

NORTH CAROLINA
ENVIRONMENTAL MANAGEMENT COMMISSION

Minutes of November 14, 2019 Meeting

The North Carolina Environmental Management Commission met on Thursday, November 14, 2019 in the Ground Floor Hearing Room of the Archdale Building in Raleigh, NC.

Meeting Called to Order: Dr. Stan Meiburg, Chair

The meeting was called to order at 9:03 a.m. with **Chair Meiburg** presiding. He provided the notice required by N.C.G.S. §163A-159(e).

Present: 15 – Dr. Stan Meiburg (Chair), Dr. Suzanne Lazorick (Vice-Chair), David W. Anderson, Shannon Arata, Yvonne Bailey, Charles Carter, Donna Davis, Marion Deerhake, Mitch Gillespie, Pat Harris, Steve Keen, John McAdams, Maggie Monast, J. D. Solomon, Donald van der Vaart

Others Present: Commission Counsel Phillip T. Reynolds

Commissioner McAdams indicated in abundance of caution regarding the AVX Corporation petition for declaratory ruling, he wanted to bring forth that in reviewing the materials he had discovered that AVX is represented by the law firm, Parker Poe. Parker Poe is the law firm that his engineering firm uses. Particularly, the attorney in question, Mr. Weber is not someone he has met. He did not believe that there was enough connection to be concerned with and he did not feel that he had a conflict or bias. It was his intent to participate in the discussion and he just wanted to inform the Commission that there was an in commonness in the law firms.

Counsel Reynolds indicated that he and **Commissioner McAdams** had discussed this matter and it was his recommendation that there was no reason to require recusal for any bias and there was no connection and certainly no real or apparent conflict of interest involved either.

I. Preliminary Matters

1. Approval of minutes from Commission meetings on November 14, 2019 (attached)

Chair Meiburg asked for a motion to approve the minutes. **Commissioner Anderson** made a motion to approve the minutes and **Commissioner Bailey** seconded the motion. The minutes passed unanimously.

II. Action Items

19-29 and 19-30 were removed from the agenda.

19-31 Request Approval of Proposed Rule Revisions, Regulatory Impact Analysis, and to Proceed to Public Hearing on Amendments to 15A NCAC 13A .0101

Jennifer Patterson, Division of Waste Management, presented the request for approval to proceed to public hearing for amendments to 15A NCAC 13A .0101. Ms. Patterson gave an overview of the proposed amendments that incorporate by reference two provisions (40 CFR 260.4 and 260.5) of the federal e-Manifest User Fee Rule. The rulemaking schedule was then presented which gave a proposed public comment period from December 16, 2019 to February 14, 2020 and an anticipated effective date for the proposed amendments of July 1, 2020. Ms. Patterson provided a brief overview of EPA's electronic hazardous waste manifest system and further described rule changes being proposed. She closed her presentation by requesting approval to proceed to public hearing for amendments to 15A NCAC 13A .0101(d).

Chair Meiburg asked **Commissioner Bailey** if she had any comments since the initial request for approval went through the GWWMC.

Commissioner Bailey indicated that the GWWMC heard this subject proposal for amendments in September (2019) and had recommended these proposed amendments to go to the EMC for approval for public hearing. Commissioner Bailey also indicated that the GWWMC supported the need for the state rules to be as stringent as the federal regulations. **Commissioner Bailey** then made the motion to approve the proposed rule revisions and the regulatory impact analysis such that they can proceed to public hearing on amendments to 15A NCAC 13A .0101.

Commissioner Keen seconded the motion. The motion passed unanimously.

