

## **15A NCAC 02B .0240 NUTRIENT OFFSET PAYMENTS**

(a) The purpose of this Rule is to establish procedures for the optional payment of nutrient offset fees to the NC Ecosystem Enhancement Program, subsequently referred to as the Program, or to other public or private parties where the Program or such parties implement projects for nutrient offset purposes and accept payments for those purposes, and where either of the following applies:

- (1) The following rules of this Section allow offsite options or nutrient offset payments toward fulfillment or maintenance of nutrient reduction requirements:
  - (A) .0234 and .0235 of the Neuse nutrient strategy,
  - (B) .0258 of the Tar-Pamlico nutrient strategy, and
  - (C) applicable rules of the Jordan nutrient strategy, which is described in Rule .0262; and
- (2) Other rules adopted by the Commission allow this option toward fulfillment of nutrient load reduction requirements.

(b) Offset fees paid pursuant to this Rule shall be used to achieve nutrient load reductions subject to the following geographic restrictions:

- (1) Load reductions shall be located within the same 8-digit cataloguing unit, as designated by the US Geological Survey, as the loading activity that is being offset;
- (2) The Division shall track impacts by 10-digit watershed, as designated by the US Geological Survey and providers shall locate projects proportional to the location of impacts to the extent that the projects would meet the least cost alternative criterion per S.L. 2007-438. The location of load reduction projects shall be reviewed during the approval process described in Paragraph (c) of this Rule;
- (3) Impacts that occur in the watershed of Falls Lake in the upper Neuse River Basin may be offset only by load reductions in the same watershed; Impacts in the Neuse 01 8-digit cataloguing unit below the Falls watershed, as designated by the US Geological Survey, may be offset only by load reductions in that same lower watershed;
- (4) Restrictions established in the Jordan nutrient strategy, which is described in Rule 15A NCAC 02B .0262; and
- (5) Any further restrictions established by the Commission through rulemaking.

(c) The Program and other parties shall obtain Division approval of proposed nutrient offset projects prior to construction. Other parties shall sell credits in compliance with approved credit release schedules and with the requirements of this Rule. Project approval shall be based on the following standards:

- (1) Load reductions eligible for credit shall not include reductions used to satisfy other requirements under the same nutrient strategy;
- (2) The Program and other parties shall agree to provide adequate financial assurance to protect and maintain load reductions for the stated duration, including for maintenance, repair and renovation of the proposed measure;
- (3) The Program and other parties shall agree that once credits are established for a measure and until they are exhausted, they shall provide a credit/debit ledger to the Division at regular intervals;
- (4) The Program and other parties shall agree that the party responsible for a measure shall allow the Division access to it throughout its lifetime for compliance inspection purposes;
- (5) The Program or other party seeking approval shall obtain a site review from Division staff prior to Division approval to verify site conditions suitable to achieve the proposed load reductions through the proposed measure; and
- (6) The Program shall submit a proposal, and other parties shall submit a proposal or a draft banking instrument, addressing the following items regarding a proposed load-reducing measure:
  - (A) Identify the location and site boundaries of the proposed measure, the geographic area to be served by credits in compliance with the requirements of Paragraph (b) of this Rule, existing conditions in the contributing drainage area and location of the measure, and the nature of the proposed measure with sufficient detail to support estimates of load reduction required in this Paragraph;
  - (B) Provide calculations of the annual magnitudes of load reductions and identify final credit values incorporating any delivery factors or other adjustments required under rules identified in Paragraph (a) of this Rule;
  - (C) Define the duration of load reductions, and provide a conservation easement or similar legal mechanism to be recorded with the County Register of Deeds and that is sufficient to ensure protection and maintenance of load reductions for the stated duration;

- (D) Identify the property owner and parties responsible for obtaining all permits and other authorizations needed to establish the proposed measure, for constructing and ensuring initial performance of the proposed measure, for reporting on and successfully completing the measure, for holding and enforcing the conservation easement, and for ensuring protection and maintenance of functions for its stated duration;
- (E) Provide a plan for implementing the proposed measure, including a timeline, a commitment to provide an as-built plan and report upon establishment of the measure, elements to be included in the as-built plan and report, a commitment to provide a bond or other financial assurance sufficient to cover all aspects of establishment and initial performance prior to the release of any credits, and criteria for successful completion; and
- (F) Provide a monitoring and maintenance plan designed to achieve successful completion, that commits to annual reporting to the Division until success is achieved, that recognizes the Division's authority to require extension or re-initiation of monitoring depending on progress toward success, and that commits to a final report upon completion. The final report shall reaffirm the party that shall hold and enforce the conservation easement or other legal instrument.

