B) Thirty three thousand six hundred and ninety six (\$33,696) per acre for riparian wetlands.~~

~~(7) Class SWL wetlands as defined in 15A NCAC 02B .0101(d)(4). The payment shall be one hundred and forty six thousand and six hundred and fifteen dollars (\$146,615.00) per acre.~~

~~(e) The fees outlined in Subparagraphs (b)(1) through (b)(7) and Paragraph (e) of this Rule shall be reviewed annually by the Department and compared to the actual cost of restoration activities conducted by the Department, including planning, monitoring and maintenance costs. Based upon this annual review, revisions to Paragraph (a) of this Rule shall be recommended to the Commission when adjustments to this Schedule of Fees are deemed necessary to ensure that the Schedule of Fees reflects the actual costs of restoration activities.~~

~~(d) The fees outlined in Subparagraphs (b)(1) through (b)(7) and Paragraph (e) of this Rule shall be adjusted for inflation on an annual basis using the Civil Works Construction Cost Index System published by the US Army Corps of Engineers. This adjustment shall occur at the end of each calendar year as follows: the fees in Subparagraphs (b)(1) through (b)(7) and Paragraph (e) of this Rule for each year shall be multiplied by the annual composite Civil Works Construction Cost Index yearly percentage change issued in September of each year and the result shall be the increase to that fee for the next fiscal year. The revised fees shall be made available via the NC Ecosystem Enhancement Program's web site (www.nceep.net) and become effective on the following July 1st.~~

~~(e) For properties and easements donated to the NC Department of Environment and Natural Resources, a fee of one thousand dollars (\$1,000) per acre shall be charged at the time the land or easement is transferred to the Department's Conservation Grant Fund Endowment to cover costs of long term management of the property. For properties that are less than one acre in size, the minimum payment shall be one thousand dollars (\$1,000). This charge applies only to properties and easements donated to the Department for the sole purpose of property or easement maintenance.~~

1 ~~This does not apply to properties or easements donated to the Department in association with restoration projects~~
2 ~~conducted by the Department.~~

3

4 *History Note: Authority G.S. 143-214.11; 143-214.12; 143-215.3;*

5 *Eff. August 1, 1998;*

6 *Amended Eff. July 18, 2008; April 1, 2003.*

7 *Readopted Eff. March 1, 2018.*

REQUEST FOR TECHNICAL CHANGE

AGENCY: Environmental Management Commission

RULE CITATION: 15A NCAC 02R .0403

DEADLINE FOR RECEIPT: Thursday, February 8, 2018

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

Line 8 – “33” appears twice

Page 4, lines 10-11 and 17-18 – these standards should be incorporated by reference pursuant to 150B-21.6.

Page 4, lines 22-23 – do you mean “well, septic, water, or sewer connections” or “wells, septic systems, or water or sewer connections”?

Page 4, line 23 – show punctuation changes by deleting and adding the preceding word: “~~remediated~~ remediated,” and “~~expense~~, expense”

Page 5, line 1 – show punctuation changes by deleting and adding the preceding word: “~~permit~~ permit.”

Page 5, lines 3 and 6 – move “only” to after “accepted”

Page 5, lines 7-9 – listing this would resolve ambiguity as follows:

(i) The donation of conservation easements to satisfy compensatory mitigation requirements shall be accepted only if:

- (1) the conservation easement is granted in perpetuity and the property to be encumbered meets the requirements of Paragraphs (a) through (j) of this Rule; or
- (2) the property interest is being donated to satisfy a condition of a certification issued by the Department pursuant to 33 U.S.C. Section 1341.

Page 5, lines 16-17 – what does “the applicant shall pay the remaining balance due” mean? Can that phrase be replaced by “the designated fee shall be ...”?

Jason Thomas
Commission Counsel
Date submitted to agency: Thursday, January 25, 2018

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Jason Thomas
Commission Counsel
Date submitted to agency: Thursday, January 25, 2018

1 15A NCAC 02R .0403 is readopted as published in 32:04 NCR 177 as follows:

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15A NCAC 02R .0403 DONATION OF PROPERTY

(a) If approved by the Council of State, donations or dedications of interests in real ~~property, property~~ for the purposes of restoration, enhancement, or ~~preservation, preservation~~ may be accepted by the ~~Secretary, Secretary~~ or the Secretary's ~~designee, designee~~ if the property is consistent with the Basinwide Restoration Plan for the appropriate river basin subject to the factors listed in Paragraphs (b) and (c) of this Rule, or if the property interest is being donated to satisfy a condition of a certification issued by the Department ~~under pursuant to 33 USC 33 U.S.C. Section 1341. The property is consistent with the Basinwide Restoration Plan if the property is located within an area that is identified as a priority for restoration in the Basinwide Restoration Plan or is located at a site that is otherwise consistent with the goals outlined in the Basinwide Restoration Plan for the appropriate river basin.~~

