

## SUBCHAPTER 02R – DIVISION OF MITIGATION SERVICES

### SECTION .0100 - PURPOSE AND DEFINITIONS

#### 15A NCAC 02R .0101 PURPOSE

*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Repealed Eff. March 1, 2018.

#### 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 shall mean:

- (1) "Aquatic resources" means wetlands, streams, lakes, rivers, springs, seeps, reservoirs, ponds, groundwater, riparian areas, and the fauna that reside within them. Aquatic resources include permanent, seasonal, flowing, standing, natural, or man-made water bodies.
- (2) "Non-riparian wetlands" means Class WL wetlands as defined in 15A NCAC 02B .0101(c)(8) whose major source of water is precipitation. Examples of non-riparian wetlands include wet flats, pocosins, and ephemeral wetlands.
- (3) "Riparian area" means an area that does not meet the definition of wetlands found at 15A NCAC 02B .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 02B .0101(c)(8) whose primary source of water is ground water or surface water. Examples of riparian wetlands include freshwater marshes, swamp forests, bottomland hardwood forests, headwater forests, bog forests, mountain bogs, and seeps.

*History Note:* Authority G.S. 143-214.8; 143-214.9; 143-214.11; 143-215.3;  
Eff. August 1, 1998;  
Readopted Eff. March 1, 2018.

### SECTION .0200 - BASINWIDE RESTORATION PLANS

#### 15A NCAC 02R .0201 PURPOSE

*History Note:* Authority G.S. 143-214.10; 143-215.3;  
Eff. August 1, 1998;  
Amended Eff. July 3, 2008;  
Repealed Eff. March 1, 2018.

#### 15A NCAC 02R .0202 COMPONENTS

Each Basinwide Restoration Plan shall consist of the following components conducted by DMS staff and contractors:

- (1) an assessment of the baseline aquatic resource functions within each 8-digit cataloging unit;
- (2) an assessment of the potential functional improvement of aquatic resources within each 8-digit cataloging unit;
- (3) an identification of aquatic resource areas that have the potential, if restored or enhanced, to contribute to the functional goals identified in the Basinwide Restoration Plans;
- (4) an identification of aquatic resource areas that have the potential, if preserved, to contribute to the functional goals identified in 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; and

- (6) 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;  
Readopted Eff. March 1, 2018.

#### **15A NCAC 02R .0203 PUBLIC INVOLVEMENT; AVAILABILITY**

- (a) The Secretary or the Secretary's 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 Division of Mitigation Services' website at <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;  
Readopted Eff. March 1, 2018.

### **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 U.S.C. Section 1341 and permits or authorizations issued by the United States Army Corps of Engineers (Corps) under 33 U.S.C. Section 1344 shall be consistent with the Basinwide Restoration Plan for the appropriate river basin. A project shall be consistent with the Basinwide Restoration Plan if the project demonstrates that it advances the functional improvement goals identified in the Basinwide Restoration Plan or is 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;  
Readopted Eff. March 1, 2018.

#### **15A NCAC 02R .0302 MITIGATION BANKS**

All sponsors of mitigation banks that submit a prospectus to the United States Army Corps of Engineers after the effective date of this Rule shall 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 demonstrates that it advances the functional improvement goals identified in the Basinwide Restoration Plan, 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 Interagency Review Team in accordance with 33 CFR Part 332 Compensatory Mitigation for Losses of Aquatic Resources. The signature of the Secretary or the Secretary's designee on the Mitigation Banking Instrument, described in 33 CFR Part 332, shall be considered as a finding by the Department that the mitigation bank is consistent with the Basinwide Restoration Plan.

*History Note:* Authority G.S. 143-214.11; 143-214.12; 143-215.3;  
Eff. August 1, 1998;  
Readopted Eff. March 1, 2018.

### **SECTION .0400 - ECOSYSTEM RESTORATION FUND**

#### **15A NCAC 02R .0401 PURPOSE**

*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. March 1, 2018.*

**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:
- (1) Streams shall consist of classified surface waters other than wetlands as defined in 15A NCAC 02B .0202.
  - (2) Freshwater wetlands shall consist of Class WL wetlands as defined in 15A NCAC 02B .0101(c)(8) and shall include riparian and non-riparian wetlands.
  - (3) 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 five hundred sixty thousand dollars (\$560,000) per credit.
- (f) Rate Adjustment Frequency. Initial rates shall be effective as of the readoption 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:

$$ActualCostRate = 1.43 \frac{ActualProjectCosts_{PresentDay}}{ActualCredits_{PresentDay}}$$

Where:

- (1) "Actual Project Costs<sub>PresentDay</sub>" 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, 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](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, the adjustment to present-day values shall be calculated using the average annual composite USACE Civil Works Construction Cost values from the previous three years;

- (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<sub>PresentDay</sub>" means the total number of credits from Actual Project Costs<sub>PresentDay</sub> at the time of calculation. If the Actual Credits<sub>PresentDay</sub> for an existing or completed project is reduced, the Actual Costs<sub>PresentDay</sub> for that existing or completed project shall be proportionally adjusted.

*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;  
Readopted Eff. March 1, 2018.*

### **15A NCAC 02R .0403 DONATION OF PROPERTY**

(a) If approved by the Council of State, donations or dedications of interests in real property for the purposes of restoration, enhancement, or preservation may be accepted by the Secretary or the Secretary's 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 pursuant to 33 U.S.C. Section 1341.

