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Governor

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April 29, 2016

MEMORANDUM

To: Environmental Management Commission

From: Department of Environmental Quality

Subject: Study of the State's Riparian Buffer Protection Program pursuant to SL 2015-246

Session Law (SL) 2015-246 (13.2.)(a) directed the Commission, with the assistance of the Department, to examine ways to provide regulatory relief from the impacts of riparian buffer rules adopted to implement the State's Riparian Buffer Protection Program for parcels of land that were platted on or before the effective date of the applicable riparian buffer rule.

Attached is the final report from the Department of Environmental Quality that will be submitted to the Environmental Management Commission for review and approval. The report will be updated with the commission's recommendations and submitted to the Environmental Review Commission of the North Carolina General Assembly.



STATE OF NORTH CAROLINA

DEPARTMENT OF ENVIRONMENTAL QUALITY

**Study of the State's Riparian Buffer Protection Program
Pursuant to SL 2015-246**

April 1, 2016

Introduction

Pursuant to Session Law 2015-246 (13.2.)(a), the Department of Environmental Quality (Department) examined ways to provide regulatory relief from the impacts of riparian buffer rules adopted to implement the State's Riparian Buffer Protection Program for parcels of land that were platted on or before the effective date of the applicable riparian buffer rule. The Department was tasked to specifically examine ways to fairly provide properties with relief where a change in use had occurred that would otherwise trigger the requirements of the riparian buffer rules. Such relief would be determined on a case-by-case basis and provide relief to successor owners.

As specified in SL 2015-246 (13.2.)(a), a change in use that would otherwise trigger the requirements of the riparian buffer rules did not include either of the following circumstances:

- (1) Developing from a vacant condition to a use allowed by the current local regulations, unless the local regulations have been changed at the request of the property owner since the date the buffer rule was applied; the parcel was recorded prior to the effective date of the applicable buffer rule; and the allowable use is for any nonfarming or nonagricultural purpose.
- (2) The property configuration has not been altered except as a result of either an eminent domain action or a recombination involving not more than three parcels, all of which were recorded before the effective date of the applicable buffer rule.

Background

Tar-Pamlico – In the late 1980s, the Pamlico estuary experienced increased algal blooms and fish kills that were linked to excessive nutrient levels in the river. The Environmental Management Commission (Commission) designated the entire Tar-Pamlico River Basin as Nutrient Sensitive Waters (NSW) in 1989, and a management strategy was developed.

Neuse – During the summer of 1995, algal blooms and massive fish kills in the Neuse River and the Neuse River estuary led the N.C. General Assembly to pass Session Law 1995-572. The session law directed the Commission to develop a plan to reduce the average annual load of nitrogen to the Neuse River estuary.

Randleman – When the Piedmont Triad Regional Water Authority requested that the Deep River be reclassified for drinking water supply use and a dam be constructed on the River in 1997, models indicated potential violations of North Carolina's chlorophyll a standard in the new reservoir. As part of the state and federal approval to reclassify the water and build the Randleman Reservoir, a nutrient management strategy was developed.

Catawba – Lakes along the mainstem of the Catawba River (Rhodhiss, Hickory and Wylie) had documented water quality problems from excess nutrients. In 2003 the Commission completed a stakeholder process and the temporary buffer rules that had been in effect since 2001 became permanent in 2004.

Goose Creek – The Goose Creek watershed provides habitat for an aquatic animal species listed as federally endangered by the U.S. Fish and Wildlife. The Commission designated Goose Creek

as impaired in 2002. A TMDL (Total Maximum Daily Load) was finalized in 2005 and a water quality management strategy was developed.

Jordan – The Commission designated Jordan Reservoir a NSW the year of its impoundment and imposed phosphorus limits on wastewater dischargers. The lake did not respond to these controls so in 2002, the Commission determined the reservoir was impaired. Nutrient management strategy development began in 2003 and the U.S. EPA approved a final TMDL in September 2007.

