

Jordan Lake Nutrient Reduction Rules: Comments Regarding Legal Authority

15A NCAC 2B.0265 Jordan Water Supply Nutrient Strategy: Stormwater Management for New Development

- G.S. 143-214.7 (a) Policy, Purpose and Intent. – The Commission shall undertake a continuing planning process to develop and adopt a *statewide plan* with regard to establishing and enforcing stormwater rules for the purpose of protecting the surface waters of the State.....The plan shall be *applied evenhandedly* throughout the State to address the State's water quality needs.
- Local governments do not have the statutory authority to create offsetting programs. Local governments do not have statutory authority to collect the fees to establish a local nutrient offsetting program.
- The EMC can not justify requiring additional stormwater measures until it proves that the existing stormwater management measures (Water Supply Watershed Protection, NPDES Phase II, local government requirements) are not adequately protecting water quality.
- Under this rule, local governments is required to submit technical information demonstrating the adequacy of “alternative” requirements. It is not local governments’ responsibility to evaluate the adequacy of state programs or of state program implementation. Further, the state has not demonstrated the adequacy (or inadequacy) of existing state programs or of programs, like NPDES Phase II, that have not been fully implemented.
- Local governments do not have the authority to require developers to pay to “supersize” buffers, ponds or any other stormwater management device in order to reduce nitrogen coming from existing, off-site sources. Local governments can not pay homeowner’s associations to maintain the oversized devices. Neither local governments nor homeowner’s associations can bear the liability that goes with “supersize” devices.

15A NCAC 2B.0266 Jordan Water Supply Nutrient Strategy: Stormwater Management for Existing Development

- (1)(a) and (3)(a)(i) These provisions are inconsistent with Rule .0265 in that the EMC is attempting to force local governments to comply with the provisions of these rules before the effective date. Rule .0265 exempts “existing development”, including projects that are initiated and/or completed after the baseline period, but prior to the proposed effective date. The EMC then mandates, under this Rule, that local governments account for in their (*unauthorized*) offsetting program that development which occurred between the baseline period and the local program effective date. In other words, ALL DEVELOPMENT THAT OCCURRED AFTER THE ARBITRARY 2001 BASELINE PERIOD IS SUBJECT TO THE PROVISIONS OF

THIS RULE. The EMC does not have the authority to require retroactive development requirements.

15A NCAC 2B.0267 Jordan Water Supply Nutrient Strategy: Protection of Existing Riparian Buffers

- The EMC has failed to prove that stream buffers currently required under the Water Supply Watershed Protection program, NPDES Phase II and other state and local programs are not functioning as mandated.
- N.C. Gen. Stat. §143-214.23 states that local governments may request that responsibility for the implementation and enforcement of the State's riparian buffer protection requirements be delegated by the EMC. To that end, local governments that have the riparian buffer protection requirements delegated may adopt ordinances and regulations necessary to establish and enforce those requirements. The EMC does not have the authority to require local governments to enforce buffer requirements.
- As affirmed by the NC Court of Appeals in Hashemi v Town of Cary, [(04-128) 09/20/2005], N.C. Gen. Stat. §143-214.23(a) does not allow local governments to impose greater riparian buffer restrictions than those required by the State. As such, local governments do not have the authority to implement more stringent riparian buffer requirements in the Jordan Lake Watershed.
- N.C. Gen. Stat. §143-214.23 states that local governments may request that responsibility for the implementation and enforcement of the State's riparian buffer protection requirements be delegated by the EMC. To that end, local governments that have the riparian buffer protection requirements delegated may adopt ordinances and regulations necessary to establish and enforce those requirements. The EMC does not have the authority to require local governments to enforce buffer requirements.
- The requirements for maintaining diffuse flow are equal to "buffering the buffers". This requirement is unjustly applied. Under the proposed 15A NCAC 2B .0264(7), agricultural uses may use BMPs and combinations of BMPs to achieve nutrient removal. One of the approved methods is a 20-foot forested buffer strip and nutrient management. Agricultural uses are not required to maintain diffuse flow through this buffer. In limited circumstances, there may be a need to maintain diffuse flow based upon topography and other site factors. There is no scientific evidence to prove that every buffer in the Jordan Lake watershed needs additional diffuse flow measures. Even though the Division of Water Quality has, without authority and without rulemaking, been implementing diffuse flow requirements in the Neuse and Tar-Pamlico River Basins, the EMC is acting arbitrarily in requiring diffuse flow for all development projects, but not for any other land uses requiring buffers.
- The requirements for a determination of "No Practical Alternatives" allow the local government or the Director to review the entire project in order to make a finding of fact. Local governments that voluntarily implement the riparian buffer requirements and the Director are ill equipped to determine whether the "project purpose can be practically accomplished in a manner that would better minimize disturbance" and whether the use "can be practically reduced in size or density, reconfigured or redesigned to better minimize disturbance". Further, the requirements pertain only to riparian buffers. If such determinations are to be made, local governments and the

Director are only justified in making the determination as it pertains to the riparian buffer – not the entire project. The EMC does not define “practically accomplished”, which will surely result in arbitrary and capricious application.

15A NCAC 2B .0269 Jordan Water Supply Nutrient Strategy: Mitigation for Riparian Buffers

- (1) N.C. Gen. Stat. §143-214.23 states that local governments may request that responsibility for the implementation and enforcement of the State’s riparian buffer protection requirements be delegated by the EMC. To that end, local governments that have the riparian buffer protection requirements delegated may adopt a riparian buffer mitigation program. There is no statutory authority for the EMC to require local governments that DO implement the State’s riparian buffer requirements to ALSO implement a local riparian buffer mitigation program. The EMC does not have the authority to require local governments to enforce the State’s riparian buffer requirements or to implement a local mitigation program.
- Neither Session Law 1999-448, nor NC Gen. Stat. §143-214.23, nor any other statute gives the EMC the authority to apply multipliers to riparian buffer impacts to determine the area of mitigation. There is no authority for the EMC to arbitrarily expand the mitigation area in order to extort more money from developers and landowners.
- Neither Session Law 1999-448, nor NC Gen. Stat. §143-214.23, nor any other statute gives the EMC the authority to specify the distance from the impact in which mitigation must occur. Both NC Gen. Stat. §143-214.20 and §143-214.21 state that donations of real property or moneys shall be used in the same river basin as the buffer that was lost. The EMC may suggest that mitigation take place relative to the riparian buffer impact, but does not have the authority to require that mitigation be located in the same watershed, much less a specific distance from the reservoir.
- NC General Statutes authorize the use of private mitigation banks. The EMC should add a provision (d) in this section that allows the purchase of credits from an approved private mitigation bank.

15A NCAC 2B .0269 Jordan Water Supply Nutrient Strategy: Options for Offsetting Nutrient Loads

- (1) The EMC must specify that sellers that received any state or federal funds to establish or maintain certain land uses or buffers that produce excess load reduction, can not sell those credits to buyers.
- (2) The criteria established by the EMC must apply to ALL sellers, including the Ecosystem Enhancement Program.

15A NCAC 2B .0272 Riparian Buffer Mitigation Fees

- DWQ is attempting to increase fees paid to the Ecosystem Enhancement Program on an annual basis using the Civil Works Construction Cost Index System. No statutory authority exists for an “automatic” fee increase.