

STATE OF NORTH CAROLINA
DEPARTMENT OF ENVIRONMENTAL QUALITY
DIVISION OF MITIGATION SERVICES

HEARING OFFICERS' REPORT OF PROCEEDINGS
OF PUBLIC HEARINGS ON
AMENDMENTS TO RULES 15A NCAC 02R

12 December 2017

RALEIGH, NC

ENVIRONMENTAL MANAGEMENT COMMISSION

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CHAPTER I

SUMMARY AND RECOMMENDATIONS

Proposed Amendments to 15A NCAC 02R

Summary Information

Commission:	Environmental Management Commission
Agency:	NCDEQ Division of Mitigation Services
Citation:	Subchapter 15A NCAC 02R
Title:	Ecosystem Enhancement Program
Description of the Proposed Rule Amendments:	The Division of Mitigation Services operates four in-lieu fee mitigation programs in the state of North Carolina. These programs are accessed on a voluntary basis by members of the development community in need of compensatory mitigation credits when private mitigation bank credits are unavailable. This subchapter is being readopted with substantive changes pursuant to G.S. 150B 21.3A
Agency Contact:	Kelly Williams In-Lieu Fee Program Coordinator Kelly.williams@ncdenr.gov (919) 707-8915
Authority:	G.S. 143-214.8-12
Statement of Necessity:	Re-adoption of this subchapter is required by 150B 21.3A. Staff proposed amendments to update rules to reflect current basinwide restoration planning practices and to update outdated language. Recent advances in accounting and data analysis software now provide DMS with the capability to calculate actual project costs for all credit types. Per 15A NCAC 02R .0402(c) the conversion of all rate calculations to actual cost basis is recommended so that rates reflect project costs. Currently, only the nutrient offset program and the NCDOT program use actual cost accounting to calculate rates.
Impact Summary:	The proposed rule amendments will update the rate structure to reflect actual costs. The updates represent both increases and decreases to the flat rates currently in place. Entities electing to participate in the in-lieu fee programs will be invoiced based on the rate corresponding to the mitigation required by their permit or authorization. These rates will apply to state and local government entities and private developers. Financial analyses are provided in the fiscal note.

Background

Two hearings were held to receive public comments on proposed amendments to the 15A NCAC 02R rules which propose changes to rules outlining the operation of the Department of Environmental Quality Division of Mitigation Services' in-lieu fee mitigation programs. The first hearing was held in Wilmington on September 27, 2017 and a second hearing was held in Raleigh on October 4, 2017.

The Division of Mitigation Services (DMS), formerly the Ecosystem Enhancement Program, has proposed rulemaking with the North Carolina Office of Administrative Hearings to amend the rules in Subchapter 15A NCAC 02R pursuant to G.S.150B-21.3A(d)(2) *Periodic review and expiration of existing rules*. The 02R rules establish the components and procedures for the operation of DMS in-lieu fee (ILF) mitigation programs which provide a reliable option to meet the compensatory mitigation needs of the development community. DMS is best characterized as both a provider and a consumer of mitigation credits. As a national leader in compensatory mitigation, the program works with developers and regulators to consolidate, streamline and assume the risk associated with mitigation requirements resulting from permitted activities. To date, DMS has provided mitigation credits for thousands of public and private development projects statewide.

[Proposed amendments](#) include minor updates to rule language in 02R .0102, .0202, .0203, .0301, .0302 and .0403 to reflect current practices and procedures. Rules .0101 and .0201. are proposed for repeal. In addition to technical and formatting changes, the amendments include updates that reflect the Division's current function-based priorities in basinwide restoration planning and consistency determinations. Proposed amendments to .0602 Nutrient Offset Rates seek to adjust the threshold for "premium watershed rates," modify the "adjustment factor" and improve the rate adjustment frequency procedures. Staff propose to eliminate the unpopular and confusing quarter-acre rounding procedure for wetland credit invoices and recommend combining riparian and non-riparian wetland rates since no significant cost disparity between these two credit types has been identified. DMS would continue to offer both credits types where restoration opportunities are available, but the rates would be the same.

In accordance with G.S. 143-214.11(e), the existing rule 15A NCAC 02R .0402(c) and recent legislative initiatives, Division staff proposed amendments to the Environmental Management Commission (EMC) to ensure the fee schedules reflect the actual costs of restoration activities. Proposed changes to .0402 Stream and Wetland Rates and .0601 Riparian Buffer Mitigation Fees include the implementation of sustainable methods for calculating rate schedules applicable to the in-lieu fee programs offered by the DMS. These rate schedules have remained static for many years despite the most recent updates to the DMS procurement requirements in G.S. 143-214.11(i) and evolving regulatory requirements. As such, the wetland, stream and riparian buffer rates currently in place do not reflect actual program costs resulting in a revenue shortfall that jeopardizes the future availability of the in-lieu fee program as a mitigation option for the development community. The availability of accurate project cost data presents an opportunity to implement Actual Cost Methods (ACMs) to adjust the rate schedules for streams, wetlands and riparian buffer mitigation credits. An ACM is currently used to calculate rates for the Nutrient Offset ILF program which allows rates to reflect actual costs and to increase or decrease when program costs change.

DMS now has the ability and the data to apply an ACM calculation to the Statewide Stream and Wetland ILF Program and the Riparian Buffer ILF Program. These programs represent a crucial service to the development community when other mitigation options are unavailable or inaccessible. Thousands of public and private customers have voluntarily accessed these programs to meet compensatory

mitigation and environmental offset requirements from federal, state and local water quality protection regulations. Federal Rules establish a preference for third-party mitigation from mitigation banks and approved in-lieu fee programs over permittee-responsible mitigation projects.

Public Comment Period

Public Hearings

The Notice of Text was published in the August 15, 2017 NC Register. No public comments were offered or submitted at either of the public hearings. At each hearing the hearing officer read a prepared statement (see Chapter III) inviting the public to comment. DMS staff followed with a presentation on the proposed amendments providing information on the more minor editorial and technical updates and the amendments related to watershed planning. The presentations focused on characterizing the decreasing revenue stream that has resulted from under-collection of fees and the projected future financial insolvency of the program if rates are not updated to reflect program costs. Staff detailed the solutions that the proposed amendments will provide to ensure long-term program stability and success so that DMS can continue to provide services to the development community.

Written Comments and Responses

Written comments were submitted by four individuals representing four entities during the comment period that began on August 15, 2017 and ended October 16, 2017. The comments are provided in their entirety in Chapter III. While two entities requested additional consideration of particular elements in the proposed rules, none offered specific alternative language for any of the proposed rule amendments. No comments pertaining to the proposed coastal wetland rates were received, though concerns about mitigation cost increases in general were expressed.

Comments were received from Resource Environmental Solutions (RES), the North Carolina Home Builders Association (NCHBA), Environmental Defense Fund (EDF) and Business Alliance for a Sound Economy (BASE).

Resource Environmental Solutions (RES) Comments

RES is a private mitigation banking company and a full-delivery vendor for DMS. Comments from RES strongly support DMS and EMC efforts to offer pricing that reflects actual mitigation costs. RES stated they believe the current system forces some customers to pay more than is necessary for mitigation credits. RES comments support localized pricing to ensure developers pay a fair price for their project. The Actual Cost Methods proposed in the rule amendments will accomplish these goals by calculating actual project costs and setting rates that reflect those costs. The methods specify rate adjustment procedures when costs in some service areas are significantly higher than others. RES suggests the EMC consider DMS setting a separate rate in each 8-digit HUC or service area – this would require creating up to 54 stream rates, 54 freshwater wetland rates, and 9 coastal wetland rates. Customer feedback, however, tends to favor preserving a rate system that is as simple as possible. In addition, the proposed ACM uses full-delivery and bank credit purchase data as the basis for calculating rates. There are service areas where insufficient cost data exist to make individual HUC rates a possibility. At this time, DMS staff do not believe it is necessary to have dozens of rates; staff does recognize that as the calculations for actual costs are carried out over time, those HUCs and service areas that do have significantly higher costs will be designated as “premium rate areas” where rates will be calculated solely on the actual costs of implementing the ILF program in those areas. RES also requested transparency with the rate calculations. DMS currently provides annual reports on costs to the General Assembly, but will consider how to increase transparency with respect to data management and rate calculations. RES has

suggested that rates calculated using the ACMs be published and posted for public comment three months in advance of the rate's effective date. DMS currently publishes rates two weeks in advance of quarterly updates for the nutrient offset ACM. This allows for the maximum time to include the most recent payments and expenditures to maximize accuracy of the calculations. The procedures for running the nutrient offset ACM and DMS customer service standards have been successful for maintaining customer awareness of rate updates. Soliciting public comments on rates as RES suggests, is unnecessary since the rates reflect the actual costs incurred by the program.

Additional comments from RES regarding the language in rule 02R .0202 are noted. As indicated by RES, it is not the intent to shift the focus of Basinwide Restoration Plans to 8-digit HUCs. Rather, the rule provides for HUC-specific assessments as components within the overall restoration planning process carried out on the basinwide level. Organizing basinwide planning efforts by 8-digit HUC flows from the current preference for the mitigation service area concept. Service areas are most often 8-digit HUCs, though there are numerous examples of other approved service areas in the state. 02R .0202 (1), (2) and (5) provide a means to organize the functional assessments with a basin's watersheds to facilitate the federal requirements to use a watershed approach for compensatory mitigation. To that end, DMS assessments within each basin are done on a scale widely seen as appropriate for most federal and state considerations while offering a larger basinwide view of functional improvement goals.

North Carolina Home Builders Association (NCHBA) comments

The NCHBA, whose membership represents a portion of the DMS customer base, expressed their membership's concern over the cost of mitigation. While the proposed rule amendments will result in some rates increasing, some are projected to decrease. In addition, the elimination of the wetland rounding feature will allow for customers to be charged for only the credits they need. DMS continues to assert that the implementation of Actual Cost Methods will not increase costs, rather they measure and reflect the actual costs of mitigation. DMS is keenly aware of rising mitigation costs as a large consumer and buyer of mitigation credits, but has been effective in realizing cost efficiencies only available to large-scale programs like North Carolina's. DMS will continue to work closely with partners and with regulatory agencies to streamline the mitigation process and identify innovative and cost-effective means of achieving compliance with regulatory requirements and pass those efficiencies on to our customers. As a receipts-based program, DMS puts a high priority on customer service and is always seeking ways to reduce costs and increase effectiveness of mitigation efforts. DMS shares NCHBA's concern over the costs associated with mitigation and the need for regulations to consider a balance between costs and benefits. DMS is a non-regulatory entity that is subject to the same regulatory guidelines and restrictions as any other mitigation provider. The adoption of ACM rate structures will result in a net savings to the development community. Failure to adjust rates will result in DMS ceasing its services in some service areas at a minimum and would result in higher mitigation costs to developers. As discussed in the fiscal analysis, the ability of DMS to consolidate the mitigation needs from multiple customers has resulted in large savings to the development community compared to permittee-responsible mitigation.

Environmental Defense Fund (EDF) comments

As an active partner in the development of innovations to improve and streamline mitigation practices, EDF expressed their support for the proposed amendments. They highlighted their strong support for the use of actual cost methodology to maintain DMS' fiscal health citing it as fair and efficient. EDF recognizes widespread increasing land costs as well as the higher costs of construction, maintenance and monitoring that rates need to reflect. In their comments, they recommend the EMC adopt the

proposed rule amendments to address emerging liabilities and ensure the continuation of services to the development community.

EDF also strongly supports the proposed changes to watershed planning components in 02R .0301 and .0302 commenting that DMS leadership in advancing aquatic functional improvement will improve project site selection and bring the basinwide restoration planning process in line with the Federal Mitigation Rule. Overall, EDF comments stressed the significance of adopting the proposed rule amendments for the continued prosperity of North Carolina's economy and environment. EDF contrasted the DMS ILF programs with others in surrounding states that have been suspended due to the failure to develop and maintain sustainable fiscal procedures.

Business Alliance for a Sound Economy (BASE) comments

The comments from BASE expressed concern over the increasing costs of mitigation and DMS program efficiency. No specific examples of inefficiencies were given in the comments. DMS program's annual administrative costs range from six to twelve percent. The proposed ACM rate calculations will require the program to adhere to strict watershed planning, overhead, and administrative cost limitations and will allow rates to adjust to costs that are based on bank credit purchases and full-delivery provider pricing.

BASE suggests that the free market play a more important part in the process of setting mitigation rates. The proposed rule revisions in no way hinder the free market to further develop the North Carolina mitigation industry. DMS agrees and suggests that the Actual Cost Methodologies proposed will allow DMS rates to be calculated by the actual costs incurred by procuring mitigation credits from the private mitigation banks and private full-delivery vendors. The mitigation market should be reflective of actual costs instead of a static fee structure that does not account for market fluctuations.

BASE prefers a system that facilitates use of private mitigation banks. They also would like to see NCDOT allowed to use private banks in their procurement of mitigation credits. BASE also cites legislative recommendations as their preferred solution to the problem of high mitigation costs. DMS would offer that the NCDOT is currently permitted (G.S. 143-214.11(d)) to use private mitigation banks and has recently contracted with private banking companies to procure private bank credits. DMS would note however, that a side effect of these NCDOT contracts were shortages of bank credits in these regions and increases in developer requests for mitigation assistance to DMS. Likewise, G.S. 143-214.11(d) and (d1) require developers to first seek credits from a private mitigation banks before seeking credits from the DMS in-lieu fee programs. G.S. 143-214.11(i) also establishes a hierarchy for the DMS listing full-delivery and bank credit purchase as the preferred procurement method to fulfill the program's mitigation responsibilities. The most significant components of the proposed 02R rule amendments-- rates based on actual costs and an aquatic function approach to watershed planning- are both included in the legislative solution from the previous session (H557) cited in the BASE comments and are established in G.S. 143-214.11(c) and (e). DMS has maximized program efficiency and significantly reduced overhead by reducing the number of staff and administrative costs while passing the substantial benefits of economies of scale and extensive mitigation experience along to customers. For example, since 2008, DMS has reduced the number of staff from 65 to its current 29, cutting overhead by nearly \$2.5 million in salary and fringe benefits.

Hearing Officers' Recommendations

Commissioners Wilsey and Whisnant recommend adoption of the rules as proposed except for 02R .0402(e)(2), the initial coastal wetland rate. Concern with regards to the initial coastal wetland rate of \$825,000 per credit has been communicated to DMS staff. The original proposed amendments include an initial coastal wetland rate in .0402(e)(2) as a fee schedule surrogate for the ACM results until sufficient data exist to use project costs in the ACM calculations. The hearing officers requested that DMS staff reconsider the available data and propose an alternative fee that would allow the ILF program to continue to accept payments for coastal wetland mitigation requirements despite the extremely low demand, high costs, and low economies of scale issues for coastal wetland credits. It would be ill-advised to set the fee artificially low in light of EDF's comment pertaining to financial uncertainty playing a role in the failure of other ILF programs to evolve to the level of success seen in North Carolina.

Coastal Wetland Cost Background

Since 2005, there have only been nine payments into the DMS Statewide Stream & Wetland ILF program for coastal wetland mitigation credits. These payments total \$462,000 for 2.21 credits in five service areas of different river basins. Regulatory expectations are such that mitigation is preferred as close as possible to the area of impact meaning providers need to have multiple projects available along the coast to serve as credit sources. DMS staff gathered data on other ILF programs along the East Coast. Programs whose projects include a large proportion of preservation were excluded since North Carolina relies on 1:1 restoration to achieve a goal of no net loss of wetlands. Likewise, programs based on grant funding were eliminated from the dataset because their cost structure is too dissimilar from the DMS business model to provide for a comparable fee. The remaining states where ILF program rate data were available were considered as valid sources to inform this initial coastal rate.

The proposed initial rate of \$825,000 was the resulting median coastal ILF rate from Virginia, Massachusetts and New Hampshire attributed to these programs' similarity in habitat, organizational features and project types as compared with DMS projects. DMS believed this rate would allow for the program to maintain services in all the coastal service areas and sustain project development as needed in the future. Despite the available detailed cost data on existing DMS projects, they are likely unrepresentative of future project costs given they were implemented 13 to 18 years ago on donated land.

Average Coastal Wetland Rates in Similar ILF Programs

VA (average of fees for 8 projects)	\$559,406.73
NH (1 project)	\$451,542.00
MA (1 project)	\$648,484.26*
Total	\$1,659,432.99
Overall Average	\$553,144.33
Median	\$825,325.00

**Updated 2016 rate data became available from MA and is reflected in this rate*

Note that rates in the preceding table are inflated to 2018 values since the data originated from projects implemented as many as eight years ago and rule adoption will not occur until 2018.

Despite available data from New Hampshire and Massachusetts, DMS staff updated the proposal based on the consolidated rate data from Virginia alone since it closely reflects the conditions present in North Carolina. The Massachusetts data were not solely based on coastal wetland restoration and were

inclusive of multiple habitat types including open water, mud flats and other types of wetlands. The New Hampshire program is grant-based which operates differently than the DMS ILF programs. DMS staff recommend updating the proposed rule amendment as follows based on the average rate for the Virginia ILF program.

15A NCAC 02R .0402 (e)(2) The initial coastal wetland rate shall be five hundred sixty thousand dollars (\$560,000) per credit until sufficient data are available to calculate an actual cost rate pursuant to Paragraph (g) of this Rule.

This proposed initial rate takes into consideration a reasonable prediction of future costs of implementing new projects as applicable and historical costs of existing projects that are part of DMS's current project portfolio.

Conclusion

DMS continues to serve as an effective and reliable mitigation solution for the development community. The program has accepted payment for 120 wetland, stream, buffer and nutrient requirements so far, this calendar year (Jan.-Oct. 2017). Forty seven percent of these requirements are in HUCs that have private mitigation banks established. While private banks are established in 7 of 17 river basins and 14 of 54 HUCs, there remain service areas where developers rely on the state's in-lieu fee programs to meet their mitigation needs either due to temporary bank credit shortages or banks not developing a supply of certain credit types. Furthermore, the recent upturn in the economy and resulting marked increase in development projects results in banks temporarily selling out of credits; therefore, DMS provides a crucial and reliable source of credits to keep projects from being delayed when bank credits are unavailable. The program, in turn, consolidates those requirements and procures credits from private sector mitigation bankers and full-delivery providers.

As highlighted in EDF's comments, DMS is recognized for its leadership in modeling sustainable approaches to in-lieu fee mitigation. The DMS program facilitates the development of innovative approaches to mitigation solutions through its partnerships and statewide presence. DMS is uniquely positioned to offer historical data, watershed planning initiatives and technical and policy experience to support improvements in the regulatory environment that can result in advances in project procurement, construction and monitoring that streamline the mitigation process and save customers money. Important updates to outdated rule language and references and watershed planning procedures notwithstanding, the main impact of the adoption of the proposed rate calculation methods will be the conversion of all rate calculations to an actual cost basis.

Chapter II

PROPOSED RULE AMENDMENTS

Notice of Text

TITLE 15A – DEPARTMENT OF ENVIRONMENTAL QUALITY

Notice is hereby given in accordance with G.S. 150B-21.2 and G.S. 150B-21.3A(c)(2)g. that the Environmental Management Commission intends to readopt with substantive changes the rules cited as 15A NCAC 02R .0101-.0102, .0201-.0203, .0301-.0302, .0401-.0403 and .0601-.0602.

Link to agency website pursuant to G.S. 150B-19.1(c): <https://deq.nc.gov/deq.nc.gov/about/divisions/mitigation-services>

Proposed Effective Date: *March 1, 2018*

Public Hearing:

Date: *September 27, 2017*

Time: *2:30 p.m.*

Location: *Oleander Room Northeast Regional Library, 1241 Military Cutoff Rd., Wilmington, NC 28405*

Date: *October 4, 2017*

Time: *2:30 p.m.*

Location: *NCDEQ Green Square Training Room 1210, 217 W. Jones Street, Raleigh, NC 27603*

Reason for Proposed Action: *Pursuant to G.S. 150B-21.3A(d)(2), 15A NCAC 02R rules shall be readopted by September 30, 2018. Proposed amendments include minor updates to rule language to reflect current practices and procedures. Substantive proposed changes include the implementation of sustainable methods for calculating rate schedules applicable to the In-Lieu Fee programs offered by the NCDEQ Division of Mitigation Services. In accordance with the existing 15A NCAC 02R .0402(c), Division staff proposed amendments to ensure the fee schedules reflect the actual costs of restoration activities. Sufficient cost data are available to apply the Actual Cost Method (ACM) currently used to calculate rates for the Nutrient ILF Program to the Statewide Stream and Wetland ILF Program and the Riparian Buffer ILF Program. Application of a flat fee is initially proposed for the coastal wetland mitigation category until sufficient data are available to apply the ACM to this credit type. The proposed flat fee is based on coastal land costs and credit pricing in other states that offer coastal marsh mitigation credit and is reflective of the low demand for this credit type and the service area requirements and regulatory constraints associated with implementing restoration projects of this type. The Environmental Management Commission has particular interest in receiving public comments on 02R .0402(e)(2) as proposed and invites the suggestion of alternative language.*

Comments may be submitted to: *Kelly Williams, NCDEQ-Division of Mitigation Services; 1652 Mail Service Center, Raleigh, NC 27699-1652; email Kelly.williams@ncdenr.gov*

Comment period ends: *October 16, 2017*

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal impact (check all that apply).

- State funds affected
 Environmental permitting of DOT affected
 Analysis submitted to Board of Transportation
 Local funds affected
 Substantial economic impact (≥\$1,000,000)
 Approved by OSBM
 No fiscal note required by G.S. 150B-21.4
 No fiscal note required by G.S. 150B-21.3A(d)(2)

Proposed Rule Amendments as Published in NC Register [without revised .0402 (e)(2)]

CHAPTER 02 - ENVIRONMENTAL MANAGEMENT

SUBCHAPTER 02R – ECOSYSTEM ENHANCEMENT PROGRAM

SECTION .0100 - PURPOSE AND DEFINITIONS

15A NCAC 02R .0101 PURPOSE

~~This Subchapter establishes the North Carolina Ecosystem Enhancement Program pursuant to G.S. 143-214.8 through 143-214.13.~~

Authority G.S. 143-214.8; 143-214.9; 143-215.3.

