

NORTH CAROLINA
ENVIRONMENTAL MANAGEMENT COMMISSION

Minutes of September 10, 2015 Meeting

The North Carolina Environmental Management Commission met on Thursday, September 10, 2015 in the main floor hearing room in the Archdale Building, Raleigh, NC. Commissioners present were:

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

Commissioner Anderson was absent from this meeting.

Commission Counsel Jennie Hauser was also present. Jill Weese, AG's Office was also present.

I. Preliminary Matters

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

II. Approval of Minutes

Chairman asked for approval of the minutes from the Commission meeting on July 10, 2015. Those minutes had been published and distributed for review.

Commissioner Tedder made a motion to approve the minutes and Dr. Raymond seconded the motion. The motion carried unanimously.

Chairman Carroll stated they would be going into closed session to consult with Counsel immediately following the business on the agenda. There would be no more open business or public business after going into closed session.

Agenda Item: 15-30 Request for Approval of 30 day Waiver on Additional Rule Revisions and Fiscal Note for Streamlining of Permit Exemptions Rule (525) and for Approval to Proceed to Public Hearing on Streamlining of Permit Exemptions Rule Related Revisions

Chairman Carroll asked Mr. Knowlson to explain the rationale for that for the 30 day waiver request, which he did.

Chairman Carroll noted that these changes represent cost savings which is another good reason to expedite it.

Patrick Knowlson presented the four draft rules which were 02Q .0102, .0302, .0318, and .090, changing the permitting requirements for small facilities. These small facilities represent 3.4% of the criteria pollutants in this state and the ones to be exempted represent only 0.6% of emissions. Mr. Knowlson stated that the Director recommended the Commission approve the 30 day waiver and the rule revisions and fiscal note, approve one or more hearings and also appoint a hearing officer.

Chairman Carroll asked for other questions and stated they would first need a motion to approve a waiver of the 30-day rule which required a two-thirds vote.

Commissioner Carter made a motion to waive the 30-day rule and the fiscal note. Commissioner Solomon seconded the motion. There was no discussion and the motion passed.

Chairman Carroll stated they would need a motion to approve the rule revisions and fiscal note and proceed to public hearing.

Commissioner Carter offered that motion to send this package to public hearing. Commissioner Solomon seconded the motion. There was not discussion and the motion passed.

Agenda item: 15-31 Hearing Officer's Report on Revisions Hearing to Open Burning Rules to Reflect S.L. 2014-120 (529)

Joelle Burleson presented the hearing officer's report on the revisions to the open burning rules to reflect Session Law 2014-120. Chairman Carroll served as hearing officer. Ms. Burleson stated they held a public hearing in Raleigh July 21, 2015. Their current Rule 15A NCAC 02D .1903 has language that prohibits residential open burning of stumps and logs that are greater than six inches in diameter. In 2014 the General Assembly enacted Session Law 2014-120 requiring the EMC to adopt a rule regarding residential open burning allowing for the burning of logs and stumps of any size and not considering the burning of logs and stumps to create a nuisance. Staff initially proposed changes to remove the definition of nuisance in 02D .1902 as well as removing a condition that the burning would not create a "Nuisance" from Subparagraph .1903(b)(1)(E). In the comment period comments from four commenters asked for clarification and expressed concern regarding the striking of the nuisance language. In response to the comments, the hearing officer recommended that the rule be modified so as to incorporate verbatim the language contained in section 24(c) of the session law. That language retains condition five in the session law which does state that the burning shall not create a nuisance. The hearing officer recommended that these proposed amendments be adopted by the EMC.

Dr. Raymond registered his opinion that he felt would be shared by many pulmonary physicians in the state that because open burning logs and stumps was deemed not to be a nuisance, this did not

alter the fact that it could create a nuisance in many conditions.

Chairman Carroll thanked Dr. Raymond and asked if there were any other comments and for a motion to approve the hearing officer's recommendations.

Commissioner Carter made a motion to approve the hearing officer's report and the changes that were made as a result of the hearing. Commissioner Ferrell seconded the motion. There was no further discussion and the motion passed with one opposing vote from Dr. Raymond.

Agenda Item: 15-32 Request Interbasin Transfer Certificate Approval for Kerr Lake Regional Water System

Commissioner Solomon recused himself from this item.

Commissioner Craven indicated that at the Water Allocation Committee, the committee heard the presentation from staff. They had considerable discussion and the committee decided by a split vote to defer consideration and potential action on the item until their next committee meeting.

Chairman Carroll noted that this item would be on the agenda in November.

Commissioner Craven indicated as a point of clarification they were not planning a full presentation of the information at the next committee meeting. They would be asking staff for a brief summary of focus on the wording changes that took place that they presented with at the committee meeting, and proceed on to discussion.

Agenda Item: 15-33 Request Approval of the Proposed Reclassification of a Portion of the Cape Fear River in New Hanover and Brunswick Counties (Cape Fear River Basin) from Class SC to Class SC Sw with a Water Quality Management Plan

Commissioner Julie Wilsey stated that she received outstanding support from Elizabeth Kountis and the DENR staff as she served as the hearing officer for the proposed reclassification and associated water quality management plan for the Cape Fear River in New Hanover and Brunswick Counties. As a reminder the proposal was to help implement the current permitting strategies for new NPDES wastewater discharges and expansion of existing individual NPDES wastewater discharges to the subject waters. In addition, the proposal would add supplemental standards for DO and PH to the subject waters that would apply as a result of natural conditions. In other words, lower DO and PH values for the SC waters that carry the supplemental swamp designation are allowed if caused by natural conditions. Commissioner Wilsey stated it was important to note that a request received from the Lower Cape Fear River Program in March 2014 for the swamp reclassification started this process. The actual 60-day public comment period started in January 2015 and on February 5, a public hearing was held in Wilmington to hear public comments. Twenty-four people attended the hearing. Ten people spoke: 4 in support of the proposal and 6 opposed. Then throughout the comment period 312 written comments were received. Seven of those letters provided a position positive to neutral, and 303 letters provided negative positions. In response to the comments one change was made: the phrase, "for all dischargers" in the final sentence of the management plan was added. Based on all the considerations and comments the hearing officer recommended approval of the proposed SW reclassification of a section of the Cape Fear River and associated water quality management plan with the modification of those three words as mentioned. If this reclassification is approved, it would become effective November 1, 2015.

