

## **North Carolina Environmental Management Commission**

### **Minutes of March 13, 2014 Meeting**

The North Carolina Environmental Management Commission met on Thursday, March 13, 2014, in the main floor hearing room in the Archdale Building in Raleigh, North Carolina. Commissioners present were:

Benne Hutson, Chairman  
Kevin Martin, Vice Chairman  
David Anderson  
Jerry Carroll  
Charlie Carter  
Tommy Craven  
Dan Dawson  
E.O. Ferrell  
Bill Puette  
Bob Rubin  
Butch Smith  
Steve Tedder  
Julie Wilsey

Due to illness, Steve Keen was not present.

Commission counsel Mary Lucasse was also present.

The meeting was called to order at 9:05 a.m. with Chairman Hutson presiding. He read the notice required by N.C.G.S. § 138A-15(e) and reminded Commission members that they have a duty to avoid conflicts of interest and appearances of conflicts. At this time, Chairman Hutson and Commissioner Carter advised that they would be recusing themselves from agenda item 14-10 regarding closed session pursuant to N.C.G.S. § 143-318-11(a)(3) to consult with Commission counsel regarding the March 6, 2014 Order in 13 CVS 00093(OAG).

#### **Approval of Minutes**

Chairman Hutson asked for any discussion, comments or corrections concerning the transcript of the January 9, 2014 meeting. There were none. On motion by Commissioner Tedder, seconded by Commissioner Ferrell, the transcript was approved.

#### **Action Items**

Commissioner Hutson stated that the order for consideration of action items would be changed from the published agenda. The meeting would begin with consideration of agenda item 14-08, followed by 14-09, 14-06 and 14-07.

**Agenda Item 14-08 - Requests of Approval For Temporary Rule Changes to 15A NCAC 2H.1002.**

This matter concerned the proposed temporary rule to change the definition of “built upon area” and “permeable pavement” and to add a definition of “gravel” in 15A NCAC 2H.1002. Julie Ventaloro of the Division of Energy, Mining and Land Resources presented an overview of the proposed temporary rule. She stated the reasons for the proposed temporary rule were to prevent an unforeseen threat to the environment from having sites with either no or under-designed stormwater management systems and to resolve confusion among the regulated community.

Commissioner Craven served as the hearing officer and presented the hearing officer’s report. Commissioner Craven stated that a public hearing was held on January 23, 2014 in Raleigh and the public comment period ran from January 15 to February 7, 2014. There were six comments presented at the public hearing and 18 written comments submitted. He said that most of the comments were in support of the recommendation, seeing it as a good first step in the proper management of stormwater. Those opposed to the rule questioned whether or not the Environmental Management Commission had authority to promulgate such a rule.

Commissioner Craven said that there were comments regarding the use of the terms “pounded” and “well rounded” in the original proposal. He also noted that there were comments saying that the specific exclusion of crushed stone or rock was not necessary. Based on the comments provided at the hearing and in written public comments as well as overall review of the matter, Commissioner Craven proposed that the revised definitions in the proposed rule for “built upon area” and “permeable pavement” not be changed. Commissioner Craven recommended that the definition of “gravel” be changed to the following:

“Gravel” means a clean or washed, loose, uniformly-graded aggregate of stones from a lower limit of 0.08 inches up to 3 inches in size.

Commissioner Craven presented the conclusions of the hearing officer’s report as a motion which was seconded by Commissioner Tedder.

There was discussion among the Commission on whether or not the phrase “clean” was redundant of “washed.”

Chairman Hutson then reported on the proceedings of the General Assembly’s Environmental Review Commission the previous day in which the study committee on this issue reported that it would propose legislation that would remove the exclusion of “gravel” from the definition of “built upon area.” This legislation will not be considered until the General Assembly reconvenes in May and will not become effective, if adopted, until sometime after that. By its terms, the legislation would only apply to projects submitting permit applications after the effective date of the legislation, leaving a period of time where projects could be proposed to include gravel which would be excluded from the definition of “built upon area.” Chairman Hutson noted that in light of this, and in his opinion, the actions of the Environmental Review Commission did not eliminate the need for a temporary rule. Chairman Hutson also

noted the statutory standards for adoption of a temporary rule and the findings that had been made showing that those standards had been met.

The motion passed unanimously.

**Agenda Item 14-09 - Request of Approval to Proceed to Public Comment and With Rules Review Of 15A NCAC 02B, 02H and 02U in Accordance With SL 2013-413 (HB 74).**

Jeff Manning of the Division of Water Resources presented this matter to the Commission. The matter dealt with obtaining approval from the Commission to proceed to public comment with the initial classifications of the rules in subchapters 2B, 2H, 2T and 2U of Title 15 of the North Carolina Administrative Code as required by the Regulatory Reform Act of 2013 (HB 74). Mr. Manning provided an overview of the Regulatory Reform Act's process and the basis for classifying all of the rules in these subchapters as "necessary with substantive public interest."

Upon motion by Commissioner Tedder, seconded by Commissioner Puette, the motion to proceed to public comment with the classification of regulations in 15A NCAC 2B, 2H, 2T and 2U as "necessary with substantive public interest" passed unanimously.

**Agenda Item 14-06 - Hearing Officer's Report on Air Toxics Rule Revisions and Asbestos Acceptable Ambient Limit Correction.**

This matter was presented by Mike Abraczinskas, Deputy Director of the Division of Air Quality, and Brad Newland, hearing officer for this matter.

