



Michael F. Easley, Governor

William G. Ross Jr., Secretary
North Carolina Department of Environment and Natural Resources

Coleen H. Sullins, Director
Division of Water Quality

August 21, 2008

Steven L. Medlin
City-County Planning Director
101 City Hall Plaza
Durham, NC 27701

Dear Mr. Medlin:

This letter is in response to your request for guidance regarding implementation of the N.C. Environmental Management Commission's (EMC) Water Supply Watershed Protection rules. Specifically, you requested clarification on: 1) the authority of a local government to determine the exact boundary of a watershed protection area, 2) the process of EMC review of boundary changes, and 3) Durham's authority to use survey information to locate the normal pool of water supply reservoirs.

Authority to Revise Watershed Boundaries: Rule 15A NCAC 02B .0104(o) states that all revisions (expansions or deletions) to the EMC's adopted critical and protected area boundaries or to the local government's interpreted critical and protected area boundaries must be approved by the EMC prior to adoption by the local government. However, it is the N.C. Division of Water Quality's (DWQ) interpretation that it was the EMC's intent to allow certain minor adjustments to watershed protection boundaries to be made *without prior approval*. Language in 15A NCAC 02B .0202 and the state's Model Ordinance supports this interpretation and outlines some instances that could be considered "minor". Examples of "minor" adjustments are listed below. Please bear in mind that, *upon adoption*, all modifications to local watershed ordinances or maps must still be filed with DWQ and approved by the EMC or its designee, as appropriate, per Rule 15A NCAC 02B .0104 (b).

Definitions (20) and (53) in Rule 15A NCAC 02B .0202 describe instances when minor boundary adjustments may be appropriate for consideration by a local government. For example, major landmarks such as highways and property lines may be used to delineate the outer boundary of the critical and protected areas if the landmarks are adjacent to the appropriate outer boundary of 1/2 mile and 5 miles (in the case of reservoirs), respectively. The state's Model Ordinance, Section 305, Rules Governing the Interpretation of Watershed Area Boundaries, reiterates this example and contains additional guidelines in considering watershed area boundary adjustments. For example, Section 305 references a local government's option to consider surveyed plats prepared by a registered land surveyor as evidence that properties along boundaries shown on the watershed map do not actually lie in the watershed.

The Model Ordinance is offered as a guide to local governments in administering a watershed protection program that is in compliance with the EMC's rules; therefore, we believe that it



would be appropriate for a local watershed administrator to make minor boundary interpretations that are in line with the guidelines in the Model Ordinance without prior EMC approval. With that being said, we recommend that local governments consult with DWQ when there is any uncertainty as to what constitutes a "minor" boundary interpretation as it would be impractical to anticipate all possible scenarios. Final review of boundary revisions by DWQ and/or EMC would still be required.

DWQ/EMC Review: Requests by local governments for adjustment of watershed area boundaries, though infrequent, are reviewed first by DWQ for compliance with the letter and spirit of the EMC's rules. Typically, DWQ is given the opportunity to review proposed boundary revisions well before they are adopted by a local government. This serves to reduce the risk to the local government of having to reverse an adopted revision as a result of DWQ or EMC's review. In instances when DWQ determines that the request has some unique issue or concern, DWQ forwards the request to the Water Quality Committee (WQC) of the EMC for their review and deliberation. A local government may request to have the WQC or EMC make the approval decision for the issue or may request that the WQC or EMC reconsider a decision made by the Director.

Authority to Use Survey to Locate Normal Pool: The authority to determine the location of the normal pool, or the normal pool elevation (NPE), of a water supply reservoir rests primarily with the Army Corps of Engineers (ACOE). Durham, or any local government entity, should seek the approval of the ACOE, DWQ/EMC, and preferably the public well before adjusting a NPE and subsequently adjusting watershed boundaries. Any NPE survey should be at least supported by, if not initiated by, local government staff, and should be witnessed and approved by ACOE and local government staff.

It appears that Durham acted outside its authority when it adjusted the normal pool location and watershed boundaries around the eastern portion of Jordan Lake without first seeking the necessary federal and state approvals. This adjustment may be justified; however, DWQ and the ACOE should have been involved much earlier in this process. If accepted by DWQ/EMC, such a NPE change could result not only in a substantial revision to Durham's watershed map, but also significant alterations to the EMC's adopted critical and protected areas for perhaps the entirety of the lake. In contrast, federal and state staff were involved early on in Durham's request to change watershed boundaries around Ellerbee Creek, provided necessary approvals, and discovered that the methodology used to originally determine the NPE for the area of interest was different from the methodology used to originally determine the NPE for the rest of the Falls Reservoir. The Ellerbee Creek case raised concerns regarding the NPE for only a small area of interest rather than for the entirety of the reservoir, as may be the case with Jordan Lake.

DWQ cannot recognize Durham's current watershed map as it is drawn until it goes through the EMC approval process. Use of its current watershed map by Durham could constitute a program deficiency under Rule 15A NCAC 2B .0104 (o). To correct this deficiency, Durham would need to submit materials in support of the map revision to DWQ/EMC for approval. These materials would need to include documentation of the ACOE's concurrence with the adjustment to the normal pool location. Upon receipt of these materials, DWQ staff will determine whether the boundary adjustments warrant further action by the EMC.

I hope that I have adequately addressed your questions. DWQ will continue to work with you to address this possible program deficiency. Please feel free to contact me at (919) 807-6370 if you have further questions.

August 21, 2008
Sincerely,

Steven L. Medlin
City-County Planning Director
161 City Hall Plaza
Durham, NC 27701

Julie Ventaloro
WSWP Program Coordinator

cc: Elizabeth Kountis, DWQ Classifications & Standards Unit
John Hennessy, DWQ NPS-ACO Unit

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