Chairman Carroll asked for questions or comments and a motion to approve the hearing officer's recommendations.

Commissioner Wilsey made a motion that the EMC adopt the hearing officer's recommendation. Commissioner Tedder seconded the motion. The motion passed unanimously.

Agenda Item: 15-34 Consolidated Buffer Mitigation Rule – 15A NCAC 02B .0295 – Modifications to Respond to RRC Objection and Request for Technical Changes

Sue Homewood updated the consolidated buffer mitigation rule and gave the recent history which they have a temporary rule currently in effect and has been in effect since October 24. She stated the Commission approved the permanent rule to go to public notice in January of 2015. It went to public notice in February and it was out for comment for two months, February through April. A revised permanent rule was adopted by EMC on July 9. That permanent rule was filed with the RRC in July and the RRC met on August 20 to discuss the rule. Based on the RRC's review they had two objections as well as some technical change requests. In the staff's opinion none of those technical change requests affect the meaning, intent or the implementation of any part of the rule. However, they do want the EMC to adopt those changes in the revised rule. She requested that the Commission adopt the proposed revised rule and the associated fiscal note, in addition, if the RRC requires them to go out to notice, that would also be approved, so they don't have to come back to the EMC in November.

Commissioner Tedder stated he was the hearing officer for this matter. He felt Sue and Karen had done a superior job trying to deal with the issue. He made a motion to approve the staff's request to adopt the changes as presented as well as approve proceeding to public notice if so notified by the RRC. Commissioner Puette seconded the motion.

Commissioner Martin stated that he is opposing this item just on principle because he believed the RRC was wrong and they were not directed to adopt exactly the same language in a permanent rule. They were directed to do that in a temporary rule. He didn't believe it was the intent of the Legislature for them to do what they were about to do. He indicated that he wanted to get that in the record and on principle, he was going to vote against the motion.

Chairman Carroll asked if anyone had other comments. The motion was approved with two votes against.

Agenda Item: AG15-35 Request Approval to Proceed to Public Comment and Hearing for Proposed Amendments to Replace Rules for the Collection and Transportation of Solid Waste: 15A NCAC 13B .0105

Jessica Monte reported this item and stated that the Regulatory Reform Act of 2013, Session Law 2013-413 required that DENR amend the rule governing collection and transport of solid waste to require that containers be leak resistant rather than leak-proof. 15A NCAC 13B .0105 collection and transport of solid waste. DENR's methodology in revising the rule language was determined by the language from the session law.

She indicated that they were recommending approval of the text mandated by S.L. 2013-413. Staff asked for the Commission's approval to publish the rule in the Office of Administrative Hearings Register and to proceed to public comment and hearing for these rule changes.

Commissioner Martin commented that the Groundwater and Waste Management Committee heard the item and had significant discussion in July which brought about concern by several members of the committee about labeling of the vehicles. But based on what Ms. Montie reported his suggestion was to agree with staff and to move forward with the language that was proposed excluding the language on the labeling requirement. But with a directive to staff that when these rules come back to the EMC, they will be brought back to the committee and the labeling issue will be considered when they go through a review of the entire rule. With that said, he made a motion that the EMC adopt staff's recommendation as proposed and outlined by Counsel. Commissioner Carter seconded the motion.

Chairman Carroll asked for discussion. Hearing none he asked for a vote and the motion passed unanimously.

Chairman Carroll noted the next item 15-36 is a quasi-judicial item.

Agenda Item: 15-36 Request for Exemption of "green area" Requirements in 15A NCAC 02H .0407

Counsel Hauser reminded the Commission that this was a decision that they would have to make in their quasi-judicial capacity and to remember the Chairman's admonition regarding conflicts of interest made at the beginning of the meeting. The decision must be made according to due process standards, and therefore their decision limited to the record presented to them in their written materials and the presentations that they will hear.

Chairman Carroll thanked Counsel Hauser and mentioned that since this was a quasi-judicial matter that they would stick to the materials that were in the written record and that they have been presented with and any oral testimony that's presented here in the meeting. He asked if the parties intended to present.

Counsel Hauser responded that Mr. Risgaard was representing the department and provide them with the factual information. He would not be representing the parties.

Jon Risgaard (Wastewater Branch within the Division of Water Resources) gave a summary of the exception requests from Sugarloaf Utilities as well as staff recommendations and they had representation from Sugarloaf Utilities, Inc as well. He pointed out that the exception request did go to the Water Quality Committee and received a favorable review. Sugarloaf Utilities, Inc is a wastewater treatment facility that serves Atlantic Station in the outer banks of Carteret County. The property has a 100,000 gpd wastewater treatment facility that was permitted in the early 80s with two rotary distributor high rate infiltration systems. Like many aging wastewater treatment facilities it had history of compliance issues including some groundwater issues inability to meet the nitrate standard of 10mg/l. This facility was originally permitted under the now repealed 02H .0200 rules. These rules were readopted specific to high rate infiltration basins as part of the whole 2T 700 rules. This facility was also permitted under the coastal rules 2H .0400 and those rules were currently in place now, and it's one of those rules that they were requesting the exception from. The rule in question is commonly referred to as the "green area" requirement. This is a requirement that

