

**MEETING OF THE NORTH CAROLINA
ENVIRONMENTAL MANAGEMENT COMMISSION**

**Raleigh, North Carolina
May 9, 2013
Minutes**

The North Carolina Environmental Management Commission met in the Ground Floor Hearing Room of the Archdale Building, 512 North Salisbury Street, Raleigh, North Carolina. Chairman, Stephen T. Smith presided. The following persons attended for all or part of the meeting.

COMMISSION MEMBERS:

Christopher J. Ayers	William L. Hall	Kevin Martin	Dr. Charles H. Peterson
Yvonne C. Bailey	Benne C. Hutson	Jeff Morse	Amy E. Pickle
Marvin S. Cavanaugh	Dr. Ernest W. Larkin	Mayor Darryl D. Moss	Clyde "Butch" Smith, Jr.
Tom Ellis	Steve P. Keen	Dr. David Peden	Stephen Smith
			Steve W. Tedder

DIVISION OF WATER QUALITY:

Tom Belnick	Karen Higgins	Jeff Manning	Jay Sauber
Ted Bush	Steve Kaasa	Susan Massengale	Kathy Stecker
Kevin Bowden	Evan Kane	Matt Matthews	Lois Thomas
Janice Bownes	Cyndi Karoly	Cam McNutt	Julie Ventalaro
Connie Brower	Elizabeth Kountis	Sarah Nienow	Chuck Wakild
Amy Chapman	Gary Kreiser	Robert Patterson	Debra Watts
Linda Culpepper	Keith Larick	Ken Pickle	
Richard Gannon	Annette Lucas	Diane Reid	

ATTORNEY GENERAL'S OFFICE:

Frank Crawley

DIVISION OF AIR QUALITY:

Sheila Holman
Joelle Burleson
Patrick Knowlson
Michael Pjetraj
Angela Terry

DIVISION OF WATER RESOURCES:

Tom Reeder
Tom Fransen
Sarah Young

I. Preliminary Matters

(Chairman Smith called the meeting of the North Carolina Environmental Management Commission to order at 9:05 a.m.)

13-15 Hearing Officers Recommendation on Proposed Modifications to the Consolidated Buffer Mitigation Rule

Summary (Dr. Larkin): I'm going to do a brief introduction before Eric's talk. To tell you a few things, this rule that we're considering is 15A NCAC 02B. 0295. Its purpose is to consolidate buffer mitigation rules and to present alternatives to the restoration and enhancement for buffer mitigation as was enacted in 1999 in GS 143-214.20. We will also then, assuming that the rule is passed in some form, repeal the relative portions of the buffer mitigation rules for the Neuse, Catawba and Tar-Pamlico Rivers, and the Randleman, Jordan and Goose Creek watersheds which are consolidated into this rule that we will consider. The rule has been developed with a public stakeholder process for several years and a formal process for about four years. The Water Quality Committee has been working on it for about four years. I'm sure there was work done before that. It was approved by the Commission for public hearing last year. We had two hearings: on February 6 in Raleigh where there were 13 attendees but no speakers; and on February 12 in Greenville where there were six attendees and two speakers. We did, however receive 11 written comments, some of which were very extensive as you've seen in the package. They covered the gambit, both ends of the spectrum were covered well and had a lot of different opinions in between those ends. I then met with Eric Kulz and Karen Higgins primarily at multiple times. Matt Matthews joined us for one of those meetings. Eric really did a lot of the work on this rule, all through the writing and the word-smithing, and going back and forth, and all that sort of stuff. I really thank him for his job all the way through. I would ask you when we are considering this rule to consider the rule as a whole. I know that's hard to do when we get sort of focused down on a particular thing that each of us cares about. But there are a series of compromises in the rule as it's written now, as is the hearing officers' recommendation. Some of those compromises ended up agreeing with those at one end of the spectrum, some agreed with those at the other end and some are in between, many of them. So with five different options it's unlikely that everybody is going to agree with every one of those options. But I think it's a reasonable process. Obviously, I think that because that's what I'm bringing forward and I recognize that there will be debate and discussion about these options which is why they were submitted as options in the first place for us to consider and the public considered them fairly extensively. The process I'd like to use for the next little while is just ask to Eric to give a presentation. The slide presentation will be similar for what he did at the hearings and also the presentation that the Commission got when we approved the rules to send out to public hearing. Then I'd like to begin the hearing officers' recommendations by going through each of the options individually and asking for discussion. I will make a motion and ask for discussion and a vote on each of those five separately. Then, if we confine the discussion to each option then after we get through those options, we can then have a motion to accept the rule as a whole and then discuss other issues that are not in the options, but that there's still a fair amount of other substance to the rule that some of you may want to talk about; then to vote on that rule as a whole. If that passes that rule in some form we would need then to have a motion to repeal the relative portions of the current buffer mitigation rules in each of the six areas that we're talking about. Finally, after the rule has passed, if it is or even if it's not when the discussion is finished,

I have a couple of other recommendations for further study that I'd like to make. So that's the plan.

Eric Kulz: Just a recap. A lot of you have seen these slides a bunch of times. The original statutes required the EMC to adopt rules concerning construction of an alternative measure of buffer mitigation that reduces nutrient loading as well as or better than the riparian buffers lost. That never made it into the rules that we have currently in place. We also consolidated the rules to make them easier to understand to be consistent between the various buffered watersheds and provide greater flexibility for compliance. How we do that is introducing some of these various alternatives would actually increase the opportunities for buffer mitigation as opposed to simply finding buffer streams that do not have trees and traditional buffer mitigation. It also makes existing rules consistent with the principles and Executive Order 70 and session law. As Dr. Larkin indicated we had the public notice for two months. We had two public hearings, February 6 in Raleigh and February 12 in Winterville. We got oral and written comments and those are all summarized in the hearing officers' report. I'm going to go through some of the changes and additions. As Dr. Larkin indicated there are some options that we wrote into the rules that we're asking for guidance and recommendations on which should appear in the final rule. We received a number of comments regarding the location of mitigation relative to the impact site. Option A is the way that we currently do mitigation. You calculate your mitigation requirements and then you simply either replant that much buffer or purchase available credits from either a mitigation bank or the EEP. Those that are one to one regardless of where the mitigation is, although if we go to an adjacent eight-digit HUC we apply it to the one multiplier, although we have not had anybody do this. Option B gives an incentive for onsite mitigation. It reduces the mitigation requirements a little bit and then within the eight-digit HUC not onsite, it's a 1:1 ratio. Within the eight-digit HUC it basically increases the required mitigation, kind of as an incentive to get the mitigation closer to the impact site. Option C is similar to Option B in that it gives incentives for onsite or within a 12-digit HUC, but it doesn't provide that multiplier within the eight-digit HUC. So we'll be asking for which of these three should appear in the final rule.

