

November 22, 2017

Via Electronic Mail

Ms. Lois Thomas, EMC Recording Clerk
Attn: 2T 2U Rule Comments
Department of Environmental Quality
Division of Water Resources
Water Planning Section
1611 Mail Service Center
Raleigh, NC 27699-1611
15ANCAC2T2URule_Comments@ncdenr.gov

Re: Proposed Readoption and Revision of 15A NCAC 02T, 02U Rules

Dear Ms. Thomas,

These comments are submitted on behalf of American Rivers, Cape Fear River Watch, Catawba Riverkeeper Foundation, Coastal Carolina Riverwatch, Crystal Coast Waterkeeper, Dan River Basin Association, River Guardian Foundation, Sound Rivers, Southern Environmental Law Center, SouthWings, MountainTrue, North Carolina Conservation Network, NC Sierra Club, White Oak-New Riverkeeper Alliance, Winyah Rivers Foundation, Waterkeeper Alliance, and Yadkin Riverkeeper. As organizations that value North Carolina's public health and environmental quality, we appreciate the opportunity to provide input regarding the proposed revision and readoption of rules codified in Subchapters 02T and 02U of Chapter 15A of the North Carolina Administrative Code.¹ These regulations, designed to limit the environmental impact of "non-discharge" systems and reclaimed water systems, are critical to the protection of water quality, and we urge the Environmental Management Commission (EMC), in consultation with the Department of Environmental Quality (DEQ), to carefully consider our recommendations to improve them in furtherance of the goals of maintaining, protecting, and enhancing water quality within North Carolina.²

I. Rules Readoption

We are mindful of the unique context in which this rulemaking is proposed. In 2013, the North Carolina General Assembly commanded executive agencies to review all existing regulations and declared that rules not reviewed and readopted in accordance with newly announced statutory protocol would, with limited exception, automatically expire.³ Pursuant to this new review process,⁴ the EMC

¹ North Carolina Register, Vol. 32, Issue 6, at 530 - 590 (Sept. 15, 2017), *available at* <http://www.ncoah.com/rules/register/Volume%2032%20Issue%2006%20September%2015,%202017%20ONLINE.pdf>.

² See N.C. Gen. Stat. § 143-211(b) (declaring the public policy of North Carolina with respect to water and air resources); *see also* 33 U.S.C. § 1251 (declaring goals and policy of the federal Clean Water Act to include "restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters).

³ N.C. Sess. Laws. 2013-413 (Aug 23, 2013).

⁴ This new "periodic review" was an addition to the preexisting annual agency obligation to "conduct an annual review of its rules to identify existing rules that are unnecessary, unduly burdensome, or inconsistent with the principles" outlined to guide the rulemaking process. See N.C. Gen. Stat. § 150B-19.1(b).

determined that all 108 rules in Subchapter 02T and all 32 rules in Subchapter 02U were “necessary with substantive public interest.”⁵ As such, they must be “readopted as though the rules were new rules.”⁶

The legislature directed the Rules Review Commission (RRC) to “establish a schedule for the review and readoption of existing rules.”⁷ The deadline for adoption of the 2U and 2T rules is October 31, 2019.⁸ Notwithstanding, during public hearings regarding the instant rulemaking, DEQ repeatedly stated its intent to submit approved rules to the RRC in April 2018. While we understand the desire to complete the readoption process, we caution against proceeding with a false sense of urgency. The EMC should carefully consider public input before finalizing these rules. And there is time to do so.

We commend the staff of the Division of Water Resources (DWR) for preparing the draft rules for consideration with almost two years to spare before the deadline. This will allow the rapid finalization of rules about which there is little or no comment or objection.⁹ However, for many of the rules under review, the readoption process motivated the first solicitation of public comment in more than a decade.¹⁰ Where necessary, the EMC should not hesitate to make responsive substantive amendments to the proposed rules. Although making substantive changes would require the agency to afford an additional opportunity for public comments,¹¹ we believe such input is important, particularly since the “periodic review of existing rules” that spawned the instant rulemaking may not occur for another decade.¹² The EMC should finalize an adequately protective rule set rather than rush to complete one in need of further revision.

II. Tailoring Comments

Although this rulemaking involves two whole subchapters of the North Carolina Administrative Code, and the volume of proposed amendments is daunting, upon closer inspection many of the changes did not, in our estimation, merit specific comment. First, many of the proposed amendments to the 2T and 2U rules have little effect on existing programs and appear designed to replace outdated cross-references,

⁵ Letter from Benne Hutson, Chair, EMC, to Rules Review Commission re: Periodic Review of Existing Rules (Sept. 11, 2014).

⁶ N.C. Gen. Stat. § 150B-21.3A(c)(2)g. Contrary to the direction to “readopt” rules, this rulemaking also includes the proposed adoption of an entirely new rule to be codified at 15A N.C. Admin. Code 02T .1310 and the complete rescission of others (e.g., 15A N.C. Admin. Code 02T .0104, 02U .0104).

⁷ N.C. Gen. Stat. § 150B-21.3A(d).

⁸ RRC, *Periodic Review and Expiration of Existing Rules: Readoption Schedule*, <http://www.ncoah.com/rules/2014/2014ReadoptionSchedule/2014ReadoptionSchedule.html> (last visited Nov. 14, 2017).