19-32 Request Approval of Proposed Rule Revisions, Regulatory Impact Analysis, and to Proceed to Public Hearing on Amendments to 15A NCAC 13A .0111

Jenny Patterson, Division of Waste Management, presented the request for approval to proceed to public hearing on amendments to 15A NCAC 13A .0111. Ms. Patterson gave an overview of the proposed amendments that incorporate by reference provisions of the federal Management Standards for Hazardous Waste Pharmaceutical Rule. The rule making schedule was then presented which gave a proposed public comment period from December 16, 2019 to February 14, 2020 and an anticipated effective date for the proposed amendments of July 1, 2020. Ms. Patterson gave a brief summary of the federal provisions (40 CFR 266.500 through 266.510) proposed for incorporation by reference in the state hazardous waste management rules. In closing, Ms. Patterson requested approval to proceed to public hearing for amendments to 15A NCAC 13A .0111.

Chair Meiburg asked **Commissioner Bailey** if she had any comments since the initial request for approval went through the GWWMC.

Commissioner Bailey indicated that the GWWMC heard this subject proposal for amendments in September (2019) and had recommended these proposed amendments to go to the EMC for approval for public hearing. **Commissioner Bailey** indicated that it was important to be consistent with the federal RCRA program and be as stringent as the federal RCRA program.

Commissioner Bailey then made the motion to approve the proposed rule revisions and the regulatory impact analysis and to proceed to public hearing on amendments to 15A NCAC 13A .0111. **Commissioner Davis** seconded the motion. The motion passed unanimously.

19-33 Request Approval of Proposed Rule Revisions, Regulatory Impact Analysis, and to Proceed to Public Hearing on Periodic Rule Readoption and Amendments for 15A NCAC 02N Underground Storage Tanks and 15A NCAC 02O Financial Responsibility Requirements for Owners and Operators of Underground Storage Tanks

Ruth Strauss, Division of Waste Management, presented the request for approval of proposed rule revisions, regulatory impact analysis and to proceed to public hearing on periodic rule readoption and amendments for 15A NCAC 02N underground storage tanks and 15A NCAC 02O financial responsibility requirements for owners and operators of underground storage tanks. Ms. Strauss stated that the RRC had established a deadline of January 1, 2023 for readoption of the rules. A Regulatory Impact Analysis had been approved by OSBM on September 19, 2019. No fiscal note was required. Ms. Strauss presented a rule making schedule with a proposed effective date of May 1, 2020. She summarized the proposed rule changes and answered a few questions for clarification including

Chair Meiburg requested that if evidence arises that shows negative results regarding the change in inspection frequency from one year to every three years, they should bring that to the attention of the Commission.

Commissioner Bailey made a motion to approve to proceed to public comment and hearing for the amendments and readoption of 15A NCAC 02N underground storage tanks and 15A NCAC 02O financial responsibility requirements for owners and operators of underground storage tanks and the regulatory impact analysis. **Commissioner Keen** seconded the motion. The motion passed unanimously.

19-34 Request Approval of 2020 303(d) Listing and Delisting Methodology

Pam Behm, Division of Water Resources (DWR) Modeling and Assessment Branch, presented the 2020 303(d) Listing and Delisting Methodology to the EMC for approval. The EMC Water Quality Committee approved the methodology on September 11, 2019. The presentation provided an overview on the 303(d) program a review of changes made to the 303(d) Listing and Delisting Methodology during the 2018 cycle and the results of those changes, and a description of the primary changes to the 2020 303(d) Listing and Delisting Methodology. The proposed changes for 2020 were primarily clarifications that were added to the methodology as a result of public comments received during 2018 public review. The three primary changes to the 2020

methodology included: adding a delisting process for old total metals listings; adding a section to describe the process for assessment unit delineation; and correcting an unintended consequence for one of the pathways to 303(d) listing. The estimated timeline to deliver the 2020 303(d) list to EPA approval is in August 2020. This will cause North Carolina to miss the Clean Water Act deadline of April 1, 2020, but EPA is aware of the delay and understands that it was caused by delays related to previous list approval.