facilities within the identified coastal area east of a certain line, must maintain green area with additional potential disposal area equal to 1,000 sq. ft. for each residential service unit served or 2,500 sq. ft. per 1,000 gpd of wastewater flow. Looking at the flow requirement there would be 5.37 acres required under this rule and they were currently meeting that requirement using only the green area. It may not all be considered green area, but 25% of it can be impervious pathways gravel, walkways. It is not a requirement for it to be continuous land, but in this case it is. The administrative code that allows them for their request is also located in the coastal rules. It says that no exception from these requirements of these regulations shall be made until such exception is approved by the Commission, which is the entire rule. Mr. Risgaard indicated that it did not give criteria for making EMC decision. It was up to the Commission to hear the facts of the matter and make a decision. As part of the exception request Sugarloaf Utilities has offered a few items to be incorporated into the permit for the Commission's consideration. The first was coming to the Commission for a permanent modification and meet the current administrative code for the 2T highway infiltration basins, and the other requirements that are in the coastal rules. They're proposing to include in the permit, permit limits for total nitrogen and total phosphorus, total nitrogen limit of 7 mg/l and total phosphorus of 3 mg/l. These would be effluent limits that would not be required by administrative code IV, highway infiltration basis. In addition the plan upgrade would include a one-hundred percent repair area. They would basically design another infiltration area adjacent to the one that would be for primary use. The capacity of that would be one-hundred percent of the design flow. Mr. Risgaard showed a draft of Sugarloaf Utilities' proposal with property outlines and the treatment facility. He pointed out that this was the same location of the existing treatment facility that would have significant upgrades in order to meet the high quality effluent requirements.

There was continuous discussion along with questions and comments from the Commissioners on this matter.

Chairman Carroll remind the Commissioners that they have to vote based on the information in the record that they've got, up or down.

Commissioner Solomon commented that looking at the matter when they were being asked to give a variance on the green space, because they hadn't seen the full report or any other thing in the record, it looked tight with those lots. There's setback requirements from residential lots and properties. He asked if there were any other variances being granted as part of this site development plan?

Jon Risgaard stated for setbacks it wouldn't be a variance. The rules did have setbacks for property lines and offset and onset residences and they also allow for setback waivers to be recorded in the deed. He indicated that they didn't have an application yet, but the plan was that they would take care of that as part of the development records. Those waivers would be recorded in the deeds as the properties that were heard about.

Commissioner Solomon indicated that for the record, they had not submitted it yet but the understanding was that they're going to ask for waivers on setbacks, in addition to what is being described as a variance. Is that what they are asking for mostly, on green space?

Jon Risgaard responded that's correct and stated where the lots 13-17, 20-24, those certainly would not meet the setbacks in the administrative code unless they seek the waivers.

Chairman Carroll commented that the Commission was obligated to make a decision based on the record, but it didn't have to make it a decision. It could reject the proposal and ask for more information and that would also be an option. If the Commission was not comfortable making a decision based on the record, they could deny and ask staff to go back and develop more information.

Jon Risgaard clarified and explained their reason why they wanted the exception from the green area, which was because the existing green area was going to be utilized by the Division. He indicated several options that the Commission could consider. He stated that recommendation from the Water Quality Committee was in support of the recommendation and move it to the full Commission. With that being said, staff recommendation was for the Commission to grant the exception with the provisions that were proposed by Sugarloaf Utilities.

Commissioner Tedder stated that the matter was heard before the Water Quality Committee and the committee unanimously voted to forward it to the full EMC. After further discussion, Commissioner Dawson asked if he could second Commissioner Tedder's motion, and they could discuss the matter further.

Chairman Carroll asked Commissioner Tedder to restate the motion. Commissioner Tedder stated that he would support staff recommendation for approval of the exemption. Commissioner Dawson seconded the motion.

Chairman Carroll asked for a vote on the motion.

Commissioner Craven stated that he had a question and he stated that his vote on Wednesday was on the assumption that the permit that was in the record from 2008 was in force and would remain in force after whatever action the EMC takes. He noted that the permit had a number of performance standards including monitoring wells, compliance boundary, setbacks, and seemed very well documented. He was comfortable that if those conditions and requirements remained in place, any issues about adjacent or adjacent water supply wells in the area will continue to be monitored and handled in accordance with the existing permit. He wanted to be sure that the existing permit was still in place and nothing that they're doing in the full Commission meeting would change that, other than the green area requirements.

The Commissioners continued discussion and questions with Counsel Hauser regarding this matter.

Chairman Carroll restated the motion and asked for a vote. He stated that the motion was to grant the exception request with the addition of conditions proposed by Sugarloaf. Correct. The motion passed unanimously.

Agenda Item: 15-37 Request Approval to Proceed to Public Comment and Hearing on Temporary Rulemaking for Proposed Revisions to Definition of Solid Waste Rule: 15A NCAC 13A .0102, .0103, and .0106

Director Culpepper began the report on this item by stating that they were working with the definition of solid waste on temporary rulemaking and seeking approval to move forward with that effort. The temporary rulemaking process and the permanent rulemaking process have different timelines. They are seeking EMC approval on the temporary rulemaking.

Julie Woosley gave some more information about the definition of solid waste rule. This is a federal

rule change and there were several main reasons to make this change. The last time definition of solid waste passed in 2008. At that time there were a number of concerns held by states and other groups about the unintended consequences of some of the parts of that rule. The 2015 rules attempts to address some of issues that were found previously. Ms. Woosley discussed the four main ways that the rule would encourage recycling.

Ms. Woosley then indicated that the state must adopt this rule by July 1, 2016 or 2017 if statutory change is required. The rule will not go into effect until we adopt it and it will require rulemaking. The permanent rule could be in place as soon as July 1 of next year.

Commissioner Martin stated that the Groundwater and Waste Management Committee heard this matter at their last meeting in July and recommended moving it forward to the full Commission with the changes to the definition in red that Julie had pointed out and therefore moved that EMC approve the request to proceed to public comment and hearing on temporary rulemaking for the proposed revision of the definition of solid waste as outlined by Julie with the change recommended by the committee. Commissioner Raymond seconded.

Chairman Carroll asked for discussion. The motion passed unanimously.

Agenda Item: 15-38 Request to Approve Revisions to the Commission's Internal Operating Procedures

Chairman Carroll stated that there were basically two objectives in proposing this. The current operating procedures contain some errors and obsolete language. One objective is to correct them.