(b) The factors that shall be considered by the ~~Secretary, Secretary~~ or the Secretary's ~~designee, designee~~ in determining whether to accept donations or dedications of interests in real property for the purposes of wetland or riparian area restoration or enhancement include the following:

- (1) whether the property is
 - (A) adjacent to, or will become a part of, a Department compensatory mitigation project;
 - (B) adjacent to or includes a sensitive natural resource, as identified in the Basinwide Restoration Plan;
 - (C) adjacent to or includes property on which rare aquatic species, as identified by the North Carolina Natural Heritage Program in the "Natural Heritage Program List of Rare Animal Species of North Carolina" or the "Natural Heritage Program List of the Rare Plant Species of North Carolina," is known to have been found; or
 - (D) is adjacent to or includes a Significant Natural Heritage Area as identified by the North Carolina Natural Heritage Program at <https://ncnhde.natureserve.org>. These documents are hereby incorporated by reference, including subsequent amendments and editions. Copies of these documents may be obtained from the Department of Natural and Cultural Resources Division of Land and Water Stewardship at <http://www.ncnhp.org/references/publications/rare-animal-list> and <http://www.ncnhp.org/references/publications/rare-plant-list>;

~~whether the property is adjacent to, or will become a part of, a Department approved restoration or preservation project; or is adjacent to or includes a sensitive natural resource, as identified in the Basinwide Restoration Plan; or is adjacent to or includes property with known occurrences of rare species as identified by the North Carolina Natural Heritage Program in the "Natural Heritage Program List of Rare Animal Species of North Carolina" or the "Natural Heritage Program List of the Rare Plant Species of North Carolina"; or is adjacent to or includes a Significant Natural Heritage Area as identified by the North Carolina Natural Heritage Program in the "North Carolina Natural Heritage Program Biennial Protection Plan, List of Significant Natural Heritage Areas." Copies of these documents may be obtained from the Department of Environment and Natural Resources~~

~~Division of Parks and Recreation, Natural Heritage Program, PO Box 27687, Raleigh, North Carolina 27611;~~

- (2) whether the size of the property is at least five contiguous acres;
- (3) the likelihood that the site can be successfully restored or enhanced, based on hydrology, soils, and vegetation;
- (4) the ~~extent~~ intensity of activities required to successfully restore or enhance the site. Sites requiring extreme measures for successful restoration, such as removal of structures or infrastructure, ~~will~~ shall not be accepted;
- (5) ~~the~~ absence of cultural and historic resources;
- (6) ~~the~~ prior, current, and future land use of the donated property and adjacent properties;
- (7) ~~the~~ existence of federally or state-listed sensitive, endangered, or threatened species, or their critical habitat;
- (8) the potential for enhancement of natural resource values of public lands;
- (9) ~~the~~ absence of hazardous substance and solid waste;
- (10) whether the property is adjacent to non-supporting, partially supporting, or support-threatened waters as designated by the Division of Water ~~Quality Resources~~ pursuant to 40 CFR 131.10(a) through (g). This material is available ~~for inspection at~~ from the Department of ~~Environment and Natural Resources~~ Environmental Quality, Division of Water ~~Quality Resources~~, ~~Water Quality Section~~, 512 North Salisbury Street, Raleigh, North Carolina at <https://deq.nc.gov/about/divisions/water-resources/planning/classification-standards/surface-water-standards>;
- (11) ~~the~~ absence of encumbrances and conditions on the transfer of the property interests; and
- (12) ~~whether~~ provisions have been made ~~by the landowner~~ for the long term maintenance and management of the property.

(c) The factors that shall be considered by the ~~Secretary~~, Secretary or the Secretary's ~~designee~~, designee in determining whether to accept donations or dedications of interests in real property for the purpose of preservation of existing wetland and riparian areas include the following:

- (1) whether the property has clearly identifiable unique wetland or riparian area functions or values, such as federally or state-listed sensitive, ~~endangered~~ endangered, or threatened species, or their critical habitat;
- (2) the potential for enhancement of natural resource values of public lands;
- (3) ~~whether the property is~~
 - (A) ~~adjacent to, or will become a part of, a Department-approved restoration or preservation project;~~
 - (B) ~~adjacent to or includes a sensitive natural resource, as identified in the Basinwide Restoration Plan;~~

1 (C) adjacent to or includes property on which rare aquatic species, as identified by the North
2 Carolina Natural Heritage Program in the "Natural Heritage Program List of Rare Animal
3 Species of North Carolina" or the "Natural Heritage Program List of the Rare Plant Species
4 of North Carolina," is known to have been found; or

5 (D) is adjacent to or includes a Significant Natural Heritage Area as identified by the North
6 Carolina Natural Heritage Program at <https://ncnhde.natureserve.org/>. These documents
7 are hereby incorporated by reference, including subsequent amendments and editions.
8 Copies of these documents may be obtained from the Department of Natural and Cultural
9 Resources Division of Land and Water Stewardship at 1651 Mail Service Center Raleigh,
10 NC 27603 or at <http://www.ncnhp.org/references/publications/rare-animal-list> and
11 <http://www.ncnhp.org/references/publications/rare-plant-list>;