Some alternative buffer mitigation options that we have included in the rule, non structural or vegetated options. We have planted buffers generating buffer credit from coastal headwater stream mitigation sites. These are not traditional stream restoration projects. They don't involve creating a bed and bank. They're kind of wetland/stream hybrid projects. Non-subject stream buffer restoration enhancements – the way the buffer rules read are a stream is subject to the buffer rules if it appears on either the USDA soil survey map or the USGS topo map. There are some streams that do not appear on these maps and may provide opportunities for buffer restoration enhancement. Narrower buffers on urban streams – we've got a lot of input from municipalities that they would like opportunities to do buffer mitigation but very often can't find fifty feet. Enhancement of grazed forest riparian areas – we have sites in the state that have cattle within them but they have trees and the exclusion of the cattle from those buffers, we recognize would give us water quality improvement. Buffer preservation – the buffers are obviously protected by the buffer rules but there are a whole table of uses by preserving buffer and putting it within conservation easement it gives it a maximum amount of protection. We propose preservation of non-subject streams and those are streams that don't show up on the maps are not subject to the buffer rules at a 5:1 credit ratio which is not applicable in the Randleman because the Randleman has a kick-in clause. Then for preservation of subject

streams, we have two options. Option 1 would simply be to credit them at a 10:1 ratio. Again, we have gotten input from municipalities and counties regarding opportunities for mitigation on urban sites. Option 2 would be 10:1 credit ratio in rural sites and 3:1 in urban sites. Another one from municipalities was if a sewer easement is present – the way we do it right now is Option 1 if there is an easement present in Zone 1 or Zone 2, then the area with an easement is not suitable for mitigation. The site may get credit for narrower buffers if it's an urban site under the urban buffers of the rule. But Option 2 is allowing for credit to be generated within the managed portion of the easement in Zone 2 so it would not have to be trees. It could simply be grass, you know vegetated, managed vegetation and the fuse flow has to be maintained. So we will be looking for a recommendation for which of these should appear in the final rule. We have structural or BMP options – the use of things like constructed wetlands or other types of water quality BMPs that remove nutrients and pollutants. For using these structural BMP options we have a 1:1 restoration requirement for the footprint of the actual impact prior to using structural options to satisfy the remainder of the mitigation requirements. If the BMP is required by the local, state or federal rules or regulations, it cannot generate mitigation credit. Retrofitting or expanding an existing BMP would be allowed and the balance of the nutrient removal could be used to offset buffer impacts. Again it's not required by other local, state or federal rules. The BMP must provide at least 30% total nitrogen and 35% phosphorus removal and must follow the DWQ BMP Manual. Then finally, the BMP would require bonding and endowment for long-term maintenance of the structure. We have a section in here that's other alternative buffer mitigation options. There may be something new out of the box, you know some alternative that we have not considered. We would consider these on a case by case basis. They must meet our exceedance removal function of the buffer for nitrogen and phosphorus obviously. It would have to meet other requirements related to bonding, maintenance and long-term endowment. Any alternatives that people bring to us would be put out to public notice and comment. DWQ would then, based on the public comments, present recommendations to the EMC. Because of the length of time it has taken us to get this rule in place, we have some requests by mitigation providers to allow projects that are already in the ground, but not generating buffer mitigation to credit, to be able to provide those credits. Option 1 is the projects however constructed, if they are within the required monitoring period, which is generally five years, those sites would be eligible for use as alternative buffer mitigation. Option 2 provides a 10 year period from the effective date of the rule. It doesn't take 10 years so we're looking for guidance on those options. Finally, credited counting on mitigation sites – I got comments on a wide variety of these options. Option 1 is the way we are currently doing it. Buffer and stream mitigation on a stream site – the buffer and stream credits are independent of one another and are sold independently. Option 2 would tie stream and buffer credit together so if someone impacted a stream with associated buffer impact that could be offset on a stream mitigation site that had fifty foot buffers. But any additional buffer mitigation need would have to be acquired elsewhere which could potentially result to stranding stream credit if somebody were to sell buffers on a stream site. So Option 2 basically says that anybody needing mitigation would likely have to go to multiple sources for it. Option 3 – if a site is constructed to generate stream mitigation credit, you can't generate riparian buffer credit. We're looking for a recommendation for options here. For Options 1 or 2 any wetlands within the fifty foot buffer can be used as wetland credit or buffer credit but they cannot count as both. Dr. Larkin is going to present his recommendations.

Dr. Larkin: Thanks Eric. That was masterful. I think you probably could have done that without the slides. His knowledge has been very helpful. What I may do then is proceed with the series of five options starting with the first one which I thought would be a good place to start, which is the zonal multiplier. We called them multipliers and that sort of terminology we were asked by a commenter to be consistent with what we called these multiplier or ratios and all that, so we decided to go with ratios. We will be calling them ratios.

Mr. Morse: When you present them can we have them back on the screen, each one that we talk about? Are they available?

Chairman Smith: The powerpoint is available online.

Dr. Larkin: This is in paragraph e(1) if anybody wants to look at the recommendation.

Chairman Smith: It's on page 3 of the written rule.

Dr. Larkin: Or on page A185, which is in the written report. Option A as Eric said you can see the numbers, there's no incentive to put mitigation any closer to the buffer impact. Option B again you can see what the numbers are. There is incentive for onsite or for onsite mitigation but in this instance there's a penalty for the current eight-digit HUC at location. Option C has more incentive to put the mitigation as close to the impact as possible. But no penalty for the current requirement for eight-digit HUC. Option A was favored by one commenter, Option B by one commenter and Option C by three commenters. The hearing officers' recommendation is Option C. The rationale I've just kind of been through.

