On behalf of the Neuse River Compliance Association, please find attached its comments on the proposed rules regarding Nutrient Trading (15A NACA 2B .0701 and .0703). This substantial revision of the existing rule at 15A NCAC 2B .0240 is important to the NRCA and its members. In particular, the provisions on trading ratios for nonpoint to point source trading of nutrient credits could substantially impact the NRCA. In separate comments, the NRCA has explained the reasons that it supports the proposed rule submitted to you by Chairman Rubin. Proposed rule .0703 is in conflict with that proposal. It would establish a minimum trading ratio of 1:1.2 and another option would continue the ratio at the same level as is now established in 15A NCAC 2B .0234.

The Neuse Estuary nutrient rules are the oldest strategy rules with direct impacts on waste water treatment capacity. The rules date from 1998 when the science supporting the nutrient capture and reduction values of SCMs was in its infancy. Today, the science is substantially more robust and DEQ applies conservative measures in its methodology for valuing those reductions from SCMs. The purpose of the 1:2 ratio is now met by other means and the 1:2 ratio creates unreasonable burdens for the waste water treatment facilities in the Lower Neuse Basin. Accordingly, the NRCA urges the WQC to reject the proposed options sent forward by DWR and to substitute for them the provision crafted by Dr. Rubin.

In NC Gen. Stat.§143-215.8B(b)(1), the EMC received legislative direction on basinwide management plans: “Provide that all point sources and nonpoint sources of pollutants 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 requirement for joint responsibility for reducing pollutants in the Neuse Basin in a proportionate manner was fractured when the Falls rules were adopted. The WWTPs in that part of the basin were relieved from the 1:2 ratio and may use nutrient credits based on a 1:1 ratio.

To address that inequality, DWR has proposed that all WWTPs in all other nutrient sensitive waters also have to comply with a trading ratio as great as 1:2. In its comments, the NRCA shows that this recommendation is both inconsistent with the EPA Trading Policy and the means of addressing this issue in other basins.

The NRCA is also concerned about the potential that its members may have to establish nutrient banks to engage in the use of nutrient credits generated by other departments within their respective local governments. This serves no beneficial purpose and creates another obstacle to an open and responsible trading program. The NRCA commends its other comments to your attention as well.

If you have questions, please contact Dan McLawhorn or me at your convenience.

TO: WATER QUALITY COMMITTEE

FROM: NEUSE RIVER COMPLIANCE ASSOCIATION
Daniel F. McLawhorn, Chair

DATE: MAY 8, 2018

RE: PROPOSED APPROVAL OF 2B .0701 AND .0703 REGARDING NUTRIENT CREDIT APPROVAL AND TRADINIG PROGRAM

The Neuse River Compliance Association remains a stakeholder with great interest in these proposed rules. They will impact greatly the future of sewer utilities subject to the Neuse Estuary rules. When the nutrient strategy was developed 20 years ago, it was generally assumed the nutrient problems would be solved by now. Instead, we now recognize that nutrient controls will be required in the foreseeable future to address nutrient impairment of the Neuse Estuary. Given the limited allocation of nitrogen loading to the point sources, it is also now clear that allocation will be fully utilized in less than 20 more years. The nitrogen budget makes it necessary to consider other means by which the sewer utilities can meet the growth needs of municipalities in the basin.

The NRCA has a few general concerns with the proposed rules. The specific requests for change will be accompanied by an explanation of the request. To make the use of space more efficient, the introductory part of the rule number [15A NCAC 02B] is omitted.

.0701(39) – Definition of the term "Provider." As this term is proposed and the purpose paragraph of .0703 is proposed, any person who seeks nutrient offset credit is a "provider." The NRCA requests that term and the purpose be limited to persons who will sell or otherwise convey ownership for credits to persons subject to implementation of the rules. That limitation is consistent with the language of the statute authorizing the EMC to regulate this subject area. NC Gen. Stat. §143-214.26(a) begins with the key phrase: "(a) Nutrient offset credits <u>may be purchased</u> to partially offset nutrient loadings to surface waters required by the Environmental Management Commission." As proposed, it is unclear is each local government subject to the nutrient strategies will have to establish a nutrient bank. The burden to establish a nutrient bank should only fall on persons who will sell credits.