⁹ Notably, during the initial determination phase of rules readoption, the EMC reported the receipt of public comments regarding only five of the 02T rules (15A N.C. Admin. Code 2T .0103, .0704, .1307, .1403, .1404), and three of the 02U rules (15A N.C. Admin. Code 2U .0202, .0501, .1101). Letter from Benne Hutson, Chair, EMC, to Rules Review Commission re: Periodic Review of Existing Rules (Sept. 11, 2014); *but see* N.C. Gen. Stat. § 150B-21.3A(a)(3) (defining as “necessary with substantive public interest” any rule “for which the agency has received public comments within the past two years” or any rule that “affects the property interest of the regulated public and the agency knows or suspects that any person may object to the rule”).

¹⁰ The rules currently codified in Subchapter 02T were the subject of notice and comment rulemaking in October 2005 prior to their ultimate adoption in 2006. See North Carolina Register, Vol. 20, Issue 7, at 484 - 550 (Oct. 3, 2005), *available at* <http://www.ncoah.com/rules/register/Volume20Issue07.pdf>

¹¹ N.C. Gen. Stat. § 21.2(g) (“An agency shall not adopt a rule that differs substantially from the text of a proposed rule published in the North Carolina Register unless the agency publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the proposed different rule for the time set in subsection (f) of this section.”).

¹² N.C. Gen. Stat. § 150B-21.3A(c).

correct grammatical errors, or clarify existing language. Notably, to improve rule clarity, DWR solicited “pre-review” of the draft rules by the Rules Review Commission.¹³ Indeed, many of the amendments under consideration were initially proposed not by staff within DWR but instead by RRC reviewers seeking to unambiguously articulate rule requirements.¹⁴ The RRC focused its comments on consistency, capitalization, formatting of enumerated lists, use of Oxford commas, and specific word choice.¹⁵ With limited exceptions specified below, we have no objection to the resulting proposed amendments.

Moreover, although many of the undersigned lament recent state legislation that has eroded environmental protections,¹⁶ we simultaneously recognize that the EMC cannot ignore statutory direction. Accordingly, we will refrain from restating objection to proposed rule changes stemming from legislative commandment. However, where appropriate, we will identify concerns regarding the degree to which proposed rule language accurately interprets or faithfully implements statutory language motivating the change.

III. Concerns Spanning Subchapters 02T and 02U

While we recognize and appreciate the efforts undertaken to improve the rules, there are four issues, spanning multiple provisions Subchapters 02T and 02U, that we believe merit closer inspection and a departure from the proposed language.

1. Extension of Permit Terms from Five to Eight Years

First, we are deeply troubled by the proposal to extend the terms of permits issued under the 02U and 02T rules from five to eight years. Currently, under the 02T rules, “All permits requiring an annual fee shall be issued for a time period not to exceed five years.”¹⁷ This requirement also applies to rules issued under the 2U rules.¹⁸ In addition, the 02T rules establish a five-year term for general permits.¹⁹ According to DWR, the extension of these permit terms to eight years is proposed “to match statutory time frames.”

In reality, although the legislature previously allowed the issuance of permits for terms “not to exceed eight years,”²⁰ it deferred to the agency regarding the length of permit terms. Indeed, the legislature directed the environmental agency to “review the types of permits issued by the Department and the rule-making agencies under the Department and recommend whether the duration of any of the types of permits should be extended beyond their duration under current law or rule.”²¹ Following this

¹³ The RRC is tasked with ensuring that rules are “written in a clear and unambiguous manner.” See N.C. Gen. Stat. § 150B-21.8(b).

¹⁴ Unfortunately, the RRC did not pre-review the rules codified in 2T .1300 or .1400. E-mail from Jeff Manning, Chief of Classifications, Standards, and Rules Review Branch, DWR, to Will Hendrick, Staff Attorney, Waterkeeper Alliance (July 21, 2017).

¹⁵ RRC, *Environmental Management Commission Pre-Review* (May 2017).

¹⁶ See, e.g.,

¹⁷ 15A N.C. Admin. Code 02T .0108(e).

¹⁸ 15A N.C. Admin. Code 02U .0108 (“Final action on permit applications to the Division shall be in accordance with 15A NCAC 02T .0108.”).

¹⁹ 15A N.C. Admin. Code 02T .0111(e).

²⁰ N.C. Gen. Stat. § 143-215.1(d2) (“No permit issued pursuant to subsection (c) of this section shall be issued or renewed for a term exceeding five years. All other permits issued pursuant to this section for which an expiration date is specified shall be issued for a term not to exceed eight years.”).

²¹ 2011 N.C. Sess. Laws 2011-398 § 60.(d) (July 25, 2011). The legislature overrode the veto of then-Governor Beverly Perdue to enact this legislation.

review, the Department indicated its intent to “conduct rule-making to allow issuance of the permits under ‘Waste Not Discharged to Surface Waters’ in 15A NCAC 02T .0108(e) and .0111(e) for a period of eight years.”²² A “working group” of agency staff concluded that “[e]xtending the term period from five years to eight years for non-discharge, reclaimed water, and injection well permits would have little effect from a regulatory standpoint.”²³

We are dismayed that the agency reached those conclusions without public input; indeed, among our greatest concerns regarding the proposed extension of permit terms is the resulting minimization of opportunity for citizen comment. Currently, the public has the chance to comment on these permits twice a decade. Although the agency has the authority to modify permit terms after initial issuance, in practice it rarely does so before the expiration of the permit term. Consequently, the renewal process is often the only opportunity for the public to recommend changes to improve environmental protection under the permit under consideration.

Unfortunately, the agency appeared to ignore the value of public input when assessing the impact of extended permit terms. In contrast, the working group opined that “[i]t is reasonable to assume that permit holders would see some decrease in costs due to savings in preparing a permit renewal application every eight years as opposed to every five.”²⁴ We question whether these hypothetical cost savings outweigh the benefit that public comment periods would afford in terms of both public confidence in the agency and identification of needed permit revisions.