12 ~~whether the property is adjacent to, or will become a part of a Department approved restoration or~~
13 ~~preservation project; or is adjacent to or includes a sensitive natural resource, as identified in the~~
14 ~~Basinwide Restoration Plan; or is adjacent to or includes property with known occurrences of rare~~
15 ~~species as identified by the North Carolina Natural Heritage Program in the "Natural Heritage~~
16 ~~Program List of Rare Animal Species of North Carolina" or the "Natural Heritage Program List of~~
17 ~~the Rare Plant Species of North Carolina"; or is adjacent to or includes a Significant Natural Heritage~~
18 ~~Area as identified by the North Carolina Natural Heritage Program in the "North Carolina Natural~~
19 ~~Heritage Program Biennial Protection Plan, List of Significant Natural Heritage Areas." Copies of~~
20 ~~these documents may be obtained from the Department of Environment and Natural Resources,~~
21 ~~Division of Parks and Recreation, Natural Heritage Program, PO Box 27687, Raleigh, North~~
22 ~~Carolina 27611;~~

23 (4) whether the size of the property is at least five contiguous acres;

24 (5) whether the property is under imminent threat of degradation;

25 (6) ~~the~~ prior, current, and future land use of the donated property and adjacent properties;

26 (7) ~~the~~ absence of extensive structures and infrastructure;

27 (8) ~~the~~ absence of hazardous substance and solid waste;

28 (9) ~~the~~ absence of cultural and historic resources;

29 (10) whether the property is adjacent to non-supporting, partially supporting, or support-threatened
30 waters as designated by the Division of Water ~~Quality Resources~~ pursuant to 40 CFR 131.10(a)
31 through (g). ~~This material is available for inspection at the Department of Environment and Natural~~
32 ~~Resources, Division of Water Quality, Water Quality Section, 512 North Salisbury Street, Raleigh,~~
33 ~~North Carolina;~~

34 (11) ~~the~~ absence of encumbrances and conditions on the transfer of the property interests; and

35 (12) ~~whether~~ provisions have been made by the landowner for the long term maintenance and
36 management of the property.

1 (d) At the expense of the applicant or donor, the following information ~~must~~ shall be submitted with any proposal for
2 donations or dedications of interest in real property:

- 3 (1) documentation that the property meets the criteria ~~outlined~~ in Paragraph (b) and (c) of this Rule;
- 4 (2) US Geologic Survey 1:24,000 (7.5 minute) scale topographic map, county tax map, USDA Natural
5 Resource Conservation Service County Soil Survey Map, and county road map showing the location
6 of the property to be donated along with information on existing site conditions, vegetation types,
7 and the presence of existing structures and easements;
- 8 (3) a current property survey performed in accordance with the ~~procedures~~ requirements of the North
9 Carolina Department of Administration, State Property Office as identified by the ~~State Board of~~
10 ~~Registration for Professional Engineers and Land Surveyors~~ North Carolina Board of Examiners for
11 Engineers and Surveyors in "Standards of Practice for Land Surveying in North Carolina." Copies
12 may be obtained at no charge from the North Carolina State Board of ~~Registration for Professional~~
13 ~~Engineers and Land~~ Examiners for Engineers and Surveyors, 3620 Six Forks Road, Suite 300,
14 Raleigh, North Carolina 27609; www.ncbels.org;
- 15 (4) a current appraisal of the value of the property performed in accordance with the ~~procedures~~
16 requirements of the North Carolina Department of Administration, State Property Office as
17 identified by the Appraisal Board in the "Uniform Standards of Professional ~~North Carolina~~
18 Appraisal Practice." Copies may be obtained at no cost from the Appraisal Foundation, ~~Publications~~
19 ~~Department, PO Box 96734, Washington, D.C. 20090-6734; <http://www.appraisalfoundation.org>;~~
- 20 (5) a title certificate; and
- 21 (6) a Phase 1 Environmental Site Assessment documenting ~~documentation~~ that the property does not
22 contain structures that present health or safety problems to the general public. If wells, septic, water,
23 or sewer connections exist, they shall be filled, remediated, or closed at owner's expense; and in
24 accordance with ~~state~~ State and local health and safety regulations.

25 (e) In addition to the factors outlined in Paragraphs (b) through (d) of this Rule, the ~~Secretary,~~ Secretary or the
26 Secretary's ~~designee,~~ designee shall consider the following factors when determining whether to accept a donation of
27 interest in real property to satisfy compensatory mitigation requirements:

- 28 (1) whether restoration of the property will offset the adverse impacts of the permitted project; and
- 29 (2) whether the adverse impacts of the permitted project are within the same ~~subbasin~~ 8-digit cataloging
30 unit as the property proposed for donation.

