

## Minutes of May 12, 2016 Meeting

The North Carolina Environmental Management Commission met on Thursday, May 12, 2016 in the main floor hearing room in the Archdale Building, Raleigh, NC. Commissioners present were:

Steven J. Rowlan, Chairman  
David Anderson  
Charlie Carter  
Gerard Carroll  
Tommy Craven  
E.O. Ferrell  
Kevin Martin, Vice-Chairman  
Bill Puette  
Larry Raymond  
Bob Rubin  
John D. Solomon  
Steve Tedder  
Julie Wilsey

**Commissioners Elam and Smith** were absent from this meeting.

**Commission Counsel Jennie Hauser** was also present. Jill Weese and Mary Lucasse from the Attorney General's office were also present.

### I. Preliminary Matters

The meeting was called to order at 9:00 a.m. with **Chairman Rowlan** 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.

**Commissioner Solomon** recused himself from the discussion regarding the Cary-Apex for Clerical Correction to 2015 IBT Certificate matter.

### II. Approval of Minutes

The Chair asked for approval of the minutes from the Commission meeting on March 12, 2016. The minutes had been published and distributed for review. Minutes were approved **by Commissioner Tedder and Commissioner Wilsey** seconded the motion. The motion passed unanimously.

### **Agenda Item: 16-20 Request to Proceed to Hearing on Startup, Shutdown and Malfunction (SSM) State Implementation Plan (SIP) Call Rule Revisions (533)**

Michael Pjetraj, DAQ Stationary Source Compliance Branch Supervisor, presented the request to proceed to hearing on proposed rule amendments and a rule adoption regarding startup, shutdown and malfunction operations. On May 22, 2015, the U.S. Environmental Protection Agency (EPA) issued a final

action to ensure states have plans in place that are fully consistent with the Clean Air Act and recent court decisions concerning start-up, shut-down and malfunction (SSM) emission limit exemptions. EPA's final action responds to the Sierra Club Petition; clarifies the EPA's SSM Policy to assure consistency with the Clean Air Act and recent court decisions, finalizes findings that the SSM provisions in the SIPs of 36 states that do not meet the requirements of the Clean Air Act (CAA), and accordingly issues a "SIP call" for each of those states directing the affected states to correct specific SSM provisions in their SIPs. The Clean Air Act allows a maximum of 18 months from the issuance of the final action to submit a SIP revision. The SIP submission deadline for each of the 36 states subject to the SIP call action is November 22, 2016.

As described in the February 2013 proposal, the Petitioner objected to two generally applicable provisions in the North Carolina SIP that provide exemptions for emissions exceeding otherwise applicable SIP emission limitations at the discretion of the state agency during malfunctions (15A NCAC 02D .0535(c)) and during start-up and shut-down (15A NCAC 02D .0535(g)). The EPA granted the Petition with respect to 15A NCAC 02D .0535(c) and (g), finding that 15A NCAC 02D .0535(c) and 15A NCAC 02D .0535(g) are substantially inadequate to meet CAA requirements and issued a SIP call with respect to these provisions. 15A NCAC 02D .0535 is proposed to be revised to add an "if then" applicability statement to clarify its status pending outcome of pending litigation by several states, including North Carolina, such that 15A NCAC 02D .0535 is not in effect if 15A NCAC 02D .0545 is valid. New Rule 15A NCAC 02D .0545, Treatment of Malfunction Events and Work Practices for Start-Up and Shut-Down Operations, is proposed for adoption to address the identified inadequacies and contains language such that it would not be in effect if the EPA SIP call is invalidated. Rule 02D .0545 addresses Start-up, Shut-down and Malfunction events and defines how a facility can comply during those time periods. For Start-up and Shut-down periods, facilities can comply with: 1) existing numeric emission limits; 2) generally available work practice standards; 3) federal work practice standards applicable to similar equipment; or 4) source specific start-up and shut-down work practice standard permit limits. For Malfunction periods, facilities can comply with: 1) existing numeric emission limits; or 2) source specific malfunction work practice standard permit limits.

