

**NORTH CAROLINA
ENVIRONMENTAL MANAGEMENT COMMISSION**

Minutes of March 12, 2015 Meeting

The North Carolina Environmental Management Commission met on Thursday, March 12, 2015 in the main floor hearing room in the Archdale Building, Raleigh, NC. Commissioners present were:

Gerard Carroll, Chairman
David Anderson
Charlie Carter
Tommy Craven
Dan Dawson
Charles Elam
E.O. Ferrell
Bill Puette
Larry Raymond
Bob Rubin
Butch Smith
Steve Tedder
Julie Wilsey

Kevin Martin, Vice Chairman was absent from this meeting.

Commission Counsel Jennie Hauser was also present.

I. Preliminary Matters

Commissioner Carroll informed the Commission that Commissioner Benne Hutson, regrettably, had to resign from the Commission due to the demands of time of being the chair. He further stated that the Commission would miss Commissioner Hutson because he had done an excellent job, had a tremendous amount of knowledge and excellent leadership skills, and the Commission appreciated his service. Commissioner Carroll announced that he had been chosen by the Governor to be the Chairman. Commissioner Carroll then introduced Secretary of State Elaine Marshall for her to administer the Oath of Office to him.

Chairman Carroll introduced a special guest, Secretary of the Department of Environment and Natural Resources, Secretary Donald R. van der Vaart, and asked the Secretary to make a few remarks to the Commission.

Secretary Van der Vaart thanked Chairman Carroll and asked them to feel free to call him at any time if they wanted to sit down and chat. He stated that the Secretary's office would certainly try to help. The Secretary also introduced two of his senior staff, Chief Deputy Secretary John Evans and the Department's new General Counsel, Sam Hayes.

Chairman Carroll thanked Secretary Van der Vaart for his comments. The meeting was then called to order at 9:05 a.m. with Chairman Carroll presiding. He read 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.

II. Approval of Minutes

Chairman Carroll asked for discussion, comments or corrections to the minutes from the January 9, 2015 Commission meeting.

On motion by Commissioner Tedder, seconded by Commissioner [REDACTED], the minutes were approved.

Chairman Carroll then mentioned to the audience that that the proceedings were being streamed and recorded, and if anyone wanted a record of the proceedings they would be available by request as a CD.

Commissioner Dawson asked if the minutes would be available 60 days later. Chairman Carroll stated that the minutes would be sent to the Commission members after review, and the final minutes would be available once approved by the Commission.

III. Action Items

Agenda Item 15-08: Request for the adoption of the Hearing Officer's Recommendations on proposed amendments to the Underground Storage Tank Rules in 15A NCAC 02N .0304, .0903, and .0904

Ms. Ruth Strauss introduced Mr. Donnie Redmond from Division of Air Quality, who was the hearing officer for these rules, and he presented the hearing officer's report and recommendations.

The public hearing was held in Raleigh on December 4, 2014. The rules at issue were required by session laws passed by the General Assembly in 2011 and 2013. The rule changes extend the deadline to upgrade secondary containment for certain tanks to January 1, 2020; establish a variance process for certain tanks having to upgrade by January 1, 2020 to allow cathodically protected double-walled steel tanks to be installed; eliminate the requirement that all piping be replaced when a tank is replaced; and eliminate the requirement that all piping be replaced when a section of piping is replaced or extended. During the public comment period the hearing officer only received one set of comments involving these rules. Those comments were from the North Carolina Petroleum & Convenience Marketers who commented in favor of the proposed rules as they were written. The hearing officer recommended that the EMC adopt the amendments as presented.

After opportunity for questions or comments by Commission members, Commissioner Carter moved that the Commission adopt the recommendations of the hearing officer, and Commissioner Tedder seconded the motion. After opportunity for discussion, the motion passed unanimously.

