**15A NCAC 02B ~~.0240~~.0703 NUTRIENT OFFSET CREDIT TRADING**

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

(1) the Neuse Nutrient Strategy as set forth in Rule .0710 of this Section;

(2) the Tar-Pamlico Nutrient Strategy as set forth in Rule .0730 of this Section;

(3) the Jordan Lake Nutrient Strategy as set forth in Rule .0262 of this Subchapter, including to the extent that the requirements of this Rule related to the nutrient offset credits are incorporated by the Jordan Lake rules; and

(4) the Falls Lake Nutrient Strategy as set forth in Rule .0275 of this Subchapter, including to the extent that the requirements of this Rule related to the nutrient offset credits are incorporated by the Falls Lake rules;

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

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

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

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

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

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

(A) surface waters identified for restoration under the applicable nutrient-related TMDL or nutrient strategy; or

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

(c) NUTRIENT OFFSET CREDIT APPROVAL STANDARD. Providers shall demonstrate that a nutrient reduction project is designed, constructed, implemented, and sustained in a manner that, according to the best available scientific evidence, studies, and principles, will generate the estimated nutrient load reduction for the duration of time for which credits are approved. Nutrient offset credits shall be generated and transferred in accordance with G.S. 143-214.26.

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

(1) Nutrient reduction credit sought on developed lands shall be calculated in relation to load reductions achieved relative to the project site's current loading condition, as determined by the provider and verified by the Division;

(2) Nutrient load reductions shall be site-specific estimates of decreases in annual mass load of nitrogen or phosphorus to the nearest receiving surface water feature. Such estimates shall be supported by the weight of evidence from available, current and applicable research, may involve water quality modeling or engineering formulas and calculations, and shall reflect as closely as possible project design specifications.

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

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

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

(6) A nutrient reduction project may be designed to generate permanent nutrient offset credit or term nutrient offset credit and shall specify which, or both, in the project plan. Permanent nutrient reduction credits and term nutrient reduction credits shall be maintained separately, even if associated with the same nutrient offset project.

(7) Permanent nutrient offset credits may be utilized for temporary compliance purposes. If so, for each pound of annual term compliance credit received, $1/30^{th}$ of one pound of permanent nutrient offset credit shall be utilized and retired by removal from the applicable ledger.

(8) Nutrient offset credits that were approved prior to the adoption of this Rule may make application to be reclassified. The Division shall approve the application associated with any nutrient offset project to reclassify credits as permanent that meet the requirements for permanent credits at the time of the application to be reclassified. Other nutrient offset credits that were approved prior to

the adoption of this Rule or that were conditionally approved pursuant to a mitigation banking instrument or other agreement with DEQ prior to the adoption of this Rule, shall be considered term credits and may be transferred between term and permanent ledgers at a ratio of 30 years of term nutrient offset credit to one permanent nutrient offset credit.

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

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

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

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

(A) A site location and site boundaries of the proposed project.

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

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

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

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

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

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

(i) establish the proposed project;

(ii) construct and ensure initial performance of the project;

(iii) report on and successfully complete the project by completing all crediting milestones;

(iv) hold and enforce all easement or other protection mechanisms; and

(v) ensure maintenance of the project for its credited duration.

(H) A description of how the project will be implemented, which shall include a timeline and a commitment to provide an as-built report upon the full project construction or installation.

(I) A description of how the project will be maintained and monitored after it has been installed and for its duration.

(J) A description of how the project will be sustained for its credited life, including a commitment to repair and renovate it as needed to maintain its performance, to keep records of all such operation, maintenance, monitoring, repair and renovation, and to notify the Division of any significant performance remediation needs and plans.

(K) Identification of federal or State grant funding contributing to project implementation.

(3) FINANCIAL ASSURANCES. Providers seeking approval of a nutrient offset bank shall provide the financial assurance that a project plan will be constructed as proposed. The financial assurance shall be in the form of a completion bond, credit insurance, letter of credit, escrow, or other vehicle acceptable to the Division in accordance with this Subparagraph, payable to, or for the benefit of, the Division, to ensure the involved property is secured in fee title or by easement and that planting or construction, monitoring or maintenance are completed as necessary to meet the requirements of the project plan.

(4) PROJECT PLAN APPROVAL. The Division shall approve the provider's project plan proposal after verifying the provider's compliance with Subparagraphs (1), (2) and (3) of this Paragraph and completing an onsite review to verify that preconstruction site conditions are suitable to generate the credits proposed by the project plan. However, the Division may partially or fully waive these requirements for term practices or projects if it determines that the burden of compliance is disproportionate to the value of the credits being generated and alternative means are used to satisfy the basic credit approval standard set forth in Paragraph (c) of this Rule.

(f) RELEASE AND ACCOUNTING FOR NUTRIENT OFFSET CREDITS. The Division shall release nutrient offset credits from an approved project in the following manner:

(1) The Division shall release credits to providers upon confirmation that project-specific milestones reflected in the project plan's credit release schedule have been met. Project-specific milestones for permanent nutrient offset credits shall conform to the following requirements:

(A) Credits shall not be released until the property is secured in fee title or by easement and financial assurance is posted for planting or construction of the project.