Dr. Larkin: I would make a motion that we incorporate Option C in the rule with the language that's in paragraph e(1) on page A185 of the hearing officers' report. (Mr. Morse seconded.)

Mr. Martin: Steven, I got a call from someone who misunderstood the .75 and thought it would result in a net less than 1:1 mitigation, but they had forgotten that in our buffer rules in the various counties impacts to Zone 1 required 3:1 mitigation and Zone II 1:05 to 1. So those multipliers applying the permitting before this does, so none of this would ever result in less than a total 1:1.

Dr. Larkin: Good point.

Chairman Smith: Other comments or questions?

Mr. Smith: How does this, Dr. Larkin, go as far as what is required by the feds. Are we adding another stimulation to it to where we are adding more to it than what the feds are doing? They've introduced that House Bill Senate 781 a while back and they've got a couple of other things in the general election they've done. I just wondered if this is running with the federal regulations or are we adding something more to it?

Dr. Larkin: I'm not sure.

Mr. Smith: On the mitigation on buffers, is that also a federal?

?? No.

Dr. Peterson: There is no federal counterpart that matches this directly or indirectly as far as I'm aware.

Chairman Smith: I see a general shaking of heads "no" indicating agreement with what Dr. Peterson just said. So I think the answer to your question, Mr. Smith, is it doesn't increase the federal standard because it's not a federal standard. Is that roughly correct?

Mr. Martin: I think to clarify it more is we're not adopting anything new to require mitigation. This is only about how the mitigation is done. The rules are already in effect that require stream buffer mitigation. Now the legislative could decide to do away with those rules but what we're doing today does not adopt new buffer rules. It just adopts the way you do the mitigation for impacts for buffer mitigation that's already required by existing rules.

Chairman Smith: It makes those mitigation provisions and existing rules consistent with one another. Whereas now Tar-Pamlico rules have one set of considerations, the Neuse and so forth. Other comments, questions or discussion? Then we have a motion to adopt Option C and rule in e(1) of the rule. (The vote was one "No" and the remainder voted "Aye". The motion carried.)

Dr. Larkin: The second option has to do with sewer easement within the buffer. It's paragraph g(10); it was originally when it went out. We've moved it to k2e, the non structural alternatives because we thought it would fit better there. Option 1 – it's written up there, says that if it is in Zone 1 or 2 then that site is not suitable for buffer mitigation. That is one of two of the proposed mitigation site. Option 2 says that if the sewer easement is in Zone 1 the site is not suitable for buffer mitigation. But if it's in Zone 2 it is suitable if several conditions are met. The easement is 30 ft. wide, it's maintained and in Zone 1 has been restored. There were two commenters who favored Option 1, three commenters favored Option 2.

Dr. Larkin: The hearing officers' report favors Option 2 and recommends that. The rationale being that with the first 30 ft. of buffer restored we get some hard to find areas of urban mitigation which can be closer to the impact. So the motion is that we include Option 2 in the rule using the language in paragraph k2(e) on page A192 of the hearing officers' report. (Second by Dr. Peterson)

Chairman Smith: Discussion?

Mr. Smith: What about water lines, power lines and all of those? They're like buffer zones that you know also like sewer. Is this all municipalities or agencies in water and sewer, they maintain the right of ways? That's what I'm wondering, just sewer. There's only one mentioned instead of water lines and towns that have their own power lines and everything else. They are maintained and I was just wondered why just sewer?

Dr. Larkin: Could somebody just help me with that question?

Eric Kulz: We were specifically requested for sewer. That's where all of the discussions lie during these stakeholder meetings. Again, we got a lot of input from municipalities and they were very specific on sewer. Very often that's where the sewers are, down along streams and valleys.

Mr. Martin: Personally I would be fine with expanding to the other easements. But I think because of what you just said, Eric, the gravity sewers follow the streams that the others are usually perpendicular crossings that are not near the stream. So it is going to be so limited as to any effective mitigation. I doubt they would be used but if that was proposed as a change, I don't see how it's a problem. I just question if it's going to ever be applicable. But it could be.

Mr. Keen: Just a thought though in municipalities versus rule. Perhaps was it thought that there might be offsite drain fields for subdivision development?

Mr. Martin: That was not my understanding. It was pretty much like Eric. The municipalities requested it specifically for sewers because I think that's where they felt like they had a place that they could actually get some credit and they didn't suggest the other ones. I'm assuming because they didn't think it would be that much opportunity there.

Dr. Larkin: That has not been part of the discussion.

Chairman Smith: Good question Mr. Smith. Almost stumped them.

Dr. Peterson: My view is that this is likely not to be something that would play a role because of the inappropriateness of it. That is to say the low lying areas of sewers are there because of gravity, and that doesn't apply to the other utilities. But more than that to make a change at this stage would go beyond of what we took out for comment. So if we had an interest in this I think we would want to take out that specific issue and solicit comments from municipalities and other interested parties.

Chairman Smith: That's a good point. It may be the thing to do is to make a note here and make inquiries about whether or not there is any demand on the part of the municipalities for water and power lines. If so, then that's a consideration for the future Commission to put out to public comment period.

Mr. Morse: Mr. Chairman I'm not speaking on behalf of the League, but I know the League has thoroughly reviewed these buffers and I don't think they had an interest in dealing with electric city or electric lines. I'm sure that the utility companies, if they had a concern they would have voiced it by now anyway. I just don't believe that's a pertinent issue at the moment.

Chairman Smith: Ok. Other comments or questions? We have a motion and a second. The motion is for adoption of Option 2 under g(10). (The chairman asked for a vote and the motion carried unanimously.)

Dr. Larkin: The third option has to do with projects completed and released as of the effective date of the rule. The first option is written here such that projects that have been constructed that

are within the monitoring period are eligible. It does not say but implies that those that are outside the monitoring are not eligible. I'll refer to the language in just a minute. Basically, in Option 1 these projects are not eligible if they've already finished their monitoring period. In Option 2 they are eligible for 10 years from the effective date of the rule. One commenter favored Option 1 and four commenters favored Option 2. The hearing officers' recommendation is Option 2. The rationale being that the law directing the EMC to prepare these buffer mitigation alternatives to buffer restoration and enhancement was enacted in 1999. There had been people who have acted since then on the basis of the law and it has taken us a fair amount of time to catch up with the law. So that's the reason that Option 2 is favored.