(b) The factors that shall be considered by the Secretary or the Secretary's 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>;
- (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 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, 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 Resources pursuant to 40 CFR 131.10(a) through (g). This material is available from the Department of Environmental Quality, Division of Water Resources, 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 or the Secretary's 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, 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>;
  - (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 Resources pursuant to 40 CFR 131.10(a) through (g);
  - (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 shall be submitted with any proposal for donations or dedications of interest in real property:
- (1) documentation that the property meets the criteria 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 requirements of the North Carolina Department of Administration, State Property Office as identified by the North Carolina Board of Examiners for Engineers and Surveyors in "Standards of Practice for Land Surveying in North Carolina," incorporated by reference including subsequent amendments and editions. Copies may be obtained at no charge from the North Carolina State Board of Examiners for Engineers and Surveyors, [www.ncbels.org](http://www.ncbels.org);
  - (4) a current appraisal of the value of the property performed in accordance with the requirements of the North Carolina Department of Administration, State Property Office as identified by the Appraisal Board in the "Uniform Standards of Professional Appraisal Practice," incorporated by reference including subsequent amendments and editions. Copies may be obtained at no cost from the Appraisal Foundation, <http://www.appraisalfoundation.org>;

- (5) a title certificate; and
  - (6) a Phase 1 Environmental Site Assessment documenting that the property does not contain structures that present health or safety problems to the general public. If wells, septic systems, water treatment systems, or water or sewer connections exist, they shall be filled, remediated, or closed at owner's expense and in accordance with State and local health and safety regulations.
- (e) In addition to the factors outlined in Paragraphs (b) through (d) of this Rule, the Secretary or the Secretary's 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 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 shall only be considered for acceptance if the proposed donation offsets an impact for which an application has already been made to the United States Army Corps of Engineers under 33 U.S.C. Section 1344 or to the Department under 33 U.S.C. Section 1341.
- (g) For the purposes of satisfying compensatory mitigation requirements through the donation of interests in real property requiring restoration, enhancement, or preservation, the size of property to be donated shall equal or exceed the acreage of wetland required to be mitigated under the approved permit, and every parcel shall be a minimum of five contiguous acres in size.
- (h) Donation of real property interests to satisfy compensatory mitigation requirements shall be accepted only if such property meets the requirements of Paragraphs (a) through (i) of this Rule and 15A NCAC 02H .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 shall be accepted only if:
- (1) 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
  - (2) if the property interest is being donated to satisfy a condition of a certification issued by the Department pursuant to 33 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 according to the Rate Schedule in Rule .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(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(c) of this Section, the applicant shall pay the difference between the calculated fee and the appraised value of the property interest.

*History Note:* Authority G.S. 143-214.11; 143-214.12; 143-215.3;  
 Eff. August 1, 1998;  
 Readopted Eff. March 1, 2018.

**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 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 readoption 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 10 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<sub>PresentDay</sub> 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, incorporated by reference including subsequent amendments and editions. 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, future year annual inflation rates 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" means 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<sub>PresentDay</sub>" means the total amount of credits provided by projects in the rate area at the time of calculation. If the Total Riparian Buffer Credits<sub>PresentDay</sub> for an existing or completed project is reduced, the Actual Costs<sub>PresentDay</sub> 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 percent of the overall rate;

- (A) "Actual Costs" shall be the same as Actual Costs<sub>PresentDay</sub> as defined in Subparagraph (1) of this Paragraph, except that the existing contracts and completed land acquisitions shall not be 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.

*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); Eff. August 11, 2009; Amended Eff. May 1, 2015; Transferred from 15A NCAC 02B .0269 Eff. May 1, 2015; Readopted Eff. March 1, 2018.*

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

- (a) 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 premium watershed rates for specific watersheds as identified in Paragraph (d) of this Rule. All rates shall be based on the per-pound nutrient reduction costs incurred by the Program in those watersheds.

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

(d) Premium Watershed Rates. The Program shall apply 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 that is subject to nutrient management rules where costs are 33 percent greater than costs in the larger watershed or river basin where that cataloging unit is located.

The initial rate for a 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 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 premium watershed rates, it shall remain a premium watershed rate area.

(f) Rate Adjustment Frequency. Rates shall be adjusted quarterly whenever the 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 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 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 values:

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

Where:

- (1) "Actual Costs<sub>PresentDay</sub>" 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 pound cost adjusted to the future inflated value at the time 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 nutrient reduction projects including identification, land acquisition, project design, project construction, monitoring, maintenance, and long-term stewardship;
  - (B) "Administrative Costs" means costs associated with administration of the Program including staffing, supplies, and rent; and
  - (C) The "costs 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 nutrient reduction obligations in the rate area;

- (3) "Total Pounds Offset<sub>PresentDay</sub>" 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<sub>PresentDay</sub> for an existing or completed project is reduced, the Actual Costs<sub>PresentDay</sub> for that existing or completed project shall be proportionally adjusted:

- (A) The Adjustment Factor shall be calculated using the following formula:

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

The Adjustment Factor shall be applied 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 percent of the overall rate;

- (B) "Actual Costs" shall be the same as Actual Costs<sub>PresentDay</sub> 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" means the sum of all offset payments made to the Program in the rate area at the time of calculation; and
- (D) "Number of Pounds Paid during Adjustment Period" means the average number of pounds of a nutrient 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 pounds paid shall be 1,000 pounds until greater than 1,000 pounds 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 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) If 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) If 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. 1995-572; S.L. 2006-215; S.L. 2007-438; S.L. 2009-337; S.L. 2009-484; S.L. 2009-486; Eff. September 1, 2010; Transferred from 15A NCAC 02B .0274 Eff. May 1, 2015; Readopted Eff. March 1, 2018.*