15A NCAC 02R .0102 DEFINITIONS

The definition of any word or phrase used in this Subchapter shall be the same as given in G.S. 143, Article 21.

The following words and phrases, which are not defined by statute, ~~phrases shall be interpreted as follows:~~ mean:

- (1) ~~"Mitigation bank" means a site where wetlands or other aquatic resources are restored, created, enhanced, or preserved expressly for the purpose of providing compensatory mitigation in advance of authorized impacts to similar resources. "Aquatic resources" means wetlands, streams, lakes, rivers, springs, seeps, reservoirs, ponds, groundwater, riparian areas, and the fauna that reside within them. Aquatic resources may include permanent, seasonal, flowing, standing, natural, or man-made water bodies.~~
- (2) ~~"Non-riparian wetlands" means Class WL wetlands as defined in 15A NCAC 2B .0101(c)(8) whose major source of water is precipitation. Wetland types generally considered to be~~ Examples of non-riparian wetlands include wet flats, peecosins pocosins, and ephemeral wetlands.
- (3) ~~"Riparian area" means an area that does not meet the definition of wetlands found at 15A NCAC 2B .0202 and that is located within 300 feet of any perennial or intermittent water body as shown by the most recently published version of the United States Geological Survey 1:24,000 (7.5 minute) scale topographic map (available at <http://viewer.nationalmap.gov>) or other site-specific data.~~
- (4) ~~"Riparian wetlands" means Class WL wetlands as defined in 15A NCAC 2B .0101(c)(8) whose major primary source of water is ground water or surface water. Wetland types generally considered to be riparian~~ Examples of riparian wetlands include freshwater marshes, swamp forests, bottomland hardwood forests, headwater forests, bog forests, mountain bogs bogs, and seeps.

Authority G.S. 143-214.8; 143-214.9; 143-214.11; 143-215.3.

SECTION .0200 - BASINWIDE RESTORATION PLANS

15A NCAC 02R .0201 PURPOSE

~~The purpose of the Basinwide Restoration Plans is to identify wetlands and riparian areas within each of the 17 major river basins of the state that have the potential, through restoration, enhancement, creation or preservation, to contribute to the goals of the Ecosystem Enhancement Program.~~

Authority G.S. 143-214.10; 143-215.3.

15A NCAC 02R .0202 COMPONENTS

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

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

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

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

Authority G.S. 143-214.10; 143-215.3;143-214.9.

15A NCAC 02R .0203 PUBLIC INVOLVEMENT; AVAILABILITY

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

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

Authority G.S. 143-214.10; 143-215.3.

SECTION .0300 - COMPENSATORY MITIGATION

15A NCAC 02R .0301 GENERAL

All projects implemented for the purpose of satisfying compensatory mitigation requirements of certifications issued by the Department under 33 USC ~~U.S.C. Section 1341; 1341~~ and permits or authorizations issued by the United States Army Corps of Engineers (Corps) under 33 USC ~~U.S.C. Section 1344 1344~~, shall be consistent with the Basinwide Restoration Plan for the appropriate river basin. A project ~~is shall be~~ consistent with the Basinwide Restoration Plan if the project 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; ~~demonstrates that it advances the functional improvement goals identified in the Basinwide Restoration Plan or is approved~~ determined to be consistent by the United States Army Corps of Engineers.

Authority G.S. 143-214.11; 143-214.12; 143-215.3.

15A NCAC 02R .0302 MITIGATION BANKS

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

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

Authority G.S. 143-214.11; 143-214.12; 143-215.3.

SECTION .0400 - ECOSYSTEM RESTORATION FUND

15A NCAC 02R .0401 PURPOSE

~~This Section establishes the Ecosystem Restoration Fund pursuant to G.S. 143-214.12.~~

Authority G.S. 143-214.11; 143-214.12; 143-215.3.

15A NCAC 02R .0402 RATE SCHEDULE- STREAM AND WETLAND RATES FOR THE NC DIVISION OF MITIGATION SERVICES

(a) For the purposes of this Rule:

- (1) "cost" or "costs" shall mean the NC Division of Mitigation Services In-Lieu Fee Mitigation Program's costs associated with stream or wetland projects in a given rate area, as described in this Rule; and
- (2) "credit" or "credits" shall mean the number of credits of stream or wetland compensatory mitigation that have been
 - (A) requested by the applicant; and
 - (B) specified in the approved certifications issued by the Department and in the permits or authorizations issued by the United States Army Corps of Engineers pursuant to 33 U.S.C. Section 1344.

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

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

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

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

- (1) Any 8-digit cataloging unit (as defined by the United States Geological Survey), mitigation service area, or smaller watershed where costs are 33 percent greater than the general statewide rate shall have a surcharge equal to the difference between the general statewide rate and the actual cost of mitigation in that mitigation service area.
- (2) The initial coastal wetland rate shall be eight hundred twenty-five thousand dollars (\$825,000) per credit.

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

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

$$\text{ActualCostRate} = 1.43 \frac{\text{ActualProjectCosts}_{\text{PresentDay}}}{\text{ActualCredits}_{\text{PresentDay}}}$$

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

Authority G.S. 143-214.11; 143-214.12; 143-215.3.

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>;
- (1) ~~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;
 - (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 1651 Mail Service Center Raleigh, NC 27603 or at <http://www.ncnhp.org/references/publications/rare-animal-list> and <http://www.ncnhp.org/references/publications/rare-plant-list>;
- (3) ~~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;~~

- (4) whether the size of the property is at least five contiguous acres;
- (5) whether the property is under imminent threat of degradation;
- (6) the prior, current, and future land use of the donated property and adjacent properties;
- (7) the absence of extensive structures and infrastructure;
- (8) the absence of hazardous substance and solid waste;
- (9) the absence of cultural and historic resources;
- (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); ~~(g). This material is available for inspection at the Department of Environment and Natural Resources, Division of Water Quality, Water Quality Section, 512 North Salisbury Street, Raleigh, North Carolina;~~
- (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.

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

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

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

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

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

(g) For the purposes of satisfying compensatory mitigation requirements through the donation of interests in real ~~property,~~ for property requiring restoration, enhancement, or preservation, the size of property to be donated ~~must~~ shall equal or exceed the acreage of wetland required to be mitigated under the approved permit, and every parcel ~~must~~ shall be a minimum of five contiguous acres in size.

- (h) Donation of real property interests to satisfy compensatory mitigation requirements ~~will~~ shall only be accepted if such property meets the requirements of Paragraphs (a) through (i) of this Rule and 15A NCAC 2H ~~.0506(h) and .0506(h)~~ and if it satisfies the compensatory mitigation requirements of the approved permit.
- (i) The donation of conservation easements to satisfy compensatory mitigation requirements ~~will~~ shall only be accepted if 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 if the property interest is being donated to satisfy a condition of a certification issued by the Department ~~under~~ pursuant to 33 USC U.S.C. Section 1341.
- (j) Donation of interests in real property may contribute to or fulfill compensatory mitigation requirements that may be satisfied through payment of a fee ~~as outlined in the Schedule of Fees~~ according to the Rate Schedule in Rule .0402(a) .0402(c) of this Section. The value of the property interest shall be determined by an appraisal performed in accordance with Subparagraph (d)(4) of this Rule. The required fee as calculated in accordance with Rule ~~.0402(a) .0402(c)~~ .0402(c) of this Section shall be satisfied if the appraised value of the donated property interest is equal to or greater than the fee. If the appraised value of the donated property interest is less than the designated fee requirement as calculated in accordance with Rule ~~.0402(a) .0402(c)~~ .0402(c) of this Section, the applicant shall pay the remaining balance due.

Authority G.S. 143-214.11; 143-214.12; 143-215.3.

SECTION .0600 – RIPARIAN BUFFER RESTORATION FUND

15A NCAC 02R .0601 RIPARIAN BUFFER MITIGATION FEES TO THE NC DIVISION OF MITIGATION SERVICES

- (a) For the purposes of this Rule:
 - (1) "cost" or "costs" shall mean the NC Division of Mitigation Services In-Lieu Fee Mitigation Program's costs associated with riparian buffer mitigation projects in a given rate area, as described in this Rule; and
 - (2) "credit" or "credits" shall mean the number of credits of riparian buffer compensatory mitigation that have been
 - (A) requested by the applicant; and
 - (B) specified in the approved certifications issued by the Department.
- (b) The Program shall calculate and publish one general riparian buffer mitigation payment rate applicable to all river basins where Commission rules allow riparian buffer mitigation payments and premium rates for specific watersheds, as identified in Paragraph (c) of this Rule. Rates shall be published on the Division's website (<https://deq.nc.gov/about/divisions/mitigation-services>). All rates shall be based on the costs incurred by the program in those watersheds.
- (c) Premium Watershed Rates. The Program shall apply premium watershed rates to:
 - (1) The Randleman Lake Watershed;
 - (2) The Jordan Lower New Hope Watershed; and
 - (3) Any 8-digit cataloging unit, mitigation service area, or smaller watershed where costs are 33 percent greater than the general statewide rate shall have a surcharge equal to the difference between the general statewide rate and the actual cost of mitigation in that mitigation service area.

The initial rate for a premium watershed with fewer than two riparian buffer mitigation projects that have reached the design stage shall be the highest riparian buffer rate in effect under the Program. The initial rate shall be revised for a premium watershed in the quarter following a quarter in which at least two riparian buffer mitigation projects in that watershed have reached design stage.
- (d) Rate Adjustment Frequency. Initial rates shall be effective as of the effective date of this Rule. They shall be adjusted quarterly whenever the rate calculation set forth in Paragraph (e) of this Rule exceeds the existing rate by at least ten percent. The rates shall also be adjusted annually. Annual calculations and adjusted rates shall be published by June 15 on the Program's website, <http://deq.nc.gov/about/divisions/mitigation-services>, and shall become effective July 1. Any quarterly rate adjustments shall become effective on the first day of October, January, or April, as applicable, and shall be published on the same website two weeks prior to that date. The rate shall be adjusted within two business days if the Program suspends acceptance of payments at the current rate.
- (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;
- (3) The Adjustment Factor shall be applied only in those calculation periods where actual costs are calculated to be greater than actual receipts.

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

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

- (A) "Actual Costs" shall be the same as Actual Costs_{PresentDay} as defined in Subparagraph (1) of this Paragraph, except that the existing contracts and completed land acquisitions are not adjusted for inflation.
- (B) "Actual Receipts" means the sum of all riparian buffer mitigation payments made to the Program in the rate area at the time of calculation.
- (C) "Number of Riparian Buffer Credits Paid During Adjustment Period" means the average number of riparian buffer mitigation credits paid to the Program over the last three years in the rate area, multiplied by the adjustment period. If no payments have been made to the Program in a rate area the number of credits paid shall be 435,600 riparian buffer credits until greater than 435,600 riparian buffer credits have been purchased in that rate area.
- (4) Adjustment Period shall be one to four years determined as follows for a rate area.
- (A) One year if Actual Costs exceed Actual Receipts by less than five percent.
- (B) Two years if Actual Costs exceed Actual Receipts by 5 percent or more but less than 15 percent.
- (C) Three years if Actual Costs exceed Actual Receipts by 15 percent or more but less than 25 percent.
- (D) Four years if Actual Costs exceed Actual Receipts by 25 percent or more.

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

- (1) **SCHEDULE OF FEES:** The amount of payment into the Fund shall be based on the costs of riparian buffer restoration. The payment amount shall be determined by multiplying the acres or square feet of mitigation required under other rules in 15A NCAC 02B by an initial value of ninety six cents per square foot or forty one thousand eight hundred and eighteen dollars per acre (\$41,818/acre). This initial per-acre rate shall be adjusted in January of each year by staff of the NC Ecosystem Enhancement Program based upon the construction cost index factor published every December in the Engineering News Record. The Engineering News Record is hereby incorporated by reference including subsequent amendments and editions, and is located at <http://enr.construction.com/economics/> at an annual subscription cost of forty nine dollars and ninety nine cents (\$49.99).
- (2) The required fee shall be submitted to the N.C. Ecosystem Enhancement Program (NC EEP), 1652 Mail Service Center, Raleigh, NC 27699-1652 prior to any activity that results in the removal or degradation of the protected riparian buffer for which a "no practical alternatives" determination has been made pursuant to requirements of other rules in 15A NCAC 02B.
- (3) The payment of a compensatory mitigation fee may be fully or partially satisfied by donation of real property interests pursuant to requirements of other rules in this Subchapter.

Authority G.S. 143-214.1; 143-214.5; 143-214.5(i); 143-214.7; 143-214.12; 143-214.21; 143-215.3(a)(1); 143-215.6A; 143-215.6B; 143-215.6C; 143-215.8B; 143B-282(c); 143B-282(d).

15A NCAC 02R .0602 NUTRIENT OFFSET PAYMENT RATES FOR THE NC DIVISION OF MITIGATION SERVICES

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

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

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

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

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

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

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

(f) Rate Adjustment Frequency. ~~Initial rates shall be effective as of the effective date of this Rule. They~~ Rates shall be adjusted quarterly whenever the rate ~~increases ten percent above the existing rate~~ calculation set forth in Paragraph (g) of this Rule exceeds the existing rate by at least 10 percent. The rates shall also be adjusted annually. Annual

calculations and adjusted rates shall be published by June 15 on the Program's ~~Web site, www.nceep.net, website~~ <http://deq.nc.gov/about/divisions/mitigation-services>, and shall become effective July 1. Any quarterly rate adjustments shall become effective on the first day of October, January, or ~~April~~ April, as applicable, and shall be published on the same ~~Web site website~~ two weeks prior to that date. The rate shall be adjusted within two business days if the Program suspends acceptance of payments at the current rate pursuant to 15A NCAC 02B .0240(e)(2).

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

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

Where:

- (1) ~~Actual Costs_{PresentDay}~~ "Actual Costs_{PresentDay}" means the sum of all costs adjusted for inflation as described in this ~~Sub-Item. Subparagraph.~~ Costs are shall mean project costs and administrative costs. ~~costs and shall include the costs of Projects in the calculation are~~ completed projects, terminated projects, and projects in process. At the time the rate is set, ~~set to ensure that collected payments are sufficient to implement new projects,~~ all completed land acquisition contracts and expenditures shall be adjusted to ~~present day~~ 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~~ present-day values using the annual composite USACE Civil Works Construction Cost Index. Future land acquisition contract costs for projects in process ~~are shall be~~ calculated using the Program's ~~per credit~~ per-credit contract costs of the same type adjusted to the inflated future value ~~when 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~~ per-credit contract costs of the same type adjusted to the inflated future value ~~when 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 pound cost adjusted to the future inflated value ~~when at the time~~ the project will be initiated. Future year annual inflation rates shall be drawn from ~~either the North Carolina Department of Agriculture and Consumer Services' Agricultural Statistics Farm Real Estate Values or 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~~ "Project Costs" ~~are means~~ the total costs associated with development of nutrient reduction projects including identification, land acquisition, project design, project construction, monitoring, ~~maintenance~~ maintenance, and long-term stewardship;
- (B) ~~Administrative Costs~~ "Administrative Costs" ~~are means~~ costs associated with administration of the Program including staffing, ~~supplies~~ supplies, and rent; and
- (C) ~~The cost~~ "costs" for projects in ~~process~~ process ~~is shall be~~ 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 nutrient reduction obligations in the rate area;
- (3) ~~Total~~ "Total Pounds Offset_{PresentDay} Offset_{PresentDay}" means the total number of pounds of a nutrient reduced by ~~the Program's~~ projects in the rate area at the time of calculation. If the Total Pounds Offset_{PresentDay} for an existing or completed project is reduced, the Actual Costs_{PresentDay} for that existing or completed project shall be proportionally adjusted; ~~and~~

$$(4) \quad AdjustmentFactor = \frac{(ActualCosts - ActualReceipts)}{NumberofPoundsPaidDuringAdjustmentPeriod}$$

Where:

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

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

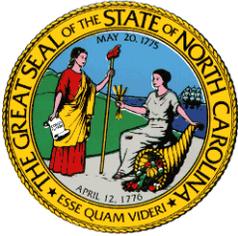
The Adjustment Factor shall be applied ~~in~~ only in those calculation periods where actual costs are calculated to be greater than actual receipts. The Adjustment Factor shall not comprise more than 60% of the overall rate;

- (B) ~~Actual Costs~~ "Actual Costs" ~~are~~ shall be the same as ~~Actual Costs~~ Present Day Costs ~~Present Day~~ Costs Present Day as defined in Subparagraph (1) of this Paragraph, except that the existing contracts and completed land acquisitions are not adjusted for inflation;
 - (C) ~~Actual Receipts~~ "Actual Receipts" ~~are~~ means the sum of all offset payments made to the Program ~~to date~~ in the rate area at the time of calculation; and
 - (D) ~~Number~~ "Number of Pounds Paid during Adjustment Period" ~~is~~ means the average number of pounds of a nutrient paid to the Program over the last three years in the rate ~~area~~, area multiplied by the adjustment period. If no payments have been made to the Program in a rate area, the number of pounds paid shall be ~~set to~~ 1,000 pounds until greater than 1,000 pounds have been purchased in that rate area.
- (~~5~~)(4) Adjustment Period ~~is~~ shall be one to four years determined as follows for a rate area:
- (A) One year if Actual Costs exceed Actual Receipts by less than five percent;
 - (B) Two years if Actual Costs exceed Actual Receipts by five percent or more but less than 15 percent;
 - (C) Three years if Actual Costs exceed Actual Receipts by 15 percent or more but less than 25 percent; and
 - (D) Four years if Actual Costs exceed Actual Receipts by 25 percent or more.
- (h) When individual projects produce more than one type of nutrient reduction, the project costs shall be prorated for each nutrient being offset by the project.
- (i) In cases where an applicant is required to reduce more than one nutrient type and chooses to use the Program to offset nutrients, the applicant shall make a payment pursuant to 15A NCAC 02B .0240(e)(3) for each ~~nutrient~~. nutrient type.

Authority G.S. 143-214.1; 143-214.20; 143-214.21; S.L. 1995, c. 572; S.L. 2006, c. 215; S.L. 2007, c. 438; S.L. 2009, c. 337; S.L. 2009, c. 484; S.L. 2009, c. 486.

CHAPTER III
HEARING DOCUMENTS

Hearing Officer Appointment Letter



ENVIRONMENTAL MANAGEMENT COMMISSION

**NORTH CAROLINA
DEPARTMENT OF ENVIRONMENTAL QUALITY**

John D. Solomon
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Julie A. Wilsey
Vice Chairman

Roy Cooper, Governor
Michael S. Regan, Secretary

David W. Anderson
Gerard P. Carroll
Charles Carter
Marion Deerhake
Charles B. Elam
Mitch Gillespie
Steve Keen

Dr. Suzanne Lazorick
Dr. Stan Meiburg
Manning Puette
Dr. Albert R. Rubin
Clyde E. Smith, Jr.
Richard Whisnant

September 20, 2017

To: Ms. Julie A. Wilsey
Mr. Richard B. Whisnant

From: John D. Solomon 

Subject: Hearing Officer Appointment

I am hereby appointing you to serve as Hearing Officers for two public hearings to receive public comments on proposed amendments to the 15A NCAC 02R rules.

The Division of Mitigation Services (DMS) implements these rules. DMS staff will be in touch with you about coordinating the public hearing dates with your schedules. If you have questions about the program components for any of these rules, please feel free to contact staff directly:

- Jim Stanfill Asset Management Supervisor- 919.707.8314 jim.stanfill@ncdenr.gov
- Kelly Williams- In-Lieu Fee Program Coordinator 919-707-8915 kelly.williams@ncdenr.gov

Staff will provide support to develop the Hearing Officers' Report of Proceedings. Please receive all relevant public comments and report your findings and recommendation to the Environmental Management Commission.

JDS/kbw

Cc: Lois Thomas

Hearing Officer Statements

Commissioner Wilsey

Good afternoon ladies and gentlemen and welcome to the first of two public hearings on the proposed amendments to the 15A NCAC 02R Rules. I'm Julie Wilsey, Vice-Chair of the Environmental Management Commission and the assigned Hearing Officer for today's hearing. [I would also like to recognize my fellow EMC members present today.] It is now after 2:30 and time to start the Public Hearing.

The Rules in subchapter 02R govern the operation of the In-Lieu Fee programs offered by the Division of Mitigation Services. These rules are required to be readopted per the 150B guidelines of the Administrative Procedures Act as part of the periodic review and expiration of existing rules. These rules are required to be readopted by September 30, 2018, approximately year from now.

DMS staff have proposed a number of amendments to these rules which serve to update outdated language and practices. Additional proposed changes serve to update procedures to bring increased accuracy and responsiveness to rate schedule calculations to ensure the rates extended to customers capture the actual costs of implementing the program.

I would like to introduce the DMS staff members here today. They are Jim Stanfill, Asset Management Supervisor for DMS, Kelly Williams, the In-Lieu Fee Coordinator and DMS Director, Tim Baumgartner. Staff will be available for questions after the public meeting as well as via email.

The purpose of this hearing is two-fold. We will begin by presenting an overview of the proposed amendments to the DMS In-Lieu Fee Programs. Following that, we invite your comments. At this time we will begin the presentation by the DMS staff.

Following Slide Presentation

This leads us to the public comment period. Has everyone who wants to speak signed in? I want to go over a few ground rules to maintain order and fairness to all participants.

- We will follow the order in which you signed up to speak.
- Please approach the podium, state your name and address.
- Given the number of requests to speak, we will limit the time to five minutes per person.
- If your comments are written down, then we would appreciate a copy.
- This hearing is being recorded so please speak clearly. I also ask the audience to silence cell phones and remain quiet while others are presenting their comments.

If there are no other public comments, then I will close the public hearing. As a note, written comments can be submitted to DMS through October 16, 2017. On behalf of the EMC I would like to thank you for your time and participation today on this rules re-adoption process for the 02R rules.

Staff and I will be available for questions. Note anything discussed will be informal and will not be part of the public record for the hearing unless you submit additional written comments.