Statutory requirement – G.S. 143-215.8B directs the Commission to consider the cumulative impacts of all point and nonpoint sources of pollutants (*e.g.* wastewater discharges, development, agricultural operations, etc.). It further requires that the Commission provide that all point and nonpoint sources jointly share the responsibility of reducing the pollutants in the State's waters in a fair, reasonable, and proportionate manner, using computer modeling and the best science and technology reasonably available and considering future anticipated population growth and economic development.

The Division of Water Resources (Division) uses water quality monitoring and modeling to determine the allocation of nutrient loading among the different source categories. That information becomes the basis for a management strategy that, as directed by the General Assembly, ensures that all sources jointly share the responsibility of reducing the pollutants in the State's waters.

Riparian Buffer Protection Rules Overview

The purpose of each of the riparian buffer protection rules is to protect *existing* riparian buffers within the designated river basin or watershed. The Neuse, Tar-Pamlico, Catawba, Randleman and Jordan rules require a 50-foot riparian buffer that is divided into two zones. The 30 feet closest to the water (Zone 1) must remain undisturbed. The outer 20 feet (Zone 2) can be managed vegetation, such as lawns or shrubbery. The Goose Creek rules require a 100-foot undisturbed buffer outside of the 100-year floodplain and a 200-foot undisturbed buffer inside the 100-year floodplain.

The riparian buffer protection rules allow for uses that are present and ongoing (*i.e.* existing uses) to remain in the buffer. For new uses, the riparian buffer protection rules include a Table of Uses that lists activities allowed in each zone of the buffer. There are three different categories of allowable activities:

- **Exempt** uses are allowed in the riparian buffer without approval from the Division or Local Government.
- **Allowable** uses may occur in the buffer on a case-by-case basis with approval from the Division or Local Government.
- **Allowable with mitigation** uses may occur in the buffer on a case-by-case basis with approval from the Division or Local Government when mitigation is provided.

Some examples of these different uses include maintaining an existing lawn, pruning, removing nuisance vegetation, removing trees that may be a danger, planting vegetation, grading in Zone 2, fences, playground equipment, and driveway crossings.

Uses that are listed as **prohibited** or uses that are not included in the Table of Uses are **prohibited** unless a variance is granted.

Case-by-Case Approvals¹

Uses designated as *allowable* or *allowable with mitigation* are reviewed on a case-by-case basis by the Division or local government. The Division/local government makes a “no practical alternatives” determination (aka Buffer Authorization) based on:

- (i) The basic project purpose cannot be practically accomplished in a manner that would better minimize disturbance, preserve aquatic life and habitat, and protect water quality;
- (ii) The use cannot practically be reduced in size or density, reconfigured or redesigned to better minimize disturbance, preserve aquatic life and habitat, and protect water quality; and
- (iii) Best management practices shall be used if necessary to minimize disturbance, preserve aquatic life and habitat, and protect water quality.

Variances¹

Persons who wish to undertake uses designated as *prohibited* may pursue a major or minor variance. Minor variances can be granted by the Division/local government for impacts to Zone 2. Major variances can be granted by the Commission for impacts to Zone 1. Variances must meet the following requirements:

- (i) There are practical difficulties or unnecessary hardships that prevent compliance with the strict letter of the riparian buffer protection requirements. Practical difficulties or unnecessary hardships shall be evaluated in accordance with the following:
 - (A) If the applicant complies with the provisions of this Rule, they can secure no reasonable return from, nor make reasonable use of, their property. Merely proving that the variance would permit a greater profit from the property shall not be considered adequate justification for a variance. Moreover, the Division/local government shall consider whether the variance is the minimum possible deviation from the buffer rule that shall make reasonable use of the property possible;
 - (B) The hardship results from application of the buffer to the property rather than from other factors such as deed restrictions or other hardships;
 - (C) The hardship is due to the physical nature of the applicant’s property, such as its size, shape, or topography, which is different from that of neighboring property;
 - (D) The applicant did not cause the hardship by knowingly or unknowingly violating the buffer rule;
 - (E) The applicant did not purchase the property after the effective date of the buffer rule; and
 - (F) The hardship is unique to the applicant’s property, rather than the result of conditions that are widespread. If other properties are equally subject to the

¹ Requirements from the Neuse riparian buffer protection rules

hardship created in the restriction, then granting a variance would be a special privilege denied to others, and would not promote equal justice;

- (ii) The variance is in harmony with the general purpose and intent of the State’s riparian buffer protection requirements and preserves its spirit; and
- (iii) In granting the variance, the public safety and welfare have been assured water quality has been protected, and substantial justice has been done.