Since the facility will have the ability to comply with work practice standards, the facility will be subject to a standard at all times. Reporting will continue to be required for excess emissions associated with malfunctions.

The Commission discussed with staff the Court schedule for the litigation.

**Commissioner Craven** asked whether the Director had the ability to extend the timeframe for submittal. Mr. Pjetraj responded according to the rule there was not a provision specifically that allows for

an extension. There were no other comments or questions and Ms. Joelle Burleson discussed the fiscal note.

Ms. Burleson indicated that as part of the process staff did need the Commission's approval of the fiscal note in order to move forward to public comment and notice, and they had prepared a fiscal note which was reviewed by the Office of State Budget and Management. There were some minor adjustments and the adjusted version was now available and approved by OSBM to date.

**Commissioner Carter** made a motion to approve the fiscal note and request to proceed to public hearing along with incorporating the technical corrections outlined by Mr. Pjetraj. **Commissioner Ferrell** seconded the motion and the motion passed unanimously.

**Chairman Rowlan** inquired as to plans for hearings on the proposed revisions and instructed staff that more than one hearing on the proposed revisions should be held. Staff agreed the hearing could be held in Raleigh and Charlotte. **Commissioner Carter** and **Commissioner Ferrell** agreed to serve as hearing officers.

**Agenda Item: 16-21 Request Approval of Hearing Officer's Report on Proposed Adoption of 15A NCAC 13A .0101, .0102, .0103, .0106, .0107 and .0108 for the General Rule, Definition of Solid Waste Rules, and the Electronic Manifest Rules and Approved Fiscal Note and Economic Impact Analysis**

**Agenda Item: 16-22 Adopt Rule for Revisions to the Definition of Solid Waste Rule**

**Agenda Item: 16-23 Adopt Rule for Amendments of General Rule 15A NCAC 13A .0101 (b) and (f)**

**Agenda Item: 16-24 Adopt Revisions for the Electronic Manifest Rules**

These agenda items were grouped together and Ms. Julie Woosley, Hazardous Waste Section Chief of the Division of Waste Management, presented the Hearing Officer's Report on a list of amendments to rules .0101, .0102, .0103, .0106, .0107 and .0108. The Public Hearing occurred January 11, 2016. The text for the rules were posted, in advance on the website for the entire comment period, at the Public Hearing, and at the end of the Hearing Officer's Report.

**Dr. Albert Rubin** was the Hearing Officer for the Public Hearing. No written comments were received for any of the rules, and one person, Mr. Ray Dudley from Ecoflo attended. Mr. Dudley offered no formal response to these rules, except for support for the Definition of Solid Waste Rules.

Ms. Woosley and the Hearing Officer recommended the EMC adopt the rules and approve the Economic Impact Analysis. **Dr. Rubin** indicated he was pleased with the explanation of the E-Manifest

criteria. Motion by **Vice Chairman Kevin Martin** to adopt the recommendations of the Hearing Officer's Report and Economic Impact Analysis and the motion was seconded by **Dr. Lawrence Raymond**.

Discussion occurred after the seconded motion. **Commissioner Charles Carter** questioned why there were two separate agenda items with what looks like the same set of rules. Ms. Woosley stated there are four items for the presentation: The Hearing Officer's Report (one hearing for all of the rules), and then the three sets of rules for the Definition of Solid Waste Rule, the E-Manifest Rule, and the administrative rule changes, with the Fiscal Impact or related Economic Impact Statement for each.

The Commission discussed the option of hearing all of the rules in advance approving the Hearing Officer's Report: Agenda Action Items 16-21, 16-22, 16-23 and 16-24. The Commission amended their motion and second to approve the Hearing Officer's Report and proposed rules for Action Items 16-21, 16-22, 16-23 and 16-24 and motion passed with **Commissioner Carter** responding nay.