31 (f) Donations of interests in real property for the purpose of satisfying compensatory mitigation requirements ~~will~~
32 shall only be considered for acceptance ~~when if~~ the proposed donation ~~will offset~~ offsets an impact for which an
33 application has already been made to the United States Army Corps of Engineers under 33 ~~USC~~ U.S.C. Section 1344
34 or to the Department under 33 ~~USC~~ U.S.C. Section 1341.

35 (g) For the purposes of satisfying compensatory mitigation requirements through the donation of interests in real
36 ~~property, for~~ property requiring restoration, enhancement, or preservation, the size of property to be donated ~~must~~

1 shall equal or exceed the acreage of wetland required to be mitigated under the approved permit, and every parcel
2 ~~must~~ shall be a minimum of five contiguous acres in size.

3 (h) Donation of real property interests to satisfy compensatory mitigation requirements ~~will~~ shall only be accepted if
4 such property meets the requirements of Paragraphs (a) through (i) of this Rule and 15A NCAC 2H ~~.0506(h) and~~
5 .0506(h) and if it satisfies the compensatory mitigation requirements of the approved permit.

6 (i) The donation of conservation easements to satisfy compensatory mitigation requirements ~~will~~ shall only be
7 accepted if the conservation easement is granted in perpetuity and the property to be encumbered meets the
8 requirements of Paragraphs (a) through (j) of this Rule, or if the property interest is being donated to satisfy a condition
9 of a certification issued by the Department ~~under~~ pursuant to 33 USC U.S.C. Section 1341.

10 (j) Donation of interests in real property may contribute to or fulfill compensatory mitigation requirements that may
11 be satisfied through payment of a fee ~~as outlined in the Schedule of Fees~~ according to the Rate Schedule in Rule
12 ~~.0402(a)~~ .0402(c) of this Section. The value of the property interest shall be determined by an appraisal performed in
13 accordance with Subparagraph (d)(4) of this Rule. The required fee as calculated in accordance with Rule ~~.0402(a)~~
14 .0402(c) of this Section shall be satisfied if the appraised value of the donated property interest is equal to or greater
15 than the fee. If the appraised value of the donated property interest is less than the designated fee requirement as
16 calculated in accordance with Rule ~~.0402(a)~~ .0402(c) of this Section, the applicant shall pay the remaining balance
17 due.

18
19 *History Note: Authority G.S. 143-214.11; 143-214.12; 143-215.3;*
20 *Eff. August 1, 1998.*
21 *Readopted Eff. March 1, 2018.*
22

REQUEST FOR TECHNICAL CHANGE

AGENCY: Environmental Management Commission

RULE CITATION: 15A NCAC 02R .0601

DEADLINE FOR RECEIPT: Thursday, February 8, 2018

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

Line 10 – add a colon after “been”

Page 2, lines 8-9, 10, and 16-17 – these standards should be incorporated by reference pursuant to 150B-21.6.

Page 2, line 26 – replace “are” with “means”

Page 2, line 35 – what does “proportionally adjusted” mean?

Page 3, line 6 – replace “are not” with “shall not be”

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Jason Thomas
Commission Counsel
Date submitted to agency: Thursday, January 25, 2018

1 15A NCAC 02R .0601 is readopted as published in 32:04 NCR 177 as follows:

2
3 **15A NCAC 02R .0601 RIPARIAN BUFFER MITIGATION FEES TO THE NC ECOSYSTEM**
4 **ENHANCEMENT PROGRAMDIVISION OF MITIGATION SERVICES**

5 (a) For the purposes of this Rule:

6 (1) "cost" or "costs" shall mean the NC Division of Mitigation Services In-Lieu Fee Mitigation
7 Program's costs associated with riparian buffer mitigation projects in a given rate area, as described
8 in this Rule; and

9 (2) "credit" or "credits" shall mean the number of credits of riparian buffer compensatory mitigation
10 that have been

11 (A) requested by the applicant; and

12 (B) specified in the approved certifications issued by the Department.

13 (b) The Program shall calculate and publish one general riparian buffer mitigation payment rate applicable to all river
14 basins where Commission rules allow riparian buffer mitigation payments and special premium rates for specific
15 watersheds, as identified in Paragraph (c) of this Rule. Rates shall be published on the Division's website
16 (<https://deq.nc.gov/about/divisions/mitigation-services>). All rates shall be based on the costs incurred by the program
17 in those watersheds.

18 (c) Premium Watershed Rates. The Program shall apply premium watershed rates to:

19 (1) The Randleman Lake Watershed;

20 (2) The Jordan Lower New Hope Watershed; and

21 (3) Any 8-digit cataloging unit, mitigation service area, or smaller watershed where costs are 33 percent
22 greater than the general statewide rate shall have a surcharge equal to the difference between the
23 general statewide rate and the actual cost of mitigation in that mitigation service area.