(d) The Program shall establish and revise nutrient offset rates as set out in Rule .0274 of this Section. Offset payments accepted by the Program shall be placed into the Riparian Buffer Restoration Fund administered by the Department pursuant to G.S. 143-214.21

(e) Persons who seek to pay nutrient offset fees under rules of this Section shall do so in compliance with such rules, the requirements of Paragraph (b) of this Rule, and the following:

- (1) A non-governmental entity shall purchase nutrient offset credit from a party other than the Program if such credit is available in compliance with the criteria of this Rule at the time credit is sought, and shall otherwise demonstrate to the permitting authority that such credit is not available before seeking to make payment to the Program;
- (2) Offset payments made to the Program shall be contingent upon acceptance of the payment by the Program. The financial, temporal and technical ability of the Program to satisfy the mitigation request will be considered to determine whether the Program will accept or deny the request;
- (3) Where persons seek to offset more than one nutrient type, they shall make payment to address each type;
- (4) The offset payment shall be an amount sufficient to fund 30 years of nutrient reduction.
- (5) Persons who seek offsets to meet new development stormwater permitting requirements shall provide proof of offset credit purchase to the permitting authority prior to approval of the development plan; and
- (6) A wastewater discharger that elects to purchase offset credits for the purpose of fulfilling or maintaining nutrient reduction requirements shall submit proof of offset credit acquisition or a letter of commitment from the Program or third party provider with its request for permit modification. Issuance of a permit that applies credits to nutrient limits shall be contingent on receipt of proof of offset credit acquisition. A discharger may propose to make incremental payments for additional nutrient allocations, contingent upon receiving a letter of commitment from the Program or third party provider to provide the offset credit needed for permit issuance. In that event the Division may issue or modify that permit accordingly, and shall condition any flow increase associated with that incremental purchase on payment in full for the additional allocation. Offset responsibility for nutrient increases covered under this Paragraph shall be transferred to the Program or third party provider when it has received the entire payment.

(f) Credits associated with load reducing activities funded under this Rule shall be awarded exclusively to the person, municipality, discharger, or group of dischargers who paid the offset fee.

*History Note: Authority G.S. 143-214.1; 143-214.20; 143-214.21; S.L. 1995, c. 572; S.L. 2007, c. 438; S.L. 2009, c. 337; S.L. 2009, c. 484; S.L. 2009, c. 486; Eff. August 1, 1998; Amended Eff. August 1, 2006; Amended Eff. September 1, 2010.*

**15A NCAC 02B .0274 NUTRIENT OFFSET PAYMENT RATES FOR THE NC ECOSYSTEM ENHANCEMENT PROGRAM**

(a) The purpose of this Rule is to establish actual cost rates for the payment of nutrient offset fees to the NC Ecosystem Enhancement Program, subsequently referred to as the Program, where rules adopted by the Commission allow this option toward fulfillment of nutrient load reduction requirements and where the Program implements projects to achieve nutrient reductions. Wherever the term "cost" or "costs" is used in this Rule, it means the Program's costs associated with nutrient offset projects in a given rate area, as described below. For this purpose, the Program shall operate according to the requirements 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 special rates for specific watersheds as identified in Paragraph (d) of this Rule. All rates shall be based on the actual and complete per-pound nutrient reduction costs incurred by implementing projects in those watersheds.

(c) Payment rates shall be developed for nitrogen, phosphorus, or other nutrients as dictated by Commission rule requirements for each river basin.

(d) Special Watershed Rates. The Program shall apply special 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 subject to nutrient management rules where costs are 40 percent greater than costs in the larger watershed or river basin in which that cataloging unit is located.

The initial rate for a special 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 special watershed 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 Special Watershed Rates, it shall remain a Special Watershed Rate area.

(f) Rate Adjustment Frequency. Initial rates shall be effective as of the effective date of this Rule. They shall be adjusted quarterly whenever the rate increases ten percent above the existing rate. The rates shall also be adjusted annually. Annual calculations and adjusted rates shall be published by June 1 on the Program's Web site, [www.nceep.net](http://www.nceep.net), 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 Web site two weeks prior to that date.

(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 Sub-Item. Costs are project costs and administrative costs. Projects in the calculation are completed projects, terminated projects and projects in process. At the time the rate is set, to ensure that collected payments are sufficient to implement new projects, 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 are calculated using the Program's per credit contract costs of the same type adjusted to the inflated future value when 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 when 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 when the project will be initiated. Future year annual inflation<sub>PresentDay</sub> shall be drawn from either the North Carolina Department of Agriculture and

Consumer Services' Agricultural Statistics Farm Real Estate Values or 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 are 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 are costs associated with administration of the Program including staffing, supplies and rent; and
  - (C) The cost for projects in process is 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 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; and

(4) 
$$AdjustmentFactor = \frac{(ActualCosts - ActualReceipts)}{NumberofPoundsPaidDuringAdjustmentPeriod}$$

Where:

- (A) The Adjustment Factor is a per-pound value used to bring actual costs and actual receipts into balance, ensuring that future payments are sufficient to cover the cost of implementing the Program in the rate area. The Adjustment Factor shall be applied in only those calculation periods where actual costs are calculated to be greater than actual receipts;
  - (B) Actual Costs are the same as Actual Costs<sub>PresentDay</sub> as defined in Subparagraph (1) of this Paragraph, except that existing contracts and completed land acquisitions are not adjusted for inflation;
  - (C) Actual Receipts are the sum of all offset payments made to the Program to date in the rate area at the time of calculation; and
  - (D) Number of Pounds Paid during Adjustment Period is 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 set to 1,000 pounds until greater than 1,000 pounds have been purchased in that rate area.
- (5) Adjustment Period is 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) When 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) In cases where 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 for each nutrient.

*History Note: Authority G.S. 143-214.1; 143-214.20; 143-214.21; S.L. 1995, c. 572; S.L. 2006, c. 215; S.L. 2007, c. 438; S.L. 2009, c. 337; S.L. 2009, c. 484; S.L. 2009, c. 486; Eff. September 1, 2010.*