Commissioner Whisnant

Good afternoon ladies and gentlemen and welcome to the second of two public hearings on the proposed amendments to the 15A NCAC 02R Rules. I'm Richard Whisnant of the Environmental Management Commission and the assigned Hearing Officer for today's hearing. [I would also like to recognize my fellow EMC members present today.] It is now after 2:30 and time to start the Public Hearing.

The Rules in subchapter 02R govern the operation of the In-Lieu Fee programs offered by the Division of Mitigation Services. These rules are required to be readopted per the 150B guidelines of the Administrative Procedures Act as part of the periodic review and expiration of existing rules. These rules are required to be readopted by September 30, 2018, approximately year from now.

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I would like to introduce the DMS staff members here today. They are Jim Stanfill, Asset Management Supervisor for DMS, Kelly Williams, the In-Lieu Fee Coordinator and DMS Director, Tim Baumgartner. [?others?] Staff will be available for questions after the public meeting as well as via email.

The purpose of this hearing is two-fold. We will begin by presenting an overview of the proposed amendments to the DMS In-Lieu Fee Programs. Following that, we invite your comments. At this time we will begin the presentation by the DMS staff.

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Staff and I will be available for questions. Note anything discussed will be informal and will not be part of the public record for the hearing unless you submit additional written comments.

List of Hearing Attendees

Hearing Location	Name	Affiliation	Comments
Wilmington 9/27/2017	Tyler Newman	BASE	Written 10/12/2017
Wilmington 9/27/2017	Ben Ashba	Catlin	No
Wilmington 9/27/2017	Kim Williams	LMG	No
Raleigh 10/4/2017	Jason Lorch	Wildlands Engineering	No

Also in attendance for the hearings were Tim Baumgartner, Jim Stanfill and Kelly Williams from the Division of Mitigation Services. EMC commissioner Steve Keen was in attendance for the Wilmington hearing. Tim Muhs from DMS also attended the Raleigh hearing.



302 Jefferson Street, Suite 110
Raleigh, NC 27605

Corporate Headquarters
5020 Montrose Blvd. Suite 650
Houston, TX 77006
Main: 713.520.5400

October 16, 2017

BY EMAIL – ORIGINAL BY FIRST CLASS MAIL

Kelly Williams
NC Department of Environmental Quality
Division of Mitigation Services
1652 Mail Service Center
Raleigh, NC 27699-1652
kelly.williams@ncdenr.gov

Re: Proposed Revisions to 15A NCAC 02R

Dear Ms. Williams:

Resource Environmental Solutions, LLC (“RES”) appreciates the opportunity to provide comments to the Division of Mitigation Services (“DMS”) and the Environmental Management Commission (the “EMC”) regarding the proposed changes to the rules codified in 15A NCAC 02R published in the North Carolina Register on August 15, 2017 (the “Proposed Rules”).

RES is a privately-held business that provides ecosystem mitigation credits to facilitate permitting for development projects throughout the United States. We have invested over \$100 million in restoration-related efforts nationwide, and to date, RES has developed over 75 project sites in North Carolina, providing restoration and conservation of more than 70 miles of streams and 2,000 acres of wetlands in the state.

RES strongly supports DMS’s and the EMC’s efforts to make pricing for ecosystem mitigation credits more accurately reflect their actual cost. While the current system of high-cost and low-cost hydrologic unit code areas (“HUCs”) is preferred over a single, state-wide credit price, RES believes that the current system still forces some permittees to pay more for mitigation credits than necessary. Aggregate rates in the high-cost and low-cost HUCs – by their very nature – are based on an average cost-per-credit across a wide variety of locations in North Carolina. More localized pricing for mitigation credits ensures that developers pay a fair price for their specific project and avoids forcing development in one area to subsidize the cost of development in another.

To that end, RES believes that DMS and the EMC should consider whether the concept of a “premium watershed rate” is appropriate or necessary. Under the Proposed Rule, a “premium watershed” is one in which mitigation costs are at least 33% higher than the statewide rate. If so, DMS proposes to add a



surcharge to the statewide credit rate in an amount equal to the difference between the statewide costs to generate a mitigation credit versus the cost to do so in the premium watershed. RES believes the requirement for costs to be at least 33% higher is unnecessary. Given that DMS has sufficient data to determine the cost to generate credits in each HUC – and that DMS must go through the effort to determine if a HUC is a premium watershed – RES believes DMS should simply use that data to set HUC-specific rates.

In addition, and regardless of whether DMS and the EMC ultimately adopt the “premium watershed” concept, RES believes the Proposed Rule should provide greater transparency and defined procedures for establishing the rates for mitigation credits. Thus, the Proposed Rules should include requirements for DMS and the EMC to publish proposed rate structures for the coming fiscal year, including all supporting analyses, data and calculations, at least three months before they become effective and to accept public comment on those materials for no less than 30 days. The regulated community, as well as the providers of mitigation credits to DMS (such as RES), are uniquely positioned to help DMS project future credit costs as well as supply and demand in the market. Furthermore, considering the potential economic effects of mitigation credit costs on the development community, the public should have the opportunity to review, understand and offer comments on the economic and technical basis for DMS’s rates.

Finally, RES would like to propose several related editorial changes to the proposed revisions to 15A NCAC 02R.0202. In subsections 1, 2 and 5 of the revised language, DMS has proposed to use the phrase “8-digit cataloging unit” in lieu of referring simply to “basins.” The net effect of this change is to direct Basinwide Restoration Plans towards HUC-specific considerations rather than basinwide ones. When this new language is read in combination with the requirement of 15A NCAC 02R.0301 for mitigation to be consistent with Basinwide Restoration Plans, the revisions could lead to Basinwide Restoration Plans that foreclose the opportunity to use mitigation banks in adjacent HUCs. RES does not believe this was DMS’s intention – given that certain mitigation banks are currently operating with secondary service areas (for example, Restoration System’s Barra Farms bank) and has previously petitioned the US Army Corps of Engineers to allow mitigation out of the impact HUC. RES suggests that DMS return to the original focus on “basins” in these provisions to avoid this unintended consequence.

Please feel free to contact me at (919) 209-1056 if you have any questions or would like to discuss this matter further.

Sincerely,

Daniel Ingram



NORTH CAROLINA HOME BUILDERS ASSOCIATION

P.O. BOX 99090 • RALEIGH, N.C. 27624-9090
 PHONE (919) 676-9090 • TOLL FREE 1-800-662-7129 • FAX (919) 676-0402
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- NAHB Executive Committee**
 BUDDY HUGHES
 Lexington, (336) 240-3097
 hucon@ptmc.net
- Executive Vice President**
 MIKE CARPENTER

October 12, 2017

Dear Ms. Williams,

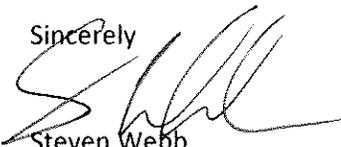
The North Carolina Home Builders Association believes that every citizen of this wonderful state deserves safe and affordable housing. We know that every requirement for land development adds to the cost of the homes that are being built. However, we also understand the importance of a clean environment to the quality of life those that choose to live here. We appreciate the hard work that you and your Department do for the citizens of this state.

While we understand the complexity of your work, we do have concerns about the proposed preadoption of the rules 15A NCAC 02R Division of Mitigation Services.

Over the last few months, we have reached out to our members and have received numerous comments concerning the issue of mitigation and its cost in North Carolina. We believe that regulations must grounded in facts and rely on a cost/benefit factor that balances the public good.

As the cost of providing affordable housing increases, these types of fee increases make it much more difficult to guarantee that all North Carolinians can achieve that American dream of home ownership.

We look forward to working with the Department on specific ways to accomplish this goal.

Sincerely

 Steven Webb
 NCHBA Legislative Lobbyist.

- | | | | | | |
|------------------------------|------------------------------|----------------------------|----------------------------|------------------------|------------------------|
| *EUGENE A. GULLEDGE (1964) | *C.L. REAVIS (1974) | *NELSON CALLAHAN (1983) | RUSS DAVIS (1992) | JONATHAN ELLIOT (2001) | LYLE GARDNER (2010) |
| C. PHIL ROBINSON, JR. (1966) | *JOHN T. BELL (1975) | *PAUL D. TROLLINGER (1984) | CHUCK MILLER (1993) | DON CROOM (2002) | BILL DALEURE (2011) |
| *CARL W. JOHNSON (1967) | *WILLIAM T. BOYD (1976) | RICK BATCHELOR (1985) | CHARLES MULLEN (1994) | GREG ISENHOUR (2003) | ERIK ANDERSON (2012) |
| *JOHN CROSLAND, JR. (1968) | LaRUE HAMBRICK (1977) | BURL LANCE (1986) | ROBERT INGRAHAM (1995) | RICK JUDSON (2004) | J. GARY HILL (2013-14) |
| *J.M. DAUGHTRIDGE (1969) | J. RAY SPARROW (1978) | LARRY SUMMER (1987) | DAVID PRESSLY, JR. (1996) | BUDDY HUGHES (2005) | SEAN SULLIVAN (2015) |
| *HOMER BARRETT (1970) | SHERRILL FAW (1979) | HERSCHEL REDDING (1988) | DONALD W. BETSWORTH (1997) | DAVE STORMONT (2006) | BRIAN PACE (2016) |
| *JAMES W. LESTER (1971) | MARK E. TIPTON (1980) | JAMES FORD (1989) | GEORGE HENSON (1998) | PAUL MULLICAN (2007) | |
| CHARLES C. McLAURIN (1972) | M. DURWOOD STEPHENSON (1981) | *STEVE NASH (1990) | ROBERT YATKO (1999) | RAY RHODES (2008) | |
| *J. VAUGHN KLUTTS (1973) | J. WATTS ROBERSON (1982) | HARRIS B. GUPTON (1991) | DANNY ADAMS (2000) | FRANK WIESNER (2009) | |
| *Deceased | | | | | |

October 16, 2017

Ms. Kelly Williams
 North Carolina Division of Mitigation Services
 1652 Mail Service Center
 Raleigh, NC 27699-1652

RE: Readopt with amendments the rules in 15A NCAC 02R

Dear Ms. Williams,

On behalf of Environmental Defense Fund's more than 60,000 members and activists who live in North Carolina, I am pleased to submit the following comments supporting the proposal to readopt with amendments the rules in *15A NCAC 02R*. Environmental Defense Fund (EDF) is an environmental non-profit organization with over 2 million members worldwide, many of whom are deeply concerned about the quality and quantity of freshwater resources, aquatic ecosystems and their endemic species.

For years, EDF has engaged with and supported the work of North Carolina's in-lieu fee stream mitigation program. From the Ecosystem Enhancement Program to the Division of Mitigation Services (DMS), EDF values the history of mitigation leadership that North Carolina has modeled for other states. DMS has provided compensatory mitigation for over 1,000 unique customers and fulfills an important role in ensuring that the state achieves "no net loss" of wetlands and streams. Since the program's inception, the North Carolina Department of Transportation has not experienced project delays due to a lack of available mitigation credits. DMS provides critical services to meet the needs of its customers and North Carolina's environment.

EDF supports the Division of Mitigation Service's proposed rule amendments. The following comments focus on two important proposed changes to the rule. The first is critical to DMS' fiscal health and solvency. The second is an important shift in watershed planning, functional improvements and compliance with the 2008 Federal Mitigation Rule.

1. EDF strongly supports the Actual Cost Accounting method as an efficient and fair approach to pricing credits/units and a necessary approach to ensure DMS' fiscal health.

EDF is keenly aware of, and concerned about, the financial conditions facing DMS as detailed on pages 5, 9, and 11 within *Fiscal Note for Proposed Amendments to 15A NCAC 02R*. Aside from adjustments for inflation, stream and wetland fees have not been updated

since 2008, and riparian buffer fees have not been updated since 1996 (pg. 3). Rapid and widespread increases in land values as well as increased construction, maintenance, and monitoring costs necessitate the proposed revision to mitigation pricing. DMS' current rates as dictated by 15A NCAC 02R .0402 do not reflect the current and actual costs of providing regulatory assurances for developers. Without adoption of the proposed amendments, DMS' cash reserves and portfolio value will both fall below zero in the next one to three years.

To remedy these operating shortfalls and to ensure that North Carolina's aquatic resources are protected, EDF strongly supports the Actual Cost Accounting method as a transparent approach to pricing stream, wetland, riparian buffer, and nutrient credits/units (15A NCAC 02R .0402; 15A NCAC 02R .0601; NCAC 02R .0602). This methodology has served the Nutrient Offset program well and will more accurately reflect the true cost of restoring stream and wetland functions in North Carolina. Adoption of the proposed rule amendments will allow DMS to address current and future financial liabilities, allowing the Division to continue to provide high-quality mitigation to its customers in a timely manner. As such, the Environmental Management Commission should act swiftly to adopt the proposed rule amendments and address this emerging liability.

2. EDF strongly supports DMS efforts to improve river basin planning and ensure mitigation projects replace lost aquatic functions.

The proposed rule change at 15A NCAC 02R .0301 provides an important and needed improvement in river basin planning and project approval. Under the current rules, projects must be located within a geographically defined priority area. These priority designations are well reasoned and scientifically valid. However the current approach has not always resulted in the selection of the best project sites.

The 2008 Federal Mitigation Rule (33 CFR 332.3(d)(1), 2008) requires "... compensatory mitigation project site must be ecologically suitable for providing the desired aquatic resource functions." DMS has revised the Basinwide Restoration Plans to better identify the functional needs of the state's watersheds (i.e. nutrient reductions, aquatic habitat, flood control). With the new Basinwide Restoration Plans, DMS can focus on projects that "advance the functional improvement goals identified" in the plans. EDF applauds the leadership of DMS on this important mitigation issue and strongly supports the proposed rule change at 02R .0301 and .0302.

Adoption of the new Basinwide Restoration Plan will necessitate DMS developing internal processes to demonstrate the extent to which projects "advance the functional improvement goals identified" in the plans. Several function-based accounting tools, including the Stream Quantification Tool developed by Stream Mechanics and EDF, provide a ready solution to quantify improvements to stream functions as detailed in 02R .0301. EDF remains committed to assisting the Division in completing this final step of project selection.

The proposed rule amendments are necessary to ensure that DMS is able to provide reliable and high quality mitigation for the state's growing economy. The recent history in other states whose in-lieu fee programs did not evolve is both unfortunate and avoidable. Several state in-lieu fee programs have experienced fiscal uncertainty and even program suspension. Adoption of the proposed rules is critical for the future of DMS and the continued prosperity of North Carolina's economy and environment. EDF welcomes the opportunity to collaborate with DMS and other interested parties to continually improve mitigation in North Carolina. With these rule changes, the state can continue to be a national leader in stream and wetland mitigation.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Willi C McDow". The signature is written in a cursive, slightly slanted style.

William McDow
Director, Habitat Markets



October 12, 2017

Kelly Williams
NCDEQ – Division of Mitigation Services
1652 Mail Service Center
Raleigh, NC 27699-1612

RE: Re-adoption of 15A NCAC 02R Division of Mitigation Services

Dear Ms. Williams:

BASE, Business Alliance for a Sound Economy, is an organization that advocates for business and industry in southeastern North Carolina. BASE has a range of business members, as well as formal advocacy partnerships with groups like the Wilmington Chamber of Commerce, Wilmington-Cape Fear Home Builders Association and Brunswick County Association of REALTORS®. Our mission is to support public policy that attracts a mix of business and industry and enhances economic opportunities in southeastern North Carolina

Our diverse membership represents business interests across southeastern North Carolina—where investment almost certainly involves wetland impacts. This is true for both public and private investments. Thus, we are extremely interested in a viable, functional, cost-effective wetland mitigation apparatus in North Carolina. With the interplay between public and private mitigation banks and their fees, we think it is critical that the free market play a more important part in this process.

With regard to the rules as proposed, there remains room for improvement. Overall, we remain concerned with the current cost of the DMS credits and the efficiency of the program. Unfortunately, the proposed rules would seemingly exacerbate these issues. Instead of aiming to operate the program efficiently, the proposal aims to raise the fees to cover the costs. Perhaps before assuming automatic cost increases, it would be more beneficial to examine the current overhead-heavy system of state dictated rates.

Our preferred approach is one that utilizes efficiency to provide for wetland mitigation. Instead of creating complicated formulas, our preference is to create an efficient state system that also facilitates private mitigation banks. To that end, to further streamline costs and impacts, we would like to see public projects (NCDOT, etc.) be able to use the private banks.

Overall, we believe it is important to run DMS as efficiently as possible, but respectful of the efficacy of the private market.

This is a statewide issue and has a major impact on both public and private investment—and the costs that are passed down to the buyers and taxpayers. Legislative recommendations such as HB557 offer a more preferred approach to this important public and private problem. We encourage further analysis on the rules as proposed.

Thank you for the opportunity to provide comment.

Tyler Newman

President & CEO

BASE

CHAPTER IV ECONOMIC IMPACT ANALYSIS

this attachment is numbered independently from the previous chapters and is inclusive of the appendices that are part of the Fiscal Note as approved

**ENVIRONMENTAL MANAGEMENT COMMISSION
FISCAL NOTE FOR PROPOSED AMENDMENTS TO
DIVISION OF MITIGATION SERVICES RULES
AMENDED December 11, 2017**

- Rule Amendments:** 15A NCAC 02R .0101 -.0102 Purpose and Definitions
15A NCAC 02R .0201-.0203 Basinwide Restoration Plans
15A NCAC 02R .0301 Compensatory Mitigation - General
15A NCAC 02R .0302 Mitigation Banks
15A NCAC 02R .0402 Schedule of Fees
15A NCAC 02R .0403 Donation of Property
15A NCAC 02R .0601 Riparian Buffer Mitigation Fees to the NC Ecosystem Enhancement Program
15A NCAC 02R .0602 Nutrient Offset Payment Rates for the NC Ecosystem Enhancement Program
- Name of Commission:** Environmental Management Commission
- Agency Contact:** Tim Baumgartner
DEQ Division of Mitigation Services
1652 Mail Service Center
Raleigh, NC 27699-1652
(919) 707-8543
tim.baumgartner@ncdenr.gov
- Impact Summary:** State government: Yes
Local government: Yes
Federal government: Yes
Substantial impact: Yes, as this rule will have total costs and benefits that exceed \$1,000,000 in one year.
- Authority:** G.S. 143-214.8; 143-214.9; 143-214.11; 143-215.3
- Necessity:** Proposed amendments will update rule language to reflect current procedures and implement sustainable methods for calculating rate schedules based on actual costs.

I. Summary

As required by § 150B-21.3A for the periodic review and expiration of existing rules, NCDEQ Division of Mitigation Services proposes to readopt the rules in 15A NCAC 02R with amendments. The proposed amendments will accomplish several goals. The first is to update the rules to reflect recent name changes for the department and division which were changed from the Department of Environment and Natural Resources (NCDENR) to the Department of Environmental Quality (DEQ) and the North Carolina Ecosystem Enhancement Program (NCEEP) to the Division of Mitigation Services (DMS). The nature of other proposed amendments is to update language related to the components and procedures of the Division; many of the rules in this subchapter have not been updated since they were adopted in 1998. A third type of

amendment relates to clarifications to rule language being proposed in response to public comments received pertaining to the determinations made during the review process under § 150B-21.3A(c). Finally, division staff are proposing amendments to the rate schedule calculation procedures to bring increased accuracy and responsiveness to the rules governing rate schedules in this subchapter and to ensure that the rates capture the actual costs of implementing the program.

The following rules contain amendments that consist of technical corrections, updates, and clarifications, but do not result in a cost to customers or partners:

15A NCAC 02R .0101 Purpose

This rule is proposed for repeal.

15A NCAC 02R .0102 Definitions

Proposed amendments seek to address comments on definitions received during the stakeholder process and public comment period from the rules review.

15A NCAC 02R .0203 Public Involvement; Availability

Proposed amendments update format, program name change and website links.

15A NCAC 02R .0301 Compensatory Mitigation - General

Proposed amendments to this rule consist of updating the language to address comments received during the rules review public comment period. These updates will more clearly define what it means to be consistent with the basinwide restoration plans. The proposed changes define consistency based on a demonstration of advancing ecosystem functional goals, and updates references.

15A NCAC .0302 Mitigation Banks

Proposed amendments update federal references and language the define consistency based on advancing functional improvement goals.

15A NCAC 02R .0403 Donation of Property

The changes proposed are technical in nature and serve to clarify existing language and update contact information and references provided in the rule.

This analysis will focus on the costs and benefits of the proposed amendments to rules governing the rate schedules for DMS in-lieu fee mitigation programs. DMS is proposing to update the rate calculation methods for the stream and wetland and riparian buffer programs (15A NCAC 02R .0402 and .0601) where financial analyses indicate the current rates are below the cost of providing mitigation services to the regulated public. The proposed changes will allow DMS to determine and publish actual cost rates for services provided. Under the current rate schedule, DMS has no means of quickly adjusting to changes in costs outside of annual inflation adjustments which are insufficient to keep pace with changes in program costs. DMS is also proposing minor modifications to the rate-setting methodology for the Nutrient Offset program (15A NCAC 02R .0602).

II. Necessity of the Rate Changes

Without the ILF program in areas where private mitigation bank credits are unavailable, developers would be required to either eliminate or reduce the source of their mitigation requirements (e.g. impacts) or be required to build expensive permittee-provided mitigation projects. Currently, DMS rates are not keeping pace with the real costs of mitigation. The under-collection of fees threatens the sustainability of this service. Over 1,600 customers have benefitted from the Statewide Stream and Wetland ILF program with almost 2,000 separate mitigation requirements accepted by DMS. Likewise, over 400 customers have benefitted from the Riparian Buffer ILF program with over 500 separate mitigation requirements met by DMS. A summary of payment activity by sector is contained in Appendix I.

The current fee schedule for stream and wetland credits is based on program costs enumerated in the period preceding the last rule amendment in 2008. While the rule contains an annual inflation adjustment, changes in the regulatory environment, legislatively mandated procurement strategies, and construction, maintenance and project stewardship costs have resulted in program costs exceeding revenue in most areas of the state.

The current fee schedule for riparian buffer credits was based on program costs enumerated in 1996. While the rule contains an annual inflation adjustment, changes in the regulations and project stewardship costs have resulted in program costs exceeding revenue in some areas of the state and in costs being lower than revenue in other areas of the state. Note that state law requires that the funds collected in the Riparian Buffer ILF be utilized within the same river basin.