Prior to the presentations, Commissioner Hutson reported to the Commission that a letter had been submitted the previous day by the Blue Ridge Environmental Defense League to the Attorney General claiming that Mr. Newland could not have served as a hearing officer in this matter due to classification of his job as exempt. The claim was based on N.C.G.S. § 26-5(d)(7). Chairman Hutson asked Mr. Newland questions regarding matters addressed by this statute. The questions established that it is not one of Mr. Newland's primary duties to conduct hearings of this type, that he has only handled this hearing in the last few years, that at the hearing no witnesses were sworn under oath nor was there questioning or cross examination of witnesses, and that he did not make any findings or fact or conclusions of law but only recommendations.

Mr. Abraczinskas then presented an overview of Session Law 2012-91 regarding regulation of air toxics in North Carolina and the implementation of that law since its passage. This included information on the decrease in the level of air toxics being emitted in North Carolina and the small number of permit applications that have been subject to air toxics review since passage of the law. Mr. Newland then presented the hearing officer's report.

Commissioner Carter, as chair of the Air Quality Committee, made a motion to approve the hearing officer's report with the following changes:

On page II-10 at lines 10 and 12, the phrase "by the facility" be deleted.

Commissioner Craven seconded the motion. The motion passed unanimously.

**Agenda Item 14-07 – Request to Proceed to Hearing on Repeal of Transportation Facility’s Permitting Rules**

Patrick Knowlson of the Division of Air Quality made the presentation on this matter.

Mr. Knowlson reported that this is a rule that is obsolete and is no longer necessary.

Commissioner Carter, as the chair of the Air Quality Committee, reinforced Mr. Knowlson’s comments and made a motion to approve the request to proceed to hearing. The motion was seconded by Commissioner Dawson. The motion passed unanimously.

**Information Items**

**Item 14-04 – Summary of Draft 2014 303(d) List**

Cam McNutt of the Division of Water Resources presented this matter.

Mr. McNutt reviewed the revised methodology for listing of waters pursuant to Section 303 of the Clean Water Act that was approved by the Environmental Management Commission last year. This included a review of the methodology’s requirement that 10% of samples be above a standard for numeric criteria and that there be a 90% confidence level in those sample results in order for a water segment to be placed in Category 5 as impaired. Mr. McNutt stated that the justification for the 90/10 rule would be included in the materials submitted to EPA. The deadline for submittal to EPA is April 1.

Commissioner Ferrell questioned as to whether or not the changes in this list are an indication that water quality is getting better. Mr. McNutt explained that this is not the best tool for determining whether or not there are improvements in water quality. There were also questions and discussion as to how stream lengths are determined.

**Agenda Item 14-05 – Hearing Officer’s Recommendations on Proposed Changes to Surface Water Rules: 15A NCAC 2B**

Commissioner Tedder as the hearing officer presented this matter.

This involves the triennial review of surface water quality standards. Commissioner Tedder stated that a hearing was held in December to obtain public input on this matter. The proposed rule changes will come to the Water Quality Committee at their May meeting. There will likely be a request for a waiver of the 30-day requirement so they can be acted on by the full Commission in May.

**Action Item 14-10 – Closed Session Pursuant to N.C.G.S. § 143-318-11(a)(3) to Consult With Commission Counsel Regarding March 6, 2014 Order in 13 CVS 0093.**

Chairman Hutson and Commissioners Carter and Ferrell recused themselves from this matter. Vice Chairman Martin presided. On motion by Commissioner Tedder, seconded by Commissioner Smith, the Commission unanimously voted to go into closed session. On motion

by Commissioner Tedder, seconded by Commissioner Smith, the Commission after closed session unanimously voted to reconvene into open session.

### **Concluding Remarks**

By Commission Members: None.

By Directors: None.

By Counsel: None.

By Chairman:

Chairman Hutson reported on the status of the arsenic ambient air limit rule change and that a sufficient number of persons had filed letters objecting to that rule change with the Rules Review Commission, meaning that the rule could not become effective until the legislature reconvened. Chairman Hutson noted that a number of the letters were filed by persons who had not made comments during the public comment proceeding. Chairman Hutson encouraged persons in the future to participate in the public comment proceedings so that all concerns can be considered and the Commission is not left wondering if it had missed something when an objection is raised with the Rules Review Commission.

Chairman Hutson addressed actions by the legislature that require changes in rules. Chairman Hutson stated that if the legislature says that a rule should be changed, the legislature should expect that rulemaking will start promptly. Chairman Hutson identified a situation where that had not occurred and that he had discussed with all of the Division Directors except the Division of Waste Management that in the future such rulemakings receive priority unless there is good reason not to and such good reason is announced at a public meeting. Commissioner Hutson said that he or Vice Chairman Martin would be speaking with the Director of the Division of Waste Management on this issue. Chairman Hutson also suggested that in these situations the 30-day rule be waived.

Chairman Hutson addressed questions that had come up at the previous day's committee meetings regarding the public meetings law. Chairman Hutson stated that members could talk with each other outside of meetings provided there is less than a quorum present. Chairman Hutson encouraged such discussions, noting the different expertise and experiences of Commission members that need to be taken advantage of. However, Chairman Hutson asked that deliberations to the extent possible be held in public at meetings.

Chairman Hutson reviewed his presentation to the General Assembly's Environmental Review Commission on January 15, and identified persons and groups he had met with and speaking engagements he had had in his capacity as Chairman since the last meeting.

With no other business before the Commission, the meeting was adjourned at 12:00 p.m.