

NORTH CAROLINA GENERAL ASSEMBLY

LEGISLATIVE FISCAL NOTE

BILL NUMBER: House Bill 1402 (3rd Edition)

SHORT TITLE: Disapprove/Revise Neuse River Basin Rule

| FISCAL IMPACT | | | | |
|---|-------------------|---------------------------|-------------------|-------------------|
| Yes () | No () | No Estimate Available (x) | | |
| <u>FY 1998-99</u> | <u>FY 1999-00</u> | <u>FY 2000-01</u> | <u>FY 2001-02</u> | <u>FY 2002-03</u> |
| REVENUES | | | | |
| No Estimate Available | | | | |
| EXPENDITURES | | | | |
| POSITIONS: | | | | |
| PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Department of Environment and Natural Resources, Division of Water Quality, Division of Land Resources; Local Units of Government | | | | |
| EFFECTIVE DATE: When the act becomes law. | | | | |

BILL SUMMARY:

ENVIRONMENT COMMITTEE SUBSTITUTE:

House committee substitute makes the following changes to 1st edition. Disapproves in part the permanent Neuse River Basin Nutrient Sensitive Waters Management Strategy, 15A NCAC 2B.0233 (the “current EMC rule”), providing for the current EMC rule subject to certain legislative changes (the “legislated temporary rule”) to remain in effect until a new rule (the “new EMC rule”) becomes effective. (The 1st edition of this bill disapproved of the EMC rule altogether, as provided in GS 150B-21.3(b).)

Legislated temporary rule: presence of surface water. Requires the presence of surface waters in the Neuse River basin to be determined presumptively by reference to either the most recent versions of the soil survey maps prepared by the U.S. Department of Agriculture or the 7.5 minute quadrangle maps prepared by the U.S. Geologic Survey. In the event of a question as to the accuracy of these maps with respect to the presence of surface water, provides for determination by the director of the Division of Water Quality of the Department of Environment and Natural Resources, subject to contested case review under GS Ch. 150B, with a final agency decision by the Environmental Management Commission (EMC).

Legislated temporary rule: headwaters exclusion. Excludes from the requirements of the EMC rule any segment of an intermittent stream that drains an area of 25 acres or less.

Legislated temporary rule: definition of “forest vegetation.” Defines “forest vegetation” as vegetation consisting of trees and woody perennial plants with associated herbaceous vegetation

in conjunction with a defined surface layer consisting of leaves, branches and other plant material, and including mature and successional forest areas and cutover areas.

Compensatory mitigation fees. Allows persons to remove riparian buffers in the Neuse basin, notwithstanding the requirements of the legislated temporary rule or the EMC rule, by paying fees or donating property in a program created by the EMC. To qualify for this compensatory mitigation program, a person must demonstrate that he or she has attempted to avoid and minimize the loss of riparian buffer and that there is no practical alternative to the loss of the buffer. Compensatory mitigation is available only for loss of riparian buffer along an intermittent stream. Creates a new Riparian Buffer Restoration Fund as a nonreverting fund within the Department of Environment and Natural Resources to hold compensatory mitigation fees.

Delegation of riparian buffer protection requirements to local government. Authorizes and creates procedure for delegation of implementation and enforcement of riparian buffer protection requirements to units of local government in the Neuse River basin that have the power to regulate land use. Authorizes the EMC to adopt rules to implement this section.

Recognition of vested development rights. Provides that the legislated temporary rule and the new EMC rule do not apply to development with vested rights recognized or established under GS 153A-344(b), 153A-344.1, 160A-385(b) or 160A-385.1 prior to July 22, 1997 in the Neuse River basin. For development with vested rights under common law, the legislated rule and the new EMC rule do not apply to rights recognized or established prior to the effective date of this act, if the EMC has issued a certification pursuant to GS 143B-282(a)(1)u (a “401 certification” under the federal Clean Water Act).

Requirements for the new EMC rule. Requires the EMC to adopt a new rule (first as a temporary rule, then as a permanent rule) for the Neuse River basin that (1) establishes a method for determining the presence of surface waters that is scientifically valid, easily understandable, efficient, consistent, reliable and cost-effective, as well as a means for resolving disputes; (2) establishes methods to determine the landward extent of zones within protected riparian buffers appropriate to different regions of the basin; (3) excludes certain drainage areas along intermittent streams from riparian buffer requirements; (4) defines forest vegetation; (5) establishes exemptions and permitted uses within riparian areas; and (6) establishes criteria to determine whether there is a practical alternative to the loss of riparian buffer.