Participation in the in-lieu fee programs is completely voluntary. In-lieu fee program (ILF) customers include private developers, and government entities at local, state and federal levels. There is a potential that most sectors of the development community who elect to use the DMS ILF programs to fulfill mitigation requirements will have increased payments associated with the revised rate calculation methods when compared to the current rate schedules which are mostly below the actual costs to render the services. Some customers will have lower payments, but overall, the rates will result in a net increase in payments. The development community will benefit from implementation of the proposed rate calculation methods as it allows the ILF programs to remain financially solvent and because developers are net savers when able to access the ILF program and avoid the high costs of permittee-provided mitigation. Furthermore, the proposed rate calculation allows the ILF to continue its role of simplifying, facilitating and accelerating the permit and compensatory mitigation process for developers by providing a reliable, quick, and cost-efficient provider of compensatory mitigation credits. A detailed analysis of cost and benefit estimates and an explanation of assumptions is provided later in this document.

III. Proposed Changes to Basinwide Restoration Plans

The proposed amendments to 15A NCAC 02R .0201-.0203 seek to update language to reflect DMS' current Basinwide Restoration Planning components which focus on ecosystem functional improvements in watersheds rather than on spatially locating projects within specific regions. The proposed updates are not expected to change the workload or costs associated with implementing the basinwide restoration plans. However, since the area where potential compensatory mitigation projects may be implemented is enlarged to include the entire

watershed, the theoretical supply of potential mitigation sites in each watershed is expected to increase. This increase in the number of potential mitigation sites creates the opportunity for the program and its contractors to identify and implement lower-cost projects in the future which would directly benefit the program and the developers who elect to utilize the program's ILF services.

IV. Proposed Changes to In-Lieu Fee Mitigation Program Rates

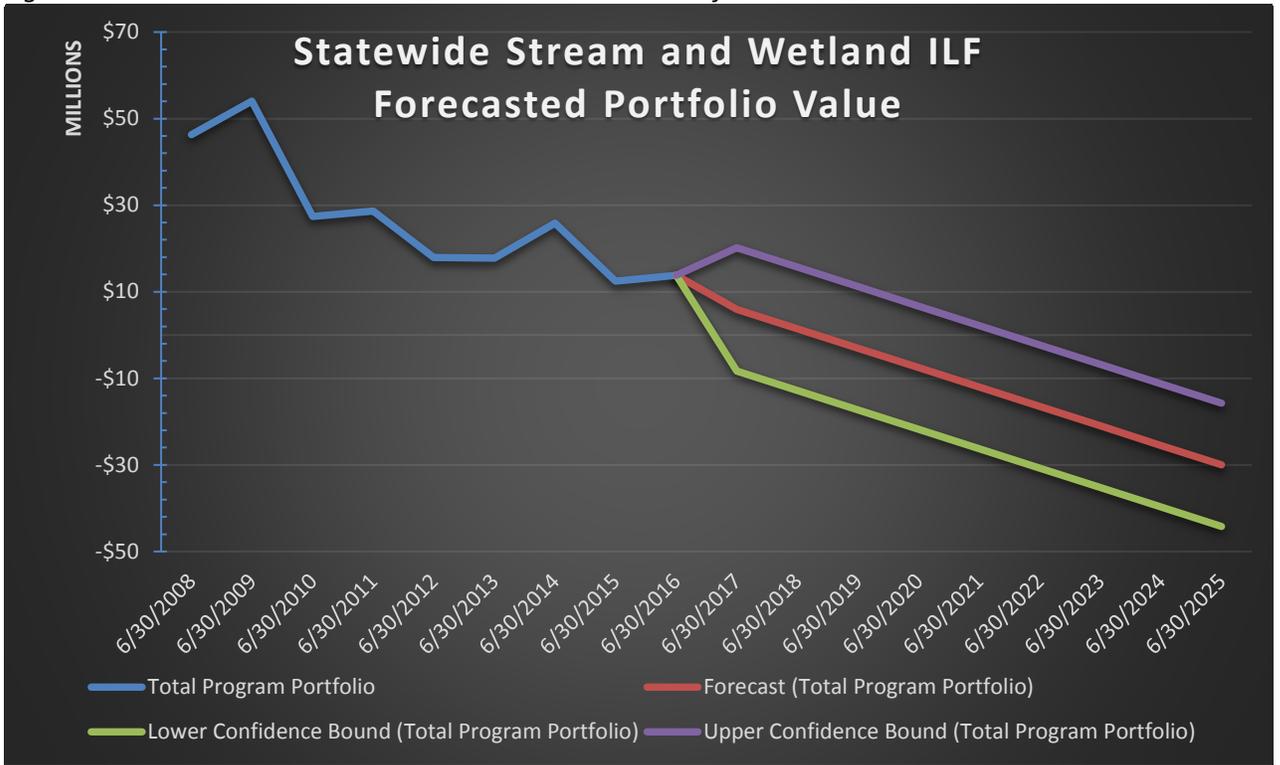
This fiscal analysis was prepared to assist members of the EMC and the public in their review of the proposed amendments to the rules in 15A NCAC 02R. To keep pace with a dynamic market and prevent disruptions or suspension of the delivery of the Division's services to the development community, the Division of Mitigation Services (DMS) proposes amending two rules to allow for the use of Actual Cost Methods (ACMs) to calculate payment rates for stream, wetland, and riparian buffer mitigation similar to the current method for calculating nutrient offset rates. The nutrient rate actual cost methodology (15A NCAC 02R .0602), is the result of an extensive stakeholder process and has been in effect since 2010. It has proven to be an accurate, transparent, and well-accepted means of adjusting rates in response to both increasing and decreasing program costs. The Division also proposes minor modifications to the rate setting methodology for the nutrient offset program.

A. 15A NCAC 02R .0402 Schedule of Fees – Stream and Wetland Payment Rates for the NC Division of Mitigation Services

15A NCAC 02R .0402 establishes rates for payments into the Statewide Stream and Wetland In-Lieu Fee (ILF) program operated by DMS based on a two-tiered fee schedule. Participation in this program is voluntary for developers. Rules adopted by the Environmental Management Commission, certifications issued by the Department under USC 1341, and permits or authorizations issued by the United States Army Corps of Engineers under 33 USC 1344 allow permittees seeking third-party compensatory mitigation the option of using the ILF program to fulfill stream and/or wetland mitigation requirements when private mitigation bank credits are not available.

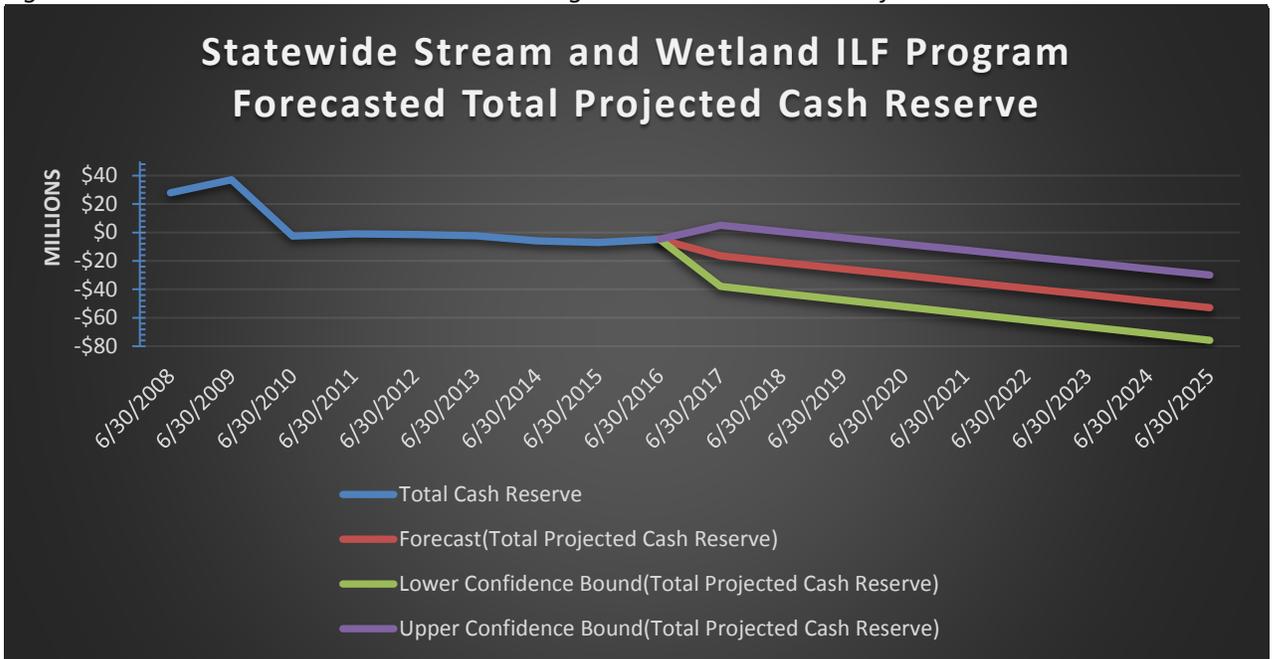
The under-collection of fees threatens the sustainability of this service. DMS is completely receipt-based, thus, financial solvency is essential to the ability of the program to operate. Figure 1 below shows the financial condition of the Statewide Stream and Wetland ILF Program since the 2008 fees were adopted. The portfolio includes the program's net assets (credits, cash, etc.) and liabilities (existing and future contracts and other costs necessary to complete program requirements). As indicated in Figure 1, as costs have continued to outpace fees, the overall portfolio value has declined and the future projections indicate that the portfolio values will go negative between 2017 and 2022 if rate schedules are not modified. The forecasted projections include 95% confidence intervals.

Figure 1. Statewide Stream and Wetland ILF Forecasted Portfolio Value.



Similarly, Figure 2 demonstrates a similar trend for the Statewide Stream and Wetland ILF Program cash reserves.

Figure 2. Statewide Stream and Wetland ILF Program Forecasted Total Projected Cash Reserve



As DMS proceeds toward re-adoption of this rule per § 150B-21.3A, Division staff identified the need for the rate schedule to adjust in response to changing program costs. This will provide for an efficient and effective means of setting rates that consistently reflect actual project costs in accordance with paragraph (c) of 15A NCAC 02R .0402.

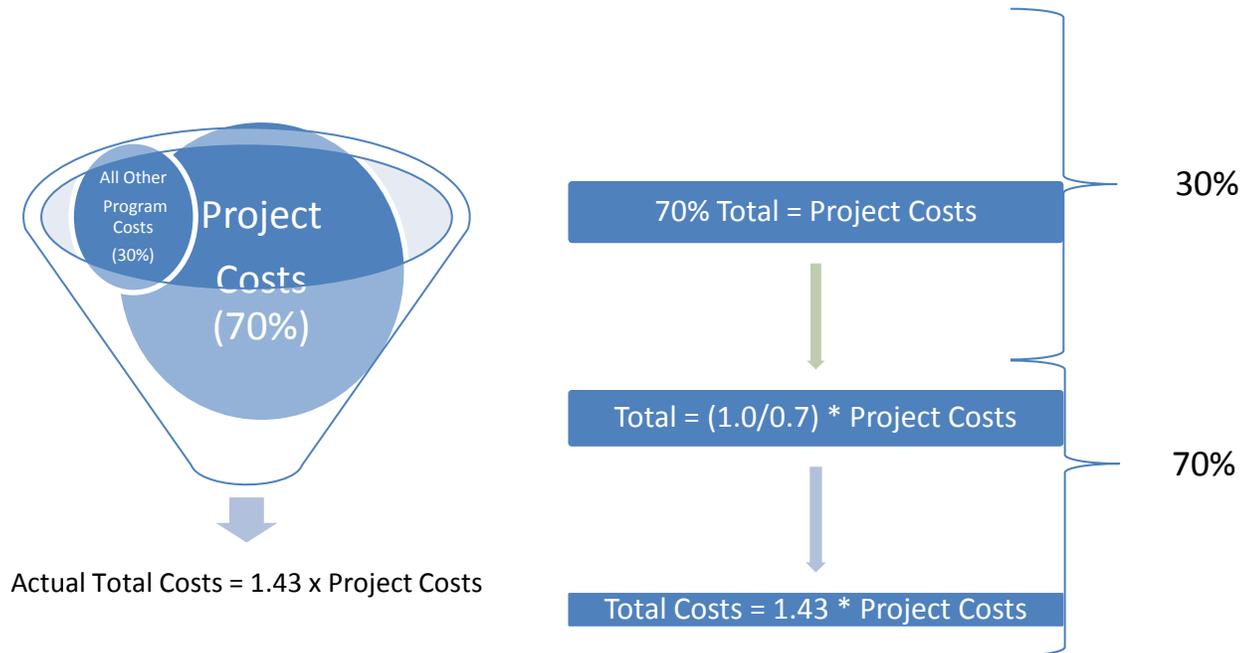
The proposed amendments to 15A NCAC 02R .0402 are two-fold. The primary purpose is to establish an Actual Cost Method (ACM) that calculates the rate schedule for stream and wetland mitigation payments to DMS. This ACM will adjust the rates annually based on the actual project implementation costs of the program. The subsequent rate adjustments will allow DMS to continue to operate a fiscally responsible and financially sustainable service for the regulated community. Without the ILF program, developers would be required to either reduce or eliminate the source of their mitigation requirements (e.g. impacts), or be required to build expensive, complicated, and time-consuming permittee-provided mitigation projects in areas where private mitigation bank credits are unavailable, or to wait until mitigation bank credits become available.

The proposed amendments will also eliminate the rounding requirement for wetland mitigation payments outlined in 15A NCAC .0402 (a). This procedure has been a source of confusion for customers and regulatory staff alike. The use of an ACM will render the rounding procedures unnecessary and reduce the number of credits invoiced to customers. The proposed amendments will also combine the rates for riparian and non-riparian wetlands to form a single freshwater wetland rate. Analysis of DMS statewide mitigation procurement data has shown that the costs of providing riparian and non-riparian wetland credits are similar and do not justify separate rates for these two wetland types.

The proposed actual cost method for the stream and wetland rates is more simplified than the actual cost methods for calculating riparian buffer rates and nutrient offset rates. A more simplified method is required because of the size of the program (over 500 projects) and the regulatory complexity and dynamic regulatory changes that are experienced in the stream and wetland program. Stream and wetland mitigation projects initiated more than 3 years ago are likely to have been implemented under significantly different rules, laws, and policies rendering the costs of these older projects substantially different and unrepresentative of the costs of implementing new projects. For example, a project developed in 1999 will have significantly different costs per credit primarily because of the different regulatory requirements in effect during those earlier years. Although the actual cost method can account for these differences by adjusting the costs and the credits into present-day values, this task would be very difficult to accurately quantify given the continuous and extensive regulatory changes experienced for stream and wetland compensatory mitigation. Consequently, the stream and wetland actual cost method was simplified to utilize only the last 3 years of full-delivery and mitigation bank credit purchase projects to calculate the rate. This near-term window effectively reduces the potential impact of regulatory shifts on costs to provide a more accurate and precise calculation of present day costs. This simplification was unnecessary for the riparian buffer and nutrient offset actual cost methods as those programs operate in a less complex regulatory arena where calculating present-day credits are straightforward.

The stream and wetland actual cost method also simplifies the rate calculation by determining the program rate by using a static coefficient of 1.43. The overall program rate is determined by project costs, administrative costs, overhead inventory, and credit risk. Project costs are 70% of

the overall costs of the program whereas administrative costs, overhead inventory, and credit risk represent 30% of the overall program costs. The coefficient of 1.43 is the mathematical multiplier that allows the overall rate to be calculated solely by measuring project costs:



These simplifications will allow the program to accurately and efficiently calculate actual cost rates. The potential downside to the simplification will be that the program will need to exercise cost discipline to ensure that non-project related costs are contained within the 30% parameters. If the program is unable to maintain non-project related costs within these parameters, the program will need to revisit rule-making in the future to propose appropriate adjustments.

Finally, DMS is proposing to raise the rate for coastal wetland mitigation credits to \$560,000 per credit from \$176,551. DMS researched pricing in 13 states along the eastern US coast and the District of Columbia to determine what other programs are charging for coastal wetland mitigation credits. Although most states had no coastal wetland fees, three states (Virginia, Massachusetts, and New Hampshire) had similar programs with rates for coastal wetland credits. DMS chose to propose the average rate from Virginia as the initial DMS coastal wetland rate based on regional similarities. Table 1 below summarizes the per credit costs in Virginia. This rate increase is necessary for DMS to continue to offer coastal wetland credits. While the rate increase is significant, it is reflective of the higher real estate costs along the North Carolina coast and the low volume of payments compared to other mitigation types. Since 1996, the Statewide Stream and Wetland ILF Program has received only 9 coastal wetland payments totaling 2.21 credits. The low volume of coastal wetland payments and credits results in the need for producing small projects very infrequently that offer little to no economies of scale. Under the proposed rules, when DMS implements two full-delivery or bank credit coastal marsh projects, the DMS coastal wetland rate will be then be based on the actual costs of those projects using the actual cost method.

Table 1. Virginia coastal wetland ILF rates

State Program	Wetland Type	Price Range (Present Day)
VA ILF	Tidal Wetlands	\$447,525 -\$671,288
Average Cost per Credit		\$560,000

B. 15A NCAC 02R .0601 Riparian Buffer Mitigation Fees to the NC Division of Mitigation Services

15A NCAC 02R .0601 establishes rates for payments into the Riparian Buffer ILF mitigation program operated by DMS for the purchase of riparian buffer mitigation credits where rules adopted by the EMC allow this option toward fulfillment of riparian buffer mitigation requirements. Participation in this program is voluntary for developers. The purpose of the proposed amendments to this rule is to establish an Actual Cost Method (ACM) that calculates the rate schedule for riparian buffer mitigation payments to DMS. This ACM will adjust rates quarterly based on the actual costs of implementing the program. The subsequent rate adjustments will allow DMS to continue to operate a fiscally responsible and financially sustainable service for the regulated community. The ILF program assists developers and promotes economic development by simplifying, facilitating and accelerating the permit and compensatory mitigation process.

Figures 3 and 4 show the portfolio values and projected cash reserves for the Riparian Buffer ILF Program in all areas. Note that state law requires that the funds collected in the Riparian Buffer ILF be utilized within the same river basin. The under-collection of fees in areas where costs exceed the rate threatens the sustainability of this service which has been used by over 400 developers since the program’s inception to meet more than 500 riparian buffer mitigation requirements. One important difference between the Statewide Stream and Wetland Program and the Riparian Buffer Program is revealed in the figures. Although both programs are on a negative trajectory indicating current rates are not sustainable, the Riparian Buffer Program’s negative decline is on a slower trajectory. The program’s portfolio value is expected to reach zero by 2024. However there remains a 5% chance the net portfolio value could go to zero as early as 2017-2018.

The proposed amended rule allows for the creation of “premium watershed rates” when costs in designated service areas exceed the general rate schedule by 33%. Currently there are two areas in the state, the Randleman Watershed and the Jordan Lake Lower New Hope Watershed, that will be designated premium watershed rates and the actual cost rate will be based on the specific costs to implement the program in those regions. These two areas are discussed in more detail below in the Costs section.

Figure 3. Riparian Buffer ILF Program Forecasted Portfolio Value

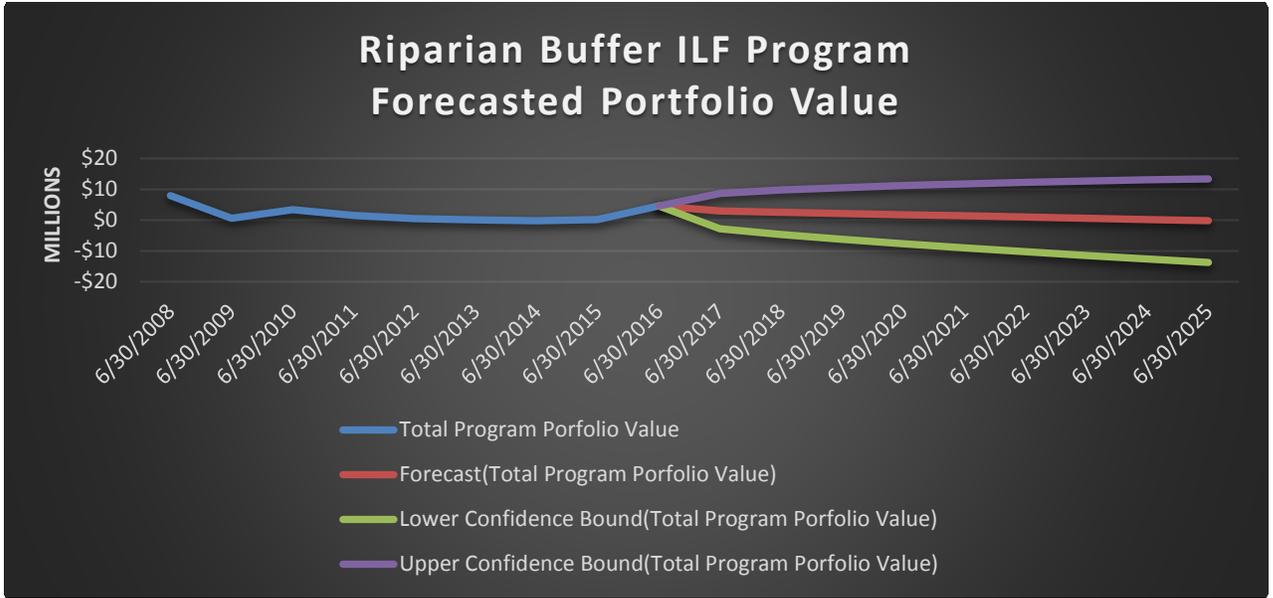
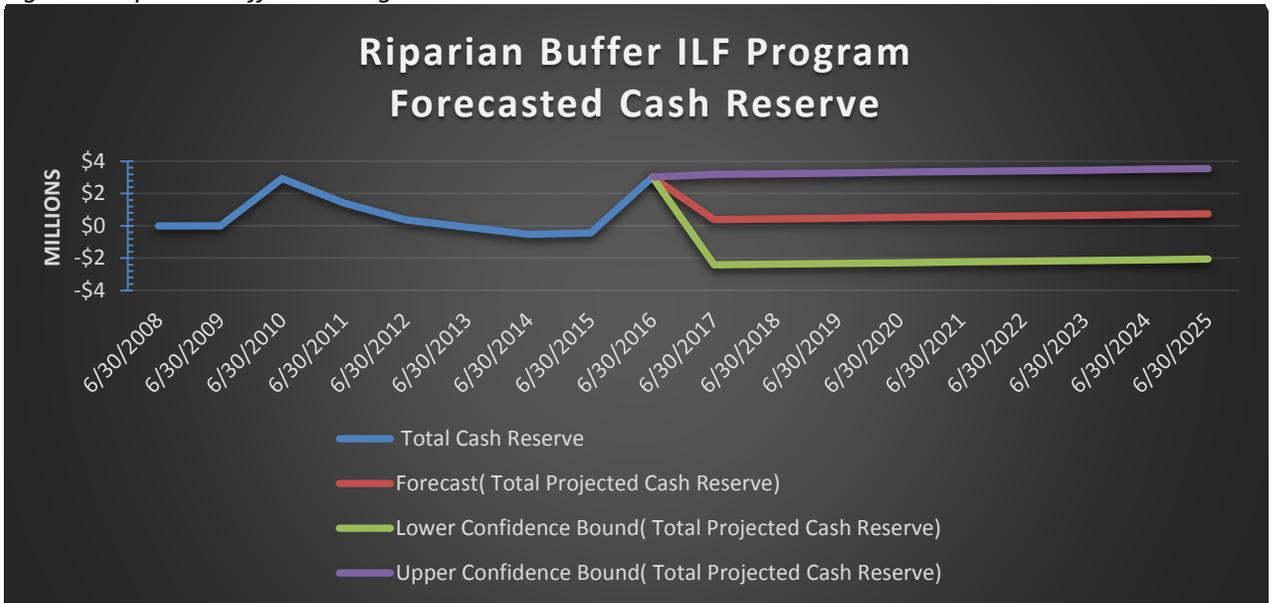


Figure 4. Riparian Buffer ILF Program Forecasted Cash Reserve



C. Rule 15A NCAC 02R .0602 Nutrient Offset Payment Rates for the NC Division of Mitigation Services

Currently, 02R .0602 contains an actual cost method for determining rates for nutrient offset payments to DMS where rules adopted by the EMC allow this option toward fulfillment of nutrient load reduction requirements. This rate calculation method adopted in 2010 has been very effective for the adjustment of nitrogen and phosphorus buy-down rates in response to changes in project costs resulting from regulatory decisions, procurement strategies and other factors that affect program costs.