Commissioner Carter questioned the proposed timeline and wondered if bringing the results of the 303(d) process to the EMC as an information item prior to EPA submittal would add to the delay in delivering the list to EPA for approval. **Chair Meiburg** noted that this would be a decision for the Department to make. **Commissioner Solomon** noted that it was better to hear if there were any controversial issues before the list goes to EPA for approval. He discussed the statistical changes that were made in 2018 to address listing and delisting decisions and noted that overall, the system seems to be working very well now. However, **Commissioner Solomon** also discussed the unresolved issue with regards to objections to segmentation of Falls Lake. The Department continues to work with stakeholders to come to resolution on this issue, site specific to Falls Lake related to the ways the rules were written.

Commissioner van der Vaart questioned where the 90% statistical confidence came from as opposed to the more common 95% used in many statistical calculations. Ms. Behm noted that the method was first adopted by the EMC in 2014 and was derived from Florida's approach. **Commissioner Solomon** noted that increasing the percent confidence would increase the need for data that would impact the sampling program in that much more data would be needed.

Chair Meiburg noted that this is really one of the foundational principles of the Clean Water Act, in determining where waters are impaired. Listing decisions are based on three key principles: more representative data is better; there needs to be a balance between listing and delisting decisions; and that decisions need to be based on best available science. The decision to ultimately list or delist ultimately turns on what are the water quality standards, which is a separate process (triennial review). **Chair Meiburg** noted the amount of progress in this area over the years and acknowledged **Commissioner Solomon** and former-Commissioner Rubin for their leadership role in moving the process forward.

Commissioner Deerhake made the motion for approval of the 2020 303(d) Listing and Delisting, and **Commissioner Carter** seconded the motion. The motion passed.

19-35 Petition for Declaratory Ruling by AVX Corporation regarding the Applicability of N.C.G.S. § 130A-310.9 and its implementing rules, 15A NCAC 13C .0300 et seq.

Chair Meiburg introduced the matter and provided a general description of the petition process for the members. Following the Chairman's remarks, **Commissioner Carter** offered a motion to decline to hear the petition for good cause without reaching the merits of the petition. **Commissioner Carter** described the basis for his motion and **Commissioner Gillespie** seconded the motion. **Commissioner Solomon** commented that he supported **Commissioner Carter's** motion and expressed his position that the matter should be disposed of before hearing

presentations from the parties. The Chairman then recognized Commission counsel to discuss the Commission's bylaws and past practices regarding the hearing of presentations. There was discussion among commissioners about whether to hear presentations by the petitioners and the DEQ before voting on the petition. **Commissioner Carter** was recognized to further discuss the basis for his motion, followed by **Commissioners Gillespie** and **Solomon**. **Commissioner Bailey** was then recognized for a question to counsel regarding the potential for the Commission to become involved in the ongoing litigation. The Chairman then recognized **Vice-Chair Lazorick** for a question regarding whether the presentations were limited to matters raised in the written submissions, to which the Chairman responded affirmatively. Clarification was given as to the effect of the motion by **Commissioner Carter**. **Commissioner Carter** asked for additional clarification from Commissioner Carter. **Commissioner Deerhake** was recognized for a question, followed by **Commissioner Gillespie**. Commissioner Arata was then recognized for comments regarding the presentations and questions being limited to the written record. Commission counsel was recognized to provide additional guidance. **Commissioner Carter** then made additional remarks regarding matter and procedure followed by a discussion with counsel. The Chair then called the question. Additional discussion was had regarding the circumstances under which the Chair is allowed to vote.

Following the discussion, the commission voted 11-4 to decline to issue the requested ruling without hearing oral presentations.

III. Information Items

1. 19-IF-08

Jim Hawhee, DWR Nonpoint Source Branch, provided an overview of the 2019 Neuse and Tar-Pamlico Agriculture Reports. The Neuse and Tar-Pamlico Agriculture Rules (15A NCAC 02B .0238 and .0256) require their respective Basin Oversight Committees to report to the EMC regarding annual implementation progress. These reports demonstrate agriculture's ongoing collective compliance with each rule. The reports estimate cumulative nitrogen loss reductions from crop agriculture of 53% in the Neuse basin and 58% in the Tar-Pamlico basin relative to the baseline time period of each strategy. These reductions are slightly down in relation to those achieved last year, which were the highest reported to date. A qualitative evaluation of indicators also shows no increased risk of phosphorus loss in the Tar-Pamlico basin.