Stakeholder advisory committee. Requires the new EMC rule to be developed with the assistance and advice of a stakeholder advisory committee consisting of 23 members specified in the statute.

EMC review and reports on rule implementation. Requires the EMC to review implementation of the Neuse Nutrient Sensitive Management Strategy, including progress towards the 30% nitrogen reduction goal of 1995 SL, Ch. 572 and the effect of the strategy on regulated parties. Requires reports to the EMC by Dec. 1, 2000 and Dec. 1, 2001. Also requires joint reports to the EMC on progress in implementing this act on or before Dec. 1, 1998 and March 1, 1999.

Sediment control plans consistent with riparian buffer requirements. Amends GS 113A-54.1(c) and 113A-61(b1) to require the director of the Division of Land Resources in DENR and any authorized local government to disapprove an erosion control plan that would result in violation of the Neuse River basin riparian buffer requirements.

Temporary rule deadlines. Authorizes the EMC to adopt temporary rules to implement the act until July 1, 1999. Authorizes the Sedimentation Control Commission to adopt temporary rules to implement the required changes to sediment control plans until July 1, 1999.

Donations of real property. Authorizes DENR to accept donations of real property and interests in real property that are riparian buffers or will be used to restore, create, enhance or maintain riparian buffers to protect water quality.

EMC to establish riparian buffer maintenance and restoration goal. Requires the EMC to establish a goal for maintenance and restoration of riparian buffers consistent with the 30% nitrogen reduction goal of 1995 SL, Ch. 572.

Severability. Includes a severability clause in case portions of this act are declared unconstitutional or invalid.¹

FINANCE COMMITTEE SUBSTITUTE:

House Finance committee substitute makes the following changes to 2nd edition. (1) Deletes provision that would have exempted from temporary rule 15A NCAC 2B.0233 (regarding management of nutrient-sensitive waters in Neuse River Basin) a segment of an intermittent stream that drains area of 25 acres or less and is upstream from point of measurement from which drainage area is determined. (2) Revises section regarding recognition of vested development rights to prohibit Environmental Management Commission from adopting rules that confer or restrict a vested right to undertake or complete development. Also states intent of General Assembly that this section applies only to particular circumstances that are subject of act, and that section does not establish precedent as to application of vesting under zoning or land-use planning program administered by local government or to any other environmental program.²

ASSUMPTIONS AND METHODOLOGY:

The bill provides that the Neuse Buffer Rule will remain in effect as a temporary rule until revisions required by the act become effective. According to the Department of Environment and Natural Resources (DENR), the fiscal note for the rule provided that it be implemented with existing resources. Therefore, this fiscal note addresses requirements imposed by the bill that appear to be above and beyond the requirements of the temporary rule.

IMPLEMENTATION OF THE TEMPORARY RULE/DETERMINATION OF SURFACE WATERS -- The bill provides that for the purposes of implementing the temporary rule, the existence of surface water on a particular parcel of land will be presumed if the surface water appears on either the most recent soil survey maps or US Geological Survey topographic maps. If there is a question as to the accuracy of the maps, it will be the decision of the Director of the Division of Water Quality to determine the application of the maps. The division anticipates a one-time expenditure of approximately \$80,000 to acquire satellite imagery for updating 1993-94 data to estimate riparian area baseline conditions to facilitate implementation of this provision. However, the provision of the bill allowing determination of surface waters by the director is expected to require a less intensive review by the department than the permanent rule which provides for the

¹ *Daily Bulletin*, Institute of Government, UNC-Chapel Hill, Vol. 1998, August 12, 1998.

² *Daily Bulletin*, Institute of Government, UNC-Chapel Hill, Vol. 1998, August 24, 1998.

application of site specific criteria for this purpose. Since the permanent rule contains a similar provision, it is assumed the division needs to update the satellite imagery data regardless of the bill requirements.