Dr. Larkin: My motion is that we include Option 2 in the rule using the language in k1(b) which is on page A-190 and 191 of the hearing officer report. (Dr. Peterson seconded.)

Chairman Smith: We have a motion by Dr. Larkin and a second by Dr. Peterson that we adopt Option 2 Rule k1(d) using the language that is now in k1(b) which is clear if you're looking at all these documents.

Mr. Phillips: I'm sorry. I really don't understand what these are likely to apply to. These would be projects that would be done for mitigation purposes but not otherwise been used as credit anywhere else or they would not have been eligible is the idea, where they would not have been allowed previously? But why would they have been done if not credited previously?

Dr. Larkin: I think there's a rule earlier that says that is the case.

Eric Kulz: One of the things that this is pertaining to is, we have some sites that are out there now that the way the buffer rules read in buffer mitigation is restoration and enhancement of a non-forested buffer. These sites actually have canopy. They have large trees. These are some of the ones that we're talking about with excluding cattle and the projects areone of them is five or six years old already, and the others are all about four years old. The way the buffer rules read now is they can't be used for buffer credit. But if we start going with the cattle exclusion and then allow this time period, those sites would be usable for buffer credit.

Mr. Phillips: But would those exclusions have been done under some other program that they're required to do such as the nutrient reduction program?

Eric Kulz: No. They couldn't be used for nutrient buffer. It would have to be one or the other. They were done and the rules as they were written at the time were not interpreted properly by those providers.

Mr. Keen: So if I have a (PUD) planned unit development in process, how would that affect more time?

Dr. Larkin: Can you repeat the question?

Mr. Keen: If I'm a developer and have a Planned Unit Development over a 10, 15 year period and this all of a sudden comes to pass.

Mr. Martin: I think the confusion is the use of the word project instead of mitigation project. This is exclusively related to mitigation projects that were done in the last 10 years, not like a subdivision project or development project. It's exclusively to that unless I'm misinterpreting the rules.

Dr. Larkin: That's right.

Mr. Martin: So I don't think it would affect the PUD or anything at all because it wouldn't be normally a mitigation site. But if you had a mitigation site within the PUD that met this criteria it would apply.

Mr. Keen: That is correct. Ok.

Chairman Smith: Other comments or questions? We have a motion and second that we adopt Option 2 in k(1) d. (The vote was unanimously and the motion passed.)

Dr. Larkin: The fourth option has to do with the preservation ratio in urban areas. It's k2(c) on page 191 and 192. Option 1 says that the preservation site must be 10 times larger than the mitigation area required on all sites. Option 2 says the preservation site must be 10 times larger than the mitigation area required except in urban areas where it's a 3:1 ratio. Two commenters favored Option 1 and four commenters favored Option 2. The hearing officers' recommendation is Option 2, the rationale being that similar to the second option, I think. Option 2 would incentivize preservation to be done in urban areas where green space and buffer function are probably more threatened and needed than in non-urban areas. In addition it would have incentivized mitigation closer to an impacted urban buffer.

Dr. Larkin: The motion is to include Option 2 in the rule using the language in paragraph k2(c) on page 191 of the hearing officers' report. (Mr. Morse seconded.)

Chairman Smith: We have a motion by Dr. Larkin and a second by Mr. Morse. Comment by Mr. Martin?

Mr. Martin: I'm not going to propose any change. I just wanted to comment that I understand the 3:1 ratio on the urban. It makes sense to me. Unfortunately, I think only one commenter (I hadn't heard from anybody else on the EMC)...to me the 10:1 credit for preservation I think you should get more credit on subject streams. I think there's a lack of understanding of what you can do within the buffers under our current rules. For example on a property for timber management you can basically go in and pretty much remove just about everything within the buffer once every 20 years of high value trees. You have to leave certain ones and stuff. But if you saw a picture of what is allowed under the rules you might think that there was a better value to preserving those buffers without allowing them to be cut voluntarily and given the incentive to someone that wants to do that to protect a resource rather than give a high credit for an urban resource that's already degraded and try to come back and recover it. Not that I disagree with the urban. But it's like if we could prevent it from happening in the first place I think we should. I'm just going to make that comment. I'm not proposing a change but I would have thought

something in the 7 or 5:1 ratio would have been more appropriate. I don't think that with 10:1, you're going to have a whole lot of takers unless they've got huge tracts of land.

Ms. Bailey: I was going to say I was actually thinking the same thing. I'd be interested in seeing what the current rules would allow and because I was imagining the same thing that a lot of it could be developed or taken out, whereas the greater value is a natural buffer and it should have more credit.

Dr. Peterson: I don't like to derail this direction because it sounds interesting and perhaps profitable. But in that regard whether the buffer that you create is partnered with other buffers in a single stream to me would make some merits to incentivize as well. But that makes this even more complicated. I just wanted to mention it just in case we have a vision of something even bolder and better for the public interest in the future.

Chairman Smith: Mr. Keen said that's what amendments are for. That's true. We can also make a note of that and make inquiry and anybody brave enough could come back with some fine tuning. What's your pleasure, my friends? We have a motion and a second. Any further discussion? The motion is for Option 2 of k2(c). (There was one opposed and 16 favored the motion. The motion passed.)

Dr. Larkin: The fifth option that we considered is to deal with the question of whether we allow a buffer and stream mitigation on the same site or not. Option 1 says that buffer mitigation credit can be generated on stream mitigation sites. Option 2 is sort of a hybrid and says that if streams and buffers are both impacted then a single site can be used to mitigate both. But if only buffer impact needs to be mitigated the mitigation can be done for the impacted buffer only, not for any stream and not only any stream mitigation site. Option 3 says that the buffer and stream mitigation credits are not available on the same site with the exception of the coastal headwaters stream mitigation sites. We'll talk about that in a minute. There were three commenters who favored Option 1. Nobody favored Option 2 and three commenters favored Option 3. The recommendation of the hearing officers is Option 3, that we not allow the mitigation credits on the same site. The rationale is that this option is clearly defined and would result in the most environmental benefit. Its cost is offset by the alternatives and by accepting coastal headwaters stream mitigation sites. The exception to allow the coastal headwater stream sites is because they would otherwise not be allowed in the rule if we go with this option. They were in the rule as it went out to public hearing. They were included in the original rule as a non-structural option. The reason to include the headwaters of coastal streams, but not those in other areas of the state, is that these coastal headwaters are generally so diffuse as to be difficult to define and identify before restoration and that therefore they may not be subject to buffer rules as opposed to those in upland areas which are more clearly subject streams and do have buffer requirements.