In addition, it strains reason to suggest that the cost-benefit analysis would be identical for every permit issued under 02T and 02U. Indeed, as the “working group” noted, “Non-discharge systems continue to increase in complexity as developers strive to minimize land requirements for disposal systems and can range from small single-family residence systems to large municipal systems capable of treating millions of gallons of wastewater per day.”²⁵ This complexity and variability counsels against a one-size-fits-all approach to the extension of all non-discharge permits.

After all, the range of activity permitted under 02T and 02U suggests differing levels of public interest and community impact. And concentration of those impacts in certain areas may require more proactive and frequent agency engagement of affected communities. For instance, consider the general permit governing swine waste management. The proportions of African Americans, Latinos, and Native Americans living within 3 miles of facilities operating under this permit are 1.54, 1.39, and 2.18 times higher, respectively, than the proportion of non-Hispanic Whites.²⁶ Underscoring the benefit of public input, this disproportionality was first raised by researchers at the University of North Carolina during the public comment period regarding the proposed renewal of that permit. DWR’s ultimate decision to ignore public input gave rise to pending litigation and a “Letter of Concern” from the U.S. Environmental

²² *Id.*

²³ Letter from Kari Barsness, Director of Legislative and Intergovernmental Affairs, DENR, to the NC Environmental Review Commission 9 (April 13, 2012), *available at* <https://www.ncleg.net/documentsites/committees/ERC/ERC%20Reports%20Received/2012/Department%20of%20Environment%20Natural%20Resources/2012-Feb%20Review%20of%20Permits%20-%20Jt%20Reg%20Refrom.pdf>

²⁴ *Id.* at 10. If the agency is concerned about application costs, it seems a more impactful change would be to expand the use of electronic applications.

²⁵ Letter from Kari Barsness, Director of Legislative and Intergovernmental Affairs, DENR, to the NC Environmental Review Commission 10 (April 13, 2012).

²⁶ Steve Wing & Jill Johnston, *Industrial Hog Operations in North Carolina Disproportionately Impact African-Americans, Hispanics, and American Indians* (Aug. 2014).

Protection Agency directing DEQ to “[c]onduct an assessment of [the] current Swine Waste General Permit to determine what changes to the Permit should be made in order to substantially mitigate adverse impacts to nearby residents.”²⁷ We applaud the demonstrated interest in environmental protection by academics at our flagship public university and we encourage DEQ to reconsider the wisdom of foregoing such valuable input. We urge the agency not to extend the terms of permits where receipt and response to more frequent public input could inform improvements to permit terms and ultimately environmental quality.

2. Expansion of the Universe of Activities “Deemed Permitted”

At the same time EMC proposes to limit public input regarding some categories of permitted activity, it proposes to *eliminate* public input with respect to others by expanding the scope of activities “deemed permitted” by rule.²⁸ A facility is “deemed permitted” when, even though it does not operate under a permit issued by DWR, it is viewed as “having a needed permit *and* being compliant with the permitting requirements of G.S. 143-215.1(a).²⁹ Typically, a certain activity otherwise required to be permitted is “deemed permitted” as long as the activity is performed consistent with specific limitations.³⁰ We caution the agency against over-reliance on permitting by regulation, particularly where the assumption of compliance is contrary to available information about operators in a particular category of deemed permitted activity.

Drastic budget cuts have substantially hindered the ability of DWR staff in regional offices to ensure compliance with the requirements necessary for an activity to be “deemed permitted.”³¹ Understaffed regional offices may respond to a complaint, but they do not conduct routine inspections of “deemed permitted” operations. As such, whenever the agency “deems permitted” an activity, it should consider the potential consequence of effectively ignoring that activity absent a citizen complaint. The agency should also consider whether foregoing a requirement for permit application will hamper the agency’s knowledge of activities that may increase in frequency over time such that the cumulative effect of turning a blind eye becomes unsustainable.³² The explosion of “deemed permitted” poultry operations in North Carolina serves as a cautionary tale.

Under North Carolina law, it is illegal to “[c]onstruct or operate an animal waste management system, as defined in G.S. 143-215.10B, without obtaining a permit under either [Part 1] or Part 1A of [Article 21].”³³ An “animal waste management system” is defined as “a combination of structures and

²⁷ Letter from Lilian S. Dorka, Director, External Civil Rights Compliance Office, Office of General Counsel, EPA, to William G. Ross, Jr., Acting Secretary, DEQ (Jan. 12, 2017).

²⁸ The agency proposes to add two categories of activity deemed permitted under 15A NCAC 02T .0113 and six categories of activity deemed permitted under 15A NCAC 02U .0113.

²⁹ 15A N.C. Admin. Code 02T .0103(8).

³⁰ The nature of those limitations varies; mine dewatering is deemed permitted if “no chemicals are used in the mining process” while mobile carwashes are deemed permitted only if all detergents used are biodegradable; no steam cleaning, engine or parts cleaning is being conducted; notification is given to local government prior to operation, and non-recyclable washwater is collected and discharged with permission into a sanitary sewer or wastewater treatment facility.” 15A N.C. Admin. Code 02T .0113(14), (16).

³¹ Robin Smith, A smaller DEQ, Greensboro News & Record (Jan. 22, 2017) (noting a 41% reduction in water-quality and water-resources staff since 2011), *available at* http://www.greensboro.com/opinion/columns/robin-smith-a-smaller-deq/article_27d97a1c-f789-5e3b-a6d9-c54d6ca92c48.html

³² N.C. Gen. Stat. § 143-215.1(b)(2) (“The Commission shall also act on all permits so as to prevent violation of water quality standards due to the cumulative effects of permit decisions.”).