**Agenda Item: 16-25 Request for Approval of Hearing Officer's Report and Adoption of Proposed Amendments to Replace Rules for the Collection and Transportation of Solid Waste: 15A NCAC 13B .0105**

Ms. Jessica Montie, Compliance Officer, Division of Waste Management Solid Waste Section, presented the Hearing Officer's Report which included the regulatory impact analysis and the amendments to replace rule 15A NCAC 13B .0105. Ms. Montie identified the amendment from SL 2013-413 paragraph (c), changing the terminology from "leak-proof" to leak-resistant", and also include industry standards. The Rules Review Commission (RRC) recommended additional changes for clarification in paragraphs (a), (b) and (d). OSBM reviewed these proposed rule changes. They approved the change and determined a fiscal note was not required. The rule was published for public comment through December 14, 2015. The public hearing was held on November 13, 2015, and Ms. Montie was assigned as the Hearing Officer. No comments were received at the hearing, and one comment was received during the comment period on behalf of a stakeholder group from the North Carolina Solid Waste Section of North America (NCSWANA). The stakeholder took issue with the striking of the phrase "when necessary" in the first sentence of paragraph (d). The change was made as a result of a comment from the RRC counsel that the phrase is ambiguous.

Continued dialogue between DEQ and the stakeholder clarified the impact of removing the phrase. DEQ revised the proposed text from what was published in the register: removing paragraph (d) and adding/revising some language in paragraph (c) to incorporate the requirements for collecting/loading waste from paragraph (d). DEQ's deputy general counsel reviewed the changes and recommended the changes were not substantial, therefore not requiring the rule be re-published for public comment. The stakeholder

did not take issue with the changes. Ms. Montie, the hearing officer recommended that the EMC adopt the rule with these changes from the published version.

Session Law requires the adopted rule become effective as though (10) or more comment letters were received, and exempted the rule change from review from the RRC. As the rule, if adopted today, cannot be submitted for legislative review (25) days prior to the current session, the rule will become effective pending legislative review in the 2017 legislative session.

Motion was made by **Vice Chairman Martin** to adopt the rule as proposed with the Hearing Officer's Report and Fiscal Analysis and seconded by **Commissioner Gerard Carroll**. The motion passed unanimously.

**Vice Chairman Martin** added that the previous rule items brought up by **Dr. Rubin** concerning signage on vehicles was passed on by the Committee. The signage had not been addressed in the fiscal note, and it would have held up the rule process. The opportunity to revisit the vehicle signage will come through Rules Review, at which time **Dr. Rubin** and staff could consider/address the signage.

**Agenda Item: 16-26 Request Approval of Revisions to 15A NCAC 02B .0227 Water Quality Management Plans**

Elizabeth Kountis, Division of Water Resources presented this item. Ms. Kountis reviewed the history of recent rulemaking. At the September 2015 EMC meeting, the EMC approved rule amendments reflecting the reclassification and water quality management plan. The rulemaking involved proposed amendments to 15A NCAC 2B .0227 and 15A NCAC 2B .0311. DWR submitted the EMC approved rule amendments to the Rules Review Commission (RRC) and the RRC legal staff requested technical changes to 2B .0227. The requested changes addressed old 2B .0227 rule language primarily in existence prior to the rule amendments approved at the September 2015 EMC meeting. DWR considered the requested changes for the purposes of clarity only, and DWR responded to the requested technical changes with revisions to 2B .0227 that DWR felt did not alter the intent or purpose of the rule. EMC approved the revisions at its November 2015 meeting to go out to public notice. The 60-day public comment period on the revisions to 2B .0227 began in December 2015, when the proposal appeared in the North Carolina Register, and ended in February 2016; the opportunity to request a public hearing was included in the public notice, but no hearing was requested, and therefore, no hearing was held. The purpose of the public notice was to receive public comments on the technical change revisions to 2B .0227. She continued to discuss and review the changes and details surrounding this matter.

