MEETING OF THE NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION

Raleigh, North Carolina
September 13, 2012
Minutes

The North Carolina Environmental Management Commission met in the Ground Floor Hearing Room of the Archdale Building, 512 North Salisbury Street, Raleigh, North Carolina. Chairman, Stephen T. Smith presided. The following persons attended for all or part of the meeting.

COMMISSION MEMBERS:

Christopher J. Ayers
Marvin S. Cavanaugh
Tom Cecich
Marion E. Deerhake
Tom Ellis
William L. Hall
Benne Hutson
Steve P. Keen
Dr. Ernest W. Larkin
Kevin Martin
Jeff Morse
Mayor Darryl D. Moss
Dr. David Peden
Dr. Charles H. Peterson
Amy E. Pickle
J. Dickson Phillips III
Clyde "Butch" Smith, Jr.
Stephen Smith
Steve W. Tedder

DIVISION OF WATER QUALITY:

Bradley Bennett
Janice Bownes
Ted Bush
Kevin Bowden
Connie Brower
Amy Chapman
Alan Clark
Nora Deamer
Bethany Georgoulias
Deborah Gore
John Huisman
Steve Kaasa
Elizabeth Kountis
Susan Massengale
Matt Matthews
Sandra Moore
Diane Reid
Jon Risgaard
Jason Robinson
Jay Sauber
Lois Thomas
Julie Ventaloro
Chuck Wakild

DIVISION OF AIR QUALITY:

Sheila Holman
Mike Abraczinskas
Joelle Burleson
Michael Petratjic

DIVISION OF WASTE MANAGEMENT:

Ruth Strauss
Debra Watts

DIVISION OF WATER RESOURCES:

Tom Reeder
Tom Fransen
Sarah Young

ATTORNEY GENERAL'S OFFICE:

Frank Crawley

I. Preliminary Matters

Chairman Smith: Our first order of business is the consideration of the minutes from the July 12, 2012 meeting. Are there any changes or revisions to the minutes?

Mayor Moss: made a motion to approve the minutes. Mr. Cavanaugh seconded. Chairman Smith asked for discussion which there was none and the minutes passed.

Chairman Smith: Let me ask members if any member knows of any known conflict of interest or potential appearance of conflict with respect to matters before the Commission, please signify that at the time; or if any conflicts or apparent conflicts you become aware of as the meeting unfolds please state so at that time.

Mr. Tedder: I want to recuse myself from item 12-29.

Chairman Smith: That's the House of Raeford.

Ms. Deerhake: I'm recusing myself from that same one. I notified you in advance of that.

Ms. Pickle: With respect to item 12-30 the Nicholas Institute has a contract with Environmental Defense Funds to conduct policy analysis unrelated to that contested case. While it's not an actual conflict I believe it might present an appearance of conflict. So out of an abundance of caution, I'm recusing myself from that agenda item.

Chairman Smith: Thank you. Any other recusals or statements relating to apparent conflicts? Additions or deletions to the agenda?

Mr. Tedder: If I could I'd like to request for allowing, maybe an expanded discussion. But item 12-24 at the end of at least what is listed in the agenda, if we could add the phrase "or other directives as deemed appropriate by the Commission". This is on the 12-24 where we're discussing methodology for 303d and I'd just would request that be added so it would be duly noticed so we could fully have our discussion.

Chairman Smith: Well, we could add that but we couldn't convert that into a broader action item, because the public hasn't had adequate notice of it. 12-24 is a request for approval of a request for public comment on the questions of whether the EMC should be more involved in setting future assessment methodologies. And too, if so, to what extent? That's the first step in us moving into consideration and decision on the extent to which we are involved in the 2014 assessment methodologies. The anticipated schedule at this point is that we ask for public comment. That will go out as part of the Division's request for public comment on the 2014 methodology. Then depending on how quickly that public comment concludes either at the November meeting, which is what I expect or at the January meeting, the anticipation is that we, as a Commission have a full discussion on the extent to which we want to be involved in the

and as requested by the Committee yesterday to also make sure that we make the EMC aware of any of these revisions that may come forward.

Chairman Smith: asked for any questions.

Dr. Peterson: On behalf of the Water Quality Committee they did hear this item as Jason reported yesterday and Jason reported the outcome. We recommend the full Commission approve. This is the twenty third of the local governments that moved and we approved the others with the same petition, that if there are changes subsequently, the director has authority from us to move on that, but if there's some complexity, it comes to the Water Quality Committee. We also ask that any of these actions that are taken be reported to us so that we keep our finger on that process. With that I make that motion that Jason has suggested that we make.