(Dr. Larkin: So the motion is to include Option 3 of this fifth option of the rule using the language in L3 on page A194 which includes the exception for coastal headwater stream mitigation sites which could be used for buffer credit as in k2(a) which is the paragraph for the coastal headwater streams on A191.

Chairman Smith: We have a motion by Dr. Larkin and second by Mayor Moss. Discussion?

Mr. Martin: I think Dr. Larkin has done a great job on this. I wouldn't have wanted to undertake this thing the way we had it structured for him. But on this one I do disagree and I am going to propose a substitute. I prefer Option 1 and I'll tell you why. As you mentioned, the commenters were evenly split. But at least one of the commenters was either confused or misrepresented what they referred to as stacking. I've heard it referred to as double dipping that you could get buffer credit for the same square foot of area that you're also getting stream credit for, and that's not correct. The stream is here and the buffer is measured from the edge of the stream. The buffer program stream mitigations are two totally different programs, buffer mitigations under the buffer rules, stream mitigations under the 401/404 program. I'm concerned that we're going to incentivize people who have, for example a ditch, straighten out a stream in the middle of a cow pasture to say, "Hmm I can make more money doing buffer restoration. I'm going to do the buffer restoration. I'm going to leave that stream alone and not restore it because I can't do both." There's nothing that would prevent us from doing that. It's also a lot cheaper to do buffer mitigation than it is to do stream restoration. As hard as mitigation sites are to find, I think that it's a huge mistake if we cut that out.

Mr. Martin: I would propose a substitute motion that Option 1 be adopted with the caveat that was at the bottom of the screen that I do agree with that was double dipping as it you cannot get wetland restoration credit and buffer restoration credit on the same square foot of property. You could do one or the other. That was in Eric's presentation and Dr. Larkin's information as well. So I would agree with that caveat that you can't double dip there as part of my motion.

Chairman Smith: Motion by Mr. Larkin and second by Dr. Peterson. Motion to make a substitute motion by Mr. Martin seconded by Dr. Peterson that we adopt Option 1 of L5.

Dr. Peterson: To explain a little further, I think Kevin had incorporated this in his explanation which I agree with. But I think there is potential synergy and value in having on the same site the stream restoration and the buffer added to it. So I think we gain by having them done together and I don't think it's double dipping. You're getting separate programs and you're doing separate things.

Mr. Phillips: Clarify this for me if you would please. In the stream restoration there is no requirement to have a buffer?

Mr. Martin: By who?

Mr. Phillips: Well, under the 401 program.

Mr. Martin: I think mine is a converse. Whether or not if you do stream restoration credit you do the buffer. It's sort of the converse logic. I would choose not to do the stream and I would only do the buffer because the buffer is cheap and you can get a lot of money. The stream's very expensive, very risky as if it fails, then you have to redo it. So whether or not if the Corps or somebody else want you to do buffer restoration. Some places you can and some places you can't. My concern is not that. My concern is that people will elect just not to do it because for doing a mitigation site, and I'm not talking about the guy permitting; I'm talking about the

mitigation banker doing a site, making a financial decision. I'm going to do the buffer instead of the stream. Why do both?

Chairman Smith: Mr. Martin, I understand your point but I thought stream restoration entailed buffers as well, that you could not restore a stream without also including buffers. That is not just changing a straightened out stream back into its meandering crooked path but it also includes buffer restoration. My understanding is that if you do stream restoration and you get credit for that you have to do buffer along the way or you don't get credit for stream restoration. Why should you, in addition, get credit for buffer restoration when in order to get credit for the stream restoration you're required to do the buffer. I understand your converse point.

Mr. Martin: And I agree with what you and Dixon said. That's not my concern that if you do the stream restoration you have to do the buffer. That's all well and good. My concern is losing good mitigation sites where you choose not to do the stream restoration, just financially because it makes sense and you're picking between buffer and stream, and you just choose to give up a good site. Then as Dr. Peterson said you don't get the synergy of having them both done which is an environmental benefit, and I'd rather incentivize somebody to do them both than to do what's just financially best for them on that one project.

Mr. Phillips: Isn't stream restoration driven by stream impacts? So if there's stream impacts you have to do stream restoration.

Mr. Martin: I'm not saying somebody won't do it somewhere.

Mr. Phillips: But you're suggesting that somebody would come in and do stream restoration just as a way of them generating credits even though it's not required stream impact offset.

Mr. Martin: No. I'm suggesting if I had a site that I was doing mitigation on and this rule passes with Option 3, I would choose to plant the buffer which is cheap as dirt, make my 96 cents a square foot and walk away, and leave the stream degraded. Instead of restoring the stream. Because there's no incentive for me to do the stream and the buffer, I'm better off doing just the buffer.

Mr. Phillips: There's not a market demand for....

Mr. Martin: There's a market demand but I'm looking at it on a project basis. I mean there may be a market demand for two million dollar houses but that demand is this big, and with the buffers you've got buffer impact demand and nutrient offset credit demand.

Chairman Smith: I understand Mr. Martin's point very well and I think it's a good point. I think there are instances under Option 3 in which people will choose to do the buffer rather than the stream restoration. The reason I support Option 3 is the overall water quality impact. There will be some loss of stream restoration coming from our adoption of Option 3, but I think if we adopt Option 1 the greater negative impact on the overall water quality is by allowing the credit for the same stream section in effect twice. I understand the different aspects of that same stream section which means that there's that much more impact that is offset, and that impact that is

offset has negative impacts on water quality. So I think overall the negative impact on water quality is greater without Option 1 than it is with Option 3. I may not have said that as artfully as I wanted to, but that's why I support Option 3 for what that's worth.