The second objective is to try to provide some additional guidance to Commissioners regarding the handling of matters that are quasi-judicial. After some discussion, the Steering Committee voted to take this proposed language to the full EMC for consideration.

Commissioner Carter raised questions about Section V, particularly the listing of quasi-judicial matters which he still considered that incorrect: Special Orders of Consent and interbasin transfers.

Chairman Carroll stated these topics were presented to him by Counsel as her legal judgment on what are quasi-judicial, which is why they are listed, and asked Counsel to comment.

Counsel Jennie Hauser stated that that before she recommended any of these matters to the Chairman, she consulted with all of the attorneys that work in her Environmental Division, and these were the issues to be included. They affect individuals' property interests and so would fall into the category of quasi-judicial.

Commissioner Carter commented that was an awfully broad statement and any permit affects the property interest, and certainly permitting is not quasi-judicial.

Counsel Hauser indicated that in the past permitting has been considered quasi-judicial. The difference now is that many of those permitting issues don't come directly to this body for decision making. Those decisions have been delegated by the Legislature to the Department.

Commissioner Tedder asked for some clarification in Article XII, #5, third line. It's inquiring about information and says unless all parties are provided notice of the communication. Who are all parties? Is

that the applicant and the staff?

Counsel Jeannie Hauser responded that in most situations it would be the applicant and the staff. In some situations you may have a party who has requested to intervene in the proceedings as third party and it would include those as well if the Chairman had approved those.

Commissioner Tedder stated he just needed to understand who all were. As far as doing with staff it says not directly involved in investigating or prosecuting the matter before the Commission. IBT is an example again. If I want to ask a staff member that's knowledgeable of an IBT issue, obviously that staff may be evaluating the issue. I'm not sure I would consider that person investigating or prosecuting and I'm just looking for clarification there.

Counsel Jennie Hauser stated that she and the Chairman were having some challenges with exactly the type of language that should be employed here. The Chairman's idea was to exclude as few of the staff members that support this Commission as possible. We were trying to tailor that with the language.

Counsel Jennie Hauser indicated that the ultimate concern is to limit decision making to the actual record that's been presented, and the presentations at official meetings. We're trying to help put boundaries around any sort of external exploration or question asking. But recognizing that there are certain areas where some may be more or less familiar with the subject area and need to contact a staff person for additional insights, just generally, what is this area that we're dealing with? Remember that the bottom line goal is to limit decision making to the record that's presented and to the presentations that are made at the official meetings.

Chairman Carroll commented that this language is intended to re-emphasize the point that the decision must be based on the record as presented. It would be inappropriate to go out and develop new facts on your own to add to the record because you're supposed to be making the decision based on what's in front of you in the official record. That was the reason the language was there, to emphasize that point. It's a point of emphasis. There's no suggestion that we've had problems with this in the past.

The Chairman also stated that the point in these quasi-judicial matters is that those informal discussions may not consider the facts of the case. You're just not allowed to talk about the facts of the case to another person, unless everybody is in the room listening to the conversation as asked to participate. That's the key point and so we're just trying to make sure everybody understands that. Some people would say, and it has been said, don't talk to anybody about anything. Just read what you have, listen to the presentation and make your decision. That's one viewpoint. We're not suggesting that, but I think our point is you have to be careful. We have to be careful and Counsel's advice is be very careful in these things and her advice is for our benefit. There's no other agenda here except to protect the members of the Commission.

Commissioner Dawson indicated that he agreed moving ahead with the improvements with the continuation of the improvement process. But he appreciated the effort. He felt the discussion was a great benefit for all the members to understand how and what the responsibilities were and how the communications can occur. Our attorney will defend us or tell us when we have made a terrible mistake. Therefore, we take note of the attorney's advice. In the advisory letter there's more specificity about what we can and cannot do than what is in the current language. One example is in the new language where we are, it opens the door for Commission members to discuss among themselves a matter provided we don't bring up new information. That's my interpretation of what the proposed language is. Persuasive arguments between individuals do not have to include new information. It's important that we recognize that if there's a

persuasive argument we all need to hear it. The operating guidelines are important but they don't override rules, regulations for judicial decisions that we have to abide by. I'm comfortable with doing how you want to, and this is very important and very good discussion.

Commissioner Wilsey commented in paragraph 6 at the very end during the buffer area comment that was made, they learned that as a body they could also vote and just stay in the facts of what was presented. They could also ask for additional information and send it back so that sentence makes it sound like a decision shall be made upon the record as whole or such portion as they have to make a decision that day. We should also explain that we could also defer it back and ask for additional information, if we felt the record was incomplete.

Chairman Carroll stated that could be the decision. The decision doesn't have to be up or down. It could be to do exactly what you suggested.

After more discussion Chairman Carroll stated that this matter is in front of the Commission and they had to dispose of it, and needed a motion to do something.

Commissioner Martin made a motion to adopt as proposed. Commissioner Tedder seconded the motion. The Chairman asked for discussion on the motion.

Commissioner Tedder further stated that he seconded that based on a previous conversation that they may come back and revisit parts of it. Commissioner Dawson wanted to put a date on the matter and the Chairman asked for further discussion on the motion.

Commissioner Dawson indicated by stating that I want to make an amendment or a substitute motion. I'd like to have the same motion that's on the table with a date certain that the discussion we've had today and other information that we may want to provide will be looked at and brought back up. That it is distinctly important that we don't think we've solved the problem by adopting this and don't deal with it further. If you put a date certain on it.

Commissioner Martin indicated that what he was willing to amend and it's not a date certain, with it is at such time that any Commission member submits to the Chair recommendations for revisions to the bylaws the Chair will take it under advisement and convene the Steering Committee to discuss it. That puts the onus on the persons who want to change to do something, not an arbitrary date that we may or may not meet.