(B) No more than 50 percent of the credits shall be released for a project until financial assurance is provided for monitoring and maintenance activities lasting until project completion.

(C) No more than 80 percent of the credits shall be released for a project until the provider complies with the requirements of Paragraph (g).

(2) Once credits are released for a nutrient offset bank and until bank closure, nutrient offset bank providers shall provide a credit/debit ledger to the Division at intervals no less frequently than quarterly.

(3) The Division shall not release any credits for a project if that project is financed in whole or in part by State grant funding or federal grant funding.

(g) MAINTAINING PERMANENT NUTRIENT OFFSET CREDITS. All permanent nutrient offset projects shall comply with the following requirements:

(1) A provider shall transfer responsibility for oversight of a completed permanent project to a perpetual steward in accordance with this Paragraph and the approved project plan. A perpetual steward may also transfer responsibility to another perpetual steward in accordance with the terms of this Paragraph, subject to DWR approval. Perpetual stewards may not assume project maintenance or restoration responsibilities.

(2) The provider shall create and transfer to the perpetual steward a non-wasting endowment or other dedicated financial surety to provide for the oversight of the completed permanent project. The endowment amount shall be proportionate to the duties accepted by the perpetual steward.

(3) For projects utilizing conservation easements, the provider shall acquire and then transfer a conservation easement to a perpetual steward in accordance with 26 U.S.C. 170(h) and the Conservation and Historic Preservation Agreements Act, G.S. 121, Article 4. The terms of the conservation easement shall be consistent with a Division-approved template or be approved by the Division as conforming to Paragraph (c) of this Rule. Non-governmental perpetual stewards shall be accredited by the Land Trust Accreditation Commission or approved by the Division.

(4) For projects utilizing SCMs, they shall be placed in and protected by recorded drainage easements with recorded access easements to the nearest public right-of-way for purposes of operation and maintenance. These easements shall be granted in favor of the person or entity responsible for operating and maintaining the structures, with a note as to the responsible person or entity. Easements shall be of sufficient width for inspection and maintenance of the project. The Division may temporarily or permanently invalidate permanent credits generated by an SCM if it determines that the SCM has been impacted due to failure to comply with the terms of an associated project plan, nutrient offset banking instrument, easement, maintenance agreement, other protective agreement, or this Rule.

(5) Projects designed to restore a natural ecological community at the project site, which are completed and then damaged by natural causes, may be passively restored exclusively through natural ecological processes.

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

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

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

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

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

(4) If DMS fails to meet deadlines associated with project institution or construction as specified in Subparagraph (3) of this Paragraph, then DMS shall develop an action strategy to include in the annual report specified in Subparagraph (2) of this Paragraph. Action strategies shall include all of the following:

(A) a list of factors resulting in delays or deficiencies in procurement, project implementation, or construction;

(B) specific actions and a timeline planned by DMS to satisfy outstanding credit requirements such that a project will be instituted before the end of the first full state fiscal year after the action strategy is submitted to the Division in the annual report and constructed before the end of the third full state fiscal year after the action strategy is submitted to the Division in the annual report, unless otherwise specified in the action strategy;

(C) the anticipated date by which all outstanding nutrient offset credit requirements will be satisfied; and

(D) an evaluation of current progress in relation to any prior action strategies.

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

(1) Offset payments made to DMS shall be contingent upon acceptance of the payment by DMS. DMS shall consider its financial, temporal, and technical ability to satisfy the request to make its determination.

(2) Where persons seek to satisfy regulatory obligations for more than one nutrient type, they shall acquire nutrient reduction credits to address each type.

(3) Projects shall be approved and the associated offset credits released by the Division before they may be utilized for NPDES wastewater permit compliance purposes.

(4) For offset credits used to meet NPDES wastewater discharge requirements, the applicant shall provide 50 percent additional credits to address the uncertainty factor for using unmonitored nonpoint source reductions to meet point source discharge limits. Application of this ratio is in addition to other ratios that may be applied, including delivery or transport factors where applicable. Exceptions to the application of this uncertainty factor are as follows:

(A) The uncertainty factor for wastewater dischargers in the Jordan Lake watershed shall instead be determined in accordance with 15A NCAC .0273(2)(d)(ii) until final action is taken with respect to that rule's next readoption pursuant to G.S. 150B-21.3A, S.L. 2016-94, and S.L. 2018-5.

(B) The uncertainty factor for wastewater dischargers in the Falls Lake watershed shall instead be determined in accordance with 15A NCAC .0282(2)(b)(i) until final action is taken with respect to that rule's next readoption pursuant to G.S. 150B-21.3A, S.L. 2016-94, and S.L. 2018-5.

(5) Delivery factors shall be applied to estimate nutrient reductions to an impaired water body subject to a nutrient strategy if required under rules of this Subchapter for that strategy.

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

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

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

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

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

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

*History Note:* *Authority G.S. 143-214.1; 143-214.20; 143-214.21; 143-214.26;*
*Eff. August 1, 1998;*
*Amended Eff. August 1, 2006;*
*Amended Eff. September 1, 2010.*
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