Dr. Larkin: I think that was our primary rationale that was in our mind in this discussion.

Dr. Peterson: I appreciate both of these arguments and I wonder if Eric or someone has evidence, data or some kind of notion of which of these two is more likely to be applied and which effect, the good one or the bad one is more likely.

Eric Kulz: Option 1 is the way that we're doing it now. Bear in mind that when there's buffer mitigation requirements there are the multipliers that are applied to the Zone 1 and the Zone 2 impacts. So we're still getting a net gain of buffers any time we have a mitigable impact. Option 3 is going to significantly increase the cost of mitigation projects and obviously, with the current discussions of the economy and so on, so forth I'm not sure that would be taken favorably or be a significant increase in the cost of mitigation. That's certainly a concern.

Mr. Morse: I'm not sure I understood what you just said. If we choose Option 3 it's going to increase the cost?

Mr. Martin: That's in the fiscal note.

Mr. Morse: So we choose Option 1?

Eric Kulz: In Option 1 it would stay the exact same as it is now.

Mr. Morse: Why are we increasing the cost?

Eric Kulz: Because if you cannot do buffer mitigation on stream mitigation sites, you either have to start doing what Mr. Martin was talking about on choosing between either doing stream mitigation or buffer mitigation, it's going to result in using up sites faster and mitigation sites are already very expensive. Potential mitigation sites are already very expensive. By allowing there to be both buffer credit and stream credit, it provides an incentive to do both the stream and the buffer, and it also gives added funds to perhaps purchase a bigger or better project.

Mr. Morse: That sounds to me like Option 1 is the best option.

Chairman Smith: Mr. Morse, I think Mr. Martin is right. He is hesitant to ask that question because that's our job and not his job. But what we're being asked tothe question before us if I'm saying what I think is a simpler way, maybe an oversimplification is: This is one of those situations in which we are called upon to balance cost and water quality. I don't doubt, having looked at the fiscal note, that in one sense the cost of Option 3 is greater. There are some of us that believe the water quality benefit is greater and that's just a personal call on how you go about balancing that.

Mr. Morse: A lot of times I like to hear from the staff what their recommendation is and I know we make the ultimate decision but I'm not sure we have never or had not asked staff what their recommendation would be on an option. What would the professional staff feel would be the best option? We weigh theirs versus what we feel collectively as a board. My asking the staff what he felt would be the best option – why would that be inappropriate?

Chairman Smith: I don't say that it is inappropriate. I was just explaining his hesitation in answering it. But it's ultimately our decision.

Mr. Morse: I realize that. Ok.

Ms. Deerhake: I wonder if it might be possible to resolve this by phrasing Option 3 a bit differently. What I am leading up to is that perhaps there's a traditional amount of buffer that goes along with the stream restoration, but sometimes there can be benefit by putting additional buffers stacking it on top of that. So if you had a phrasing that would permit additional buffers beyond what traditionally happens with stream mitigation, would that be helpful phrasing it that way? Because there could be added nutrient removal that way.

Mr. Martin: There is potential under these and the existing rules to make the buffers wider than what's required. But I'm kind of going back to Dr. Peterson. We've hashed this around for two or three years. These are the three options. I think we need to choose one of them and if we wanted to do anything like you suggest, we'd have to send it back out, start over again and maybe that's something to consider for another day. I don't think at this point we can make...I think that would be a significant change.

Mr. Cavanaugh: I want to dig back in for just a minute. As I understood we had the same favorable comment from Option 1 and Option 3. But then I heard an input, I think from you Kevin that one was confused, which side was confused? Three or one?

Mr. Martin: In my opinion one of the commenters at least on Option 3 was either confused or misstated regarding the double dipping and stacking comment by indicating that for the same square foot of land you would get both stream and buffer credit, which is wrong. If you've got a ten foot wide stream you don't get any buffer credit for that ten foot wide of stream. It's the fifty feet or beyond on each side. I agree with Dr. Peterson that if there happens to be wetlands in that buffer that you restore, you should not be able to get buffer and wetland credit. You should only be able to get one of those. Because in that case it would be the exact same square foot of land. I hope I didn't confuse you.

Mr. Cavanaugh: If we chose Option 1 and there was the existence of the two things, is there anything in Option 1 that rules that out, that you couldn't double dip?

Mr. Martin: Yea, at least in the stuff that I saw that went to public hearing and it was on Eric's slide. It referenced that if Option 1 was chosen you would not be able to get wetland and buffer credit on the same square foot. You would have to choose one or the other and that would be part of my motion.

Mr. Cavanaugh: Thank you.

Dr. Larkin: I think in terms of the commenters and who's mistaken, misspeaking or whatever Kevin correctly said in his opinion. These are opinions and people do point fingers and you don't understand, and that sort of thing. So I don't think that's an automatic one way or the other with this. Similarly I don't think the economic issue is an automatic "Let's do this because it's cheaper" sort of thing. There is a value judgment to be made. Not only in terms of the return on the investment, say of clean water and clean streams and all that sort of stuff, but also in terms of looking at the rule as a whole. One of the different options when you look at the fiscal analysis some things are more expensive. Others we save money on. There's a tradeoff in that. I made the comment earlier and I'll make it again. I'd like you to consider the rule as a whole, not saying that amendments can't be made because obviously they can. But I think particularly from the fiscal perspective it's worth looking at the entire rule.

Mr. Phillips: So Kevin, from just an economic standpoint for a banker going out to do projects to banks is having an opportunity to do stream restoration even though you don't have an immediate contract to generate stream restoration. Are the economics under number one such that you might likely decide to go ahead and do stream restoration as well as the buffer?

Mr. Martin: Absolutely. No question about it.

Chairman Smith: Other comments or questions?

Dr. Peterson: I get the feeling that we're going much more towards banking as a business in the context of how we get our restoration. Is that a fair characterization of where this has gone?

Mr. Martin: About legislative mandate you've got to go there first.

Dr. Peterson: Ok. I take it you are not compelled to change your mind. You think that the Option 3 is preferable from the basis of the total package of how you've made your recommendations.