³³ N.C. Gen. Stat. § 143-215.1(a)(12).

nonstructural practices serving a feedlot that provide for the collection, treatment, storage or land application of animal waste.”³⁴ Most permits governing animal waste management systems are issued pursuant to Part 1A, which contemplates the creation of a permitting system for hog and dairy operations as well as a small subset of dry litter poultry operations.³⁵ Rather than require other dry litter operations to get a permit for their animal waste management systems, the agency “deemed permitted” remaining operations if they comply with regulatory guidelines.³⁶ Today, those “deemed permitted” operations constitute the vast majority of dry litter poultry operations in the State.³⁷ Meanwhile, the poultry industry has expanded significantly in North Carolina, and poultry operations are now the largest and fastest growing source of nutrients from animal agriculture in North Carolina.³⁸ Yet, because DWR does not require a permit, “the locations of dry litter poultry operations and the disposal of their waste are not known to environmental regulators, making it difficult to form a complete picture of possible non-point source contributions within a specific watershed.”³⁹

To be fair, the new activities proposed to be “deemed permitted” in the instant rulemaking do not pose nearly the same threat to water quality as do the thousands of dry litter poultry operations in North Carolina. But we are gravely concerned by the proposal to retain the “deemed permitted” status for dry litter poultry operations and urge the EMC to close the loophole through which so many contributions to water pollution currently pass. We also urge the agency to track changes in the volume or impact of other “deemed permitted” activities to avoid turning a blind eye to potentially increasing environmental threats. Without appropriate consideration of such factors, the EMC risks shirking its duty to act on all permits so as to “prevent . . . pollution of the waters of the State from any new or enlarged sources” and “prevent violation of water quality standards due to the cumulative effects of permit decisions.”⁴⁰

3. Failure to Protect Tenant Rights

Throughout subchapters 02T and 02U, DWR proposes to eliminate setback requirements when a permittee owns the adjacent property from which the setback would otherwise apply. Before we address concerns with this proposal, it is important to note a problem with the proposed change to the definition of “setback.” Currently, a setback is defined as the distance *between* some permitted system X and

³⁴ N.C. Gen. Stat. § 143-215.10B(3). Animal waste is “livestock *or* poultry excreta or a mixture of excreta with feed, bedding, litter, or other materials from an animal operation.” *Id.* at (2)(emphasis added). A “feedlot” is “a lot or building “a lot or building or combination of lots and buildings intended for the confined feeding, breeding, raising, or holding of animals and either specifically designed as a confinement area in which animal waste may accumulate or where the concentration of animals is such that an established vegetative cover cannot be maintained.” *Id.* at (5).

³⁵ See N.C. Gen. Stat. § 143-215.10C(a) (“No person shall construct or operate an animal waste management system for an animal operation or operate an animal waste management system for a dry litter poultry facility that is required to be permitted under 40 Code of Federal Regulations § 122, as amended at 73 Federal Register 70418 (November 20, 2008), without first obtaining an individual permit or a general permit under this Article.”).

³⁶ 15A N.C. Admin. Code 02T .1303(a)(2).

³⁷ Heather Patt, Basinwide Planning, DWR, *A Comparison of PAN and P₂O produced from Poultry, Swine and Cattle Operations in North Carolina* 1 (2017) (“Most poultry operations, however, produce dry litter waste that typically falls under the deemed permitted category (NCAC 2T .1303). Poultry operations in this category are only inspected as a result of complaints.”).

³⁸ *Id.*

³⁹ *Id.* DWR’s report did not consider the utility of one option available under the deemed permitted rule: requiring submission to DWR of certain facility-specific records. See 15A N.C. Admin. Code 02T .1303(b). If EMC continues to “deem permitted” these operations, it should direct the DWR Director to request all available information about their operations so as to better inform a long-overdue management response.

⁴⁰ N.C. Gen. Stat. § 143-215.1(b)(1), (2).

physical feature Y.⁴¹ The proposed amendment would add “includes” before the list of physical features, such that the relevant provision reads: “‘Setback’ means the separation . . . required between a treatment works, disposal system or utilization system and includes physical features such as buildings, roads, property lines, or water bodies.”⁴² We encourage reconsideration of this amendment, as it could result in unnecessary confusion regarding the points between which separation must be maintained in order to satisfy “setback” requirements codified throughout these subchapters. Fortunately, removing “includes” should correct the problem.

While it is important that setbacks be clearly defined, it is just as important that they serve their intended purpose of ensuring permitted activity is not conducted in problematic locations. For instance, typically, rules state the required setback between permitted activity and “any property line” to minimize impacts of permitted activity on adjacent parcels.⁴³ However, in the proposed rules, setbacks to property lines “shall not be applicable when the Permittee, or the entity from which the Permittee is leasing, owns both parcels creating said property line.”⁴⁴

At first blush, this may seem reasonable. If a permittee wishes to conduct permitted activity next to his own property, perhaps he should be allowed to assume the risk of impacting his own property by essentially waiving the protection otherwise afforded by a setback. However, this justification fails to consider the potential that the adjacent property is occupied by the permittee’s tenant. After all, the impacts of permitted activity can affect people, not just land.

According to the U.S. Census Bureau, between 2011 and 2015, only 65.1% of housing units in North Carolina were owner-occupied.⁴⁵ Yet, under the proposed rule, whether or not one owns his residence could directly impact the degree of protection afforded under the 02T and 02U rules. Not only does this unfairly burden tenants, it threatens to invite violations of well-established principles of landlord/tenant law. “North Carolina law provides that a lease, in the absence of a provision to the contrary, carries with it an implied covenant that the tenant will have the quiet and peaceable possession of the leased premises during the term of the lease.”⁴⁶ The EMC should not adopt rules that allow an absentee landlord to breach this implied covenant of quiet enjoyment by waiving setback requirements.