24 The initial rate for a premium watershed with fewer than two riparian buffer mitigation projects that have reached the
25 design stage shall be the highest riparian buffer rate in effect under the Program. The initial rate shall be revised for a
26 premium watershed in the quarter following a quarter in which at least two riparian buffer mitigation projects in that
27 watershed have reached design stage.

28 (d) Rate Adjustment Frequency. Initial rates shall be effective as of the effective date of this Rule. They shall be
29 adjusted quarterly whenever the rate calculation set forth in Paragraph (e) of this Rule exceeds the existing rate by at
30 least ten percent. The rates shall also be adjusted annually. Annual calculations and adjusted rates shall be published
31 by June 15 on the Program's website, <http://deq.nc.gov/about/divisions/mitigation-services>, and shall become effective
32 July 1. Any quarterly rate adjustments shall become effective on the first day of October, January, or April, as
33 applicable, and shall be published on the same website two weeks prior to that date. The rate shall be adjusted within
34 two business days if the Program suspends acceptance of payments at the current rate

35 (e) Payment rates shall be determined for a rate area using the following equation and presented in per-credit values:

$$ActualCostRate = \frac{ActualCosts_{PresentDay}}{TotalRiparianBufferCredits_{PresentDay}} + AdjustmentFactor$$

Where:

(1) Actual Costs_{PresentDay} means the sum of all costs, adjusted for inflation, as described in this Subparagraph. Costs shall mean project costs and administrative costs and shall include the costs of completed projects, terminated projects, and projects in process. At the time the rate is set, all completed land acquisition contracts and expenditures shall be adjusted to present-day values using the current North Carolina Department of Agriculture and Consumer Services' Agricultural Statistics Farm Real Estate Values. All other completed contracts and expenditures shall be adjusted to present day values using the annual composite USACE Civil Works Construction Cost Index. Future land acquisition contract costs for projects in process shall be calculated using the Program's per-credit contract costs of the same type adjusted to the inflated future value at the time the contracts will be encumbered using the North Carolina Department of Agriculture and Consumer Services' Agricultural Statistics Farm Real Estate Values. All other future contracts shall be calculated using the Program's per-credit contract costs of the same type adjusted to the inflated future value at the time the contracts will be encumbered using the current composite USACE Civil Works Construction Cost Index. For projects in process where the contract type has not been determined, the cost of the project shall be calculated using the Program's average per credit cost adjusted to the future inflated value when the project will be initiated. Future year annual inflation rates shall be drawn from the USACE Civil Works Construction Cost Index. If not available from either source, they shall be calculated using the average annual percentage change over the last three-year period;

(2) As used in this Rule:

(A) “Project Costs” means the total costs associated with development of riparian buffer mitigation projects including identification, land acquisition, project design, project construction, monitoring, maintenance, and long-term stewardship.

(B) “Administrative Costs” are costs associated with administration of the Program including staffing, supplies and rent.

(C) The “cost for projects in process” means the sum of expenditures of project contracts to date, contracted cost to complete existing contracts, and the projected cost of future contracts needed to complete those projects required to fulfill Program riparian buffer mitigation obligations in the rate area.

(D) “Total Riparian Buffer Credits_{PresentDay}” means the total amount of credits provided by projects in the rate area at the time of calculation. If the Total Riparian Buffer Credits_{PresentDay} for an existing or completed project is reduced, the Actual Costs_{PresentDay} for that existing or completed project shall be proportionally adjusted;

- 1 (1) The Adjustment Factor shall be applied only in those calculation periods where actual costs are
2 calculated to be greater than actual receipts.

3
$$\text{Adjustment Factor} = \frac{(\text{Actual Costs} - \text{Actual Receipts})}{\text{Number of Riparian Buffer Credits Paid During Adjustment Period}}$$

4 The Adjustment Factor shall not comprise more than 60% of the overall rate;

5 (A) “Actual Costs” shall be the same as Actual Costs_{PresentDay} as defined in Subparagraph (1) of
6 this Paragraph, except that the existing contracts and completed land acquisitions are not
7 adjusted for inflation.

8 (B) “Actual Receipts” means the sum of all riparian buffer mitigation payments made to the
9 Program in the rate area at the time of calculation.

10 (C) “Number of Riparian Buffer Credits Paid During Adjustment Period” means the average
11 number of riparian buffer mitigation credits paid to the Program over the last three years
12 in the rate area, multiplied by the adjustment period. If no payments have been made to
13 the Program in a rate area the number of credits paid shall be 435,600 riparian buffer credits
14 until greater than 435,600 riparian buffer credits have been purchased in that rate area.

15 (4) Adjustment Period shall be one to four years determined as follows for a rate area.

16 (A) One year if Actual Costs exceed Actual Receipts by less than five percent.

17 (B) Two years if Actual Costs exceed Actual Receipts by 5 percent or more but less than 15
18 percent.