Mr. Martin: One thing I'd just want to say. Some of the things I said were opinion but as far as the commenter being confused or misinterpreting there's no confusion in this statement. "Credit stacking is proposed in Option 1 of the proposed rules, provides no environmental benefit. As written Option 1 would allow a single square foot of property to provide a mitigation credit for both stream restoration and buffer mitigation or nutrient offset." That is completely false. That's not an opinion; that's the fact. So I don't know if they misinterpreted, misunderstood but they were wrong in that comment. That's my point. Some of the other things I said were opinion.

Mr. Phillips: Isn't that true to the extent that as a part of restoring the stream you have to also restore the buffer so that you would get credit, to that extent you would be getting credit to some extent for the same square footage?

Mr. Martin: No.

Mr. Phillips: You wouldn't get credit for the area of the stream but there would be some buffer that you'd be getting credit for.

Mr. Martin: If you do stream restoration you get credit for the linear feet of stream restoration. You get new additional credit for the buffer. If you choose not to do the stream you get credit for the buffer restoration. You get no credit for that piece of stream in the middle so the exact square foot of property is not providing stacking or double dipping. That's my only point. It's not what's required when you do stream restoration. It's that statement of the same square foot of property getting double dip is a non-factual statement. Whereas, in Dr. Peterson's concern if you do wetlands and buffer within the buffer that is double dipping and you do get credit. That would be stacking, to which I am opposed.

Mr. Phillips: But the point is as I would understand it is that we're talking about environmental. We're talking about what actually happened on the ground. When you restore a stream you've got to restore some buffer as I understand it. You have to do some buffer. It has to be a buffer, says here with a stream. Right?

Mr. Martin: You have to do which?

Mr. Phillips: Don't you have to ensure that there's buffer on that restored stream?

Mr. Martin: It depends. Sometimes there's no area that's adequate for the buffer so you do what you can. In a perfect site you would hope to have fifty feet or more for stream restoration. But there's very many stream restoration sites that are due to damage and urban streams are hurt where there is no area to do buffer cleanup. Clean Water Management Trust Fund funds a lot of those.

Mr. Phillips: Well I think that would be a different case because there wouldn't be any buffer to get credit for either there.

Mr. Martin: Unless they volunteer to do it. There's a benefit to restoring streams. Sometimes when you don't restore the buffer, the property owner is not willing to do that.

Chairman Smith: I think what we have here is a semantic difference rather than a substantive difference. In my assessment, in order to do a stream restoration almost all of the time, except for the exception that Mr. Martin just mentioned and there is no land available to do buffer. But part of the definition of stream restoration is buffer restoration as well. You don't get full credit. You don't get credit for the stream restoration unless it includes good buffers to filter the water. It's true that your stream restoration credit is linear feet of the flowing stream. That stream restoration credit of linear feet includes whatever buffers come along with those linear feet. The reason some of us maybe carelessly think of that as Option 1 as stacking or double dipping is that in order to, under Option 1, you get your linear, you get your credit for the linear feet of the flowing stream for stream restoration which must include buffer restoration. In addition to that in my thinking, on top of that you get credit for the square footage of the buffers of the linear feet of that flowing stream that you've resolved. You've made your point there effectively. You see

those as totally different things because one measures by the linear footage and one measures by the square footage. A number of us see that as double credit and a negative water quality impact.

So we have a motion to substitute Option 1 and a second that we substitute Option 1.

Mr. Keen: Mr. Martin made it very clear for clarity. Thank you.

Chairman Smith: The first thing we do is vote on whether or not we're going to accept the substitute. If we do accept the substitute then we vote on the substitute as the primary motion on the merits. If we don't accept the substitute we go back to the original motion.

Mr. Cavanaugh: Before we take a vote I'm still a little confused. The purpose is what I'm looking at. Is Option 1, if it wasn't broken then Option 3 seems to be that we're fixing something that's not broken. I'm a little confused on that. Since they seem to be so close together on what the end result is, am I missing something?

Dr. Larkin: I think the chairman talked about that pretty well. They're just two different opinions as to whether the current situation allows people to get both credit for the linear feet of a stream that's restored and to go off and destroy buffers somewhere and get buffer for credit on that piece of stream. Some people think that is not appropriate, that's getting two sites for the same, you're getting two credits for the same action. Others don't. Kevin, I think pretty eloquently presented the other option.

Mr. Cavanaugh: So basically Option 3 has been put in. But we've been doing the current status Option 1. The current status is Option 1 and we've been doing that. Option 3 is put in as I'm hearing that there is a danger of double dipping. How does that change the water quality?

Dr. Larkin: What it does is in Option 3 there is the buffer that's impacted is mitigated on another piece of stream. That's one reason it's more expensive. It does require more stream restoration or buffer restoration or both of those. There's more activity on other streams to mitigate what the damage has been.

Chairman Smith: I think the answer to try to say the same thing. On Option 3 there is no change in the water quality impact for the stream mitigation site itself. But if you allowed Option 1 somewhere else somebody could take those buffer credits and have a negative impact on another stream because they've got the buffer credits from the stream mitigation site that we're looking at here.

We have a motion to substitute Option 1(and we have a second on that. Eleven voted in favor of the substitute motion and 6 opposed.) The substitute motion is accepted and becomes the primary motion. We have a motion and a second that we adopt Option 1 of L5. Any further discussion?

Let me ask a procedural question. If a person seconds a motion and then votes against it does that nullify the second?

Various: No.

Mr. Phillips: I'm frustrated by this because I'm impressed by Kevin's argument that if we move away from what we're currently doing that it's going to dis-incentivize stream restoration. What I don't know is what the data actually is as to what extent that would actually happen. It's also concerning to say generally we're going to greatly increase the cost of mitigation stream and buffer mitigation given the pressures that this overall program is under. So that leaves me in a state of some consternation about what to do here.

Dr. Peterson: That's exactly my position as well, consternation.

Ms. Deerhake: After we had the incident a few years ago the so called stacking incident, didn't the Commission act on that to disallow it. So why is this reappearing? Did we not act on it? Or was there legislation forbidding?

Chairman Smith: Can somebody help us out that has a better memory than me? I've got a great file on what Marion is talking about but I can't piece that together in my mind right now.

