



Michael F. Easley, Governor

William G. Ross Jr., Secretary
North Carolina Department of Environment and Natural Resources

Coleen H. Sullins, Director
Division of Water Quality

December 4, 2008

TO: 401 Water Quality Certification Mailing List

FROM: John Dorney, Program and Policy Development Unit
Cyndi Karoly, 401 Oversight and Express Permits Unit
Brian Wrenn, Transportation Permitting Unit
John Hennessy, Non-Point Source Assistance and Compliance

RE: Update on permitting programs for Waters of the State administered by the Division of Water Quality

The purpose of this memo is to inform you of several items in relation to surface waters programs administered by the Division of Water Quality (DWQ). If you have any questions regarding specific items, please contact the staff members referenced within each topic.

I. PUBLIC NOTICE AND PUBLIC HEARING FOR JANUARY 15, 2009 AND CANCELLATION OF PUBLIC HEARING INITIALLY SCHEDULED FOR DECEMBER 16, 2008; WATER QUALITY CERTIFICATION FOR THE YADKIN HYDROELECTRIC PROJECT – ALCOA POWER GENERATING, Inc.; FERC No. 2197, DWQ # 2007-0812, Davie, Davidson, Rowan, Montgomery and Stanly Counties

NORTH CAROLINA DIVISION OF WATER QUALITY

PUBLIC NOTICE is hereby given that Alcoa Power Generating, Inc has applied to the North Carolina Division of Water Quality for a Water Quality Certification pursuant to Section 401 of the Federal Clean Water Act and Water Quality Commission rules in 15A NCAC 2B .0101, 15A NCAC 2B .0231 and 15A NCAC 2H .0500.

The activity for this Certification is to relicense the hydroelectric dams at High Rock, Tuckertown, Narrows and Falls Reservoirs in Davie, Davidson, Rowan, Montgomery and Stanly Counties pursuant to an application received on May 9, 2008 with supplemental information received on October 2, 2008 (Narrows Discharge Sampling Results) and August 29, 2008 (Sediment Sampling Work Plan – Badin Lake). As well as this Certification from the Division of Water Quality, Alcoa Power Generating, Inc. will need to obtain a license from the Federal Energy Regulatory Commission in order to continue to operate these hydroelectric facilities.

The public is hereby notified that that the Division of Water Quality will hold a public hearing on Thursday, January 15, 2009 starting at 7 p.m. at the Stanly County Commissioners Meeting Room at 1000 North Street in Albemarle, NC 28001. The applicant proposes to address dissolved oxygen issues in the Yadkin River downstream of the dams, modify the minimum low flow in the river, provide permanent protection of stream corridors, conduct monitoring in the river and dam discharge, conduct sediment sampling in Badin Lake and address low inflows into the reservoirs. The applicant also proposes to address sediment removal at the water intake for the Town of Salisbury.

The public is invited to comment in writing on the above-mentioned application as well as during the Public Hearing. Speaking times will likely be limited to 3 minutes maximum per speaker, with the final time limit to be determined on the day of the hearing depending upon the number of speaking slots requested. Those wanting to speak, need to register at the hearing and speaking sequence will be in order of registration. Written comments may be forwarded at any time before or after the hearing provided they are received by the Division no later than February 16, 2009.

Comments should be sent to the N.C. Division of Water Quality, 401/Wetlands Unit, 1650 Mail Service Center, Raleigh, NC, 27699-1650, Attn: John Dorney (919-733-9646, FAX: 919-733-6893 or via email at john.dorney@ncmail.net). The physical address of the 401/Wetlands Unit is 2321 Crabtree Blvd., Raleigh, NC, 27604-2260.



Copies of the 401 application and supplemental information are on file at the DWQ Regional Offices at 585 Waughtown St., Winston-Salem, North Carolina (Winston-Salem Regional Office phone 336-771-5000), at 610 East Center Avenue, Suite 301, Mooresville, NC 28115 (Mooresville Regional Office phone 704-663-1699) and 225 Green Street, Systel Building Suite 714, Fayetteville, NC 28301 (Fayetteville Regional Office phone 910-433-3300) as well as the Raleigh location listed above during normal business hours (8:00 a.m. to 5:00 p.m.) and may be inspected by the public. Copies of all public comments received are available for review at the Raleigh location only. File materials may not be removed from any DWQ office, as copy machines are available.

Coleen Sullins
Director
N.C. Division of Water Quality

II. Proposed Policy to require compensatory mitigation for impacts to greater than 150 linear feet of intermittent streams in North Carolina

Based on data collected since 2002 by the NC Division of Water Quality (DWQ) and presented to the Water Quality Committee of the Environmental Management Commission on 12 November 2008, the Division has determined that there are sufficient existing uses in intermittent streams to require mitigation for their loss. This information is described in the following documents, which are available at the following website: http://h2o.enr.state.nc.us/ncwetlands/rd_pub_not.html

- "Aquatic Life in Intermittent Streams and its Mitigation Implications (PowerPoint file)
- "Stream Mitigation Requirements and the 401 Water Quality Certification and Isolated Wetlands Programs: Proposed Changes in Internal DWQ Policy" (Word document)

The proposed policy would require mitigation for intermittent streams at the same rate as perennial streams (2:1 for isolated streams; 1:1 for non-isolated streams) for projects with 150 feet or more of total stream impacts (150 feet per stream for DOT). Mitigation for intermittent stream impacts would include perennial stream restoration as well as uncredited intermittent enhancement or restoration. This policy will only affect applications submitted after the date the policy takes effect.