Of course, if a permittee does not lease the property adjacent to the parcel on which the permitted activity is conducted, this concern would be mitigated. We encourage the EMC to consider adding this caveat to prevent landlords from waiving protections or violating legal rights designed to benefit tenants. Alternatively, the EMC should consider removing this setback exception and analyzing on a case-by-case basis whether or not a variance from the setback would provide equal or better treatment of waste, equal

⁴¹ A “setback” is the “minimum separation in linear feet, measured on a horizontal plan, required between a treatment works, disposal system, or utilization system and physical features such as building [sic], roads, property lines, or water bodies.” 15A N.C. Admin. Code 02T .0103(36).

⁴² North Carolina Register, Vol. 32, Issue 6, at 526 (Sept. 15, 2017).

⁴³ See, e.g., 15A N.C. Admin. Code 02T .0506(a).

⁴⁴ This language, or substantially similar language, is proposed for addition to 15A NCAC 02T .0506, .0606, .0706, .1108 and 15A NCAC 2U .0701.

⁴⁵ U.S. Census Bureau, Quick Facts: North Carolina, <https://www.census.gov/quickfacts/NC> (last visited Nov. 13, 2017). “A housing unit is owner-occupied if the owner or co-owner lives in the unit, even if it is mortgaged or not fully paid for.” *Id.*

⁴⁶ *McNamara v. Wilmington Mall Realty Corp*, 121 N.C. App. 400, 406, 466 S.E.2d 324, 328 (1996); see also *Marina Food Assoc. v. Marina Restaurant*, 100 N.C. App. 82, 92, 394 S.E.2d 824, 830 (1990) (citing 49 Am. Jur.2d *Landlord and Tenant*, § 576 (1970) (“An act of a landlord which deprives his tenant of that beneficial enjoyment of the premises to which he is entitled under his lease, causing the tenant to abandon them, amounts to a constructive eviction.”)).

or better protection of the waters of the state, and no increased potential for nuisance conditions from noise, odor, or vermin.⁴⁷

4. Inadequate Compliance Reviews

Whenever someone applies to DWR for a permit, the agency has the authority to require proof that “the applicant, or any parent, subsidiary, or other affiliate of the applicant or parent . . . [h]as substantially complied with the effluent standards and limitations and waste management treatment practices applicable to any activity in which the applicant has previously engaged, and has been in substantial compliance with other federal and state laws, regulations, and rules for the protection of the environment”⁴⁸ Indeed, the rules acknowledge this authority, at least in the context of applications for “permits for new and expanding facilities,” and articulate situations in which such permits may be denied due to noncompliance by various actors.⁴⁹ We believe the rules should also clearly state that similar noncompliance may result in the denial of an application for *renewal* of a permit.⁵⁰ The EMC proposes to add language stating “Permits for renewing facilities shall not be granted if the Applicant or any affiliation has not paid an annual fee in accordance with Rule .0105(e).”⁵¹ We recommend clearly articulating other forms of noncompliance by the applicant or affiliate that would trigger permitting consequences in the renewal context; at minimum, the same noncompliance that triggers rejection of a permit application under 15A NCAC 02T .0120(b) for a new or expanding facility should trigger rejection of an application for renewal of a permit.

In some instances, the EMC is not only authorized but in fact obligated to consider historical noncompliance when making permitting decisions. Of particular relevance to this rulemaking, in 1997 the legislature directed the EMC to create a “violation points system applicable to permits for animal waste management systems for swine farms.”⁵² Under this system, violations of applicable law would be assigned point values and the accumulation of a pre-determined number of points would have automatic permitting consequences up to and including permit revocation.⁵³ In order to heed the legislature’s direction, rulemaking is required to codify the points system and clarify the conditions under which one whose permit is revoked may reapply for a swine waste management permit. The EMC should not continue to ignore this decades-old legal obligation when conducting rulemaking to readopt the very subchapter, 02T, in which the violations points system would be codified.⁵⁴ We implore the EMC to take this overdue step to ensure that repeat offenders are not treated the same as compliant operations.

IV. Concerns about Animal Waste Management Rules

Sadly, the creation of a violation points system is not the only overdue action necessary to curb pollution from animal agriculture operations. More than two decades ago, the North Carolina General Assembly observed that “[t]he growth in animal operations in recent years has increased the importance

⁴⁷ 15A N.C. Admin. Code 02T .0105(n).

⁴⁸ N.C. Gen. Stat. § 143-215.1(4)b.2.

⁴⁹ 15A N.C. Admin. Code 02T .0120.

⁵⁰ Currently, the only explicit reference to the “current compliance status of the permittee’s facilities and the magnitude of previous violations” is made in the context of approving a variance from otherwise applicable compliance review procedures. *Id.* at (c).

⁵¹ North Carolina Register, Vol. 32, Issue 6, at 537 (Sept. 15, 2017).

⁵² N.C. Gen. Stat. § 143-215.6E.