Eric Kulz: I think we had a situation a few years ago where we accepted buffer mitigation credit on sites with wetlands. That was the bill. That was the double dipping.

Chairman Smith: Other comments or questions? Dr. Larkin's original motion was for Option 3. Mr. Martin made a motion to substitute Option 1. We have accepted the substitute motion. It becomes the primary motion. We're now voting on the merits of Mr. Martin's motion that we adopt Option 1 to L5. (Eleven voted in favor of Option 1 of L5 and six opposed.) Option 1 carries.

Mr. Martin: Did the section on the preservation credits for non mapped streams, did you just now go over it and was I asleep?

Dr. Larkin: No. It wasn't an option.

Chairman Smith: It wasn't one of the ones where there were multiple options. We voted on the five that had multiple options. Now we're come back to do an umbrella motion to cover everything else.

Dr. Larkin: We're not through yet. What I'd like to do now is to move that we accept this rule including the options as we voted on them before, that is the first four as in the hearing officers' report, the last one with a substitute motion for Option 1. That's a motion.

Chairman Smith: We have a motion by Dr. Larkin. I'll call it the umbrella motion. Seconded by Mr. Cavanaugh. Discussion? (The motion carried unanimously.)

Dr. Larkin: One more motion. That motion is now that we have a consolidated mitigation rule we need to repeal the mitigation portions of the other. I move that we repeal the following sections of 02B.0242 which is the Neuse River, .0244 Catawba, .0260 Tar-Pamlico, .0252 Randleman, .0268 Jordan and .0609 Goose Creek, that we repeal those sections. (Mr. Martin seconded.)

Chairman Smith: Motion by Dr. Larkin to repeal those various sections and seconded by Mr. Martin. Discussion? The motion carried unanimously.

Dr. Larkin: My comments have to do with two other alternative mitigation options that we discussed during the course of the comments and discussions that were not included in the material that was sent out to public hearing. Therefore, we couldn't add them to the rules. They were also not vetted by the Water Quality Committee or the public. There are two of those. I'll mention one that has been mentioned and that is to allow wider buffers to be used to generate mitigation credit than the standard fifty feet we use now. The suggestion was made to add another twenty-five feet beyond the standard fifty feet buffer to give some mitigation credit for restoring that portion of the buffer. The second is similar and that is to allow buffer mitigation credit for buffers on ephemeral channels or other conveyances of surface water draining into the streams. We're talking about ditches and other things that are not now protected by buffers. The thought was that we would...I guess I will recommend that we look into those things, do the research and come back to the Water Quality Committee with some thoughts, recommendations. The Water Quality Committee can then move those on to the Commission to rulemaking if they want to or not. They might as well in the same breath mention a couple of other things that maybe you were going to speak to that were mentioned during this discussion. One is to change the buffer ratio for preservation to make that 5:1 or 7:1 or whatever. But to look at that ratio again in the Water Quality Committee. The other one I wrote down somewhere but I can't find it right now. There was one other that we said that I think we were going to work on. Well, if it comes to somebody's mind we can look at that at the same time.

Dr. Peterson: It could be added. Even if something is a total loser coming to water quality it shouldn't take long to identify it as such. Just having the suggestion from anybody is always welcome for the committee agenda.

Dr. Larkin: I found it. It was the issue of power lines and whether we should include those easements like we did for sewage, and others. That's a suggestion. It's not a motion or anything.

Chairman Smith: I understand. Anything else Dr. Larkin?

Dr. Larkin: I think I'm done.

Chairman Smith: I want to say some of this you've already heard. This has been a multi-year project, more than four years but intensely for the last four years. It has involved literally scores and scores of people. I'm not going to undertake the names of everybody in the Division of Water Quality staff that has contributed heavily to this. But you have and it has been very much appreciated. The Water Quality Committee has labored on this repeatedly as have various members of the Environmental Management Commission, both the ones present and some who have come and gone. Particularly, I want to (as they say) lift up Dr. Larkin. As I look back on this, this is probably a three hearing officer job. It could not have been done better by a committee that it was done by Dr. Larkin singularly. It was a bear to begin with. He, with a lot of good help, worked through a lot of complicated issues, struck multiple compromises that

pretty much satisfied or placated everybody, that proved to be acceptable to everybody, with the one exception that we just debated at length and resolved. But that's part of our job. Not only that, he organized this in such a way that we were able to get through it effectively and thoroughly in less than an hour, maybe a little over an hour. But for his and staff's organization of the multiple issues and decisions that we had to make, we would have been floundering and foundering all day long. I highly commend you. If you've got to go off the Environmental Management Commission after eight years you certainly went off with an outstanding job. So thank you.

Mr. Martin: You said I could say my thing about the non-map stream. So I just wanted to add that to the Water Quality Committee wish list. I feel like the ratios on that are not adequate. I mean the streams are totally unprotected and we're giving them 5:1, whereas on the urban streams it's 3:1. I want to add that to the wish list. I wanted to ask one dumb question and it's a big picture question. Do these rules apply to buffers for mitigation regardless of whether it's for buffer or for nutrient offset, or with the nutrient offset has to be handle through a similar process?

Eric Kulz: There is not a whole lot in our rules that dictate how nutrient offset mitigation is done. But we would probably consider, you know projects like these to be able to be used for buffer or nutrient offset, which is the way we've been handling the banks for a number of years. They have a nutrient ledger and a buffer ledger. As long as the same square foot of land doesn't appear on both of them, that's fine because in some areas there's more need for buffer, and other areas more need for nutrient. But I would think we would apply this stuff the same way to those because they're all part of the nutrient management strategy.

Mr. Martin: That's what I thought. It's kind of mentioned in the report and everything else, but it's not explicitly stated so I wanted to be sure that staff didn't have any question if it came up. Is it or isn't it? It sounds like it is.

Chairman Smith: We move to our single information item which is an update on the North Carolina Nutrient Criteria Development Plan, speaking of a long running project. Ms. Reid is not with us today. She is with her ailing Father. We have an able substitute in the form of Ms. Stecker.

Dr. Peterson: I would just like to mention the role that Leo Green played in a lot of the work and he's not up here to send himself a reminder, but he was exceptional in his guidance in that process on the buffer consolidation.