Chairman Carroll stated that that if there were any Commission members who had wanted to propose changes to the Operating Procedures, if they would send the changes to him he would then meet with the Steering Committee and discuss those changes as they arise, then the Steering Committee would make recommendations to the full Commission in a timely manner. The Chairman stated that he would commit to this procedure.

The Chair stated that there was a motion on the table to adopt the internal operating procedures as proposed and it had been seconded. A change of the operating procedures requires a three-quarters vote of the members present. 14 members were in attendance, requiring eleven 11 positive votes for acceptance.

The motion passed unanimously. The changes become effective immediately.

III. Information Items

Information Item: 15-03 Staff Report on Study of Surface Water Quality in Agricultural Watersheds Associated with Concentrated Animal Feeding Operations

Christine Lawson presented this information item on the Study of Surface Water Quality Agricultural Watersheds associated with concentrated animal feeding operations. This process began at the end of 2007 when DENR received a petition for rulemaking for monitoring at animal feeding operations, specifically swine operations. This petition requested that the EMC develop the rules of water quality monitoring initially at NPDES facilities and then a second petition was submitted to expand that to all state general permitting Facilities as well. That petition was granted in 2008. Then DWQ, now DWR was directed at the same time in 2009 to proceed development of a study. DWQ contacted the USGS and went into contract with them to conduct the study the beginning of May 2011. The study plan was finalized in 2012 and the final study report was just issued in June of this year. As a matter of record the EMC directed the Division to develop the rules. Went through the entire rulemaking process, went out to public comment twice. The hearing officers' final recommendations were split. Ultimately the EMC declined to adopt the rules that were proposed saying there was need for additional information to develop meaningful rules. The study was currently in development and felt that would be an appropriate vehicle to find the information they needed. EMC expressed its desire to review the results when available. The study objectives were to assess water quality differences among watersheds with and without animal feeding operations, to examine the multiple chemicals constituents to identify the effects of animal feeding operations on streamwater quality, and to further examine the relations of the environmental variables among the watersheds with and without measurable differences in water quality. In the study design there were 18 background watershed sites.

The Director does have the authority to require monitoring at any permitted facility as he deems necessary.

The results of the USGS study identified additional parameters which we would take into consideration as we move forward.

Ms. Lawson continued to present detailed information to Commissioners regarding the study.

Chairman Carroll asked for comments or questions.

Commissioner Rubin commented on his concerns regarding legacy issues, and also the comparability of the data bases being used.

Steve Harding (USGS) touched on some of the points Dr. Rubin raised. There's a good reason they couldn't get background in agricultural areas there at the whole coastal plain, especially when you get down in Dublin County. It is hard to find watersheds that didn't have a swine or swine and poultry facility. Had to get outside of those counties to get areas without an animal facility. Under the parameters they were trying to work with having sites with and without facilities, they did the best they could finding 18 sites with.

Commissioner Rubin stated the legacy issue was his most critical question.

Steve Harding continued discussion with comments and questions from the Commissioners.

Commissioner Tedder thanked Steve Harding and staff for their efforts. This has been going on since 2007. This is a topic that is near and dear to his heart because he probably lost 5 or 6 years of life

expectancy back in the 90s when he was involved in this swine permitting program. Staff has actually gone through the information and looked at the information. Basically they concurred with what three hearing officers said earlier on this. It's a very complicated issue but if situations arise that need additional work, additional monitoring, the Department has clear authority to go out there to get it. He commended staff of their assimilation of all this information and then their recommendation.

Commissioner Dawson stated his concern is that we hear from all sides and the built upon development community and municipalities, industries and all of them are pretty well regulated. They monitor daily in some cases. There's extensive monitoring and there's requirements for compliance and so forth. The best information we get from the agricultural community is a fine study like you have done and that's very well respected. But it's not viewed as detail as something that's continuous as what the built upon environment permittees have to deal with. I'm curious if there's some way to say this is how you put this in perspective and why the agricultural community and the development community are not carrying the same load as far as protecting the environment.

Steve Harding stated that they all contribute to downstream processing, the urban environment for point source dischargers and things of that nature are contributing. There are strict regulations and facilities in place to reduce the amount that is discharged but they still contribute nutrients into the systems as well as agriculture and other non-point sources. So the difference between point sources and non-point sources and don't know if you can necessarily say one contributes more than the other. It would depend on the scale you're looking at, the particular system and your location. But we all have a responsibility to manage it as best as we can in reducing the amount of nutrients that are ultimately getting into our downstreams.

Chairman Carroll thanked to both Christine and Steve. **(FIVE MINUTE RECESS)**

Information Item: 15-04 Challenge by NC DENR to Recent EPA Rulemaking on the Redefinition of "Waters of the U.S."

Craig Bromby reported on this item. He indicated that he gave this presentation to the Water Quality Committee, but there have been some further developments. The EPA rule redefining "Waters of the United States" became effective on August 28 accepting those 13 states which challenged the rule and the District Court of North Dakota. North Carolina DENR took the position that the rule expanded the federal jurisdiction beyond the authority of the Clean Water Act. The position of DENR and 29 other states essentially is that EPA has dropped the word significant out of significant nexus with their definition. They lost sight of the fact that under the old definition they actually lost both the solid waste case and the Raponos case. DENR joined a group of other states filing in the Southern District of U. S. District Court in the Southern District of Georgia. Now EPA has acknowledged that jurisdiction was expanded. Their first estimate was that jurisdiction would be expanded by 3%. They later amended that to 4%, however they made public statements saying that this new definition of the rule would regulate 60% of streams and millions of acres of wetlands that previously had been without clear protection. So it has expanded at least 3% more likely 4%, we believe it's more than that, probably less than 60%. The development of this rule, EPA did not consult with the states before the rule was published in the Federal Register. Thirty states including at least two state regulatory agencies challenged this rule in five different U.S. District Courts, in Georgia, Ohio, Texas, Oklahoma and North Dakota. Some of the states including the group that North Carolina was a part of also filed protectively in the Circuit Court of Appeals with an eye toward Section 509 of the Clean Water Act, which we do not believe actually applies in this case. But it was a protective filing and as it turns out may have been a very appropriate thing to do. Other private entities including Trade Associations Environmental Advocacy Groups have also challenged this rule in various U. S. District