19 (C) Three years if Actual Costs exceed Actual Receipts by 15 percent or more but less than 25
20 percent.

21 (D) Four years if Actual Costs exceed Actual Receipts by 25 percent or more.

22 ~~The following is the process for payment of fees to the Riparian Buffer Restoration Fund administered by the North~~
23 ~~Carolina Ecosystem Enhancement Program as one option to mitigate riparian buffer impacts allowed under rules in~~
24 ~~15A NCAC 02B. Persons who wish to use this option shall first meet the criteria established for doing so in the buffer~~
25 ~~rules in 15A NCAC 02B that reference this Rule. Such buffer rules include, but may not be limited to 15A NCAC~~
26 ~~02B .0295. Persons who choose to satisfy their mitigation determination by paying a compensatory mitigation fee to~~
27 ~~the Riparian Buffer Restoration Fund as allowed here shall use the following procedure:~~

- 28 (1) ~~SCHEDULE OF FEES: The amount of payment into the Fund shall be based on the costs of riparian~~
29 ~~buffer restoration. The payment amount shall be determined by multiplying the acres or square feet~~
30 ~~of mitigation required under other rules in 15A NCAC 02B by an initial value of ninety six cents~~
31 ~~per square foot or forty one thousand eight hundred and eighteen dollars per acre (\$41,818/acre).~~
32 ~~This initial per acre rate shall be adjusted in January of each year by staff of the NC Ecosystem~~
33 ~~Enhancement Program based upon the construction cost index factor published every December in~~
34 ~~the Engineering News Record. The Engineering News Record is hereby incorporated by reference~~
35 ~~including subsequent amendments and editions, and is located at~~
36 ~~<http://enr.construction.com/economics/> at an annual subscription cost of forty nine dollars and~~
37 ~~ninety nine cents (\$49.99).~~

1 (2) ~~The required fee shall be submitted to the N.C. Ecosystem Enhancement Program (NC EEP), 1652~~
2 ~~Mail Service Center, Raleigh, NC 27699-1652 prior to any activity that results in the removal or~~
3 ~~degradation of the protected riparian buffer for which a "no practical alternatives" determination has~~
4 ~~been made pursuant to requirements of other rules in 15A NCAC 02B.~~

5 (3) ~~The payment of a compensatory mitigation fee may be fully or partially satisfied by donation of real~~
6 ~~property interests pursuant to requirements of other rules in this Subchapter.~~

7
8 History Note: Authority G.S. 143-214.1; 143-214.5; 143-214.5(i); 143-214.7; 143-214.12; 143-214.21; 143-
9 215.3(a)(1); 143-215.6A; 143-215.6B; 143-215.6C; 143-215.8B; 143B-282(c); 143B-282(d); ~~S.L.~~
10 ~~2005-190; S.L. 2006-259;~~
11 ~~Eff. August 11, 2009;~~
12 ~~Amended Eff. May 1, 2015;~~
13 ~~Transferred from 15A NCAC 02B .0269 Eff. May 1, 2015.~~
14 ~~Readopted Eff. March 1, 2018.~~
15

REQUEST FOR TECHNICAL CHANGE

AGENCY: Environmental Management Commission

RULE CITATION: 15A NCAC 02R .0602

DEADLINE FOR RECEIPT: Thursday, February 8, 2018

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

Line 23 – add “that is” before “subject” if that is what is meant.

Line 35 – replace “415” with “4 15”

Page 2, line 9 – replace with the following “~~costs.~~ costs and shall include the costs of Projects in the calculation are completed projects, terminated” (just as published).

Page 2, line 10 – don’t delete the comma after “set” (just remove the strikethrough).

Page 2, lines 13 and 15 – these standards should be incorporated by reference pursuant to 150B-21.6.

Page 2, line 35 – replace “shall be” with “means”

Page 3, line 6 – replace the semicolon with a colon

Page 3, lines 10-12 – delete the first sentence of Part (A).

Page 3, line 28 – add a comma after “years”

Page 4, line 1 – replace “When” with “If”

Page 4, line 3 – replace “In cases where” with “If”

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Jason Thomas
Commission Counsel
Date submitted to agency: Thursday, January 25, 2018

1 15A NCAC 02R .0602 is readopted as published in 32:04 NCR 177 as follows:

2
3 **15A NCAC 02R .0602 NUTRIENT OFFSET PAYMENT RATES FOR THE NC ECOSYSTEM**
4 **ENHANCEMENT PROGRAMDIVISION OF MITIGATION SERVICES**