In closing, Ms. Kountis indicated DWR staff recommended that of the proposed revisions to 2B .0227 in response to requested technical changes, be approved by the Commission including the above-noted citation correction and clarifying language as presented in the attachment for this agenda item. If approved by the EMC and then approved by the RRC in June of this year, the proposed effective date for all modifications to 2B .0227 that were approved by the EMC at its September 2015 meeting and today's meeting is July 1, 2016. In addition, given that the proposed amendments to 2B .0227 for a water quality management plan for a Cape Fear River segment were approved in conjunction with proposed amendments to 2B .0311 for a reclassification of the same Cape Fear River segment to Class SC SW, the proposed effective date of the amendments to 2B .0311 will also be July 1, 2016.

**Counsel Jennie Hauser** commented just to clarify that the Commission was being asked to adopt this rule. Ms. Kountis had called an approval, but this is the adoption phase where it goes to the RRC after you take this action.

**Commissioner Wilsey** made a motion that the Commission adopt the revisions to 15A NCAC 02B .0227 with the clarifying technical language. **Commissioner Rubin** seconded.

**Dr. Rubin** questioned the dates and how long could the RRC hold this item up if they decided to.

**Ms. Kountis** stated that when the RRC gets a rule they have their legal counsel look at it and they have a couple of options. One option was to send back technical changes and one is send back more significant changes and the other is to have no comment at all. She indicated that at this point they are ready to go forward. They have looked at .0227 already and .0311.

**Commissioner Martin** stated that the other way it could get held up was the ten letters of objection if they were received by the RRC. Even if RRC was ok with it that would slow the process.

The Chairman asked for a vote and the motion passed unanimously.

**Agenda Item: 16-27 A Survey of In Situ Strategies for Mitigation of Water Quality Impairments in North Carolina**

**Deputy Director Culpepper** indicated that they were anticipating that the department was not going to be making presentations today about agenda item 16-27 and the next agenda item 16-28. Staff were present to answer comments and if there were any issues that they could address they would be more than glad to do that.

**Commissioner Wilsey** stated that the report was discussed in the Water Quality Committee and they adopted the report. **Chairman Rowlan** then asked if the Commission had any comments or questions with this issue moving forward, before **Commissioner Wilsey** made her motion.

**Commissioner Carter** wanted to know what were the procedures for moving forward with this item. **Commissioner Carroll** asked that it be clarified what the Water Quality Committee adopted.

**Commissioner Wilsey** stated that the Committee discussed the item, and the result of the Committee was that they adopted the report that was posted to the website for the March meeting. The committee approved this version of the In Situ strategies otherwise known as, solarbees. The Committee approved the March 2016 version of the report and instructed staff to post that version on the website for the full Commission's consideration today; not the version that was posted with the May agenda.

**Chairman Rowlan** asked if this was the report due to the ERC by April 1. **Commissioner Wilsey** responded yes that was correct. He asked **Commissioner Wilsey** to summarize for those who were not present at the Committee meeting why they went back to the version initially posted for the March meeting.

**Commissioner Wilsey** stated based on the Committee's discussions and deliberations they felt that the March report had more technical data in it and it was more consistent. It was very important that the report reflect that it was actually a joint report by the EMC and the Department. They felt that the language, which was more clear and the material was covered in broader depth. They thought that report should go to the Legislature.

**Commissioner Carter** indicated that he just needed to understand what the process would be if they moved forward with the motion to approve this report. He questioned what was going to happen from there going forward. He asked if staff was still revising the report. **Commissioner Wilsey** responded that they revised which report was posted on the website overnight based upon the Committee actions and it was ready for approval by the EMC. She stated that the EMC would submit the approved report and the Department may submit a separate report on the same item. The March version of the report would be the EMC's report.