Courts where intervened and other cases that have already been filed. There's another group of states, mostly in the northeast that are seeking to intervene in some of these cases, and those particularly in the six Circuit Court of Appeals, and in Washington, D. C. The outcomes of these cases as some of them have happened fairly recently within the last several weeks. The Georgia case motion for injunction was denied and the case was dismissed because the Judge held that jurisdiction was proper in the Court of Appeals. So there are protective filing in the eleventh circuit is going to work to our favor. All of those court of appeals cases have now been consolidated into the Sixth Circuit, so our case is still alive in the six circuit. The Ohio case was voluntarily stayed. The Oklahoma case was stayed. The Texas case had their motion for injunction denied but in the district North Dakota the injunction issued although it is only applicable in those thirteen Midwestern states which were in the North Dakota group. All of the Circuit Court of Appeals cases were consolidated into Sixth Circuit. If jurisdiction is proper under Section 509 of the Clean Water Act, that case will go forward. The things that happened yesterday, two motions were filed in the Sixth Circuit Court of Appeals. One was to stay the effectiveness of the rule asking the Sixth Circuit for a ruling to stay the effectiveness of the rule nationwide, which the injunction in North Dakota did not do. The other motion was to dismiss all of the cases filed in the Court of Appeals because the belief of the moving party there is that jurisdiction is proper in the U.S. District Court. This is a real lawyer's case because of all of the various courts involved, all of the motions which are crossing and threading one way or another. It's interesting, at least from our point of view to watch and participate in. In addition to those two motions, the Southern District of Georgia group including North Carolina DENR yesterday filed a Notice of Appeal to the Eleventh Circuit appealing the Judge's decision denying the preliminary injunction and dismissing the case for lack of jurisdiction. That's the up to the minute report on it, unless something was filed today which we can't discount. I'd be happy to take any questions.

Dr. Raymond stated that he was just curious the bulk of the Legislative or objections rather that were raised for individual states, the petition seemed to refer only to those states rather than their environmental agencies. So North Carolina stands out in having DENR sort of the Lone Ranger. I just wondered why that was as a procedural matter.

Craig Bromby responded that North Carolina is not the only one. New Mexico is also in the same sort of situation. In this case the Secretary of the Department wanted to file as the Department. The Governor authorized using separate counsel. Those decisions were made late in the process. They went forward. There has been a request to the Attorney General to support those cases with an amicus. The Attorney General is still considering that request. So from a procedural there's no reason why North Carolina is different legally. It was more the way the process worked in this stay the way when the decisions were made, I think more than anything else.

Commissioner Ferrell asked what problem was EPA trying to fix?

Craig Bromby responded in 2001 the Solid Waste Authority of Northern Cook County case was the case that said that isolated waters do not have the correct link to the commerce clause on which federal jurisdiction is based, and therefore, took out isolated waters. Now the Environmental Management Commission responded to that by implementing an isolated wetland, then isolated water permit rule. The state has actually broader authority. The waters of the state is actually a broader category than waters of the U.S. That was the SWANCC case. There were reams of articles written about that and the effect it would have on the Clean Water Act Program. It was ripe for yet another visit with the Supreme Court which happened in 2006 with the Rapanos case. The Rapanos case was a four to four to one decision with Justice Scalia writing a majority opinion. In that majority opinion he laid down basically a bright line rule which was you are so much more limited. There were four Justices who dissented and said that under

Chevron Deference that if the Corps and the EPA believed that this is where jurisdiction ought to be then we ought to leave it to them to say that. Then Justice Kennedy wrote an opinion concurring in the result in which he borrowed out of the SWANCC case the language that there either has to be a significant nexus between waters over which EPA and the Corps want to assert jurisdiction or a significant nexus between those waters and a traditionally navigable water. The phrase used in the Clean Water Act is navigable water.

Chairman Carroll commented that concluded the agenda items and moved to reports by the Committee Chairs.

V. Concluding Remarks

By Committee Chairs

Chairman Carter

The committee considered several items yesterday. The principal action item dealt with the air permit exemptions.

Chairman Craven

We've already discussed the committee's action on the Kerr Lake Interbasin Transfer. After that action we had an information item on future interbasin transfers, the next of which will be the Union County transfer. Commissioner Puette has agreed to serve as hearing officer in that and it will be going to public hearing next week. We also had in our continuing education series on impediments to creating additional water supplies presentations from both the Cape Fear Public Utilities Authority and the Greenville Utilities Commission. They were very enlightening and I would certainly encourage any of you who weren't at the meeting to go back and view their presentations. They are online and very good powerpoint presentations. We ran out of time for adequate discussion of the Greenville Utilities Commission situation and they have very kindly agreed to come back to our next meeting. Not to rehash their presentation but to hopefully shed a little more light and do some narrative and help us to understand a few more of the details of their circumstances there. Both those groups are doing a great job and they need some help. It's clear that help needs to come from somewhere and we may be the group that's available to help ease their path to creating additional water resources. With that we adjourned.

Chairman Martin

The Groundwater and Waste Management Committee did meet. We heard three items that we moved forward to the full Commission with a recommendation to go to public comment and hearing which will be heard at our next meeting in November. One is related to the permanent definition of solid waste which we heard today, and the other is basically a clarification of when terms, Department of Environment and Natural Resources applies to both terms, Environmental Protection Agency and EPA, and some non-technical changes. The third was related to the adoption of new federal EPA E-manifest rules that are in 40CFR and are currently incorporated by reference. That was it.

Chairman Tedder

Two other things that we discussed yesterday that have not been discussed here today is that we did have a discussion from the stormwater folks concerning the minimum design criteria which will be coming forward in the future and that kind of gave us a good briefing as to what to expect now the rules are being reorganized. The other action was an action item where the committee approved an annual report for the Coastal Habitat Protection Plan. As far as our involvement there, two members are on that Steering Committee, Dr. Rubin and Commissioner Dawson. That was approved by the committee yesterday.

