

NORTH CAROLINA ENVIRONMENTAL MANAGEMENT  
COMMISSION

**Minutes of January 14, 2016 Meeting**

The North Carolina Environmental Management Commission met on Thursday, January 14, 2016 in the main floor hearing room in the Archdale Building, Raleigh, NC. Commissioners present were:

Gerard Carroll, Chairman

David Anderson

Charlie Carter

Tommy Craven

Charles Elam

E. O. Ferrell

Kevin Martin

Bill Puette

Larry Raymond

Steven J. Rowan

Bob Rubin

John D. Solomon

Steve Tedder

Julie Wilsey

**Commissioner Smith** was absent from this meeting.

**Commission Counsel Jennie Hauser** was also present. **Jill Weese** from the Attorney General's office as also present.

• **Preliminary Matters**

The meeting was called to order at 9:05 a.m. with Chairman Carroll presiding. He provided the notice required by N.C.G.S. §138A-15(e). No conflicts of interest or appearances of conflicts of interests were identified at this time.

• **Approval of Minutes**

The Chair asked for approval of the minutes from the Commission meeting on November 5, 2015. Those minutes had been published and distributed for review.

**Commissioner Tedder** made a motion to approve the minutes and Commissioner Martin seconded the motion. The motion carried unanimously.

**Chairman Carroll** indicated that Commissioner Smith was absent due to surgery undergone January 4<sup>th</sup>

and reported that the surgery went well and that he may be out for six to eight weeks. Hopefully he will be back with the Commission in March. The Commission extended its best wishes to him and his family.

**Agenda Item: 16-01 Request for Approval to Proceed to Public Comment on S.L. 2013-413 (H74)**  
**Periodic Review of Existing Rules Report for 15A NCAC 02A**

**Craig Bromby** presented this item, which pertains to rules entitled Organization of the Environmental Management Commission. He explained the recommended changes to the rules, and recommended the revised rules be sent out for public comment.

**Commissioner Martin** made a motion to send the rules out for public comment as recommended. **Commissioner Raymond** seconded. With no further discussion, the motion passed unanimously.

**Agenda Item: 16-02 Request for Adoption of Rule Text Modifications to Respond to RRC Staff Request for “Technical Changes” to Proposed Rules 15A NCAC 02L .0501 through .0515 Risk-Based Corrective Actions for Petroleum Releases from Aboveground Storage Tanks and other Sources; (formerly referred to as Risk-Based Assessment and Corrective Action for Non- UST Petroleum Releases)**

Art Barnhardt with the Underground Storage Tank Section of the Division of Waste Management presented proposed rules 15A NCAC 02L .0501 through .0515 which are named as risk-based corrective actions for petroleum release from above ground storage tanks and other sources. Formerly the title of this set of proposed rules was referred as the risk-based assessment and corrective action for non-UST petroleum releases. But this was one of the technical changes that was requested by the RRC to change the title somewhat to reflect the rule contents a little better. He indicated that the rules that the EMC was considering were for these modifications to these RRC requests for technical corrections was made in 2014. Mr. Barnhardt informed the Commission that Department Counsel and Commission Counsel were there if they wanted to discuss the statutory authority aspect.

**Counsel Jennie Hauser:** I just would point out that you added the definition to .0502 for non-UST. It's probably not controversial but that is a major change to the rule itself. Those types of changes that staff and I agree are most importantly needing to come back to the Commission so the Commission understands exactly what is going to be in this rule set when it is approved by the RRC. It was in the portion that Art referred you to beginning at line 10 and then going through line 13. Those types of changes are normally technical in nature and staff is enabled to make those changes on your behalf. I appreciate him bringing it to your attention so you could see it. But includes is not really different from the phrase means but is not limited to. Then the last change in that line was the addition of a comma in a series of terms and that's a pet peeve of the RRC staff. So your staff is fully able to take care of those and that's why he didn't mention that to you. Just so you'll see the distinction between the types of things he's going to bring to you, there are the very technical items grammatical type changes that your staff makes on your behalf without showing you normally. Then there are the more important matters that change the substance of the rule and the nature of the rule, the structure of the rule beyond just in tabulation type issues. I hope

that helps orient you to Mr. Barnhardt's comments.