**Commissioner Carter** commented that if the EMC adopted the report today it would be submitted as just a report of the Commission or would it be submitted as the joint report of the Commission and the Department. **Commissioner Wilsey** stated the requirement was for a joint report by the EMC and the Department. Their intent is to approve this report as the joint report, and she stated that the Department had said overnight that they would submit their own report along with the current report from the EMC. **Chairman Rowlan** asked if this report would fulfill the Legislative requirement and **Chairman Wilsey** answered yes.

**Commissioner Wilsey** made a motion on behalf of the Water Quality Committee that the EMC approve the Survey of the In Situ Strategies for Mitigation of Water Quality Impairments report pursuant to requirement for S.L. 2015-241 that was approved by the Committee. **Commissioner Solomon** seconded the motion.

**Chairman Rowlan** indicated that there was a lot of hard work because there were a lot of versions of this report and he appreciated that kind of effort from the staff. With no other comments or questions the motion passed unanimously.

**Agenda Item: 16-28 Request Approval of a Study of the State's Riparian Buffer Protection Program pursuant to SL 2015-246**

**Deputy Director Linda Culpepper**, Division of Water Resources, indicated there is a similar understanding with this item as well that staff would not be giving a presentation on this item. Karen Higgins was there and able to answer questions

**Chairperson Wilsey** provided a summary of the Water Quality Committee's action the day before, which was to unanimously disapprove the May 2016 report and unanimously approve the March 2016 report with a couple minor edits. It was important to note that this is a report by the EMC with the input of the Department staff.

**Mr. Martin** clarified that he requested the phrases "50-foot" and "on intermittent and perennial streams" be added to the executive summary. **Chairperson Wilsey** on behalf of the Water Quality Committee recommended approval of the Study for the State's Riparian Buffer Protection Program pursuant to S. L. 2015-246 to be submitted to the Legislature on behalf of the Environment Management Commission. **Commissioner Tedder** seconded. The EMC unanimously approved the motion.

**Commissioner Martin** thanked the staff because they spent a huge amount of time, particularly Ms. Higgins on getting the report into a format with redline versions to make it easier for the Commission to see the differences.

**Chairman Rowlan** indicated that he was going to change the agenda by moving action item 16-29 to the end of the meeting. Therefore, he would move to concluding remarks from the Committee Chairs. He thanked the former chairs for extremely good work, **Commissioner Tedder, Commissioner Craven and Commissioner Martin** for having chaired for many years the three committees. He indicated that he and

**Commissioner Martin** had been working on some things that hopefully would help the Commission. He stated that they wanted the agenda to be set three weeks before the meeting.

**Commissioner Martin** commented unless there were things that were not under their control, for example requests for declaratory ruling that would have specific times that the Commission could not control, the expectation is to have the agenda information posted by the three-week deadline.

**Chairman Rowlan** stated they are going to work with the Committees and **Commissioner Martin** would be having a meeting with the Department in June to make sure that they were on track with the agenda and have time to study the items. He expressed appreciation to Commissioner Martin for working with him in trying to figure out how to do that with the Department Heads.

### **III. Concluding Remarks**

#### **By Committee Chairs**

**Commissioner Carter** thanked **Vice Chairman Ferrell** for chairing the Air Quality Committee in his absence and he did an excellent job. He also thanked the Division of Air Quality staff for an excellent proposal going forth on the SSM.

**Commissioner Wilsey** stated at the Water Quality Committee, in addition to the hard work staff did on the two reports that they just approved, they also approved two major variances for buffers and a reclassification request for a segment of the Catawba River and Lake James, that will come to the EMC in the future. They received an update and information item on the EPA's response to a triennial report on water quality and they will have more in-depth information next time at the Water Quality Committee meeting, if they would like to hear the comments from EPA. She also thanked both the committee members and DWR for their hard work.

**Commissioner Puette** indicated that the Groundwater and Waste Management Committee had items which dealt with hazardous waste, solid waste and Superfund rules. He stated that those rules would be back before the Commission in July for final adoption.