COMPENSATORY MITIGATION FEES – The Environmental Management Commission (EMC) is responsible for developing a compensatory mitigation fee schedule to provide an alternative to maintaining riparian buffers. Payment of a fee into the Riparian Buffer Restoration Fund established in the bill will be an option available to persons in lieu of complying with the requirements of the revised temporary rule and permanent rule required by the bill. Revenues to be credited to the fund cannot be estimated until the EMC adopts a fee schedule. The bill does not establish a minimum nor maximum fee amount, but requires the fee schedule to be commensurate with the cost of providing equivalent or greater water quality than the area impacted. In addition, the department does not currently have a reliable estimate of the number of projects that may opt to pay the compensatory mitigation fee.

RIPARIAN BUFFER RESTORATION FUND – The bill establishes the Riparian Buffer Restoration Fund to be credited with compensatory mitigation fees and any other monetary contributions. The funds may be used to restore, acquire, create, enhance and maintain riparian buffers. Expenditures of the fund cannot be estimated until the EMC adopts the compensatory mitigation fee schedule, as most of the fund's revenue is expected to be derived from the payment of these fees.

Although the bill directs the EMC to establish a program to provide alternatives to maintaining buffers as required by the rule, it does not statutorily establish a Riparian Buffer Restoration Program outlining the purpose and requirements for implementation of the program. The bill requires the department to report on proposed legislation required to implement the act. It is anticipated that additional statutory language for the program will be needed to guide its implementation. The department may require additional staff and resources to administer the program; however, the lack of a reliable estimate of the number of projects that may impact riparian buffers in the Neuse River Basin makes it difficult to determine an appropriate level of administrative support.

DELEGATION OF RIPARIAN BUFFER REQUIREMENTS TO LOCAL GOVERNMENTS – The bill allows the EMC to delegate implementation and enforcement responsibilities of the Neuse River Basin riparian buffer requirements to units of local government with the authority to regulate land use. Under the temporary rule the Division of Water Quality is responsible for implementation and enforcement activities throughout the Neuse basin. So this provision potentially reduces the amount of staff time and resources devoted to the program. The department does anticipate incurring one-time costs in the development of the local government ordinance and memorandum of agreement delegating compliance and enforcement authority.

Local government units applying for delegation of responsibility of the riparian buffer protection requirement may incur costs associated with administering the program. Such expenditures are likely to vary depending on the number of projects within the local unit's jurisdiction and current staff and resources.

REVISION OF TEMPORARY RULE/ADOPTION OF PERMANENT RULE – The bill sets out several requirements for the EMC to use in revising the temporary rule for the purposes of developing a permanent rule. The Division of Water Quality anticipates additional staff time and resources will be required to develop a temporary rule that satisfies all the criteria called for by the legislation. Based on a review of staff availability and previous experience with rule making procedures, and the Neuse Buffer Rule in particular, the division estimates up to two additional technical staff persons (i.e. Environmental Specialists) will be required at a cost of approximately \$50,000 each to provide necessary support to the EMC. The two positions would also supplement other activities called for by the bill, including providing technical assistance to local riparian buffer programs, administration of the program under the temporary rule and interaction with the stakeholder committee. In the absence of additional resources, the division will reallocate current staff and resources to meet the requirements imposed by the bill.

STAKEHOLDER ADVISORY COMMITTEE – The bill directs DENR to provide professional and clerical staff support for the stakeholder committee established to assist in the development of a revised permanent rule. It is anticipated that these costs can be absorbed within existing resources.

The division would like to use a consultant to facilitate meetings of the stakeholder committee and estimates the cost to be approximately \$50,000. However, the bill does not specifically require the use of an outside contractor.

EROSION CONTROL PLANS – The Division of Land Resources anticipates an increase in the amount of time required to review erosion control plans for projects subject to the Neuse River Buffer rule. Although no reliable data exists to accurately determine the increased workload for the Sedimentation and Erosion Control program, the division estimates at least a 20% increase in the current activity level, based on time and resources currently required to complete plan reviews and site inspections.

TECHNICAL CONSIDERATIONS: none

FISCAL RESEARCH DIVISION

733-4910

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DATE: August 24, 1998



Signed Copy Located in the NCGA Principal Clerk's Offices