The Division is seeking public comment on this proposed policy. Please address questions regarding the proposed policy to Larry Eaton (Larry.Eaton@ncmail.net) at (919) 715-3471 or 2321 Crabtree Blvd, Suite 250, Raleigh, NC, 27604) by 5 pm on January 23, 2009. The Division will review all the comments received and prepare a formal policy for approval by the Director after that time. Once that policy is finalized, the public will be notified of the final policy via posting on our website.

III. Clarification of mitigation requirements associated with Isolated and other non-404 Jurisdictional Wetlands

The State General Permit for Impacts to Isolated and Other Non-401 Jurisdictional Wetlands and Waters (Permit Number IWGP100000) was renewed effective October 31, 2008. Subsequently, questions have arisen regarding the reporting requirements and mitigation thresholds associated with this General Permit in combination with 401 Water Quality Certifications. The revised IWGP100000 includes the following statement, which was not included in the expired version of the Permit, as a clarifier of the mitigation requirements:

"...Similarly, if collective wetland impacts, including 404 and non-404 wetlands, are equal to or greater than one (1) acre, compensatory mitigation is required. If the project requires a mitigation plan, but is otherwise below the written approval thresholds for use of IWGP100000, the applicant may provide a courtesy copy of the Pre-Construction Notification along with a copy of the mitigation plan."

To further clarify the process for compliance with DWQ's mitigation requirements for current projects, please take note of the following. In the event that non-404 wetland and/or stream impacts otherwise fall below the notification threshold for use of IWGP100000, but these impacts (in combination with 404 Jurisdictional impacts) exceed DWQ's mitigation threshold of 1.0 acre, the applicant may send a courtesy copy of the Pre-Construction Notification along with a narrative explaining how the applicant intends to meet the mitigation condition (condition number 10) of IWGP100000. If the applicant is using a private mitigation bank or implementing their own mitigation plan, DWQ will provide written acknowledgement of compliance with this condition to the applicant as well as other entities (such as the mitigation bank provider) at the applicant's request. If the applicant intends to make payment to the Ecosystem Enhancement Program, the applicant will need to include verification of EEP availability with their PCN submittal as is customary with all applications to DWQ. Since DWQ will not be providing a formal written authorization for use of IWGP100000, but the EEP requires notification from DWQ in order to invoice the applicant for the mitigation, DWQ will provide formal notification to the applicant and EEP that the applicant will be using IWGP100000. This notification will include the customary EEP

mitigation summary so that EEP can proceed with invoicing the applicant. Note that the transactions described above would not require the applicant to pay an application fee, since written authorization for the use of IWGP100000 would not be required or requested. If, however, project impacts fall below the written application thresholds for the Permit or Certification, but the applicant still desires a formal, written Certification or Permit from DWQ, the applicant will be required to pay the administrative fee for processing the application.

Furthermore, as this process was not described within the expired version of IWGP100000, we are hereby notifying the regulated community that DWQ will not pursue compliance with the mitigation requirement for historical stream and wetland impacts falling under the scenario described above. Take for example a project east of Interstate 95, where historical wetland fills associated with 404/401 impacts equaled 0.9 acres (401 mitigation requirement therefore not triggered), and the project subsequently involved additional non-404 jurisdictional wetland fill of 0.11 acre. In this case, the wetland impacts exceeded the 1.0 acre DWQ mitigation requirement threshold, but the non-404 fill qualified for use of IWGP100000 without notifying DWQ. In such cases implemented prior to October 31, 2008, applicants do not need to notify DWQ after-the-fact, and DWQ will not pursue compliance with respect to mitigation triggers.

We understand that this process will generate some confusion, but this scenario is actually quite rare. We are happy to talk with affected parties to discuss specific historic and contemporary scenarios for clarification. The alternative is to require written application for all uses of IWGP100000, thereby eliminating the need to develop administrative processes tailored to a few rare cases. However, we believe it is in the interest of the regulated community to maintain a non-404 General Permit that may be used in many cases without formal application to DWQ. If you have questions regarding this item, please contact Cyndi Karoly or Ian McMillan at 919-733-1786.