> Proposed revision: "'Provider" means any public or private person or entity that implements a nutrient reduction project and seeks nutrient offset credit <u>for sale, lease, or conveyance in exchange for remuneration</u>, including DMS.

.0701(40) – "Residential development." The proposed definition does not state whether it applies to mixed use building, or only to buildings that are exclusively used for residential purposes.

.0701(45) – "Temporary Nutrient Offset Credit." The concept of permanent credits is introduced by this rule. Prior credit projects which otherwise qualify as permanent credits should be allowed to get that approval. The last sentence of this definition makes the ability to seek permanent credit status for those otherwise eligible projects unclear, if not barred. It should be deleted.

.0703(a) PURPOSE. The problem is discussed above. The rule states that it covers all persons who are implementing projects to achieve nutrient offset credits. That undefined term would include situations where local governments have joined together to achieve compliance as allowed by certain nutrient strategies. In its last sentence, the rule distinguishes nutrient offset credit from nutrient accounting, another undefined term. Based on the preceding sentence, the rule can be read to include joint compliance by multiple entities as being within the scope of the nutrient credit rule. That will require the local governments to establish nutrient banks and otherwise conform to this rule despite the stand alone provisions in the Falls and Jordan nutrient strategy rules. As such, it represents an amendment of those rules before the time when legislation authorizes amendment of those rules. The rule is unclear and should exclude from the coverage and purpose actions taken to create nutrient offset credits which will not be sold, leased or otherwise conveys ownership of the credits to another person as well as joint compliance by multiple entities.

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

.0703(b)(5) – This rule provision uses the term "in-water nutrient reduction projects." The term is undefined and its common meaning would seem to refer to a device like a solar bee. The NRCA requests the term "in-water" be removed from the rule. This rule exceeds the limitation established by NC Gen. Stat. §143-214.26(a)(2) as to geographic limitations and it appears to be in excess of the EMC's authority.

.0703(d)(1)(B) – The proposed restrictions of the use of lands that have been timbered for replanting in forest are harmful to removal of potential sources of substantial nutrient loading. They are also lands that are feasible for restoration to achieve nutrient offset credits. This set of restrictions should be removed from the rule. The Division has presented no scientific basis for this proposal and it appears for the first time in this version of the draft rules. The NRCA requests it be removed.

.0703(d)(1)(C) – It is lawful to make use of land in areas subject to nutrient strategies, except as otherwise regulated by the EMC. This restriction on the conversion of lawfully developed land to only the baseline status as forest lands will remove incentives to recover lands to forest status which have been altered with important nutrient impact. The Division has presented no scientific basis for this proposal and it appears for the first time in this version of the draft rules. The NRCA requests it be removed.

.0703(d)(8) – Previous nutrient credit projects which meet, or can be improved to meet, the requirements for the new status as a permanent credit should be allowed to make application and be approved as permanent credits. This provision punishes the entities which obtained the credits by making them purchase new credits when the 30 year period expires. The NRCA requests it be removed. NRCA members have needs for additional loading capacity now that cannot be met except by the purchase of nutrient offset credits. This proposal punishes anyone who buys credits between now and when a new rule goes into effect.

> Proposed revision: "(8) Nutrient offset credits that were approved prior to the adoption of this rule may make application to be reclassified. The Division shall approve the application of any bank to reclassify credits as permanent which meet the requirements for permanent credits at the time of the application to be reclassified. Other nutrient offset credits that were approved prior to the adoption of this rule or that were conditionally approved pursuant to a mitigation banking instrument or other agreement with DEQ prior to the adoption of this rule, are considered term credits and may be transferred between term and permanent ledgers at a ratio of 30 years of term nutrient offset credit to 1 (one) permanent nutrient offset credit.