Session Law 2011-394

SL 2011-394 established a new “allowable” use in the coastal counties in the Neuse and Tar-Pamlico Basins, which allows case-by-case approval for encroachment into Zone 2 of the riparian buffer if necessary to construct a residence on an existing lot. The SL defines an existing lot as *“a lot of two acres in size or less that was platted and recorded in the office of the appropriate county Register of Deeds prior to August 1, 2000.”* The provision allows additional flexibility in siting structures on these small, previously platted lots without having to go through a variance process.

Session Law 2012-200

In a study submitted to the General Assembly in February 2012, the Department recommended expanding the new “allowable” use established in SL 2011-394 for constructing a residence in Zone 2 to all counties in the Neuse and Tar-Pamlico Basin. That change was adopted in Session Law 2012-200.

Session Law 2015-246

SL 2015-246 established a new “allowable” use, which allows case-by-case approval for a landowner to remove woody vegetation in the buffer upon a showing that alternative measures (*e.g.* buffer mitigation, stormwater treatment) will provide equal or greater water quality protection.

SL 2015-246 also changed the start point of the buffer from the landward edge of the coastal marsh to the normal high water level or normal water level, which added even more flexibility for coastal lots.

Ongoing Regulatory Review

The Department is currently reviewing existing regulations that govern the riparian buffer protection rules. This is in accordance with G.S. 150B-21.3A, and will take into account public comments from various stakeholders. Draft revisions include numerous steps to reduce the regulatory burden of these rules, especially for parcels of land platted prior to the applicable riparian buffer protection rule. The Department believes that the current regulations and the draft proposed changes underway through the rules re-adoption process are essential to fairly provide properties with relief where a change in use had occurred that would otherwise trigger the requirements of the riparian buffer protection rules on a case-by-case basis with relief provided to successor owners.

Additional Ways to Provide Regulatory Relief

The Department has examined the following as ways to fairly provide additional regulatory relief for parcels of land platted prior to the effective date of the applicable buffer rule:

- Establish a new “allowable with mitigation” use for lots with residences constructed prior to the applicable buffer rule to allow case-by-case approval for uses in the riparian buffer when mitigation is provided and stormwater treatment is provided for any new structure or built-upon area in the riparian buffer. Such relief would be determined on a case-by-case basis using the “no practical alternatives” criteria in the rule and would provide relief to successor owners.
- Expand the “allowable” use established in SL 2011-394 and SL 2012-200 (allows case-by-case approval for encroachment into Zone 2 of the riparian buffer to construct a residence on an existing lot in the Neuse and Tar-Pamlico River Basins) to the Jordan and Randleman Lake Watersheds. Such relief would be determined on a case-by-case basis using the “no practical alternatives” criteria in the rule and would provide relief to successor owners.
- Establish a new “allowable with mitigation” use to allow case-by-case approval for encroachment into Zone 1 of the riparian buffer if necessary to construct a residence on an existing lot (as defined in SL 2011-394) when mitigation is provided. This would provide additional regulatory relief in the Neuse, Tar-Pamlico, Jordan and Randleman Rules. Such relief would be determined on a case-by-case basis using the “no practical alternatives” criteria in the rule and would provide relief to successor owners.
- Modify the variance process, which is currently cumbersome and time-consuming for the applicant, staff and the Commission, by allowing major variance decisions to be made by the Director of the Division of Water Resources (Division) instead of the Commission.
- Modify the hardships (criteria) that must be met to receive a variance, including removing the requirement that applicants purchase the property prior to the effective date of the applicable buffer rule. This would provide regulatory relief, especially to successor owners.
- Clarify that change of ownership through purchase or inheritance is not a change of use.