Agenda Item 15-09: Hearing Officer's Report on Clerical Revision to 15A NCAC 02Q .0711 (526)

Robin Barrows, Division of Air Quality, served as the hearing officer and reported that the public hearing was held on December 3, 2014 on the amendment of Rule 15 NCAC 02Q .0711 to make clerical revisions to the toxic air pollutant emission rates (TPERs), for unobstructed and vertical oriented emission release points. These rule amendments to the TPERs were made in Session Law 2012-91 and they were originally approved by the Commission in March of 2014, but staff had found some clerical errors in the rules. The December 2014 public hearing was to receive comments on proposed corrections to those rules. The corrections were to reflect numeric values in the correct position within the rules chart and to include values that were inadvertently left off the chart. She indicated the Division did not receive any comments during the comment period and no one attended the public hearing to make comments. The hearing officer recommended that the EMC adopt the amendments as presented.

Chairman Carroll asked if a fiscal note was prepared on this change. Ms. Joelle Burleson answered that the fiscal note was included in the hearing record.

After opportunity for questions or comments by Commission members, Commissioner Carter moved that the Commission adopt the proposed amendment as presented in the hearing officer's report, including the fiscal note, and Commissioner Rubin seconded the motion. After opportunity for discussion, the motion passed unanimously.

Chairman Carroll stated that he had been advised by Counsel that another motion was needed on item 15-08 to approve the fiscal note for the rules adopted in that action. Commissioner Carter moved approval of the fiscal note for item 15-08, the amendments to 15A NCAC 02N .0304, .0903, and .0904, and Commissioner Rubin seconded the motion. After opportunity for discussion, the motion passed unanimously.

Agenda Item 15-10: Request for '30 day Waiver' and to Proceed to Hearing on Permanent Amendments to Clarify Applicability of Prevention of Significant Deterioration (PSD) Rule for Greenhouse Gases and Title V Applicability Rule (528)

Chairman Carroll indicated that item 15-10 was a request for a "30-day waiver" to approve text and to proceed to hearing on rule amendments. He further stated that a fiscal note was attached to this rule, and the EMC would need to approve the fiscal note as part of the motion. Chairman Carroll asked Ms. Burleson to briefly explain to the Commission why the Division was asking for the 30-day waiver in this particular case.

Ms. Burleson, Division of Air Quality, stated that the Commission had previously approved a temporary rule that became effective in December, 2014, that temporary rules have a finite existence before they expire, and in order to ensure that a permanent rule was in place before that the temporary rule expired, the Division was requesting the "30-day waiver."

Commissioner Carter moved to approve the 30-day waiver, and Commissioner Ferrell seconded the motion. After opportunity for discussion, the motion passed unanimously.

Ms. Burleson stated that the purpose of the temporary rule was to reflect the UR vs. EPA decision of June 2014. These changes in 15A NCAC 02D .0544, the prevention of significant deterioration rule,

included one additional cross-reference from the federal rule to the most recent global warming potentials. Ms. Burleson indicated staff failed to re-letter paragraph (d) and would need to make the appropriate changes within 02D .0544 before filing. Ms. Burleson stated that staff prepared a fiscal note because the permanent rulemaking process requires a fiscal note if there is a local or state impact, even if the impact is below the one million dollar threshold for “substantial impacts.” She requested that the Commission approve the proposed text of the rule and authorize a public hearing.

Commissioner Carter moved the Commission approve publication of text of the proposed rule and authorize staff to proceed to public hearing on this matter, authorize staff to make the clerical corrections that Ms. Burleson noted, and approve the fiscal note. Commissioner Wilsey seconded the motion. After opportunity for discussion, the motion passed unanimously.

Agenda Item 15-11: Request for “30 day Waiver” and to Proceed to Hearing on Revisions to Reflect S.L. 2014-120 Repeal of Source Reduction and Recycling Reporting Requirement (530)

Chairman Carroll opened discussion of this item by noting that this was another request for a “30-day waiver” and a request to approve rule text and to proceed to public hearing.

Steve Schliesser, Division of Air Quality, presented the matter to the Commission, stating that the session law became effective in September 2014 and the Department had been acting consistently with the legislative mandate since that time.