.0703(e)(3) FINANCIAL ASSURANCES. – The last sentence of this rule infers that local governments must establish a mitigation bank for all nutrient offset credits even if they are being used internally by the local government to meet its regulatory requirements for nutrient loading reductions. The internal use of nutrient offset credits by a local government is outside the scope of NC Gen. Stat. §143-214.26. The NRCA requests that the last sentence of the proposed rule be removed. It reads: "Where the credits are generated by a locality, authority, utility, sanitation district, or permittee operating an MS4 or a permitted wastewater treatment facility, financial assurance may be provided through its existing tax or rate authority."

.0703(i)(4) NUTRIENT OFFSET CREDIT TRANSACTIONS. This proposed rule is concerned with whether a ratio greater than 1:1 should be applied when nutrient offset credits from a nonpoint source are used by a point source. The body of the provision misstates the Trading Policy adopted by EPA in 2003. As presented, the proposed rule states that EPA always requires a ratio at least 1:1.2. That is incorrect, the EPA policy reads:

> EPA supports a number of approaches to compensate for nonpoint source uncertainty. These include monitoring to verify load reductions, the use of greater than 1:1 trading ratios between nonpoint and point sources, using demonstrated performance values or conservative assumptions in estimating the effectiveness of nonpoint source management practices, using site- or trade-specific discount factors, and retiring a percentage of nonpoint source reductions for each transaction or a predetermined number of credits. Where appropriate, states and tribes may elect to establish a reserve pool of credits that would be available to compensate for unanticipated shortfalls in the quantity of credits that are actually generated.

Accordingly, the EMC should refuse to send the presently proposed options to notice. Instead, it recognizes that the science of quantifying the value of SCM reductions has greatly advanced and that the purposes of the prior limitations are no longer an appropriate basis for a rule provision as proposed by DWR. Instead, it should use the language in the draft rule .0713(7)(b) and (8)(d). The proposal is included in the following language:

> For offset credits used to meet the discharge requirements, the applicant shall provide 10% additional credits to address the uncertainty factor for using unmonitored nonpoint source reductions to meet point source discharge limits. For offset credits used to meet the discharge requirements, the applicant shall provide no additional credits to address the uncertainty factor for using monitored nonpoint source reductions to meet point source discharge limits.

In Commented [A21], DWR misstates that national norm as it regards the 1:2 ratio. The only other place that uses the ratio is the State of Virginia for the Chesapeake Bay. Maryland uses no uncertainty ratioThe most comprehensive look at this issue was done as a part of report by the National Network on Water Quality Trading in 2015. Chapter 5 of the report discusses this issue. it is attached. Section 5.1.1 discusses the Uncertainty Ratio, and reads:

> "Not all trading programs have uncertainty ratios applied to nonpoint source credit estimation. When determining where (or whether) to set the uncertainty ratio, programs should consider the degree of uncertainty introduced through nonpoint source pollution reduction estimations and whether that uncertainty is, in part, already compensated from through conservative estimation factors, direct monitoring, or other means. The U.S. EPA Water Quality Trading Policy states that it supports a number of approaches to compensate for scientific uncertainty associated with estimating nonpoint source load reductions, including monitoring, trading rations of greater than 1:1, use of conservative performance values, trade-specific discount factors, retirement ratios and reserve ratios. Different uncertainty ratios could be used for different types of practices and/or trades. Similarly, some management practices may have less uncertainty associated with them because their impacts are better understood and can be more accurately estimated."
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> *Building a Water Quality Trading Program: Options and Considerations,* pp 80-81.

In addition, this proposed rule does not exclude from its coverage the existing Falls rule which allows a local government to consolidate its point source reductions and nonpoint source reductions into a single budget for compliance purposes. That rule has no ratio to be applied when nonpoint source reductions are used to meet the point source reduction requirements. See 15A NCAC 2B .0282(4). The EMC will exceed its authority it amends the Falls rules with this provision.

> (4) Local governments have the option of combining their reduction needs from NPDES dischargers assigned allocations in 15A NCAC 02B .0279 and existing development as described in 15A NCAC 02B .0278, including loads from properly functioning and malfunctioning septic system and

discharging sand filters, into one reduction and allocation requirement and meet them jointly.