Mr. Barnhardt continued to further explain changes and revisions to the rules. The Commissioners gave comments and asked questions. Counsel Jennie Hauser continued to assist the Commission in clarification of Mr. Barnhardt's information regarding technical changes to the rules.

**Chairman Carroll** asked the group if the Commission was comfortable moving forward with the changes that were made to date, in other words approving them to go forward or would the Commission like to see the item again with changes made? He also asked that there was one item raised by Commissioner Martin about the non-UST and he wasn't sure it was answered or settled.

**Michael Scott**, Deputy Director with the Division of Waste Management indicated staff took a look at the current statutes within the program didn't appear to provide a direct clarification. He indicated that it was a session law language issue meaning and other sources.

Therefore, at this time they were trying to move this particular motion forward and discussion on that particular component. Could they address that here?

**Commission Martin** asked if he was suggesting that within the definition they say, "other than USTs" even though it could be redundant. **Michael Scott** commented that would be a suggestion. He also stated going to the current statutory definitions they did not see a distinction, so taking it back to the session law language, they were seeing that potentially it could be a little problematic as you eluded to. Once again just seeing if they needed to clarify that in the rule language.

**Commissioner Martin** stated that his suggestion was just tacking on to the end of that definition "other than from USTs" or something like that.

**Chairman Carroll** asked Deputy Director Scott if that could be done and asked the Commission if they agreed. He stated that would be the Commission's recommendation so asked Deputy Director Scott if he could incorporate that in the definitions and if that would solve the problem. Deputy Director Scott replied yes. The Chairman asked for a motion to approve the technical changes to the proposed rules as modified to date.

**Commissioner Martin** made the motion and Commission Rubin seconded. There was no further discussion and the motion passed unanimously.

**Agenda Item: 16-03 Request for Approval of Hearing Officer's Report on and Adoption of Streamlining of Permit Exemptions Rule 15A NCAC 02Q .0102 and Related Rules Revisions**

Patrick Knowlson presented this item. He began by stating that a public hearing was held in Raleigh on November 4 on the rules and Chairman Carter, AQC served as the hearing officer. He explained that they were rewriting the 15A NCAC 02Q .0102 rules which was their permanent exemption rule for non-Title V sources for small and synthetic minor facilities. An internal group was created to rewrite the rule to make it more understandable. A fiscal note was approved the Office of State Budget

and Management on August 18, 2015. They addressed the issues with the rules and to date the hearing officer has recommended that the amendments proposed as presented in Chapter II of the hearing officer's report be adopted by the Environmental Management Commission.

After continued discussion of the issues associated with this rule, **Commissioner Carter** made a motion to adopt the rules with the changes that Mr. Knowlson mentioned. **Commissioner Ferrell** seconded the motion. The motion passed with one opposing, and the motion carried.

**Agenda Item: 16-04 Request for Waiver of 30-day Rule on Approval of Fiscal Note and Request for Approval to Proceed to Hearing on Revisions to Volatile Organic Compound (VOC) Rules in 15A NCAC 02D .0902**

This agenda item was removed from the agenda.

**Agenda Item: 16-05 Request Approval of a Coastal Region, Piedmont Region and Mountain Region for Purposes of Regulating Impacts to Isolated Wetlands**

**Karen Higgins**, Division of Water Resources, 401 Buffer and Permitting Program presented a brief overview and what an isolated wetland was. She described the three types of wetlands which were 404 wetlands, isolated wetlands and coastal wetlands. The Commissioners asked questions and discussed the impacts of the wetlands.

**Commissioner Elam** made a motion to approve the Coastal Region, Piedmont Region and Mountain Region as described. **Commissioner Puette** second the motion.

With further discussion the motion passed unanimously.