Commissioner van der Vaart asked about chlorophyll *a* trends resulting from agricultural management in these basins. Mr. Hawhee explained that impaired waters tend to move annually between assessment units depending on precipitation trends, which makes it difficult to make quantitative assessments of chlorophyll *a* trends relative to the baseline period. However, chlorophyll *a* impairments remain in both estuaries and algal blooms and fish kills still occur. **Commissioner Monast** commended staff associated with the development of these reports and noted the national challenges associated with nutrient management. She then asked how this information can be incorporated into the adaptive management process adopted into rule during the September meeting. Mr. Hawhee indicated there are at least two opportunities, one through the development of biennial reports to the commission and one through the Basin Oversight

Committee process. **Commissioner Deerhake** requested an overview of what an NLEW tool update entails.

Joey Hester, with the Department of Agriculture and Consumer Services' Division of Soil and Water Conservation, provided an overview of NLEW. Significant changes include changes in corn cultivars (requiring more fertilization), scaled back estimates of BMP nutrient reduction efficiencies, and the transition to an online and real time tool interface. **Commissioner Deerhake** also noted a c. 2012 USGS study regarding the contributions of land applied nutrients of manure to groundwater.

Chair Meiburg noted a contrast between language suggesting more BMPs would be helpful in the Neuse basin, but that the BOC recommends no further action is needed in the Tar-Pamlico basin. Mr. Hawhee noted that while continued BMP installation is encouraged and helpful for the estuary in both basins, the language in the Tar-Pamlico report indicates that no further rulemaking action is required because the agricultural sector is meeting its nutrient strategy goals. **Commissioner McAdams** requested clarification regarding the double negative concepts inherent in "nutrient loss reduction," which Mr. Hawhee provided. **Commissioner Harris** asked whether solar farm installations were considered permanent or temporary under this accounting method. Mr. Hester indicated we do not necessarily know whether such installations in fact will result in permanent cropland loss, but that loss of crop acreage is reflected in the tool on an annual basis.

IV. Concluding Remarks

Directors' Comments

The division directors made their respective comments, the written version of which were published with the agenda and details of those comments can be found at:

[https://files.nc.gov/ncdeq/Environmental%20Management%20Commission/EMC%20Meetings/2019/nov 2019/Directors Comments for November2019.pdf](https://files.nc.gov/ncdeq/Environmental%20Management%20Commission/EMC%20Meetings/2019/nov%202019/Directors%20Comments%20for%20November2019.pdf)

Director Danny Smith, Division of Energy, Mineral and Land Resources

Director Michael Scott, Division of Waste Management

Director Michael Abraczinskas, Division of Air Quality Division

Director Linda Culpepper, Division of Water Resources

Committee Chairs

Commissioner McAdams reported that the **Water Allocation Committee** had one issue on the agenda which was a presentation on the Science of Ecological Flows presented by Chris Goudreau of the NC Wildlife Resources Commission.

Chair Deerhake reported that the **Water Quality Committee** had three action items and one information item. First, the committee approved a major variance request in a Neuse River riparian area. The homeowner petitioner wants to install a swimming pool which will impact Zone 1. The approval was conditioned on implementation of the homeowner's proposed mitigation plan. The second action item resulted from the petition for rulemaking the EMC approved in July on the removal of supplemental swamp classification for the lower Cape Fear. The committee voted unanimously to proceed to the EMC for rulemaking to remove the swamp classification and to amend the management strategy rule per staff's recommendation. Before the vote, staff presented information on past modeling which indicated the need to address sediment oxygen demand, including pre-Clean Water Act legacy sediment. In 2020, the staff will engage with stakeholders to proceed with developing a management strategy. In the third action item, the committee voted unanimously to proceed to the EMC for approval of a request from the Buncombe County Metropolitan Sewage District to proceed to public notice and comment on the acquisition/consolidation with Henderson County's Kane Creek Sewer and Water District. Buncombe's request is an outgrowth of legislation that requires this consolidation be completed by July 1, 2020. Next, the Committee heard the annual progress reports of the Neuse and Tar-Pamlico agriculture rules (information item). Finally, the committee learned that staff will provide the committee routine documents that will help members monitor progress on water quality rules review, NPDES permits, and agenda items on the calendar.