Chairman Smith: Motion by Dr. Peterson and second by Mr. Hall. Discussion? The Commission voted unanimously and the motion carried.

Mr. Tedder: I meant to bring it up a while ago. Before we move on there are a couple of items that I know will be quite lengthy. I am kind of back to where we were with the TMDL and I am not trying to recreate anything, believe me. But we are kind of in new territory with this process and I would just ask that staff be requested to bring the TMDL on permitting strategies back to the Commission for reconsideration, if either EPA or the courts seek to require implementation inconsistent with what we approved today. That is just a request.

Chairman Smith: That sounds like a reasonable request. Everybody comfortable with that request? I see Mr. Wakild nodding his head, yes. We move to 12-29.

Administrative Hearings – Contested Cases

Commission legal counsel noted the Commission was sitting as the final agency decision-maker in their quasi-judicial role and had before it two contested cases. He noted that the facts and legal issues in the cases had been considered by the Administrative Law Judge and that the Commission had received the official records and the ALJ's recommendations. He then reviewed the standards which were applicable.

12-29 House of Raeford Farms, Inc. v. DENR, Division of Water Quality, 10 EHR 5508, DV 09-0046, Duplin County

Assistant Attorney General Anita LeVeaux presented oral argument for the Department and requested the Commission reject the ALJ's decision and enter a final decision upholding the separate civil penalty assessments for unlawfully discharging waste to the waters of the State and violating water quality standards for dissolved oxygen and settleable solids and sludge. House of Raeford Farms, Inc. was represented by Lori P. Jones of Raleigh, N.C. who presented oral argument and requested the Commission not adopt the ALJ's decision and instead enter a final decision reversing the civil penalty assessments and vacating the ALJ decision.

After discussion by the Commission, a motion was made by Mr. Hutson to not adopt the ALJ's decision as the final decision and instead uphold the assessment of the civil penalties and two-thirds of the investigation costs for the unlawful discharge to the waters of the State and the violation of the water quality standard for settleable solids and sludge; and also to uphold the ALJ's decision to reverse the civil penalty assessment for violation of the numerical dissolved oxygen standard because it was not supported by a preponderance of the evidence.

The motion received a second.

Chairman Smith called for discussion or questions from Commission members.

Chairman Smith called for a vote on the main motion which carried by majority vote.

Having considered the whole record, arguments, and submissions of the parties, the Environmental Management Commission, upon duly made motion and majority vote, did not adopt the complete Decision by the ALJ as the Final Agency Decision. The Environmental Management Commission upheld the assessment of the $25,000.00 civil penalty for discharging waste to the waters of the State in violation of water quality standards without a permit and the $25,000.00 civil penalty for violating the water quality standard for floating solids, settleable solids or sludge that occurred on or about September 9, 2009. The Commission vacated the penalty assessment for a violation of the numeric water quality standard for dissolved oxygen because it was not supported by the preponderance of the evidence. The Commission upheld the assessment of the reasonable enforcement and investigation costs pursuant to N.C.G.S. §143-215.3(a)(9) in the amount of $905.30.

12-30 Pamlico-Tar River Foundation, Environmental Defense Fund, NC Coastal Federation and Sierra Club v. DENR, Division of Water Quality, and PCS Phosphate Company, Inc. (Respondent-Intervenor), 09 EHR 1839, Wake County.

Chairman Smith: Ok everybody I'll call us back to order. Thank you for being so prompt.

Steve Keen: Mr. Chairman I'd like to recuse myself, and also I will be leaving at 1:30. I have a meeting in New Bern at 4:00 p.m.

Chairman Smith: Thank you Mr. Keen. And I will note that Ms. Pickle has already recused herself. Before we get to the merits of that case we have two filings under old NCGS Section 150B-36a. That statute has since been repealed but I'll read it to you. "If a party files in good faith a timely and sufficient affidavit of personal bias or other reason for disqualification of a member of the agency making the final decision, the agency shall determine the matter as a part of the record on the case and the determination is subject to judicial review at the conclusion of the case."

Mayor Moss: Mr. Chairman I need to recuse myself from this one as well. It just hit me that the City of Creedmoor just became a member of the Tar-Pamlico Association earlier this week so may be not a direct connection, but out of an abundance of caution.