**Agenda Item: 16-06 Request for Determination of IBT SEPA Approval Process for an EIS Document**

Kim Nimmer, Inter-basin Transfer Program Coordinator with the Division of Water Resources presented and provided a brief background on the agenda item regarding the delegation of authority from the Commission to the Department for determining the adequacy of an environmental document prepared for an interbasin transfer certificate. Ms. Nimmer stated that the adequacy determination of an environmental document was a required step in the process for obtaining an IBT certificate. She was there at this time because there had been statutory changes that had altered the process in a current application being considered from Union County had triggered a closer look at that process, because it was the first application to go through the regular process for obtaining a certificate. The more recent certificates had come before the Commission and had followed either the process outline in Subsection V for the modification of an existing certificate or Subsection W regarding coastal counties or reservoirs built by the U.S. Army Corps of Engineers.

She indicated that moving through the process with Union County and looking at the steps in determining the adequacy there were some questions prompted by the change in statute. A Steering Committee meeting was held in November and staff brought forward a proposed process for determining the adequacy which had the Commission making that determination.

Concerns were expressed by commissioners about the Commission making that determination so early in the process. The Steering Committee made the recommendation that the authority to make that adequacy determination instead be delegated to the Department. The Department does not object to that delegation. The Steering Committee met again on January 13 to consider language for delegating that authority. That language is now available for consideration.

Ms. Nimmer mentioned briefly at the January 13 Steering Committee meeting that there was a brief discussion regarding the delegation and the upcoming rules revision process. She pointed out that surface water transfers fall under Rule 2E, Section 400 and that Section 2E rule, revision process would be discussed by Nat Wilson. Therefore, changes could be considered in that rule revision process regarding the delegation of authority. She introduced the proposed language for delegating authority from the Commission to the Department for adequacy determination of environmental documents for an IBT certificate. Copies of the proposed language were given each Commissioner.

The Commissioners presented comments and discussed this item in more detail.

**Commissioner Puette** served as the hearing officer for the public hearing on the adequacy of the environmental impact statement. He commented on his concerns and issues with this delegation of authority.

**Commissioner Solomon** asked for an explanation of the difference between the adequacy determination and a record of decision (ROD). Ms. Nimmer answered this question and described the differences between the two. She continued to discuss these two items with the Commissioners.

**Counsel Jennie Hauser** stated to clarify the question regarding the ROD that the two statutes that Kim went over overlapped and at the end of the adequacy determination, the ROD would issue under the SEPA document. If the Commission determined to delegate then that would be a discrete part of the process and then the Commissioners would receive that final environmental document to consider during the final IBT decision.

**Chairman Carroll** stated just to clarify that delegating the ROD authority would not preclude the Commission from making a decision at the final state of the process on that same matter.

**Counsel Hauser** stated that it did not necessarily preclude such, but that there might be challenges if there were different decisions made, but there were likely going to be challenges in any case. The decision could get reviewed at a contested case proceeding. Counsel informed the Commission that they were not setting themselves up for a separate judicial review because the statute currently specifies

where that review would occur.

**Commissioner Puette** commented that the Commissioners would have given away their authority also to serve as hearing officers for the draft EIS.

**Commissioner Martin** stated that he didn't see how a Commission member could be a hearing officer for the EA and the EIS, and then the Commission be making the decision. That would be the same conflict that Commissioner Tedder was concerned about in the beginning.

**Counsel Hauser** stated that for that to be abundantly clear as **Mr. Puette** had suggested, perhaps that paragraph should be specifically referenced in the delegation. As a practical matter since the Chairman appoints the hearing officers, the problem could be avoided by the chair not making those appointments. But in order that it be abundantly clear that paragraph could be added.

**Chairman Carroll** – Could we simply say the document required by G.S. 143-22L(d) and (e) is adequate pursuant to? Could you just do it that way?