The proposed amendments to this rule include renaming “special watershed rates” to “premium watershed rates” and adjusting the threshold in which a premium watershed rate may be established from 40% higher costs to 33% higher costs. Based on the last nutrient offset rate calculation, this modification would not cause the creation of any new premium watershed rates. However, since the threshold is lower, more watersheds could potentially fall into the category of premium watershed rates under this proposal if costs were to rise 33% above the general rates. When a watershed is classified as a premium watershed, the rate for that watershed is determined by the actual costs of implementing the program in that specific area.

The proposed amendments also seek to modify the ACM’s “Adjustment Factor” enumerated in .0602 (g)(3) to address instances when the number of pounds being paid into the program approaches zero. Staff have determined that this amendment will not increase rates or result in a cost to customers. DMS also proposes to amend the rule to allow for immediate rate adjustments if the program determines it is necessary to suspend acceptance of payments due to significant cost increases. The current rule requires DMS to wait until the beginning of the next quarter even if costs are known to be significantly higher than the present rate.

Figures 5 and 6 show the portfolio values and projected cash reserves for the Nutrient Offset ILF Program.

Figure 5. Nutrient Offset ILF Program Forecasted Portfolio Value.

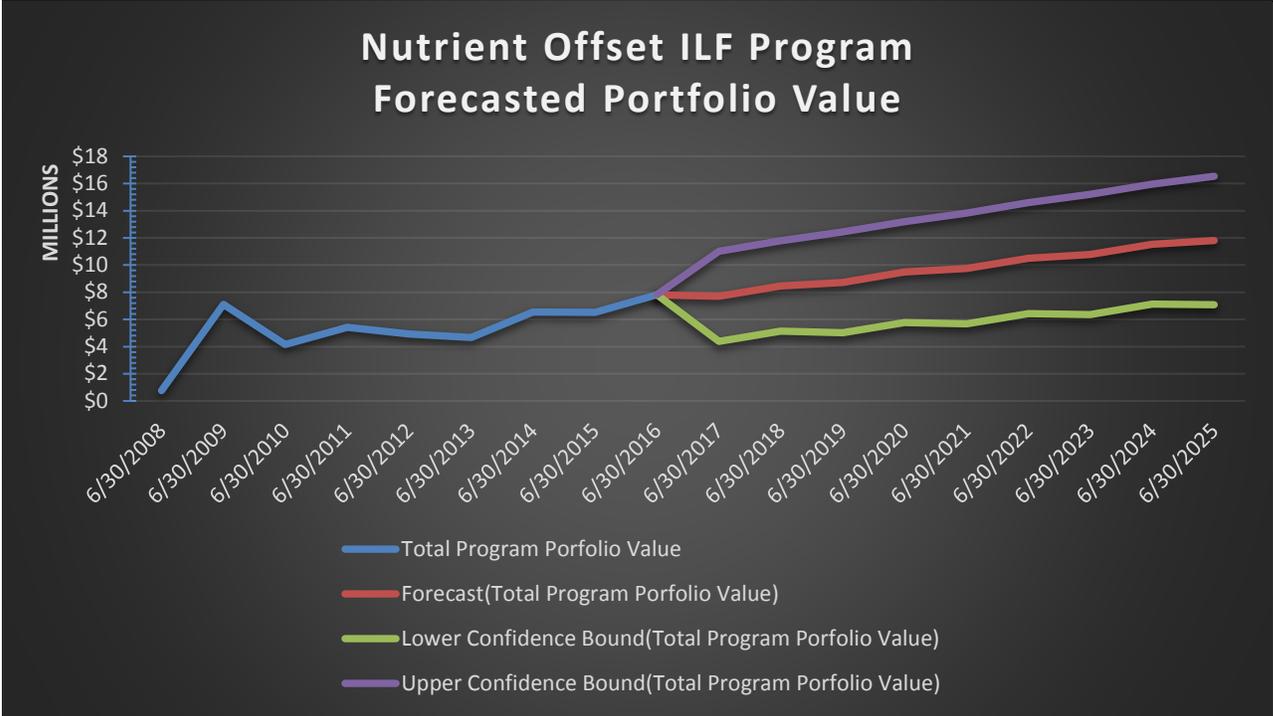
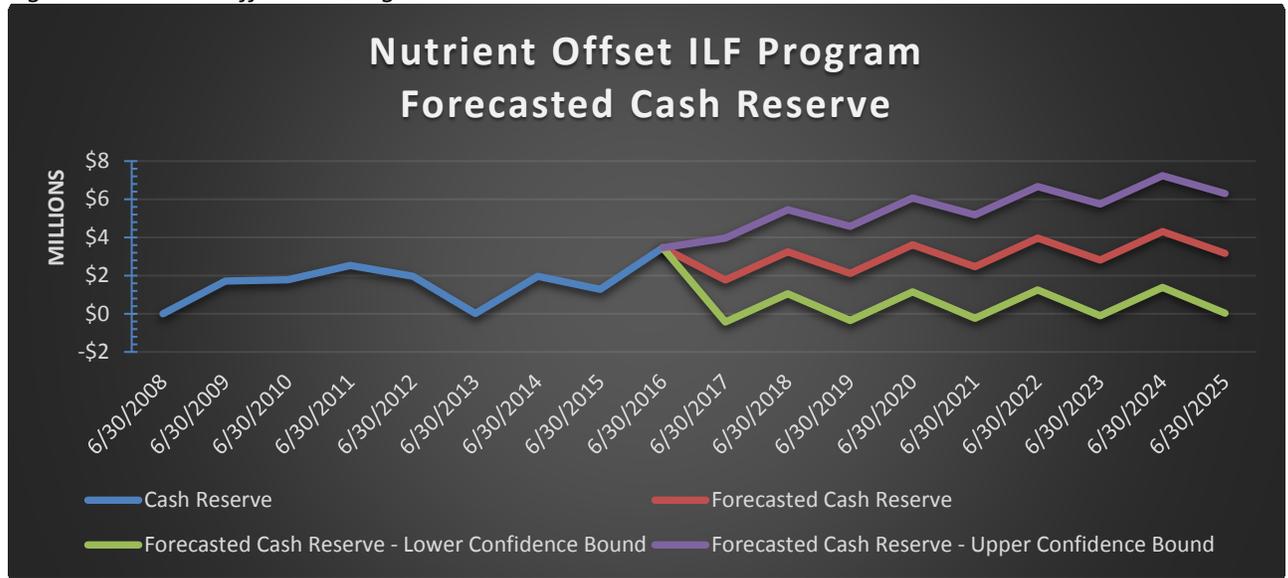


Figure 6. Nutrient Offset ILF Program Forecasted Cash Reserve



V. Costs

15A NCAC 02R .0402 Schedule of Fees – Stream and Wetland Payment Rates for the NC Division of Mitigation Services

As a direct result of the proposed amendments to 15A NCAC 02R .0402, there will be changes to the rates and therefore potential changes in costs and savings to multiple entities. Private sector and public sector entities (including state, local, and federal government entities) electing to purchase credits to meet compensatory mitigation requirements will be subject to the revised rate schedule. Whereas currently, ILF participants have been able to pay using rates that were below actual costs, the revised rates will reflect the current actual cost of implementing the program. Estimates of rates using the proposed Actual Cost Method and current cost data are shown in Table 2. These estimated initial rates are subject to change as they are based on data available at the time this analysis was performed.

Table 2. Stream and Wetland 2016-17 Rates and Estimated Initial Rates based on ACM

	Current (2016-17) Rate		Estimated Initial Rate	% Change	% Change
	High	Standard		High	Standard
Stream	\$391	\$297	\$458	17.06%	54.11%
Riparian Wetland	\$71,273	\$40,297	N/A	N/A	N/A
Non-riparian Wetland	\$51,422	\$26,445	N/A	N/A	N/A
Freshwater Wetland	N/A	N/A	\$67,851	N/A	N/A
Coastal Marsh Wetland	\$175,323	\$175,323	\$825,000 \$560,000	370.56% 219.41%	370.56% 219.41%

The DMS rates have historically been similar to the rates charged by private mitigation banks even though the two systems utilize very different business models. DMS routinely procures private mitigation banking credits when DMS has existing credit needs and the private mitigation banks have credits available. In North Carolina, most private banks have limited credit availability and are concentrated in the Cape Fear, Neuse, and to a lesser extent the Tar-Pamlico basins. Historically banks have only been able to provide approximately 3-7% of DMS's annual mitigation credit needs. Nevertheless, DMS solicits requests for bids annually to all mitigation banks in North Carolina. Table 3 below shows the actual submitted prices for mitigation banks credits from its request for bids during the 2015-2016 fiscal year.

Table 3. Private Mitigation Bank Submitted Bids in Fiscal Year 2015-2016

Mitigation Type	Range of Mitigation Bank Prices per credit
Stream	\$270 to \$400
Riparian Wetland	\$37,000 to \$72,000
Non-Riparian Wetland	\$19,850 to \$52,000
Coastal Wetland	None Submitted
Riparian Buffer	\$0.90 to \$1.55
Nitrogen	\$16.00 to \$135.00
Phosphorus	\$168.50 to \$750.00

In 2017, the North Carolina Department of Transportation (NCDOT) solicited bids to purchase stream mitigation banks credits in Neuse 03020201 and 03020202. NCDOT received 58 banks site submittals. Of these 58, 2 submittals were from existing mitigation banks sites with available credits, 16 were from sites that had no available credits but were expected to have credits available for sale within the request period, and 40 submittals were from firms who had not yet secured a banking instrument but planned to develop a bank and have credits within the request period. The costs of these submittals are shown in Table 4 below.

Table 4. NCDOT Request for Proposals for Mitigation Bank Credits

Stream Credits	Location	Bank Rate	DMS current Rate	Bank Costs	DMS Cost Comparison	Difference	% Difference
94,867.06	All Sites	\$375.82	\$369.12	\$35,653,085.04	\$35,017,359.46	\$635,725.58	1.78%
73,165.56	Neuse 03020201	\$339.78	\$391.00	\$24,859,864.62	\$28,572,013.96	-\$3,712,149.34	-14.93%
22,081.50	Neuse 03020202	\$497.74	\$297.00	\$10,990,820.43	\$6,558,205.50	\$4,432,614.93	40.33%
29,033.00	Dam Removal (NS 01)	\$318.00	\$391.00	\$9,232,494.00	\$11,351,903.00	-\$2,119,409.00	-22.96%
65,834.06	Non-Dam Removal Projects	\$401.32	\$359.47	\$26,420,591.04	\$23,665,456.46	\$2,755,134.58	10.43%

The costs of these existing and future bank credits were more expensive on average than existing DMS rates which is expected since the existing rates on average are below the program's actual costs. When compared to the initial estimated rate of \$458 under the proposed actual cost method, the mitigation bank rates in Neuse 03030201 was less expensive and the Neuse 03030202 was more expensive.

One of the banks proposed in Neuse 03030201 under the NCDOT RFP was a dam removal project which was significantly less expensive than other sites and skews the average costs lower. Dam removal mitigation has been uncommon in North Carolina. DMS has implemented two dam removal stream mitigation projects in North Carolina. DMS's two dam projects cost \$128.54 and \$172.77 dollars as measured in present-day dollars. The new bank dam removal project cost \$318 costs per credit, a substantial difference but still less expensive than other traditional stream projects. If the dam removal site project is removed, then the private mitigation bank credits were 10.43% more expensive than current DMS rates on average and 40.33% more expensive in Neuse 03020202. Since the Neuse river basin has one of the highest stream credit demand curves in North Carolina, mitigation banks are more active in this basin. In lower demand regions, the price of mitigation bank credits is generally expected to be higher due to the higher risk probability that credits might take longer to sell.

Baseline Analysis – Proposed Rate Method Not Adopted & DMS Ceases Services

Currently the Statewide Stream & Wetland ILF program actual costs per credit exceed credit rates. If the proposed amendments and actual cost rates are not adopted, the Statewide Stream & Wetland ILF program's financial condition are expected to continue to decline until it will be forced to cease stream and wetland credit services. In the event of a closure to the Statewide Stream & Wetland, mitigation providers and developers will be affected:

- Existing DMS mitigation contractors and full-delivery providers will no longer have a DMS market to sell credits to and will be forced to either become a mitigation bank, subcontract with a mitigation bank, become a permittee-provided mitigation consultant, or go out of business. The most likely scenario is that the number of full-delivery and mitigation contractor firms will decrease due to the high barriers to entry and that mitigation would become more concentrated among the surviving firms.
- If DMS no longer provides ILF services, the largest buyer of stream and mitigation procurement (DMS) will be dispersed to small individual developers who may lack expertise in the market. The lack of a large expert buyers in a market decreases leverage and purchasing power in the market which usually leads to upward pressure on price.
- If DMS is no longer a mitigation provider, the services of companies that facilitate permittee-provided mitigation will likely be in greater demand, particularly when mitigation banks have no available credits. The higher demand may allow for these firms to have pricing leverage leading to higher costs to developers and higher margins for providers.
- Elimination of DMS ILF program will result in a shortage of mitigation credits to support current economic development in North Carolina. Mitigation banks are currently able to meet 3-7% of DMS's annual stream and wetland mitigation procurement needs. For mitigation bank credits to meet all the stream and wetland credit demand currently

satisfied by DMS, available and released bank credit supply would need to increase 14 to 33 times greater than current supply, including supply in regions where mitigation demand is low. Because banks credits are released annually on a 7-year cycle, banks can only sell a portion of a bank's credits in any given year. Banks would also need to develop approximately 7-times as many credits as the market's annual credit demand in every region to ensure sufficient credits are available for any given year. Because the required capital investments are large and the risks that future demand may dissipate or disappear are even larger, banks are unlikely to make these investments in most regions of North Carolina due to low mitigation demand.

- In all scenarios, the amount of private sector mitigation work is not expected to increase. DMS already outsources all its mitigation procurement to the private sector in a competitive bid process. By collecting payments from multiple developers, the DMS program can package mitigation procurement into larger, multi-credit mitigation projects that are more efficient, create economies of scale, and produce lower costs and higher environmental benefits than can be achieved by implementing smaller individual projects. In a scenario where DMS ceases operations, the net effect would likely result in a transfer of benefits from one private provider type to a different private provider type. The three main private provider types are permittee providers, full-delivery firms, and mitigation banks. If the DMS ILF programs are terminated, mitigation work amongst the private providers will be reduced or eliminated for firms associated with full-delivery mitigation projects.
- More developers would be forced to implement permittee-provided mitigation resulting in smaller more expensive projects and higher mitigation costs to developers.
- The cessation of the DMS ILF program also results in the cessation of the Statewide Stream & Wetland ILF watershed planning program which is currently funded by program revenue. Since mitigation, by federal law, is required to be done in a watershed context, this service would need to be provided elsewhere, either by the private sector or by another State program. DMS's watershed planning expenditures only measure 1-3% of DMS's annual expenditures. Although the cost to implement the watershed planning costs are not large, the primary costs with its loss would be lower returns on investment in the form of potentially less environmentally beneficial project selections. Some mitigation providers also utilize these watershed plans in their mitigation projects.
- In regions where banks already exist (these are also historically higher mitigation demand regions), the lack of an alternative solution for when banks have no credits available may lead to upward pricing pressures as supply may become constrained.
- It is unlikely that this scenario will lead to a significant increase in mitigation banks in lower demand regions. Mitigation banks have already had legal priority provider status since 2008 in these regions and have failed to provide any meaningful number of banks or amounts of mitigation credits in these regions.
- If banks do not have available credits, there is the potential for regulatory agencies to be unwilling to expand mitigation bank service areas. This outcome would lead to either more small, expensive permittee mitigation or in some cases, regulatory agencies not requiring mitigation which would be a benefit to developers but a cost to the environment (as environmental damages would receive no compensation).

Impact of Adopting Proposed Rate Method

DMS Customers

To extrapolate the potential impacts on DMS customers from the proposed actual cost method, five years of historical stream and wetland ILF payments were used to estimate the average annual credit purchases from DMS Stream and Wetland ILF program. Table 5 shows the total annual payment amount at the current rate schedule compared to what the payment would be at the current estimated ACM rate.

Table 5. Payment Amounts Pre- and Post-ACM

	Stream	Riparian	Non-Riparian	Coastal (estimated)
Average Total Credits/Year	11,753	36.5	9.2	0.25
Average Number of Payments /Year	25	45	19	1 or fewer
Annual Payment Total - Current Fee	\$4,361,855	\$2,489,519	\$378,480	\$43,831
Payment Total - ACM Fee	\$5,383,084	\$2,478,636	\$626,703	\$206,250 \$140,000
Difference	\$1,021,229	\$-10,882	\$248,223	\$162,419 \$96,169

Most customers purchasing riparian wetland credits will experience little change in their payment amount for that credit type but overall costs will decrease slightly. Most customers purchasing stream or non-riparian credits will experience an increase in their payment amount under the proposed rates. When compared to the current fee schedule with separate riparian and non-riparian rates, the non-riparian cost increase is significant because many non-riparian payments are now paid in standard (lower) fee HUCs. However, the actual program costs for developing non-riparian credits are higher than the current fee schedule in these areas so the current rate structure is unsustainable. The elimination of the quarter-acre rounding provision in the rule, however, will help reduce the total payment amount under this new structure for customers who elect to use the ILF program. The elimination of the quarter-acre rounding provision will result in substantial savings for the customers who purchase wetland credits. The estimates in Table 5 above incorporate the savings from eliminating the quarter-acre rounding provision. Table 6 below shows the savings that eliminating rounding had when applied to the same last five years of ILF payments.

Table 6. Estimated Savings from Eliminating Rounding on Last 5 years of ILF wetland payments

Mitigation Type	Actual Credits	Invoiced Credits (Rounded to nearest 0.25)	Difference	Savings at Proposed ACM Rate
Riparian Wetland	211.15	230.25	-19.10	\$1,296,171.22
Non-riparian Wetland	53.39	61.00	-7.61	\$516,563.23
Coastal Wetland	1.26	3.75	-2.49	\$2,054,250.00 \$1,394,400

The proposed ACM rates reflect the program's cost to procure credits from bank credit purchases and full delivery providers. In North Carolina, roughly 90 percent of permittees seek mitigation credits from third-party providers that are private mitigation banks and/or the State's ILF programs. The two primary reasons for this is that both options usually save permittees time and money when compared to permittee-responsible mitigation. Permittee responsible mitigation requires the permittee to implement a 7 to 9-year mitigation project and assume the full risk that the project might fail. If the project fails, the permittee would still be responsible for producing the mitigation by either purchasing credits, fixing the failing project, or producing a second project to generate credits. The proposed changes are not expected to change customer behavior as roughly ten percent will continue to perform permittee responsible mitigation. However, developers who experience higher ILF payment or banking costs, are incentivized to find ways to reduce their environmental impacts to reduce their mitigation obligations and therefore mitigation costs.

Mitigation Bank Customers

Under the proposed rules, there are no anticipated direct effect to mitigation bank customers. Mitigation banks will still have priority provider status under the law and private developers will not be legally allowed to access the DMS ILF programs regardless of rates until all available private mitigation banks credits are exhausted. Mitigation bank pricing is independent of DMS rates. There are no requirements set under the rules that will directly affect mitigation bank pricing extended to their customers. Historically, however, some mitigation banks have set rates that closely match DMS rates. Consequently, one may anticipate that as DMS raises or lowers its rates, the mitigation banking industry may also lower or raise its rates. The factors that lead to decreasing rates are based on supply and demand of mitigation credits in the market and the regulatory framework that determines what constitutes a mitigation project and a mitigation credit. Mitigation banks do not currently have significant competition from other mitigation banks as the overall market to sell credits is limited in size. Most service areas in North Carolina currently are unable to support a single mitigation bank due to the low demand for credits. In higher demand areas, a few banks may be able to meet the majority of the mitigation needs for the area. Consequently, downward pricing pressure is likely limited by the lack of competition from other mitigation banks.