**Counsel Jeannie Hauser** indicated that this was for the periodic rule review under House Bill 74 and these are the reports that classify the rules in the different categories. The reports will come for approval in July. The reports would be published and there will be public comments on those classifications.

**Commissioner Anderson** chaired the Water Allocation Committee in **Commissioner Smith's** absence. He indicated that they had updates by DWR personnel on several different issues, the Greenville Utility Commission, the capacity use study feasibility and the interbasin transfers. The committee voted on general support for a Union County webinar that's upcoming, and it's not mandatory that they, as members attend that webinar, but it is recommended.

**Counsel Jeannie Hauser** clarified the record by stating that the webinar was proposed to the committee and there was discussion about whether that was advisable, but the ultimate vote on that was not to take official action to allow that.

**Commissioner Anderson** stated that they didn't want to establish a precedence for that action going forward at all. It was a good gesture and committee members could voluntarily view a webinar but it is not required at all.

**Commissioner Solomon** indicated that the 2H rules would be scheduled for the July meeting. He stated a forewarning that it was the best re-adoption of 2H rules and he is the hearing officer. The Department has reorganized those rules and the Commission would not only see rules to be re-adopted but also a total of re-chaptering of those stormwater rules. In addition, there is a legislative mandate on them for a minimum design criteria and a fast-track stormwater process. You will see these in July. He stated that the minimum design criteria had to be adopted by November 1.

#### **By Directors**

**Director Holman**, Division of Air Quality noted that for the rules that the Commission approved them proceeding to public hearing at the March meeting the VOC rule changes and the repeal of the heavy duty engine idle restriction rule, they have a public hearing scheduled from May 25 held at the Department's Green Square office building at 3:00 p.m. in the afternoon and DAQ staff would serve as hearing officer upon instructions from **Chairman Rowlan**. That hearing officer will be Lori Cherry who is a staff member in their ambient monitoring section. She also updated the Commission on the H74 rule re-adoption process for the air quality rules contained in 02D and 02Q.

**Deputy Director Linda Culpepper** indicated that Director Zimmerman was in Atlanta meeting with EPA Region 4 and the other state directors. Director Culpepper provided the status of a legislative summary which included Senate Bill 813, disapproves the EMC's recent 15A NCAC 02L .0106 rule changes, House Bill 965 (companion SB 769), House Bill 996 (companion SB 766), House Bill 1006 (companion SB 767),

House Bill 997 (companion SB 764), House Bill 1024 (companion SB 763), House Bill 1025 (companion SB 765), and a DOT related bill, House Bill 1003 (companion SB 778).

**Commissioner Puette** asked DWR to give the Commission a list of the email summary of the legislative summary that **Deputy Director Culpepper** provided. **Deputy Director Culpepper** stated that she would discuss the request with Mollie Young

**Director Michael Scott** thanked **Commissioner Craven** for stepping into the role of solid waste serving as the hearing officer for the licensed permit rules that would be coming before the EMC in July. **Commissioner Puette** presented the periodic rule review before the Groundwater and Waste Management Committee a set of hazardous waste, Superfund and solid waste rules starting that process. Initial determinations were made and presented before the Committee. He updated the Commission that the Division of Waste Management would be hiring an administration officer in the near term to help with some coordination with their Division and the EMC. The Departmental staff from DEMLR, DWR and the Division of Waste Management would be visiting Kingston, Tennessee where a release occurred in 2008 of coal ash. They are meeting with EPA and Tennessee staff to glean information from that particular site. This was something that **Commissioner Rubin** and Dr. Daniels, UNC Charlotte had recommended that the Department visit the Kingston, Tennessee site, learn from EPA and the Tennessee officials regarding that particular release. He indicated that there were some informational items to bring before the Commission about some specific topics. They are working actively on the environmental justice component as a Department when it comes to the proper permitting of coal ash in North Carolina. This information was requested when they have everything finalized to bring it before the Commission. They are nearing completion of their art GIS online application in coordination with DHHS regarding making an informed decision when drilling wells in the state of North Carolina related to non-sources of contamination. He indicated that the Department was actively involved on several legislative fronts and they were tracking several bills, which he indicated for the Division of Waste Management.