By Directors

Director Holman

I'll begin just by thanking you for your service as the hearing officer for open burning rules hearing back in July and appreciate your service, time and energy spent on that. I'll give a quick update first on the air quality changes since the last Commission meeting. EPA has taken action to officially redesignate the Charlotte area under the 2008 ozone standard that took effect on August 27 of this year. For the first time in a very long time all areas of the state are not only monitoring compliance with the standards, but all areas are in compliance with the standards. That being said, EPA is poised to announce a new ozone standard by October 1. The agency took comment on the standard of 60-70 ppb. The current standard of the 2008 standard is wet at 75 ppb. We've only had five monitors that exceeded this summer so far over. Our current design values, the highest one is in the Charlotte area at 68 ppb. If we have a standard of 70 ppb, all areas in North Carolina would be in compliance with that standard. If we saw a standard at 65 ppb, we would have five monitors that would violate, two of those mountain top monitors in the western part of the state. Two are in Mecklenberg County and one is in Forsythe County. Again, much lower ozone levels than we've seen in the past and we will just be updating you as that new standard draws out and the potential implications that it will have in the state. Let me talk about the information session yesterday and thank all the members that were able to participate. All of the presentations are on page two under the agenda for that special session as well as the link to the principal's document that Chief Deputy Secretary John Evans mentioned in his remarks during the information session. We do intend to come back to the Air Quality Committee and the Commission with draft rules that would hopefully position the state to be able to submit a final state plan by September 2016. I'll move over into the Legislative update and I'll begin with House Bill 571. That was the draft legislation that the House version directed the Department to develop a plan in full compliance with the EPA final rule. That passed out of the House and to the Senate. The Senate adopted a different version of the plan that would direct DENR in consultation with the EMC, the North Carolina Utilities Commission and the North Carolina Utilities Commission's Public Staff to develop a heat rate improvement plan for the coal-fired units in the state. That's passed out of the Senate on August 5 and so it went back to the House. Right now the House has referred that version to the Committee on Rules calendar and Operations of the House. That's where that bill stands. Not a lot of action as many of you know has been going on in the General Assembly other than a very aggressive focus on resolving the budget. Let me also mention a couple of other bills and just where they stand. The first is House Bill 169 that is the bill that

would adopt many of the recommendations on the counties that can be removed from the Vehicle Inspection and Maintenance Program. That comes from an April 1, 2015 DENR report to the General Assembly. Currently the bill stands at recommending 29 counties total. It has passed out of the House on July 21, went to the Senate and the Senate has referred it to the Committee on Transportation. The final bill that I will touch on is House Bill 765, the Regulatory Reform Bill. That contains a variety of environmental changes but it includes changing up how the states responds to the federal new source performance standards and these shall pose currently. We have rules that adopt those by reference. It would change that to be an affirmative adoption but it would also require readoption of all of the federal rules that have been adopted by reference. Where does House Bill 765 stand? There has been two different versions, the House version and the Senate version. Currently conference Committees have been appointed but I don't believe there has been a lot of meeting on House Bill 765.

Commissioner Tedder

We talked about the clean air thing yesterday. Lots of information. Did a really good job. We heard from staff and the Department but we didn't hear anything from those who are really impacted by whatever is developed. I know at some point there will be rules but I was just wondering why we haven't heard or didn't give the industry an opportunity to at least discuss their thoughts on the Clean Air Plan at the same time, before rules get drafted. It's a question. I think it was a missing component of discussion.

Director Holman

That's a fair point. I don't really have a response other than the intent was just to provide you with the background and the Department's perspective. But I take your point, Mr. Tedder.

Director Davis

Thank you for the opportunity to provide some quick remarks on the DEMLR programs. If you recall back on July 10 I gave an update on several legislative bills that were of interest to the EMC and our DEMLR programs, primarily stormwater. Those were House Bill 97 which is the Budget Bill, had quite a few components that affected our program as well as Sheila mentioned the House Bill 765 Regulatory Reform. If you have seen the paper both of those and Conference Committee and there's no updates to provide as far as what may come out of those and what file provisions may be put in place. But hopefully by the November meeting we will have some answers to that and I can give you an update at that time. I want to touch very quickly on the stormwater built upon area definition. The bill that I talked about and we talked about in depth was House Bill 634. That was passed by the Legislative and signed by the Governor on July 16 has Session Law 215-149. If you recall that was the change in the built upon area definition under stormwater programs to exempt certain activities from built upon area calculations and therefore stormwater management controls. As part of that there is a requirement for the EMC to adopt rules by December 1 of this year which as we discussed is practically impossible. So what we intend to do is staff has been working with stakeholder group to reorganize, readopt and amend all of our existing stormwater rules to put them in a more cohesive and understandable format. That's part of the House Bill 74 Rule Readoption Process but in addition we're also working in the minimum design criteria of rulemaking and the fasttrack permitting process rulemaking at the same time, so everything can be done as a bundle. We'll include, obviously this new definition of built upon area rulemaking with that bundle so it all makes sense and it's all intertwined and understandable for both the regulated community to review as well as the public as we go through the final rulemaking process. Our intent is to have that rule bundle readoption including these different provisions into the Water Quality Committee by November's meeting. It would then go before the full EMC for approval of the text and to go to public notice and the fiscal note in January 14, 2016 meeting. Then we go through the public hearing and public comment process and end up back before the Commission for final adoption of the entire bundle of stormwater rules at its July 13, 2016 meeting. I just want to make a note that the built upon

area definition is in statute right now and is effective and it's in place right now. The only thing that we would do with this rule is I can give you the actual text that we were looking at. The new rule for built upon area that the EMC would be considering as we propose would be built upon area has the same meaning as in GS 143-214.7 so we're not going to reiterate the rule or change the rule of having it or aspects added to it. So it shouldn't be controversial. It's pretty straightforward with the statute that's for the definition. That's another reason why we feel it's most efficient just to do all this as one rule set and go through the process that we're already undertaking. That's my final comments.