Under these conditions, an indirect effect of the rule is that most mitigation bank rates are likely to match DMS's rates when DMS rates increase. Thus, developers who elect to purchase

credits from mitigation banks will likely incur similar costs to those that can purchase from DMS when bank credits are unavailable. Even if bank prices were initially substantially lower than DMS rates, DMS rates would likely move towards those bank prices as DMS also purchases mitigation bank credits and the rate is based on the actual costs of full-delivery and mitigation bank credit purchases from the last 3 years. So, any initial rate disparities are likely to decline within a few years of the actual cost method being implemented.

However, since mitigation banks tend to concentrate in the high demand regions which allow for banks to build larger projects, and DMS operates in high and low demand regions, DMS may incur higher costs when required to develop smaller projects in the lower demand regions. Furthermore, mitigation bank credit prices are usually associated with a single project in a single location. Individual site costs can be highly variable for both banks and DMS. DMS is proposing a single statewide rate that captures both high and low cost regions. Because of these differences, bank rates and DMS rates are not expected to be precisely the same and some variations may arise in various regions of the state. These differences are why the rule has the provision that regions where the costs are 33% higher than the general rate will become a premium rate area and the rate will be based in the actual costs of providing services for that specific area.

Private Sector Providers

Mitigation banking companies will not incur any direct costs associated with the proposed amendments but may incur market power opportunity costs. The proposed changes create a method for setting DMS rates based on actual DMS incurred costs of procuring mitigation from the private sector providers. The proposed rate method does not determine if rates will go up or down. The DMS rates will go up or down based on the actual costs of mitigation projects procured from the private sector by DMS. Mitigation bank rates are currently unregulated in North Carolina; banks are permitted to set their own rates independent of DMS rates. Under North Carolina General Statutes, private developers are not allowed to purchase DMS mitigation credits when banks have credits available and, therefore, DMS does not compete on price with mitigation banks for these customers. DMS receives payments from private developers only after all available mitigation bank credits have been purchased. Only state and federal governmental agencies, and the cities of Raleigh, Charlotte, and Greensboro are exempt from the bank preference law and can choose their mitigation provider. However, in total, these governmental requests represent less than 5% of the total requests in the Statewide Stream and Wetland ILF program.

- The mitigation banks may have market power opportunity costs due to changes in the market that could develop under the baseline condition where the rules and rate methods are not adopted. Under the baseline condition, the DMS Stream and Wetland and Riparian Buffer ILF programs are likely to be terminated between 2019 and 2024 due to being unable to remain financially sustainable. Under these conditions mitigation banks would likely experience increased market power as the number of available credits in the market are diminished. The level of these opportunity costs cannot be precisely measured but are discussed in more detail in the Risks Analysis section.
- Mitigation contractors, full-delivery providers, and other DMS program vendors will not incur any costs associated with the proposed changes.

- The number of developers who elect to pursue permittee-provided mitigation is expected to be unchanged by the proposed rate method.
- Mitigation providers who work directly with clients to produce permittee-provided mitigation are not directly affected by the proposed amendments but may have market power opportunity costs that could otherwise develop in the baseline condition as market credits diminish. In the baseline condition, demand for permittee provided mitigation is expected to increase when the ILF programs are terminated and mitigation bank credits are not available. If the proposed rate methods are adopted, the demand for permittee-provided mitigation is expected to be unchanged.
- Under the proposed rules, the DMS rates will respond to the actual costs of mitigation projects contracted by DMS from the vendors. If the market has sufficient numbers of mitigation vendors to compete on price, the DMS rate will not only represent actual costs, it will also be reflective of undistorted market rates.

A concern that affects market pricing is the high barrier to entry to either become a mitigation bank or mitigation contractor. Due to the technical nature of the projects, the high capital requirement, high bonding requirement, slow approval process, risk, and complex regulations, the total number of banks, mitigation contractors, and full-delivery providers is constrained. Most regions of North Carolina have zero mitigation banks despite laws that offer priority provider status to banks since 2008. As noted above, all mitigation banks in North Carolina can currently only meet 3-7% of DMS total annual mitigation credit procurement needs. Similarly, in many regions of the state, requests for mitigation credit proposals from full-delivery providers and mitigation banks often results in less than three submittals. Low demand regions and small need requests have low numbers of submittals. Wetland projects in the Piedmont and Mountain regions have also historically had low response rates.

15A NCAC 02R .0601 Riparian Buffer Mitigation Fees

Baseline Analysis – Proposed Rate Method Not Adopted & DMS Ceases Services

Currently the Riparian Buffer ILF programs actual costs per credit exceed credit rates. If the proposed amendments and actual cost rates are not adopted, the Riparian Buffer ILF program's financial condition will continue to decline until it will be forced to cease riparian buffer credit services. This is most likely to occur in the Cape Fear river basin first as actual costs greatly outpace rates. In the event of a closure to the Riparian Buffer ILF program, mitigation providers and developers will be affected:

DMS Customers and Private Sector Providers Costs and Benefits

The costs and benefits to mitigation providers (full delivery providers, mitigation banks, permittee provided mitigation providers), and developers discussed in the previous section covering 15A NCAC 02R .0402, are equally applicable to the proposed rule amendments to 15A NCAC 02R .0601. Rather than duplicate the previous discussion here, they are incorporated by reference and this section will cover the specific differences and details solely associated with 15A NCAC 02R .0601.

Other ILF Programs

DMS's project implementation costs in the Nutrient Offset ILF and the Statewide ILF program will increase if Riparian Buffer ILF program size decreases in size or ceases to exist. The net effect is that lower volume results in fewer projects, smaller project sizes, fewer multiple credit type projects, lower economies of scale, and the higher overall costs in the remaining ILF programs. The consequence is that the other ILF programs will need to raise fees to compensate for these losses. The benefits of scale are discussed in detail in the Benefits section.

Impact of Adopting Proposed Rate Method

Adopting the proposed Riparian Buffer ACM rate method will allow the program to be financially stable in the higher cost river basins where costs far exceed the current rates and allow the program to maintain riparian credit services when banking credits are not available.

DMS Customers

To extrapolate the potential impacts on DMS customers of the estimated ACM buffer rates, five years of historical ILF payments were used to estimate the average annual credit purchases from the DMS Riparian Buffer ILF program. Table 7 shows the current rates and the estimated rates using the ACM method proposed in 15A NCAC 02R .0601. Table 8 shows the projected total payment amounts at the current 2017 rate schedule compared to total payments using the projected ACM rates.

Table 7. Riparian Buffer Current and Proposed Rates

	2017 Rate Per Credit	ACM Rate Per Credit
Standard Fee HUCs	\$1.16	\$1.06
Randleman	\$1.16	\$2.98
Jordan Lower New Hope	\$1.16	\$2.98

Table 8. Riparian Buffer Payment Amounts Pre-and Post ACM

	Standard Rate Areas	Randleman ACM Rate Area	Lower New Hope ACM Rate Area
Current Rate	\$1.16	\$1.16	\$1.16
Projected ACM Rate	\$1.06	\$2.98	\$2.98
Average Credits/Year	970,701	152,547	7,061
Average Number of Paid Requirements /Year	17	2-3	1-2
Annual Payment Total - Current Fee	\$1,126,013	\$176,955	\$8,191
Annual Payment Total - ACM Fee	\$1,028,943	\$454,590	\$21,042
Difference	(\$97,070)	\$277,636	\$12,851

As shown in Table 8, most customers will have decreased costs under the proposed riparian buffer ACM rules. Only customers in the two premium rate areas are estimated to have higher costs. Currently there are no mitigation bank credits available in these two regions. The Randleman watershed has historically been the most expensive location in North Carolina for riparian buffer mitigation credits. Utilizing the ACM rate will allow the program to charge the actual costs of delivering services in this high cost area. The Lower New Hope watershed rate will initially be the same as the Randleman watershed. This is due to the lack of two DMS mitigation projects in this area at this time. DMS has been unable to secure mitigation projects in this area at the current standard rates. Per the rule, whenever a rate area does not have two projects, the highest rate in the program shall be utilized (e.g. in this case the Randleman Watershed Rate). After two projects are established in the Lower New Hope, the rate will be based solely on the costs of delivering services in the Lower New Hope.

NCDOT Customer

The effects that the proposed riparian buffer rate method would have on NCDOT was specifically examined. The number of NCDOT riparian buffer payments from the last 6 years were examined across all buffer regulated watersheds. Based on historical usage and the estimated proposed credit rates, NCDOT would have decreased credit payment costs in all buffer regulated regions of North Carolina except for the Randleman watershed where NCDOT represents a significant percentage of the historical customer base. NCDOT has not yet been a riparian buffer customer in the Lower New Hope watershed. Assuming that NCDOT future riparian buffer credit demand is consistent with the historical 6 year average, the net cost of the adopting the proposed rate method using the estimated rates is estimated to be \$95,000 per year. However this outcome is dependent on the locational mix of future NCDOT credit needs. Should NCDOT build fewer transportation projects in the Randleman and/or more projects in the other lower rate regions of North Carolina, adopting the proposed rates would likely result in no additional costs and likely result in savings.

15A NCAC 02R .0602 Nutrient Offset Payment Rates for the NC Ecosystem Enhancement Program

There are no additional costs associated with the amendment to 15A NCAC 02R .0602. There will be benefits which are discussed in Section VI below.

VI. Benefits

15A NCAC 02R .0402 Schedule of Fees – Stream and Wetland Payment Rates for the NC Division of Mitigation Services and 15A NCAC 02R .0402 Schedule of Fees and 15A NCAC 02R .0601 Riparian Buffer Mitigation Fees

The proposed amendments to 15A NCAC 02R .0402, .0601 and .0602 will benefit DMS, the development community, as well as other mitigation partners. The primary benefit associated with the proposed rule amendments is that DMS will be able to continue to provide quality mitigation services to customers statewide when banking credits are unavailable. Since the proposed rule establishes rates that adjust upward and downward as actual costs increase or

decrease, the proposed rule amendments will provide financial stability and sustainability for the ILF program while also providing fair and accurate pricing to the development community. Over 1,600 customers have benefitted from the Statewide Stream and Wetland ILF program with almost 2,000 separate mitigation requirements accepted by DMS. Likewise, over 400 customers have benefitted from the Riparian Buffer ILF program with over 500 separate mitigation requirements met by DMS.

Savings to Developers

About 10% of compensatory mitigation is implemented as permittee- provided mitigation. Usually the developers that elect to implement permittee-provided mitigation have large impacts that would justify the large capital expense required to implement a mitigation project. The types of developers that elect to do permittee-provided mitigation may also have permanent staff that are dedicated to managing or implementing a mitigation program. Most developers have much smaller impacts and mitigation requirements. The costs of providing small mitigation sites (from any provider type) can be very high as they do not offer any economies of scale. Design costs, mobilization costs, construction costs, monitoring costs, and stewardship costs all become less expensive per credit on larger projects. Combined with the required 7 to 9 years required to complete a permittee-provided project, it is not surprising that permittee-provided mitigation is infrequently implemented. ILF mitigation offers developers the option of navigating the mitigation pathway in as little as a few hours but usually within one to two weeks. The ILF option also allows a developer to avoid the highly technical, complex, and evolving regulations that govern the implementation of mitigation projects. These two benefits save considerable time, money, and lowers the mitigation risk to zero for the permittee. The minimum costs for ILF programs and most mitigation banks to acquire, design, construct, monitor for 7 years, and provide long-term management in perpetuity usually will exceed \$600,000 per mitigation project. Developers achieve very large savings when they elect to purchase mitigation credits from an ILF program or from a mitigation bank

DMS mitigation services provides substantial cost savings and certainty versus permittee-responsible mitigation. As a consistent and reliable source of appropriately priced quality mitigation credits the ILF program reduces costs and risks to the development community by assuming the responsibility for compensatory mitigation for permittees and consolidating mitigation activities to increase economies of scale. Figures 7 and 8 below show the cost relationship between the size of 35 DMS single category full-delivery projects since 2002 and the cost of the credits. The costs per credits for each project have been inflated to 2017 present-day values for comparison. As both tables clearly show, smaller projects (as might be done by a permittee or by a smaller version of DMS) are substantially more expensive. This is the primary reason permittees elect to use third-party provider mitigation services: the costs are substantially lower.

Figure 7. Project Size and Stream Cost Per Credit

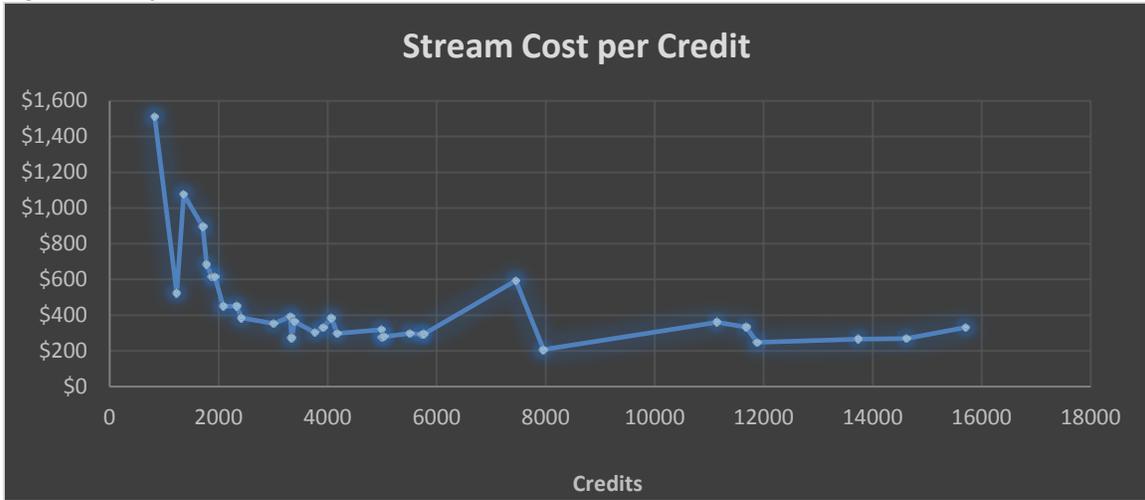
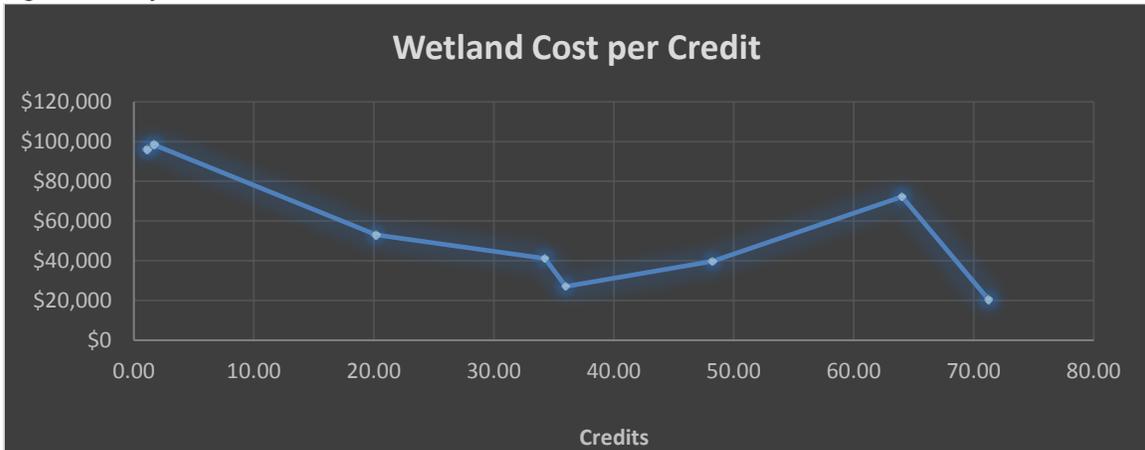


Figure 8. Project Size and Wetland Cost Per Credit



If DMS were forced to cease operations, permittee-provided mitigation would be expected to increase since mitigation banks do not currently and would not be expected to provide services in all areas of North Carolina. All private developers that utilize DMS ILF services were unable to purchase mitigation bank credits.

To estimate the potential savings that developers accrue annually by having access to third-party ILF stream and wetland credits, DMS reviewed ILF customers who had made stream, riparian wetland, and/or non-riparian wetland payments from the last 6 fiscal years. All of these customers did not have mitigation bank credits available for purchase. An estimate of savings was based on the size of the developers' credit needs and the average cost per credits as shown in Figures 7 and 8 above. A minimum project size of \$400,000 was utilized as a conservative estimate of the lowest viable project cost. Table 9 shows the savings that developers obtain by avoiding permittee-provided mitigation. On average, the private development community as a whole currently saves up to \$23.4 million annually. However, if ILF services were terminated as the case in the baseline condition, the annual savings are expected to decrease but be greater

than \$1.6 million but less than \$23.4 million as some developers would attempt to reduce impacts or abandon their development projects rather than incur the high costs of permittee-provided mitigation. It is also expected that some mitigation banks may also elect to enter the market since a larger bank that services multiple smaller developers is far less expensive. However, given that new banks have not yet entered the market despite bank preference laws already in place, banks may not be motivated to enter these markets until higher rates and higher margins can be realized. This would still result in additional costs to developers.

Table 9. Estimated Current Annual Savings to Developers.

Number of Permittees Studied	397
Number of Permittees who did not save on project costs by using ILF	3
Total Estimated Additional Savings	\$140,000,000
Average Additional Savings Per Permittee	\$350,000
Average Annual Additional Savings	\$23,400,000

The precise number of developers who would terminate projects or implement permittee-provided mitigation, as well as the amount of new bank development cannot be precisely quantified and would be variable by region. Table 9, however, clearly demonstrates that developers remain significant net savers under the proposed rules despite the estimated increase in fees.

In addition, electing to use a third-party mitigation provider such as DMS ILF program creates savings by reducing the length of the permit process, greatly simplifying permit review, and eliminating the 7-9-year mitigation project process. The additional benefit of eliminating a risky and lengthy regulatory process cannot be underestimated.

The adoption of the rules is also expected to create net savings for developers in the mid to long term for banks credit purchases and permittee-provided mitigation by avoiding the potential costs discussed in the baseline condition –specifically the potential for regional credit shortages and leveraged market power positions by providers.

North Carolina Department of Transportation (NCDOT)

Prior to the formation of the DMS ILF Program for the North Carolina Department of Transportation (NCDOT), NCDOT had as much as 50% of its transportation construction program delayed due to lack of successful mitigation. Since 2003, when NCDOT elected to utilize the DMS ILF program, NCDOT has not experienced a single transportation project delay due to compensatory mitigation. Today's annual construction transportation plan exceeds \$2 billion. The annual potential savings from zero transportation delays on a budget as large as that of NCDOT's probably exceeds the entire annual DMS NCDOT ILF budget which ranges from \$25-40 million per year. It was due to these high risk and high costs that DMS developed a separate stream and wetland ILF Program specifically for NCDOT.

Adoption of the proposed amendments ensures DMS will also be able to continue to provide cost-effective and reliable mitigation services to the NCDOT. Although the non-NCDOT ILF programs are the primary beneficiary of the rule amendments, the rule amendments allow DMS to continue to assume the responsibility of procuring credits and the associated risk, offering NCDOT efficient mitigation solutions for required permits. Both NCDOT and other customers directly benefit when the total program volume is higher, as larger projects can be more efficiently delivered than smaller projects. Of the ILF programs, NCDOT participates most commonly in the Riparian Buffer ILF Program. NCDOT is not a regular customer to the Statewide Stream and Wetland ILF Program and has not participated in it within the last 5 years because DMS operates a separate stream and wetland ILF program specific for NCDOT to address those needs. However, it is very important to note that the Statewide ILF Program is the primary alternative mitigation solution for resolving NCDOT mitigation problems. NCDOT may request to participate in the Statewide Stream and Wetland Program when unanticipated mitigation needs arise that endanger the delivery of transportation projects. Currently this scenario is rare as NCDOT orders stream and wetland mitigation credits in the NCDOT ILF program for the transportation projects 5 to 7 years ahead of the permit application. Consequently, NCDOT will not incur any direct costs from a change in rates to the Statewide Stream and Wetland ILF program. Eliminating delays on a single large new construction transportation project could save millions of NCDOT dollars.

However, NCDOT will lose major savings and efficiencies if the DMS Statewide Stream and Wetland ILF Program ceases to provide mitigation services. There are two primary areas where NCDOT would be greatly affected:

1. Currently DMS is able to procure larger, more environmentally beneficial, less expensive, and fewer stream and mitigation projects when it combines the mitigation needs of the Statewide Stream and Wetland ILF Program with the NCDOT Stream and Wetland ILF Program. If DMS ceases to offer mitigation services in the Statewide ILF Program, then the NCDOT program will be required to build smaller, less environmentally beneficial, more expensive, and more projects than it would otherwise be required to do for the NCDOT Stream and Wetland ILF Program.
2. NCDOT would no longer be able to sell surplus credits to the Statewide Stream and Wetland ILF Program and Riparian Buffer ILF Program. Currently these sales finance a portion of the annual NCDOT Stream and Wetland ILF Program costs. Without these sales, NCDOT would be required to spend more to finance the NCDOT Stream and Wetland ILF which would consequently decrease NCDOT's other investments in transportation projects.

DMS and NCDOT have analyzed these costs and benefits multiple times since 2004 and have concluded that the synergies generate substantial savings to NCDOT. The major synergies identified by DMS and NCDOT include:

- Allows DMS to function as a larger, more efficient organization designed to meet the mitigation needs of both programs.
- Allows DMS to accept the mitigation responsibility for a large number of NCDOT TIP projects that otherwise may have been delayed while additional mitigation was developed to address those project needs.
- Substantially decreases threats to future NCDOT lets.
- Provides higher environmental compliance under both ILF programs.