Chairman Carroll commented that there was no reason to delay and stated the rule change was just to expedite the cleaning up and getting the records straight. Commissioner Carter moved to approve the “30-day waiver,” and Commissioner Raymond seconded the motion. After opportunity for discussion, the motion passed unanimously.

Mr. Schliesser continued with the request to approve text and proceed to public hearing on the repeal of the source reduction and recycling requirements. Session Law 2014-120 included provisions repealing these reporting requirements in 15A NCAC 02Q .0206, 15A NCAC 02Q .0304, and 15A NCAC 02Q .0507. He pointed out that although these rules and the underlying statute previously required this reporting, the statute also stated that there were no consequences for failing to report this information rather

the intent of the reporting requirement was to encourage facilities to consider source reduction and recycling as part of a pollution prevention mechanism. The reports had the facility's name, address and contact information, which was really all that previously was required. The Department prepared fiscal information, which they called "a regulatory impact analysis" rather than a "fiscal note" because the economic impact was less than a million dollars. That regulatory analysis was approved by OSBM in January 2015. On this basis the Division was recommending that the Commission approve the proposed rule amendments for publication and authorize a public hearing on these items, and that the Chairman appoint a member of the Commission to serve as a hearing officer.

Chairman Carroll thanked Mr. Schliesser. Commissioner Carter moved that the Commission approve the text of the rule amendments and authorize the Division to go forward to public hearing on this matter, and Commissioner Ferrell seconded the motion. After opportunity for discussion, the motion passed unanimously.

Chairman Carroll announced that item 15-12, open burning rules, had been removed from this agenda and would be placed on the agenda for the next regular meeting.

Agenda Item 15-13: Request for Approval to Proceed to Public Comment on S.L. 2013-413 (H74) Periodic Review of Rules Report for 15A NCAC 02D and 02Q

Joelle Bureson, Division of Air Quality, presented information on the Division's periodic review of existing rules per Regulatory Reform Act of 2013, Session Law 2013-413. The Division had made recommendations for the report to the Air Quality Committee at the January meeting. Ms. Bureson presented to the Commission a summary table of the two chapters. She stated that in Chapter 02D, 232 rules were determined to be necessary with substantive public interest, four rules were determined to be necessary without substantive public interest, and twenty-seven rules were determined to be unnecessary. In chapter 02Q, all rules were determined to be necessary with substantive public interest. In terms of the unnecessary rules, staff had initially brought to the Air Quality Committee in January some rules that were already in the process of being repealed. Upon recommendation of the Committee in January, and after consultation with the RRC staff, the Division removed from the current version of the report the rules that were repealed effective January 1, 2015. Those rules were 15A NCAC 02D Section 0800, which dealt with title complex sources, and its corresponding permitting section 02Q .0600 transportation facility procedures.

Ms. Burleson pointed out that additional rules that the Division had classified as unnecessary were the general conformity rules in 02D .1600, the clean air interstate rules in 15A NCAC 02D .2400, and the clean air mercury rules in 15A NCAC 02D .2500. Rules that the Division identified as being without substantive public interest are basically things that are common information that's readily available elsewhere, something as simple as the name and address and that sort of thing. Included in that category are 15A NCAC 02D .0103, copies of referenced federal regulations where people can find information regarding incorporation by reference, 02D .0104 and 02D .0105, information regarding the mailing list, and 02D .1905, which tells folks where regional offices are located. All this information is readily available on the webpage.

Ms. Burleson told the Commission the report had to be submitted to the Rules Review Commission by November 15, 2015. The final determination would be effective only after APO consultation, sometime in early 2016. The schedule for rulemaking to readopt the rules under the APA would not be developed until after APO has completed the consultation process and fiscal notes would be required unless changes are merely technical.

Commissioner Carter moved that the Commission approve the Division's request to go to public comment on the rules review report for subchapters 02D and 02Q and to accept staff's recommendations on classification of these rules, and Commissioner Raymond seconded the motion. After opportunity for discussion, the motion passed unanimously.