Director Culpepper

Our legislative updates focuses on potential budget issues. Our petroleum non-commercial trust fund was phased out in the Senate's version of the budget. However, petroleum releases would still have to be remediated and there is no longer a funding mechanism to reimburse folks for those remediation costs. The fund also does pay for staff time to oversee remediation guidance and oversight of projects so we look forward to having the budget finalized so we know what changes were actually made and how we need to respond. The commercial UST trust fund was also proposed in the Senate for continuation review. That is because it also receives funds from the motor fuel tax. It's among many programs that are under continuation review. In addition we may see in the budget funding issues related to solid waste feed changes. It's in legislation rather than the rules. Once the budget is resolved our legislation in House Bill 765 that we may see moving forward includes the broadening of the risk based remediation to other DENR programs and potentially a change in the Brownfield Program on the definition of perspective developer which it may remove the requirement to buy or sell which would open the door for redevelopment of properties that are currently owned by parties that have not caused or contributed to contamination. Moving on to rules I think you've all heard the updates on the rulemaking projects we have underway right now, except for one which is to revise the current structural fill rules and Ellen Lorscheider and her staff are planning to provide an informational update at the Groundwater and Wastewater Management Committee in November on that effort.

Director Zimmerman

Thank you Mr. Chairman and Members of the Commission. As you've heard there hasn't been a whole lot of movement on a number of bills that are currently in the General Assembly. I'll focus on two that were there has been some movement. The first is House Bill 795 which is the SEPA Reform Bill. As many of you may know or may not, the SEPA requirements now apply to projects that use more than 10 million dollars of state funds or disturb 10 continuous acres of land or more. There are a number of exemptions that are included in the session law. The net result of this is it has effectively eliminated most of the SEPA documents that we've been working on within our Division. We're working with the Department to better understand the impact to the Division's activities. There is an exception for interbasin transfers. They are still required to do a SEPA review. An example of that is the Union County IBT. That's the only one that's currently remaining in our queue. Also, Session Law 2015-196, House Bill 186 is the Cape Fear Water Resource Availability Study. That requires our Division to study water availability for all users within the Cape Fear Basin including enhanced reviews for Brunswick, New Hanover and Pender counties. An interim report is due in 2016 with the final report due to the ERC in 2017, and we've already started work in that study. It's also going to be part of the current update for the Cape Fear River Basin Plan. Other than that, I'd like to just thank staff for their work and Members of the Commission for the reclassification on the Cape Fear work in the consolidated buffer rules, which I hope are done, and you won't have to hear about for a while. Also, to staff and Members of the USGS staff as well as Dr. Showers for their work on the CAFO study.

By Commission Members

Commissioner Solomon

It may have been in Commissioner Craven's committee but the last time we had requested several of us wanted to see the peer reviewers for ecological flows study. There was a peer review report presented. Have we got any information on that?

Commissioner Craven

We'll get that added to the minutes.

Commissioner Solomon

Air Quality staff did a really good job on yesterday. Just on the highly technical nature every presenter did very well. I want to thank Dr. Rubin help me get the two papers accepted to the International Symposium.

By Chairman

I just wanted to go back to the Directors for a second. I know the legislature is still at it but hopefully they will be done by November. Again I would ask you by November if we have legislation hopefully we will know exactly what it is and how it impacts us. So come back and make that same report in November and hopefully we've have something to talk about. Counsel, legal update.

Counselor Hauser

This is the same format that you've seen for the past two meetings, a litigation summary update. As I did at the last meeting I will just provide you with the changes from the previous updates.

As you are all familiar there is the City of Fayetteville vs EMC matter and just wanted to let everyone know that the parties have scheduled the Discovery Meeting for September 23. At that meeting what will be discussed primarily is how documents will be produced in the discovery phase. That meeting is scheduled to occur. The House of Raeford Farms vs EMC matter – I had updated this and then Mary Lucasse, the other attorney sent around yesterday to each of the Commission members a document that was filed yesterday. By way of background at the last meeting there was discussion about whether or not review would be had on the Court of Appeals decision and our office filed the petition for discretionary review and a petition for stay and supersedeas. Petition for stand and supercedeas was granted by the North Carolina Supreme Court on August 26. The communication you received yesterday from Ms. Lucasse the other party, House of Raeford Farms filed a response in opposition to the petition that we filed for discretionary review. In their response they have requested that the Supreme Court not grant review to the matter, but if the Court decides to do that they've asked the Court to add an additional issue which would whether the burden of proof was properly allocated in the case below. That's just an update. We are currently at the North Carolina Supreme Court on that matter and we will keep you informed as that develops.

Commissioner Carter

I'm not clear of what the petition for state is for.

Counselor Jennie Hauser

The Court of Appeals decision remanded the case and so the petition for stay and supercedeas was to prevent that remand from occurring during the pendency of the request. Everything is in a good stable format while we're waiting for the Court to decide whether it's going to entertain this. Those are the two matters in which there are updates. There are additional matters on the list for you for your information.

Chairman's Comments

My only comment has to do with the meeting minutes for our meetings. We try to get them out as early as we can in draft form so that all the members have an opportunity to read and review them. If you have comments please get them back in. My only suggestion is the sooner we get them in, the easier it is to incorporate the changes that are suggested. I recommend, if possible, take a look at them as soon as they are available and making sure they're ok. That concludes our business. I just want to comment that our business will be done after closed session. Of course, we do have remission meetings immediately following at the designated places.

Commissioner Carter made a motion that the EMC go into closed session on the Court of NC General Statute 143-1811C for receiving litigation advice from and by direction to the Commissioners attorney regarding two matters.

The Commissioners reconvened the business meeting after 30 minutes. With no further business before the Commission, the Chairman adjourned the meeting at 1:09 p.m.

Approved this _____ day of September, 2015

Gerard P. Carroll, Chairman of the EMC