⁵³ *Id.*

⁵⁴ In the 2T rules, the EMC attempts to promulgate rules applicable to “all persons proposing to construct, modify, expand, or operate an animal waste management system.” 15A NCAC 2T .1301.

of good animal waste management practices to protect water quality.”⁵⁵ The legislature also noted “[i]t is critical that the State balance growth with prudent environmental safeguards.”⁵⁶ In response, the State made meaningful progress to address pollution caused by poor animal waste management, and was once heralded as a national leader. But years have passed without meaningful reconsideration of the adequacy of steps taken at the turn of the century and today runoff from farms and ranches continues to be the leading cause of water quality impairment in the country.⁵⁷ In North Carolina, any meaningful attempt to prevent impairment caused by agricultural operations requires addressing pollution caused by industrial animal agriculture. After all, as DWR has previously noted, North Carolina leads the country in the amount of animal manure generated per farmland acre.⁵⁸

While we believe progress on animal waste management is overdue, we recognize that credible information should form the foundation of any agency response. Below, we recommend ways for the EMC to ensure the collection and accessibility of critical information regarding animal waste management in our state. In addition, we offer recommendations regarding the new proposed rule that would govern the management of animal waste residuals.

1. Collecting Information about Impacts

A significant amount of academic research⁵⁹ and litigation⁶⁰ has been conducted to document and propose mitigation of the impacts of industrial animal agriculture operations. Unfortunately, the 02T rules allow the vast majority of these facilities to either be “deemed permitted” or operate under “non-discharge” permits. We question the underlying assumption that these operations pose a limited risk of off-site impacts, and encourage amendments to the rules that would assess a facility’s impact on water quality and assure compliance with applicable non-discharge requirements.⁶¹

Notably, more than a decade ago, the EMC entertained two petitions for rulemaking to establish water monitoring requirements for animal feeding operations. The EMC directed DWQ “to develop rules

⁵⁵ N.C. Gen. Stat. § 143-215.10A.

⁵⁶ *Id.*

⁵⁷ EPA, *Nonpoint Source: Agriculture*, <https://www.epa.gov/nps/nonpoint-source-agriculture> (last visited Nov. 9, 2017); see also USDA, Natural Resources Conservation Service, *Animal Manure Management* (Dec. 1995), available at

https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/technical/nra/rca/?cid=nrcs143_014211#collected (“Nonpoint source pollution is recognized as the primary category of water pollution that is not yet controlled, and unmanaged animal manures contribute to nonpoint source pollution in most States.”); Claudia Copeland, Cong. Research Serv., RL 31851, *Animal Waste and Water Quality: EPA Regulation of Concentrated Animal Feeding Operations (CAFOs) 4* (2010).

⁵⁸ As DWR has previously noted, North Carolina leads the country in the amount of animal manure generated per farmland acre. Heather Patt, Basinwide Planning, DWR, *A Comparison of PAN and P₂O produced from Poultry, Swine and Cattle Operations in North Carolina* 8-9 (2017).

⁵⁹ See e.g., Michael A. Mallin et al., *Industrial Swine and Poultry Production Causes Chronic Nutrient and Fecal Microbial Stream Pollution*, 226 *Water, Air, & Soil Pollution* 407 (2015); Wendee Nicole, *CAFOS and Environmental Justice: The Case of North Carolina*, 121 *Envtl. Health Persp.* A182–A189 (2013); Steve Wing, Dana Cole & Gary Grant, *Environmental Injustice in North Carolina’s Hog Industry*, 108 *Envtl. Health Persp.* 225–31 (2000).

⁶⁰ See, e.g., *In re NC Swine Farm Nuisance Litigation*, Master Case No. 5:15-CV-00013-BR, 2016 WL 3661266 (E.D.N.C. July 1, 2015); Earthjustice Complaint Under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, 40 C.F.R. Part 7 (September 3, 2014), <http://earthjustice.org/sites/default/files/files/North-Carolina-EJ-Network-et-al-Complaint-under-Title-VI.pdf>.

⁶¹ Ignorance of environmental impacts is particularly problematic where, as with the swine industry, operations are concentrated in vulnerable communities.

to establish and implement a surface water monitoring program addressing the petitioners concerns.”⁶² The Division of Water Quality (since merged with DWR) recommended adoption of a surface water monitoring rule informed by stakeholder input.⁶³ The EMC specifically recognized that the proposed rule would help to “develop an understanding of the impact of Animal Feeding Operations on surrounding surface waters,” “document that facilities are in compliance with the no-discharge provisions of the permits,” “identify potential sources of pollution,” and “help direct resources where they are needed to meet water quality goals.”⁶⁴ Yet, the rule was never adopted, and these need for meaningful compliance assurance through surface water monitoring remains. We encourage the EMC to amend the 02T rules to require permittees to collect much needed information about the impacts of animal waste management on our water resources.⁶⁵

2. Maintaining Public Access to Information

Next, we urge the EMC to forego proposed rulemaking that would decrease the amount of publicly available information about animal waste management in North Carolina. Specifically, we believe it would be a mistake to eliminate existing annual reporting requirements for manure haulers.

Manure haulers play an important role in animal waste management. In fact, a permitted animal operation may be excused for not having “adequate animal waste application and handling equipment” if the producer has “a contract with a third-party applicator capable of providing adequate waste application.”⁶⁶ Manure haulers collect or purchase manure from an animal operation and then transport and land apply it elsewhere, on land not covered by the generator’s permit.⁶⁷

Provided they follow specified guidelines, manure haulers are “deemed permitted.”⁶⁸ Unfortunately, as noted above, these “deemed permitted” activities are largely ignored by the agency. Manure haulers land applying up to 99 tons of waste in a calendar year ostensibly have to maintain 25-foot setbacks from perennial waterbodies and apply at agronomic rates, but limited agency resources prevent DWR from ensuring compliance with these requirements.⁶⁹ In contrast, manure haulers transporting the most waste throughout our watersheds currently have to provide some information to the State on an annual basis. Manure haulers land applying more than 100 tons a year have specified reporting requirements, and even more information is required from manure haulers land applying 750 or

⁶² DEQ, Fact Sheet- Proposed Monitoring Rules for Animal Feeding Operations (June 2009).