Agenda Item 15-:14 Request Adoption of Amendments to 15A NCAC 02B .0269 and 15A NCAC 02B .0274 and Approval to Transfer to 15A NCAC Subchapter 02R per 26 NCAC 02C.0408 and "30-day waiver"

Jeff Manning, Division of Water Resources, presented this item and indicated that this was a procedural item just transferring certain rules; therefore, the Division was requesting the 30-day waiver.

Commissioner Tedder moved to approve the 30-day waiver, and Commissioner Smith seconded the motion. After opportunity for discussion, the motion passed unanimously.

Mr. Manning stated that the transfer of rules resulted from the periodic review of rules for the water quality rules implemented by the Division of Water Resources. Two of the rules in subchapter 02B are now implemented by the Ecosystem Enhancement Program (EEP). It was simply a procedural item to transfer

the rules from subchapter 02B to subchapter 02R so that they could be readopted under EEP's rules review schedule. Additionally, one of the rules has citations in it, and the citations needed to be corrected since the rules were moving. That rule is 15A NCAC 02B .0269, and the other rule 02B .0274 was simply a transfer. Both rules would become effective in 02R with EMC's approval at the next meeting.

Commissioner Tedder reported that the item came before the Water Quality Committee on Wednesday, and it was approved unanimously to move forward to the EMC. He moved approval of staff's recommendations to move the rules forward, and Commissioner Smith seconded the motion. The motion passed unanimously.

Agenda Item 15-15: Towns of Cary, Apex, Morrisville, and Wake County Interbasin Transfer Certificate Modification

Chairman Carroll introduced Evan Kane, Division of Water Resources, to present this item. Prior to Mr. Kane's presentation Commissioner Dawson moved that item 15-15 be removed from the agenda and to postpone any discussion of this item until the next meeting. Commissioner Wilsey seconded the motion.

After further discussion, Commissioner Craven made the substitute motion attached to these minutes as Exhibit 1, and requested that the Commission hear from Mr. Kane regarding the Hearing Officer's Report. Commissioner Tedder seconded the motion.

Commissioner Dawson offered a substitute motion for the Commission to hear the presentation and then decide whether the Commission wanted to take some action on the certificate. Commissioner Wilsey seconded the motion. Hearing no further questions or discussion, the Chairman called for the vote, and the motion carried.

Evan Kane, Supervisor of DENR's Groundwater Planning and Environmental Review Branch, who was appointed by the Director of the Division of Water Resources to serve as the hearing officer for this Interbasin Transfer Certificate Modification request, stated that the Towns of Cary and Apex currently hold an interbasin transfer certificate issued by the EMC in July of 2001, and their requested modification to their existing certificate would (1) change the basis of the existing limit from a maximum day basis to an average day maximum month basis, (2) reflect the 2013 modifications to the statute, and (3) include transfers to the

Cape Fear subbasin, i.e., for consumptive uses in the Town of Apex service area. Also, the towns have requested to base the certificate term on an updated 30-year planning period to address IBT needs through 2045, whereas the 2001 certificate was based on a planning period ending in 2030. Mr. Kane gave a quick overview of the timeline for the modification: the notice of intent for this certificate modification was submitted to the EMC in September 2013; a draft environmental assessment was submitted to the Division of Water Resources in September 2014; the environmental assessment was submitted for public comment in December, 2014; public hearings on the request for modification were held in Apex and Fayetteville on January 7 and 22, 2015, respectively; and the Division issued the Finding of No Significant Impact (FONSI) on January 22, 2015.

Mr. Kane reminded the Commission that the statute governing interbasin transfer certificate modifications requires the Commission to consider nine factors: the necessity, reasonableness and beneficial effects of the transfer, the detrimental effects on the source river basin, cumulative effects on the source basin, the detrimental effects on the receiving basin, reasonable alternatives to the proposed transfer, the uses of any impounded storage owned by the certificate holder, the purposes of any US Army Corps of Engineers multi-purpose reservoir that is involved in the transfer and in this case, the Jordan Lake reservoir, the service area of the applicant, and any other circumstances that the Commission finds relevant.