IV. New Pre-Construction Notification Form – an update

The new joint application form used by the U.S. Army Corps of Engineers and NC Division of Water Quality (Pre-Construction Notification Form or PCN) was made available for use on November 12, 2008. As a reminder, beginning January 12, 2009, all applications received by this office must be made using this new form. Until that time, applicants have the option of using the new form or the old form. We have noticed that the “Help” document loaded onto the Corps’ website, and linked from the DWQ website, did not mention that five hard copies of the PCN form are required when submitting applications to DWQ. The Corps’ website at <http://www.saw.usace.army.mil/WETLANDS/pcn/> has been updated to rectify this, and the “Help” document is to be updated as well. We apologize for any confusion or inconvenience this may have caused. Until January 12, 2009, if DWQ receives single application copies, we will make the additional copies needed if that is the only administrative error observed upon receipt. If we return an application for other reasons, such as lack of a signature, we will ask the applicant in writing to provide five copies. Additional updates may be made to the “Help” document and the PCN form, so we recommend that applicants always use the most current documents posted on the Corps’ website when preparing applications.

Please address questions regarding the revised form to Lia Myott Gilleski (Lia.M.Gilleski@ncmail.net) at (919) 733-1786 or 2321 Crabtree Blvd, Suite 250, Raleigh, NC, 27604) or other 401 Oversight Staff within the 401 Oversight and Express Permitting Unit.

V. Buffer Interpretation/Clarification #2008-019 – Diffuse Flow Through a Newly Restored Buffer

The following buffer Clarification memo is posted in its entirety on the DWQ website at <http://h20.enr.state.nc.us/ncwetlands/documents/DiffuseFlow.pdf> . The narrative from this memo is printed below. The online version contains depictions of various scenarios concerning this policy.

MEMORANDUM

RE: The Division of Water Quality’s (DWQ’s) stance on whether diffuse flow of stormwater through the newly restored buffers on mitigation sites should be a requirement. Diffuse flow is a requirement for buffer restoration or enhancement in the Neuse River Basin Buffer Rule 15A NCAC 02B.0242(9)(d)(iii), the Tar-Pamlico River Basin Buffer Rule 15A NCAC 02B.0260(9)(d)(iii), and the Catawba River Basin Buffer Rule 15A NCAC 02B.0244 (9)(d)(iii).

Diffuse flow is a requirement for all sites in a buffered basin for buffer mitigation and for sites providing nutrient offset credit as well.

Current Policy: According to the Mitigation rules in the Neuse, Tar-Pamlico and Catawba Buffer Rules, a grading plan must be provided for buffer mitigation sites. In addition, those rules state that “The site shall be graded in a manner to ensure diffuse flow through the riparian buffer”.

Problem: The question has been raised as to whether stormwater carried by lateral ditches that enter buffered streams should provide diffuse flow prior to that stormwater entering the restored buffers.

Solution: The Neuse, Tar-Pamlico and Catawba buffer rules with respect to buffer mitigation sites contain a very clear requirement that states that diffuse flow of stormwater must be maintained through the buffer. Unless otherwise approved by DWQ, all buffer mitigation sites must provide diffuse flow of stormwater from ditches and similar conveyances through the restored buffer.

VI. Buffer Interpretation/Clarification #2008-020

Working Draft

December 03, 2008

Buffer Interpretation/Clarification #2008-020

MEMORANDUM

The Division of Water Quality's (DWQ's) stance on the location of buffer mitigation for restoration and enhancement credit.

RE: The Riparian Buffer Mitigation Program Rule for the Neuse River Basin [15A NCAC 2B.0242(4)], the Riparian Buffer Mitigation Program Rule for the Catawba River Basin [15A NCAC 2B.0244(4)], and in the Riparian Buffer Mitigation Program Rule for the Tar-Pamlico River Basin [15A NCAC 2B.0260(4)], states that the location of mitigation for restoration or enhancement shall be located the same distance from the estuary as the proposed impact or closer to the estuary than the impact, and as close to the location of the impact as feasible.

Session Law 2008-152, "An Act to Promote the Use of Private Mitigation Banks for Compensatory Mitigation", states that with respect to availability of mitigation credit, the "hydrologic area" within which appropriate credit can be obtained is identified as the eight-digit Hydrologic Unit Code. This contradicts the definition of the location of mitigation as described above.

Solution: The DWQ has taken the stance that the location of buffer mitigation sites in the Neuse, Tar-Pamlico and Catawba basins need to be located within the same eight-digit cataloging unit as designated by the U.S. Geological Survey as the impact to the buffers, in order for the restoration or enhancement to be the acceptable distance from the estuary as required by the above-referenced rules. The Session Law supercedes the above-referenced rules.

For any additional questions or clarifications on this issue, please contact Amy Chapman or Eric Kulz at (919) 733-1786.

The Division is seeking public comment on this proposed buffer clarification memo. Please address questions regarding the proposed buffer clarification memo to Amy Chapman (Amy.Chapman@ncmail.net) at (919) 733-1786 or 2321 Crabtree Blvd, Suite 250, Raleigh, NC, 27604) by 5 pm on January 23, 2009. The Division will review all the comments received and prepare a formal buffer clarification memo for approval by the Director after that time. Once that buffer clarification memo is finalized, the public will be notified of the final buffer clarification memo via posting on our website.

Cc: Paul Rawls
Matt Matthews
Regional Wetland Contacts
Larry Eaton
Eric Kulz
Tammy Hill
John Dorney
Cyndi Karoly
Roger Edwards, DWQ Asheville Regional Office