⁶³ DEQ, Division of Water Quality, *Rulemaking Petition- Division Response* (May 5, 2008), <https://files.nc.gov/ncdeq/Water%20Quality/Aquifer%20Protection/AFO/Statutes%20and%20Rules/DWQSupportWKPetitionWQCMay0805.pdf>.

⁶⁴ *Id.*

⁶⁵ See 15A N.C. Admin. Code 2T .0108(c) (“The Division may require any monitoring and reporting requirements, including groundwater, surface water or wetlands, waste, wastewater, sludge, soil, treatment process, lagoon/storage pond, and plant tissue, necessary to determine the source, quantity and quality of the waste and its effect upon the surface water, ground waters or wetlands.”). We are mindful of concerns regarding the potential cost of such monitoring and would welcome the opportunity to work with the agency to identify ways to achieve data collection goals without imposing undue financial hardship on permittees.

⁶⁶ See, e.g., Swine Waste Management System General Permit, No. AWG100000 § II.15 (March 7, 2014).

⁶⁷ 15A N.C. Admin. Code 2T .1402.

⁶⁸ 15A N.C. Admin. Code 02T .1403. When initially proposing these rules in 2006, the agency noted “Although Manure Brokers are required to be permitted by General Statutes, these are the first rules specifically developed for these operations.” North Carolina Register, Vol. 20, Issue 7, at 544 (Oct. 3, 2005).

⁶⁹ Apart from resource limitations, without knowing the location to which the hauler is transporting manure, or the surrounding geographic features, or the cover crops, it is exceedingly difficult for DWR to enforce these requirements.

more tons of waste in a year.⁷⁰ These records are the sole source of information submitted to the State that helps inform DEQ's management of animal waste by manure haulers.⁷¹ We object to the proposal to eliminate this reporting requirement.

It is already problematic that so many records relevant to the waste management practices of animal operations in the state exclusively maintained on site, beyond the reach of the North Carolina Public Records Act.⁷² For instance, although swine operations permitted under the 02T rules are required to maintain the following records and keep them "readily available at the facility" for DWR to review, none are submitted to the agency: soil and waste analyses, rain gauge readings, freeboard levels, irrigation and land application event(s), animal stocking records, records of additional nutrient sources applied (including sludge), cropping information, waste application equipment testing and calibration, and records of removal of solids to off-site locations.⁷³ But at least DWR annually inspects swine operations. The agency does not conduct regular inspections of manure haulers, so it is difficult to foresee an opportunity for the agency to review manure hauler records if, as proposed, they are only kept on site. In fact, DWR personnel sought to justify the elimination of the reporting requirement by noting the infrequency with which agency staff currently review the data contained in manure hauler reports. But this argument only underscores the value of public access to the data.

After all, while DWR may lack capacity to review manure hauler records, eliminating public reporting requirements would eliminate the ability of the public to supplement the agency's resources. Environmental organizations and academics have demonstrated ample interest in the contents of manure hauler reports. For example, this past spring multiple researchers from the UNC Gillings School of Public Health analyzed manure hauler reports to inform an ongoing assessment of the frequency with which waste is transported between watersheds. Notably, because of the relative costs of transporting wet waste and dry litter, manure haulers are most commonly used to relocate and land apply dry litter, so the information they contain is often the only publicly available information about poultry waste management. Hence the study of poultry manure hauling records conducted in 2012 for the Environmental Defense Fund.⁷⁴ That study noted that manure hauler reports constitute the only publicly available data set "that records the quantity and location of poultry manure" in North Carolina. Far from supporting a limitation of reporting requirements, the study noted "[a] more complete data set would allow a thorough transportation analysis, which could analyze the relationship between fuel prices, litter prices, and transport distances."⁷⁵

⁷⁰ 15A N.C. Admin. Code 02T .1404.

⁷¹ *Id.* Notably, however, dry litter poultry operations do not have permits and therefore the definition of "manure hauler" should be amended to clarify when land application of dry litter is to "land not covered by the generator's permit."

⁷² *See* N.C. Gen. Stat. § 132-1 (defining "public records" as records "made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions."); *see also id.* § 132-6(a) ("Every custodian of public records shall permit any record in the custodian's custody to be inspected and examined at reasonable times and under reasonable supervision by any person, and shall, as promptly as possible, furnish copies thereof upon payment of any fees as may be prescribed by law.")

⁷³ Swine Waste Management System General Permit, No. AWG100000 § III.11 (March 7, 2014).

⁷⁴ Memorandum from Damon Cory-Watson, Duke University Nicholas School of the Environment, to Maggie Monast, Environmental Defense Fund, "Analysis of North Carolina Department of Environment and Natural Resources Poultry Manure Hauler Data" (Aug. 17, 2012) (hereinafter "EDF Memo"). This study evaluated manure hauler data compiled between 2006 and 2011.

⁷⁵ EDF Memo at 1.

Even if the agency cannot review the records, surely the EMC recognizes the benefit to North Carolina's environment derived from making the information available for review and analysis by third parties that may assist DWR in carrying out its mission. Moreover, public education about threats to human health and the environment can justify reporting requirements even when the receiving agency lacks the will or resources to utilize the information provided, especially where the agency retains authority to respond or the information might inform response efforts by others.⁷⁶ As such, we urge the EMC not to eliminate the reporting requirements currently codified at 15A NCAC 02T .1404.