Mr. Kane stated that the Division reviewed the applicant's request, and the public comments received regarding the request, and determined that this modification is necessary and reasonable and has beneficial effects. The modification has insignificant detrimental effects on the source basin, has insignificant cumulative effects on the source basins, and has insignificant detrimental effects on the receiving river basins. Reasonable alternatives to the proposed transfer were considered, and the Division determined that the requested modification is the most feasible for meeting the petitioner's water supply needs while minimizing detrimental environmental impacts. Impounded storage is not relevant to this decision because the towns do not have their own impoundments. The request for modification is consistent with the multiple purposes of the Jordan Lake River reservoir. The service areas of the applicants are located in both the source basins and the receiving basins. Additionally, conditions have been added to the recommended certificate to address other issues.

The Division's review as based on modeling of essentially three different scenarios: one, being 2045 water demands with no change to the certificate; two, the requested change based on 2045 water demands; and three, the 2045 water demands with an increase discharge of water to the Neuse basin. The Division also looked at the model results for various low flow thresholds for lake level thresholds. The Division noted no significant differences in the amount of time out of the year that Jordan Lake or the Cape Fear River goes below those low thresholds under the three scenarios. The modeling also showed that the downstream water users 2045 water demands would be met 100% of the time and those demands were based on the same 30 year planning period that was used to evaluate Cary and Apex's demands. Mr. Kane indicated there was a tremendous level of very informed and insightful public comment, with sixty-one commenters either verbally or in writing providing comments on 36 different themes. Based on public comments, the Division did some additional research related to the cost analysis of the preferred alternatives and performed some additional modeling to reflect tougher drought conditions to see what the impact would be. The public comments were thoroughly considered by the Division and a full report of the comments was included in Part II of the Hearing Officer's Report. Some of the comments were used to develop conditions contained in the recommended certificate. After a full consideration of the public comments, the Division did not find any reason to prevent issuing the requested modification.

Mr. Kane explained that the recommended certificate in the Hearing Officer's Report includes specific conditions for a water conservation plan to ensure that the applicants are not wasting the water that they use. The towns are required to have a drought management plan to protect the source basin during drought conditions and to mitigate future need for allocations of the limited resources of that basin. As with any certificate issued for interbasin transfer, a compliance and monitoring plan has been recommended as a part of the certificate to ensure that the applicants are operating within the constraints of the certificate. There are clauses in the certificate to reopen, amend or modify the certificate if the Division learns of new information that suggests the transfer is inappropriate or that information leading to the decision to issue the certificate was faulty. The certificate also contains conditions to prohibit the selling of transferred water to systems that are not co-applicants on the certificate. The certificate requires that Cary and Apex provide access to the existing intake site to other allocation holders in Jordan Lake.

Mr. Kane told the Commission that its authority to modify the certificate allowed the Commission to grant the requested modification in whole or in part or to deny the request and to impose limitations and

conditions on the modified certificate that the Commission deems necessary and relevant. Specifically, in order to grant the modification the Commission must determine that the applicant has established that the benefits outweigh the detriments, that the detriments have been or will be mitigated to the maximum extent practicable, that the amount of transfer does not exceed to the applicant's projected shortfall under their water supply plan after it has considered other sources, and that there are no reasonable alternatives to the proposed transfer.

Mr. Kane indicated the Division was recommending the Commission grant the requested modification of the permitted transfer not to exceed 31 mgd from the Haw River Basin to the Neuse and 2 mgd from the Haw River Basin to the Cape Fear, calculated as daily average of a calendar month basis with the conditions presented in the draft certificate.

The Commission members asked questions of Mr. Kane regarding information contained in the Hearing Officer's Report regarding water supply, waste water disposal, and service areas that straddle two basins. There was also discussion among Commission members with Counsel and Tom Fransen of the Division regarding the Commission's authority to issue a modification for an existing certificate.