5 a) ~~The purpose of this Rule is to establish actual cost rates for the payment of nutrient offset fees to the NC Ecosystem~~
6 ~~Enhancement Program, subsequently referred to as the Program, where rules adopted by the Commission allow this~~
7 ~~option toward fulfillment of nutrient load reduction requirements and where the Program implements projects to~~
8 ~~achieve nutrient reductions. Wherever the term "cost" or "costs" is used in this Rule, it means the Program's costs~~
9 ~~associated with nutrient offset projects in a given rate area, as described below. For this purpose, the Program shall~~
10 ~~operate according to the requirements in this Rule. For the purposes of this Rule, the term "cost" or "costs" means the~~
11 ~~costs of the NC Division of Mitigation Services, hereinafter in this Rule the "Program," associated with nutrient offset~~
12 ~~projects in a given rate area, as described in this Rule.~~

13 (b) The Program shall calculate and publish general offset payment rates applicable to each river basin where
14 Commission rules allow such nutrient offsets and special premium watershed rates for specific watersheds as identified
15 in Paragraph (d) of this Rule. All rates shall be based on the ~~actual and complete~~ per-pound nutrient reduction costs
16 incurred by ~~implementing projects~~ the Program in those watersheds.

17 (c) Payment rates shall be developed for nitrogen, phosphorus, or other nutrients as dictated by Commission ~~rule~~
18 ~~requirements~~ rules for each river basin. Rates shall be published on the Division's website ([https://deq.nc.gov/about/](https://deq.nc.gov/about/divisions/mitigation-services)
19 [divisions/mitigation-services](https://deq.nc.gov/about/divisions/mitigation-services)).

20 (d) Special Premium Watershed Rates. The Program shall apply special premium watershed rates to:

- 21 (1) The Neuse 03020201 cataloging unit below the Falls watershed, the Jordan Lake watershed, and the
22 Falls Lake watershed; and
23 (2) Any eight digit cataloging unit or smaller watershed subject to nutrient management rules where
24 costs are ~~40~~ 33 percent greater than costs in the larger watershed or river basin ~~in which~~ where
25 that cataloging unit is located.

26 The initial rate for a special premium watershed with fewer than two nutrient reduction projects that have reached the
27 design stage shall be the highest rate in effect under the Program for the applicable nutrient. The initial rate shall be
28 revised for a special premium watershed in the quarter following a quarter in which at least two nutrient reduction
29 projects in that watershed have reached design stage.

30 (e) Once an area has been established as an area with ~~Special Watershed Rates~~, premium watershed rates, it shall
31 remain a ~~Special Watershed Rate~~ premium watershed rate area.

32 (f) Rate Adjustment Frequency. ~~Initial rates shall be effective as of the effective date of this Rule. They~~ Rates shall
33 be adjusted quarterly whenever the rate ~~increases ten percent above the existing rate~~ calculation set forth in Paragraph
34 (g) of this Rule exceeds the existing rate by at least ten percent. The rates shall also be adjusted annually. Annual
35 calculations and adjusted rates shall be published by June 15 on the Program's ~~Web site, www.nceep.net; website~~
36 <http://deq.nc.gov/about/divisions/mitigation-services>, and shall become effective July 1. Any quarterly rate
37 adjustments shall become effective on the first day of October, January, or ~~April~~ April, as applicable, and shall be

1 published on the same ~~Web site~~ website two weeks prior to that date. The rate shall be adjusted within two business
2 days if the Program suspends acceptance of payments at the current rate pursuant to 15A NCAC 02B .0240 (e)(2).

3 (g) Payment rates for each nutrient shall be determined for a rate area using the following equation and presented in
4 ~~per pound~~ per-pound values:

$$ActualCostRate = \frac{ActualCosts_{PresentDay}}{TotalPoundsOffset_{PresentDay}} + AdjustmentFactor$$

5
6 Where:

7 (1) ~~Actual Costs_{PresentDay}~~ “Actual Costs_{PresentDay}” means the sum of all costs adjusted for inflation as
8 described in this ~~Sub-Item. Subparagraph.~~ Costs are shall mean project costs and administrative
9 costs and shall include the costs of. ~~Projects in the calculation are~~ completed projects, terminated
10 ~~projects projects,~~ and projects in process. At the time the rate is set, ~~to ensure that collected~~
11 ~~payments are sufficient to implement new projects,~~ all completed land acquisition contracts and
12 expenditures shall be adjusted to ~~present day~~ present-day values using the current North Carolina
13 Department of Agriculture and Consumer Services' Agricultural Statistics Farm Real Estate Values.
14 All other completed contracts and expenditures shall be adjusted to ~~present day~~ present-day values
15 using the annual composite USACE Civil Works Construction Cost Index. Future land acquisition
16 contract costs for projects in process are shall be calculated using the Program's ~~per credit~~ per-credit
17 contract costs of the same type adjusted to the inflated future value ~~when at the time~~ when at the time the contracts
18 will be encumbered using the North Carolina Department of Agriculture and Consumer Services'
19 Agricultural Statistics Farm Real Estate Values. All other future contracts shall be calculated using
20 the Program's ~~per credit~~ per-credit contract costs of the same type adjusted to the inflated future
21 value ~~when at the time~~ when at the time the contracts will be encumbered using the current composite USACE Civil
22 Works Construction Cost Index. For projects in process where the contract type has not been
23 determined, the cost of the project shall be calculated using the Program's average per pound cost
24 adjusted to the future inflated value ~~when at the time~~ when at the time the project will be initiated. Future year annual
25 inflation rates shall be drawn from ~~either the North Carolina Department of Agriculture and~~
26 ~~Consumer Services' Agricultural Statistics Farm Real Estate Values or~~ the USACE Civil Works
27 Construction Cost Index. If not available from either source, they shall be calculated using the
28 average annual percentage change over the last three-year period;