**Director Tracy Davis**, Division of Energy, Mineral, and Land Resources gave a brief update on DEMLR rulemaking. He indicated that the Division really appreciated Commissioner Solomon being the hearing officer and for his support of the Division's stormwater rule amendment and readoption package. He commented that the Division conducted three separate hearings on the rule package in March, one each in the east, west and central regions of the state. The Division received public comments during the hearings

and public comment period that ended on April 18. Since the close of the comment period, Division staff has been reviewing comments, providing responses and working with **Commissioner Solomon** to draft the hearing officer's report and to make appropriate improvements to the rule text. **Director Davis** conveyed the upcoming rule making schedule and noted that staff intends to complete final documents for internal review so that the hearing officer report and rule package can be delivered to Commissioners a month in advance of the July 14, 2016 EMC meeting. The Division will request that the EMC approve the hearing officer report and adopt the rule package so that it can be sent to the Rules Review Commission for their review. **Director Davis** also mentioned that the Dam Safety rules were coming up for the House Bill 74 re-adoption process and gave a timeline for this process.

**Commissioner Wilsey** and **Commissioner Solomon** participated in a May 2 conference call for the Coastal Habitat Protection Plan. They joined the Committee on behalf of the EMC and there was a great deal of effort from other members of the EMC. **Commissioner Wilsey** stated that the group did make the three changes that the EMC had requested for that document. **Commissioner Solomon** stated that **Dr. Rubin**, **Commissioner Anderson** and past member Dan Dawson that worked on the document for several years and it is an outstanding document and was very well done.

#### **By Commission Members**

There were no comments from Commission members.

**Chairman Rowlan** stated that the Environmental Justice area that Dr. Rubin mentioned would be a good thing to get some training in. That was a significant issue in most permits and they had to have an element of that in the permit.

#### **By Commission Counsel**

**Counsel Jennie Hauser** distributed the EMC's litigation summary document and highlighted two places where there were changes. The first being the City of Fayetteville v. EMC case, the hearing had been set for the week of June 13 at the Office of Administrative Hearings. The other was the Coastal Federation v. DENR and Carolina Cement Company which that matter had been resolved and it will be removed from the litigation summary in the future.

The Chairman had asked her to speak to an issue that is going to be coming before the EMC in the future. She indicated that they had already seen the issue once which is the Jordan Lake allocation decision. That issue has been in the public comment process which will close May 18. Staff will work with the

comments so that it is in a format that can be presented to the EMC for final decision. It is a quasi-judicial decision that the EMC will make ultimately, and she reminded them quasi-judicial decisions had to be made by fair and impartial decision maker, and it has to be made on the record that is provided to them and the official presentations that are made to the EMC. She also pointed the EMC back to their internal operating procedures in Section V, Article XI regarding hearings which states, "Members are to refrain from communicating outside formal hearing proceedings with any person regarding issues pertaining to the pending matter, unless all parties are provided notice and an opportunity to participate." However, they do have the ability under Section VI of that same article to discuss with staff, other than staff members that are investigating or prosecuting a pending matter, provided that no factual information that's not part of the record is transmitted. The EMC has given itself that latitude within the quasi-judicial process. She indicated that she wanted to make them aware that the public comment period is closing, therefore their interactions with staff now should be governed as actions under a quasi-judicial proceeding.

#### **By Chairman**

**Chairman Rowlan** thanked the past Chair and he already thanked the Department Heads for their work in meeting with them and putting together new processes. He really wanted to thank the IT staff for having the screen in front of him to view the presentations. He stated that the last item on the agenda was 16-29 which included litigation aspects.