Commissioner Dawson moved that the Commission postpone voting on this item until the May meeting, and Commissioner Wilsey seconded the motion

After additional discussion, Commissioner Tedder made a substitute motion, the text of which attached to these minutes as Exhibit 1 attached to these minutes, and Commissioner Craven seconded the motion.

After further discussion, Commissioner Dawson made a substitute motion to approve the text of the original motion by Commissioner Tedder with the addition of language in item 7 that the applicants will bear all costs of water allocation that would reduce flow to the certificate holder. Commissioner Wilsey seconded the motion. The motion was defeated by a vote of four in favor and seven opposed.

Commissioner Dawson moved to adjourn the meeting, but no Commission member offered to second the motion; therefore, the motion died.

Chairman Carroll returned to the motion made by Commissioner Tedder. There being no additional discussion on the motion, Chairman Carroll called for the vote, and the motion passed unanimously.

IV. Concluding Remarks

By Committee Chairs

Commissioner Carter reported for the Air Quality Committee that several matters coming before the Commission at this meeting had been approved by the Committee.

Commissioner Carter also reported for the Groundwater & Waste Management Committee, which he chaired in Commissioner Martin's absence. The committee had two excellent presentations from the Division of Waste Management staff; the first on the new EPA definition of solid waste and potential impacts on recycling. The second presentation was a comparison of the relative requirements for coal ash management and disposal and beneficial use.

Commissioner Tedder reported for the Water Quality Committee, which heard several items including a presentation on the draft Tar-Pamlico Basin report and a presentation on the water supply watershed program.

Commissioner Craven reported for the Water Allocation Committee. In addition to the interbasin transfer discussed at this meeting, the committee received information on another interbasin transfer that likely will be coming to the committee and the full Commission in July. The committee also received a presentation on public water supplies.

Commissioner Rubin reported for the ad hoc committee on Beneficial Use of Coal Ash. The committee discussed the form of its final report, which will be voted on in the May meeting. One of the appendices to the report will deal with health concerns. The report will include criteria for beneficial use and findings from the Asheville Beneficial Use Project, the quality of some of the material that's been used, and the results of some of the monitoring.

Chairman Carroll remarked that this is a big issue in the State, and so the EMC will be looking forward to the final report. He offered his appreciation of everybody's efforts.

Commissioner Tedder mentioned an upcoming round of DENR stakeholder meetings that begin the end of March to start looking at proposed changes to the three hundred and some Water Quality rules. He directed Commission members having an interest in attending to contact Jeff Manning

By Directors

Mike Abraczinskas congratulated Jay Zimmerman on being named Director of the Division of Water Resources.

By Commission Members

Dr. Raymond asked for more information about quasi-judicial issues.

Chairman Carroll stated he had asked Counsel to identify and explain the types of quasi-judicial matters the Commission considers.

By Counsel

Ms. Hauser spoke to the Commission members about remissions, variances, and any sort of a permitting issues, highlighting the legal requirements and constraints for making quasi-judicial decisions.

Chairman Carroll requested Ms. Hauser assist him in proposing to the Commission clarifying changes to the Internal Operating Procedures for quasi-judicial proceedings.

Chairman Carroll told the Commission that he had also asked Counsel to provide to the Commission information on the litigation involving the Commission at this time. Ms. Hauser gave the Commission with a handout listing matters to which the Commission is a party and matters affecting the Commission's rules, which handout is attached to these minutes as Exhibit 2. She then reviewed with the Commission the status of the pending litigation.

By Chairman

Chairman Carroll referred the Commission members to a draft resolution in appreciation of Chairman Hutson. He proposed to present a framed certificate or plaque to Chairman Hutson at a meeting. Alternatively Chairman Carroll could present it to former-Chairman Hutson in Charlotte. The members agreed that it was appropriate to present Chairman Hutson with this token of their esteem and would leave the details of the actual presentation to the Chair.

With no further business before the Commission, the Chairman adjourned the meeting at 11:20 a.m.

Approved this _____ day of May, 2015.

Gerard P. Carroll, Chairman of the EMC