29 (2) As used in this Rule:

30 (A) ~~Project Costs~~ “Project Costs” are means the total costs associated with development of
31 nutrient reduction projects including identification, land acquisition, project design, project
32 construction, monitoring, ~~maintenance~~ maintenance, and long-term stewardship;

33 (B) ~~Administrative Costs~~ “Administrative Costs“ are means costs associated with
34 administration of the Program including staffing, ~~supplies~~ supplies, and rent; and

35 (C) The ~~cost~~ “costs for projects in process process” is shall be the sum of expenditures of
36 project contracts to date, contracted cost to complete existing contracts, and the projected

1 cost of future contracts needed to complete those projects required to fulfill Program
2 nutrient reduction obligations in the rate area;

3 (3) ~~Total~~ “Total Pounds Offset_{PresentDay} Offset_{PresentDay}” means the total number of pounds of a nutrient
4 reduced by the Program’s projects in the rate area at the time of calculation. If the Total Pounds
5 Offset_{PresentDay} for an existing or completed project is reduced, the Actual Costs_{PresentDay} for that
6 existing or completed project shall be proportionally adjusted; ~~and~~

7
8 (4) ~~—~~
$$AdjustmentFactor = \frac{(ActualCosts - ActualReceipts)}{NumberofPoundsPaidDuringAdjustmentPeriod}$$

9 ~~Where:~~

10 (A) ~~The Adjustment Factor~~ “Adjustment Factor” is a per-pound value used to bring actual costs
11 and actual receipts into balance, ensuring that future payments are sufficient to cover the
12 cost of implementing the Program in the rate area. The Adjustment Factor shall be
13 calculated using the following formula:

14
$$AdjustmentFactor = \frac{(ActualCosts - ActualReceipts)}{NumberofPoundsPaidDuringAdjustmentPeriod}$$

15 The Adjustment Factor shall be applied ~~in~~ only in those calculation periods where actual
16 costs are calculated to be greater than actual receipts. The Adjustment Factor shall not
17 comprise more than 60% of the overall rate;

18 (B) ~~Actual Costs~~ “Actual Costs” ~~are~~ shall be the same as Actual Costs_{PresentDay} Costs_{PresentDay}
19 as defined in Subparagraph (1) of this Paragraph, except that the existing contracts and
20 completed land acquisitions are not adjusted for inflation;

21 (C) ~~Actual Receipts~~ “Actual Receipts” ~~are~~ means the sum of all offset payments made to the
22 Program ~~to date~~ in the rate area at the time of calculation; and

23 (D) ~~Number~~ “Number of Pounds Paid during Adjustment Period Period” ~~is~~ means the average
24 number of pounds of a nutrient paid to the Program over the last three years in the ~~area,~~
25 area multiplied by the adjustment period. If no payments have been made to the Program
26 in a rate area, the number of pounds paid shall be ~~set to~~ 1,000 pounds until greater than
27 1,000 pounds have been purchased in that rate area.

28 ~~(5)(4)~~ Adjustment Period is shall be one to four years determined as follows for a rate area:

29 (A) One year if Actual Costs exceed Actual Receipts by less than five percent;

30 (B) Two years if Actual Costs exceed Actual Receipts by five percent or more but less than 15
31 percent;

32 (C) Three years if Actual Costs exceed Actual Receipts by 15 percent or more but less than 25
33 percent; and

34 (D) Four years if Actual Costs exceed Actual Receipts by 25 percent or more.

1 (h) When individual projects produce more than one type of nutrient reduction, the project costs shall be prorated for
2 each nutrient being offset by the project.

3 (i) In cases where an applicant is required to reduce more than one nutrient type and chooses to use the Program to
4 offset nutrients, the applicant shall make a payment pursuant to 15A NCAC 02B .0240 (e)(3) for each nutrient type.

5

6 *History Note:* Authority G.S. 143-214.1; 143-214.20; 143-214.21; S.L. 1995-572; S.L. 2006-215; S.L. 2007-438;
7 S.L. 2009-337; S.L. 2009-484; S.L. 2009-486;

8 Eff. September 1, 2010;

9 Transferred from 15A NCAC 02B .0274 Eff. May 1, 2015.

10 Readopted Eff. March 1, 2018.

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