**Counsel Hauser** – However, paragraph (e) does not require the document. Paragraph (e) is a separate procedural requirement in the statute. But at least it would be in there. I also think that the wording currently given could cover any activities that are taken to accomplish the adequacy determination which would necessarily include paragraph (e). I was just trying to accommodate Commissioner Puette's request that it be specifically referenced which I think is also a good idea.

**Chairman Carroll** – Do you consider it to be necessary to accomplish this? If the Commission hasn't delegated this authority is that sort of understood in (e).

**Counsel Hauser** – I would ask the staff whether they needed a specific reference to paragraph (e) in order to accomplish the delegation.

**Tom Fransen**, Planning Section Chief and Jay and I were just talking. I think if we can do the broad interpretation that you had suggested that this would cover all activities related to it. We wouldn't necessarily have to have a specific reference. But we also follow up like your suggestion earlier that we put this in rule. Since we are starting the rules review that may be some place we can further clarify this later down the road, which is a way to keep it moving forward.

**Commissioner Martin** – asked regarding the delegation of authority. EMC's delegation of authority says it makes the delegation to the Secretary and then he may delegate to any qualified employee. Can EMC do a delegation that's inconsistent with this rule?

**Counsel Hauser:** It's not inconsistent with that rule because that rule doesn't govern every situation. It governs certain situations and EMC is able to develop this delegation any way it wants to. That was what was done in the Steering Committee yesterday.

**Chairman Carroll** suggested that they use the proposed language that had been handed out in order that they document the motion appropriately.

**Commissioner Tedder** made a motion that the Commission proceed forward and approve the proposed language with the delegation, as on the hard copy that each Commissioner had been given. Commissioner Rubin seconded the motion. The motion passed with one opposing (**Puette**).

**Agenda Item: 16-07 Request for Approval to Proceed to Public Comment and Hearing on Proposed Amendments to Stormwater Rules including new “Minimum Design Criteria” and Fast-Track Permitting Process and Approval of Regulatory Impact Analysis**

Annette Lucas, Division of Energy, Mineral and Land Resources presented this item regarding the proposed amendments to the stormwater rules. She proceeded to comment on the legislative background for the item. After discussion of the proposed amendments, Ms. Lucas on behalf of staff requested that the Commission approve the package of stormwater rule re-adoptions and the Regulatory Impact Analysis to proceed to public comment and hearing, and also requested that the Chairman appoint a member of the Commission to serve as the hearing officer.

**Commissioner Tedder** made a motion to approve the rule amendments as proposed by staff and Commissioner Martin seconded. With no further discussion the motion passed unanimously.

**Commissioner Tedder** recommended **Commissioner J. D. Solomon** to serve as hearing officer for the proposed amendments.

(There was now a Five minute recess)

**Agenda Item: 16-08 Request Approval to Proceed with Rules Review of Rules 15A NCAC 02C in accordance with HB74 and G.S. 150B**

Debra Watts, Water Quality Regional Operations Section discussed the reasons why staff had to review the rules, a summary of the 2C rules and overview of the process and what categories and determinations that they are required to consider. She stated that Session Law 2013-413 required that existing rules have to be reviewed every ten years. She stated that the procedures that they use are in accordance with G. S. 150B-21.3A. Ms. Watts explained after all the each agency reviewed their rules to determine the category that they fit under and after they make an initial determination, it is presented before the Groundwater Committee and then forwarded to the EMC for approval to go forward. If the Commission approves the rules staff will take them out to public hearing and be adopted on their website and the OAH website. After comments are received staff will look to see if they need change or determination, and then go to the Rules Review Commission. After Ms. Watts completed the presentation she stated that staff was recommending that the 15A NCAC 02C well construction standards be considered necessary with substantive public interested. She shared the schedule for action and

responsibility with the dates included.

**Commissioner Martin:** stated that the Groundwater and Waste Management Committee previously heard this presentation and recommended moving it along to the Commission. He made a motion that the Commission approve the request to proceed with the rules review of the rules 02C consistency with HB74 and G.S. 150B as proposed by staff. **Commissioner Raymond** seconded the motion. The motion passed unanimously.