- Reduces the number of projects required to meet regulatory requirements for both ILF Programs.
- Eliminates need to develop additional projects in locations where one of the ILF programs already had surplus.
- Reduces the number of times when small expensive projects must be procured.
- Reduces inefficiencies associated with building projects by utilizing, selling, and reducing surplus.
- Selling unneeded surplus credits reduces NCDOT ILF programs quarterly cash requirements.
- Increases efficiencies of scale, by allowing future projects to be larger.

DMS has estimated that combining DOT and non-DOT needs when procuring mitigation projects has reduced the total number of mitigation projects by 5 to 10 annually. Since the smallest stream and wetland mitigation projects average approximately \$600-800 thousand dollars, the annual savings from these synergies is \$3 to \$8 million annually. In the first four years of the program, an estimated 74 projects were avoided resulting in approximately \$30 million in savings to NCDOT.

Similarly, the cessation of the Statewide Stream and Wetland ILF Program would also terminate the sale of NCDOT's surplus mitigation credits. Selling surplus credits is a major source of revenue for NCDOT. Since 2003, the Statewide Stream and Wetland ILF Program has generated \$39.5 million dollars from sales of mitigation credits from the NCDOT Stream and Wetland ILF Program. This equates to an average revenue stream of \$3 million annually.

Savings to State Regulators and Environmental Benefits

DMS also provides important oversight and quality assurance for stream, wetland and buffer mitigation projects which reduces the burden on state, federal and local regulatory agency staff and increases mitigation effectiveness compared to permittee-responsible mitigation.

Basinwide restoration planning is another important service facilitated by DMS which helps satisfy federal requirements for mitigation to take place in a watershed planning context. The extensive history, partnerships, experience and data available from DMS informs the improvement of mitigation site development and monitoring.

A valuable additional benefit of third-party mitigation such as the DMS ILF programs that is difficult to quantify is related to mitigation regulations. Utilization of the in-lieu fee program saves the regulator administrative costs associated with reviewing, approving, monitoring and enforcing smaller more numerous permittee-provided projects.

Benefits to Full-Delivery Providers and Mitigation Contractors

Full-delivery firms and mitigation contractors are expected to benefit from the adoption of the proposed rule amendments. Although some full-delivery firms participate in the mitigation banking industry, not all do. Similarly many specialized mitigation contractors subcontract with full-delivery firms or provide supporting services outside of mitigation banking. Under the Baseline Analysis, DMS would close the Statewide Stream & Wetland and Riparian Buffer ILF

programs. Closure of the ILF programs would also mean closure DMS's full-delivery procurement for these ILFs. Existing DMS mitigation contractors and full-delivery providers would likely be forced to either become a mitigation bank, subcontract with a mitigation bank, become a permittee-provided mitigation consultant, or go out of business. The most likely scenario is that the number of full-delivery and mitigation contractor firms would decrease due to the high barriers to entry and that mitigation would become more concentrated among the surviving firms. Avoiding these outcomes is a benefit to the firms that specialize in the full-delivery and mitigation support markets. An additional benefit that full-delivery provides is that more and smaller firms can participate in the mitigation industry.

Other ILF Program Benefits

Adoption of the proposed rules and the subsequent continuation of the Statewide Stream & Wetland and Riparian Buffer program will create substantial savings in the NCDOT Stream & Wetland ILF and Nutrient Offset ILF programs. The major reason that riparian buffer rates have been able to remain relatively stable since their inception in 1998 is due to the cost synergies that exist between the Riparian Buffer ILF Program, the Statewide Stream and Wetland ILF Program, and the Nutrient Offset ILF Programs. There are very large savings when riparian buffer credits are developed in conjunction with other types of mitigation credits. These savings are particularly pronounced when stream or wetland credits are combined to also produce riparian buffer credits on a single project. All the land acquisition, design, mobilization, monitoring and stewardship costs can be implemented far more efficiently when done as single project. The combination of multiple program needs also allows for larger projects which creates additional economies of scale. Of the 45 full-delivery, design-bid-build, and mitigation bank credit purchases contracted by DMS, riparian buffer projects that were implemented with streams and/or wetlands were found to be 58% less expensive than projects implemented solely as riparian buffer projects.

The termination of the Riparian Buffer Program would directly affect the costs associated with the Statewide Stream and Wetland Program. The Statewide Stream and Wetland Program has sold 5,022,125 riparian buffer credits to the Riparian Buffer ILF program for \$4,494,799. The average annual sales over the last 9 years is \$499,420. Termination of the program would eliminate these sales and increase costs of the Statewide ILF Program by \$499,420 annually. The same effect would occur to the Nutrient Offset ILF Program where the program has sold an average of \$373,333 annually over the last 3 years. Eliminating the buffer program would increase costs to the Nutrient program by \$373,333 annually. Increased program costs ultimately would lead to increase rates that would negatively affect developers.

15A NCAC 02R .0602 Nutrient Offset Payment Rates for the NC Ecosystem Enhancement Program

Customers will be positively affected by the proposed amendment in the rule to allow for immediate rate adjustments if the program determines it is necessary to suspend acceptance of payments due to significant cost increases. The current rule requires DMS to postpone rate adjustments until the beginning of the next quarter even if costs are known to be significantly higher than the present rate. In cases where costs become significantly higher than the published rate, DMS is forced to suspend collections of payments for up to 3 months until the

rate is recalculated. Under this scenario, the developer seeking nutrient credits will be unable to move forward with their development without redesigning their construction project, waiting until mitigation bank credits become available, or wait until DMS can recalculate fees to actual costs in the next quarter. This situation has occurred in the past and this proposed amendment will prevent it from occurring in the future.

Although the recalculated rate would be higher, the alternative would most likely be significantly worse. Redesigning a fully permitted development project can be expensive or impossible depending on the site constraints. For nutrient reductions, developers are required to meet a threshold of nutrient reduction on-site. The remainder of their nutrient offset can be acquired from a mitigation bank or from the DMS Nutrient Offset ILF program. DMS is only an option when no private bank credits are available. For developers, the nutrient buydown is typically the last step in the development process before construction commences. In these cases, it is common for the construction equipment to already be mobilized and on site. Since mobilization represents a substantial portion of construction costs, developers who have equipment mobilized can lose substantial sums of money if forced to wait for either mitigation bank credits or DMS credits to become available. Demobilization and remobilization are undesirable high cost consequences. The proposed amendment resolves this problem by allowing DMS to immediately recalculate the fee to give relief to developers who find themselves in this situation.

VII. Risk Analysis

There are several possible risks associated with the proposed amendments to *15A NCAC 02R .0402 and .0601* which are listed below:

Political Risk –The development community may perceive the rates changes negatively because in many cases it will increase their payment amount. The initial perception should be tempered by understanding that the fee will solely be based on the actual costs of implementing the program. Furthermore, since the participation in the program is voluntary, developers are free to elect not to use the program. As shown in this document, the development community will be net savers under the proposed amendments to the rule primarily by continuing access to ILF program services when bank credits are not available which will save them significant dollars by avoiding higher permittee-provided mitigation costs or having to terminate development projects due to cost. Over the middle to long-term, the rule also would reduce the potential of leveraged pricing in credit shortage situations. However, the data is not available to precisely measure the probabilities for each of these potential effects.

Uncertainty Risk - The net impact of the rules on both banks and developers has uncertainty over the very long run under the baseline scenario of no action because insufficient data is available to precisely determine (1) how many mitigation banks would enter markets where they are currently not present; (2) how many banks would enter low demand markets, if any, (3) whether enough banks would enter markets to provide meaningful competition, and (4) whether existing firms would consolidate to create or maintain monopoly or oligopoly statuses.

Regulatory Risks – Mitigation costs are mainly influenced by regulations. These regulations determine the intensity, duration, and characteristics of credit-generating mitigation projects. If

costs continue to escalate, there may be pressure to change the regulations to reduce costs. Fortunately, the current and proposed ACM methods are designed to adjust both upward and downward as these costs fluctuate. Failure to implement the proposed ACM methods would elevate the risk resulting from future regulatory changes.

Contracting Risk – The simplified ACM used to calculate stream and wetland rates requires the program to exercise cost discipline to ensure that, on average, non-project related costs are contained within the 30% parameters of the method. If the program is unable to maintain non-project related costs within these parameters, the program will need to revisit rule-making in the future to propose appropriate adjustments.

Method Assumptions – In the proposed amendments to the stream and wetland rates, the project data incorporated into the ACM is limited to the last three years. One risk to the rate method occurs if the program contracts a very low number of projects. Under that scenario, a limited number of projects would have a larger-than-expected effect on the average project price and the average credit cost. In the riparian buffer ACM, there is an adjustment factor to account for program costs that exceed program revenues. This adjustment factor component becomes less effective when revenues are low.

VIII. Alternative Policies

1. **No Change** – Failure to adopt the proposed ACM for Rules 15A NCAC 02R .0402 and .0601 would negatively impact DMS, its customers and partners. As stated previously, DMS operates on receipts paid per the fee schedule by mitigation type. If the fees collected are below the actual cost to procure credits, then the program will lose money on a continual basis until DMS is unable to accept payments and take on additional mitigation responsibility.

Should DMS cease to offer mitigation services, permittees themselves or other third-party mitigation providers would need to produce sufficient credits to meet demand from regulated entities in areas where private bank credits are not available. Another possible outcome is that permittees would seek bank credits outside of the area of the impact potentially increasing their required mitigation and decreasing the proximity to the impact. These scenarios would increase the financial burden and time investment on permittees and would also result in delays in meeting compensatory mitigation requirements. At present, few private mitigation banks are available in the vast majority of the state and even where available, are periodically sold out of credits. Though banks are designated by state law to be “preferred” as a mitigation option, DMS has proven to be an important and reliable mitigation alternative for the development community. DMS is the largest mitigation provider in the United States and has more successful mitigation sites than any other provider to date.

Without a consolidated and reliable provider of statewide mitigation services, the Interagency Review Team’s (IRT) workload and responsibilities would increase significantly as those agencies bear the burden of managing and tracking projects from numerous sources. This would equate to an increase in staffing and associated cost for agencies

comprising the IRT. Likewise, NCDOT would need to respond by adjusting their staff and workloads and potentially their let schedule and permit processes. In addition, without adequate revenue, DMS would be unable to continue providing Basinwide restoration and watershed planning services which are essential for the most effective mitigation.

2. **Static Rate versus Actual Cost Rate**— As shown in Table 2, the current stream rates in both the Higher and Standard Fee areas are lower than the proposed stream rate based on actual project costs. For wetlands, a single rate based on an average of the Higher and Standard rates would be inadequate to cover the cost of providing wetland credits. If the rate is set higher than the current Higher fee areas based on actual cost, problems arise from the rate being static should project costs exceed the fee. If the rates do not reflect the actual cost to procure credits, then the program will lose money on a continual basis until DMS can no longer accept payments from developers. The implementation of the ACM in the DMS Nutrient Offset ILF program has proven to be an effective and efficient means of adjusting rates when costs change. Expanding the ACM to the other programs will allow mitigation providers who partner with DMS to focus on procuring mitigation rather than being held to a static rate schedule.

For riparian buffer rates the disparity between costs in areas identified as “premium watershed rate” areas and other areas where DMS offers riparian buffer credits creates the ability for the rate to be adjusted to reflect the actual costs for that area. Without the premium watershed component of the rule, the program fee collection may suffer significantly if a disproportionate or high number of payments are made in a high cost region of the state. Again, the nutrient offset ACM has proven successful in the use of premium watershed rates for higher cost areas and offers increased sophistication in reflecting actual costs when they differ substantially from region to region.

IX. Summary of Economic Impacts

Adoption of the proposed amendments will result in DMS setting rates based on the actual costs of implementing each DMS ILF program. Since current rates are below actual costs for streams, non-riparian wetlands, coastal wetlands, and, in two regions of the state, riparian buffer credits, most ILF customers are expected to have higher costs, estimated at \$1.7M per year. ILF customers who are seeking to purchase riparian wetland credits and riparian buffer credits in the Neuse, Catawba, Goose Creek, Falls Lake, and Tar-Pamlico areas are expected to experience decreased costs. There are no expected direct costs to mitigation banks, mitigation full-delivery providers, and mitigation contractors from the adoption of the proposed amendments and ACM methods but there are market power opportunity costs for mitigation contractors and banks.

The costs of adopting the proposed amendments and rate methods are significantly outweighed by the benefits. Table 10 at the end of the section summarizes the net effects of adopting the proposed amendments. Table 11 at the end of the section summarizes the most significant potential estimated net costs and benefits by entity. The primary benefit of the proposed amendments is that they will allow DMS to maintain a financially sustainable program without disruption of its mitigation services for developers when and where bank credits are unavailable. The proposed methods will allow DMS ILF rates to automatically adjust to changes

(up or down) in program costs. The operation of the DMS ILF program enables the consolidation of many small developer mitigation needs and allows DMS to procure larger, more efficient, more effective, and less expensive mitigation from private mitigation providers.

Developers who would otherwise be forced to either abandon or modify economic development projects to avoid or reduce mitigation requirements, or to implement costly and complex 7 to 9-year permittee-provided mitigation projects will greatly benefit from having access to the DMS ILF programs when bank credits are not available. Whereas the total potential savings to developers who avoid permittee provided mitigation is an estimated \$23.4 million annually, the absence of ILF program would likely create smaller savings. Some new mitigation banks would likely increase or create supply, though at prices commensurate with the level of market supply. Overall the development community would likely implement a combination of bank credit purchases, permittee-provided mitigation, and termination or modification of development. DMS mitigation costs are substantially lower than permittee-provided mitigation costs. The ILF mitigation process offers a greatly simplified and expedited permit process as compared to permittee-provided mitigation. Whereas permittee-provided mitigation requires 7 to 9-years for completion, the ILF process expedites the mitigation process to as little as a few days for the developer. The ILF process also provides stability to the developer by ensuring that credit availability does not become a major constraint. Credit availability also reduces the risk that credit shortages do not create distorted market prices. Stability also enables developers to better plan, budget, and acquire financing for development projects and for mitigation credits. The minor adjustments made to the rules regarding “consistency” offer the potential of identifying more and lower-priced mitigation projects. Lower cost projects will result in lower rates and lower mitigation costs to developers.

The regulatory agencies will benefit from the consolidation of mitigation that occurs through third-party mitigation providers by avoiding the increased administrative costs and workload that large numbers of permittee-provided mitigation proposals would require. The total number of mitigation projects and permittee-provided mitigation is substantially lower when banks and ILF mitigation options are available. These reductions reduce the number of mitigation proposals that must be reviewed, approved, managed, and enforced.

The environment benefits from having larger, more effective mitigation projects. DMS procures all stream and wetland mitigation projects through a watershed planning process that ensures watershed functions and needs are more effectively addressed by the projects procured. Permittee-provided mitigation projects historically have had a lower success rate than any other type of mitigation. Federal law ranks permittee-provided mitigation as the least-preferred source of compensatory mitigation.

Mitigation providers will benefit from the adoption of the rules as well. DMS, as a consolidated purchaser of compensatory mitigation reduces the large barriers to entry that exist for firms to participate and provide mitigation services. DMS enables private full-delivery firms, design firms, construction firms, and monitoring firms to participate and compete in a competitive bid process. The termination of the program would decrease opportunities for most firms and providers though it would not be expected to change the overall amount of mitigation work. The most likely outcome is that mitigation work would be transferred away from full-delivery firms and some mitigation contractors and concentrate work to mitigation banks with existing banking instruments. However, all providers, including banks, should benefit from the proposed

rate methods in the short run, as DMS rate schedules would adjust to existing market rates. Since DMS is required by law to first purchase credits from full-delivery firms and mitigation banks, DMS rates should more closely track rates charges by mitigation banks – although some differences are still expected since DMS operates in many higher cost watersheds where mitigation banks do not offer services.

In the middle to long-term, mitigation banks and firms that implement permittee provided mitigation are expected to have market power opportunity costs. Since ILF programs eliminate most credit shortage scenarios for developers, particularly in lower demand regions, these firms would not develop market power due to supply constraints. In the absence of ILF programs and when credit supply is limited, these firms are expected to capture some of the developer savings (\$1.6M to \$23.4M). Thus, over the mid to long term, these firms may bear net costs from the proposed rule and developers will capture net benefits.

NCDOT is a primary beneficiary from DMS offering multiple ILF programs even though NCDOT typically only utilizes two of the ILF programs. The Statewide Stream and Wetland Program, Riparian Buffer ILF Program, the Nutrient Offset ILF Program, and the NCDOT Stream and Wetland Program are each able to be implemented much more efficiently and at lower costs. The combined needs of all four of the ILF programs are collected to procure larger, more effective, and less expensive projects. Multi-credit projects that provide multiple mitigation credit types are far less expensive than single mitigation type projects. For example, riparian buffer projects, when combined with stream and/or wetlands are 58% less expensive than implementing riparian buffer only projects. The operation of the Statewide Stream and Wetland ILF program, Riparian Buffer ILF program, and Nutrient Offset ILF program offers an avenue for NCDOT to dispense of surplus mitigation credits. These sales generate over \$3 million annually for NCDOT. The combined approach to acquiring projects also greatly reduces the number of projects necessary to satisfy the combined mitigation needs of the various programs. Each ILF program is able to reduce the number of necessary projects which decreases the costs per credit for each program. Annual savings range from \$6 million to \$8 million per year for stream and wetland credits.

Table 10. Summarized Net Effect of Adopting proposed rule amendments.

Net Effects
Rates reflect actual program costs
Rates automatically update
Rates respond quickly (up or down) to changes in costs
DMS mitigation services available
Larger less expensive projects
More multi-credit type projects
Larger more environmentally beneficial projects
Expedites permit process
Maintains regulatory administrative workload
Maintains larger diversity of private mitigation providers
Mitigation credit shortages do not distort markets
Riparian Buffer rates estimated to decrease in most regions
Riparian wetland rates estimated to decrease
Simpler stream and wetland rate structure easier to understand
Nutrient rate adjustment factor effect limited in low volume payment scenarios
High cost region threshold more easily met -- allows rates specific to those regions
Stream Wetland rates estimated to be higher
Randleman Watershed and Jordan Lake Lower New Hope riparian buffer rates estimated to be higher

Table 11. Summarized Estimated Annual Major Net Costs and Benefits by Entity

	Near Term Annual Impacts (approx 2019-2024)¹
COSTS	
Developers (all sectors)	(\$1,700,000)
- NCDOT	(\$95,000)
DMS	(\$-)
State regulators	(\$-)
Private Mitigation Providers	- (Unquantified)
Total Costs	(\$1,795,000)
BENEFITS	
Developers (all sectors)	\$1,700,000 - \$23,400,000
- NCDOT	\$6,000,000 - \$11,000,000
DMS	\$1,700,000
State regulators	+ Unquantified
Private Mitigation Providers	+ Unquantified
Total Benefits	\$11,900,000 - \$33,600,000
NET IMPACT	
Developers (all sectors)	\$0 - \$21,700,000
- NCDOT	\$5,900,000 - \$10,900,000
DMS	\$1,700,000
State regulators	+ Unquantified
Private Mitigation Providers	(+/-) Unquantified

¹ The full economic impacts of the rule are expected to occur initially between 2019-2024. This is the anticipated time period during which - If no rate changes are adopted – DMS would terminate the Statewide Stream & Wetland ILF program and some or all of the Riparian Buffer ILF program. Note: Impact estimates are presented in 2017 dollars.

Appendix I - Payments by Sector

Looking at customer data since FY2011-2012, Tables A, B, and C show the frequency and magnitude of payments by sector type. Note that between 65% and 90% of all government entities do not meet the criteria needed for exemption from the bank preference law. Of the total amount of government customers, 10% clearly do meet the exemption requirements of the law.

Table A. Number of Payments into Statewide Stream and Wetland ILF (SSWS) and Riparian Buffer ILF.

Credit Type	Private	Government	NCDOT	Total
SSWS Stream	113	33	0	146
SSWS Wetland	237	68	0	305
Riparian Buffer ILF	343	107	52	502

Table B. Percentage of Payments into Statewide Stream and Wetland ILF (SSWS) and Riparian Buffer ILF.

Credit Type	Private	Government	NCDOT	Total
SSWS Stream	77.40%	22.60%	0.00%	100.00%
SSWS Wetland	77.70%	22.30%	0.00%	100.00%
Riparian Buffer ILF	68.33%	21.31%	10.36%	100.00%

Table C. NCDOT Payments into the Riparian Buffer ILF Program.

Year Paid	Total Buffer Credits	Sum of Buffer Fees
2013	820,182.00	\$836,585.64
2014	1,542,492.00	\$1,619,616.60
2015	707,864.00	\$754,655.61
2016	1,325,619.00	\$1,470,477.15
2017	366,053.00	\$406,318.83
Grand Total	4,762,210.00	\$5,087,653.83
Average	952,442.00	\$1,017,530.77

Appendix II

SUBCHAPTER 02R – ECOSYSTEM ENHANCEMENT PROGRAM DIVISION OF MITIGATION SERVICES

SECTION .0100 - PURPOSE AND DEFINITIONS

15A NCAC 02R .0101 PURPOSE

This Subchapter establishes the North Carolina Ecosystem Enhancement Program pursuant to G.S. 143-214.8 through 143-214.13.

History Note: Authority G.S. 143-214.8; 143-214.9; 143-215.3;
Eff. August 1, 1998;
Amended Eff. July 3, 2008.
Repealed Eff. XX, 1, 20XX.

15A NCAC 02R .0102 DEFINITIONS

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

- (1) ~~"Mitigation bank" means a site where wetlands or other aquatic resources are restored, created, enhanced, or preserved expressly for the purpose of providing compensatory mitigation in advance of authorized impacts to similar resources.~~ "Aquatic resources" means wetlands, streams, lakes, rivers, springs, seeps, reservoirs, ponds, groundwater, riparian areas, and the fauna that reside within them. Aquatic resources may include permanent, seasonal, flowing, standing, natural, or man-made water bodies.
- (2) ~~"Non-riparian wetlands" means Class WL wetlands as defined in 15A NCAC 2B .0101(c)(8) whose major source of water is precipitation. Wetland types generally considered to be~~ Examples of non-riparian wetlands include wet flats, poeosispocosins, and ephemeral wetlands.
- (3) ~~"Riparian area" means an area that does not meet the definition of wetlands found at 15A NCAC 2B .0202 and that is located within 300 feet of any perennial or intermittent water body as shown by the most recently published version of the United States Geological Survey 1:24,000 (7.5 minute) scale topographic map (available at~~ http:viewer.nationalmap.gov) or other site-specific data.
- (4) ~~"Riparian wetlands" means Class WL wetlands as defined in 15A NCAC 2B .0101(c)(8) whose major primary source of water is ground water or surface water. Wetland types generally considered to be riparian~~ Examples of riparian wetlands include freshwater marshes, swamp forests, bottomland hardwood forests, headwater forests, bog forests, mountain bogs bogs, and seeps.