#### **Agenda Item: 16-29 Request from Cary-Apex for Clerical Correction to 2015 IBT Certificate**

**Counsel Jennie Hauser** stated that the matter before them was a request to clarify a document that was issued under the former Chairman's signature on your behalf. For the record I want to remind everyone that Commissioner Solomon was recused from the matter. Many of you were on the Commission when it heard the final request for an interbasin transfer certificate for Cary and Apex back in March of 2015. You have in your materials information about the meeting minutes from that and the actual motion which was attached to the meeting minutes, which was the motion that **Mr. Tedder** made at the time that the interbasin transfer was adopted. **Mr. Tedder's motion** is very clear that with regard to mitigating detrimental impacts the standard to be employed was the statutory standard. However, in the document that was presented to the Chairman an incorrect legal standard was used. It was a reasonable standard and you have before you a request from Cary Apex to change the certificate to correctly reflect the action that you took in issuing the interbasin transfer certificate.

**Chairman Rowlan** stated to correctly reflected the motion.

**Counsel Hauser** indicated that the action of the body consisted of two things, the motion that was on the table and then the vote that was taken. The motion on the table and the vote that was taken is the action of the Commission. So the request is to reflect what is the correct standard, which is what the Commission voted on at the time that it issued the certificate. So you have that letter that is a request from Counsel for Cary and Apex. You also, late yesterday received from me a letter that was filed in response by the Counsel for Fayetteville. Now this is being brought to you as a request for a change under the interbasin transfer statute which is allowed for the correction of typographical or clerical errors or for the clarification of existing conditions or language. There is no provision here for oral presentations by any party. **Counsel Hauser** stated she did extend to the Counsel for Fayetteville when they called and they were not pleased this had been placed on your agenda. She extended to them the ability to file a letter for your consideration and that was forwarded to you last night. She offered to assist the Commission with their process and their decision making, but there was no substance that she could contribute to them other than what they had been provided with in their agenda item. All those documents speak for themselves.

**Commissioner Carter** stated before the Commission proceeded with this item, it struck him as it had already been described, that this was a matter in litigation. He would benefit from having some discussion with Counsel about the litigation in a closed session. He thought some things needed to be clarified before they rendered a vote and decide whether to act on that motion.

**Commissioner Martin** made a motion that the Commission go into closed session in accordance with NC G. S. 143-318.11C to receive litigation advice from and provide direction to EMC's attorneys concerning a legal matter in the case of the City of Fayetteville v. EMC 15 EHR 03 241 as permitted pursuant to G. S. 143-318.11A3. **Commissioner Tedder** seconded the motion. There were no comments to the question and the motion passed.

**Chairman Rowlan** indicated with that the general session would be adjourned and the Commission would move into closed session to discuss one matter and the Commission would reconvene to adjourn the meeting after the closed session is finished.

**(The EMC went into closed Session at 10:46 a.m. and reconvened at 11:01 a.m.)**

**Counsel Jennie Hauser** reminded everyone that this was a request from Cary Apex to conform the IBT certificate to the motion and vote of the Commission in March of 2015, and that the statute, the Interbasin Transfer Statute at 143-215.22LV allows for modification of certificates, and specifically for correction of

things such as typographical errors or for clarifying of existing language. That would be the statutory authority under which you would act today.

**Chairman Rowlan** noted for the record that a letter was passed on to the Commission from the affected parties. He then asked for any discussion on the matter. Hearing no discussion, the Chairman entertained a motion. **Commissioner Tedder** moved that the Commission approve the technical clerical corrections in the certificate to match the actions of the Commission, the language of the Commission at the March 12<sup>th</sup> meeting. **Commissioner Solomon** seconded the motion.

**Chairman Rowlan** asked for discussion on the motion. Hearing no discussion, the motion passed unanimously.

With no further business before the Commission, the Chairman adjourned the meeting at 1:10 p.m.

Approved this day 11th of March 2016.

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Steven J. Rowlan, Chairman of the EMC