3. Animal Waste Residuals

Under the proposed rule to be codified at 15A NCAC 02T .1340, DWR contemplates permitting “the treatment, storage, transportation, use, and disposal of animal waste residuals to be applied to a lawn, home garden, or public contact use site or sold or given away in a bag or other container for application to the land.”⁷⁷

The residuals rule proposed to be codified at 15A NCAC 02T .1310 is an anomaly in the context of the “re-adoption” process; here the agency is proposing an entirely new rule. Apparently, when many regulations were transferred out of the 02H subchapter to create the new 02T subchapter governing animal waste management, the agency failed to replicate an existing rule governing management of animal waste residuals.⁷⁸ As such, we commend the agency for closing this loophole and reasserting its regulatory authority. We also appreciate the inclusion of a requirement for permittees to annually submit a summary of their monitoring and reporting activities.⁷⁹ As explained above, these public reporting requirements, even when compilations of data points collected over time, have significant value to members of the public studying CAFO issues. In addition, we acknowledge multiple ways in which the new rule draws from existing regulations governing the management of “biological residuals” to inform pollutant concentration limits as well as pathogen and vector attraction reduction requirements. The similarity in these requirements is reasonable given the similarity of the proposed definition of “animal waste residuals”⁸⁰ and the existing definition of “biological residuals.”⁸¹

However, there is room for improvement in the proposed rule. First, parts of the rule are unclear. For instance, the EMC proposes to define “bulk animal waste residuals” to mean “animal waste residuals that are transported and not sold or given away in a bag or other container for application to land.”⁸² Yet, two subsections of the proposed rule state that “bulk animal waste residuals” shall not be “sold or given

⁷⁶ *Waterkeeper Alliance v. EPA*, 853 F.3d 527, 537 (D.C. Cir. 2017)(recognizing the injury caused to plaintiffs by agency exemption of CAFOs from a public reporting requirement and rejecting agency's argument, in defense of the exemption, “that notifications of animal-waste-related releases serve no regulatory purpose because it would be ‘impractical or unlikely’ to respond to such a release.”)

⁷⁷ North Carolina Register, Vol. 32, Issue 6, at 587 (Sept. 15, 2017).

⁷⁸ See North Carolina Register, Vol. 20, Issue 7, at 484 - 550 (Oct. 3, 2005), available at <http://www.ncoah.com/rules/register/Volume20Issue07.pdf>

⁷⁹ North Carolina Register, Vol. 32, Issue 6, at 587 (Sept. 15, 2017). However, as written the rule requires “a report of all monitoring and reporting requirements.” *Id.* Although the proposed subsection (i)(1) details monitoring obligations, it appears submission of the annual report is the only “reporting” requirement, so it would be helpful for the rules to clarify the required contents of the annual report.

⁸⁰ *Id.* (proposing to define “Animal waste residuals” as “residuals that have been generated during the treatment of animal waste”).

⁸¹ 15A N.C. Admin. Code 02T .1101(6) (defining “biological residuals” as “residuals that have been generated during the treatment of domestic wastewater, the treatment of animal processing wastewater, or the biological treatment of industrial wastewater”).

⁸² North Carolina Register, Vol. 32, Issue 6, at 582 (Sept. 15, 2017).

away in a bag or other container for application to land” in specified circumstances. Either those subsections should apply to all animal waste residuals, or they should be amended to reduce confusion given the definition of included terms. Similarly, the proposed rule states “The Class A pathogen requirements shall be met when bulk animal waste residuals are . . . sold or given away in a bag or other container for application to the land.”⁸³ This internal inconsistency should be corrected before the rule is finalized.

Second, it is unclear what the EMC intended when stating the rule does not apply to animal waste residuals applied to land by manure haulers.⁸⁴ The definition of “manure hauler” contemplates one land applying “animal waste”, but not residuals generated during the treatment thereof. If the EMC intends to deem permitted manure haulers that are land applying hundreds of tons of animal waste residuals, those manure haulers should be subject to the same requirements as one applying “bulk animal waste residuals” under this rule. We are also concerned that manure haulers, and others exempted from the animal waste residuals rule (e.g., those land applying residuals pursuant to 02T .1303, .1304, .1305, or .1307) may not evaluate the nutrient concentrations in the residuals to ensure land application does not exceed the agronomic rate unless the EMC explicitly states in their permits or governing rules that animal waste residuals, not just animal waste, must be applied at agronomic rates.⁸⁵

In addition to improving the clarity of the rule, the agency should consider provisions to decrease the environmental risk posed by the management of animal waste residuals. Specifically, we recommend inclusion of setback provisions similar to those applicable to the land application of biological residuals.⁸⁶ Similarly, we suggest restrictions on land application like those stated in 02T .1109(b), including but not limited to prohibitions of land application “if the application causes prolonged nuisance conditions;” “within the 100-year flood elevation” absent certain conditions; or “if the vertical separation of the seasonal high water table and the depth of residuals application is less than one foot.”⁸⁷ These basic requirements would help limit the threat to water quality posed by land application of these residuals.

V. Conclusion

We appreciate the opportunity to comment on the proposed rulemaking and welcome future opportunities to work with DWR and the EMC to protect North Carolina’s water resources.

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⁸³ North Carolina Register, Vol. 32, Issue 6, at 587 (Sept. 15, 2017).

⁸⁴ North Carolina Register, Vol. 32, Issue 6, at 587 (Sept. 15, 2017).

⁸⁵ Fortunately, the proposed rule would at least require distributors of bulk animal waste residuals to specify their nutrient concentration. But that labeling requirement would not apply to exempted operations that generate and land apply animal waste residuals.

⁸⁶ See 15A N.C. Admin. Code 02T .1108(b)(1).

⁸⁷ 15A N.C. Admin. Code 02T .1109(b).

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