Chair Bailey reported that the **Groundwater and Waste Management Committee** had one agenda item. This item was regarding a request to approve to proceed to the EMC for the voluntary remedial action oversight by registered environmental consultant regulations. These were worked on with the consultants, and the Department as a whole. They worked through some of the some of those changes, and as a result of 2011 and 2015 legislation that put together the Risk-based environmental remediation of sites program. The rules are meant to make this more consistent with that new legislation and make it less of a burden for the Department. It's for the lower risk sites that takes the burden off the Department and is a good program. The committee voted to send this item to the EMC and request to proceed to public hearing. The committee also discussed the groundwater 2L standards which are still being looked at for revision. The committee asked for additional information which staff is putting that together, and a component of the groundwater standards toxicology is being considered by the Secretaries' Science Advisory Board.

Chair Arata stated that the **Air Quality Committee** heard the sixth and final group of 2d rules which will soon wrap up the readoption process for the 2d rules. She thanked the division for making sure they had a working draft of the fiscal note ready for their review. They anticipate

that there would be a final fiscal note to review with the full Commission in January. They also heard an update from Director Abraczinskas about the division's efforts to physically raise the monitoring stations in the eastern part of the state because of flooding damage that they had incurred from past hurricanes.

Assistant Secretary Holman expressed appreciation for the Commission's continued work through rule readoption and all the issues before the Commission.

Committee Members

Commissioner Van der Vaart stated his belief that rulemaking is needed in connection with the Memorandum of Understanding (MOU) that was signed with the Atlantic Coast Pipeline. He was concerned about the MOU which put conditions on permits that are issued under the EMC as part of that agreement. He felt it would help to clarify how this kind of agreement going forward might work if they can work. The Commissioners gave several comments regarding rulemaking.

Commissioner Solomon stated that South Carolina just finished their statewide water plan enabling the basin concept. They are now back into the basin approach and he was proud of that effort he supported through his work. He hoped the state of North Carolina would continue to look at a more aggressive basinwide approach.

Commissioner Deerhake mentioned that they had a really good Lunch and Learn from the Office of State Budget and Management on the regulatory impact analysis assessment process. She asked that the information be published to the website to share with all the Commission. She stated at via the EMC Chair's appointment she was honored to be sworn in early November as a member representing the EMC on the Sedimentation Control Commission under the leadership of Dr. Susan White, who is also Director of different institutes in North Carolina including the Water Resources Research Institute.

Commissioner Bailey stated she was asked to be on the Coastal Habitat Protection Plan Committee. **Commissioner Anderson** and she attended the meeting in October and the draft minutes were sent to the EMC. One thing that she picked up was an overlap with the Environmental Management Commission and the Division of Water Resources regarding a jurisdictional question with the fishing waters between the Wildlife Resources Commission and the Division of Marine Fisheries.

Dr. Meiburg stated he would continue to encourage Commissioners to follow-up on being a lead for river basins across the state. He stated that as a result of some action today, a couple of hearing officers were needed. He was going to consider that they may not necessarily need a Commission member to be hearing officer for each but would rely on the staff for some.

Dr. Meiburg thanked the Commission for their vote and open discussion and transparency on both the Commission and committees.

With no further business before the Commission, the Chairman adjourned the meeting at 3:00 p.m.

Approved this 9th day of January 2020.



Dr. A. Stanley Meiburg, Chairman
Environmental Management Commission