**Agenda Item: 16-09 Request Approval to Proceed with Rules Review of Rules 15A NCAC 02E in Accordance with SL 2013-413**

Nat Wilson presented this item in saying that this was a three-step process and they are in step one. They have determined how to classify the rules getting an approval from the Commission through the Water Allocation Committee. Staff determined that the 27 rules in subchapter (02E) should be classified as necessary with substantive public interest. Mr. Wilson continued to discuss the different rules and their determinations. He followed up with a schedule for the initial determinations of the process of these rules. Staff was requesting approval to proceed with the public comment phase of the review of Rules 15A NCAC 02E in accordance with Session Law 2013-413.

**Counsel Jennie Hauser** asked for clarification was this just for the approval of just the classification of the rules for the report that will be delivered? It's not the rules themselves.

Nat Wilson responded that was correct.

**Commissioner Craven** made a motion for approval of the rules as staff recommended. **Commissioner Ferrell** seconded. Hearing no other discussion the motion passed unanimously.

• **Information Items**

**Information Item: 16-01 Status Report: Falls Lake Nutrient Strategy**

This information item was removed from the agenda.

**Concluding Remarks:**

**By Committee Members**

**Chairman Carter** stated that the Air Quality Committee had one action item which was on the permit exemptions that were presented. The Committee had a couple of concepts that were coming forward. He mentioned the Startup, Shutdown, Malfunction rule which is a requirement that EPA has issued a notice of deficiency to the state. Some corrections to current rules are needed to satisfy EPA. The other item of business was a short summary on the 111(d) primary plan that will be considered at the Special Call meeting on February 16. He asked anyone interested in information to contact either **Director Holman** or

himself to resolve any questions before the 16th. The Department will undertake the next step in the process, which is the backup plan to go forward with the broader look at building blocks 2 and 3, once they've completed this. This will start up in March after final action on February 16.

**Chairman Craven:** The Water Allocation Committee met yesterday and took a very deep plunge into the Jordan Lake Water Allocation pool. After a detailed presentation on the history of the modeling and the various requests that support the allocation recommendations, the Committee voted unanimously to approve an allocation and authorize the staff to hold a public meeting, and to begin to receive comment on that allocation. After the comment period this will come back to the full EMC for action. The committee also received an interbasin transfer update and is keeping watch on the Yadkin interbasin transfer that is still in process. Unfortunately due to time constraints the committee was forced to postpone its ongoing discussion of water supply impediments and challenges until its next meeting.

**Chairman Martin:** The Groundwater Committee met and had one action item which was considering amendments to the solid waste rules 15A NCAC 13(b) .0201, .0206 and a proposed rule .0207. These are basically related to the life of permits for solid waste facilities like landfills, transfer stations and those kind of things. Committee did recommend approving and bringing this to the full Commission to go in the March meeting. EMC is mandated by legislature to approve this by July 1 but if it meets July 14, that's going to be pretty close so hopefully, that will be acceptable. These are legislatively mandated issues so not likely to be highly controversial.

**Chairman Tedder:** At committee's meeting yesterday, it did approve one major variance after the fact, for a small situation on Blounts Creek. A couple of the items were heard today and committee did get a draft status report on Falls Lake. A final draft should be coming to the full Commission in March. It's a good document and for those that have not looked at the N & O this morning, there's a good article in there based on discussions that were held at the ERC yesterday.

### **By Directors**

**Michael Scott**, Deputy Director of Waste Management who spoke on behalf of Director Culpepper provided a legislative update. He focused on public access to information, which was one item he shared with the Commission.