History Note: Authority G.S. 143-214.8; 143-214.9; 143-214.11;143-215.3;
Eff. August 1, 1998.

SECTION .0200 - BASINWIDE RESTORATION PLANS

15A NCAC 02R .0201 PURPOSE

~~The purpose of the Basinwide Restoration Plans is to identify wetlands and riparian areas within each of the 17 major river basins of the state that have the potential, through restoration, enhancement, creation or preservation, to contribute to the goals of the Ecosystem Enhancement Program.~~

History Note: Authority G.S. 143-214.10; 143-215.3;
Eff. August 1, 1998;
Amended Eff. July 3, 2008.
Repealed Eff. XX, 1, 20XX.

15A NCAC 02R .0202 COMPONENTS

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

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

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

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

History Note: Authority G.S. 143-214.10; 143-215.3;143-214.9
Eff. August 1, 1998.

15A NCAC 02R .0203 PUBLIC INVOLVEMENT; AVAILABILITY

- (a) The ~~Secretary~~, Secretary or the Secretary's ~~designee~~, designee shall provide interested parties an opportunity to review and comment on the proposed Basinwide Restoration Plans.
- (b) The Basinwide Restoration Plans shall be available for review through the ~~Ecosystem Enhancement Program's~~ Division of Mitigation Services' website at ~~www.nceep.net~~http://deq.nc.gov/about/divisions/mitigation-services.

History Note: Authority G.S. 143-214.10; 143-215.3;
Eff. August 1, 1998;
Amended Eff. July 3, 2008.

SECTION .0300 - COMPENSATORY MITIGATION

15A NCAC 02R .0301 GENERAL

All projects implemented for the purpose of satisfying compensatory mitigation requirements of certifications issued by the Department under 33 USC¹ U.S.C. Section 1341; 1341 and permits or authorizations issued by the United States Army Corps of Engineers (Corps) under 33 USC¹ U.S.C. Section 1344, shall be consistent with the Basinwide Restoration Plan for the appropriate river basin. A project is shall be consistent with the Basinwide Restoration Plan if the project ~~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; demonstrates that it advances the functional improvement goals identified in the Basinwide Restoration Plan or is approved~~ determined to be consistent by the United States Army Corps of Engineers.

*History Note: Authority G.S. 143-214.11; 143-214.12; 143-215.3;
Eff. August 1, 1998.*

15A NCAC 02R .0302 MITIGATION BANKS

- (a) All sponsors of mitigation banks that submit a prospectus to the United States Army Corps of Engineers after the effective date of this Rule must provide the Secretary, or the Secretary's designee documentation that the proposed mitigation bank is consistent with the approved Basinwide Restoration Plan for the appropriate river basin and meets the requirements of G.S. 143-214.11(f). A mitigation bank is consistent with the Basinwide Restoration Plans if the mitigation bank is ~~located within an area that is identified as a priority for restoration~~ demonstrates that it advances the functional improvement goals identified 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; or is approved by the United States Army Corps of Engineers. The Secretary, or the Secretary's designee, shall provide comments concerning this documentation through participation on the ~~Mitigation Bank Interagency~~ Review Team in accordance with 33 CFR Part 332 Compensatory Mitigation for Losses of Aquatic Resources "Federal Guidance for the Establishment, Use and Operation of Mitigation Banks," found in Volume 60, Number 228 of the Federal Register, November 28, 1995. The signature of the Secretary, or the Secretary's designee, on the Mitigation Banking Instrument, described in the above guidance, shall be considered as a finding by the Department that the mitigation bank is consistent with the Basinwide Restoration Plan.
- (b) ~~Each credit in a proposed mitigation bank must include a minimum of one acre of restoration or creation as defined in 15A NCAC 2H .0506(h)(4).~~

*History Note: Authority G.S. 143-214.11; 143-214.12; 143-215.3;
Eff. August 1, 1998.*

SECTION .0400 - ECOSYSTEM RESTORATION FUND

15A NCAC 02R .0401 PURPOSE

~~This Section establishes the Ecosystem Restoration Fund pursuant to G.S. 143-214.12.~~

*History Note: Authority G.S. 143-214.11; 143-214.12; 143-215.3;
Eff. August 1, 1998;
Amended Eff. July 3, 2008.
Repealed Eff. XX, 1, 20XX.*

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

(a) For the purposes of this Rule:

- (1) "cost" or "costs" shall mean the NC Division of Mitigation Services In-Lieu Fee Mitigation Program's costs associated with stream or wetland projects in a given rate area, as described in this Rule; and
- (2) "credit" or "credits" shall mean the number of credits of stream or wetland compensatory mitigation that have been
 - (A) requested by the applicant; and
 - (B) specified in the approved certifications issued by the Department and in the permits or authorizations issued by the United States Army Corps of Engineers pursuant to 33 U.S.C. Section 1344.

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

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

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

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

- (1) Any 8-digit cataloging unit (as defined by the United States Geological Survey), mitigation service area, or smaller watershed where costs are 33 percent greater than the general statewide rate shall have a surcharge equal to the difference between the general statewide rate and the actual cost of mitigation in that mitigation service area.
- (2) The initial coastal wetland rate shall be [~~eight hundred twenty five thousand dollars \$825,000~~] **five hundred sixty thousand dollars (\$560,000)** per credit.

(f) Rate Adjustment Frequency. Initial rates shall be effective as of the effective date of this Rule. They shall be calculated and adjusted on July 1 of each year and shall become effective on those dates. Rate

adjustments shall be published on the Program’s website two weeks prior to the effective date. The rate shall be adjusted within two business days if the Program suspends acceptance of payments at the current rate.

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

$$\text{Actual Cost Rate} = 1.43 \frac{\text{Actual Project Costs}_{\text{Present Day}}}{\text{Actual Credits}_{\text{Present Day}}}$$

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_1_110-2-1304.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.~~
- ~~(c) 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. This does not apply to properties or easements donated to the Department in association with restoration projects conducted by the Department.~~

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

Eff. August 1, 1998;

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

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;
 - (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 1651 Mail Service Center Raleigh, NC 27603 or 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;

- (4) whether the size of the property is at least five contiguous acres;
 - (5) whether the property is under imminent threat of degradation;
 - (6) the prior, current, and future land use of the donated property and adjacent properties;
 - (7) the absence of extensive structures and infrastructure;
 - (8) the absence of hazardous substance and solid waste;
 - (9) the absence of cultural and historic resources;
 - (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 the Department of Environment and Natural Resources, Division of Water Quality, Water Quality Section, 512 North Salisbury Street, Raleigh, North Carolina;~~
 - (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.
- (d) At the expense of the applicant or donor, the following information ~~must~~ shall be submitted with any proposal for donations or dedications of interest in real property:
- (1) documentation that the property meets the criteria ~~outlined~~ in Paragraph (b) and (c) of this Rule;
 - (2) US Geologic Survey 1:24,000 (7.5 minute) scale topographic map, county tax map, USDA Natural Resource Conservation Service County Soil Survey Map, and county road map showing the location of the property to be donated along with information on existing site conditions, vegetation types, and the presence of existing structures and easements;
 - (3) a current property survey performed in accordance with the ~~procedures~~ requirements of the North Carolina Department of Administration, State Property Office as identified by the ~~State Board of Registration for Professional Engineers and Land Surveyors~~ North Carolina Board of Examiners for Engineers and Surveyors in "Standards of Practice for Land Surveying in North Carolina." Copies may be obtained at no charge from the North Carolina State Board of ~~Registration for Professional Engineers and Land~~ Examiners for

~~Engineers and Surveyors, 3620 Six Forks Road, Suite 300, Raleigh, North Carolina 27609;~~
www.ncbels.org;

- (4) a current appraisal of the value of the property performed in accordance with the ~~procedures~~ requirements of the North Carolina Department of Administration, State Property Office as identified by the Appraisal Board in the "Uniform Standards of Professional ~~North Carolina~~ Appraisal Practice." Copies may be obtained at no cost from the Appraisal Foundation, ~~Publications Department, PO Box 96734, Washington, D.C. 20090 6734;~~
http://www.appraisalfoundation.org;
- (5) a title certificate; and
- (6) a Phase 1 Environmental Site Assessment documenting ~~documentation~~ that the property does not contain structures that present health or safety problems to the general public. If wells, septic, water, or sewer connections exist, they shall be filled, remediated, or closed at owner's expense; and in accordance with ~~state~~ State and local health and safety regulations.
- (e) In addition to the factors outlined in Paragraphs (b) through (d) of this Rule, the ~~Secretary,~~ Secretary or the Secretary's ~~designee,~~ designee shall consider the following factors when determining whether to accept a donation of interest in real property to satisfy compensatory mitigation requirements:
- (1) whether restoration of the property will offset the adverse impacts of the permitted project; and
 - (2) whether the adverse impacts of the permitted project are within the same ~~subbasin~~ 8-digit cataloging unit as the property proposed for donation.
- (f) Donations of interests in real property for the purpose of satisfying compensatory mitigation requirements ~~will~~ shall only be considered for acceptance ~~when if~~ the proposed donation ~~will offset~~ offsets an impact for which an application has already been made to the United States Army Corps of Engineers under 33 ~~USC~~ U.S.C. Section 1344 or to the Department under 33 ~~USC~~ U.S.C. Section 1341.
- (g) For the purposes of satisfying compensatory mitigation requirements through the donation of interests in real property, ~~for property~~ requiring restoration, enhancement, or preservation, the size of property to be donated ~~must~~ shall equal or exceed the acreage of wetland required to be mitigated under the approved permit, and every parcel ~~must~~ shall be a minimum of five contiguous acres in size.
- (h) Donation of real property interests to satisfy compensatory mitigation requirements ~~will~~ shall only be accepted if such property meets the requirements of Paragraphs (a) through (i) of this Rule and 15A NCAC 2H .0506(h) ~~and .0506(h) and if it~~ satisfies the compensatory mitigation requirements of the approved permit.
- (i) The donation of conservation easements to satisfy compensatory mitigation requirements ~~will~~ shall only be accepted if 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 if the property interest is being donated to satisfy a condition of a certification issued by the Department ~~under~~ pursuant to 33 USC U.S.C. Section 1341.

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

History Note: Authority G.S. 143-214.11; 143-214.12; 143-215.3;
Eff. August 1, 1998.

SECTION .0500 - WETLANDS RESTORATION FUND

- 15A NCAC 02R .0501 PURPOSE**
15A NCAC 02R .0502 DEFINITIONS
15A NCAC 02R .0503 SCHEDULE OF FEES
15A NCAC 02R .0504 PAYMENT

History Note: Authority G.S. 143-214.11; 143-214.12;
Temporary Adoption Eff. May 6, 1997;
Repealed Eff. August 1, 1998.

SECTION .0600 – RIPARIAN BUFFER RESTORATION FUND

**15A NCAC 02R .0601 RIPARIAN BUFFER MITIGATION FEES TO THE NC ECOSYSTEM
 ENHANCEMENT PROGRAM**
DIVISION OF MITIGATION SERVICES

(a) For the purposes of this Rule:

- (1) "cost" or "costs" shall mean the NC Division of Mitigation Services In-Lieu Fee Mitigation Program's costs associated with riparian buffer mitigation projects in a given rate area, as described in this Rule; and
- (2) "credit" or "credits" shall mean the number of credits of riparian buffer compensatory mitigation that have been
- (A) requested by the applicant; and
- (B) specified in the approved certifications issued by the Department.

(b) The Program shall calculate and publish one general riparian buffer mitigation payment rate applicable to all river basins where Commission rules allow riparian buffer mitigation payments and special premium

rates for specific watersheds, as identified in Paragraph (c) of this Rule. Rates shall be published on the Division's website (<https://deq.nc.gov/about/divisions/mitigation-services>). All rates shall be based on the costs incurred by the program in those watersheds.

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

- (1) The Randleman Lake Watershed;
- (2) The Jordan Lower New Hope Watershed; and
- (3) Any 8-digit cataloging unit, mitigation service area, or smaller watershed where costs are 33 percent greater than the general statewide rate shall have a surcharge equal to the difference between the general statewide rate and the actual cost of mitigation in that mitigation service area.

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

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

(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;

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

$$\text{AdjustmentFactor} = \frac{(\text{ActualCosts} - \text{ActualReceipts})}{\text{NumberOfRiparianBufferCreditsPaidDuringAdjustmentPeriod}}$$

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

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

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

- (C) “Number of Riparian Buffer Credits Paid During Adjustment Period” means the average number of riparian buffer mitigation credits paid to the Program over the last three years in the rate area, multiplied by the adjustment period. If no payments have been made to the Program in a rate area the number of credits paid shall be 435,600 riparian buffer credits until greater than 435,600 riparian buffer credits have been purchased in that rate area.
- (4) Adjustment Period shall be one to four years determined as follows for a rate area.
- (A) One year if Actual Costs exceed Actual Receipts by less than five percent.
- (B) Two years if Actual Costs exceed Actual Receipts by 5 percent or more but less than 15 percent.
- (C) Three years if Actual Costs exceed Actual Receipts by 15 percent or more but less than 25 percent.
- (D) Four years if Actual Costs exceed Actual Receipts by 25 percent or more.

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

- (1) ~~SCHEDULE OF FEES: The amount of payment into the Fund shall be based on the costs of riparian buffer restoration. The payment amount shall be determined by multiplying the acres or square feet of mitigation required under other rules in 15A NCAC 02B by an initial value of ninety six cents per square foot or forty one thousand eight hundred and eighteen dollars per acre (\$41,818/acre). This initial per acre rate shall be adjusted in January of each year by staff of the NC Ecosystem Enhancement Program based upon the construction cost index factor published every December in the Engineering News Record. The Engineering News Record is hereby incorporated by reference including subsequent amendments and editions, and is located at <http://enr.construction.com/economics/> at an annual subscription cost of forty nine dollars and ninety nine cents (\$49.99).~~
- (2) ~~The required fee shall be submitted to the N.C. Ecosystem Enhancement Program (NC EEP), 1652 Mail Service Center, Raleigh, NC 27699-1652 prior to any activity that results in the removal or degradation of the protected riparian buffer for which a "no practical alternatives" determination has been made pursuant to requirements of other rules in 15A NCAC 02B.~~

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

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

15A NCAC 02R .0602 NUTRIENT OFFSET PAYMENT RATES FOR THE NC ECOSYSTEM ENHANCEMENT PROGRAM
DIVISION OF MITIGATION SERVICES

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

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

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

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

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

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

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

(f) Rate Adjustment Frequency. ~~Initial rates shall be effective as of the effective date of this Rule. They Rates shall be adjusted quarterly whenever the rate increases ten percent above the existing rate calculation set forth in Paragraph (g) of this Rule exceeds the existing rate by at least 10 percent.~~ The rates shall also be adjusted annually. Annual calculations and adjusted rates shall be published by June 15 on the Program's ~~Web site, www.nceep.net; website http://deq.nc.gov/about/divisions/mitigation-services,~~ and shall become effective July 1. Any quarterly rate adjustments shall become effective on the first day of October, January, or ~~April~~ April, as applicable, and shall be published on the same ~~Web site website~~ two weeks prior to that date. The rate shall be adjusted within two business days if the Program suspends acceptance of payments at the current rate pursuant to 15A NCAC 02B .0240(e)(2).

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

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

Where:

- (1) ~~Actual Costs_{PresentDay}~~ “Actual Costs_{PresentDay}” means the sum of all costs adjusted for inflation as described in this ~~Sub Item. Subparagraph.~~ Costs are shall mean project costs and administrative costs and shall include the costs of . ~~Projects in the calculation are completed projects, terminated projects projects, and projects in process. At the time the rate is set, to ensure that collected payments are sufficient to implement new projects, all completed land acquisition contracts and expenditures shall be adjusted to present day 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 present-day values using the annual composite USACE Civil Works Construction Cost Index. Future land acquisition contract costs for projects in process are shall be calculated using the Program's per credit per-credit contract costs of the same type adjusted to the inflated future value when 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 per-credit contract costs of the same type adjusted to the inflated future value when 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 pound cost adjusted to the future inflated value ~~when at the time~~ the project will be initiated. Future year annual inflation rates shall be drawn from ~~either the North Carolina Department of Agriculture and Consumer Services' Agricultural Statistics Farm Real Estate Values or 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~~ "Project Costs" ~~are means~~ the total costs associated with development of nutrient reduction projects including identification, land acquisition, project design, project construction, monitoring, ~~maintenance~~ maintenance, and long-term stewardship;
- (B) ~~Administrative Costs~~ "Administrative Costs" ~~are means~~ costs associated with administration of the Program including staffing, ~~supplies~~ supplies, and rent; and
- (C) ~~The cost~~ "costs" for projects in ~~process~~ process ~~is shall be~~ 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 nutrient reduction obligations in the rate area;
- (3) ~~Total~~ "Total Pounds Offset_{PresentDay} Offset_{PresentDay}" means the total number of pounds of a nutrient reduced by the Program's projects in the rate area at the time of calculation. If the Total Pounds Offset_{PresentDay} for an existing or completed project is reduced, the Actual Costs_{PresentDay} for that existing or completed project shall be proportionally adjusted; ~~and~~

(4) ~~————~~
$$AdjustmentFactor = \frac{(ActualCosts - ActualReceipts)}{NumberOfPoundsPaidDuringAdjustmentPeriod}$$

~~Where:~~

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

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

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

- (B) ~~Actual Costs~~ “Actual Costs” ~~are shall be~~ the same as ~~Actual Costs~~^{PresentDay} ~~Costs~~^{PresentDay} as defined in Subparagraph (1) of this Paragraph, except that the existing contracts and completed land acquisitions are not adjusted for inflation;
- (C) ~~Actual Receipts~~ “Actual Receipts” ~~are means~~ the sum of all offset payments made to the Program ~~to date~~ in the rate area at the time of calculation; and
- (D) ~~Number~~ “Number of Pounds Paid during Adjustment Period ~~Period”~~ is means the average number of pounds of a nutrient paid to the Program over the last three years in the rate ~~area,~~ area multiplied by the adjustment period. If no payments have been made to the Program in a rate area, the number of pounds paid shall be ~~set to~~ 1,000 pounds until greater than 1,000 pounds have been purchased in that rate area.

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

- (A) One year if Actual Costs exceed Actual Receipts by less than five percent;
- (B) Two years if Actual Costs exceed Actual Receipts by five percent or more but less than 15 percent;
- (C) Three years if Actual Costs exceed Actual Receipts by 15 percent or more but less than 25 percent; and
- (D) Four years if Actual Costs exceed Actual Receipts by 25 percent or more.

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

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

History Note: Authority G.S. 143-214.1; 143-214.20; 143-214.21; S.L. 1995, c. 572; S.L. 2006, c. 215; S.L. 2007, c. 438; S.L. 2009, c. 337; S.L. 2009, c. 484; S.L. 2009, c. 486; Eff. September 1, 2010; Transferred from 15A NCAC 02B .0274 Eff. May 1, 2015.

From: [Hollis, Carrie](#)
To: [Stanfill, Jim](#); [Williams, Kelly](#); [Muhs, Tim](#); [Everett, Jennifer](#)
Cc: [Masich, Molly](#); [McGhee, Dana](#); [Grozav, Anca](#); [Creech, Shannon A](#)
Subject: Amendment - 15A NCAC 02R .0101-.0102, .0201-.0203, .0301-.0302, .0402-.0403, .0601-.0602, Mitigation Services
Date: Tuesday, December 12, 2017 12:00:36 PM
Attachments: [DEQ_2017-07-06_Amended_12-11.pdf](#)
[image001.png](#)

OSBM has reviewed and approves revisions to the Division of Mitigation Services' proposed rules, 15A NCAC 02R .0101-.0102; .0201-.0203; .0301-.0302; .0402-.0403; and .0601-.0602. OSBM approved the original rule analysis on 07/06/17 (see email below). The amended fiscal note is attached and approved for publication.

The .pdf file of rule impact analysis (attached) will be posted on our website at the following URL (please allow for some time):

https://ncosbm.s3.amazonaws.com/s3fs-public/documents/files/DEQ_2017-07-06_Amended_12-11.pdf

Please post this link on your agency's website to ensure compliance with G.S. 150B-19.1(c)(5).

Please let me know if you have any questions.

Regards,
Carrie

Carrie Hollis
 Economic Analyst
 Demographic and Economic Analysis Section
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From: Hollis, Carrie
Sent: Thursday, July 06, 2017 2:54 PM
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Cc: Molly Masich (molly.masich@oah.nc.gov) <molly.masich@oah.nc.gov>; Vojtko, Dana <dana.vojtko@oah.nc.gov>; Grozav, Anca <Anca.Grozav@osbm.nc.gov>; Creech, Shannon A <shannon.creech@osbm.nc.gov>

Subject: Approval - 15A NCAC 02R .0101-.0102, .0201-.0203, .0301-.0302, .0402-.0403, .0601-.0602, Mitigation Services

OSBM has reviewed the DEQ Division of Mitigation Services' proposed changes to 15A NCAC 02R rules, Mitigation Services, in accordance with G.S. 150B-21.4 and with E.O. 70 from 10/21/2010 as amended by E.O. 48 from 4/9/2014. The fiscal note is approved for publication. Please ensure that the state, local government and substantial economic impacts are included in the Notice of Text and that the NC League of Municipalities and Association of County Commissioners are notified.

The .pdf file of rule impact analysis (attached) will be posted on our website at the following URL (please allow for some time):

https://ncosbm.s3.amazonaws.com/s3fs-public/documents/files/DEQ_2017-07-06.pdf

Please post this link on your agency's website to ensure compliance with G.S. 150B-19.1(c)(5).

Please let me know if you have any questions.

Regards,
Carrie

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