**Director Davis**, Energy, Mineral and Land Resources provided a legislative update.

**Director Holman** informed the Commission that the H74 rule categorization report that they approved at the November meeting went before the Rules Review Commission in December and the RRC did approve the report. It is now before the Administrative Procedures Oversight Committee and we will keep you posted as it moves through the process. On the 111(d), they did complete their public hearings. They had three across the state, one in Charlotte and one in Wilmington. Somewhere between a 125-150 attendees were at each meeting and anywhere between 30 and 50 registered speakers. The primary comments that we've heard so far is that really urging the state to develop a complete plan to be fully compliant with the EPA's Clean Power Plan. That work will begin in March as we conduct our first stakeholder meeting. We also heard that the current plan doesn't go far enough and that we need to focus on energy efficiency and renewable energy as part of a complete plan. We also heard concerns

about rising utility rates for families on fixed incomes. To date we have over 11,000 comments, most of those are in the form of emails and we will be working with the hearing officer, Commissioner Carter to complete the hearing record by the end of that first week in February to give the Commission adequate time for review prior to the February 16 meeting. Thank you very much for accommodating the special meeting. One other note that affects the Department and all Departments across state government we are in the process of migrating our web pages to a new format. Our Department one is scheduled to go live in the new format on or about January 25 and we are doing our best to make sure there are no hiccups in that, and that everybody continues to get access to all of the data and forms that are normally available on our web pages. Bear with us as we go through that process.

**Director Zimmerman** stated that he wanted to echo what Sheila said that we're going to do our best to ensure that with the migration of content over from our current servers to the new Department server, we will try and make that as flawless and seamless as possible. I wanted to bring an item to your attention that doesn't directly come before this Commission but I thought you might be interested in it. We are going to begin a series of meetings concerning the coal ash impoundment classifications in March. Those meetings are to gather public input into the classifications that have been assigned the various impoundments currently owned and operated by Duke. That will begin sometime in early March and continue through most of March, and hopefully we will be preparing a report shortly thereafter to allow before the Coal Ash Management Commission if they are here. Along the lines of a reorganization, the Albemarle Pamlico National Estuary Partnership (APNEP) have been formerly housed under the Secretary within the Department and has been moved into the Division of Water Resources within the last several weeks. If there is any desire on the part of the Commission to learn a little more about that partnership, I can get with the staff and ask they prepare a brief presentation before the Commission so you know a little bit more about what they do. We will be piggy backing a meeting in February to try and wrap up the revisions to the groundwater corrective action rules. It is our intent to discuss the hearing officer's report with the hearing officers and hopefully present that in February. That's the changes that the Commission mandated to make to clarify the corrective action rule and compliance boundary rule.

#### **By Commission Counsel**

A copy of the January 2016 litigation summary was distributed to each Commissioner and staff. Counsel Hauser stated that most of the remarks would be updates of continuing litigation. Counsel Hauser summarized and updated the cases of City of Fayetteville v. EMC, House of Raeford Farms v. EMC, Hallie Turner v. EMC, Sierra Club et al. v. EPA, EPA v. EME Homer Generation, L.P., N.C. Coastal Federation, et al., v. DENR and Carolinas Cement Company and the City of Lenoir v. NCDENR, DWR and EMC.

#### **By Commission Members**

**Commissioner Tedder:** The Water Quality Committee had a major action item and that was the review of rules for 2B, 2T, 2U and 2H. In this past meeting, I am assuming they will be coming to the Committee in March. I would just urge everybody to continue to get a head start because there is a lot of information. If you had gone to the Division website over the past several months they were tracking rule changes and pre- and post-stakeholder involvement. After discussions with staff and it was on the agenda for today for the Water Quality Committee if you go to that, they have converted a lot of the information into tables. It is

much better to understand than go through the process to see why they made changes and where they moved them to or explain what's going on. They are still making those revisions. But rather than go to what was on the original website, I would go to that agenda item that was removed. It's a lot better explanation and easy to follow the changes as you review for the next Water Quality Committee meeting.

**By Chairman**

**Chairman Carroll** informed everyone that the Civil Penalties Remission Group I would be meeting in 20 minutes. With no further business before the Commission, the Chairman adjourned the meeting at 1:00 p.m.

Approved this day 14th of January 2016.



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Gerard P. Carroll, Chairman of the EMC